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CHARLES SEXTON

v.

Docket No. BOR2-87-284

MARSHALL UNIVERSITY

D E C I S I O N

Grievant, Charles Sexton, is an electrician employed by Marshall University. He filed the present grievance when he was suspended five (5) days without pay in November 1987. A Level IV evidentiary hearing was held on December 14, 1987.¹

On August 14, 1987 Mr. Sexton was observed by Mr. Ray Welty, Director of Auxiliary Services at Marshall University, entering and exiting a building to which he was not normally assigned. Mr. Welty

¹A motion to change the location of the hearing site from Charleston to Huntington was granted on December 8, 1987 but there was a substantial delay in the preparation of the transcript of the hearing and it was not received by the West Virginia Education Employees Grievance Board until February 23, 1988. At the conclusion of the hearing, the parties were requested to submit proposed findings of fact and conclusions of law but no such proposals were received.

made some inquiries about Mr. Sexton's schedule for that day and subsequently held a meeting on August 17, 1987 in which grievant participated. During the course of this meeting it was apparently determined grievant had been conducting American Federation of State, County and Municipal Employees (A.F.S.C.M.E.) business when he should have been working at his assigned station and he was given an oral warning not to do so in the future. (T. 14,15) This warning was reduced to writing in the form of a letter to grievant dated August 17, 1987 from Mr. Ray Welty. (Employer's Exhibit No. 4)

On October 2, 1987 grievant went to the office of Ms. Barbara Atkins and presented her with some documents concerning a grievance of Mr. William Smith and Ms. Atkins reported to Mr. David Scites, Assistant Manager of Student Housing, this had been done at 8:15 a.m. Grievant's supervisor later conferred with Mr. Welty and Mr. Paul Michaud, Director of Human Resources and Personnel, and it was decided that since grievant should have been at his assigned duties at 8:00 a.m. his actions constituted a flagrant disregard for the previous warning and by letter dated October 6, 1987 he was notified of his impending suspension.²

²This letter informed Mr. Sexton he would be recommended for suspension and a memorandum from Cliff Curry, Maintenance Supervisor, dated October 28, 1987 set the dates of suspension from November 2, 1987 through November 6, 1987. The letter of October 6, 1987 indicated grievant could have a hearing prior to his suspension but the record is unclear as to if and when such a hearing was held.

Grievant contends he arrived at the office of Ms. Atkins at 7:50 a.m. and was therefore not conducting A.F.S.C.M.E. business during his regularly scheduled working hours. (T. 39) The testimony of Ms. Atkins and Mr. David Scites, however, was more persuasive and the success of grievant's protest of his suspension depends on whether or not Marshall University adhered to its own personnel policies relating to such disciplinary measures. Mr. Paul Michaud's testimony at the Level IV hearing revealed Marshall University adheres to a progressive disciplinary policy in which an oral warning and a written reprimand precede any suspensions. (T. 38) The testimony of certain witnesses for Marshall University was conflicting but it appears the University took a position that the meeting held on August 17, 1987 and the subsequent letter of the same date constituted both the oral warning and written reprimand required by the University's discipline policy.³ The Director of Auxiliary Services, Mr. Ray Welty, indicated he felt the personnel handbook amounted to the first warning in that

³It should be noted this meeting was an apparent violation of an agreement reached in April 1987 between grievant and Marshall University whereby the grievant would be given the opportunity to obtain representation prior to engaging in communications with the University which might have disciplinary ramifications. In a letter dated August 26, 1987 grievant received an apology from Mr. Welty for a "communication breakdown in our request for a meeting" and a notice that depending on the facts discovered at the meeting (August 17, 1987), "disciplinary action may or may not have been taken."

it placed all employees on notice that they were to conduct only work related business during their working hours. (T. 23,24) A reasonable interpretation of the terms of the policy by which grievant was suspended makes both positions untenable. A personnel handbook obviously is not labeled or intended to be a warning concerning a specific area of conduct and while the oral admonishments given grievant at the August 17, 1987 meeting clearly amounted to an oral warning to cease his practice of performing A.F.S.C.M.E. business on school time, they could not also constitute the required written reprimand simply because they were reduced to writing. The University's progressive discipline policy contemplates two specific warnings for two distinct incidents of misconduct on the employee's part before suspension is initiated and school regulations must be strictly construed in favor of the employee. Morgan v. Pizzino, 163 W.Va. 454, 256 S.E.2d 592 (1979).

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

FINDINGS OF FACT

1. Grievant, Charles Sexton, has been employed by Marshall University for approximately ten (10) years and has been assigned to the position of electrician in the Housing Maintenance Department.

2. On August 17, 1987 grievant was observed entering and exiting a building to which he had not been assigned and it was

determined he had been absent from his assigned duties without permission and performing union business for which he received an oral warning not to do so in the future.

3. By letter dated August 17, 1987 this oral warning was reduced to writing.

4. On October 2, 1987 grievant, representing Mr. William Smith, delivered a grievance form to Ms. Barbara Atkins at her office at 8:15 a.m. when he should have been performing his assigned duties.

5. By letter dated October 6, 1987 grievant was notified he would be recommended for suspension.

6. By letter dated October 28, 1987 grievant was informed he would be suspended from November 2, 1987 to November 6, 1987.

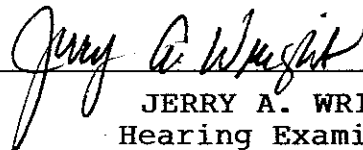
CONCLUSIONS OF LAW

1. Marshall University must be held to the remedies and procedures it properly establishes for its employees, Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977); Kopp v. Harrison County Board of Education, Docket No. 17-87-148-2, and those remedies and procedures must be strictly construed in favor of the employee. Morgan v. Pizzino, 163 W.Va. 454, 256 S.E.2d 592 (1979).

2. Marshall University's progressive discipline policy provides that an employee shall be given two warnings before suspension and in grievant's case only one such warning was given before his November 1987 suspension in violation of said disciplinary policy.

Accordingly, the grievance is **GRANTED** and Marshall University is hereby **ORDERED** to reimburse the grievant, Charles Sexton, for any loss of wages and benefits he may have incurred due to the improper five (5) day suspension.

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: April 8, 1988