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WILLIAM SMITH

v.

Docket No. BOR2-87-229-1

MARSHALL UNIVERSITY

D E C I S I O N

Grievant, William Smith, is employed by Marshall University as a custodian in the Housing Department. He filed a grievance on September 28, 1987 alleging he had been wrongfully given an oral reprimand for misconduct. A Level I conference was subsequently held with Mr. Smith's supervisor, Ms. Barbara Atkins, and because of some confusion as to procedure, Level II and/or Level III hearings were not held.¹ A Level IV appeal was filed November 11, 1987 and an evidentiary hearing was held January 22, 1988. Proposed findings of fact and conclusions of law

¹ The record is silent as to whether or not any Marshall University official made a final decision on the grievance.

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were received from the grievant on February 23, 1988.²

On September 11, 1987 Mr. David Scites, Assistant Manager of Housing and Physical Environment, and Ms. Atkins called Mr. Smith to Ms. Atkins' office and during the course of their conference he was advised that he was no longer to make derogatory racial remarks during the course of his work at Marshall University. The following day Mr. Smith received a memorandum from Mr. Scites confirming their conversation and indicating their talk should serve as a warning that racial remarks about black persons would not be tolerated at Marshall University. (Employer's Exhibit No.1) Several days prior to this conference grievant had been in a custodian's lounge on break and during a conversation with a co-worker referred to an employee in another department as a "colored girl". (T.__) Ms. Annie Smith, another custodian sitting nearby, indicated the term "colored" was offensive to her and the two engaged in an argument. Ms. Smith subsequently made a complaint to her supervisor about the incident. (T.__) According to the testimony of Mr. Scites he then talked to several other University employees and determined other more serious incidents had occurred and he and Ms. Atkins decided an oral reprimand was in order. (T.__)

²Hearing Examiner Leo Catsonis conducted the Level IV hearing and the case was assigned to the undersigned hearing examiner in March 1988.

Grievant contends his remarks in the custodian's lounge were not derogatory and he has never made racial slurs against blacks while employed at Marshall University. He requests in his grievance that the memorandum of September 11, 1987 be removed from his personnel file and replaced with a letter exonerating him of any wrongdoing.

Mr. Smith's testimony was simply a denial of any and all allegations against him and he offered no explanation for the number of witnesses who contradicted his statements. Ms. Dorothy Scruggs, a custodian, testified that she, Mr. Smith and Ms. Jerry Stowasser were in the custodian's lounge watching a television program on one occasion in August 1987 and after noticing a black person in the program, Mr. Smith remarked "turn that nigger off". (T.__) Ms. Scruggs also indicated that on another occasion Mr. Smith was cleaning a bathroom and asked her for extra cleanser because a "black boy had washed his hands in one of the sinks." (T.__) Ms. Scruggs complained about these remarks in a note to her supervisor. (Employer's Exhibit No.3) Mr. Ronald Lester, a security guard at the University, testified he had also heard Mr. Smith use the term "nigger" on several occasions when he passed his security desk in Buskirk Hall. (T.__) He also related other derogatory remarks against blacks which he considered poor attempts at humor and these incidents were brought to the attention of Mr. Scites. (Employer's Exhibit No.4) Ms. Teresa Wall, a student director at Buskirk Hall, also testified she had overheard

grievant use the term "nigger" while cleaning one of the bathrooms near her room and informed Ms. Ramona Orondorff, Housing Manager, of the incident. (T.___) The testimony of these three persons was essentially uncontroverted by the grievant.

Marshall University presented more than sufficient evidence that the oral warning given Mr. Smith was justified and in accordance with its progressive disciplinary policy. Grievant provided little if any rebuttal to the testimony of witnesses for the University but more importantly he failed to establish any legal basis in support of his request for relief. The testimony of Mr. Paul Michaud, Director of Human Resources/Personnel, indicated the memorandum of September 11, 1987 was not placed in grievant's personnel file and this fact was communicated to him. (T.___) (Hearing Examiner's Exhibit No.1) The grievant's request for relief was therefore reduced to a demand that he receive a letter exonerating him of any wrongdoing. Such relief, if granted, would be at best illusory and of little practical effect on the parties and such matters are not properly cognizable in the grievance procedure. See, Dunleavy v. Kanawha County Board of Education, Docket No. 20-87-102-1. Moreover, in the absence of any showing that an oral reprimand is part of a continuing practice of harassment by an employer, the West Virginia Education Employees Grievance Board will not intrude upon the reasonably exercised discretion of school officials in such matters.

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

FINDINGS OF FACT

1. Grievant, William Smith, is employed by Marshall University as a custodian in the Housing Department.

2. On September 10, 1987 grievant received an oral reprimand from his supervisor, Barbara Atkins, and David Scites, Director of Human Resources/Personnel, for making derogatory remarks about blacks during the course of his employment at Marshall University.

3. By memorandum dated September 11, 1987 Mr. Scites confirmed the content and purpose of the reprimand.

CONCLUSIONS OF LAW

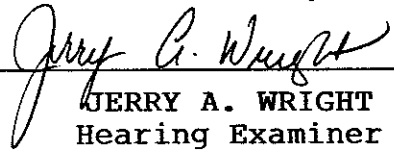
1. Marshall University has proven by a preponderance of the evidence that grievant engaged in misconduct by making racial slurs in the presence of other employees and that said conduct warranted an oral reprimand pursuant to the University's progressive disciplinary policy.

2. Grievances in which the relief, if provided, would have no practical effect on either party are abstract propositions and are not properly cognizable in the grievance

procedure contained in W.Va. Code, 18-29-1, et seq. Dunleavy v. Kanawha County Board of Education, supra.

Accordingly, the grievance is **DENIED.**

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.


JERRY A. WRIGHT
Hearing Examiner

Dated:

June 29, 1988