J. KIMMINS KESSELL,

Grievant,

v. **DOCKET NO. 03-20-090D**

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

Grievant filed a grievance on December 2, 2002, regarding a letter of reprimand that was placed in her personnel file. On March 20, 2003, Grievant's representative, Anita Mitter of the WVEA, filed a notice with Kanawha County Schools Superintendent Dr. Ronald Duerring stating, “We have asked previously that a hearing be scheduled on this matter. Therefore, we are claiming default in this grievance and ask that the relief sought in this instance be granted.”

A level four default hearing was held in the Grievance Board's Charleston office on May 2, 2003. Grievant, having fired her representative, appeared *pro se*, and Respondent was represented by its attorney, Jim Withrow, Esq. The parties did not elect to file proposed findings of fact and conclusions of law, and this matter became mature for decision at the close of the hearing. (See footnote 1)

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, a teacher employed by Respondent, received a written reprimand, and consulted her union representative, Anita Mitter, regarding filing a grievance to have the reprimand removed from Grievant's personnel file. The letter informing her of the reprimand was mailed November 6, 2002, but the address contained an incorrect ZIP code and was routed to Bastian, Virginia, before being delivered to Grievant on or about November 16, 2002.

2. Grievant contacted Ms. Mitter on December 2, 2002, to see if she had filed the grievance yet. Ms. Mitter had not, but stated she would hand-deliver it that day to Superintendent Duerring's office. Grievant was not assigned to a school at the time, and therefore had no immediate supervisor.

3. Ms. Mitter mailed the grievance the following day, and it was received in Dr. Duerring's office on December 4, 2002. Dr. Duerring forwarded the grievance to William Courtney, Director of Employee Relations.

4. Mr. Courtney called Ms. Mitter to discuss why the grievance was filed with Dr. Duerring. After agreeing that level one should be waived, Mr. Courtney requested that Ms. Mitter waive the time frame for hearing the grievance, which she did, and they planned to schedule a hearing after the new year.

5. Mr. Courtney and Ms. Mitter spoke several times to try and arrange a mutually-acceptable hearing date.

6. After failing to agree on a hearing date, Ms. Mitter filed the default claim.

7. After receiving Ms. Mitter's default claim, Mr. Courtney again called her. Ms. Mitter agreed to withdraw the default claim if a hearing was scheduled. Respondent scheduled a level two hearing.

8. A level two hearing was held April 15, 2003, at which time Grievant appeared with Ms. Mitter as her representative. At the end of the hearing, Grievant stated she did not agree to withdraw her default claim.

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). Grievant asserts a default occurred when Respondent failed to schedule a hearing on her grievance after it was filed. Grievant also contends her representative acted without authority from her when she agreed to withdraw the default claim if Respondent would schedule a hearing. Respondent contends Grievant, through her representative, waived the time limits and withdrew the default claim, and that it had no duty to communicate with Grievant directly as she had a representative.

This grievance was filed directly at level two by agreement of the parties, and W. Va. Code § 18-

29-4(b) provides as follows with respect to level two time limits:

Within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator, and such administrator or his or her designee shall conduct a hearing in accordance with [W. Va. Code § 18-29-6] within five days of receiving the appeal and shall issue a written decision within five days of such hearing.

Since the grievance was not appealed to level two, the same time limit would apply to its filing at that level. It is undisputed that a level two hearing was not conducted within five days of filing, as required by statute. However, the evidence establishes that the parties agreed to waive the time lines, and did not set a limit on the waiver. The timeperiods in the grievance procedure are not jurisdictional in nature and can be waived by the parties. W. Va. Code § 18-29-3(a). A party 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. Rhodes v. Randolph County Bd. of Educ., Docket No. 000-42-233D (Jan. 17, 2001).

It is clear that Grievant, until the end of the level two hearing, was represented by Ms. Mitter, who, as far as Respondent knew, acted on behalf of Grievant. Ms. Mitter waived time lines for holding a level two hearing, and after she claimed a default, agreed, again on Grievant's behalf, to withdraw the default claim. Since Ms. Mitter was the source of the error, or at least contributed to the error, Grievant may not now claim the error caused the default.

Even if Respondent had defaulted at level two, Grievant's representative withdrew the default claim and Respondent cured the default by holding a level two hearing. Grievant apparently did not object to the hearing, and she appeared and testified at the hearing. In order to benefit from the "relief by default" provisions in subsection (a), the grieved employee must raise the default issue as soon as the employee becomes aware of such default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997). Grievant voiced no concerns regarding the default issue until the end of the hearing. By that time, it was too late as the issue was moot.

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 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); Bloomfield v. Ohio County Bd. of Educ., Docket No. 01-35-554D (Dec. 20, 2001); Birmingham v. James Rumsey Technical Inst., Docket No. 01-MCVTC-391D (Sept. 14, 2001). If the grievant establishes that the required response was not made in a timely manner, Respondent may then show that the delay was due to a statutory excuse of sickness or illness, or that Grievant agreed to waive the time lines. Donnellan, *supra*.

3. West Virginia Code § 18-29-4(b) provides as follows with respect to level two time limits: Within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator, and such administrator or his or her designee shall conduct a hearing in accordance with [W. Va. Code § 18-29-6] within five days of receiving the appeal and shall issue a written decision within five days of such hearing.

4. 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). A party 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. Rhodes v. Randolph County Bd. of Educ., Docket No. 000-42-233D (Jan. 17, 2001); Jones v. Dep't of Educ., Docket No. 99-DOE-495D (Jan. 3, 2000); Lambert v. W. Va. Dep't of Health & Human Res., Docket No. 99-HHR-326D (Oct. 14, 1999).

5. Grievant waived the time limits for holding a level two hearing.

6. In order to benefit from the "relief by default" provisions in subsection (a), the grieved employee must raise the default issue as soon as the employee becomes aware of such default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997).

7. Grievant waited too long to raise the default issue.

8. Grievants are ordinarily bound by the actions and representations of their representatives.

For the foregoing reasons, Grievant's default claim is **DENIED**. This matter is hereby remanded to level three of the grievance process and is hereby **DISMISSED** and stricken from the docket of the grievance board.

Date: May 15, 2003

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant did file some additional factual materials after the hearing, which have not been considered in the decision of this case.