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PATRICIA STRAIGHT

v.

Docket No. 30-86-184-2

WEST VIRGINIA UNIVERSITY

DECISION

Patricia Straight, the grievant, is a licensed practical nurse (LPN) and a Board of Regents employee on staff at the West Virginia University Hospitals, Inc. In June, 1986 she filed a level four grievance appeal alleging the hospital's sick leave policy violated Board of Regents and University policies, W.Va. Code, 18-26-8(a)(12) and amounted to discrimination as contemplated by W.Va. Code, 18-29-2(m).

This matter was originally filed April 1, 1986; the level one response denying the grievance is dated April 9, 1986 and signed by grievant's nurse manager, Beverly Zinn. A level two hearing was conducted May 1, 1986 and denied May 6, 1986. Several level four hearings were scheduled for Elkins on September 30, 1986 and again on November 12, 1986 but were continued for cause. Subsequently, a hearing was set for January 28, 1987 but continued to February 25, 1987 in Wheeling. Following the hearing, the parties submitted proposed findings of fact and conclusions of law on March 9 and March 16, 1987.¹

¹Further documentation was requested of respondent's counsel regarding case citations in his brief and were received May 7, 1987.

Grievant has been employed at University Hosptial since 1982 and is presently assigned to the post-natal acute care unit. On October 1, 1984 she received a letter from her former nursing supervisor regarding her sick leave usage. A first warning letter followed on August 9, 1985 and noted that grievant accrued 88 hours of unscheduled absences from October 1984 to July 1985. She was told that henceforth she would have to justify unscheduled absences charged to sick leave with medical verification. On March 5, 1986 grievant received a second warning letter stating that her frequency of absences were still disruptive and if not corrected would lead to termination of employment.

Grievant maintains that W.Va. Code, 18-26-8(a)(12) requires the Board of Regents (BOR) to establish a uniform system of compensation for classified employees and according to BOR Policy 62, sick leave benefits are a component of the compensation package. BOR Policy 35 and the West Virginia University (WVU) handbook provides that employees may use sick leave when ill or injured, when a family member is seriously ill or when death occurs in the immediate family. While acknowledging that university regulations empower its units and departments to establish specific procedures and practices to cover their particular needs, grievant argues that the hospital's Policy No. V.02 governing sick leave usage is applied in an arbitrary fashion and is restrictive and inconsistent with the intent of university-wide policies. Grievant contends that other university employees are not subjected to scrutiny and threats regarding their sick leave usage, thus BOR hospital employees are discriminated against, and in any event, that the hospital policy causes other harm.

Several University employees in other departments testified on behalf of the grievant and stated they had frequent sick leave absences, in excess of grievant's, but were never reprimanded. Another BOR hospital employee, a staff nurse, testified that when a hospital employee is forced to come to work while sick, optimal medical care cannot be provided; further, the sick employee may subject patients to infections. She said that based on her own experiences application of the policy was inconsistent; on some occasions medical verification of illness for absence was accepted but other times rejected. Implementation of the hospital's policy, she commented, fosters a belief that the hospital does not care about its employees and morale is therefore poor. Thus, she testified, the result is a negative impact upon both givers and receivers of hospital care.

Grievant testified on her own behalf and stated that she only used sick leave for actual illness and had complied with the medical verification of illness requirement set forth in the first warning letter. Grievant filed this grievance after receipt of the second warning letter and at the time of the second level hearing asked only that the second letter be removed from her files. She now requests that all the inappropriately issued disciplinary letters be rescinded and that she not be subjected to further misapplication of the hospital's policy.²

²It is noted that at the level four hearing grievant's testimony was somewhat conflicting regarding her understanding of the hospital's application of the sick leave policy. At one point she stated that she waited until receipt of the second letter to file the grievance because she was not aware she could grieve. At another point she stated she knew of the hospital's sick leave policy but thought it only applied to Corporation employees. However, she did not ignore the first warning letter and in fact met the stated requirement of furnishing medical verification for her sick leave absences.

Beverly Zinn, nurse manager and grievant's supervisor who administers and applies the hospital sick leave policy appeared on behalf of the respondent. She testified that the sick leave policy was essential to the operation of a 24-hour health care facility because employee absences are disruptive at any time but especially so when the patient census is high and other need factors are present. She stated that when nursing personnel scheduled for duty do not report for work other employees have a greater burden, some work may not get done, and patient care suffers. In most cases the risk of a sick employee infecting patients is minimal, she stated, but especially in grievant's case because most of her reported illnesses were not contagious.

The policy in question establishes hospital standards for usage of sick time and each supervisor/manager is responsible for a monthly review of usage in their department. "Excessive use of ill time" is described as, "more than 23 hours of unscheduled ill time in three months, patterns of illness, e.g., sick days taken in conjunction with scheduled days off, (and) the day before and/or after the beginning of a vacation or holiday period".

Enforcement of standards is detailed and includes these specifics: When a standard is exceeded, a determination will be made if the excess is justified. Attention should be given when an employee takes a single day off in each of three months. If abuse of sick leave is identified, certain procedures must be followed. Initially, a letter of information following counseling shall be given to the employee with notice of ongoing

review of sick time use. "Upon documentation of a second incident, a first warning letter will be sent", the third incident prompts a second warning letter and a fourth incident warrants termination. Clearly, the policy distinguishes justified from abusive use of sick leave time but does add an advisory that, "medical verification of illness does not warrant a continual excessive use of ill time". This unquantified policy term appears to be somewhat contradictory to the previous policy language and directives.

Ms. Zinn denied that her application of the policy differed from the policy's terms. She discussed situations whereby an employee's use of sick time may be first reviewed, noting that only unscheduled absences were questioned, i.e., a single day or first day only of an extended absence. She said the 23 hour - 3 month standard of sick leave use was a guideline for her determinations and not an absolute.³ She said an employee would be counseled to discuss correctional measures to avoid further excessive use of sick time if there appeared to be a pattern of usage such as one absence a month or two days every other month. While the policy requires that supervisors conduct monthly review and document second and third incidences of abuse when they occur, Ms. Zinn was not definite about when further discipline would ensue. She stated that she usually waited six months, but she emphasized that each case was handled on a case by case basis according to the circumstances.

³Presumably the purpose of this review determines whether the "excess is justified" or whether there has been "abuse" as per the language of the policy. At no time was there a suggestion or charge that grievant's absences met any pattern which suggested abuse. In fact, the initial October 1, 1984 letter of information sent to grievant focused only on her alleged but unspecified rate of absences.

Ms. Zinn corroborated grievant's testimony that for the most part grievant had complied with the medical verification requirement following the issuance ten months later of the August 9, 1985 first warning letter.⁴ Ms. Zinn then testified that, notwithstanding medical verification, grievant's rate of absences had not declined from August 1985 through February 1986 thus prompting the issuance of the March 5, 1986 second warning letter. Ms. Zinn stated at the hearing that grievant had 8 days absences in that period of time.⁵

She noted that according to the policy, medical verification is not sufficient to excuse continual excessive use of sick time, and "whether a person (absent employee) is sick or not sick, the impact is the same on the unit". When questioned by grievant's representative about this matter, Ms. Zinn was reluctant and unresponsive. He had asked whether termination proceedings would have begun if grievant's rate of medically justified absences had not improved. She answered, "We would take a very, very careful look ... I can't answer, this is circumstantial and hypothetical". Ms. Zinn did say, however, that grievant's rate

⁴ While the August 9, 1984 communication noted grievant's unscheduled time off totalling 88 hours from October 1984 to July 1985 with only two months without an absence, it did not specifically state that the time off was all charged to sick leave nor particularize whether any of the time off was deemed to be an abuse of sick leave. The letter stated that if grievant failed to produce medical verification of sick leave usage, the absence would be considered unexcused and could affect her continued employment.

⁵ It is again noted that the written communication lacked specificity concerning the number or type of absences over the seven month period and merely stated, "your high frequency of absences is still sufficient enough to be disruptive ...". Obviously, neither the first nor second warning letters were timely issued, as the policy requires, precisely when the offending (abusive?) incidence of exceeding standards actually occurred.

of sick time absences had improved since the second letter of warning was issued.⁶

Counsel for the respondent argues that excessive use of sick leave usage policies have been upheld in numerous labor arbitration cases and cites over a dozen cases (most of which are dated by ten years or more). The factual situations of these cases do not parallel those of this grievance and with the exception of one case do not involve employee usage of a contracted for or vested sick leave entitlement/privilege.⁷

Respondent's counsel further argues that the entitlement granted by the Board of Regents for accrual of sick leave must be tempered with rules and reasonable use on the part of employees without abuse of the privilege. He notes that other university departments have addressed sick leave usage and defined disciplinary measures for enforcement of control policies. This Board has previously ruled that university departments which have established proper policies defining parameters for sick leave

⁶The entirety of the evidence indicates that the policy is applied inconsistently and in grievant's case, imprecisely. Among other things close scrutiny of the three letters issued to grievant and Ms. Zinn's level one response reveals discrepancies in the computations of sick leave time allegedly amassed by grievant.

Also, it is noted that the somewhat contradictory and imprecise terms of the policy combined with the subjective application of the policy produce an ambiguous, uncertain situation for a hospital employee such as grievant in relation to unforeseen but necessary use of sick leave.

⁷That case was also distinguished by the facts. A paid for sick time was granted by the employer as part of a bargained for labor-management contract but constrained within management policy which considered all absences as "incidents" in a very liberally applied absentee control program where "abuse" is not an issue. See, In re Celanese Piping Systems, 66 LA 674(1976).

usage are enforcable and not discriminatory. Carolyn Luzader v. West Virginia University, Docket No. BOR1-86-345-2. Luzader, however, is not factually analagous to the instant grievance. In Luzader, grievant's use of sick leave was deemed abusive since the employee had performed the duties of a second job while on a medically verified one day absence from her university position.

In addition to the foregoing, the following findings of fact are appropriate.

FINDINGS OF FACT

1. Grievant is employed by the Board of Regents as a LPN and works in the university hospital post-natal care unit.

2. WVU Hospitals, Inc., Policy No. V.02 seeks to curb disruptive employee absences and one portion specifically addresses excessive sick leave usage considered abusive and sets forth disciplinary measures thereof.

3. On October 1, 1984 grievant received a letter from her former nurse supervisor stating that she had "a high use of sick leave" the past eight months, January 1 to September 28, 1984. If the high rate continued, the letter warned, grievant would have to produce medical evidence to justify each day missed for illness.

4. On August 9, 1985, grievant's present nurse manager issued a First Warning letter stating that grievant had 88 hours of "unscheduled time off" from October 1984 to July 1985 which did not require extended medical care. She was told that effective immediately she was required to produce medical evidence for each day missed attributed to illness and failure to do so "would result in the absence being unexcused" and possibly affect her continued employment at WVU Hospitals, Inc.

5. Grievant complied with the instructions in the August 9, 1985 letter and for the most part produced medical verification to justify unscheduled absences due to illness.

6. On March 5, 1986 grievant was given a second warning letter stating that her "high frequency of absences is still sufficient enough to be disruptive ...". She was told, "bring your attendance records under control by our next review" or she would be terminated. The nurse manager stated that whether grievant was sick or not was not at issue.

7. Grievant filed a grievance and initially asked that the second warning letter be removed from her files. She subsequently asked that all of the letters be removed and she not be subject to the hospital's policy.

8. A level one grievance response issued April 9, 1986 from grievant's nurse manager, Beverly Zinn, stated that grievant had 16 days total unscheduled ill time in 18 months, from September

1984 through February 1986. Zinn's level four testimony was that grievant missed 8 days from August 1985 through February 1986, thus indicating 8 days absence from September 1984 through July 1985. However, the First Warning letter of August 1984 stated that from October 1984 through July 1985 grievant missed 88 hours (approximately 11.7 days), a difference to grievant's detriment of 3.7 days. These discrepancies in the calculations are indicative of the generally imprecise and inconsistent manner in which the hospital policy was applied to the grievant and others.

9. A second portion of the WVU hospital policy states that "Medical verification of illness does not warrant a continual excessive use of ill time". This proviso is vague and nonspecific; it does not quantify "continual" excessive use nor specify whether it pertains to scheduled or unscheduled use and further, provides no discipline other than supervisory counseling of the employee. The impreciseness of the policy term fosters employee uncertainty and goes beyond the scope of prevailing university policy regarding the distinction between abusive, unexplained or unexcused absences and medically justified employee use of sick leave time.

CONCLUSIONS OF LAW

1. Pursuant to BOR Policy Bulletin No. 35, employees may use sick leave when ill or injured, when a family member is seriously ill or when death occurs in the immediate family.

2. Pursuant to the WVU Employee Handbook, university-wide policy allows for discipline, suspension, or dismissal of employees in cases of excessive absences/habitual absence from work without permission or proper explanation. (Emphasis added).

3. A public employer has a legitimate interest in prohibiting employee abuse of sick leave time. However, only the provisions of a policy not in contravention of the policy entitlement and therefore those which define abusive action and provide a disciplinary procedure for continued abusive behavior are valid and enforceable. Carolyn Luzader v. West Virginia University, Docket No. BOR1-86-345-2.

4. In part, WVU Hospitals, Inc., Policy No. V.02 seeks to limit unwarranted abusive and disruptive unscheduled employee absences charged to sick leave time and is thus proper in that respect. Carolyn Luzader v. West Virginia University, supra.

5. The University may require medically verified sick leave but such absences will be deemed abusive if the facts and circumstances of the usage ascertain that abuse occurred. Carolyn Luzader v. West Virginia University, supra.

6. Grievant was cognizant of hospital policy and acknowledged past excessive use of sick time; she complied with hospital

requirements that she provide medical verification to justify sick leave usage and no showing was made that grievant's absences charged to sick time were abusive.

7. Neither an institution, individual school, division or department may promulgate policies contradictory to those of the Board of Regents. David Graf v. West Virginia University. Docket No. 30-86-047.

8. WVU Hospital, Inc., Policy No. V.02 contains language which may be construed to limit justified sick leave usage and is otherwise vague and non-specific. By the questionable proviso's own terms, "continued" excessive use of verified ill time only permits supervisory counseling of the employee and should be restricted to that application in regard to BOR employees.

Accordingly, this grievance is **GRANTED** in part and **DENIED** in part. The nonspecific letters of October 1, 1984 and March 5, 1986 shall be removed from grievant's file. The August 1985 letter shall remain in grievant's file to serve as an informational letter and notice to her that absences charged to sick leave must be justified with medical verification and that she may not otherwise abuse sick leave privileges.

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: May 26, 1987

Nedra Koval

NEDRA KOVAL
Hearing Examiner