GLEN L. COOK, et al.,

Grievants,

v. **Docket No. 03-DNR-045D**

DIVISION OF NATURAL RESOURCES,

Respondent.

ORDER DENYING DEFAULT

On February 20, 2003, Grievants, employed as conservation officers, filed a request with this Grievance Board for a finding of default at level three of the grievance procedure. Grievants allege that the level three decision was not issued within the required statutory timeframe. A hearing was held in the Grievance Board's office in Westover, West Virginia, on March 24, 2003, for the purpose of determining whether or not a default occurred. Grievants were represented by Grievant Glen Cook, and Respondent was represented by Assistant Attorney General Kelley Goes. This issue became mature for consideration at the conclusion of that hearing.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievants initiated a grievance on September 19, 2002, which proceeded through levels one and two. 2. A level three hearing was held before Jack McClung, grievance evaluator, on February 4, 2003.

3. At the conclusion of the hearing, Mr. McClung asked the parties if they wanted to file something in writing setting forth their positions. Respondent's counsel requested two weeks after receipt of the transcript, specifically March 3, for submission of her brief. Mr. McClung agreed, and told Grievant Cook that, if he submitted anything in writing, to send copies to himself and to Ms. Goes.

4. Grievant Cook stated “Yes, sir, I understand” in response to Mr. McClung's statements regarding submission of his brief. He did not object to the filing of written briefs.

5. Aside from the discussion regarding the submission of post-hearing briefs, there were no specific statements made by any party at the hearing regarding waiver of the five-day time limit for issuance of the level three decision.

6. Grievant submitted a written brief to Mr. McClung. Mr. McClung wrote to Grievant on February 17, 2003, thanking him for his brief and stating that he would begin writing his decision as soon as he received the transcript and Ms. Goes' brief, which was due on March 3, 2003.

7. On February 20, 2003, Grievants filed a request for default judgment, because the level three decision was not issued within five days of the hearing.

8. The level three decision was issued on March 21, 2003.

Discussion

The default provision for state employees is found in W. Va. Code § 29-6A-3(a), which provides, in pertinent part:

> (2) Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing. The grievant prevails by default 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, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the 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 the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

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.

At level three, W. Va. Code § 29-6A-4(c) provides that a written decision must be issued within five days of the hearing. Although there is no dispute that the decision wasnot issued within the statutory time, Respondent contends that, by not objecting to the submission of post-hearing briefs and the agreed-upon date, Grievants have waived their right to claim default. Furthermore, W. Va. Code § 29-6A-6 affords the parties the right to file proposed findings of fact and conclusions of law before a final decision is issued. Grievants argue that the briefing discussion was “between Mr. McClung and Ms. Goes,” and they did not feel that any objection was necessary.

This Grievance Board has held on numerous occasions that an agreement to extend the timelines for issuance of a decision is binding upon the parties when made during a formal, recorded hearing and constitutes a valid waiver of the statutory requirement. Parker v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-296D (Nov. 30, 1999); Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). See Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). The time periods in the grievance procedure are not jurisdictional in nature and are subject to equitable principles of tolling, waiver, and estoppel. Jackson, supra; Gaskins v. W. Va. Dep't of Health, Docket No. 90-H-032 (Apr. 12, 1990). This Grievance Board has frequently applied such principles, specifically estoppel, to toll the time for filing a grievance. See, e.g., Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994). In order to prevail in a claim of estoppel, a party must show that there was a representation made or information given by the opposing party which was relied upon, causing an alteration of conduct or change of position to the first party's detriment. Ara v. Erie Insurance Co., 182 W. Va. 266, 387 S.E.2d 320 (1989). In the instant case, there was not a specific discussion at the hearing regarding extension of the time for rendering the level three decision. However, there can be no question that Respondent relied upon Grievant Cook's actions at the hearing, when he did not object to the submission of briefs on March 3, which was well beyond the five-day time limit. Additionally, there is the question of whether or not Grievants actually waived their right to receive the decision within the statutory timeframe. 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)

Grievant Cook's conduct at the hearing can only be construed as a voluntary waiver of the right to a decision within five days. Obviously, Grievants knew that the statute required the decision to be issued within that timeframe, yet did not object or question the submission of briefs on March 3, 2003. Respondent justifiably relied upon Grievants' actions, so Grievants are not entitled to a determination that Respondent defaulted.

The following conclusions of law support the decision reached.

Conclusions of Law

___1. 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).

___2. At level three, W. Va. Code § 29-6A-4(c) provides that a written decision must be issued within five days of the hearing.

3. The parties may agree to an extension of the statutory time limits for issuance of a decision, which constitutes a valid waiver of the statutory requirements. Parker v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-296D (Nov. 30, 1999); Bowyer v. Bd. of Trustees, Docket

No. 99-BOT-197D (July 13, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). See Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989).

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. Grievants voluntarily waived the five-day statutory deadline for issuance of a level three decision in this grievance.

Accordingly, Grievants' request for a finding of default is **DENIED**, and this grievance will proceed to a level four hearing on the merits. **The parties are directed to confer with one another and provide three mutually agreeable dates for the hearing by May 14, 2003.**

Date: May 5, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge