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CHARLES SEXTON

v. Docket No. BOR2-88-029-4

MARSHALL UNIVERSITY

D E C I S I O N

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. Mr. Sexton filed an appeal to the West Virginia Education Employees Grievance Board on February 18, 1988 protesting his dismissal. Level IV evidentiary hearings were held on March 11, 1988 and March 21, 1988.

By letter dated February 17, 1988 grievant was notified by Mr. Clifford Curry, Supervisor, that as a result of his actions in a meeting held on February 16, 1988, his employment with Marshall

University was being terminated for any or all of the following reasons:

1. Gross insubordination

2. Disobedience

3. Refusal to comply with institutional rules

4. Willful misconduct

5. Knowingly making false or malicious statements against other employees, supervisors or officials of the university with intent to harm or destroy the reputation of those persons

6. Discredit to the University

This letter went on to inform Mr. Sexton his termination would be effective February 22, 1988 and he was entitled to a pre-termination hearing if he so desired. (Employer's Exhibit No. 10) By letter dated February 18, 1988 grievant requested a pre-termination hearing with Mr. Curry. This hearing was held on February 29, 1988 by Dr. Edward Miller, hearing evaluator, and he determined the evidence was sufficient to warrant the dismissal.[1] By letter dated March 3, 1988 Mr. Dale Nitzschke, President of Marshall University, affirmed

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[1] It should be noted this hearing was held seven (7) days after the effective date of grievant's termination. As the sufficiency of the notification of the termination is an issue, certain procedural aspects of this hearing are addressed herein.

Dr. Miller's findings and notified Mr. Sexton of his right to appeal. (Grievant's Exhibit No. 9)

Prior to the meeting of February 16, 1988 grievant received a memorandum dated February 12, 1988 from Mr. Curry informing him it would be held in the Personnel Office Orientation Room at 10:00 a.m. and since subsequent disciplinary action might be taken he could have a representative present. (Employer's Exhibit No. 15) According to Mr. Sexton he then contacted Mr. Paul Michaud, Director of Human Services/Personnel, and learned the purpose of the meeting and concluded it was to be held as reprisal for previous grievances. (T.__) Mr. Sexton contacted his representative from the American Federation of State, County and Municipal Employees (A.F.S.C.M.E.) and asked her to be present on February 16, 1988 but some confusion as to the location of the meeting prevented her from attending. (T.__)[2] Present at the meeting were grievant, other maintenance personnel, Mr. Ray Welty, Director of Auxilliary Services, Clifford Curry, grievant's supervisor, Ms. Ramona Orndorff, Housing Manager and Mr. Michaud. Later that day Mr. Welty, Mr. Curry and Ms. Orndorff conferred and decided grievant's actions during the course of this meeting warranted dismissal.

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[2] Grievant contends his representative's absence was the fault of University officials who did not direct the representative to the proper room.

A number of events had led to the conference of supervisors and employees on March 16, 1988 but it appears the main reason concerned the grievant's verbal and written communications within the maintenance department regarding his belief that Mr. Alan Ward was to be promoted to the position of Assistant Supervisor, Housing Maintenance. Grievant claimed he had obtained information that the University was planning to create such a position and in a memorandum dated February 2, 1988 he indicated to Mr. Curry there were five (5) persons including himself more qualified for the position than Alan Ward, a plumber in Housing Maintenance. This memorandum contained the certifications and qualifications of these employees and was circulated to each one. (Employer's Exhibit No. 8) Grievant had previously raised the issue of Mr. Ward's status within the department and the alleged creation of the position and had been fully apprised of Mr. Ward's job function and the University's hiring procedures. (Employer's Exhibit No.7&15)

Grievant's initial contention concerns the adequacy of his notice of termination and it must be addressed before any consideration of the sufficiency of the evidence in support of the charges contained therein can be reached. It must initially be noted that the grievant's claim of a lack of due process because of the inadequacy of the termination notice has not been fully developed and certain facts relating to his employment status were not established at Level IV evidentiary hearings. No evidence was presented by either party

concerning any process by which Marshall University maintenance personnel acquire tenure and thereby gain some statutory entitlement to continued uninterrupted employment.[3] The existence of a "property interest" in such circumstances which triggers the applicability of certain procedural due process safeguards is easily found. Waite v. Civil Service Commission, 241 S.E.2d 164 (W.Va. 1978); Swiger v. Civil Service Commission, 365 S.E.2d 797 (W.Va. 1987). Absent the statutory authority for such entitlement, the West Virginia Supreme Court of Appeals has held an agency's own rules and regulations may grant its employees certain rights not required by law and that agency must be held to those standards. Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977). In the present case the record also does not reveal to what extent Marshall University has granted its employees procedural rights upon termination except the provision allowing an employee to contest a dismissal through a standard grievance procedure. (Employer's Exhibit No. 4, Board of Regents Handbook Section 10.2.2).

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[3]The Board of Regents personnel handbook (Employer's Exhibit No. 4), Section 10.1, categorizes university employees as either faculty, classified or nonclassified employees. It therefore appears that grievant who held the title "electrician" may have gained some type of tenured status but the record remains unclear as to whether or not Marshall University uses the terms "classified" and "nonclassified" in the same sense as the Civil Service Commission or other state agencies when referring to employees who may or may not have some job protection afforded by statute.

A dismissal hearing is part of the procedure and grievant exercised his right to one which was held February 29, 1988 but it is his contention that it too was inadequate since the vague and ambiguous nature of the termination notice prevented him from adequately preparing his defense. Powell v. Brown, supra, clearly mandates strict adherence to the University policy concerning termination hearings and although that case did not address the question of adequacy of notice it is not inconsistent to hold that in order for any such hearing authorized by agency policy to be meaningful the notice containing reasons for dismissal must be stated with some particularity.

Accordingly, a review of the termination letter in the grievant's case reveals notice of the date on which the alleged misconduct took place and a categorization of the actions of the grievant on that date. This information is essential and had the letter contained only these components it would have been at least adequate for the purpose of alerting the grievant as to what evidence he might expect at the hearing but in the section enumerating the charges, grievant is informed he was being dismissed for "any or all" of the charges. It is difficult to imagine how the grievant could properly prepare a rebuttal to the charges against him when the University had in effect given notice that it may produce evidence to substantiate only one or up to six allegations of misconduct. When judged by either strict due process standards or the practice of fundamental fairness

which the University's personnel policy purports to embrace, this provision renders the notice of February 17, 1988 insufficient.

The decision in grievant's case, however, does not turn on the failure of the University to adequately inform him of the charges prior to the hearing on February 29, 1988. During the course of that hearing the University substantially offered evidence in support of all of the charges contained in the termination letter. He was then afforded the opportunity to rebut the allegations in evidentiary hearings before the West Virginia Education Employees Grievance Board where no additional charges were raised.[4] The first hearing in effect served the purpose of informing the grievant with reasonable certainty and precision of the cause of his termination.[5]

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[4] W.Va. Code, 18-29-1 allows employees of the West Virginia Board of Regents to use the grievance procedure contained therein and Marshall University personnel policy gives employees the option of pursuing grievances through those proceedings or certain grievance provisions outlined in its own employee handbook. The handbook apparently contains no requirement that employees must make a choice between the two procedures and there was no contention on the University's part that grievant was precluded from appealing to the West Virginia Education Employees Grievance Board by virtue of his request for an on-campus termination hearing.

[5] In Guine v. Civil Service Commission, 141 S.E. 2d 364 (W.Va. 1965) a notice of dismissal to an employee of the State Department of Health bordered on generality but was held to be adequate since the parties met at prehearing conferences and the employee was more fully apprised of the incidents referred to in the notices.

Turning to the sufficiency of the evidence offered by the University in support of its allegations against grievant, it must initially be noted that a great deal of documentation and testimony offered by the University concerned incidents which occurred prior to February 16, 1988 and notwithstanding a holding that grievant had been adequately informed of the nature of the allegations against him, his termination letter specifically noted the dismissal was because of his actions on February 16, 1988 and therefore only evidence of occurrences on that date can be considered relevant.[6] It is for this reason the last two charges, knowingly making false and malicious statements against other employees and discredit to the University, were not supported by any testimony or documentation. There was some evidence which indicated grievant may have accused certain persons of reprisal during the meeting in question but he might conceivably believed that was the purpose of his presence there and any remarks to that effect could not be considered false or malicious. Similarly, the charge of being a discredit to the University implies some intent

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[6] It was the University's contention that while Mr. Sexton's actions on this date could be categorized under all headings contained in his termination letter, certain incidents of misconduct require prior oral and written warnings under University personnel policy and evidence of previous actions was offered to show adherence to said policy and the cumulative effect of grievant's behavior. If not for the particularity of time and place contained in grievant's dismissal notice this argument would be persuasive and the evidence considered relevant.

on the part of the grievant to inflict some damage to the reputation of the University or cause some loss of respect and there was no showing that these were the reasons for his actions.

Three of the remaining four allegations against the grievant listed as disobedience, refusal to comply with institutional rules and willful misconduct can best be summarized under the heading of the first charge, namely, gross insubordination and the testimony concerning grievant's actions during the meeting of February 16, 1988 supports the University's position that those actions warranted dismissal.[7]

Although grievant claimed he went to the meeting and merely presented a reprisal grievance to his supervisor and was attempting to explain the definition of reprisal to others present when the meeting was adjourned, there was overwhelming evidence to the contrary.[8] Nearly all persons who were present testified that Mr. Ray Welty had barely called the meeting to order when grievant stood up in

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[7]Board of Regents personnel policy provides an exception to the progressive discipline requirements of prior oral and written warnings in cases of "flagrant or willful violations of rules, regulations, standards of accepted behavior or performance". (Employer's Exhibit No.4)

[8]The grievant testified he called Mr. Paul Michaud and was told the meeting was going to be held as a reprisal against him for relating his concerns over the alleged promotion of Alan Ward but the testimony of Mr. Michaud which indicated no such statement was made was more convincing.

front of Mr. Curry, presented him with a document and began reading from a copy of that document. (T.__) The same persons also testified that Mr. Welty on two occasions asked the grievant to "please sit down" and his only response was to raise his voice and continue reading. (T.__) According to Mr. Welty, Mr. Curry, Ms. Orndorff, Mr. Cletus Richards and Mr. Michaud, grievant was still standing and shouting as they left the meeting. (T.__) It is the grievant's contention that Mr. Welty made no direct order at the time and he was therefore not insubordinate. The definition of insubordination however encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer. Weber v. Buncombe County Board of Education, 266 S.E.2d 42 (N.C. 1980) Moreover, it was not just the grievant's refusal to comply with directions which constituted the act of insubordination but also his blatant disregard for the authority Mr. Welty was exercising by calling the meeting and attempting to conduct it in a reasonably accepted manner. The complete disruption of a conference called by the grievant's supervisors demonstrated an unwillingness on his part to submit to any authority and he cannot escape the consequences of these actions simply because his superior's directive was politely phrased. Such a technical construction placed on the term of insubordination would have the effect of allowing employees to disregard any duty to obey the day to day directions of their employers unless those directions were grammatically phrased as commands. Grievant had been placed on notice that disciplinary

action could be taken as a result of information obtained at the meeting in question (Employer's Exhibit No. 14) and it was clearly in his best interest to hear any allegations concerning his behavior in order to provide a reasonable explanation or rebuttal and his decision to prevent any such exchange must be viewed as disobedient and insubordinate.

Grievant also contends that even if his actions were considered insubordinate, they were so trivial in nature as not to warrant dismissal. When viewed in the context of a meeting called for a discussion of the effects of grievant's communications concerning Mr. Ward's alleged promotion however, the actions were in no way trivial. The University could logically conclude by grievant's behavior that any further attempts to discuss what it perceived as disciplinary problems might have the same results and therefore his behavior was not correctible.

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 assigned as an electrician to the Housing Maintenance Department.

2. Mr. Sexton's immediate supervisor is Mr. Cliff Curry and Mr. Curry's supervisor is Mr. Ray Welty.

3. By memorandum dated February 12, 1988 grievant was informed his presence was required at a meeting to be held at 10:00 a.m on February 16, 1988 in the Personnel Office Orientation Room and that the meeting may result in disciplinary action.

4. Grievant, Mr. Welty, Mr. Curry, Ms. Orondorff, Mr. Michaud, Cletus Richards, Alan Ward, Jeff Mannon and Terry Mays attended the meeting and when Mr. Welty began speaking grievant stood up, presented Mr. Curry with a written grievance and began reading from a copy.

5. Mr. Welty asked grievant on two occasions to "please sit down" and he did not do so but continued to read more loudly and Mr. Welty was forced to adjourn the meeting and instruct others present to return to work.

6. On February 17, 1988 Mr. Welty and Mr. David Scites, Assistant Manager of Student Housing, presented grievant with a letter which informed him he was being dismissed from his employment with Marshall University for his actions during the meeting on February 16, 1988 and that he had a right to a hearing on said dismissal.

7. On February 29, 1988 a hearing was held by Dr. Edward Miller in which the University presented evidence in support of the charges contained in grievant's dismissal letter and grievant and

his representative were given an opportunity to rebut the evidence and/or present evidence in his behalf but they chose not to do so.

8. By letter dated March 3, 1988 Marshall University President Dale Nitzschke, affirmed the findings of the hearing examiner which indicated there was sufficient evidence to warrant the grievant's dismissal.

9. On February 18, 1988, prior to the termination hearing held by Marshall University, grievant filed an appeal to the West Virginia Education Employees Grievance Board pursuant to W.Va. Code, 18-29-1, et seq. where evidentiary hearings on his dismissal were held on March 11, 1988 and March 21, 1988.

CONCLUSIONS OF LAW

1. Marshall University must be held to the remedies and procedures it properly establishes for its employees, Powell v. Brown, supra, 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. The provisions in the Board of Regents personnel handbook that employees are to be notified of termination in writing and afforded a hearing contain an implicit requirement that the notice of dismissal

set out sufficient facts concerning alleged misconduct so that an employee is informed with reasonable certainity and precision of the cause of removal.

3. The statement contained in grievant's notice of dismissal dated February 17, 1988 that his employment was being terminated for any or all of the six listed reasons was not sufficient to inform him with any reasonable certainity of the cause(s) of his dismissal.

4. At a hearing held on February 29, 1988 grievant was sufficiently informed by the presentation of evidence in support of Marshall University's allegation of misconduct of the cause(s) of his dismissal and upon appeal to the West Virginia Education Employees Grievance Board he had the opportunity to provide rebuttal to said evidence and present testimony and documentation in his own behalf. See, Guine v. Civil Service Commission, supra; Snyder v. Civil Service Commission, 238 S.E.2d 842 (W.Va. 1977)

5. West Virginia Board of Regents and Marshall University's personnel policy provide for immediate dismissal of an employee for insubordination or willful violation of rules, regulations or standards of accepted behavior or performance.

6. Insubordination imports a willful disregard of express or implied directions of an employer. Weber v. Buncombe County Board of Education, supra.

7. Marshall University has proven by a preponderance of the evidence that on February 16, 1988 grievant purposely disrupted a meeting called by his supervisors and willfully disregarded the lawful directions of Mr. Ray Welty to sit down and said actions constituted gross insubordination within the meaning of West Virginia Board of Regents and Marshall University personnel policy.

Accordingly, the grievance is **DENIED** and the decision of Marshall University to dismiss the grievant, Charles Sexton, from his employment is hereby affirmed.

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

JERRY A. WRIGHT
Hearing Examiner

DATED: May 25, 1988