MICHAEL BENNETT,

Grievant,

v. **Docket No. 03-42-071D**

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

On March 10, 2003, Respondent requested a hearing before this Grievance Board, pursuant to Grievant's claim that a default had occurred at level two. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on April 4, 2003, regarding whether a default had occurred. Grievant was represented by counsel, Eric Gordon, and Respondent was represented by counsel, Kimberly Croyle. This issue became mature for consideration at the conclusion of the default hearing.

Discussion

The default provision for education employees is found in W. Va. Code § 18-29- 3(a), which provides:

> A grievance must be filed within the times specified in section four of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article shall be considered as the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code. Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing. 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 orillness, the grievant shall prevail by default. Within five days of such default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong,

> the examiner may modify the remedy to be granted so as to comply with the law and to make the grievant whole.

W. Va. Code §18-29-4 provides that, at level two, a hearing shall be conducted within five days of receipt of the appeal.

The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

In the instant case, a determination of default hinges entirely upon the credibility of the witnesses who testified at the default hearing, due to significant differences in their recollection of the events surrounding the scheduling of the level two grievance hearing. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation forhonesty; (4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.; Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47- 192 (Nov. 1, 1999); Jarvis v. W. Va. Dept. of Health and Human Services, Docket No. 97- HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT- 011 (Aug. 29, 1997).

The parties agree that the level two appeal was filed with the superintendent's secretary, Donna Auvil, who dated and initialed it on February 4, 2003. Ms. Auvil phoned Grievant on February 6, 2003, to discuss scheduling the hearing. According to Grievant and his wife--who was allegedly with Grievant during the phone conversations--Ms. Auvil suggested that the hearing be held on February

17 at 2:30. Grievant allegedly told Ms. Auvil that he could not be there at 2:30 due to his work schedule, and that February 17 was beyond the five-day time limit for conducting the hearing. Ms. Auvil's response to this, according to Grievant, was to tell Grievant she would have to get back to him.

When Grievant had not heard back from Ms. Auvil, he testified that he called her on Friday, February 14, which was again identical to his wife's testimony. Ms. Auvil did not answer her phone, so Grievant spoke with another secretary in the office, Sarah Daniels. Grievant stated that he told Ms. Daniels he needed to speak with Ms. Auvil about his hearing date, because it had been more than five days since he filed his appeal. He also stated he left the same message on Ms. Auvil's voice mail. The recollections of Ms. Auvil, Ms. Daniels, and Superintendent Karlen are sharply different from Grievant's regarding these phone conversations. Ms. Auvil testified that, when she initially called Grievant on February 6, she suggested that the hearing be held on February 27 at 9:00 a.m., to which Grievant agreed. While she was talking with Grievant, the superintendent overheard the conversation, and interrupted Ms. Auvil to suggest that they try to schedule the hearing around the middle of the day, when Grievant would already be in town for his midday bus run. Ms. Auvil told Grievant she would get back to him regarding a firm date and time after consulting their attorney, and she stated that Grievant never objected to the proposed hearing date as being beyond the statutory five-day limit.

Ms. Auvil stated that she then tried to phone Grievant at least once at a different number (apparently, Grievant had two different residences), and had been unable to reach him. She and Ms. Daniels both clearly recalled that Grievant called the central office on Wednesday, February 19, not February 14, because that was the day Ms. Auvil was sick. Ms. Daniels also specifically remembered what day it was, because her birthday was two days later. Both of the secretaries also testified that Grievant left a written message and a voice message, which stated he needed Ms. Auvil to call him, but did not specify what the call was about. Grievant did not say anything about his hearing being scheduled late. All parties agree that Ms. Auvil returned Grievant's call on February 20, leaving a message on his answering machine which stated that the hearing had been scheduled for March 3. She specifically asked Grievant to return her call to confirm, which he did not do. Ms. Auvil saw Grievant at the central office approximately a week later and again asked him if he would be attending the hearing. According to Ms. Auvil, Grievant said he wouldhave to get back to her, but still

did not complain that the hearing was not being held within the required time limit. Superintendent Karlen also recalled seeing Grievant at the central office on more than one occasion after his appeal had been filed, yet Grievant did not complain to him that there were any problems with his hearing date.

Grievant attended the level two hearing, but would not answer any questions or present any evidence, only stating several times that he believed Respondent to be in default. Respondent's attorney placed a statement on the record at the hearing that Respondent had contacted Grievant to schedule the level two hearing, he had been unresponsive, and that the hearing had been scheduled as soon as practicable. Grievant did not mention having ever informed anyone at the central office that he believed a default had occurred, nor did he state at any time during the hearing that he had disagreed with the proposed hearing dates.

Unfortunately for Grievant, the undersigned cannot find his testimony to be as credible as that of the central office witnesses. While Grievant and his wife both testified that there was no doubt Grievant called and left a message for Ms. Auvil on Friday, February 14, Ms. Auvil and Ms. Daniels were both completely certain of the February 19 date, because Ms. Auvil was on sick leave that day and Ms. Daniels' birthday was on the 21st. Their testimony was totally credible. In addition, while Grievant insisted that the original proposed hearing date was February 17, Superintendent Karlen testified that he would never have agreed to proposing that date, because it was the day of a board meeting and also the day before he left for a week-long trip. The superintendent and Ms. Auvil were also both quite believable in their testimony about the superintendent's interruption of Ms. Auvil's original February 6 conversation with Grievant in which a changein the time to comport with Grievant's midday run was discussed. If Grievant had objected to the hearing date at that time because of the statutory time limit, it seems odd that he and Ms. Auvil would have continued to discuss the actual time for the hearing.

Accordingly, the undersigned finds that Grievant did not object to the date of the level two hearing as being beyond the statutory time limit until he arrived at that hearing. Therefore, it must be determined whether Grievant waived his right to have a hearing scheduled within five days of the appeal. The concept of an actual waiver of one's established rights implies a voluntary act. Smith v. Bell, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947). "'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' . . . Furthermore, 'the

burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'" (Citations omitted). Potesta v. U.S. Fidelity & Guar. Co., 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998).

It has been held by this Grievance Board that timelines 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 timeframe. 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). Further, "[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 e.g. 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 bodyto grant relief to a party who invites error in a lower tribunal.' (Citation omitted).)." Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997

The undersigned finds that, through his agreement to a hearing date beyond the required time limit, Grievant waived his right to a hearing within five days. Accordingly, he is not entitled to claim Respondent defaulted.

The conclusion reached is supported by the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant filed a level two appeal with Donna Auvil, the superintendent's secretary, on February 4, 2003.

2. Ms. Auvil telephoned Grievant on February 6, 2003, regarding scheduling of the level two hearing.

3. Ms. Auvil originally proposed that the hearing be conducted on February 27, 2003, at 9:00 a.m., to which Grievant agreed. Overhearing the phone conversation, Superintendent Glen Karlen proposed that the hearing be scheduled in the middle of the day, so Grievant would already be in town for his midday bus run. Ms. Auvil told Grievant she would check Respondent's attorney's availability and get back to him, and he agreed.

4. Ms. Auvil attempted to contact Grievant unsuccessfully between February 6 and February

19, 2003, regarding scheduling of the level two hearing.

5. Grievant telephoned Ms. Auvil on February 19, 2003, and left a message for her stating he needed her to call him. He did not state why he wanted her to call. 6. Ms. Auvil returned Grievant's call on February 20, 2003, leaving a message on his answering machine stating that the hearing had been scheduled for March 3, 2003. She asked him to return the call to confirm the hearing date was all right with him.

7. Grievant did not return Ms. Auvil's February 20 phone call.

8. Ms. Auvil and Superintendent Karlen saw Grievant in the central office after February 20, and he stated he would get back to Ms. Auvil about the hearing date. He did not complain to either of them that the hearing date was a problem because it was beyond the five-day time limit.

9. Grievant attended the March 3, 2003, hearing and claimed that Respondent was in default for failure to schedule the level two hearing within five days of February 4, 2003.

Conclusions of Law

1. 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).

2. The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

3. W. Va. Code §18-29-4 provides that, at level two, a hearing shall be conducted within five days of receipt of the appeal.

4. The statutory time limits may be extended by the actions of the grievant and by the agreements of the parties. 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).

5. By agreeing to a hearing date beyond the statutory time limit, Grievant waived his right to a level two hearing within five days of his appeal, and he is not entitled to relief by default.

Accordingly, Grievant's request for a judgment of default is **DENIED**, and this matter is **REMANDED** to level two, for a hearing to be held within **FIVE WORKING DAYS OF RECEIPT OF THIS ORDER**, unless otherwise agreed by the parties in writing.

Date: May 12, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge