KENNETH PATRICK,

Grievant,

v. DOCKET NO. 04-DOH-349D

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

On April 15, 2004, Grievant filed a grievance against Respondent concerning a suspension and evaluations. He asserts a default occurred at level two when the level two decision was not issued within the allowable time.

A level four hearing was held in the Grievance Board's Charleston office on October 29, 2004, on the issue of whether a default occurred. (See footnote 1) Grievant was represented by David Reed. Respondent was represented by counsel, Barbara Baxter. The matter became mature for decision at the close of the hearing.

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. A level two hearing was held in this matter on April 30, 2004.

2. On May 4, 2004, Grievant, at the request of level two Grievance Evaluator James “Rusty” Roten, Jr., signed a “Time Frame Waiver” that was completed as follows:

> The Grievant does hereby agree to waive the procedural time frames at:
>
> _Level I
>
> _X_Level II (Waive time frame for rendering decision until _____)

_Level III

as set forth in W. Va. Code §29-6A-4, due to scheduling conflicts that have arisen.

This waiver is with the understanding that my grievance will be processed as quickly as possible.

3. Grievant did not enter a date in the blank after the word “until.” When Mr. Roten later prepared a copy of the form to give to Grievant, he noticed the blank and entered “N/A” in the space. He attached a note to the copy pointing out the change to Grievant.

4. Mr. Roten never asked Grievant if a particular date should have been entered in the blank, and Grievant never objected to the change Mr. Roten made. Grievant never notified Mr. Roten that he wished to rescind the open-ended waiver and set a time limit.

5. The level two decision was issued after Grievant's request for default was filed.

DISCUSSION

"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." W. Va. Code § 29-6A-3(a). When a grievant asserts that his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. Once the grievant establishes that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. *See* W. Va. Code § 29-6A-3(a)(2). *Board, et al. v. WVDHHR / Lakin Hospital*, Docket No. 99-HHR-329D (Sep. 24, 1999).

Normally, “[t]he chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the [level three] hearing.” W. Va. Code § 29-6A-4(c). Grievant agrees he waived this five-day limit, but claims Respondent's delay was nonetheless unreasonable, as he had received no decision after more than 90 days. Respondent claims it had an indefinite waiver of the time limit, and Grievant never objected to the delay prior to filing his default claim.

The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual agreement of the parties. To prevent misunderstandings, such waivers should be in writing. Waiver of the strict statutory time lines is a common occurrence within the context of the grievance procedure. *Parker v. W. Va. Dep't of Health & Human Resources*, Docket No. 99-HHR-296D (Nov.

30, 1999). In this case, there was a valid, written waiver. (See footnote 2) However, the waiver was not for a specific length of time and did not putRespondent on notice that a decision should be issued by a specific date. These types of open-ended waivers are a common cause for default claims, as they introduce an aspect of uncertainty in the process, under the guise of clarifying matters. In this case, it must be found that Grievant, having acquiesced to the uncertainty created by the document he signed, was a significant contributing factor to the delay he complains of.

"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." *Rhodes v. Randolph County Bd. of Educ.,* Docket No. 00-42-133D (Jan. 17, 2001); *Lambert v. W. Va. Dep't of Health & Human Resources*, Docket No. 99-HHR-326D (Oct. 14, 1999). *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).

A waiver such as the one Grievant signed may be revoked or emended, but Grievant never rescinded his indefinite waiver, even though he knew it contained no end date. He was even reminded of this fact by Mr. Roten's note pointing out the fact he had left the end-date blank blank. 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). In this matter, there is no date by which to measure when Grievant should have claimed default, because there is no date of record by which Respondent was required to respond. In the future, when a grievant signs an open-ended or indefinite waiver, he must notify the respondent that such waiver has been revoked, and the respondent will then be required to issue its required response within the statutory time limitafter it receives such notice. Like the initial waiver, revocations or changes to waivers should be in writing so they are clear and unambiguous.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. "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." W. Va. Code § 29-6A-3(a).

2. When a grievant asserts that his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. Once the grievant establishes that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. *See* W. Va. Code § 29-6A-3(a)(2). *Board, et al. v. WVDHHR / Lakin Hospital*, Docket No. 99-HHR-329D (Sep. 24, 1999).

3. The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. Waiver of the strict statutory time lines is a common occurrence within the context of the grievance procedure. *Parker v. W. Va. Dep't of Health & Human Resources*, Docket No. 99-HHR-296D (Nov. 30, 1999).

4. “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.” *Rhodes v. Randolph County Bd. of Educ.,* Docket No. 00-42-133D (Jan. 17, 2001); *Lambert v. W. Va. Dep't of Health & Human Resources*, Docket No. 99-HHR-326D (Oct. 14, 1999). *See, e.g.*, *State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996)("Having induced anerror, 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).

5. Indefinite waivers of the statutory timelines contained in the grievance procedure are revokable.

6. When a grievant agrees to an open-ended or indefinite waiver of the time limits for making a required response under the grievance procedure, he must give the respondent, a clear, unequivocal notice of his intention to revoke the waiver, such as notice
in writing, and the respondent will then be required to issue its required response within the statutory time limit after it receives such notice.

For the foregoing reasons, this default is **DENIED**.

This matter is hereby **REMANDED** to level three of the grievance procedure. Respondent is **ORDERED** to hold a level three hearing within seven 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: November 12, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

During the default hearing, it came to the attention of the undesigned that I served as a mediator in the underlying grievance and several others that were combined. Normally, a mediator does not act as Administrative Law Judge (ALJ) in matters that he mediated. However, as the default issue was not part of the mediation, the parties both stated they had no objection to my deciding the default issue. If this matter returns to level four for a hearing on the merits, it will be assigned to another ALJ.

Footnote: 2

Mr. Roten's unilateral modification of the waiver is deemed insignificant, as it did not materially change the terms of the waiver and Grievant did not object to the change.