ROBERT RUCKER, et al.,

Grievants,

v. **Docket No. 05-DOH-123D**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

On April 12, 2005, this matter was brought to level four pursuant to Respondent's request for a hearing on Grievant's allegation that a default had occurred at level two of the grievance procedure. A hearing was conducted in Westover, West Virginia, on August 24, 2005, for the purpose of determining only whether a default had occurred. Grievants were represented by Paul Ferguson, and Respondent was represented by counsel, Barbara L. Baxter. This matter became mature for consideration upon receipt of the parties' fact/law proposals, on October 5, 2005.

The following material facts have been proven by a preponderance of the evidence presented at the default hearing.

Findings of Fact

1. On January 11, 2005, Grievants filed a grievance with their immediate supervisor alleging improprieties in the selection process for a day shift position. 2. Because their grievance form did not indicate a request for an informal conference, Grievants' supervisor, Donna Gallaher, issued a level one response on January 19, 2005, denying the grievance.

3. Grievants' level two appeals were filed separately, on January 19 and 20, 2005.

4. Don Williams, Acting District Engineer, was the designated level two grievance evaluator.

5. Due to a scheduling conflict, Mr. Williams requested that Grievants sign a timeframe waiver, so that the level two conference could be held on February 2, 2005. Mr. Rucker executed this waiver

on behalf of all Grievants. The waiver specified that Grievants agreed “to waive the procedural time frames at Level II.”

6. The level two conference was conducted on February 2, 2005. The conference was lengthy, and Ms. Gallaher attended in order to facilitate achieving an understanding between the parties and a potential compromise. At the conclusion of the conference, Mr. Williams explained to Grievants that he was busy with other things and that, in light of the variety of issues discussed during the conference, it may “take him a while” to get a decision together. He indicated that he would get the decision done as quickly as he could, and Grievants agreed that would be all right. No specific timeframe was discussed.

7. Mr. Williams' level two decision was issued on February 28, 2005.

8. On March 7, 2005, Grievants appealed their grievance to level three. Mr. Rucker again executed a time frame waiver on behalf of all Grievants at level three on March 9, 2005. 9. On March 19, 2005, in conjunction with requesting a continuance of the level three hearing, Grievants' representative indicated that Grievants believed a default occurred at level two.

10. On April 5, 2005, Grievants advised the level three hearing evaluator that they would like to proceed to level four and pursue a default claim.

Discussion

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, Grievants are 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 DOH 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). In the instant case,Respondent has argued that there are two fatal flaws with this default claim. First, Grievants agreed to a waiver of Mr. Williams' time limit for rendering a written decision and, second, they did not raise the default issue in a timely fashion.

The concept of an actual waiver of one's established rights implies a voluntary act. Smith v. Bell, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947). "'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' . . . Furthermore, 'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'" (Citations omitted). Potesta v. U.S. Fidelity & Guar. Co., 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998). It has been held by this Grievance Board that timelines may be extended by the actions of the grievant and by the agreements of the parties, such as rescheduling of hearing dates beyond the statutory timeframe. Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001); Mullins v. Kanawha County Bd. of Educ., Docket No. 01-20-038D (Apr. 10, 2001). Further, "[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. 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) ('It is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.' (Citation omitted).)." Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997).

Not only did Grievants execute a written timeframe waiver for the level two proceedings, but they admittedly agreed at the conclusion of the conference that Mr.Williams could "take a while" to get the decision together. If they had desired a decision by a certain date, it was their responsibility to advise Mr. Williams at that time or inquire of him specifically how long it would take. They clearly did not do so, and voluntarily waived their statutory right to a written decision within five days of the conference. See W. Va. Code § 29-6A-4.

Moreover, an employee is allowed to pursue a default claim only if he raises it as soon as he

becomes aware of the default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). The grievant is also required to submit the default claim before a response to the grievance has been received. Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999). Since Grievants obviously believed that Mr. Williams' level two decision was untimely before it was issued, declaration of default after receipt of the decision AND appeal to the next level was long after Grievants were aware of the alleged default. In addition, not only did they wait until the level two response had been issued, but they did not attempt to claim default until level three proceedings had begun. Clearly, the pursuit of this default claim was untimely.

Consistent with the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. 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). 2. "'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' . . . Furthermore, 'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'" (Citations omitted). Potesta v. U.S. Fidelity & Guar. Co., 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998). 3. Timelines may be extended by the actions of the grievant and by the agreements of the parties, such as rescheduling of hearing dates beyond the statutory timeframe. Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001); Mullins v. Kanawha County Bd. of Educ., Docket No. 01-20-038D (Apr. 10, 2001).

4. An employee is allowed to pursue a default claim only if he raises it as soon as he becomes aware of the default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). The grievant is also required to submit the default claim before a response to the grievance has been received. Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999).

5. Grievants voluntarily waived their right to a level two decision within five days of the conference, and they did not raise the default claim as soon as they were aware of the alleged default. Accordingly, no default occurred in this case.

Accordingly, Grievants' request for judgment by default is **DENIED**, and this matter is **REMANDED** to level three for a hearing on the merits to be held within **TEN DAYS** of the date of this Order, or as otherwise agreed to in writing by the parties.

Date: October 21, 2005

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DENISE M. SPATAFORE

Administrative Law Judge