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**DICK HOWARD**

**v.**

**Docket No. BOR-88-094**

**MARSHALL UNIVERSITY**

**D E C I S I O N**

Grievant, Dick Howard, was employed by Marshall University as a Building Service Worker I until April 26, 1988 when he was dismissed. A pre-termination hearing was held April 25, 1988. A Level II hearing was held May 12, 1988 and the hearing evaluator, Deborah Dalton, concluded the dismissal was warranted. By letter dated May 16, 1988 Mr. Dale F. Nitzschke, President of Marshall University, upheld the Level II findings and conclusions. Level IV hearings were held July 19, 1988 and August 15, 1988.<sup>1</sup>

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<sup>1</sup>Transcripts of the pre-termination, Level II and Level IV hearings are hereinafter referred to as T1, T2 and T3 respectively.

Grievant's letter of dismissal dated April 14, 1988 from Mr. Charles Edwards indicated he was being dismissed from his position "primarily due to unsatisfactory work performance". The letter also made references to excessive absences, tardiness and one incident of insubordination (Respondent's Exhibit No. 1).

Grievant had received a warning letter on March 29, 1988 in which he was admonished for an excessive number of absences, tardiness in reporting to work and unauthorized departures from his work area. This letter cautioned Mr. Howard that "these habits must improve or other disciplinary action will follow". (Respondent's Exhibit No. 5). Evidence in support of the charges of incompetence and neglect of duty was presented at the pre-termination hearing, Level II hearing and upon appeal to Level IV basically the same documentation and testimony was offered. During the course of Level IV proceedings, grievant raised essentially two defenses to the charges and, because he is correct in one of his assertions, the question of whether or not the University's evidence is sufficient to warrant a dismissal need not be reached.<sup>2</sup>

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<sup>2</sup>Grievant raised the issue of discrimination and through the testimony of other employees at Marshall University, attempted to show that certain persons, whose work was similarly deficient, retained their positions while he was dismissed. The testimony however failed to support grievant's contention that the decision to dismiss him was racially motivated or otherwise discriminatory.

Mr. Howard does not contest the validity of the University's allegations concerning his work performance but takes issue with the procedures by which his dismissal was effected.<sup>3</sup> It is his position that pursuant to a provision of the Classified Employees Handbook, promulgated by the West Virginia Board of Regents, he should have been given a letter of warning which specifically noted that dismissal would be the result of a failure to make improvement in his work performance. This particular provision is found in Section 10.3.2 of the handbook:

An employee being considered for discharge must, when appropriate, be informed of the possible action by letter of warning. The letter, to be delivered in person or by certified mail, specifies: the nature of the nonstandard work; remedial steps the employee must take; a calendar date by which the employee's work will be brought back to standard; and a notification that failure to bring the work back to standard by the date specified will result in dismissal.

(Respondent's Exhibit No. 8)

The University contends this provision is not applicable in grievant's case as the handbook was only intended as a reference for classified employees and its policies are void to the extent they contradict those of the Marshall University Staff Employee's Handbook. The University further asserts that even if the Classified Employees Handbook were considered the relevant personnel policy, a provision for immediate dismissal in cases such as

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<sup>3</sup>Grievant conducted no cross-examination of witnesses who testified on behalf of the University and provided little if any rebuttal to the charge of incompetence.

grievant's is contained therein. Ms. Nichole Norian, Assistant Director of Personnel, testified Marshall University's own progressive disciplinary policy consisted of a four step process which begins with an oral warning and progresses to a written warning, suspension and ultimately dismissal. (T3. 43,44) She indicated a review of Mr. Howard's file showed compliance with this policy. (T3. 44,45)<sup>4</sup>

An examination and comparison of the two handbooks do not support either of the University's contentions regarding applicable policy. The only progressive disciplinary procedures contained in the Marshall University Staff Employee Handbook (Respondent's Exhibit No. 2) relate strictly to absenteeism problems. The only other disciplinary policy in that handbook is found on page twenty-one (21) and it merely provides a list of examples of what may constitute just cause for suspension, termination or demotion.<sup>5</sup> Moreover, the preface of the Classified Employees

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<sup>4</sup>When asked why the third step of suspension was not taken in grievant's case, Ms. Norian stated the fourth step could be suspension and/or dismissal. (T3.47)

<sup>5</sup>Grievant testified that even these scant provisions had never been made available to him and he had always relied on the Board of Regents policy. (T3. 9,10) Ms. Norian indicated employees were routinely required to sign cards upon receipt of the handbook but these cards had recently been destroyed. She also testified that the progressive disciplinary policy was incorporated in a new handbook which had not been published. (T3.48)

Handbook reveals it is more than a supplemental document. That preface specifically provides:

This handbook is intended for the purpose of covering general information on personnel administration and on the rights, privileges, security, benefits, opportunities and responsibilities of Board of Regents employees.

...

The Board of Regents is the governing body for all state-supported institutions of higher education in West Virginia. The authority to make regulations and establish local procedures in certain areas, however, is delegated to the institutions themselves. Each college or university should have handbooks containing those regulations or procedures. If so, those documents are a supplement to this handbook for each given institution.

It is not clear which document supplements the other but it is apparent from this language that an employee may rely on both. Considering the sparsity of provisions relating to procedures to be followed in dismissal cases in the Marshall University handbook, an employee would have to refer to the Classified Employees' Handbook for information on his rights in such cases. One can find the reasons for dismissal in the former but must look to the latter to determine what steps Marshall University must take to effect the dismissal. Mr. Howard's expectation that he would receive the letter required by Section 10.3.2 of the Classified Employees Handbook was therefore quite reasonable and Marshall University's failure to provide that letter was a violation of that policy. The West Virginia Supreme Court

of Appeals has consistently held that administrative bodies must abide by remedies and procedures they properly establish to conduct their affairs. Clarke v. West Virginia Board of Regents, 301 S.E.2d 618 (W.Va. 1983); State ex rel. Wilson v. Truby, 281 S.E.2d 231 (W.Va. 1981); Trimboli v. Board of Education, 254 S.E.2d 561 (W.Va. 1979); Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977). Section 10.3.2 of the Board of Regents policy does contain a proviso that an employee must be informed of the possibility of discharge "when appropriate" but it is difficult to imagine a more appropriate case than the grievant's. The actions of the grievant which led to the University's decision to dismiss were the type of things which were correctible and the improvement plan required by Section 10.3.2 would have been a particularly useful tool in his circumstances. The University did place grievant on notice as early as October 14, 1987<sup>6</sup> that there were concerns over his work habits and the testimony of his supervisor, Mr. Edwards, indicated he had been told what those concerns were but he was never given a concise plan of improvement or told dismissal was imminent. In any event, any ambiguity created by the proviso must be resolved in favor of the employee. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979); Wayne County Board of

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<sup>6</sup>This was the date of the first evaluation grievant had been given since 1977 in which he received a "does not meet expectations" in more than one of the listed areas of performance (Respondent's Exhibit No. 4, 5 & 9).

Education v. Tooley, 276 S.E.2d 826 (W.Va. 1981); Wren v. McDowell County Board of Education, 327 S.E.2d 464 (W.Va. 1985).

The University's remaining contention, that the Classified Employees Handbook authorized immediate dismissal in grievant's case and thus he was granted more procedural rights than necessary, is similarly not supported by the wording of that document. Section 10.2.7 of the handbook provides:

#### Dismissal

Immediate dismissal may be appropriate in cases of flagrant or willful violations of rules, regulations, standards of accepted behavior or performance, or for actions where an investigation proves the employee was in clear violation of policy.

This clause was obviously intended to cover some of the serious breaches of University policy enumerated in Section 10.2.2.1, such as destruction of property, wrongful injury to another employee or reporting to work under the influence of alcohol. This provision has been held to be applicable in cases of gross insubordination. See Sexton v. Marshall University, Docket No. BOR2-88-029-4. The primary reason given for grievant's dismissal was inefficiency and that charge clearly requires the application of Section 10.3.2 and its requirements that he be given the letter of warning, a written improvement plan and notice that a failure to fulfill the obligations in the plan by a specified time would result in dismissal.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

### FINDINGS OF FACT

1. Grievant, Dick Howard, was employed by Marshall University as a Building Service Worker I until April 26, 1988, when he was dismissed from his position.

2. Grievant's dismissal letter indicated he was being discharged due to unsatisfactory work performance, attitude and lack of improvement in both cases.

3. Grievant had received a written warning dated March 29, 1988 about his job performance urging him to improve or other disciplinary action would be taken but the nature of that action was not specified.

### CONCLUSIONS OF LAW

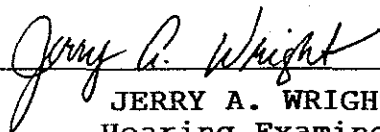
1. The Classified Employees Handbook promulgated by the West Virginia Board of Regents provides the procedures by which classified employees may be suspended, dismissed or demoted and Section 10.3.2 of said handbook specifically provides that an employee who is being considered for dismissal must receive a letter of warning, which includes an improvement plan, deadline for compliance with the plan and notice that dismissal will be the result of a failure to comply.

2. An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs and school laws must be strictly construed in favor of the employee. Powell v. Brown, supra; Morgan v. Pizzino, supra; Sexton v. Marshall University, supra.

3. The failure of Marshall University to provide the grievant with a letter of warning and improvement plan prior to his dismissal was a direct violation of Section 10.3.2 of the Classified Employees Handbook.

Accordingly, the grievance is **GRANTED** and Marshall University is hereby **ORDERED** to reinstate the grievant, Dick Howard, to his former position and reimburse him for any loss of wages he may have incurred as the result of his improper dismissal less any appropriate set off.

Either party may appeal this decision to the Circuit Court of Cabell County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of said decision. (W.Va. Code, 18-29-7) Please inform this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

  
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JERRY A. WRIGHT  
Hearing Examiner

Dated: October 18, 1988