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HENRY TRUMP

v.

Docket No. BOR-88-080

WEST VIRGINIA UNIVERSITY

D E C I S I O N

Henry Trump was employed as a custodian in Housing and Residence Life at West Virginia University (WVU) until his dismissal on February 1, 1988. Grievant appealed the matter internally and a level two hearing was conducted on three separate occasions, March 16, April 6 and April 25, 1988. A decision adverse to grievant was rendered May 5, 1988 and a level four grievance was filed May 12, 1988.

In the level four grievance filing, grievant's representative indicated the matter could be decided on the record. A partial level two transcript and exhibits were forwarded by WVU officials to the West Virginia Education and State Employees Grievance Board on August 23, 1988 with a letter which stated that the tape recording for the first session, March 16, 1988, was missing

and therefore a transcription of testimony for that day could not be produced. Grievant's representative and the respondent's counsel agreed the entire transcript would not be necessary as they would furnish stipulated facts and/or supplementary argument to fill in the void and these materials were received from the parties October 17 and 26, 1988. However, in mid-November WVU officials notified the Grievance Board that the tapes for the March 16 hearing had been located and a transcript for that day was received on November 23, 1988.¹

Grievant had been assigned to Housing and Residence Life for approximately half of his ten year employment tenure with WVU. He did not dispute his cumulative absences of late and admitted that his overall attendance record was "not too good." He stated at level two that "I miss a good bit." (T.11, 4/25/88).

Efforts to rehabilitate grievant began in December 1986 via his newly instated supervisor, Cynthia Alderson. Ms. Alderson memorialized her counseling session with grievant about his chronic absenteeism and "abuse" of the department's sick leave policy. The counseling letter advised that the problem was placing grievant's job in jeopardy. Exhibit No. 5. Following another period of absences deemed excessive, a first letter of warning was issued to grievant November 2, 1987. Exhibit No. 6. Grievant was told in the letter that if his abuse of leave time and continued chronic absenteeism did not improve he would be subject to further discipline.

¹The transcribed material for each session of the level two hearing was numbered separately and not consecutively from the first session.

Grievant missed four days of work November 16-19, 1987. On November 20, Ms. Alderson orally warned him that his practice of having others call in his absence was not sufficient and he personally must speak with her to report off from work.

On November 30, grievant's sister called to report that he was at the hospital with his infant daughters (twins born November 21) as the parents were concerned with the babies' weights. Grievant did not call off or appear for work the next two days. On December 3 his friend Marty contacted Ms. Alderson to report grievant off and stated that grievant would explain when he returned to work on the 4th. Ms. Alderson memorialized a counseling session with grievant on December 4 in regard to this incident in a report she filed with her supervisor. Ms. Alderson's report implied that she did not accept grievant's explanation that his concern for the infants (one who had a heart condition) could prevent him from remembering his duty to contact her to report his absence from work. Exhibit No. 10.

Also in regard to this incident, Ms. Alderson issued grievant a memorandum letter dated December 4, 1987 and referenced "Warning letter on failure to report off." Exhibit No. 7. She chronicled grievant's failure on December 1 and 2 to report off from work and her unwillingness to accept his friend Marty's telephone report for his (grievant's) absence of December 3, 1987. She stated that the unauthorized absences (three days) constituted grounds for immediate dismissal as per University policy, but

she would waive application of the policy if he would follow the procedures she had outlined for him to report a work absence. The letter concluded that a further instance of his failure to personally report off work as she required would result in immediate termination of his employment.

On Tuesday, January 26, 1988 grievant did not appear for work and did not call in his absence until after the work day commenced. On the morning of January 27 he had a desk clerk at a hospital call Ms. Alderson and explain that he was waiting for emergency treatment for a sore throat, cough and high fever. Exhibit No. 11. Ms. Alderson spoke with grievant about this matter Friday, January 29. On February 1, 1988 Ms. Alderson issued grievant a memorandum referenced "Letter of Termination." She characterized the December 4 letter as a "second letter of warning" and reiterated its proviso that his failure to call off from work as she required would result in his immediate termination.

The respondent's position is that grievant was an unreliable employee whose pattern of chronic absenteeism, abuse of sick leave and failure to report off from work created a health and sanitation problem in his work area and that its efforts to rehabilitate grievant were fruitless. It argues that grievant did not contest or grieve the terms of continued employment offered to him via the December 4 warning letter and he therefore was bound by those terms that one more failure to report off work as instructed would result in his immediate termination. The

respondent urges that the termination of grievant following the January 26 and 27 incident was justified and in conformance with applicable law and policy.

Grievant's representative contends that grievant did not abuse the sick leave policy and for the most part had medical verification for personal illness or that of a family member during the periods in question. He asserts that Ms. Alderson exceeded her authority and discriminated against grievant when she imposed standards on him to report off work which were not required of other employees. Finally, he argues that the Board of Regents Policy Bulletin No. 33 §8.9 states that an employee may not be dismissed for failure to report off for work until he has been issued two letters of warning for that particular infraction. He argues that grievant's supervisor cannot take away grievant's rights to progressive discipline and whether grievant contested or grieved the December 4 letter is of no consequence in this matter.

The record supports a finding that grievant was not always responsible to his position when circumstances forced his absence from work and he did not give adequate notice. However, the respondent's contention that grievant abused the sick leave policy is subject to question. Testimony adduced establishes that grievant's wife was pregnant and experiencing problems with her health by at least June 1987. (T.60, 4/25/88). In early October grievant was injured at work and filed a workers compensation claim, in mid-October his wife was detained in the hospital for pregnancy related difficulties and in late October he had medical

verification for a two-day illness. (T.67-74, 4/25/88). These and other problems extended into November, December and January 1988 following the birth of his twin daughters.

More compelling is grievant's argument that he was denied progressive discipline in this matter. While the respondent advances a theory that grievant was bound by a condition of employment set forth in a December 4 first warning letter for failure to report off, it offers no legal authority to support its argument that grievant's failure to protest the letter constituted a waiver on his part to policy requirements that he be given two written warnings for the infraction.

In addition to the foregoing narration, the following findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. The grievant had a ten year tenure as a custodian at West Virginia University until he was terminated on February 1, 1988.

2. Grievant admitted that he missed a good bit of work and a new supervisor, Cynthia Alderson, began efforts to rehabilitate him in late 1986.

3. Apparently grievant's wife became pregnant in the spring of 1987 and she experienced health difficulties by early summer. These problems and personal illnesses and injury affected grievant's attendance at work and he was counseled and issued a first letter of warning, referenced "Abuse of Annual and Sick Leave," on November 2, 1987.

4. In mid-November grievant prompted his friend Marty to call him (grievant) off from work. Ms. Alderson voiced her displeasure to Marty about grievant's practice of not reporting to her directly. When she tried to reach grievant by telephone, there was no answer after 20 rings. Shortly after that grievant called in and could not explain why he had not answered her call except to say the phone must have been turned off. After this incident Ms. Alderson told grievant that he must personally talk with her to report an absence.

5. Grievant's wife delivered twins on November 21, 1988. Both babies were underweight and one had a heart condition. The babies required medical care for a period thereafter. On November 30, grievant's sister reported him off stating the babies were at the hospital and the parents were concerned. On December 1 and 2 grievant did not report for work or call in his absence. On December 3, Marty called Ms. Alderson to say grievant would report for work on December 4 and explain the situation.

6. Ms. Alderson challenged grievant's explanation of forgetfulness due to concern for his babies when he neglected to report his work absences on December 1 and 2. He had explained to her that he felt he should stay home and help his wife with the babies. She also rejected Marty's call to her on the 3rd as proper notice of grievant's absence for that day. Ms. Alderson deemed the three absences unauthorized and subject to the University's policy as grounds for immediate dismissal. She sent grievant a first warning letter for failure to report off and advised him that one more incidence of his failure to report a work absence to her would result in his immediate dismissal.

7. On the morning of January 26, 1988 grievant untimely telephoned to report an absence from work as he had to repair his furnace. On January 27 Ms. Alderson received a call from a hospital clerk who stated that grievant was waiting for treatment for a sore throat, cough and fever. Ms. Alderson spoke with grievant on January 29 about this incident. She questioned grievant as to why he did not call her until 9:50 on the 26th and did not personally speak to her on the 27th. According to Ms. Alderson's notes memorializing the meeting, he pleaded that his family was upset and he got so busy making arrangements to transfer his children to a friend's house so they would not get chilled and working on the furnace that he was neglectful. He said he could not afford to call a serviceman to work on the furnace and got so chilled himself that he became ill later that night and had to go to the emergency room the next morning. He told Ms. Alderson that he thought she would accept the call from the hospital clerk and that is why he did not speak with her himself. Exhibit No. 11.

8. Ms. Alderson issued grievant a letter of termination dated February 1, 1988. Ms. Alderson rejected grievant's explanations for the two recent absences and stated, "I feel you have not justified your failure to comply with the procedure for reporting your absence on Tuesday, January 26, 1988 and Wednesday, January 27, 1988."

9. Grievant had been issued only one letter of warning regarding sick/annual leave abuse and one letter of warning regarding failure to report off. The two behaviors are separate infractions with separate written procedures for progressive discipline.

10. There were extenuating circumstances between June 1987 and January 1988 attendant to the pregnancy of grievant's wife and the birth of his twin daughters which greatly affected his ability to conform to his department's efforts to rehabilitate him and correct his chronic work absences. (T.9, 3/16/88).

CONCLUSIONS OF LAW

1. Board of Regents Policy Bulletin 35 §8.9 provides that an employee's failure to report off from work shall be a basis for disciplinary action which may include discharge from employment after he or she has been issued two written warnings on the subject.

2. The Housing and Residence Life Department at West Virginia University has written "Absentee Control" guidelines which provide for an employee's possible dismissal after two written warnings have been issued for cumulative absence occurrences.

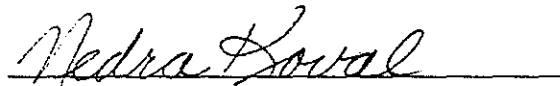
3. An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Powell v. Brown, 160 W.Va. 723, 238 S.E.2d 220 (1977); Mitchell v. West Liberty State College, Docket No. BOR-88-071 (September 30, 1988).

4. In this instance, the University's termination of grievant's employment was procedurally flawed as college officials had issued grievant only one letter of warning for sick and annual leave abuse and one letter of warning for failure to report off from work.

Accordingly, this grievance is **GRANTED** and the respondent is Ordered to reinstate grievant to his custodian position with back pay less any appropriate setoff.

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) Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

DATED: November 30, 1988

A handwritten signature in cursive script, reading "Nedra Koval", is written over a horizontal line.

NEDRA KOVAL
Hearing Examiner