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**LEWIS McCAULEY**

**v.**

**DOCKET NO. BOR1-87-088-2**

**WEST VIRGINIA UNIVERSITY**

**D E C I S I O N**

Grievant, Lewis McCauley, is employed by the Board of Regents as a custodian assigned to the West Virginia University Physical Plant. On March 3, 1987 he filed a level one grievance in which he alleged that a letter of warning dated January 29, 1987 improperly claimed that he had established a pattern of sick leave usage and that the respondent had no right to inquire specifically as to evidence of his illness or to invade his privacy by inquiring as to the nature of an illness of an immediate family member. Grievant asserted that sick leave is a benefit, alleged a violation of his rights as a Board of Regents employee and requested that the letter be removed from his file. The grievance was denied at levels one and two and was appealed to level four on April 13, 1987. The matter was scheduled for hearing on May 18, however grievant's representative notified the examiner by letter dated May 13

that both parties had agreed to submit the matter for decision based upon the record supplemented by written arguments. Proposed findings of fact and conclusions of law were filed by the grievant on June 2, 1987 and by the respondent on June 5, 1987.

Grievant does not dispute that in 1985 he used 259½ hours of sick leave, 135 hours in 1986 and 22½ hours in January, 1987. On May 9, 1986 William Morris, Supervisor of Housekeeping and Maintenance, issued a memorandum verifying a counseling session held with the grievant on May 6, 1986 regarding his high rate of sick leave usage not associated with extended medical treatment, hospitalization or recuperation. The grievant was reminded that a high rate of absenteeism disrupts work schedules and assignments affecting maintenance service to the institution and was advised that if the high rate of absence continued he would be required to verify the use of sick leave with medical evidence. Subsequent to the counseling session the grievant used no sick leave in June or July, 1986, however, between August 1986 and January, 1987 an additional ninety hours were used prompting the issuance of a warning letter on January 29, 1987.

This letter noted that the grievant had failed to bring his sick leave usage under control and that effective immediately

he would be required to provide medical evidence indicating how the nature of the medical problem created a temporary disability or determine the seriousness of the specified illness of a family member. Failure to provide this medical evidence would result in the absence being considered unexcused and possibly affect his continued employment.

The grievant argues that the Physical Plant policy includes arbitrary and vague standards restricting the use of sick leave in contravention of Board of Regents Policy No. 35 which created the entitlement and that the University has shown no just cause for the discipline as there has been no claim that he has inappropriately used sick leave.

The respondent argues that the sick leave policy is both reasonable, as the institution must rely on dependable employees in carrying out day to day operations, and legal, as any privilege may be restricted or withdrawn when abused.

In addition to the foregoing it is appropriate to make the following specific findings of fact and conclusions of law.

#### Findings of Fact

1. Grievant is employed by the Board of Regents assigned as a custodian at the West Virginia University Physical Plant.

2. In 1985 the grievant used 259½ hours of sick leave. During the period of January 1 through November 30, 131¼ of

those were taken adjacent to weekends. During December the grievant used sick leave for every work day beginning December 9 through December 31.

3. In 1986 the grievant used 67½ hours of sick leave, all adjacent to weekends, between January 1 and May 6.

4. In May, 1986 the grievant received a counseling session and a follow-up information letter regarding his high usage of sick leave.

5. The grievant used no sick leave in June or July, 1986 however between August and November he used an additional 67½ hours, 45 of which were adjacent to weekends.

6. In January, 1987 the grievant used 22½ hours of sick leave all adjacent to weekends.

7. In January, 1987 the grievant received a first letter of warning regarding his high rate of sick leave usage.

8. The grievant offers no explanation for the high rate of sick leave and opposes the requirement that he provide medical evidence for future sick leave use as a violation of his privacy.

9. Although the issue of timeliness was not raised by the respondent, the letter was dated January 29, 1987 and the level one grievance was not filed until March 3, 1987.

### Conclusions of Law

1. The West Virginia University Employee Handbook provides for discipline, suspension or dismissal of employees in cases of excessive and/or habitual absences from work without proper explanation. Patricia Straight v. West Virginia University, Docket No. 30-86-184-2.

2. The Education Employees Grievance Board has previously held the Physical Plant sick leave policy to be valid and enforceable to the extent that it does not conflict with Board of Regents or University policies. Carolyn Luzader v. West Virginia University, Docket No. BOR1-86-345-2.

3. The warning letter of January 29, 1987 was issued in compliance with the Physical Plant sick leave policy.

4. The Physical Plant sick leave policy requires that a physician's statement or other evidence of illness be provided when sick leave usage extends for more than five consecutive days. However, if the grievant suffers from what was referred to in the level two decision as a "chronic" illness, the respondent is entitled to be made aware of the nature of that illness to the extent that his work affects his health and that his health will affect his ability to continue with his work.

5. W. Va. Code, 18-29-4 (2)(1) requires that the grievance process be initiated within fifteen (15) days following the occurrence of the event upon which the grievance is based, or within fifteen (15) days of the date on which the event became known to the grievant or within fifteen (15) days of the most recent occurrence of a continuing practice giving rise to a grievance.

Accordingly, the grievance is DENIED.

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 July 14, 1987

Sue Keller  
SUE KELLER  
Hearing Examiner