REPLY TO:
401 Davis Avenue
Suite 315
Elkins, WV 26241
Telephone: 636-1123

Members
James Paul Geary
Orton A. Jones
David L. White

WEST VIRGINIA EDUCATION EMPLOYEES GRIEVANCE BOARD
ARCH A. MOORE, JR.
Governor

Offices
240 Capitol Street
Suite 508
Charleston, WV 25301
Telephone: 348-3361

CAROLYN LUZADER

v. Docket No. BOR1-86-345-2

WEST VIRGINIA UNIVERSITY

DECISION

Grievant, Carolyn Luzader, was employed as a custodian by the Board of Regents at West Virginia University from November, 1985 until her termination on October 8, 1986. Ms. Luzader alleges that the termination was without just cause, based on a department policy which violates both Board of Regents policy and W. Va. Code, 18-26-8, and discriminates against Physical Plant employees generally and her specifically and that she was deprived of due process prior to termination. She requests that she be reinstated to her position and be awarded all lost wages and benefits.

The grievance was denied at levels one and two; an evidentiary

hearing was conducted at level four on February 9, 1987.[1] Final written submissions were received on February 23rd and 25th, respectively.

The grievant was first employed at the Physical Plant of West Virginia University on November 20, 1985. In March, 1986 a counseling session was held with the grievant regarding her extensive use of sick leave"...which apparently did not involve extended medical treatment, hospitalization, or recouperation (sic)."[2] Following the counseling session a memorandum issued to the grievant advised that her sick leave usage would be reviewed on a continuing basis.

On April 9, 1986 a letter of warning was placed in the grievant's personnel file following an unauthorized absence from work on April 6, 1986. The grievant had reported off work on the code-a-phone in violation of the department's policy

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[1]Tapes of the level two hearing were offered into evidence by the respondent at the level four hearing; however, the offer was declined based upon the representation of the parties that a complete hearing was being conducted at level four. Therefore, the record does not include either the tapes or a transcription of the evidence offered at the level two hearing and no reliance was placed on the tapes in the rendering of the level four decision.

[2]The grievant had used 37.50 hours of sick leave between January 24, 1986 and March 20, 1986.

that employees were not to report vacation time via the recording system.[3] The grievant states that she knew she was not to call in vacation time on the code-a-phone and did so on April 6 only when facing an emergency situation and after she was unable to locate a supervisor.[4]

On May 6, 1986 a second warning letter was issued to the grievant. In this letter John Menear, Supervisor of Housekeeping and Maintenance, indicated that the grievant had missed thirty-nine work hours since the counseling session in March and that her poor attendance, together with the unauthorized absence of April 6, indicated an immediate need for her to improve her dependability. The grievant was warned that improvement was necessary for her to satisfactorily meet probationary period requirements and that failure to improve to an acceptable level would result in termination of her employment.

The grievant took no action upon receiving either of the letters and testified that she attached little importance to them as she believed that she had done nothing wrong regarding

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[3]This instance did not involve sick leave but annual leave as the grievant was experiencing home repair problems.

[4]Grievant notes that since this incident the Physical Plant now has an employee available to answer the phone one hour before reporting time.

the use of sick leave time and was unaware that they could lead to termination.

On October 2, 1986 the grievant called in sick for her shift which began at 11:30 p.m. and concluded at 7:30 a.m., October 3, 1986. Robert Radcliffe, Manager of General Services at the Physical Plant, was informed by a supervisor the morning of October 3rd that the grievant was also employed as a bus operator by the Monongalia County Board of Education. Mr. Radcliffe called the grievant's home and spoke with her mother who informed him that the grievant was driving a school bus at the time. On October 6, 1986 Mr. Radcliffe questioned the grievant regarding her employment with the board of education, at which time she denied driving a school bus. After securing confirmation from the local school board that the grievant was an employee and had worked as a bus operator on October 2nd and 3rd, Mr. Radcliffe concluded that termination was necessary.

Linda Knotts, Supervisor of Housekeeping and Maintenance, notified the grievant of her dismissal by memorandum dated October 8, 1986. Ms. Knotts reviewed prior disciplinary measures which included the counseling session, a follow-up information letter, two warning letters and the meeting of October 6, 1986 with Mr. Radcliffe. The memorandum indicates that Mr. Radcliffe

advised the grievant of the charges of poor attendance and reporting sick while working another job, that she was given an opportunity to respond to the charges and that she denied driving a school bus on October 3, 1986.[5] Ms. Knotts noted the grievant had missed sixty hours of work, primarily on days before or after her regularly scheduled days off, since the second warning letter of May 6, 1986 and that the Physical Plant had received verification of her employment by the board of education on October 2 and 3, 1986.[6]

The grievant testified that on October 2, 1986 she was called and agreed to work as a substitute bus operator for the board of education that afternoon. While preparing to go

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[5]The grievant accrued 11.25 hours of sick leave per month and began 1986 with a balance of 11.25 hours. From January 1, 1986 through October 6, 1986 the grievant used 113.50 hours of sick leave, 82.50 of which were days adjacent to weekends.

[6]Mr. Radcliffe obtained written confirmation from Ray Kessler regarding the grievant's status as a substitute employee of the board of education and from Leroy Tennant, Bus Supervisor, that he had called the grievant on October 2, 1986 regarding employment as a substitute bus operator for that afternoon and all day October 3, 1986. Dr. Joe Simoni, grievant's representative, objects to this exhibit and suggests that if questioned under oath, Mr. Tennant may reveal that calling a substitute to drive the same day is not the practice followed by the transportation department. Dr. Simoni stated that the grievant has had no opportunity to exact the truth of this matter. When questioned by the examiner, Dr. Simoni agreed that he could have subpoenaed Mr. Tennant to appear at the level four hearing but chose not to do so.

to work she discovered a knot on her leg which caused her concern and immediately following the completion of her duties she proceeded to the Clay-Battelle Community Health Center. She was diagnosed as having a severe contusion with bedrest, elevation and wrapping of the leg and warm compresses prescribed. The grievant returned home and at 10:30 p.m. she called in sick to West Virginia University.[7] At 5:30 a.m. on October 3 the grievant states that she was again called to work as a substitute bus operator for both the morning and afternoon shifts. She agreed to drive the bus as the knot had disappeared from her leg and because only one and one-half hours remained of her shift at West Virginia University.

The grievant relies on three arguments to support her contention that dismissal was improper. First, that sick leave is a part of a uniform system of compensation to which she is entitled and that dismissal for the use of sick leave is without just cause. In support of this argument the grievant cites

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[7]The grievant provided a doctor's verification, dated October 28, 1986, of this visit during the grievance process. Another verification indicated that Bess Luzader received dental treatment at 10:15 on October 3, 1986, a time when the grievant would not have been on duty at either job. No other evidence supporting the grievant's alleged illness was provided, nor does it appear that the respondent had required any.

is not a right, but a privilege which, if abused, may be withdrawn or made the subject of termination. In support of this position the respondent cites the West Virginia University Employee Handbook, which provides that dismissal may be based on: excessive absences or consistent tardiness (p.7); flagrant or willful violation of university rules, regulations, policy or accepted standards of behavior and for just cause which includes, but is not limited to; refusal to comply with rules; disobedience/ insubordination; neglect of duty and dishonesty. (pp. 51-52). The respondent cites Buskirk v. Civil Service Commission, 332 S.E. 2nd 579 (W. Va. 1985) in support of its position that the counseling session, warning letters and immediate access to two grievance procedures negated the requirement for a formal pre-termination hearing.

Grievant's argument that sick leave is part of compensation is supported by Board of Regents Policy Bulletin No. 62; however, it is generally recognized to differ from other forms of non-monetary compensation such as vacation time. Vacation time with pay is clearly compensation for services rendered as is evidenced by the fact that upon termination of employment the employee is entitled to compensation for accumulated leave (with certain time limitations). Employees are only provisionally

Board of Regents Policy Bulletin No. 62, Section II "Compensation/ Pay Calculations", which includes sick leave, and Board of Regents Policy Bulletin No. 35, which provides that sick leave may be used by an employee when ill or injured, when a member of the immediate family is seriously ill or when death occurs in the immediate family. The grievant asserts that she used sick leave only when ill and was never required to provide verification of illness.

Second, the grievant argues that the Physical Plant's sick leave standards are discriminatory as they are more restrictive than those applied to other Board of Regents employees.

Third, the grievant asserts that she was denied pre-termination due process as she was not provided a clear and specific description of the charges brought against her, she was not given time to prepare a defense, she was not represented or assisted by another employee and she was given no opportunity to respond to the charges made by Mr. Radcliffe at the meeting held October 6, 1986.

The respondent argues that the grievant's conduct was destructive to the institution and that she had been given ample opportunity to improve her reliability. After two warning letters she had not improved her attendance and was dishonest regarding outside employment. The respondent asserts that sick leave

entitled to sick leave based upon a legitimate need. Sick leave with pay may be more accurately characterized as a gratuity used to promote the efficiency and morale of employees. 15A Am. Jur. 2nd, §§49, 50 (1976).

The policy adopted by the Physical Plant sets standards for determining abuse of sick leave and provides for discipline in cases of abuse. It does not contravene Board of Regents Policy Bulletin No. 35. As with the Board of Regents policy, the Physical Plant policy approves sick leave when an employee is ill or injured, when an immediate member of the family is seriously ill or when there is a death in the immediate family. The Physical Plant policy simply goes one step further to explicitly state that sick leave may not be used at the whim of the employee but only when there is an actual need. Although this is implicit in Board of Regents Policy Bulletin 35, the Physical Plant has wisely put it in writing giving its employees actual notice of standards by which they will be evaluated.

The grievant has offered no evidence to show that only Physical Plant employees are subjected to such standards and are therefore treated in a discriminatory fashion. It is likely that similar standards, although perhaps unwritten, are applied to any Board of Regents employee suspected of abusing sick leave.

A review of applicable case law reveals that as a general rule some measure of due process must be given before an individual may be deprived of a property or liberty interest unless a compelling public policy dictates otherwise. North v. West Virginia Board of Regents, 233 S.E. 2nd 411 (W.Va. 1977) and Clarke v. West Virginia Board of Regents, 279 S.E. 2nd 169 (W. Va. 1981). The measure of pre-termination due process required is flexible and will vary depending upon the particular circumstances of a given case. One test frequently used is a balancing of the employee's interest in continued employment against the state's interest in the expeditious removal of an unsatisfactory employee, the avoidance of additional administrative burdens and the risk of erroneous termination. Cleveland Board of Education v. Loudermill, 84 L. Ed. 2nd 494, 470 U.S. _____, 106 S. Ct. _____ (1985) and Buskirk v. Civil Service Commission of W. Va., 332 S.E. 2nd 579 (W. Va. 1985).

In Loudermill the Court determined that a public employee who could only be discharged for cause and who was entitled to a post-termination administrative hearing under state law was also entitled to an opportunity to respond to the charges prior to termination. The Court did not require a full evidentiary

pre-termination hearing but rather a determination of whether there were reasonable grounds to believe the charges against the employee were true and supported the proposed action.

In Buskirk the Court rejected the appellant's contention that he was entitled to a pre-termination hearing under the Constitutional guarantees of due process of law when he had been offered an immediate opportunity to respond to the charges at the time he was notified of the termination of his employment.

Clearly, Ms. Luzader's interest in continued employment warrants some form of pre-termination due process. Contrary to her allegations, however, it does appear that she was given notice of the charges in the form of a letter and through the meeting with her supervisor on October 6, 1986. By her own testimony Ms. Luzader establishes that she attached no importance and offered no response to charges made in prior warning letters and incorrectly denied the charge of working for another institution while on sick leave from the respondent. After the meeting on October 6, she did nothing to remedy this situation prior to the termination letter being issued on October 8, 1986.

While the initial deprivation must be surrounded by some due process procedures, these may be minimal if there are prompt post-deprivation hearing procedures assuring the employee a fuller

measure of due process. North v. West Virginia Board of Regents, supra. As the grievant was provided a pre-termination statement of charges, was given an opportunity to respond to the charges and is now involved in a comprehensive post-termination administrative review of the termination, there was no deprivation of pre-termination due process.

Findings of Fact

1. Grievant was employed by the Board of Regents in November, 1985 as a custodian assigned to the Physical Plant at West Virginia University.

2. In March, 1986 the grievant was counseled regarding her extensive use of sick leave. Following the counseling session a follow-up letter advised the grievant that her usage of sick leave would be reviewed on a continuing basis.

3. A letter of warning was issued to the grievant on April 9, 1986 after she had taken an unauthorized absence from work on April 6, 1986 when she reported off on the code-a-phone in violation of department policy. The grievant stated that she knew that she was not to call in for vacation time and did so only because she was faced with an emergency situation and was unable to reach a supervisor.

4. A second letter of warning was issued in May, 1986, after the grievant had missed an additional thirty-nine work hours between the counseling session in March and May 6, 1986. The grievant was advised that failure to improve in her dependability would result in termination.

5. After the grievant called in sick for her October 2-3 shift, her supervisor called her home and was informed by her mother that the grievant was driving a school bus. When confronted with this information at a meeting with her supervisor the following Monday, the grievant denied that she was driving a bus.

6. After receiving confirmation from the board of education that the grievant was employed as a substitute bus operator on October 2 and 3, 1986 the grievant was terminated from her employment at West Virginia University.

7. Between January 1, 1986 and October 8, 1986 the grievant used 113.50 hours of sick leave, 82.50 of which were days adjacent to weekends.

8. The grievant states that she used sick leave only when she was ill and was never requested to verify any health problems.

9. W. Va. Board of Regents Policy Bulletin No. 35 provides

that sick leave may be used by the employee when he is ill or injured, when a member of the immediate family is seriously ill, or when there is a death in the immediate family.

10. Physical Plant sick leave policy provides for termination of an employee after the fourth incidence of sick leave abuse. Standards for determining excessive use of sick leave include: the use of more than twenty-two and one half hours of sick leave in three consecutive months; a pattern of illness prior to and following scheduled days off and all single day absences.

11. The West Virginia University Employee Handbook provides that an employee may be dismissed for just cause,which includes but is not limited to: refusal to comply with University rules; disobedience/insubordination; neglect of duty and dishonesty.

12. The termination letter issued on October 8, 1986 referred to the unauthorized absence of April 9, 1986, excessive use of sick leave primarily occurring before and after scheduled days off and that the grievant worked for the local board of education on October 3rd after having reported sick at West Virginia University.

Conclusions of Law

1. When a policy regulating the method of reporting annual leave does not provide for emergency situations and an employee

acts reasonably in such circumstances disciplinary action is unwarranted.

2. The respondent has failed to show the grievant's false denial of driving a school bus to be disobedience or insubordination. Further, while an act of dishonesty cannot be condoned, it did not occur while the grievant was on duty nor was it directly related to her work at the University. As such, this incident alone does not constitute just cause for dismissal.

3. A public employer has a legitimate interest in prohibiting employee abuse of sick leave time. Therefore, a division policy which does not contravene the Board of Regents policy creating the entitlement but defines and provides a disciplinary procedure for continued abusive use of sick leave is valid and enforceable.

4. Sick leave is a part of the Board of Regents compensation package as the employee is paid for an accrued amount of time when ill; however, it is an entitlement limited within the parameters of the policy established by the grantor and/or its agent.

5. Working at a second job while on sick leave granted by the primary employer is an abuse of sick leave time notwithstanding a medical verification of illness.

6. The grievant has failed to prove the allegation that the Physical Plant sick leave policy is discriminatory as defined by W. Va. Code, 18-29-2 (m).

7. The grievant was provided with a statement of the charges made against her and an opportunity to respond to them prior to dismissal and was afforded a full post-termination evidentiary hearing; therefore adequate pre-termination due process requirements as defined in Loudermill and Buskirk were met.

According, the grievance is **GRANTED** to the extent that the grievant is to be reinstated with lost benefits and wages and that the warning letter of April 9, 1986 is to be removed from her personnel file. The grievance is **DENIED** as to the removal of the counseling letter of March 20, 1986 and the warning leter of May 6, 1986. The termination letter of October 8, 1986 may be converted to a second letter of warning.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. (W. Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

DATED: April 20, 1981

Sue Keller

SUE KELLER

Hearing Examiner