SHARON MALCOLM,

Grievant,

v. **Docket No. 03-BEP-313D**

WEST VIRGINIA BUREAU OF

EMPLOYMENT PROGRAMS,

Respondent.

ORDER DENYING DEFAULT

On October 8, 2003, Grievant, Sharon Malcolm, filed a motion for default with this Grievance Board, stating her employer, the Bureau of Employment Programs ("BEP"), had defaulted at Level III. (See footnote 1) The underlying grievance deals with harassment and favoritism. A Level IV default hearing was held November 24, 2003, at the Kanawha County Board of Education Office, as the Grievance Board's office had recently flooded. This case became mature for decision on December 8, 2003, after receipt of Respondent's proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant asserts default occurred three times in this grievance. The first time was in June when a hearing was not held after the waiver expired, and the second time was on or about August 5, 2003, when an investigation was completed into other matters Grievant had grieved, and a hearing was not scheduled. The third time was after the Level IV default hearing on these other matters, when Grievant informed Respondent's attorney shewas going to file this default claim, and Respondent did not immediately schedule a hearing prior to the Grievance Board receiving the default complaint. (See footnote 3)

Respondent agrees it did not hold a Level III hearing after the waiver expired, and it offered no clear excuse for this failure; however, it asserts Grievant did not notify this Grievance Board of her assertion of default in a timely manner. Respondent avers Grievant's argument that default in the same grievance also occurred at two other times as without merit and not proven by the record.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the

following Findings of Fact. (See footnote 4)

Findings of Fact

1. Grievant was employed by BEP as a Supervisor I in the Office of Judges. On April 25, 2003, she completed a grievance form asserting she had been treated unfairly.

2. On May 2, 2003, Patricia Fink, Employment Manager II issued a Level I Decision. 3. Grievant appealed to Level II, and on May 14, 2003, Timothy Leach, Chief Administrative Law Judge, and Alan Drescher held a Level II conference with Grievant. (See footnote 5)

4. A Level II Decision was issued on May 14, 2003, denying the grievance.

5. Grievant appealed to Level III on May 22, 2003, and on May 29, 2003, Grievant signed an agreement to waive the time frame for thirty days.

6. Grievant had filed several grievances over the past year and a half.

7. On May 21, 2003, Judge Leach asked Grievant for an extension of a Level III hearing scheduled on May 22, 2003, on another grievance filed October 9, 2002, in order to complete an investigation. Grievant granted this request.

8. Grievant believed this extension was for all her grievances, including the one in this grievance, and others she had filed but had not appealed to Level III.

9. Respondent did not hold a Level III hearing on this grievance either on or before the expiration of the waiver agreement identified in Finding of Fact 5.

10. Grievant was aware that a timely Level III hearing was not held before the waiver expired on June 29, 2003.

11. The investigative report referred to in Finding of Fact 7 was turned in on August 5, 2003. (See footnote 6)

12. Grievant filed a notice of default on several of her other grievances on September 3, 2003, and a Level IV default hearing was held on October 6, 2003. Shebelieved she had requested to have this instant grievance included with the ones to be considered at that hearing. This grievance had not been included in her default request, and Respondent objected to its inclusion because of lack of notice. The first time Judge Leach knew Grievant had appealed this grievance to Level III, was at the October 6, 2003 hearing.

13. Administrative Law Judge Paul Marteney noted this grievance was not included in Grievant's default request to Level IV and did not consider that issue.

14. Grievant informed Respondent's attorney at the hearing on October 6, 2003, that she would be filing a default on the instant grievance, and she believes default occurred again when Respondent did not schedule a Level III hearing prior to her filing a default notice to this Grievance Board dated October 8, 2003.

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 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., DocketNo. 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 BEP 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.

Grievant asserts a default occurred because BEP did not schedule a Level III hearing within the required time frame. BEP admits it did not hold a Level III hearing by June 29, 2003, but maintains Grievant waited over three months to file this default. Respondent asserts Grievant did not timely file her default claim, arguing she should have filed it in late June or early July of 2003. While W. Va. Code § 29-6A-3(a)(2) does not specify a time within which one must file a notice of default, the Supreme Court of Appeals of West Virginia has held that, "[i]n order to benefit from the 'relief by default' provisions contained in W. Va. Code § 18-29-3(a) (1992) (Reprisal. Vol. 1994), a grieved employee or his/her representative must raise the 'relief by default' issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default." Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Harmon and Chiles v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999). "However, this Grievance Board has held that an employee is allowed to raise a default claim, so long as he raises it as soon as he becomes aware of the default and submits the claim before a response to the grievance has been received. Harmon v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 26, 1997), aff'd Harmon v. Fayette County Board of Education, No. 25323, March 12, 1999 (W. Va. S. Ct.)." Bell v. Northern Regional Jail and Correctional Facility, Docket No. 99-CORR-054D (Apr. 14, 1999).

Here, Grievant was aware a Level III hearing was not held or discussed in June of 2003, but she did not file a default claim. Additionally, if Grievant did believe the default occurred on August 5, 2003, when the investigative report was received, she still did not file a default claim. Further, Grievant may have meant to file this as a default claim on September 3, 2003, when she filed the other default claims that were considered by Administrative Law Judge Marteney, but she did not. As a consequence, this default was not filed until October 8, 2003. It is also noted that Administrative Law Judge Marteney found that on June 24, 2003, Grievant's attorney sent Respondent a letter stating, "[S]he had been retained by Grievant 'to represent her in an action for Sexual Harassment and a hostile work environment,'" and "It [was her] understanding that Ms. Malcolm has been

attempting to resolve her work difficulties through the administrative grievance process for sometime now without a satisfactory result," and "Because Ms. Malcolm has not received any relief, she has requested that I pursue this matter on her behalf pursuant to the West Virginia Human Rights Act." Administrative Law Judge Marteney also found that "[o]n August 8, 2003, Ms. Dooley sent a letter to Workers' Compensation General Counsel T. J. O'Brokta requesting a copy of the investigation report." Finding of Fact 19, Malcolm v. Workers' Compensation Comm'n, Docket No. 03-BEP-266D (Oct. 28, 2003). The June 2003 letter was shortly before the Level III hearing should have been scheduled, and the August 2003 request was after the extension had expired and the report had been issued. Grievant's attorney's letter indicates Grievant did not want to pursue the grievance process any farther. This letter would also explain why Judge Leach was unaware Grievant had appealed this grievance to Level III.

Given this set of facts, the undersigned Administrative Law Judge cannot find a default occurred at any time in the process. Additionally, if Respondent did fail to act, this failure was partially created by Grievant's attorney's representations. This Grievance Board has consistently ruled that 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).

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 before the expiration of the waiver.

4. "In order to benefit from the 'relief by default' provisions contained in W. Va. Code § 18-29-3(a) (1992) (Reprisal. Vol. 1994), a grieved employee or his/her representative must raise the 'relief by default' issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default." Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); See Harmon and Chiles v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999).

5. Grievant did not timely file her notice of default. 6. 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).

7. The actions of Grievant's attorney indicated Grievant no longer wished to pursue the grievance procedure, and she was going to take her complaints to another forum.

Accordingly, Grievant's request that a default be entered is **DENIED**, and this case is **REMANDED** to the agency to hold a Level III hearing within the specified time limits.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 29, 2004

Footnote: 1

At the time this grievance was initiated, the Workers' Compensation Commission was part of the Bureau of Employment Programs. As of October 1, 2003, it became a separate entity.

Footnote: 2

Grievant represented herself, and Respondent was represented by Kelli Talbott, Esq., Deputy Attorney General.

Footnote: 3

This Level IV hearing was held on October 6, 2003, and Grievant's notice of default is dated October 8, 2003.

Footnote: 4

Some of the information given by the parties was clarified by reading the Level IV Decision issued in Malcolm v. Workers' Compensation Commission, Docket No. 03-BEP- 266D (October 28, 2003), which dealt with related matters. At the Level IV hearing, the parties frequently discussed what happened in that hearing, the documents submitted into the record, and directed the undersigned Administrative Law Judge to this Decision.

Footnote: 5

Although not identified in the record, it is believed Mr. Drescher is the Deputy Chief Administrative Law Judge.

Footnote: 6

While this report was not for the purpose of examining the events surrounding this grievance, apparently the investigators did look into this matter.