KENNETH P. PATRICK,

Grievant,

v. **Docket No. 04-DOH-143D**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULTS

This consolidated default proceeding arises out of two grievances filed by Kenneth P. Patrick ("Grievant") against his employer, the West Virginia Department of Transportation/Division of Highways ("DOH"), on March 30, 2004. After Grievant claimed that defaults had occurred at Level I, DOH submitted requests to the West Virginia Education and State Employees Grievance Board ("Grievance Board"), pursuant to West Virginia Code section 29-6A-3(a)(2), for default hearings. The requests, which were served on April 19, 2004, were received at the Charleston office of the Grievance Board on April 21, 2004. The two underlying grievances were consolidated for a default hearing, which was held on August 16, 2004, at the Grievance Board's hearing room in Charleston. The purpose of this hearing was to afford Grievant an opportunity to substantiate, by a preponderance of the evidence, his claims that there had been defaults by DOH at Level I in connection with processing two underlying grievances. (See footnote 1) Grievant was represented by David Reed, fellow DOH employee and union member. DOH was represented by Barbara L. Baxter, Esquire. At the conclusion of the default hearing, this case was submitted for decision.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. Grievant is employed by DOH as Assistant Maintenance Engineer for District Three.

2 2. Grievant's immediate supervisor is J. Lee Thorne, Maintenance Engineer, (hereafter sometimes “Mr. Thorne”).

3 3. Grievant filed two grievances on March 30, 2004, alleging in one that he had been improperly removed as duty officer for District Three for a portion of March 2004, and alleging in the other that he had not been given an opportunity “to work any shifts covering the radio room or provided any training for such work.”

4 4. At the time he filed these two grievances, Grievant told Mr. Thorne “I'll work with you on the time.”

5 5. Although Grievant did not request informal conferences, Mr. Thorne considered that the discussion that ensued when Grievant filed his grievances on March 30, 2004, constituted an informal conference.

6 6. Grievant filed his grievances the day before he was scheduled to be off work for three days on a disciplinary suspension. The suspension was to begin on Wednesday, March 31, 2004, and extend through Friday, April 2, 2004.

7 7. On the following Monday, April 5, 2004, when he would ordinarily have returned to his normal work station, Grievant and his supervisor were out of the office attending a three-day Maintenance Seminar.

8 8. This seminar was so important to their office that DOH worked with Grievant to make sure that the timing of his three-day disciplinary suspension did not prevent Grievant from attending.

9 9. Grievant's office returned to normal operation on Thursday, April 8, 2004.

10 10. One of Grievant's co-workers is Patty Deak, (“Ms. Deak”), who is an Office Assistant III in the Maintenance Division at District Three in Parkersburg. She is also supervised by Mr. Thorne.

11 11. On Friday, April 9, 2004, Ms. Deak informed Grievant that Mr. Thorne wanted to see him about signing time waivers in a grievance. Grievant responded, “Sure, no problem. I'll be happy to.” (See footnote 2)

12 12. When Mr. Thorne first asked him to sign the written waivers, Grievant tried to use the waivers as a chip for bargaining away his suspension. This suggestion was rejected.

13 13. Nonetheless, on April 9, 2004, Grievant acted in conformity with his earlier oral waivers by executing written waivers of the Level I deadlines in his two grievances.

14 14. Level I decisions were issued in both grievances on April 13, 2004, and were received by Grievant on April 14, 2004.

15 15. By notice, dated April 14, 2004, Grievant claimed that DOH was in default “due to failure to respond within the time limits required without an acceptable reason.”

16 16. In his notice of default, which was addressed to Mr. Thorne, Grievant described the events of April 9, 2004, as follows:

> You failed to respond to the two grievances submitted on 3/30/04 in any manner until 4/9/04. On that date, **you asked me to sign two time waivers** for Level One and I did, but at that time the two defaults had already occurred. Clearly, this was an attempt to deny me my right to default granted by the grievance procedure guidelines. **You should not have asked me to grant time extensions** after the fact of default on your part.

(Emphasis added).

17 17. In his default notice, Grievant did not raise any issue about the voluntariness of the time waivers he signed.

18 18. It was not until Grievant's rebuttal case in the ensuing default hearing that he asserted, for the first time, that the written waivers were signed under duress.

19 19. Grievant also attempted to refute his oral waivers by claiming that his offer to work with Mr. Thorne with respect to time did not relate to deadlines. Rather, he claimed that he was offering to help Mr. Thorne work on the grievances during the seminar.

DISCUSSION

Grievant claims defaults on the grounds that the Level I decisions were not issued within six days of March 30, 2004, when his supervisor received the two grievances. Grievant is correct that, under the pertinent statute, “the immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.” W. Va. Code § 29-6A-4(a). For purposes of the grievance procedures, “days” are defined as “workingdays exclusive of Saturday, Sunday or official holidays.” W. Va. Code § 29-6A-2(c). April 13, 2004, when the Level I decisions were issued clearly falls outside of the six-day window. However, this does not end the inquiry.

Oral Waivers

Grievant's claim of defaults ignores the undisputed fact that, at the time he filed his grievances,

Grievant told his supervisor that he would work with him on the time. Any reasonable person would understand Grievant's statement to be an oral waiver of the statutory deadlines. An offer to waive the time requirements with respect to the two grievances was perfectly reasonable in light of the fact that both Grievant's suspension and the Maintenance Seminar were imminent. DOH had worked with Grievant regarding the scheduling of his three-day suspension to ensure that Grievant would be able to attend the Maintenance Seminar, which was characterized as an important training event.

At the default hearing, Grievant attempted to rewrite history by arguing that his offer to work with Mr. Thorne with respect to time did not mean that he was offering to waive statutory deadlines. Instead, he claimed that he was offering to help Mr. Thorne with the grievances during the seminar. This makes no sense. The grievances had been filed. Mr. Thorne had to draft a decision. There was no help that Grievant could possibly offer Mr. Thorne. Grievant's efforts to distort the meaning of a perfectly clear statement is rejected as disingenuous. Mr. Thorne's understanding that Grievant's offer to work with him on time was an oral waiver is absolutely reasonable. He was entitled to rely upon Grievant's word on this matter.

The Grievance Board has held consistently that a party may not invite error and then seek relief on the basis of that error. *Rose v. West Virginia Dep't of EnvironmentalProtection/Division of Mining and Reclamation*, Docket No. 02-DEP-412D (Apr. 23, 2003) ("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."); *Bowman v. Marion County Bd. of Educ.*, Docket No. 02-24-403D (Feb. 26, 2003). Both *Rose* and *Bowman* dealt with oral waivers by employees or their representatives that led the employers to delay taking the required actions within the statutorily-mandated time. Subsequent claims of default by the employees were rejected in both cases. A similar result is compelled here. To decide otherwise would be to invite grievants to engage in deceptive practices in an effort to induce a default.

Written Waivers

Grievant's subsequent execution of written time waivers confirms the fact that Mr. Thorne correctly understood Grievant's offer to work with him on time. Although Grievant attempted to undercut the validity of the written waivers by claiming at the default hearing that he was coerced into signing them, this attempt was not successful.

As an initial matter, the timing of Grievant's claim of coercion makes it suspect. It is a claim of

recent vintage that was not raised until Grievant testified during his rebuttal case at the default hearing. In his April 14, 2004, correspondence to his supervisor, in which he claimed defaults in his two grievances, Grievant made no mention of being pressured into signing the waivers. (See footnote 3) To the contrary, Grievant stated twice that he had been "asked" by Mr. Thorne to sign the waivers.

In addition, Grievant's testimony that he was coerced into executing waivers is directly contrary to Ms. Deak's account of the events of April 9, 2004. In assessing the credibility of witnesses who present divergent testimony, the Grievance Board generally relies upon factors such as the witness's 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additional considerations include 1) the presence or absence of bias, interest, or motive on the part of the witness; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 4) *Dalton v. Monongalia County Bd. of Educ*., Docket No. 04-30-184 (Sept. 15, 2004); *Jaggers-Green v. Bureau of Employment Programs/Unemployment Comp. Div.*, Docket No. 03-BEP-026 (July 30, 2004). In using the pertinent factors set forth above and comparing Ms. Deak's testimony to Greivant's on the issue of voluntariness of the written waivers, Ms. Deak is found to be more credible. Ms. Deak, who had no apparent personal interest in the proceedings, testified in a calm, matter-of-fact manner, as contrasted with Grievant, who was clearly angry and agitated. Obviously, Grievant has a personal interest in the matter. In addition to his demeanor and interest in the case, the belated assertion of Grievant's claim of duress, its inconsistency with Grievant's oral waiver, and Grievant's written description of the events of April 9, as set forth in his notice of defaults lead to the conclusion that Grievant's testimony that he was coerced into signing the written waivers is not credible.

Summary

Grievant's declaration of a default under the circumstances of this case smacks of sharp practice. He made an oral waiver of the deadlines. Thereafter, he reaffirmed the waiver in writing. In all fairness, Grievant cannot now complain that the written waivers were invalid because they were signed outside of the six-day limit that would otherwise apply to issuance of Level I decisions. Grievant's actions, which reasonably led his supervisor to believe that there had been a waiver of the deadlines for issuance of decisions at Level I in each of the two grievances foreclose a finding that DOH was in default. This is particularly appropriate in this case where, despite Grievant's time

waivers, the Level I decisions were issued within a relatively short period of time.

Based upon the foregoing facts and upon review of the pertinent law, as well as consideration of the arguments of the parties, the undersigned concludes as follows:

CONCLUSIONS OF LAW

1 1. West Virginia Code section 29-6A-3(a)(2) provides, in pertinent part, that "[t]he 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."

2 2. 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).

3 3. 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).

4 4. With respect to Level I, “[t]he immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.” W. Va. Code § 29-6A-4.

5 5. Grievant orally waived the six-day deadline at the time he filed his grievances.

6 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).” *Rose v. West Virginia Dep't of Environmental Protection/Division of Mining and Reclamation*, Docket No. 02-DEP-412D (Apr. 23, 2003)

7 7. Grievant cannot benefit from the delay he induced by gratuitously offering an oral waiver of the statutory time requirements by now successfully claiming a default on the part of DOH.

8 8. Issuance of the Level I decisions on April 13, 2004, comported with the requirement contained in the written waivers, executed on April 9, 2004, that the grievances be processed as quickly as possible.

9 9. Grievant has failed to meet his burden of proving that there was a default, within the meaning of West Virginia Code section 29-6A-3(a)(2), at Level I in either of the two underlying grievances.

Based upon the foregoing, Grievant's requests that defaults be entered are **DENIED**. Grievant may, if he so desires, pursue the underlying grievances at Level II.

Dated: September 30, 2004

JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

The merits of the underlying grievances are not at issue herein.

Footnote: 2

Interestingly, Grievant did not cross-examine Ms. Deak.

Footnote: 3

The sole complaint set forth in his notice of default was that DOH had already been in default before asking Grievant to waive, in writing, the statutory time limits.

Footnote: 4

These factors are drawn from the United States Merit System Protection Board Handbook ("MSPB Handbook"). Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).