LAWRENCE D. JENKINS

v. Docket No. 96-BOD-034

BOARD OF DIRECTORS/FAIRMONT STATE COLLEGE

DECISION

Grievant, Lawrence D. Jenkins, employed by the Board of Trustees as a Building Supervisor at Fairmont State College (FSC), filed a level one grievance on December 4, 1995, after he was suspended without pay for one day. By memorandum dated December 20, 1995, Grievant advised FSC Director of Human Resources Stephen Leach that he had not received a response at level one until December 14, when Mr. Leach had left a message for Grievant to call. At that time Grievant claimed that he should prevail by default. A level two hearing was conducted on December 20, 1995, and a response was issued on January 11, 1996, denying the grievance. Appeal was made to level four on January 26, 1996. An evidentiary hearing was held on April 20, 1996, to supplement the lower-level record. Both parties waived the opportunity to file proposed findings of fact and conclusions of law.

The facts of this matter are not in dispute. 1. Grievant is employed as a Building Supervisor at Fairmont State College.

2. On or about October 25, 1995, Grievant was conversing with a black female employee who he supervises when he drew her attention to a Halloween picture of someone dressed as a gorilla, sitting in another person's lap. Grievant pointed to the gorilla and said, “[i]s that your picture, Mary?”

3. The employee filed an Affirmative Action complaint and sought to have Grievant formally disciplined for the comment.

4. By memorandum dated November 27, 1995, Dr. Fred Schaupp, Vice-President of Administration and Finance, advised Grievant that he would recommend a one day suspension, without pay, and that Grievant enroll in a sensitivity program.

5. On December 5, 1995, Grievant filed a complaint at level one with his immediate supervisor, Eugene Gallucci.

6. Mr. Gallucci did not respond to the grievance; however, Stephen Leach, FSC Director of Human Resources, called Grievant regarding this matter on December 14, 1995. 7. No written decision was issued at level one.

8. FSC ignored a claim by Grievant that it had defaulted, and held a level two hearing on January 5, 1996.

9. Robert J. Dillman, President of FSC, accepted the recommendation of the level two hearing evaluator and upheld the one day suspension without pay.

In addition to the default claim, Grievant argues that the discipline is discriminatory in that other employees cited for similar offenses have not been suspended without pay, but were only required to attend training sessions. Grievant concedes that the comment hemade to the employee was a “stupid thing to say” but asserts that it was made in a lighthearted, teasing, spirit of Halloween, and that he did not intend any racial implications. He stated that he apologized to the employee for the comment and opined that counseling would be more appropriate for a first offense.

Dr. Schaupp testified at level four that he was aware of Grievant's apology and his effort to resolve the matter informally. He stated that he found Grievant to be genuinely remorseful and did not believe that any ill will was intended. However, because Grievant is a supervisor, and the comment was made to a subordinate, Dr. Schaupp determined that the perception of the employee could not be ignored. Because of the obvious racial overtones of Grievant's comment, Dr. Schaupp concluded the suspension and sensitivity training were reasonable.

Dr. Schaupp denied that this discipline was discriminatory in that other incidents involved co-workers rather than an employee and supervisor. He opined that as a supervisor, Grievant's comment carried more weight and caused more damage, even if he intended no malice, than if the comment had been made by a co-worker. Thus, he observed that FSC could not ignore the potential liability created by the situation, and that it was necessary to act in a forceful, but fair, manner.

W.Va. Code §18-29-3(a) provides:

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 or illness, the grievant shall prevail by default. Within five days of such 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.

The Grievance Board has previously held that it is not empowered to enforce a default which may have occurred at the lower levels. Smith v. Board of Directors/West Liberty State College, Docket No. 93-BOD-051 (Feb. 17, 1993). However, in the present case, it does not appear that a default in fact occurred. First, Grievant based his claim on an employee handbook which had not been updated to reflect a 1992 amendment to W.Va. Code §18-29-3(a), which extended the time for response from five to ten days. Second, Mr. Leach telephoned Grievant within ten days to discuss the grievance, and there is no statutory requirement that the level one response must be in writing. (See footnote 1)

In grievances involving disciplinary actions, the employer must establish the charges which constitute the basis of the action by a preponderance of the evidence. W.Va. Code §18-29-6; Nicholson v. Logan County Bd. Of Educ., Docket No. 95-23-129 (Oct. 18, 1995). In the present matter, FSC has proven, with no dispute by Grievant, the action which led to the suspension. Although it is also undisputed that Grievant is not a racist, and did not intend to offend the employee to whom it was directed, it is not improper for FSC to hold him accountable for an inherently racial comment, even an inadvertent one. Neither is a one day suspension excessive. FSC could have chosen to administer a lesser penalty, such as counseling or a reprimand; however, it is not the role of the undersigned to second guess institutional administrators or to substitute her judgement in matters which are not clearlywrong. Because this incident involved a supervisor and employee, rather than two co- workers, Grievant has failed to prove that imposition of a suspension, when other employees accused of similar offenses were merely required to attend sensitivity training, constitutes discrimination.

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

CONCLUSIONS OF LAW

1. In disciplinary matters, an employer must prove the charges which serve as the basis of the action by a preponderance of the evidence. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995).

2. FSC has proven by a preponderance of the evidence that Grievant made a racially

oriented comment to a black female worker under his supervision.

3. Because Grievant is a supervisor, the imposition of a more severe penalty than that imposed upon non-supervisory employees who have engaged in substantially similar activities does not constitute discrimination.

4. Grievant has failed to prove that the discipline imposed was clearly excessive or was otherwise improper.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marion County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. 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.

Date: June 7, 1996 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

W.Va. Code §18-29-4(a)(4) requires only that the immediate supervisor "shall state the decision to such filed grievance within ten days after the grievance is filed." Code §18- 29-6 provides that "[e]very decision pursuant to a hearing shall be in writing . . . ." Because no hearing is required at level one, the decision need not be written.