JIMMY LITTLE,

Grievant,

v. **DOCKET NO. 04-DEP-201D**

DEPARTMENT OF ENVIRONMENTAL PROTECTION/

DIVISION OF LAND RESTORATION,

Respondent.

ORDER DENYING DEFAULT

Grievant asserts a default occurred at level three in a grievance he filed on or about February 17, 2004, regarding performance appraisals. A level four hearing was held in the Grievance Board's Charleston office on October 15, 2004, to determine whether a default occurred. Grievant was represented by Fred Tucker of the UMWA, and Respondent was represented by Robert Williams, Assistant Attorney General. This matter became mature for decision on November 15, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

The following are the facts as stipulated by the parties:

FINDINGS OF FACT

1. Grievant filed his grievance on February 17, 2004.

2. A level one decision was issued February 26, 2004 and was received by Grievant on March 1, 2004.

3. Grievant appealed the level two decision on March 8, 2004, and a level two decision was issued on March 18, 2004. 4. The level two decision was revised March 24, 2004 and re-issued then; Grievant received it on March 26, 2004.

5. Grievant then mailed his signed grievance form and the level one and two decisions to Mr. Ken Ellison, Director of the Division of Land Restoration, on March 26, 2004, and Mr. Ellison received it on March 29.

6. In the meantime, Grievant had filed a claim of default at levels one and two on March 29, 2004 (the “first default”), which was received by Respondent on April 2, 2004. Respondent requested a hearing in that first default on April 7, a level four hearing was held May 10, and default was denied on May 24, 2004 (Docket No. 04-DEP-128D). Respondent received the decision May 27, 2004.

7. Grievant sent this default claim to the Grievance Board on May 24, 2004, and it was received in this office May 26, 2004. May 26, 2004, was one day before the decision in the first default was issued.

8. There has been no level three hearing.

DISCUSSION

The parties agreed there are two issues to be decided in determining whether a default occurred by Respondent's failure to hold a timely level three hearing: 1) Whether the grievance was properly appealed to level three; and 2) Whether level three proceedings were automatically stayed by Grievant's first default claim. When a grievant asserts that his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), 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. *See* W. Va. Code § 29-6A-3(a)(2). *Board, et al. v. Dep't of Health and Human Res.*, Docket No. 99-HHR-329D (Sep. 24, 1999).

There is no dispute that a timely level three hearing was not held. Respondent argues the grievance was never appealed to level three, and if it was, the time limit for responding to the appeal was tolled by the pendency of Grievant's first default claim. Grievant contends he properly appealed to level three and that the time limit for Respondent to hold a level three hearing continued to run.

"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). Before we can decide whether the level three time limit ever began to run, we must exam whether Grievant properly appealed from level two. The revised level two decision directed Grievant to file his appeal by sending it to Mr. Ellison. Grievant signed the grievance form in the space marked “Level III.” He included copies of the level one and two decisions, it was properly

addressed, and it was received by Mr. Ellison. Respondent argued the appeal was not labeled or noticed as an appeal, but this should have been self-evident. The undersigned finds the level two decision was properly appealed on March 26, 2004, and was received by Respondent on March 29, 2004, from which date the time limit for a level three response began to run.

However, Grievant's pending default claim did indeed toll the time in which Respondent was required to make a response at level three. Under the Grievance Board's Procedural rules, “Once a grievant files a written claim for relief by default with the Board at Level Four, all proceedings at the lower levels are automatically stayed until all defaultmatters have been ruled upon at Level Four, unless all parties agree in writing that lower level proceedings can go forward.” W. Va. C. St. R. § 156-1-5.1. The same day Respondent received Grievant's appeal to level three, he filed a claim that Respondent defaulted at levels one and two. Respondent received this first default claim four days later, with three days still remaining in the seven-day time limit for holding a level three hearing. *See* W. Va. Code § 29-6A-4(c). As Respondent correctly argues, a default claim will toll the time limits for holding a lower-level hearing, until the default has been resolved. *D'Angelo v Dep't of Health & Human Res.*, Docket No. 02-HHR-54D (April 1, 2002). At the moment Grievant filed his first default claim, the clock stopped for his level three appeal, until that default was resolved. By the time Respondent received the final decision on the first default, Grievant had already filed this default claim, again stopping the clock.

There has been no default in this matter because Grievant filed a claim of default at a lower level, tolling the time limit for a response at level three. The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. When a grievant asserts that his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), 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. *See* W. Va. Code § 29-6A-3(a)(2). *Board, et al. v. Dep't of Health and Human Res.*, Docket No. 99-HHR-329D (Sep. 24, 1999). 2. "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).

3. A default claim will toll the time limits for holding a lower-level hearing, until the default has been resolved. *D'Angelo v. Dep't of Health & Human Res.*, Docket No. 02- HHR-54D (April 1, 2002).

4. Grievant failed to prove Respondent defaulted at level three.

For the foregoing reasons, this request for a determination of default is hereby **DENIED**.

This matter is hereby **REMANDED** to level three of the grievance procedure. Respondent is **ORDERED** to hold a level three hearing within seven days of receipt of this order, or within such time as is mutually agreed by the parties, in writing. This matter is hereby **DISMISSED** from the docket of the Grievance Board.

Date: November 24, 2004 _____

M. Paul Marteney

Administrative Law Judge