MARGARET LEECH,

Grievant,

v. **DOCKET NO. 99-BOT-169**

BOARD OF TRUSTEES/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant Margaret Leech filed this grievance against her employer, Board of Trustees/West Virginia University ("WVU"), stating:

> I'm grieving the sick leave policy. The Medical Release Verification Form and the practices that is [sic] being used [b]y the dept of Human Resources. (Nurse Management unit)

She sought as relief, "[t]hat the University would follow the law and not some policy and procedure that they feel is law." (See footnote 1)

The following Findings of Fact are properly made from the record developed at Level II.

Findings of Fact.

1. Grievant is employed at West Virginia University ("WVU") as a Building Service Worker I at the Physical Plant. She works night shift on a floor by herself, and her work requires her to use ladders and stairs at times. Two other employees are in the building when she is, on other floors. The telephones in the building available to Grievant and the other employees do not allow them to dial out.

2. Around June of 1998, Grievant experienced three episodes at work of losing control of the left side of her body and falling. These "drop attacks" were caused by migraine headaches. The third time she fell, she injured her knee. Amy Guidi, a nurse in charge of sick leave verification in Human Resources, made efforts to have Grievant moved to a desk job, but Grievant's doctor would not verify the necessity of this action.

3. One evening at work in early 1999, Grievant passed out. Her husband responded, and an ambulance and Grievant's supervisor, Bill Johnson, were called. The paramedics indicated, in Mr. Johnson's presence, that Grievant appeared to be suffering from the flu and dehydration. Grievant's husband then took her to the emergency room at Ruby Memorial Hospital, which is affiliated with WVU. (See footnote 2) 4. The treating physician in the emergency room diagnosed Grievant with the flu. He completed a standard discharge form used by the Hospital, indicating Grievant could return to work in two days, but did not disclose her diagnosis on the form. No limitations or restrictions were noted.

5. Doctors work odd shifts in the Ruby Memorial emergency room, and may be off work several days in a row, so that it can be difficult to get the treating emergency room physician's signature in subsequent days. Some doctors refuse to complete anything other than the hospital's standard discharge form.

6. The next day Grievant's husband delivered the discharge form to Mr. Johnson. He told Grievant's husband there would be no problem with Grievant taking sick leave and returning to work in two days.

7. Baron Smith, Assistant Director Campus Support Services, later called Grievant at home and told her she had to have a WVU Medical Leave Verification Form completed before she returned to work.

8. In an effort to comply with Mr. Smith's directive, Grievant called the emergency room, and was told to call medical records. While she was still experiencing flu symptoms, including a temperature exceeding 100 degrees, vomiting and diarrhea, she spent two hours at medical records, and was then told it would take ten days to retrieve her records as the physician had not returned her chart. Medical records sent her to the physician's office center, where she waited one hour and forty-five minutes, and was then told to come back the next day, as they were closing. She returned to medical records the next morning at 8:30 a.m., and was sent back to thephysician's office center. She was told by the physician's office center personnel they could not help her with emergency room records. She then went to the emergency room, explained the problem she was having to Harry Swiger, Nurse Manager, and asked if someone could just fill out the WVU form so she could go back to work that night. The emergency room physician who had treated Grievant was not available. Mr. Swiger called Ms. Guidi and explained Grievant had the flu, and if the discharge form did not list any

restrictions or limitations, he believed that meant there were none. Ms. Guidi indicated the form had to be completed. Mr. Swiger completed the WVU Medical Leave Verification Form, and signed a doctor's name to it with the doctor's permission.

9. Grievant returned to work after two days off work, even though she felt as ill the night she returned as she had the day she passed out, because she did not want to have to get another WVU Medical Leave Verification Form completed.

Discussion

Grievant requests unusual relief. Grievant reasonably believes she is going to be required to have a WVU Medical Leave Verification Form completed every time she uses sick leave, and seeks to be relieved of this requirement. The reason for this is obvious. It was a hardship on her to spend most of two days at Ruby Memorial trying to resolve this problem, when she should have been home in bed. She had already sent a doctor's excuse which said she could return to work in two days. She would rather come to work sick than have to go through this unpleasant experience again. She believes Respondent cannot require her to provide verification of illnesses of fivedays or less in duration.

She also argued it was discriminatory to require her to provide a completed Medical Leave Verification Form every time she uses sick leave, when the applicable policy only requires verification of illness for absences in excess of five days, and other employees are not required to provide verification. She testified that some employees take off more than three consecutive days of sick leave on a regular basis and are never questioned, but she did not identify any particular employee or provide any leave slips or other evidence to support her assertion.

Respondent's explanation for its treatment of Grievant is that it was reasonably concerned due to Grievant's medical history. It argued it had the right to require verification of Grievant's illness. Respondent also argued the relief sought by Grievant is speculative, illusory, de minimis, and/or would result in an advisory opinion, and the grievance is moot, as Grievant has already submitted the WVU Medical Leave Verification Form.

If the relief sought by Grievant is "de minimis" to Respondent, then it should have easily been able to find a way to accommodate Grievant's concern without this grievance advancing to Level IV of the grievance process. It is not de minimis to Grievant. She has no desire to ever spend the day at a hospital again, while she is sick with the flu or any other ailment, sitting around in waiting room chairs,

and going from one place to the other just so she can get a particular form filled out.

The Board of Trustees' regulations at 128 C.S.R. 35 §§ 8.5 and 8.6 provide:

> 8.5. Sick leave for more than five (5) consecutive days shall notbe granted to an employee for illness without satisfactory proof of illness or injury, as evidenced by a statement of the attending physician or by other proof satisfactory to the institution. An employee having an extended illness or serious injury shall, before returning to duty, obtain medical clearance to help insure adequate protection.
>
> 8.6 The institution may require evidence from an employee for verification of an illness or other causes for which leave may be granted under this policy, regardless of the duration of the leave.

WVU's Medical Leave Verification Policy provides, in pertinent part:

> **PURPOSE**
>
> To outline the means by which and under what circumstances West Virginia University may require submission of medical leave verification in accordance with federal and state law, and WV Board of Trustees policy, Series 35.
>
> . . .
>
> **POLICY**
>
> WVU seeks to provide a safe and appropriate work environment for its employees, to avoid jeopardy to employee health, to appropriately facilitate employees in their work efforts, and to properly account for leave use.
>
> Medical leave verification may be required if an individual is off work due to reasons allowed for use of sick leave. The verification is to be completed by a licensed physician, and provide information regarding the individual's medical condition, diagnosis, prognosis, functional capabilities and limitations, including duration and treatment plan, if any. Verification is required for absence of more than five (5) consecutive days. Verification is required, regardless of duration, if the employee is informed of such prior to returning to work. Verification is required to initially substantiate FMLA, parental, and medical leaves of absence, as well as to continue or extend, and to finalize such leaves. Verification is required prior to returning to work from absences involving serious illness or injury to the employee. Verification is required for catastrophic leave and reasonable accommodation considerations.
>
> **PROCEDURE**

> Additional information regarding this policy or the proper procedure to follow can be obtained in the Medical Leave Verification procedure. (See footnote 3)

RESPONSIBILITY FOR IMPLEMENTATION

> The employee is responsible to obtain and provide appropriate, satisfactory medical information. . . .

It is obvious that these policies are designed so that, absent some unusual circumstances, an employee would not be required to provide any type of doctor's excuse unless she had been absent for five consecutive days. This Grievance Board has found, however, that WVU may require verification of illnesses of less than five days' duration at its discretion. Uphold v. Bd. of Trustees, Docket No. 93-BOT-472 (Oct. 31, 1994). In other grievances, it was not unreasonable for WVU to require such verification when an employee did not report to work in food services on a busy week-end for food services (Thomas v. Bd. of Trustees, Docket No. 98-BOT-274 (Nov. 30, 1998)); when an employee called in sick on the same two days she had been denied annual leave (Bucklew v. Univ. of W. Va. Bd. of Trustees, Docket No. 89-BOR- 551 (Dec. 29, 1989)); or when leave abuse was suspected (Williams v. W. Va. Univ., Docket No. 89-BOR-265 (Dec. 29, 1989)).

Given the severity of Grievant's previous illness, and the risk of injury in her job if she continued to have "drop attacks," it was not unreasonable for WVU to require documentation that Grievant did not experience another "drop attack." While it may be burdensome on Grievant to obtain a doctor's verification of her illness each andevery time she uses sick leave, WVU has a legitimate interest in documenting whether Grievant continues to suffer from "drop attacks," as Grievant could be seriously injured given the nature of her job.

What was unreasonable under the facts presented here was to require Grievant to provide written documentation from a doctor that she had passed out from the flu and dehydration before she could return to work. Those requiring this information may not have been aware of the problems Grievant would experience in trying to obtain the necessary information from Ruby Memorial, although that hospital is affiliated with WVU. However, Grievant's supervisor was made aware of the diagnosis of flu, and knew Grievant would have to return to the hospital while she was still ill in order to get the form completed. Respondent had a discharge slip which said Grievant could return to work in two days. It did not demonstrate anything else was needed in order for Grievant to return to work.

Grievant was not discriminated against. W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significantparticular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. A grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

While other employees no doubt are not required to provide verification of their illnesses, Grievant is not similarly situated to all other employees, as she has experienced "drop attacks" at work caused by a medical condition, which could result in serious injury if there is a reoccurrence at work. She did not demonstrate that any other employee has a medical condition which has placed him or her at similar risk of injury at work, who has not been required to provide verification of an illness.

While this is an unusual grievance, it is certainly the type of complaint for which the grievance process was designed: an unreasonable requirement has been placed upon the employee, creating an unnecessarily miserable situation for the employee, and there is a simple, reasonable way to resolve the matter. It is the type of complaint which should have been resolved at Level II, if not before. As the parties were unable to figure out a simple, rational solution to this grievance on their own, and allowed this matter to proceed to Level IV, apparently they believe the Grievance Board shoulddesign a solution for them. W. Va. Code § 18-29-5(b) provides, "Hearing examiners are hereby authorized and shall have the power to . . . provide such relief as is deemed fair and equitable

in accordance with the provisions of this article, and such other powers as will provide for the effective resolution of grievances not inconsistent with any rules or regulations of the board or the provisions of this article."

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In order to prevail, a grievant must prove the allegations by a preponderance of the evidence. Vance v. Logan County Bd. of Educ., Docket No. 92- 23-045 (May 21, 1992); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Grievant demonstrated Respondent acted in an arbitrary and capricious manner, that is, unreasonably, when it required her to provide verification of her illness before she returned to work, when neither her medical records nor her treating physician were available, her doctor's excuse said she could return to work in two days, and she simply had the flu. By doing so, Respondent caused Grievant to suffer unnecessarily during her illness.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to cease its unreasonable requirement that Grievant obtain verification of her illness in all circumstances before she can return to work from sick leave. Respondent may require Grievant to provide verification of illnesses of any duration, within ten calendar daysof her return to work, when necessary to assure she has not experienced another "drop attack." If Respondent continues to believe verification is needed before Grievant returns to work, Respondent is responsible for taking any and all actions necessary to get the verification form completed, and may require Grievant's signature or other authorization to obtain the necessary medical information, provided Respondent takes care of getting the forms to and from Grievant for her signature.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the

Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 19, 1999

Footnote: 1

This grievance was filed on or about March 24, 1999. The record does not reflect what occurred at Level I. A Level II hearing was held on April 14, 1999, and a decision denying the grievance was issued on April 22, 1999. Grievant waived Level III, appealing to Level IV on April 29, 1999. Grievant was represented by Diane C. Parker, and Respondent was represented by Samuel R. Spatafore, Esquire. After this grievance was set for hearing, the parties agreed to submit the grievance for a decision on the record developed at Level II. It became mature for decision upon receipt of the last of the parties' written arguments on August 10, 1999.

Footnote: 2

It is unclear from the record whether Grievant's husband just found Grievant, or she called out and he heard her and responded. The record does not reflect how the ambulance was summoned.

Footnote: 3

This procedure was not made a part of the record.