FRED MILLER,

Grievant,

v. **Docket No. 98-DOH-037**

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Fred Miller, grieves the second decision of two Level III grievance decisions issued by the West Virginia Department of Transportation ("DOT") / Division of Highways("DOH") on the same grievance. This grievance was originally filed on March 30, 1995, and it was held in abeyance pending the outcome of another grievance. On August 15, 1996, at Level II, this grievance was denied as untimely. A Level III hearing was held on September 3, 1997, and the grievance was granted at Level III on November 18, 1997. However, Respondent issued a second, Level III decision on February 2, 1998, denying the grievance as untimely. Grievant appealed this second decision to Level IV, and a Level IV hearing was held on May 20, 1998. (See footnote 1) **This case became mature for decision on June 17, 1998, the deadline for Grievant's proposed findings of fact and conclusions of law .** (See footnote 2) **After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.**

Findings of Fact

1. In 1993, Michael Shremshock, a Bridge Inspector, filed a grievance over working out of classification.

2. On August 31, 1994, Mr. Shremshock won this grievance at Level IV. Shremshock v. Dept. of Transp./Div. of Highways, Docket No. 94-DOH-095 (Aug. 31, 1994). This decision was appealed to the circuit court by the Division of Personnel. (See footnote 3)

3. Mr. Shremshock told Grievant, a Bridge Inspector who had also worked out of classification during that same time frame, about this decision sometime in March 1995, and shortly thereafter Grievant filed this grievance stating he had worked out of classification. **(See footnote 4)**

4. Mr. Shremshock had also informed other Bridge Inspectors who had also worked out of classification during that same time frame, about this decision sometime in March 1995, and they filed a grievance on March 22, 1995. That grievance was styled Pryor, et al. v. West Virginia Department of Transportation/Division of Highways, Docket No.97-DOH-341 (Oct. 29, 1997). That grievance was denied at Levels I-III as untimely filed. The Level III hearing was held on April 24, 1997, and a Level III decision denying thegrievance as untimely was issued on July 15, 1997. **(See footnote 5)** **The Pryor case was denied by this Grievance Board as untimely filed on October 29, 1997.**

5. Grievant's case was heard at Level III on September 3, 1997. The issue of timeliness was addressed by Respondent, and the three Level III Evaluators noted that Grievant did not file within ten days of the last time he worked in "an upgraded capacity" which was March 24, 1994. This decision also noted Grievant had filed the grievance approximately one year after the last time he worked out of classification. The Evaluators then stated Grievant had filed within ten days of when he learned of Mr. Shremshock's successful decision, and they recommended the grievance be granted with back pay and overtime awarded.

6. No case law was cited in Grievant's Level III decision, but the Evaluators noted their granting of the grievance was in accordance with the recommendation of Grievant's immediate supervisor. This recommendation was signed by the Evaluators on November 7, 1997, and approved and issued by Assistant Commissioner Thomas Badgett on November 18, 1997.

7. Sometime in December 1997, Respondent became aware of the conflicting decisions it had issued, and the situation was discussed by Mr. John McBrayer, a Personnel Specialist at DOH, Mr. Jeff Black, Director of Human Resources at DOH, and Mr. Badgett. Because Respondent believed it was unfair to grant the Miller grievance anddeny the Pryor grievance, Respondent issued a subsequent decision dated February 2, 1998, denying this grievance as untimely.

8. Grievant appealed that decision on February 17, 1998.

Issues and Arguments

Respondent argues the grievance was untimely filed, and the first Level III decision was clearly wrong. Respondent also argues it would be unfair to grant this grievance when the same issue was correctly denied in Pryor as untimely.

Grievant argues it is unfair to take away the award he received at Level III, and he does not understand how the prior decision was reversed. Additionally, Grievant believes he should receive compensation like Mr. Shremshock because he worked out of classification.

The undersigned Administrative Law Judge, at the Level IV hearing, asked Respondent to address the legal theory that allowed the agency to change the decision, without any intervening action, once a decision had been rendered, as it appeared Respondent no longer had jurisdiction over the grievance.

Discussion

The first issue to decide in this case is whether Respondent could change a final Level III decision months after it had been issued. This issue is, of course, dispositive of the grievance. Respondent's arguments in response to this question centered on the fact that an agency must have some way of correcting a clearly wrong decision. Respondentdid not cite any case law to support its theory. Respondent argued "there is simply no basis in statute or rules for finding the Employer 'lost jurisdiction' by issuance of an erroneous Level III decision. . . ." However, no statute or rule was cited to support this argument.

If a grievant is not satisfied with the Level III decision, W. Va. Code § 29-6A-4(d) allows the grievant five days to appeal this decision to Level IV. There is no provision that allows the employer to appeal a Level III decision to Level IV. This five day time frame allows the grievant a time to assess whether he wishes to pursue his grievance further. If he does not appeal, the Level III decision becomes final at the end of the five day period. See Spurlock v. Lincoln County Bd. of Educ., Docket No. 97-22-019 (May 29, 1997).

The issue of reopening cases is discussed in some detail in Administrative Law in West

Virginia by Alfred S. Neely, IV (1982). Mr. Neely indicates the "reopening a case is an extraordinary form of relief, and the cases in which it will be allowed will be rare." Id. at 410. The West Virginia Supreme Court of Appeals has also addressed a similar issue in a case in which the West Virginia Human Rights Commission reopened a case sua sponte. (See footnote 6) Appalachian Regional Health Care v. W. Va. Human Rights Comm'n and Hooper, 180 W. Va. 303, 376 S.E.2d 317 (1988). In Hooper, the Court cited Neely and quoted the following section :

> It is generally established in West Virginia that before an entirely final administrative adjudication may be reopened, there must be a statute permitting the practice and defining the circumstances under which it will be available. It is unlikely that an agency on its own initiative could provide for reopening by adoption of a procedural rule, since more is at stake than the interest of the agency. The interests of the judiciary are involved as well. Indeed, even with a statute authorizing reopening, there is no assurance that the statute will not suffer constitutional infirmities. . . . Perhaps the absence of cases in other areas, where there are no express statutory provisions providing for reopening, indicates widespread acceptance of the assumption that a case may not be reopened as a matter of administrative or judicial discretion. Certainly, that is the principle which traditionally governs the judiciary. . . . It would seem that the common assumption is that an administrative body acting in a judicial capacity is and should be subject to similar constraints.

Hooper at 307, citing Neely at 411-13. (Emphasis in the original).

The Hooper Court went further and explained, "We believe that to permit an agency to reopen a case at its discretion would disrupt the orderly disposition of cases and the parties' justified reliance that the case was closed." Id. This same rationale applies to this grievance. Although Respondent's position is understandable, and its desire to have each case reach the same conclusion is certainly appropriate, the point where that action is to be accomplished is before the agency issues its final decision.

The Level III Pryor decision was issued in July 1997. The Level III decision in this grievance was issued in November 1997. An agency is expected to know what decisions it has entered, and to inspect them for correctness and consistency. It is noted that the Pryor decision was written as a recommended decision and did not become final until the Commissioner or his Designee approved it. (See footnote 7) The Commissioner or his Designee had the right to alter the panel's decision if he felt it was incorrect, as W. Va. Code §§ 29-6A-1, et seq., do not prohibit the practice of a panel hearing a grievance and making a recommended decision to a Commissioner for his final decision. Gains v. Dept. of Transp./Div. of Highways, Docket No.

97-DOH- 203 (Dec. 12, 1997). See Smith v. W. Va.Dept. of Tax and Revenue, Docket No. 97-ABCA-066 (Aug. 25, 1997). However, once the decision is signed and issued it becomes final. The agency no longer has jurisdiction over the case, and cannot reopen the case without an express statutory provision. Hooper, supra. The Grievance Procedure does not contain such an express provision.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Once an agency has issued a decision on a particular grievance, it cannot on its own motion, reopen the grievance for a subsequent decision that changes the outcome. Appalachian Regional Health Care v. W. Va. Human Rights Comm'n and Hooper, 180 W. Va. 303, 376 S.E.2d 317 (1988).

2. Because DOT did not have the authority or jurisdiction to reopen the grievance and change the decision, the prior Level III decision granting the grievance must stand.

Accordingly, this grievance is GRANTED, and Respondent is directed to pay Grievant the award stated in the Level III decision.

Any party or the West Virginia Division of Personnel 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 filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(b)(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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 6, 1998

Footnote: 1

Respondent was represented by Attorney Jeff Miller, and Grievant was represented by a co-worker, Mr. Thomas Hively.

Footnote: 2

DOH filed its proposed findings of fact and conclusions of law on June 3, 1998.

Footnote: 3

According to the parties, this decision was affirmed by the circuit court.

Footnote: 4

In his original grievance, Grievant had asked for reclassification. This requested relief was later dropped.

Footnote: 5

It is noted that at the time these grievances were decided at Level III, a three panel board made a recommended decision, and this recommendation was sent to the Commissioner. He then chose whether to uphold the decision or not.

Footnote: 6

On its own motion.

Footnote: 7

It is unclear from the record who signed the Level III Pryor decision.