JUDITH D'ANGELO,

Grievant,

v. DOCKET NO. 02-HHR_54D

W. VA. DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/ PINECREST HOSPITAL,

Respondent.

ORDER GRANTING DEFAULT

Grievant notified respondent through several letters that her grievance, filed November 5, 2001, was in default at Level III. Respondent forwarded one of Grievant's to the Grievance Board, and requested a Level IV default hearing. A hearing was held on March 22, 2002, at the Grievance Board's Beckley office, where the issue was limited to a determination as to whether a default did occur and whether Respondent had a statutory excuse. Grievant appeared *pro se* and Respondent was represented by B. Allen Campbell, Esq., Assistant Attorney General. The parties elected not to file proposed findings of fact and conclusions of law, so the matter became mature for decision at the close of the hearing.

Respondent presented the testimony of one witness, Jerry A. Wright, who appeared vias telephone from the Grievance Board's Charleston office. Grievant testified in her own behalf, but called no witnesses, and there was no documentary evidence introduced. Based on the evidence adduced at the hearing and the record of the grievance from the lower levels, I make the following findings:

FINDINGS OF FACT

1. On November 5, 2001, Grievant filed a grievance stating:

> I feel that my evaluation was done unfairly and discriminatory because after the charge nurse scores my evaluation which was comparable to the other CNAs on the floor, it was changed by my unit director without my input or knowledge. I was told that it was changed due to attendance. My absences were due to work related injuries and are still ongoing.

As relief, Grievant sought "for [her] evaluation to be accepted as it was done by the L.P.N. on the unit

as were all other employees on the unit." The grievance was denied at levels I and II and was timely appealed to Level III. It was scheduled for a Level III hearing on January 25, 2002, at Pinecrest Hospital by Respondent's Level III Grievance Evaluator Jerry A. Wright.

2. On the evening before the hearing, Mr. Wright began to feel very ill, and felt worse the next morning. After preparing to travel to the hearing, he decided he was too ill and was physically unable to travel. He called his secretary to try and determine if he could hold the hearing by phone, but determined that his recording equipment was incompatible with his telephone system. As he began to feel more ill, his symptoms included disorientation, dizziness, nausea and vomiting. A visit to his physician revealed that there was a problem with a prescribed medication he was taking, and this caused the symptoms.

3. After waiting 20 or 30 minutes for Mr. Wright to arrive, Elizabeth Thews, Respondent's Level II Grievance Evaluator, who was present at Pinecrest, left the room to try and contact Mr. Wright. When she returned, she reported that Mr. Wright had notcalled, but she had spoken to someone who said the hearing was not on Mr. Wright's calendar. She informed Grievant that Mr. Wright would need to reschedule the hearing.

4. On or about January 28, 2002, Grievant sent a letter to Ms. Thewes and to Pinecrest Hospital Administrator Thomas McGraw "asking for a decision to be made because Jerry Wright has made a default." Mr. Wright was not made aware of this letter.

5. On February 21, 2002, Grievant sent a similar letter to the "Director of the Division of Personnel." On February 25, 2002, Grievant sent a letter to Mr. Wright stating in part: "You failed to show up for my scheduled Level III grievance. You did not call or inform anyone you weren't coming. You have failed to reschedule my Grievance hearing. I am declaring you on default. I should automatically win my grievance." On February 28, 2002 Grievant sent a second letter to Ms. Thewes requesting a decision based on the default. Grievant received no response to any of these requests.

6. On February 28, 2002, Respondent filed its request that this matter "be scheduled for a default hearing" with the Grievance Board, enclosing copies of the grievance form and the letter to Mr. Wright.

7. Grievant sent her copies of the Grievance Form, lower-level decisions and all of the above letters, except the January 28, 2002, letter, to the Grievance Board on March 4, 2002.

8. After failing to appear for the scheduled Level III hearing, Mr. Wright did not contact Grievant

to reschedule the hearing or to obtain a waiver of the time limits for holding a hearing. No Level III hearing has been scheduled or held. 9. Respondent concedes that a default did occur because the scheduled Level III hearing was never held, and has not been rescheduled, but asserts Mr. Wright's failure to appear for the January 25, 2002, hearing was excusable due to sickness.

DISCUSSION

___A grievant may appeal a Level II decision to Level III within five days of receiving the decision. The Level III Grievance Evaluator "shall hold a hearing within seven days of receiving the appeal." W. Va. Code § 29-6A-4(c). "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 by this article[.]" W. Va. Code § 29-6A-3(a)(2).

Respondent, conceding that the Level III hearing was not held within seven days of the appeal, admits a default did occur. Respondent therefore bears the burden of proving that it has a statutory excuse for not meeting the required time limit. West Virginia Code § 29-6A-3(a)(2) excuses a default if the Grievance Evaluator "fails to make a required response in the time limits required in [W. Va. Code § 29-6A-1 *et seq.*], unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud." *See*, Board v. W. Va. Dep't of Health and Human Resources/Lakin Hosp., Docket No. 99-HHR-329D (Sep. 24, 1999).

Respondent proved that the Level III Grievance Evaluator was prevented from holding the Level III haring on January 25, 2002, as a result of sickness. While this excuses the original failure to meet the time limit, it does not toll the time limit indefinitely. It is the Grievance Evaluator's responsibility to timely schedule a grievance hearing, and it is also his responsibility to re-schedule it in a timely manner if something prevents holding the hearing as scheduled. Grievant waited almost thirty days, after having been told Mr.Wright would reschedule a hearing, before she sent her letter to him asserting a default. No evidence was presented that would explain or excuse Mr. Wright's failure to reschedule the hearing or to at least contact Grievant in the month after the Level III hearing was originally scheduled.

Although Mr. Wright did not state the duration of his illness, he was available for the Level IV hearing and it may be inferred that he did return to work not long after his initial illness and that his illness has not prevented him from rescheduling or holding the hearing on another date, or at least contacting the parties to solicit possible hearing dates. This unexcused failure to hold the Level III

hearing constitutes a default notwithstanding that the failure to hold the hearing on its original date was excused.

The Grievance Board in the past has recognized that a default claim will toll the time limits for holding a lower-level hearing, until the default issue has been resolved. However, in those cases, there must be a showing that the person responsible for the time limits knew about the default claim. See, Huston v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-469D (Feb. 29, 2000). No such showing was made here with respect to Grievant's initial, January 28, 2002, default claim, which, according to Grievant, she sent to the Level II Grievance Evaluator, not Mr. Wright. No evidence was presented that shows this request was transmitted to Mr. Wright. Further, Respondent's request for a Level IV default determination was sent the day after Grievant's February 25, 2002 letter was received, indicating a promptness in responding to the claim that implies that Level IV hearing would have been requested much earlier had Mr. Wright known about the default claim.

The following conclusions of law supplement the above discussion:

CONCLUSIONS OF LAW

1. A grievant may appeal a Level II decision to Level III within five days of receiving the decision. The Level III Grievance Evaluator "shall hold a hearing within seven days of receiving the appeal." W. Va. Code § 29-6A-4(c). "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 by this article . . ." W. Va. Code § 29-6A- 3(a)(2)

2. The Level III Grievance Evaluator failed to hold the required Level III hearing within the time limit required by statute, causing a default to occur.

3. 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. *See*, W. Va. Code § 29- 6A-3(a)(2). Board v. W. Va. Dep't of Health and Human Resources/Lakin Hosp., Docket No. 99-HHR-329D (Sep. 24, 1999).

4. Respondent did show that the Level III Grievance Evaluator was prevented from attending the originally scheduled Level III hearing as a direct result of sickness.

5. Although sickness excuses the original failure to meet the time limit for holding a Level III hearing, it does not toll the time limit indefinitely. It is the Grievance Evaluator's responsibility to timely

schedule a grievance hearing, and it is also his responsibility to re-schedule it in a timely manner if something prevents holding the hearing as scheduled. 6. Respondent did not show that the Level III Grievance Evaluator was prevented from timely rescheduling the Level III hearing as a result of his sickness or any other cause.

7. A default claim will toll the time limits for holding a lower-level hearing, until the default issue has been resolved. However, in those cases, there must be a showing that the person responsible for the time limits knew about the default claim. See, Huston v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-469D (Feb. 29, 2000). Mr. Wright did not know about Grievant's January 28, 2002, default assertion, so that assertion did not toll his responsibility to meet the required time limits.

Accordingly, Grievant's request of a determination of default is **GRANTED**. Respondent is hereby given **NOTICE OF DEFAULT.** Pursuant to W. Va. Code § 29-6A- 3(a)(2), **Respondent may, within five days of the receipt of this notice, 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.** If no hearing is timely requested, the relief requested will be granted based on the presumption that Grievant prevailed on the merits of the grievance.

Dated: April 1, 2002 _____

M. Paul Marteney

Administrative Law Judge