TERRY WATSON,
Grievant,

v. **DOCKET NO. 04-ADMN-094D**

DEPARTMENT OF ADMINISTRATION/
GENERAL SERVICES DIVISION,
Respondent.

ORDER DENYING DEFAULT

On December 29, 2003, Grievant filed a grievance against Respondent challenging certain overtime assignments. On February 25, 2004, Grievant filed a notice of default, claiming Respondent had defaulted at level three by failing to issue a decision within the required time.
A level four hearing on the issue of whether a default occurred was held in the Grievance Board's Charleston office on April 27, 2004. Grievant appeared *pro se*. Respondent was represented by counsel, Heather Connolly. The matter became mature for decision at the close of the hearing.
Based on a preponderance of the evidence, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant filed a grievance at level one on December 29, 2003, and it proceeded to level three, where a hearing was held before Grievance Evaluator John T. Poffenberger on February 9, 2004.
2. At the close of the hearing, the following discussion occurred on the record:

MS. CONNOLLY: Your honor, you may want to have a chance to read the transcript before you make the decision and I don't know how long this will take, so --

HEARING EXAMINER: Yeah, we usually have to get a decision out in five days, but I would like to have the opportunity to read the transcript and so if we could have that in five days from the date I get the transcript, I'll get the decision out.

(Level three trans., p. 33)

3. Grievant nodded his head in assent, but did not state out loud whether he agreed or disagreed with Mr. Poffenberger's request to extend the time limit for his decision to five days after he received the transcript.
4. Grievant was unsure what Ms. Connolly and Mr. Poffenberger were referring to when they discussed the transcript. He believed they meant papers relating to pay records, which were discussed earlier in the hearing. Mr. Poffenberger believed Ms. Connolly would bring them to the hearing, and when she didn't, he assumed Mr. Poffenberger wanted five days after she provided those records to him.
5. The transcript was completed by the court reporter on February 13, 2004, and Mr. Poffenberger received it on the 18th. Mr. Poffenberger sent a copy of the transcript to Grievant that same day. (See footnote 1). 6. Mr. Poffenberger completed the level three decision on February 23, 2004 and mailed it to Grievant the following day. Grievant received it on the 25th when picked up his mail at home, after work.
7. Grievant hand-delivered his request for default on the 25th, prior to picking up his mail.

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). 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. Board, et al. v. W. Va. Dep't of Health & Human Resources / Lakin Hosp., Docket No. 99-HHR-329D (Sept. 24, 1999).

Grievant asserts that a default occurred because the level three decision was not issued within five days of the hearing, and Respondent refutes this assertion by claiming Grievant waived the time limit to allow for preparation of the transcript. While there is no dispute that Respondent did not issue the decision within the statutory time limits, the question of a waiver is the source of some confusion. 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 timelines is a common occurrence within the context of the grievance procedure. Parker v. W. Va. Dept of Health and HumanResources, Docket No. 99-HHR-298D (Nov. 30, 1999). While normally a waiver should be reduced to writing to eliminate it as a source of misunderstanding, "[a] waiver to extend the time limit for issuance of a decision may also be made on the record at the time of the hearing." Cox, et al. v. Dept of Health & Human Resources/Welch Community Hosp., Docket No. 04-HHR-021D (Mar. 17, 2004).

Taken together, the transcript of the hearing and Grievant's level four testimony confirm such a waiver was made. Mr. Poffenberger asked, on the record, if he could have additional time to issue the decision. Grievant testified that he nodded his head in agreement. While it is apparent Grievant was not sure what exactly it was he was agreeing to, there is no evidence he expressed this to Mr. Poffenberger, so there was no reason for him to believe Grievant was not agreeing to the question he asked. Mr. Poffenberger received the transcript on Wednesday, February 18, and issued the decision on Tuesday, February 24, a period of four days having elapsed. This was within the "five days after receipt of the transcript" requested by Mr. Poffenberger and ostensibly agreed to by Grievant.

While both parties were somewhat at fault for the confusion -- Respondent for failing to procure an unambiguous waiver and Grievant for agreeing to something he was unclear about -- Grievant's error prevents him from prevailing by default. "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).

Having acquiesced to the errors in making a clear waiver of the time limits, Grievant may not now claim those errors caused a default. The following Conclusions of Law support this decision.

CONCLUSIONS OF LAW

1. The grievant must establish that a default occurred 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. Board, et al. v. W. Va. Dep't of Health & Human Resources/Lakin Hospital, Docket No. 99-HHR-329D (Sep. 24, 1999).
2. 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. Dept of Health & Human Resources, Docket No. 99-HHR-298D (Nov. 30, 1999). 3. While normally a waiver should be reduced to writing to eliminate it as a source of misunderstanding, "[a] waiver to extend the time limit for issuance of a decision may also be made on the record at the time of the hearing." Cox, et al. v. Dept of Health & Human Resources/Welch Community Hosp., Docket No. 04-HHR-021D (Mar. 17, 2004). 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-376D (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 immediate and adverse consequences."); Smith v. Bechtold, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993).
5. Grievant apparently waived the time limits for issuing the level three decision, inducing the error he complains of, therefore he is unable to prevail by default.

For the foregoing reasons, Grievant's request for a determination that a default occurred is **DENIED**. The parties are directed to provide this office, by Mar. 14, 2004, with four or five mutually agreed dates on which all parties and witnesses are available for a level four hearing on the merits of the grievance.

Date: April 30, 2004

M. Paul Marteney
Administrative Law Judge

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