ROY S. DIXON,

Grievant,

v. Docket No. 99-DOH-476D

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Roy Dixon (Grievant) is employed by the West Virginia Division of Highways (DOH), as an Equipment Operator II, at DOH's Monroe County facility. He filed this action on August 15, 1997, alleging that he should have been selected for the position of Transportation Crew Chief. This grievance was denied, on August 20, 1997, by Immediate Supervisor Danny L. Evans. The record contains no information concerning any proceedings at Level II.

A Level III hearing was held in this grievance on September 29, 1998. Grievant was represented at this hearing by Steve Rutledge, and DOH was represented by Nedra Koval, Esq. At the conclusion of this hearing, Grievant waived his statutory right to a decision within five working days. W. Va. Code § 29-6A-4(c). DOH never issued a Level III decision. On November 10, 1999, Grievant moved that a default judgment be declared in this grievance, as some thirteen and one-half months had elapsed since the Level III hearing.

A Level IV default hearing was scheduled for February 7, 2000, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. By letterdated February 2, 2000, and received by the undersigned on February 4, 2000, Respondent moved that this hearing be continued. That motion, which was opposed by Grievant, was denied telephonically on February 4, 2000, and by an Order dated February 10, 2000. The undersigned administrative law judge issued an Order Granting Motion for Default on

February 10, 2000. DOH timely requested a hearing to demonstrate that the remedy, selection as Transportation Crew Chief, sought by Grievant was contrary to law or clearly wrong.

That hearing took place on March 16, 2000. Grievant was again represented by Steve Rutledge, and DOH was represented by Andrew Tarr, Esq. The parties were given until May 16, 2000, to submit proposed findings of fact and conclusions of law, both parties did so, and this grievance became mature for decision on that date.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. On June 4, 1997, DOH posted a Transportation Crew Chief position in Monroe County.

2. Grievant, another employee, and successful applicant Ronald Neel (Neel) applied for the position.

3. A Level III hearing was held, regarding the merits of this grievance, on September 29, 1998. Grievant was represented at this hearing by Steve Rutledge, and DOH was represented by Nedra Koval, Esq. At the conclusion of this hearing, Grievant waived his statutory right to a decision within five working days. W. Va. Code § 29-6A-4(c). 4. Grievant intended his waiver to be for a reasonable period of time.

5. On November 10, 1999, Grievant moved that a default judgment be declared in this grievance, as some thirteen and one-half months had elapsed since the Level III hearing.

6. DOH never issued a Level III decision.

7. By letter dated November 24, 1999, Grievant revoked his waiver of the Level III time lines.

8. On December 8, 1999, DOH, through counsel Krista L. Duncan, issued a Concession of Default in the grievance, in which it "concede[d] that a default occurred in this matter, per the agreement of counsel."

9. A Level IV default hearing was scheduled for Monday, February 7, 2000, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. 10. By letter dated February 2, 2000, and received by the undersigned on Friday, February 4, 2000, DOH moved that this hearing be continued. That motion, which was opposed by Grievant, was

denied telephonically on February 4, 2000, and by an Order dated February 10, 2000.

11. DOH's motion for a continuance was denied for its failure to show good cause. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.7 (1996). Specifically, it was determined that DOH had ample and repeated notice of the hearing; that it had agreed to the hearing date; that it had other attorneys available to handle grievance matters; that the grievance had then been pending at Level III for some 15 months; that its motion was not timely; and that Procedural Rule of the W.Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.6.2 (1996) provides that if a situation necessitating a motion arises immediately before a hearing, the movant is to be prepared to proceed with the hearing if the motion is denied and the granting of the motion would have operated to delay the hearing.

12. At the February 7, 2000, Level IV default hearing, Grievant, his representative, and his witnesses appeared. DOH did not appear. Grievant argued that he was prepared to go forward with the default hearing; that he should prevail due to DOH's purposeful absence from the hearing, and because of its Concession of Default; and that DOH's long delay in issuing a Level III decision had prejudiced his case, as one of his witnesses had since been killed on the job.

13. The undersigned Administrative Law Judge issued an Order Granting Motion for Default on February 10, 2000. DOH timely requested a hearing to demonstrate that the remedy, selection as Transportation Crew Chief, sought by Grievant was contrary to law or clearly wrong.

14. That hearing, which also addressed the merits of this grievance, took place on March 16, 2000. Grievant was again represented by Steve Rutledge, and DOH was represented by Andrew Tarr, Esq.

15. Grievant had the greatest seniority of any applicant for the Transportation Crew Chief position. The successful applicant, Neel, had the least.

16. Neel was shown pre-selection favoritism by DOH.

17. Grievant is qualified to be Transportation Crew Chief.

DISCUSSION

Effective July 1, 1998, the West Virginia Legislature amended the grievance procedure for

state employees to add a default provision. The purpose of this default provision is to encourage employers to timely rule upon pending grievances, and it provides a potentially severe penalty for the failure to do so. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999). The default provision is contained in W. Va. Code § 29-6A-3(a)(2), which provides, in pertinent part:

> **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. Within five days of the receipt of a written notice of the default, the employer may 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. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.**

(emphasis added).

However, a defaulting employer may overcome the statutory presumption that Grievant prevailed on the merits of his grievance. This Grievance Board has ruled that the employer must establish any defenses to this statutory presumption by clear and convincing evidence, a similar standard to that which applies to judicial review of factual determinations made by administrative law judges at Level IV. Lohr, supra; See W. Va. Code § 29-6A-7(b)(4).

Clear and convincing evidence is "[t]hat measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to allegations soughtto be established; it is intermediate, being more than mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases." Fred C. Walker Agency, Inc. v. Lucas, 215 Va. 535, 211 S.E.2d 88, 92 (1975). Selection as Transportation Crew Chief is a remedy which logically "flows from" his grievance. See Gruen v. W. Va. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994).

DOH raises several arguments in its attempt to show that instating Grievant into the Transportation Crew Chief position would be contrary to law or clearly wrong. It argues that the default provision of W. Va. Code § 29-6A-3(a)(2) does not apply to this grievance; that DOH's previous "counsel erroneously conceded that the default provision of W. Va. Code §

29-6A-3(a)(2) was applicable to this grievance[;]" and that instating Grievant would be contrary to law or clearly wrong because DOH's selection decision was not arbitrary and capricious. Each of DOH's arguments will be addressed in turn.

DOH's argument that instating Grievant would be clearly wrong or contrary to law because the default provision of W. Va. Code § 29-6A-3(a)(2) does not apply to this grievance has some merit. In essence, DOH argues that it has a right to be free of Grievant's default claim because, if this provision does not apply, he has no such claim. This Grievance Board has held that this provision is applicable only to grievances filed on or after July 1, 1998, its effective date, because it affects substantive rights. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998). However, this does not end the analysis of DOH's argument, because Grievant articulated, at the first default hearing in this grievance, at least one colorable claim of first impression for this statute's applicability to his grievance, and more importantly because DOH arguablywaived its rights under this statute, as discussed below.

DOH's second argument, that its previous "counsel erroneously conceded that the default provision of W. Va. Code § 29-6A-3(a)(2) was applicable to this grievance[,]" (See footnote 1) is somewhat disingenuous, because the plain language of DOH's Concession of Default states no such thing. As noted above, on December 8, 1999, DOH, through then-counsel Krista L. Duncan, issued a Concession of Default in this grievance, in which it "concede[d] that a default occurred in this matter, per the agreement of counsel." In the absence of any reference to W. Va. Code § 29-6A-3(a)(2), or any other statute, in this Concession, the undersigned must consider the possibility that DOH was conceding a default at common law. Black's Law Dictionary, 5th Ed., defines "default" as "a failure. . . . [a]n omission of that which ought to be done. . . . the omission or failure to perform a legal or contractual duty[,] to observe a promise or discharge an obligation[,] or to perform an agreement. The term also embraces the idea. . . . of wrongful act. . . . or an act of omission discreditable to one's profession[.]" (citations omitted). These definitions aptly describe an agency's failure to do, in fourteen and one-half months, what the law gives it five days to do. The undersigned must also consider the possibility that DOH was conceding a default under Rule 55(a) of the West Virginia Rules of Civil Procedure, which provides "[w]hen a party against whom a judgment

for affirmative relief is sought has failed to plead or otherwisedefend. . . . the clerk shall enter the party's default." This language also seems appropriate to this situation.

In now arguing that its Concession of Default was somehow erroneous, DOH is, of course, changing its position on whether or not a default occurred. DOH relies on a single syllabus point of McNunis v. Zukosky, 141 W. Va. 145, 89 S.E.2d 354 (1955): "[i]n the absence of fraud or a wilful misleading of the court, parties litigant are permitted to assume successive inconsistent positions in the course of an action or suit or a series of actions or suits as to questions of law." However, McNunis acknowledges that this holding is a narrow exception to the prevailing rule, that "[p]arties will not be permitted to assume successive inconsistent positions in the course of a suit or series of suits in reference to that same fact or state of facts." MacDonald v. Long, 100 W. Va. 551, 131 S.E.2d 252 (1926), See Dillon v. Mingo County Bd. of Educ., 171 W. Va. 631, 301 S.E.2d 588 (1988), Carter v. City of Bluefield, 132 W. Va. 881, 54 S.E.2d 747 (1949), Ealy v. Shetler Ice Cream Co., 110 W. Va. 502, 158 S.E. 781 (1929), Bush v. Ralphsnyder, 100 W. Va. 464, 130 S.E. 807 (1925). The prevailing rule, described as "salutory" and "favored by the courts" in McNunis, is basically a variation of estoppel. Black's Law Dictionary, 5th Ed., defines estoppel as "mean[ing] that party is prevented by his own acts from claiming a right to detriment of other party who was entitled to rely on such conduct and has acted accordingly. . . . [a]n inconsistent position, attitude or course of conduct may not be adopted to the loss or injury of another." (citations omitted). The doctrine is "wise and salutary. . . . a means of repose. It promotes fair dealing. Without it, society could not well go on." Daniels v. Tearney, 102 U.S. 415, 26 L.Ed. 187 (1880). Of course, Grievant reliedon DOH's Concession of Default in his arguments at the first default hearing and, there being no issue of the Concession's validity at the time of the first default hearing or decision, the undersigned relied on DOH's Concession of Default in his Order Granting Motion for Default. Allowing DOH to repudiate that Concession at this stage of these proceedings would certainly be to the "loss or injury" of Grievant. Allowing DOH to repudiate its Concession now would also be contrary to "[t]he general rule that a client is bound by the acts of [its] attorney." Roller v. McGraw, 63 W. Va. 462, 60 S.E. 410 (1908). However, assuming for the sake of argument that DOH can now revoke its Concession of Default, and also assuming for the sake of argument that DOH's then- counsel impliedly referenced W. Va. Code § 29-6A-3(a)(2) in her

Concession of Default, the undersigned would still decline to disregard DOH's waiver of any statutory right it might have had to be free of Grievant's default claim, for the following reasons.

First, there is nothing unusual about a party waiving a statutory right. A person may waive even a constitutional right protecting his continued liberty, providing that such a waiver is knowing, intelligent, and voluntary. See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). It follows that a right conferred by statute may also be waived. "A right or privilege given by statute may be waived or surrendered, in whole or in part, by the party to whom or for whose benefit it is given." Smith v. Bell, 129 W. Va. 749, 41 S.E.2d 695 (1947). The decisions of the West Virginia Supreme Court of Appeals are replete with examples of the waiver of both criminal and civil statutory rights: Barth v. Keffer, 195 W. Va. 51, 464 S.E.2d 570 (1995), Arndt v. Burdette, 189 W. Va. 722, 434 S.E.2d 394 (1993)(waiver of statutory right to subrogation under W. Va. Code § 33-6-31(f)(1988)); State v. Stone, 193 W. Va. 388, 456 S.E.2d 469 (1995)(waiver of a juvenile's statutory prompt presentment right under W. Va. Code § 49-5-8(d)(1982)); Grottendick v. Webber, 132 W. Va. 539, 522 S.E.2d 700 (1949)(waiver of statutory right to trial by jury in will impeachment under W. Va. Code § 41-5-11(1931)); Smith, supra, (waiver of statutory right of notice to drawers and indorsers of dishonor of a negotiable instrument under W. Va. Code § 41-7-1(1931)). Although some statutes forbid waiver of the protections they afford, See U.S. Life Credit Corp. v. Wilson, 171 W. Va. 538, 301 S.E.2d 169 (1982)(waiver of statutory right to be free of unreasonable publication of indebtedness forbidden under W. Va. Code § 46A-2-126), W. Va. Code § 29-6A-3(a)(2) is not such a statute.

Second, DOH's waiver is particularly likely to have been knowing, intelligent, and voluntary, as it was made, in writing, by a licensed attorney. Attorney Duncan has appeared before the undersigned many times, and never given any indication that she was not utterly competent.

Third, there was no reason, at the time the Concession of Default was submitted by DOH (before any question of its validity arose), to question it. DOH had several good reasons why it might have conceded a default, including its egregious delay in issuing its Level III decision (some fourteen and one-half months at the time of the Concession), the prejudice to Grievant's case caused by the death of his witness during that delay, DOH's desire to uphold

the grievance process in the interest of good employee relations and, most importantly, fundamental fairness.

Fourth, it is noted that, even absent its Concession of Default, DOH's epic delay in issuing a Level III decision has never been shown by DOH to be the result of sickness,injury, excusable neglect, unavoidable cause or fraud, although DOH had the opportunity to make such a showing by attending the Level IV default hearing in this grievance.

Finally, this Grievance Board has recognized the principle that "finality is desirable in the law," and applied it to grievance procedures. Dingess v. Lincoln County Bd. of Educ., Docket No. 99-22-218 (July 28, 1999), Oxley v. Summers County Bd. of Educ., Docket No. 98-45-104 (Nov. 19, 1998), Dingess v. Lincoln County Bd. of Educ., Docket No. 98-22-053 (May 29, 1998), Oxley v. Summers County Bd. of Educ., Docket No. 95-45-123 (Feb. 13, 1997). The Supreme Court of Appeals of West Virginia has explained the doctrine of stare decisis as follows: "[a] simple statement of this rule will be found in Black's Law Dictionary, 3d Ed., wherein it is stated that it means: 'To stand by decided cases; to uphold precedents; to maintain former adjudications. . . [t]he doctrine of stare decisis rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.'" In re Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 536, 45 S.E.2d 113 (1947). See Toth v. W. Va. Div. of Corrections, Docket No. 98-CORR-344D2 (Feb. 2, 1999). DOH has not appealed the Order Granting Motion for Default in this grievance, it has not been overturned, and the undersigned declines to reverse it now. Accordingly, DOH will not be permitted to revoke its Concession of Default.

DOH's final argument, that instating Grievant would be contrary to law or clearly wrong because DOH's selection decision was not arbitrary and capricious, is not sustainedby clear and convincing evidence, and will be addressed only briefly.

In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162,

286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra at 286, Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96- 20-362 (Jan. 30, 1997). Furthermore, in matters of non-selection, the grievance process is not that of a "super-interview," but rather serves as a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

Grievant established that he had the greatest seniority of any applicant for the Transportation Crew Chief position, and that the successful applicant, Neel, had the least.

> **When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit. W. Va. Code § 29-6-10(4).**

Of course, seniority is merely a factor to be considered, and is not determinative. An employer certainly retains the discretion to select a less-senior applicant with greaterqualifications. Lewis v. W. Va. Dep't of Administration, Docket No. 96-DOA-027 (June 7, 1996). However, Grievant produced substantial, credible, and unrefuted evidence to show that whatever slight advantage Neel might have had over Grievant in qualifications was likely the result of pre-selection favoritism by their supervisor, Danny Evans (Evans).

Evans testified that Neel was more qualified than Grievant because he had shown more initiative, could operate paving equipment, and had filled in as Transportation Crew Chief in the past. However, he also testified that he did not give Grievant a chance to fill in as Transportation Crew Chief, so that his performance in that position could be evaluated, although he should have done so. Evans further testified that Grievant was never given an opportunity to operate paving equipment; that he was an excellent equipment operator; and that he handled himself well in his interview.

Grievant also proved, by unrefuted evidence, that Evans gave Neel pre-selection favoritism, in violation of DOH policy, by upgrading him to the Transportation Crew Chief

position, See Woodruff v. W. Va. Div. of Highways, Docket No. 99-DOH-477 (May 24, 2000), and by paying him for hours that he did not work.

DOH's Temporary Upgrade Policy provides that "[a]ssignments to a higher classification may not exceed ninety days in a twelve month period." Grievant established that Evans upgraded Neel for some 120 days, and that on days when Neel was not officially upgraded, he nevertheless did the Transportation Crew Chief's duties, and received an extra hour's pay, although he left at his usual time.

Most importantly, Evans testified that Grievant is qualified to be Transportation Crew Chief. In fact, DOH presented no evidence to show that Grievant is not qualified to beTransportation Crew Chief. Given this fact, Grievant's greater seniority, and the pre-selection favoritism shown the successful applicant, the undersigned cannot conclude that DOH has proven, by clear and convincing evidence, that the remedy sought by Grievant is contrary to law or clearly wrong.

Accordingly, DOH has failed to rebut the presumption that Grievant prevailed on the merits of his grievance, and he will be instated into the Transportation Crew Chief position, effective the date Neel was awarded the promotion; and awarded all back pay and benefits, including interest, to which he would have been entitled as a Transportation Crew Chief.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. W. Va. Code § 29-6A-3(a)(2) creates a presumption that the grievant prevailed on the merits of the grievance when the employer does not timely respond to the grievance, resulting in a default.

2. A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a Level IV hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). 3. To rebut the

presumption created in W. Va. Code § 29-6A-3(a)(2), the employer must present clear and convincing evidence that the basic facts underlying the asserted presumption are not true. Lohr v. Div. of Corrections, Docket No. 95-CORR-157D (Nov. 15, 1999).

4. Clear and convincing evidence is "[t]hat measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to allegations sought to be established; it is intermediate, being more than mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases." Fred C. Walker Agency, Inc. v. Lucas, 215 Va. 535, 211 S.E.2d 88, 92 (1975).

5. DOH failed to establish, by clear and convincing evidence, that awarding Grievant the remedy sought, instatement into the position of Transportation Crew Chief, was either contrary to law or clearly wrong.

Accordingly, Respondent DOH's request for a determination under W. Va. Code § 29-6A-3(a)(2), that the remedy sought, instatement into the position of Transportation Crew Chief, is contrary to law or clearly wrong, is DENIED. Because it has been presumed, in accordance with W. Va. Code § 29-6A-3(a)(2), that Grievant prevailed on the merits of his grievance, this grievance is GRANTED, and Respondent DOH is ORDERED to instate Grievant as Transportation Crew Chief, effective the date Neel was awarded the promotion; and award him all back pay and benefits, including interest, to which would have been entitled as Transportation Crew Chief.

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 grievanceoccurred. Any such appeal must be filed within 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. 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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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated June 21, 2000

Footnote: 1

DOH appeared to argue, at the second default hearing, that its then- counsel's Concession of Default was the product of some sort of sharp practice by Grievant's representative. However, this contention was not supported by any evidence and was not addressed in DOH's proposed findings of fact and conclusions of law, and is deemed abandoned. It is also noted that DOH has been represented by legal counsel throughout this grievance, and Grievant has not.