JOHN WOODS

v. Docket No. 93-BOD-157

FAIRMONT STATE COLLEGE

DECISION

Grievant, John Woods, employed by Fairmont State College (FSC) as a Building Service Worker I, filed a level four grievance on June 9, 1993, in which he complained that he had been improperly discharged on September 4, 1992. The matter had previously been denied at level one by Ken Dillon, Director of the Physical Plant, on October 16, 1992, based upon a finding that the grievance had not been timely filed. In November 1992 Grievant's representative, Stephen L. Cook, and FSC agreed to place the grievance "on hold" pending the outcome of related criminal charges in Magistrate Court. By letter dated May 4, 1993, Mr. Cook advised Lois M. Laughlin, Assistant to the President, that the charges were dismissed by Magistrate Junior Slaughter on May 3, 1993, and requested that Grievant be reinstated to his position. FSC declined to reinstate Grievant and the grievance process was resumed. (See footnote 1)

Following an evidentiary hearing held on May 28, 1993, President Robert J. Dillman denied the grievance at level two. Upon appeal to level four a hearing was conducted on November 4, 1993; bothparties waived their right to file proposed findings of fact and conclusions of law.

The basis for the termination of Grievant's employment was set forth by Toni Christian, Director of Personnel, in a pre-termination notice dated August 27, 1992. In this notice Ms. Christian stated in pertinent part:

The College has determined that you: 1)inappropriately used Fairmont State College property, 2)sold Fairmont State College property to other individuals for personal gain, 3)verbally acknowledged removal of the property and 4)removed the College property from the campus without authorization.

At level four Respondent argues that Grievant was terminated for cause and that the grievance was not timely filed. In support of these assertions the following evidence was submitted.

Colin Cameron, FSC Athletic Director, testified at level two that he became aware that six new, football game jerseys were missing after an FSC athlete saw an individual wearing one in downtown

Fairmont. The athlete inquired of the individual as to how he might also get one and was allegedly told that he could buy one on Chicago Street that night. The athlete reported this matter to the head football coach who in turn notified Mr. Cameron.

Mr. Dillon, Grievant's immediate supervisor at the time in question, testified that Grievant had been assigned to the Feaster (athletic) Center. As a Building Service Worker Grievant had keys, and therefore free access at any time to the equipment room where the jerseys are stored. Pursuant tothe ensuing police investigation, Mr. Dillon stated that he reviewed the investigation report and spoke with Detectives Steve Cain and Joe Merendeno, who also advised him that Grievant had verbally admitted taking the jerseys. Based upon this information he recommended that Grievant's employment be terminated, consistent with the Classified Employees Handbook which provides that theft is cause for immediate dismissal and that progressive discipline need not be followed.

Mr. Dillon stated that he conducted an informal conference with Grievant on September 15, 1992, at which time Grievant denied taking the jerseys and said that other individuals who had implicated him in the crime were lying. The supervisor recalled that the meeting had not persuaded him to change his recommendation and that he was careful to advise Mr. Woods of his grievance rights at that time. When a letter from Mr. Cook, dated October 2, 1992, requesting a level one conference, was received on October 12, 1992, Mr. Dillon stated that he considered the matter untimely filed.

Ms. Christian stated that she also spoke with Detectives Merendeno and Cain who advised her that two witnesses had received the stolen FSC property from Grievant. When Mr. Dillon recommended that Grievant's employment be terminated she reviewed the facts and then met with Grievant on August 27, 1992. After Grievant denied taking the jerseys and expressed his viewpoint as to what had occurred, Ms. Christian concluded that dismissal was the appropriate measure of discipline for theft and hand delivered the pre-terminationnotice of the same date.

In addition to the previously cited reasons for the dismissal, the pretermination notice advised Grievant that he had another opportunity to rebut the charges in writing or in person before September 4, and that if he chose not to respond he could pursue his rights through the grievance procedure set forth in W.Va. Code §§18-29-1, et seq. or in Policy Bulletin No. 52. On or about September 3 Grievant telephoned Ms. Christian from Fairmont General Hospital to request that she send him a copy of the grievance form. Ms. Christian notified Grievant by letter dated September 8, 1992, that his employment was terminated effective September 4 and that "as requested, enclosed is

a copy of the Grievance Procedure WV Code 18-29-1 and form." She learned that Grievant did not receive the letter when it was returned to her office on or about September 11.

Ms. Christian stated that the letter had been mailed to Grievant's address as listed in the FSC Directory, 708 Fifth Street, Fairmont, and that she was unaware that it had changed. She opined that it was Grievant's responsibility to update his address and his failure to do so exonerated her from any blame that he did not receive the September 8 letter. Another copy of the grievance procedure was sent to Grievant at 321 Persis Way, Fairmont, under cover letter dated October 5, 1992. This document was apparently received by Grievant.

Detective Joe Merendeno testified that he received acomplaint on August 24, 1992, from Mike Rogers, FSC Equipment Manager, that six game football jerseys had been stolen. Mr. Rogers did not indicate who might have taken the items; however, on the following day two members of the FSC football team appeared in the Police Department and reported seeing a black male wearing a team jersey downtown. Detective Merendeno put a look-out call on the radio for the individual who was apprehended within the hour. When asked where he had obtained the jersey, Fred Taylor told the Detective that he had "found it on the Windmill Park playground." Approximately an hour later Mr. Taylor returned to the Police Station to report that Maurice Proctor had the remaining jerseys. At this time Detectives Merendeno and Cain proceeded to Mr. Proctor's home. The signed statement taken at that time states in its entirety:

Q: Mr. Proctor there was (12) new football jerseys recently stolen from Fairmont State College. We have came to you because we have heard that you may have some of the shirts. Do you?

A: Yes. Two. One white #61 and one maroon #43.

Q: How did you come to have these shirts?

A: John Woods brought them to the Korner Pocket Sunday, 082392. It was around 6:00 p.m. He gave me the two shirts for money he owed me in the past. He owed me $30.00.

Q: Did John Woods have any other shirts?

A: No.

Q: Did he say where he got them?

A: No.

Q: Did you only get the (2) shirts from him?

A: Yes.

Q: Do you know of anyone else who has any of the shirts?

A: No.

Detective Merendeno subsequently obtained a criminal complaint charging Grievant with stealing six Fairmont State football jerseys valued at $30.00 each. Grievant was then arrested at which time the Detective recalled he denied taking anything, but did acknowledge that he had a drinking problem and had been drinking prior to the arrest. He later admitted to taking a "handful of jerseys" but made no formal statement to that effect. The criminal charge was later dismissed by the Magistrate due to a failure of the prosecution to state the value of the merchandise.

Detective Steve Cain testified that he had accompanied Detective Merendeno to Mr. Proctor's home and had taken his statement. He stated that Mr. Proctor did not appear intoxicated at the time of the interview and he did not indicate that any part of the statement transcribed by Detective Cain was untrue or inaccurate at that time. After the officers had arrested Grievant and transported him to the police department for processing, Detective Cain recalled overhearing Grievant confess to Detective Merendeno that he had taken the jerseys.

Testifying in his own behalf at both the level two and the level four hearings, Grievant denied taking the jerseys, denied verbally admitting to the detectives that he had taken the jerseys or had sold the jerseys to Mr. Proctor. (Level II Trans., p.47) Without shifting the blame to any other specific person, Grievant stated that many others, perhaps fifty individuals, had keys to the athletic center. He alsosuggested that the shirts could have been lost or stolen while at the dry cleaners. Finally, Grievant asserted that the termination was simply based on the desire of some unnamed people at FSC wanting "rid of" him. Apparently the basis of this allegation consists of prior employment-related problems which Grievant has pursued. Grievant stated that his first encounter with FSC occurred after he was laid off in February 1989, when he discovered that he had been underpaid by FSC. With the assistance of a union representative, he ultimately collected slightly more than two thousand ($2,000) dollars in backpay, which he opined, the college was not happy to give him. Grievant also claims to have suffered from ongoing racial harassment during his employment at FSC. Specific

examples of the harassment provided by Grievant were that co-workers would call him "John Boy Johnny," "John Boy," and "nigger." Due to this ongoing harassment Grievant also filed complaints with the West Virginia Human Rights Commission in 1989 and with the Equal Employment Opportunity Commission. (See footnote 2)

Of particular interest is the testimony of Mr. Proctor who unconditionally disclaimed his signed statement taken by the police on August 26, 1992. At the level four hearing Mr. Proctor stated that he had been out all night drinking and had just arrived home when the police arrived. He stated that he found the shirts in his car and figured that whoever left them there would say something, sometime. He claims that he didnot get them from Grievant and that he does not know how they got into his car. Under oath, Mr. Proctor testified that he advised the detectives that the statement which they drafted during their conversation was inaccurate, but that he signed it because he was in a hurry to get to work.

In disciplinary matters, including dismissals, the burden is upon the employer to prove the charges against the employee by a preponderance of the evidence. W.Va. Code §18-29-7; Kinney and Toler v. W.Va. Division of Corrections, Docket No. 93-CORR-195/213 (Dec. 30, 1993). In this particular matter, a determination as to whether FSC has met this burden must necessarily be dependent upon determinations regarding the credibility and reliability of witnesses. Having observed critical witnesses for both parties, the undersigned concludes that those witnesses for FSC were more credible than those who appeared in Grievant's behalf.

The vast disparity between Mr. Proctor's signed statement of August 26, 1992, and his testimony given on November 4, 1993, casts serious doubt on his credibility. Although Grievant's representative points out that Mr. Proctor was sworn to tell the truth at the administrative hearings and that he was not so sworn in August 1992, other, more compelling factors, are determinative of his reliability. The signed statement does not indicate that he was asked questions to be answered with only "yes" or "no" answers. He was asked where he had obtained the shirts and responded, from theGrievant. It is also noted that the criminal charges were disposed of prior to the administrative hearings, thus, Mr. Proctor may have felt less compelled to abide by the statement given to the law enforcement officers. Because Mr. Proctor had been approached by the detectives with no warning and with the possibility of criminal charges being made, it must be concluded that Mr. Proctor was more likely not lying on August 26, 1992, and that his testimony offered in 1993 lacked credibility.

Neither is Grievant's testimony considered credible. Although he consistently denied taking the jerseys, other indicators are persuasive. First, on direct examination, Grievant appeared to be extremely nervous when responding to the inquiry of whether or not he had taken the jerseys, specifically evading eye contact with either his representative or the administrative law judge. Second, Grievant admits that on August 31, 1992, his parents admitted him to the alcohol rehabilitation program at Fairmont General Hospital where he remained for two weeks, yet he now denies that he has, or had, an alcohol problem. He explained his hospital stay was "for relaxation and to be away from people."

Since both detectives indicated their awareness of Grievant's drinking problem, and because he did seek assistance in a rehabilitation program, it must be accepted that the problem exists despite Grievant's denial. While perhaps not directly related to the missing jerseys, this testimonysupports the finding that Grievant lacked credibility. Therefore, even though no one actually witnessed Grievant taking the jerseys, based upon the finding that Mr. Proctor's August 1992 statement was accurate and that his and Grievant's testimony at hearing lacked credibility, it must be determined that FSC has met its burden of proving that Grievant did take the jerseys.

In addition to the issue of whether FSC had cause for terminating Grievant's employment, both parties raise the issue of timeliness. FSC argues that an informal conference was held on September 15, 1992, and that a grievance was not filed until October 12, 1992, nearly a month later. Grievant asserts that he was given no written response by Mr. Dillon and that he did not receive the dismissal notice or a grievance form from FSC until November 12, 1992.

The record establishes that Grievant was in fact advised of his termination in the August 27, 1992 memorandum hand delivered to him by Ms. Christian. That document also advised him of his grievance rights. Grievant met with his immediate supervisor for an informal conference in a timely manner. W.Va. Code §18-29-4(a) does not require that a written response be issued following the informal conference. The record does not reflect when Grievant contacted his union representative; however, it does appear that he did not give Mr. Cook a full or complete accounting of what had occurred as evidenced by the representative's October 2 request for an informal conference. Grievant had clearly begun the grievanceprocess but did not file at level one within the required ten day period.

Although Grievant was not provided a copy of the procedure at this time, his scheduling of the

conference with Mr. Dillon indicates that he had some understanding of his responsibilities when filing a grievance. Because Mr. Dillon advised Grievant how to file a grievance he could, and should, have continued with the procedure. Further, Grievant was not simply waiting for the grievance form to be sent to him as evidenced by the fact that Mr. Cook's letter requesting an informal conference was dated October 2 and Ms. Christian did not send the grievance form to Grievant's current address until October 5, 1992.

Ms. Christian made a bona fide effort to send Grievant a grievance form under cover letter dated September 8, 1992. Her lack of an updated address may indicate that FSC needs to modify personnel record keeping but there is no indication that the document was intentionally sent to the wrong address. Furthermore, because Mr. Dillon was careful to advise Grievant how to file a grievance, either Grievant, a friend, or family member could have procured a grievance form for him.

Finally, Grievant correctly asserts that he was sent an outdated copy of the grievance procedure. However, since Grievant has not identified any of the changes made to the grievance procedure by the 1992 session of the Legislature which adversely affected him, the error by FSC is deemed harmless.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

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FINDINGS OF FACT

1. Grievant was first employed by Fairmont State College in 1988 as a part-time worker and in 1992 he was a full-time Building Service Worker I assigned to the athletic center.

2. In August 1992 FSC authorities learned that six new football game jerseys valued at approximately $30.00 each were missing from the equipment room of the athletic center.

3. On August 26, 1992, Maurice Proctor signed a statement taken by members of the local police department in which he identified Grievant as the source of two jerseys which were found in his possession.

4. Mr. Proctor recanted the written statement during testimony offered at the administrative

hearings.

5. Neither Grievant nor Mr. Proctor were credible witnesses.

6. Upon learning of his dismissal Grievant requested and received an informal meeting with his immediate supervisor, thereby initiating grievance proceedings. Following this informal conference Grievant failed to file a written grievance until October 2, beyond the ten day limit established by W.Va. Code §18-29-4.

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CONCLUSIONS OF LAW

1. Pursuant to W.Va. Code §18-29-7, the burden of proof in disciplinary or discharge actions, rest with the employer and the employer must meet that burden of proving the charges against an employee by a preponderance of the evidence.

2. When the standard of proof is a preponderance of the evidence it is not necessary for the employer to prove the facts to the exclusion of all reasonable doubt, but rather, the decision must be made in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth. See Simmons v. Insurance Co., 8 W.Va. 474, ___S.E.___ (1875).

3. Fairmont State College has established just cause for the termination of Grievant's employment.

4. Grievant failed to file a level one grievance within the timelines set forth in W.Va. Code §18-29-4.

Accordingly, the grievance is Denied.

DATED January 31, 1994 _____

SUE KELLER

SENIOR ADMINISTRATIVE

LAW JUDGE

Footnote: 1 The grievance was originally filed at level four on May 17, 1993, after both parties agreed to waive consideration at level two. The matter was remanded to level two by Order dated May 19, 1993, for consideration in compliance with W.Va. Code §18-29-4.

Footnote: 2Grievant stated at level two that he filed a lawsuit in federal court on October 11, 1992, relating to racial harassment. (Level II Trans. p.46)