KENNITH ROSS,

Grievant,

v. **Docket No. 03-DJS-296D**

DIVISION OF JUVENILE SERVICES/NORTH

CENTRAL JUVENILE DETENTION CENTER,

Respondent.

ORDER DENYING DEFAULT

On September 26, 2003, the Division of Juvenile Services ("DJS") requested a default hearing with this Grievance Board, because Grievant, Kennith Ross, had filed a motion for default with his employer stating DJS had defaulted at Level II. The underlying grievance deals with a dismissal. A Level IV default hearing was held December 11, 2003, at the Grievance Board's office in Charleston, and this case became mature for decision on that date. (See footnote 1)

Issues and Arguments

Grievant asserts that a default occurred when the Level II conference was not held in a timely manner. He also argues Respondent's attempts to contact him were not done correctly, and the agency should have contacted him by mail to reschedule the conference.

Respondent maintains that although a problem did occur, and the agency attempted to resolve it. Respondent notes it made repeated attempts to contact Grievant to reschedule the Level II conference, and it was unable to do so. Accordingly, Respondent avers that it did not default, and if in the alternative it is found that it did default, its failure to hold the conference in a timely manner was due to excusable neglect. Further,Respondent notes that because the time was short, it did not believe that a letter would be the most effective way of reaching Grievant to reschedule the conference. Respondent also asserts the default was not timely filed.

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

Findings of Fact

1. Grievant was employed by DJS until his termination. On August 17, 2003, he completed a grievance form requesting re-employment.

2. On August 20, 2003, T.D. Melton, Facility Director, issued a Level I Decision denying the grievance.

3. Grievant appealed to Level II on August 26, 2003. A Level II conference was scheduled for 10:00 a.m., August 28, 2003, with Michael Hale, Superintendent of the Donald R. Kuntz Center. This meeting was to occur at DJS's Central Office.

4. When Grievant arrived for the conference, Michael Moore, receptionist and runner, informed Grievant that Mr. Hale was not there.

5. Mr. Hale was indeed at DJS's Central Office, but Mr. Moore, who had been employed only a week, believed Mr. Hale was not there.

6. Grievant asked if there was someone else he could see and was told there was not. He was given a number where he could reach Mr. Hale.

7. Shortly after Grievant left, Mr. Hale came to the front desk to inquire if Grievant had showed up. Mr. Moore told Mr. Hale Grievant had arrived for the meeting, but he had told him Mr. Hale was not there. 8. Mr. Hale looked up Grievant's numbers from his file and called both his cell phone and his home number. At 10:15 a.m., Mr. Hale reached Grievant's mother, told her what had happened, and informed her of the need to contact Grievant. Mr. Hale received no answer from his numerous attempts to contact Grievant through his cell phone. Mr. Hale also called the Donald R. Kuntz Center, informed them Grievant could be on his way there, asked them to explain what happened, and that he, Mr. Hale, was on his way there.

9. For the next several days, Mr. Hale, his Secretary, and Edward Eisley, Assistant Superintendent of Detention, attempted to call Grievant repeatedly at both numbers without success. Messages were also left with several people. Resp. No. 1.

10. On September 3, 2003, Mr. Hale's Secretary reached Grievant's brother at his mother's number, and he stated he would give Grievant the message.

11. Grievant called on September 3, 2003, and the Level II conference was scheduled for the next day, September 4, 2003. There is no indication Grievant did not agree with this date.

12. On September 4, 2003, Mr. Eisley held a Level II conference with Grievant.

13. The Level II Decision was issued on September 5, 2003.

14. After he received the Level II Decision, Grievant filed his notice of default on September 15, 2003.

Discussion

W. Va. Code § 29-6A-4 (b) sets forth the timelines to be followed at each level of the grievance procedure. The timelines for Level II require the administrator, or his or her designee, to hold a conference within five days of the receipt of the appeal, and issue a written decision upon the appeal within five days of the conference. 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., 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 DJS 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 thegrievance 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 DJS did not hold the Level II conference within the required time frame.

DJS notes the first Level II conference was scheduled within the required time frame, and was not held due to incorrect information given to Grievant. As soon as the error was discovered, fifteen minutes after the conference was scheduled to start, DJS began its attempts to contact Grievant to reschedule the meeting. Grievant, while noting the numbers are correct, asserted he did not receive any of these calls or messages, and that he was out of town during this period.

DJS cannot be considered to be in default in this scenario. When DJS started calling Grievant on August 28, 2003, it still had until September 3, 2003, to hold the Level II conference, and it attempted to contact Grievant repeatedly to do so. Grievant did not call until the afternoon of September 3, 2003, and the conference was scheduled for the next day, without complaint from Grievant.

It is observed Grievant believed default occurred on September 2, 2003, and he did not call Respondent back until September 3, 2003. Grt. No. 1.

Respondent also asserts that if it is found in default, it is due to excusable neglect, an error which it attempted to correct as soon as possible. As frequently noted by this Grievance Board, 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).

Respondent made multiple good faith efforts to contact Grievant to reschedule. Of course DJS was not in control of Grievant's behavior, and could not force Grievant to return its calls. Grievant indicated he was out of town, and unavailable by phone. DJS should not be penalized for this inability to contact Grievant.

Respondent also asserts Grievant did not timely file his default claim, arguing he did not file it until

after he received the Level II Decision. 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).

Grievant argues he did not know about defaults and filed his claim as soon as he became aware there was such a thing. What he discovered in was a legal theory. "It is not the discovery of a legal theory which triggers the statute, but the event. . . ." Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997). See also Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997); Adkins v. Boone County Bd. of Educ., Docket No 93-03-023 (Apr. 8, 1993). This default was not timely filed, as it was not filed until after the Level II Decision was issued.

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 II conference must be scheduled within five working days of the date of receipt of the Level II appeal. W. Va. Code § 29-6A-4(b).

3. A Level II conference was scheduled, but not held before the running of the time frame.

4. Respondent did not default even though it did miss a scheduled conference, as it had time to reschedule and attempted to do so. 5. Respondent's attempts to contact Grievant were

unsuccessful because Grievant was out of town, and he had not left Respondent a number where he could be reached.

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. Grievant cannot assert a default when Respondent made repeated attempts to contact him at appropriate numbers without success.

8. "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).

9. Grievant did not timely file his notice of default.

Accordingly, Grievant's request that a default be entered is **DENIED**, and this case is **REMANDED** to the agency to hold a Level II conference within the specified time limits. It is noted Grievant could have filed directly to Level IV, but instead started his grievance at Level I.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 29, 2004

Footnote: 1

Grievant represented himself, and Respondent was represented by Steven Dragisich, Esq., Assistant Attorney General.