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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

ARCH A. MOORE, JR.
Governor

ROGER D. MILLS

v.

DOCKET NO. BOR1-87-042-2

WEST VIRGINIA UNIVERSITY

D E C I S I O N

Grievant, Roger D. Mills, was employed by the Board of Regents as a nursing assistant assigned to the Operating Room at the West Virginia University Medical Center in August, 1981 and held that position until he was terminated on October 21, 1986. Mr. Mills initiated grievance proceedings that same day and alleged that the dismissal was in violation of a Memorandum of Accord, the WVU Employee Handbook and the Board of Regents/West Virginia University practices and procedures. The grievance was denied at levels one and two; upon appeal to level four both parties agreed that the matter could be submitted for decision based upon the record supplemented by briefs filed on May 15 and July 18, 1987, respectively.

By letter dated October 21, 1986 Martha DiGiovine, Business Director of the Operating Room, confirmed a phone conversation to the grievant on October 20 notifying him that his employment at West Virginia University Hospital, Inc. had been terminated. The reason given for the termination was a continued failure to show sustained and satisfactory job performance.

The grievant's disciplinary record indicates that on July 18, 1985 he was issued a follow-up letter regarding a counseling session held on July 17 relevant to his failure to timely report an absence from work on July 15, 1985 when he was scheduled to begin duty at 6:45 a.m. and did not notify the appropriate personnel until approximately 8:00 a.m.

By memorandum dated July 19, 1985 the grievant was counseled regarding his high rate of sick leave usage which apparently did not involve extended medical treatment, hospitalization or recuperation.

A first warning letter regarding his failure to report an absence was issued to the grievant when on July 19, two days after a counseling session was held for the same offense, he failed to appear for his designated shift and did not call in to report his absence.

A second letter of warning was issued on February 11, 1986 after the grievant called in at 6:50 to state that he had overslept and would report to work as soon as possible. He was scheduled to begin his shift at 6:00 and arrived at 7:30.

A first letter of warning regarding excessive unscheduled absences incurred by the grievant between September, 1985 and February, 1986 was issued on February 11, 1986. Ms. DiGiovine noted that since the counseling session held on December 15, 1985 the grievant had continued to exceed the institutional standard of twenty-three hours (or 3 days) per three months.¹

A warning letter was issued on May 14, 1986 regarding the grievant's generally irresponsible attitude as evidenced by his placing an insensitive and inappropriate sign relating to AIDS in the mens' lounge area and by his continued excessive usage of unscheduled leave.²

¹The letter of February 11 indicated that the grievant had been absent on September 25, October 8 and 16, November 18 and 25, 1985, January 6 - 10, 20 and 28 and February 11, 1986. The letter notes that January 20 was later designated a holiday and a time card submitted by the grievant indicates that he did work on September 25.

²Since February 11 the grievant had been absent an additional four days.

On October 19, 1986 the grievant failed to be available for two pre-scheduled on-call shifts resulting in the letter of termination on October 21, 1986.

The respondent contends that even though the grievant was aware of the behavioral and attitudinal expectations of operating room employees as indicated by his signature on a copy of the "Leadership Assumptions on O.R. Nursing Behaviors and Attitudes" he developed into an unsatisfactory employee as evidenced by his excessive absences, refusal to follow rules in reporting absences and by his failure to act in a responsible, professional manner. Although efforts were made by the administration through counseling sessions and warning letters to assist the grievant in becoming a productive employee, he remained uncooperative.

The grievant argues that his failure to be available for the on-call shift October 19, 1986 was the result of a simple mistake in overlooking his name on the call sheet; that it was merely an oversight which occurred shortly after his return from six weeks of sick leave when the old routines were not fresh in his mind. Further, he had mentioned to his supervisor that he was going to Ohio on October 17, the day before his on-call shift began, and she failed to remind him of his weekend duties.

The grievant cites the West Virginia University Hospital leave policy which requires that employees report off within a certain time period prior to the beginning of their shift and the "[f]ailure to report in advance will result in an unscheduled absence and vacation time being used." The grievant asserts that he failed to report sick within the time frame on only two occasions, that the two letters issued on February 11 were relative to a single incident and the letters of February 11 and May 14 contain inaccurate information regarding unscheduled absences.

The grievant concedes that the AIDS sign which he placed in the mens' lounge may have been in bad taste but that it had limited exposure, did not degrade any individual person or include remarks regarding race, sex, color, creed or sexual preference and that his right to post the sign is protected by the First Amendment to the United States Constitution.

Additionally, the grievant argues that hospital employees are not required by hospital policy to work overtime and that an on-call shift is overtime work. Finally, he suggests Ms. DiGiovine issued three unwarranted warning letters as a result of a personality conflict with the grievant.

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 has been employed as a nursing assistant assigned to the operating room of West Virginia University Hospital since August, 1981.

2. The grievant has received a counseling letter and two warning letters regarding his failure to report, or timely report, absences.

3. The grievant has received a counseling letter and two warning letters regarding his high rate of "unscheduled absences."

4. The grievant was terminated after he neglected to be available for an on-call shift on October 18, 1986 and for his failure to show sustained and satisfactory job performance.

5. The on-call schedule had been posted since October 1, 1986.

6. The grievant had signed a three page document titled "Leadership Assumptions on O.R. Nursing Behavior and Attitudes" indicating that he had read and had an opportunity to ask questions regarding the document and understood that his performance appraisal would be based in part on his meeting these expectations.

7. The behavioral expectations require, in part, that O.R. employees comply with hospital sick leave policy, that they be available by phone or beeper when on call and that they notify the O.R. unit when unable to work an on-call shift so that a substitute employee may be found.

8. The warning letters of February 11 and May 14 refer to "unscheduled absences". The "Sick Leave Policy for WVU Hospital" requires that the employee report off to a designated supervisor in case of illness. Advance notice of ½ hour for day shift is required and failure to timely report results in an unscheduled absence and vacation time being used. The warning letters incorrectly referred to unscheduled absences; however, the content of the letters clearly indicate that the reprimand was for abusive use of sick leave.

9. An excerpt from the "WVU Memorandum of Accord" dated August 31, 1982, permits the institution to require employees to work overtime under various conditions so long as consideration is given to any circumstances which might cause such an assignment to be an unusual burden for the employee. When such circumstances exist the employee shall not be required to work unless his absence would cause the institution to be unable to meet its responsibilities.

10. The WVU Employee Handbook provides that staff members are expected to report to work on time and that excessive absences or consistent tardiness will lead to suspension or dismissal.

11. The Employee Handbook provides for the immediate dismissal in cases of flagrant or willful violations of rules, regulations, standards of accepted behavior or performance or for actions in clear violation of policy. Dismissal may also occur for just cause which includes refusal to comply with University rules, disobedience/insubordination, neglect of duty and failure to maintain established performance standards. An employee may also be dismissed for offenses after two written warnings have been issued.

Conclusions of Law

1. A public institution has a recognized interest in securing and retaining dependable employees. Excessive and/or habitual absences impede the institution in providing services with patient care being an example of primary importance. Employees engaging in such detrimental behavior are subject to discipline including suspension and dismissal. Carolyn Luzader v. West Virginia University, Docket No. BOR1-86-088-2.

2. Grievant's termination following repeated absences and failure to timely report off work was in compliance with all hospital and institutional policies.

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 August 24, 1987

Sue Keller

SUE KELLER
Hearing Examiner