BEVERLY INTERDONATO,

Grievant,

v. **DOCKET NO. 03-54-216D**

WOOD COUNTY BOARD

OF EDUCATION,

Respondent,

and

KAREN WOLFE,

Intervenor.

ORDER DENYING DEFAULT

Beverly Interdonato, (Grievant) filed a grievance against Wood County Board of Education, (Respondent) on April 3, 2003, alleging she was improperly placed on transfer from her position of Special Needs Teacher at Jefferson Elementary School. Karen Wolfe intervened.

Grievant asserted a default occurred at level two when Respondent failed to timely schedule a hearing at that level, and Respondent requested a level four hearing on the default issue. A hearing was held in the Grievance Board's Charleston office on August 19, 2003. Grievant was represented by her attorney, Basil Legg, Jr., and Respondent was represented by its attorney, Howard Seuffer. Intervenor is represented by Rosemary Jenkins of the American Federation of Teachers-West Virginia, who was notified of the default hearing, but did not appear. This matter became mature for decision at the close of the hearing. Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is regularly employed by Respondent as a Special Needs Elementary Teacher.

2. On April 3, 2003, Grievant filed a grievance at level one challenging a notice that she was being placed on transfer. (Respondent's Exhibit No. 1.)

3. At the time she filed the grievance, Grievant was a member of the American Federation of Teachers - West Virginia (AFT), and was represented by AFT representative Chris Barr, who prepared the grievance form for Grievant's signature.

4. After her grievance was denied at level one on April 11, 2003, Grievant timely appealed to level two.

5. Wood County Superintendent of Schools Daniel Curry appointed Assistant Superintendent for Pupil/Personnel Services Robert Harris as the level two grievance evaluator on April 14, 2003. (Grievant's Exhibit No. 1.)

6. Ms. Barr discussed with Grievant the possibility of waiving the time limit for holding a level two hearing, so she could discuss the issue with authorities at the State Board of Education. Grievant agreed to extend the time limits by two weeks, but Ms. Barr did not communicate this limitation to Mr. Harris.

7. On April 16, 2003, Mr. Harris issued a letter to Ms. Barr stating that Respondent “has agreed to extend the time lines for this matter and awaits further contact from you to arrange discussion on the resolution of this grievance.” (Grievant's Exhibit No. 2.) 8. The same day, Ms. Barr sent a letter to Mr. Harris stating, “As we discussed via telephone on April 15, 2003 and as per [W. Va.] Code § 18-29-3(a), we agree to extend the specified time limit for a level II hearing in the above reference matter which was recently appealed to Level II of the grievance procedure. This office will contact you soon to arrange further discussion on this grievance and possible resolution.” (Grievant's Exhibit No. 3.)

9. From April to mid-June, 2003, Ms. Barr was attempting to get someone with the State Department of Education to intervene in the grievance. She spoke to Grievant a couple of times per week and copied her on all correspondence.

10. When it became apparent to her that the State Department of Education would not help, Ms. Barr contacted Mr. Harris to schedule the level two hearing. After checking the schedules of potential witnesses, party representatives, and the parties (including Intervenor), they agreed to hold the level two hearing on July 24, 2003.

11. On June 16, 2003, Mr. Harris sent the parties a letter confirming the arrangements.

(Grievant's Exhibit No. 4.)

12. Ms. Barr had apparently scheduled the hearing without consulting Grievant, who wanted an earlier hearing. Grievant fired Ms. Barr as her representative, and hired Mr. Legg.

13. On June 17, 2003, Mr. Legg sent Superintendent Curry a letter noting his appearance as counsel, he further stated: “On behalf of my client, I am revoking any agreement to extend the time lines previously made by Mrs. Interdonato and requesting that the Level II hearing in this case be held on June 27, 2003 at 10:00 a.m., if not before.” (Grievant's Exhibit No. 5.) He further asserted that Grievant had repeatedly requested a level two hearing. 14. Superintendent Curry forwarded Mr. Legg's letter to Mr. Harris, who on June 18, 2003, replied by letter stating Grievant's representative had agreed to the July 24, 2003 hearing date, and denying Grievant had ever requested a hearing date. He did not reschedule the hearing as Mr. Legg requested. (Grievant's Exhibit No. 6.)

15. Grievant had never personally contacted Respondent or Mr. Harris regarding her grievance.

16. On July 8, 2003, Mr. Legg sent a letter to Mr. Harris stating: “The purpose of this letter is to obtain a date for the Level II hearing in the above referenced case. I have determined that the best time and date for the hearing is July 16, 2003 at 10:00 a.m. Please schedule this date for the hearing and send notice to me as soon as possible.” (Grievant's Exhibit No. 7.)

17. On July 9, 2003, Mr. Legg asserted a default had occurred.

DISCUSSION

The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, *i.e.*, the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits required in this article. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

A level two hearing must be held within five days of the filing of the level two appeal. *See*, W. Va. Code § 18-29-4. "If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default." W. Va. Code § 18-29-

3(a). Grievant asserts a default occurred because Respondent did not schedule a level two hearing within 5 days of her counsel'srevocation of the agreement to extend the time limit for the level two hearing. Respondent contends Grievant may not revoke the waiver of the time limits, and that the level two hearing was scheduled by agreement of Grievant's representative.

The time periods in the grievance procedure are not jurisdictional in nature and can be waived by the parties. W. Va. Code § 18-29-3(a). Time lines may be extended by the actions of the grievant and by the agreements of the parties, such as rescheduling of hearing dates beyond the statutory time frame. Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001). Grievant was represented by Ms. Barr at the time she agreed to extend the time limits and at the time the level two hearing was finally scheduled. Although Grievant did communicate to Ms. Barr that she only wished to agree to a two-week extension, Ms. Barr did not mention this to Mr. Harris. Respondent was not privy to the private communications between Grievant and her representative, and Grievant made no attempt to make known to Respondent her desire for such limit, even after receiving copies of correspondence evidencing that the agreement was to extend the time until Ms. Barr made further contact.

Respondent had a right to rely on the representation of Grievant's representative absent a contrary communication from Grievant. “Grievants are ordinarily bound by the actions and representations of their representatives.” Kessell v Kanawha County Bd. of Educ., Docket No. 03-20-090D (May 15, 2003). Grievant's representative did not specify that the time limit was only waived for two weeks, and agreed to set the hearing on the July 24, 2003, date. Grievant received copies of all correspondence, and was in regular contact with her representative, but at no time did she inform Respondent, or direct her Representative to inform Respondent, that she wanted a hearing as soon as the two weeks expired. Although she did direct her new counsel to inform Respondent of her objectionto the hearing date, she did so after she had agreed, through her representative, to the hearing date. She was not entitled to rescind that agreement.

Grievant argues she asserted default as soon as she became aware of it, as required by Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997), by asserting default after the time limit specified in her counsel's revocation letter expired. However, at that time, she had already agreed, through her prior representative, to schedule the hearing at a later date. She had in effect already revoked the waiver, and set a new deadline for holding a hearing. While an open-ended

waiver may be revoked by a Grievant, to revise that revocation and set a new, earlier deadline after the parties had reached an agreement would be unfair. The original extension was to allow Grievant to try an work out a resolution to the grievance, at her own request, and to now blame Respondent for the delay is specious.

A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal and then complain of that error at a later date. *See* State v. Crabtree, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996). Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences. Smith v. Bechtold, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993). It is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal. Hanlon, *supra*. Grievant caused the delay in her level two hearing by agreeing to waive the time limits indefinitely, and then agreeing, through her representative, to schedule a level two hearing a much later date. Grievant has not met her burden of proving a default occurred.

CONCLUSIONS OF LAW

1. The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, *i.e.*, the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits required in this article. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

2. A level two hearing must be held within five days of the filing of the level two appeal. *See*, W. Va. Code § 18-29-4. "If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default." W. Va. Code § 18-29-3(a).

3. The time periods in the grievance procedure are not jurisdictional in nature and can be waived by the parties. W. Va. Code § 18-29-3(a). *See* Plumley v. W. Va. Div. of Natural Resources, Docket No. 00-DNR-091D (June 22, 2000); Skeens v. Lincoln County Bd. of Educ., Docket No. 99-22-171 (Aug. 31, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). Time lines may be extended by the actions of the grievant and by the agreements of the

parties, such as rescheduling of hearing dates beyond the statutory time frame. Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001); Mullins v. Kanawha County Bd. of Educ., Docket No. 01-20-038D (Apr. 10, 2001).

4. "Grievants are ordinarily bound by the actions and representations of their representatives." Kessell v Kanawha County Bd. of Educ., Docket No. 03-20-090D (May 15, 2003). 5. A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal and then complain of that error at a later date. *See* State v. Crabtree, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996). Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences. Smith v. Bechtold, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993). It is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997).

6. Grievant, through her representative, waived the time limit for holding a level two hearing until July 24, 2003, and therefore caused the delay in meeting the statutory time limits for holding a level two hearing.

7. Grievant did not meet her burden of proving a default occurred at level two.

Accordingly, Grievant's request for relief by default is **DENIED**, and this matter is hereby **REMANDED** to level two for further proceedings at that level. Respondent is ordered to hold a level two hearing within five days of receipt of this order, or within such time as is mutually agreed by the parties, in writing. This matter is hereby **DISMISSED** from the docket of the Grievance Board.

Date: August 25, 2003

M. Paul Marteney

Administrative Law Judge