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REPLY TO:
111 - 19th Street
Wheeling, WV 26003
Telephone: 233-4484

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

CARL BOWMAN

v.

Docket No. BOR-88-150

WEST VIRGINIA UNIVERSITY

D E C I S I O N

Grievant, Carl Bowman, is employed as a welder assigned to the Physical Plant Department of West Virginia University (WVU). He filed a level four grievance faulting the terms and application of the Department's sick leave policy after he received an information letter from his supervisor memorializing a counseling session with respect to his use of sick leave over a period of time. A level four hearing was conducted on September 21, 1988 for the purpose of supplementing the existing record developed at level two. Grievant submitted proposed findings of fact and conclusions of law October 13, 1988 and the respondent filed proposals October 20, 1988.

Grievant has been a WVU employee for 29 years and he presently has a seven and one-half hour workday. Present Board of Regents (BOR) policy grants employees 1.5 days sick leave (11.25 hours) per month and these hours may be accumulated without limit. An employee may use sick leave when ill or injured or when a family member is seriously ill or dies. As of early 1988 grievant had a balance of approximately 1000 sick leave hours accumulated.

In the latter half of 1987, grievant used approximately 62 hours of sick leave time. These incidents included several single day and several multiple day absences for reported self-illness. Over 21 hours were taken for family illness and there were four occasions of family illness which were under four hours duration each instance. The first quarter in 1988, grievant used 26.25 hours of ill time, 3.75 hours attributed to family illness. In April 1988, on two separate instances, grievant charged sick leave 7.50 hours and 1.75 hours, respectively.

The Physical Plant's sick leave policy identifies excessive use of sick time upon several standards: 1) more than 22.5 unscheduled absences per quarter (two days per three months); 2) patterns of illness such as sick leave absences which occur the day before or day after a scheduled vacation, weekend or holiday; and 3) all single day absences. The policy identifies enforcement criteria and states that department heads will review an employee's ill time to determine whether the employee's use

of ill time has exceeded the standard(s). A judgement shall ensue as to whether the excess use of sick leave is justified or whether abuse of sick leave is demonstrated. Progressive disciplinary measures are then set forth. The policy concludes with a notice that medical verification of illness does not justify continued excessive use of ill time. Policy language expressly allows for an employee to personally schedule and keep a doctor or dental appointment or to report off on ill time when a member of the immediate family needs emergency/acute care but does not permit a covered employee to charge ill time to accompany a family member to a doctor's appointment.

On May 13, 1988, grievant's supervisor, Charles Root, prepared and issued to grievant a memorandum referenced "Sick Leave Information." The memo memorialized a counseling session on May 6, 1988 on the subject and additionally pointed out that grievant's sick leave use from January 1, 1988 to April 30, 1988 "shows a high use of sick leave with 35.50 hours of absences which apparently did not involve extended medical treatment, hospitalization or recuperation."

Grievant faults the memorandum. He claims he did not really object to a letter stating that he had a high use of sick time during the period in question but he felt intimidated by language in the letter which noted that his usage of sick leave would be reviewed on a continuing basis and which alluded to his possible

dismissal if the problem was not remedied. Grievant stated that he had never "abused" sick leave time thus the memorandum was unwarranted. He explained that he was "doctoring for high blood pressure" at the time in question and hours charged to family illness were also for cause. He explained that his wife had experienced a mysterious ailment which necessitated repeated office visits as the doctor was unable to diagnose her illness until recently. He said he felt it was his duty to assist his wife, who was unable to drive, and to accompany her for the prolonged office visits and tests. He agreed that his sick leave usage improved after he received the memorandum because he is now afraid to accompany his wife and instead sends her in a taxi for treatment.

Grievant further charges that the policy is unfair and discriminatory when applied to older employees because older employees may already have a large reserve of accumulated sick leave at their disposal and at the same time they may have need for more frequent short-term treatment than their younger peers. He also stated that the application of the policy was inconsistent in that some employees who had used more sick time than he in a given time were not reprimanded while he was. He contended that on another occasion an employee who had been in the hospital, supposedly a "justifiable" use of sick leave, had received a counseling letter. He also believes the departmental policy is in conflict with BOR policy which grants the sick leave time because officials identify sick time usage of 22.5 hours as excessive and an employee accumulates 34 hours sick leave during

the three month period subject to review. He believes the policy to be non-specific and vague and to otherwise restrict the use of sick leave in contravention of Board of Regents sick leave entitlement. In his level four filing grievant requested that the letter of counseling be removed from his file and that the Physical Plant sick leave policy be ruled illegal and its use discontinued.

The respondent identified the rationale for its use of a sick leave policy. Due to an absenteeism rate which exceeded the University norm and impacted on the ability of the Physical Plant to meet its work commitments, that Department adopted a policy to curb excessive sick leave absences. Generally, the sick leave entitlement protects an employee from catastrophic or prolonged illness and application of the sick leave policy helps the employer to function efficiently and provides the employee some financial protection should serious illness or injury occur. School officials defended the policy on that basis and denied that grievant was discriminated against with respect to his sick leave usage and counseling. Officials explained that the letter of information issued to grievant was a form letter generated to memorialize events and apprise the employee of concern over the situation. The respondent argues that the Physical Plant sick leave policy has been upheld by the West Virginia Education and State Employees Grievance Board.

Grievant's allegation that he was discriminated against in this matter is not supported by the evidence. Part of his objection to the policy appears somewhat grounded in his disagreement with it as it pertains to his unique circumstances. The policy states that sick leave is not intended for use by employees to accompany family members who have a doctor's appointment but that the employee can charge personal/vacation leave time for that purpose.

Grievant testified that his supervisor permitted him to charge his sick leave time when he escorted his wife for her doctor's appointment. A WVU official explained that while a supervisor may not forbid the employee to charge sick time for such absences, the employee does so at the risk of abusing the sick leave policy. However, the May 3 memorandum which grievant received made no mention of the occasional half-day instances when grievant accompanied his wife to the doctor's office nor did it allege that grievant abused sick leave. Grievant's concern with the issuance of the memorandum in this instance has some basis as does his concern with the "legality" of the policy.

The policy clearly states that unscheduled absences are those absences for which the employee has failed to properly report off from work for illness. The written policy standard for determining excessive use of ill time specifies that use of more than 22.5 hours of unscheduled ill time per three consecutive

months is excessive. However the unwritten standard applied is that any use of ill time in excess of 22.5 hours per quarter will trigger a review. The policy states that excessive sick time usage will be identified and a determination made as to whether the usage was justified. Justified use is not defined in the policy but administrators explain that justifiable sick time usage is for extended serious illness and recuperation. This unwritten standard was applied to grievant and prompted the May 13, 1988 counseling memorandum. Further, the policy does not qualify under what circumstances an employee's use of ill time with medical verification will be deemed abusive. There is an obvious discrepancy in what the policy clearly states and the unwritten standards the department imposes.

The Grievance Board has previously ruled that a public employer, such as West Virginia University, has a legitimate interest in prohibiting abuse of sick leave time, that sick leave is an employee entitlement limited within the parameters of the policy established by the grantor and that a department's sick leave policy may require an employee to furnish verification of illness of one or more days. McCauley v. West Virginia University, Docket No. BOR1-87-088-2 (July 14, 1987); Luzader v. West Virginia University, Docket No. BOR1-86-345-2 (April 20, 1987).¹ However, other holdings require that a institution apply

¹In Luzader, among other things, the specific issue of whether the Physical Plant's sick leave policy was discriminatory was addressed. The decision upheld the University's position that it was not.

only current written policies and that the invocation and reliance upon unwritten and non-specific policies by school officials will not be upheld. Mitchell v. West Liberty State College, Docket No. BOR-88-071 (September 30, 1988); Straight v. West Virginia University, Docket No. 30-86-184-2 (May 26, 1987); Mooney v. Marshall University, Docket No. 06-86-150-1 (July 7, 1986).

According to the respondent, "The West Virginia University Employee Handbook states that units of the University may establish specific procedures and practices to cover their particular circumstances." Proposed Findings of Fact No. 2, 10/20/88 (emphasis added). By respondent's own terms and in accord with the authorities cited above, Physical Plant employees have a right to rely on a policy governing their use of sick time which contains specific, clear and unambiguous terms and an application of the policy which adheres to the provisions therein.

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

FINDINGS OF FACT

1. Grievant is a 29-year veteran employee of West Virginia University's Physical Plant Department. He has accumulated a reserve of over 1000 sick leave hours.

2. The Department's current sick leave policy states that unscheduled (sick leave) absences are those for which an employee does not properly report off due to illness and that excessive use of sick time occurs when an employee uses more than 22.5 hours of "unscheduled ill time" per three consecutive months.

3. During a period of time from January through April 1988, grievant's 38.5 hours of sick leave included several instances in which he accompanied his wife to a doctor's appointment, a use of sick leave clearly prohibited by the department's sick leave policy. Other hours were charged for his own illness and he was not asked to provide medical verification for those occasions. Grievant properly reported off for all absences.

4. On May 6, 1988 Charles Root, grievant's supervisor, counseled grievant about his use of sick leave time, "during the last three quarters." The handwritten note which documents the event also states, "(grievant) was advised that sick leave was ... for care of ill or death of family member and not for routine appointments."

5. On May 13, 1988 Mr. Root issued grievant a "form letter" memorandum which stated that grievant's records from January 11, 1988 through April 30, 1988 showed "a high use of sick leave ... which apparently did not involve extended medical treatment, hospitalization or recuperation." The memorandum did not allege that grievant abused sick leave.

6. The handwritten and formal typewritten documentations of grievant's use of sick time were inconsistent.

7. Grievant objected to the May 13 memorandum and to certain other terms and conditions of the sick leave policy as it is written and as it is applied to him and others.

8. Evidence in this grievance does not preponderate that the department applied its sick leave policy in a discriminatory fashion as grievant alleges.

9. The department's unwritten policy practice and application is that any sick leave absence of over 22.5 hours per quarter may trigger review. Current written policy fails to specifically state the standard for justified use of sick leave time and inadequately explains the specific circumstances upon which verified illness will be deemed abusive or unjustified. The May 13, 1988 memorandum issued to grievant was based on unwritten departmental sick leave usage standards.

10. The respondent concedes that units of the University may establish specific procedures and practices to cover their particular needs.

CONCLUSIONS OF LAW

1. A public employer has a legitimate interest in prohibiting abuse of sick leave time and it may establish a sick leave policy which defines abusive action and establishes a disciplinary procedure for continued abusive behavior. Luzader v. West Virginia University, Docket No. BOR1-86-345-2 (April 20, 1987).

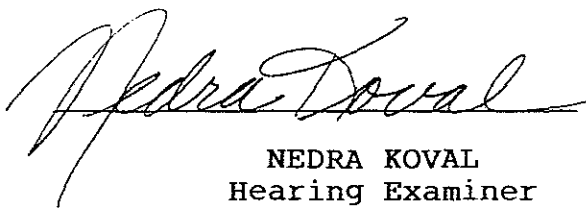
2. Reliance upon unwritten policies by school officials is not conducive to good employee relations, has the inherent appearance of unfairness and is not condoned by the courts. State ex rel. Hawkins v. Tyler Co. Bd. of Educ., 257 S.E.2d 908 (W.Va. 1981); Beverlin v. Bd. of Educ. of Lewis Co., 216 S.E.2d 554 (W.Va. 1975); Mooney v. Marshall University, Docket No. 06-86-150-1 (July 7, 1986).

3. A Board of Regents institution may apply only current written policies made available to its employees and the invocation and reliance upon unwritten and non-specific policies by school officials will not be upheld. Mitchell v. West Liberty State College, Docket No. BOR-88-071 (September 30, 1988); Straight v. West Virginia University, Docket No. 30-86-184-2 (May 26, 1987); Mooney v. Marshall University, Docket No. 30-86-184-2 (July 7, 1986).

Accordingly, the grievant's request that the counseling letter be removed is GRANTED. With respect to the sick leave policy at issue, respondent is Ordered to review the Physical Plant sick leave "Policy and Procedures" and correct misstatements therein and to reduce to writing all standards utilized and applied.

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 in order that the record can be prepared and transmitted to the court.

DATED: November 14, 1988



NEDRA KOVAL
Hearing Examiner