TERESA OPITZ,

Grievant,

v. **Docket No. 04-DJS-404**

DIVISION OF JUVENILE SERVICES/

INDUSTRIAL HOME FOR YOUTH,

Respondent.

DECISION

Teresa Opitz ("Grievant") initiated a grievance on September 14, 2004, alleging entitlement to reinstatement to a position in the "K-9" unit at the Industrial Home for Youth ("IHY"), following an absence due to a Workers' Compensation injury. As will be discussed below, Grievant also filed a grievance on October 5, 2004, alleging entitlement to reallocation to Correctional Officer III ("CO III") and a pay raise as a result of her K-9 duties, retroactive to March of 2002. The first grievance was denied at level one on September 21, 2004. The grievances were addressed together at level two and were denied by decision dated October 5, 2004. A level three hearing was conducted on November 3, 2004, and the grievances were denied in a decision dated November 9, 2004. (See footnote 1) Grievant appealed to level four on November 18, 2004, and filed a default claim on November 29, 2004. Due to confusion as to whether one or two grievances were involved, a level four hearing was conducted in which both the original grievance and the second grievance were addressed, along with Grievant's default claim. That hearing was held in the GrievanceBoard's office in Westover, West Virginia, on April 18, 2005. Grievant represented herself, and the Division of Juvenile Services ("DJS") was represented by Steven R. Compton, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' final post-hearing submissions on June 6, 2005. (See footnote 2)

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed at IHY for several years, most recently as a Correctional Officer II ("CO II").

2. In early 2002, IHY implemented a "K-9" unit. The officers initially assigned to this unit had to be at least a CO II, and they were provided specific training and certification for handling dogs. These dogs are used in contraband searches, escapes, and for other similar purposes throughout the state's correctional system. The K-9 officers have no duties or responsibilities directly related to the juvenile residents of IHY.

3. Grievant was one of the original K-9 officers at IHY, and she was a CO II at the time she began the assignment.

4. Grievant suffered an on-the-job injury to her knee on September 3, 2003. She was off work and receiving Workers' Compensation benefits until August 16, 2004.

5. Just prior to her injury, Grievant had submitted a request and attached documentation to be reallocated to a CO III position. All the K-9 officers at that time wereinformed by their supervisor, Ralph Terry, that they would be reallocated to CO III as a result of their K-9 duties.

6. During Grievant's absence, all existing K-9 officers were reallocated to CO III as a result of their K-9 duties, and they were not required to go through promotion board interviews or testing.

7. Upon her return to work on August 16, 2004, Grievant provided IHY officials with a physician's statement, which stated that she was capable of performing the duties of her K-9 officer position. A more detailed physician's statement, dated August 24, 2004, stated that Grievant was capable of controlling her dog under all circumstances, and that her chronic condition was alleviated through exercise and medication.

8. By letter dated August 31, 2004, Grievant was informed by IHY Superintendent Matthew Biggie that she would no longer be assigned to the K-9 unit. She was assigned to a security post.

9. On September 10, 2004, IHY posted a position for a CO III in the K-9 unit, and Grievant applied for the position.

10. Throughout the fall of 2004, other CO III positions were posted, and some of them were in the K-9 unit. Grievant was required to go through a promotion board interview and testing, and her scores were not high enough for her to be placed in any of the CO III positions.

11. Grievant filed a level one grievance on September 14, 2004, stating "I want my previous

position as . . . K-9 officer at the WVIHY reinstated effective immediately. . ." 12. On October 5, 2004, Grievant filed a level one grievance, stating "I want my rank and pay raise of CO III . . . that was to be applied when my position changed to . . . K-9 Officer . . . ., effective immediately from the month of March 2002."

13. After the grievance was denied at level one, Grievant appealed to level two, stating that, in addition to the claim regarding reinstatement to the K-9 unit, she was requesting placement in the position posted September 14, 2004, because she should have received a promotion and pay raise in March of 2002.

14. In his level two response on October 5, 2004, Major Edward Eisley addressed both Grievant's request for reinstatement to the K-9 unit and her request for a retroactive promotion to March of 2002 as a result of placement in the position posted in September of 2004. Major Eisley believed that Grievant had filed only one grievance, which included requests for placement in the K-9 unit and retroactive back pay.

15. Although both of Grievant's requests were discussed at the level three hearing, only her initial request for reinstatement to the K-9 unit was addressed in the level three decision, dated November 9, 2004.

16. On November 29, 2004, Grievant claimed that a default occurred with regard to her second grievance, because a level two "hearing" had not been held within the required timeframe.

Discussion

This grievance presents the unusual circumstance of a default claim being asserted in conjunction with a grievance on the merits. Accordingly, the default issue will be addressed prior to a discussion of the merits of Grievant's claims.

Default Claim

"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 burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, *i.e.*, the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits required in this article. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Upon appeal to level two, a

conference must be held within five days of receipt of the appeal. W. Va. Code § 29-6A-4(b).

It is well established 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 Res., 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 anappellate body to grant relief to a party who invites error in a lower tribunal.")(Citations omitted). Moreover, it is also well established that a grievant is obligated to raise the issue of default as soon as she becomes aware of it. Headley v. Dep't of Transp./Div. of Highways, Docket No. 04-DOH-397D (Jan. 27, 2005).

In the instant case, both of these principles were violated. It is obvious from Major Eisley's level two response that he believed that both of Grievant's claims were being addressed at that time, and Grievant was aware of this when she received his response dated October 5, 2004. Grievant was easily a participant in the confusion regarding her claims, and she waited at least six to seven weeks to raise the issue of a default that allegedly occurred at level two. Therefore, default relief would be improper under these circumstances.

Merits of Grievant's claims

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Grievant points to the following portion of W. Va. Code § 29-5A-3, regarding the rights of injured employees upon their return to work:

> (b) It shall be a discriminatory practice within the meaning of [this article] for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement

> provided that the position is available and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing. A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury.

Pursuant to this provision, Grievant contends that her reinstatement to a “line officer” security post does not comply with the statute's mandate. Although Grievant's actual classification did not change from CO II after her return to work, she argues that positions were available in the K-9 unit, as evidenced by the postings for which she applied during late 2004. In addition, she contends that, as with the other K-9 officers who were assigned to the unit in 2003, she should have been reallocated to CO III without having to go through the promotion board and testing procedures.

Despite Respondent's contentions to the contrary, the evidence does indicate that there were positions available in the K-9 unit when Grievant returned to work in August of 2004. Although her title did not change, it is also clear that the duties of a security officer, who is in charge of dealing directly with juvenile residents at IHY, are vastly different from those of a K-9 officer. Accordingly, in order to comply with the directives of the above-cited statute, Respondent was required to reinstate Grievant to a K-9 unit position upon her return to work.

However, Grievant's request for retroactive reallocation to March of 2002 is somewhat more complicated. While Grievant's supervisor did admit that she had met the requirements for reallocation to CO III, and that the paperwork had been submitted priorto her Workers' Compensation injury, there is no evidence explaining why Grievant would be entitled to reallocation as of March of 2002. Moreover, because Grievant was off work for an extensive period of time, it is unclear exactly when she was entitled to reallocation, and no specific evidence regarding her previous reallocation request was introduced into the record.

Although not worded as such, it does appear that Grievant has been subjected to discrimination in Respondent's requirement that she participate in the promotion board and testing process in order to be placed in a CO III position. Discrimination is defined as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” W. Va. Code § 29-6A-2(d). In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]he crux of such

claims is that the complainant was treated differently than **similarly situated** employees[.]" Bd. of Educ. v. White, 605 S.E.2d 814, 818 (W. Va. 2004)(emphasis added). Respondent has not disputed Grievant's contention that the K-9 officers working in the unit at the time of her injury were reallocated to CO III positions without having to go through the traditional promotion process. Therefore, Grievant has established that Respondent's requirement that she go through that process in order to be returned to a CO III position in the K-9 unit was discriminatory.

Accordingly, the undersigned finds that Grievant has proven by a preponderance of the evidence that she was entitled to placement in a CO III position in the K-9 unit upon her return to work on August 16, 2004. However, Grievant has failed to prove upon what date she would have been entitled to CO III reallocation prior to her injury, so her classification as CO III should take effect as of her return to work. The following conclusions of law support this decision.

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. 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 Res., Docket No. 99-HHR-326D (Oct. 14, 1999).

3. A grievant is obligated to raise the issue of default as soon as she becomes aware of it. Headley v. Dep't of Transp./Div. of Highways, Docket No. 04-DOH-397D (Jan. 27, 2005).

4. Grievant is not entitled to relief by default, because she was aware of her superiors' confusion regarding whether she had one grievance or two separate grievances, and she did not raise the issue as soon as she was aware of it.

5. In a non-disciplinary matter, Grievant has the burden of proving her claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ.,

Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). 6. Pursuant to the provisions of W. Va. Code § 29-5A-3, an employee who sustains a work-related injury is entitled, upon their return to work, to be placed in his or her previous position, or, if it is no longer available, in a position which is comparable as to wages, working conditions, and--to the extent reasonably practicable--duties.

7. Discrimination is defined as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” W. Va. Code § 29-6A-2(d).

8. Grievant was entitled to reinstatement to an officer position in the K-9 unit at IHY upon her return to work after her compensable injury.

9. Respondent's requirement that Grievant go through a promotion board and testing process prior to reallocation to CO III in the K-9 unit, when other K-9 officers originally assigned to the unit did not have to, was discriminatory.

10. Grievant was entitled to reallocation to CO III in the K-9 unit at IHY as of August 16, 2004.

Accordingly, this grievance is **GRANTED IN PART and DENIED IN PART.** Respondent is hereby **ORDERED** to reallocate Grievant to the classification of CO III and place her in a K-9 officer position, retroactive to August 16, 2004, with all applicable back pay and benefits. All further requested relief is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filedwithin thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by West Virginia Code section 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: July 13, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

As discussed later in this Decision, while Grievant continued to contend that two separate grievances were involved, the merits of both were addressed at levels two and three, because of the intertwined facts involved.

Footnote: 2

Although Grievant had requested permission to submit additional evidence, most of the documents submitted with her post-hearing submission had already been introduced into the record. Any new evidence which was submitted after the level four hearing, which was not approved by opposing counsel, is not being considered in this Decision.