



**REPLY TO:**  
401 Davis Avenue  
Suite 315  
Elkins, WV 26241  
Telephone: 636-1123

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Chairman  
Orton A. Jones  
David L. White

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EMPLOYEES GRIEVANCE BOARD**  
ARCH A. MOORE, JR.  
Governor

**Offices**  
240 Capitol Street  
Suite 508  
Charleston, WV 25301  
Telephone: 348-3361

HARPAL SINGH

v.

DOCKET NOS. 30-86-145-2  
BOR1-87-298-2

WEST VIRGINIA UNIVERSITY and/or the  
WEST VIRGINIA UNIVERSITY MEDICAL CORPORATION

DECISION

Grievant, Harpal Singh, is employed by the Board of Regents as a food service manager II and is assigned to the West Virginia University Hospital, Inc. (Hereinafter referred to as "the Corporation") Ms. Singh filed a level four grievance on March 26, 1986 in which she appealed a level two decision upholding the issuance of a second letter of warning pertaining to job performance. Counsel for the Board of Regents subsequently filed a motion to dismiss or limit evidence based upon the grievant's failure to present any evidence, witnesses

or arguments at the level two hearing. The grievant indicated that she appeared but did not participate in the level two hearing as she did not believe that she would receive a fair hearing or decision from a hearing officer appointed by the president of the university who is also a member of the board of the Corporation. This examiner determined the grievant's actions to have been counterproductive and noncompliant with statutory intent and remanded the matter to level two to allow the grievant an opportunity to meaningfully participate in a full evidentiary hearing. The grievance was denied following the level two hearing and appealed to level four on June 22, 1987.

On November 16, 1987 Ms. Singh filed a second level four grievance in which she alleged that she had been demoted in violation of her employment contract, the W.Va. State Constitution, state statutes and rules, regulations, policies and practices applicable to her employment status and job performance. She further alleged that the actions constituted discrimination and harassment as defined by W.Va. Code, 18-29-3(m) and (n). The grievances were consolidated for hearing at level four and the Corporation was joined as a

party to the matter by the examiner over the objection of the grievant.<sup>1</sup>

On December 27, 1985 Ms. Margaret Abbott, Director of Nutrition and Dietetics, issued a second letter of warning to the grievant. Ms. Abbott noted that a management by objective (MBO) plan had been given to the grievant in February 1985 and was to have been completed by July 19. In addition the grievant was to have completed a new set of menus, provided menus one week in advance and developed a plan to build the unit employees so they could be self-relieving and handle problems within the unit.

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<sup>1</sup>The grievant objected to the joinder of the Corporation as a party as she is an employee of the Board of Regents. While it is acknowledged that the grievant is not an employee of the Corporation she functions under the daily supervision of corporate employees who issued the letter of warning and recommended the demotion. Accordingly, the Corporation has an interest in the outcome of this grievance and it must, by necessity, present a case on defense of the action taken which has resulted in the present grievances. Although grievant's counsel argues that no procedure exists whereby an examiner may join a party to a grievance, this board has previously held that a third party may be enjoined when the rules, policies, procedures, etc. of that party affects the grievant's scope of employment. Walker v. Kanawha County Board of Education and/or West Virginia Department of Education, Docket No. 20-86-157-1.

Ms. Abbott stated that of the seven objectives included in the MBO plan four remained incomplete and that the grievant's own suggestions for improvement had not been implemented. A lack of merchandizing, marketing, employee training and menu changes were cited as reasons for cafeteria volume remaining below potential. The grievant was advised that the deficiencies in cafeteria service and her job performance should be corrected within three months or her employment would be terminated.

By letter dated June 12, 1987 David James, successor to Margaret Abbott as Director of Nutrition and Dietetics, determined that the grievant had failed to successfully complete objectives one, two and six of the MBO plan and failed to perform her duties at an acceptable level as evidenced by the following specific examples:

a. You have displayed a lack of ability to design systems to solve constantly reoccurring (sic) problems. An example of your inability to design a logical system deals with cafeteria portion control. It was only after Mr. Wallace's constant complaining for many months about inaccurate portion control and his subsequent ordering you to provide a written portion control guide for cafeteria line employees was a reasonable system designed to maintain consistent portions.

b. You have displayed a lack of ability to approach problems in your unit with possible solutions. You constantly bring to Mr. Wallace problems for which you have not thought of possible solutions. An example of this occurred in September of 1986, when you could not decide how to fill a full time position vacancy in the cafeteria. After extensive assistance from Mr. Wallace on this matter it was agreed that this position would be filled by three casual employees. You required Mr. Wallace's extensive assistance and he had to actually do this function for you.

c. Your lack of ability to effectively deal with employee/personnel problems is evidenced by the many complaints about your lack of effective employee communication. On Friday, May 9, 1986 Mr. Wallace met with a group of your employees who complained about your lack of organization and fair distribution of cafeteria workload and the lack of proper employee discipline.

d. Every effective manager must possess an ability to creatively solve problems and initiate new programs. One of your objectives has been to promote new ideas and methods of presentation, for instance through monthly special events. To this date, Mr. Wallace does not know of any new and original merchandising or promotion techniques which you have conceptualized and implemented.

e. You have constantly complained of not having enough supervisory assistance in the cafeteria and have argued that the cafeteria must have a manager and two full time supervisors in order to effectively operate. However, in July and August of 1986 you went on an extended vacation of six consecutive weeks. During that time period, the cafeteria was operated very efficiently and successfully, despite the fact that only one supervisor was assigned to the cafeteria. Even when you and your supervisor are here there is no apparent difference in the operation of the cafeteria.

f. Your inability to be reasonably organized is evident in the disorganized appearance and security of your office. In January, 1986, a cash deposit bag containing approximately \$1,100 was presumed stolen from an unsecured file cabinet drawer in your office. The ensuing security investigation revealed that large amounts of money were secured in an inappropriate fashion. After completion of the investigations, Mr. Wallace recommended, procured and implemented the use of a drop safe.

Mr. James advised the grievant of his intention to terminate her as food service manager II but noted that he would discuss the possibility of a transfer to a non-managerial position within the department as an alternative to the termination. The transfer, in the opinion of Mr. James, was to a position in which the grievant could function effectively and would provide one last opportunity for her to perform at a satisfactory level. By letter of July 28 to the grievant Mr. James recited his offer to discuss a transfer and that following two meetings the grievant had declined that offer. This letter advised the grievant of her demotion to the position of food service supervisor to be effective August 16.

The grievant argues that: (1) W.Va. Code, 18-11C-4(d) forbids the Corporation from issuing a warning letter or demoting her as she is a Board of Regents employee in all respects.

Ms. Abbott was a Corporation employee and Mr. James is an employee of ARA, a private firm employed by the Corporation. While they wrote the letter and implemented the demotion no one from West Virginia University ever evaluated the facts and circumstances upon which the actions were based.

(2) Her employment contract prohibits her demotion. A binding contract, it sets forth specific terms including the position title, salary and one year period of duration. Therefore, the grievant's employment status may only be changed with the consent of both parties or at the end of the contract period.

(3) The Corporation did not have the authority to amend the grievant's job description and the MBO plan consisted of objectives which required elements not required by the job description for food service manager II.

(4) The second letter of warning and the demotion are not supported by just cause as the grievant is competent in managerial planning and is creative and efficient. Further, she was given no specific, systematic training to rectify any alleged deficiencies.

(5) The letter of warning and demotion are invalid as

they were motivated by purposes violative of public policies set forth in W.Va. Code, 18-11C-1 et seq., i.e., that the Corporation wants all employees to be Corporate employees. This argument is supported by the timing of the disciplinary actions which began soon after the divestiture of the hospital.

(6) The actions were violative of the following Constitutional protections: (a) due process procedures requiring a revision of the job description were not followed; (b) the grievant was denied equal protection as she was treated differently without any rational justification as other Board of Regents employees are not prejudiced in their employment by entities or individuals outside the Board of Regents and (c) the actions are prohibited by a bar against private encroachment upon public functions which occurred when private employees implemented the letter of warning and demotion on behalf of West Virginia University.

The university responds that the intent of the legislature, as expressed in W.Va. Code, 18-11C-1 et seq., was to allow a private corporation to operate the hospital (which would

by necessity include the supervision and disciplining of Board of Regents employees) and that the action taken by the Corporation was consistent with the university's progressive discipline process and was administrated with the approval of the West Virginia University Department of Human Resources. It argues that the action taken by the Corporation was consistent with all applicable statutes, rules and regulations and that the grievant was treated no differently than if her supervisor had been a state employee.

The university asserts that the action was based on just cause as the grievant had continued to show no improvement in the performance of her duties subsequent to the first warning letter. Additionally, it denies that the grievant has a contract of employment and identifies the document identified as a Classified Employee Appointment form. Employee Relations Representative Susanna Renahan testified that this form is used simply as a part of the system's recordkeeping process to identify employees, their position, etc. The university argues that this document cannot be construed as a contract of employment, but even if it should be, notes that it contains a caveat that the individual's "...employment is subject to

the fulfillment of your position responsibilities during the life of the appointment..."<sup>2</sup>.

A review of the job description for food service manager II indicates that her function is to manage and supervise the hospital cafeteria and Basic Science Food Service, under administrative supervision, and to assist with the supervision of CUDP student experiences in the administrative area.<sup>3</sup> The duties and responsibilities of the food service manager II are to interview, employee, orient, evaluate, counsel and dismiss cafeteria and Basic Science employees, schedule and approve

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<sup>2</sup>The university inappropriately argues that this action is barred by res judicata and collateral estoppel which prohibit the relitigation of the issue set forth in the grievance filed as a result of the first letter of warning. Although many of the facts are the same, each action creates a separate grievable incident.

<sup>3</sup>This job description is dated November 19, 1980 and while another "job description" which the grievant believes to have been drafted by the Corporation is included in the record, university officials testified that the November 1980 document was the only job description for the position of food service manager II. Corporation employees state that the second document was not intended to be a revised job description but only a clarification of the duties and responsibilities.

time cards, check permanent time records, process accident reports and work with the Main Kitchen food service supervisors to coordinate the flow of work and utilization of joint equipment. She is to supervise cafeteria food production and service, is responsible for standardized portion control and is to recommend price adjustments as necessary.

Other duties include the maintenance of the food production records, the coordination of records with the ingredient room supervisor, plan advance food preparation and menus, order food, supervise food production and service for catering for special events, recommend the purchase of new equipment, maintain cash reports for audit and maintain a procedure manual. She is to supervise sanitation, process and follow through on work orders.

When using the job description as a guideline it appears that some of the goals of the MBO plan may exceed the responsibilities of the position. For example, goal number one is to define services offered, list what is available, suggest how changes could provide more efficient service, list physical requirements that are possible, etc. Although this goal, and others, was to assist the grievant in developing initiative

and creativity for the improvement of the cafeteria services, the job description does not indicate that to be part of her duties. The university job description defines a position which entails the responsibility for the day to day functioning of the cafeteria. It appears from the MBO plan that some expectations of the grievant may have been in excess of the position responsibilities particularly in light of the uncontroverted testimony of the grievant that she was relieved of the food production responsibilities and no longer has any control over the ordering or preparation of the food.

In recognition of the fact that technological, organizational and related changes may alter the responsibilities of a position or while management may restructure positions to meet the goals and needs of the department, when substantial changes occur it is the policy of WVU that the position descriptions are to be submitted to the Department of Human Resources for review. These requests must be submitted via the Dean/Director's office to the Classification and Compensation Unit. It does not appear that such a review was ever conducted for the position of food service manager II even though a

substantial portion of the duties was eliminated. This action may result in a downgrading of the position if it is determined to be classified at a paygrade higher than other positions performing similar work. Therefore, the grievant may have been performing less duties than required by the position description but at the same time may have been asked to complete projects which go beyond those responsibilities listed in the description.

It is clear that the grievant was not performing in a manner acceptable to the Corporation, however, as she is a Board of Regents employee the controlling question is whether she was performing acceptably as defined by the Board of Regents job description.<sup>4</sup> It would seem to be impossible to determine whether or not the grievant's performance is acceptable until the position description is reviewed and possibly revised and

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<sup>4</sup>W.Va. Code, 18-11C-1 et seq. contains no specific or implied statements that those individuals who remained state employees were to be supervised by other state employees and such a requirement would be practically impossible in a corporate run facility. Supervisors, corporate or state, are required by Code to evaluate state employees using Board of Regents, and not corporate, criteria.

an evaluation based upon that description is conducted.<sup>5</sup> If it is determined that the duties performed by the grievant are not similar to those of other food service manager II positions, it may be necessary to downgrade the position she holds. If the duties are similar and the grievant's performance is below the acceptable standard, discipline may then be imposed. Subsequent evaluations conducted by the the grievant's supervisor must be based solely upon the duties and responsibilities of the university's position description and not the Corporation's perceptions or expectations of the position.

As the letter of warning and demotion were improperly processed by the university before it determined whether the grievant was properly classified and evaluated by the Board of Regents standards, the actions were without factual basis, arbitrary and capricious. Having reached this conclusion it is unnecessary to address the remaining issues.<sup>6</sup>

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<sup>5</sup>Ms. Renahan testified that it was not the practice of the Department of Human Resources to investigate each situation and the reports and recommendations of the supervisor were accepted as accurate. While this may be viable within the university system it would appear that a higher standard of responsibility may be required for employees supervised by non-state employees who may be unfamiliar with or improperly apply Board of Regents policy as this instance illustrates.

<sup>6</sup>This decision should not be interpreted as inconsistent with Singh v. West Virginia University, Docket No. 20-86-044 as a reading of that decision indicates that in that instance the grievant failed to prove the allegations made.

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

#### Findings of Fact

1. Grievant is employed by the Board of Regents as a food service manager II and is assigned to the West Virginia University Hospital, Inc.

2. The grievant was issued a second letter of warning in March 1986 due to her continued failure to complete all of the objectives of an MBO plan and other deficiencies.

3. In June 1987 the grievant was advised by her supervisor that he intended to terminate her employment as food service manager II. He later transferred the grievant to a non-managerial, supervisory position as a last opportunity for the grievant to demonstrate that she could perform satisfactorily.

4. Both the letter of warning and the demotion were issued by the grievant's immediate supervisors who were not and presently are not Board of Regents employees.

5. Prior to both actions the West Virginia University Department of Human Resources was contracted for guidance by the Corporation employees. Both the letter and the demotion were approved and processed by that department as part of the progressive discipline program.

6. West Virginia University did not investigate the situation to determine whether the grievant was properly classified or evaluated before the progressive discipline was approved.

7. Evidence indicates that the grievant's duties and responsibilities may have been amended to such an extent that the position is no longer properly classified.

8. While the Corporation has the implied authority to evaluate and discipline Board of Regents employees assigned to its facility, that authority must be exercised within the appropriate Board of Regents policies, rules and regulations.

9. The university retains the responsibility of insuring that any evaluation, disciplining, etc. of its employees assigned to the Corporation, which it processes through its Department of Human Resources, is in compliance with Board of Regents employees policies, rules and regulations.

### Conclusions of Law

1. The West Virginia University Medical Corporation may utilize both Corporation and university personnel, however, university personnel are to be treated as university personnel in all respects. W.Va. Code, 18-11C-4(d).

2. The university and Corporation supervisors have failed to act in compliance with Board of Regents Policy Bulletin No. 62 which requires a classification review when significant changes occur in the principle duties and responsibilities of a position.

3. The warning letter and demotion were prematurely issued prior to determining whether the evaluation of the grievant's performance was in compliance with the university job description.

Accordingly, the grievance is **GRANTED** and the letter of warning is to be removed from the grievant's file and the demotion is to be rescinded.

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

DATED

May 18, 1988

Sue Keller

SUE KELLER  
HEARING EXAMINER