LARRY CROWDER,

Grievant,

v. Docket No. 96-BOT-320

BOARD OF TRUSTEES/MARSHALL

UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Larry Crowder, received a three day suspension on March 28, 1996. He grieved this disciplinary suspension, and on July 1, 1996, the Level II Grievance Evaluator, stated "the evidence and testimony, as presented by the University, is insufficient to demonstrate burden of proof. Therefore I recommend that the appeal by the grievant be approved." President J. Wade Gilley, on July 8, 1996, wrote Grievant and stated:

> **This letter is to inform you that after a careful review of the report and documentation, I have decided to adopt the campus grievance evaluator's recommendation that your grievance be upheld. Your grievance is upheld in that the decision to suspend will be reversed, however, the materials shall not be expunged from the files.**

Grievant then filed an appeal to Level IV stating "the universities [sic] decision not to purge my files concerning this issue is unacceptable. I am hereby requesting an appeal to Level IV to address the issue of removing documents from my personnel file and any other university file." A Level IV hearing was held on October 24, 1996, for the sole purpose of resolving the issue of the removal of the suspension letter and accompanying documents from Grievant's files. (See footnote 1) The parties agreed the issue before the undersigned was one of law and presented legal arguments to support each side of the issue. This case became mature for decision on December 3, 1996, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Respondent's argument for refusing to remove this documentation after it failed to prove

the charges against Grievant is as follows: Respondent believes the incidents leading to the suspension did occur, as there was nothing in the record to state the events did not occur. This evidence demonstrates there is conflict between Grievant and his supervisor. Thus, this evidence should remain in the file. Respondent also referred to the Employees Handbook which states that an employee may request that grievance materials be removed from his personnel file after one year. (See footnote 3) Therefore, since a year has not yet passed, Respondentargues, Grievant does not have a right to have these materials removed. (See footnote 4)

Grievant's argument is he has not been found guilty of the charges; Respondent has failed to prove its allegations of wrong- doing. In fact, Respondent found his suspension should be reversed. Thus, Grievant argues he should not continue to be punished for actions that he did not commit. The failure to remove the offending documents from his file can and does have a negative effect on Grievant.

Discussion

It must be noted that this was not a situation where a grievant was found to have committed the act he was accused of and the Grievance Evaluator mitigated the punishment to a less severe form of punishment. Removal would not be required in such circumstances. This is also not an incident where a minor procedural difficulty prevented Respondent from disciplining an employee who clearly deserved punishment. An employer's reluctance to remove documents in that scenario could be understood. Here, Grievant had a full, evidentiary hearing before Respondent's Grievance Evaluator, and this evaluator of fact found his employer did not prove its case. Respondent's reluctance to remove these documents in light of this set of facts is difficult to understand. When a grievance is upheld, it means Grievant prevails. To allowRespondent to continue to punish Grievant for an action it cannot demonstrate Grievant committed is unfair and inappropriate. If a grievant is to be punished whether he wins or loses, what is the purpose of the grievance procedure.

The above-discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. In a disciplinary action the respondent has the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6.

2. When a respondent cannot prove the charges by a preponderance of the evidence, no form of punishment may be visited on a grievant. This includes retaining the grievance charges and subsequent documentation in any of a grievant's files. Removal of this material is part of the remedy granted to a grievant when he prevails.

3. Respondent's failure to remove these grievance materials from any and all of Grievant's files would constitute a failure to abide by the intent of the grievance procedure. See W. Va. Code §18-29-1, et seq.

4. W. Va. Code §18-29-3(q), which permits the removal of grievance material after one year and a written request by the grievant, applies to disciplinary grievances, when the charges are proven and the materials are retained.

Accordingly, this grievance is GRANTED, and Respondent is ORDERED to remove any material related to this suspension and grievance from all of Grievant's files. These files would include, but would not be limited to, his personnel file, the files of all his supervisors, and his grievance file.

Any party or the West Virginia Division of Personnel may appeal this decision to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 31, 1997

Footnote: 1

During the Level IV Hearing, it was revealed that Marshall University typically keeps several different files on its employees. For example, personnel keeps a file, and Grievant's supervisor maintains a file.

Footnote: 2

Respondent also filed a Motion to Exclude Grievant's Brief as it was filed after the agreed time. As the submission was outside the timelines agreed to by the parties, this document was not considered by the undersigned.

Footnote: 3

This Handbook was not placed into evidence at the hearing. If this is what the Handbook states, it would be in conflict with W. Va. Code §18-29-3(q) which states a grievant has the right to request removal of any grievance records "from any file kept by the employer." (Emphasis added).

Footnote: 4

Respondent also argued the suspension was overturned because the reasons cited for the suspension were not egregious enough to warrant such an action. This statement is incorrect. The reason given by the Grievance Evaluator for granting the grievance was Respondent did not meet its burden of proof.