CHARLOTTE BUCKNER,

Grievant,

v. **Docket No. 03-HHR-038D**

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES/

WELCH COMMUNITY HOSPITAL

and DIVISION OF PERSONNEL,

Respondents.

ORDER GRANTING DEFAULT

On February 7, 2003, Grievant, Charlotte Buckner, filed a motion for default with this Grievance Board, stating her employer, the Department of Health and Human Resources ("HHR"), had defaulted at Level III. The underlying grievance deals with pay issues. After numerous continuances, a Level IV default hearing was held September 30, 2003, at the Grievance Board's Beckley Office. This case became mature for decision on November 11, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by HHR as a registered nurse. On November 22, 2003, she completed a grievance form asserting she had been treated unfairly on a variety of pay issues. (See footnote 2)

2. The parties agreed to waive this grievance to Level II on November 30, 2002.

3. The grievance was received at Level II on December 2, 2002,

4. The grievance was denied as untimely at Level II, but since the Level II Evaluator did not have the authority to grant the relief sought, the parties agreed to waive the grievance to Level III on December 9, 2002.

5. This grievance was mailed to Level III on December 9, 2002.

6. Numerous grievances were filed on the same matters, and the 119 grievants were divided into groups depending on the specific issues of their grievance. Grievant was placed into one of these groups.

7. This group grievance was assigned to then Grievance Evaluator Jerry Wright for a Level III hearing. Mr. Wright decided to wait until after the holidays to schedule the grievance.

8. Mr. Wright did not obtain waivers from any of the grievants or the group representatives to delay holding the Level III grievance hearing. He did not obtain a waiver from Grievant. 9. Mr. Wright became quite ill in January 2003, and he also suffered a serious car accident. He was unable to work for a long period of time and eventually, in February 2003, Grievance Evaluator David Adkins was assigned his cases.

10. Grievant filed a motion for default with this Grievance Board on February 7, 2003.

11. On February 5, 2003, Grievance Evaluator Adkins sent a letter to all grievants involved in the original grievance, including Grievant, discussing the procedure for the grievance and setting the Level III hearing date as February 19, 2003.

12. The Level III hearing was held on February 19, 2003, Grievant attended and testified, and the issue of default was discussed off the record.

14. Grievant received the Level III Decision on, or about, February 28, 2003. (See footnote 3)

Discussion

W. Va. Code § 29-6A-4 sets forth the timelines to be followed at each level of the grievance procedure. The timelines for Level III require the chief administrator, or his or her designee, to hold a hearing within seven days of receiving the appeal, and to issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003 (Sept. 20, 2002). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidencewhich 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.

If a default occurs, Grievant is presumed to have prevailed. W. Va. Code § 29-6A- 3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). Of course, if HHR can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the timelines for one of the reasons listed in W. Va. Code § 29-6A- 3(a), or the remedy requested is either contrary to law or clearly wrong, Grievant will not receive the requested relief. W. Va. Code § 29-6A-3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999).

W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> 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.

At Level IV, Grievant asserted a default occurred because HHR did not schedule a Level III hearing within the required time frame. Respondent argues Mr. Wright was excused from holding the hearing because of sickness and injury. Grievant is correct. While some of the time in January and February 2003 can be excused by the illness of Mr. Wright, HHR offered no excuse for the failure of Mr. Wright to either hold a hearing in December 2002 or to obtain a waiver from Grievant.

HHR makes one additional argument. HHR avers Grievant knowingly attended and participated in the February hearing after she filed her default, and this amounts to a waiver of her default claim. HHR notes 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 and 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)("[I]t is not appropriate for an appellate

body to grant relief to a party who invites error in a lower tribunal.")(Citations omitted).

This Grievance Board has held a grievant is allowed to raise and pursue a default claim as long as she raises it as soon as she is aware of it and submits the claim before a response is received. Bell v. Northern Regional Jail, Docket No. 98-CORR-054D (April; 14, 1999). In this case, Grievant raised the issue before she received notice of the LevelIII hearing, and Respondent was aware of Grievant's assertion of default. This act did not preclude Grievant from participating in the hearing. See Bell, supra. HHR maintains this ruling could result in Grievant's having two bites of the apple, since Grievant is among the grievants who have pursued the original claim to Level IV. This issue is resolved by severing Grievant from that grievance.

The above-discussion will be supplemented by the following Conclusions of Law.

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).

2. A Level III hearing must be scheduled within seven working days of the date of receipt of the Level III appeal. W. Va. Code § 29-6A-4(a).

3. A Level III hearing was not scheduled within seven working days of the date of receipt of the Level III appeal.

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 and 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)("[I]t is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.")(Citations omitted).

5. Grievant did not waive her right to assert default because of her participation in the Level III grievance. Bell v. Northern Regional Jail, Docket No. 98-CORR-054D (April, 14, 1999).

6. HHR defaulted on this grievance through its failure to hold a grievance within the required

time frame.

Accordingly, Grievant's request that a default be entered is **GRANTED**, and the parties are to give the Grievance Board five mutually agreeable dates to schedule the second part of the default process, whether the relief sought by the prevailing Grievant is contrary to law or clearly wrong. Grievant is severed from participation in the group grievance, Brown v. Department of Health and Human Resources, Docket No. 03-HHR- 062.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 13, 2004

Footnote: 1

Grievant was represented by Attorney Kay Bayless, and Respondent was represented by Robert Miller, Esq., Assistant Attorney General.

Footnote: 2

It is unclear what date her employer received this grievance form, as November 22, 2003, was a state holiday.

Footnote: 3

It is unknown what date this Decision was issued.