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TED HALL

v.

Docket No. 89-H-69

DEPARTMENT OF HEALTH

DECISION

Grievant Ted Hall, a health service worker for Respondent Department of Health at Huntington State Hospital, grieved Respondent's refusal to grant him 22 days of annual leave in December 1988. His grievance was denied at Level I on December 28, 1988, and at Level II on January 16, 1989. At Level III a hearing was held on February 7, 1989, and the decision denying the grievance was issued February 15, 1989. Grievant filed at Level IV two days later and a hearing was held April 3, 1989.¹ Proposed findings of fact and conclusions of law were received from the parties on and before May 5, 1989.

The facts are not in dispute. Grievant, employed by Respondent for approximately 24 years, earns yearly 24 days

¹A hearing scheduled for March 22, 1989, was continued at the request of Respondent.

At the hearing of April 3, 1989, the parties agreed that the evidentiary record would consist of the records of the Levels III and IV hearings.

of annual leave and can carry forward from one year to the next no more than 40 days unused annual leave. See 16.03 of West Virginia Civil Service Commission's regulations (hereinafter "CSR"). He carried over slightly less than 39 days of annual leave from 1987. With the 24 days earned in 1988 he accrued a total of approximately 63 days leave, 23 of which he had to use in 1988 in order not to lose them.

Grievant used one day of annual leave prior to the Fall. In September 1988 Grievant requested that he be allowed to take all of November, or 22 days of annual leave, and his request was granted. However, he became ill on September 26 and remained on sick leave through November 30, 1988. On November 28 he requested that he be granted from that day through December the 22 days of annual leave he would otherwise lose. His request was denied solely on the basis of Huntington State Hospital's Policy 12A.5, "December Annual Leave and Holidays," which provides as follows:

Background: Emergency staffing standards as established by the Department of Nursing will be maintained on all units on all shifts to include weekends and Holidays. During November and December Holiday period, all employees are authorized 5 Holidays. Extra days are frequently granted at the discretion of the Governor. In order to grant the authorized Holiday leave to all Nursing Department employees as closely as possible to the actual Holiday, it is necessary that no annual leave be granted during the month of December. Therefore, the following policy will be followed:

1. No annual leave will be granted in the month of December for any Nursing Department employee.
2. All annual leave which must be used or lost by Civil Service regulation must be taken prior to December 1 of each year.

3. Every possible effort will be made by Head Nurses and other supervisors to grant Holiday leave time as close as possible to the actual Holiday date.
4. Emergency annual leave will be granted only by the Director of Nursing or designee.

Grievant's primary argument is that this policy is unreasonable and contrary to the following provisions of CSR 16.03:

(a) Amount, Accrual-Except as otherwise noted in these rules, each employee shall be entitled to annual leave with pay and benefits....

(c) Requesting, Granting-Accrued annual leave shall be granted at such times as will² not materially affect the agency's efficient operation.

Respondent, in defense of the policy, argues that, because of the number of holidays in November and December, it is necessary not to allow any nursing staff to take annual leave in December in order to maintain adequate staff levels.³ This is also the rationale for the policy stated

²Grievant's representative initially argued additionally that Grievant should have been allowed to take annual leave rather than sick leave during the time he was sick. However, Grievant himself denied that he wanted any conversion of sick leave to annual leave. Accordingly, no consideration is given the argument.

³Respondent additionally argued,

Furthermore, grievant's request for annual leave was denied: (1) because grievant had not officially returned to duty at the time he made the request for annual leave for the month of December and thus, as he was not an active employee, the request was invalid, and (2) staffing levels for the month of December mandated denial of the leave request in order to maintain adequate nursing care staff.

(Footnote Continued)

in its "background" paragraph. Respondent therefore contends that the policy is not inconsistent with CSR 16.03 because without implementation of the policy the hospital would not only be inefficiently run but would be unable to provide proper patient care. Respondent argues that the policy has always only been applied to direct care employees.⁴

(Footnote Continued)

The first contention is frivolous. Not only is the contention not supported by the facts, for the evidence establishes that Grievant was denied the leave request because of policy §12A.5; the undersigned finds no support in the Civil Service Regulations for Respondent's reliance on an "active/inactive" basis on which rests the contention that an employee on sick leave cannot request annual leave. Regarding Respondent's second contention, there simply is no evidence supporting it; rather, the evidence establishes that Grievant was denied the leave because of the policy without regard to whether the need of adequate staffing required denial of the leave.

Finally, while Grievant's supervisor, Head Nurse Margaret Myers, stated that she required annual leave to be submitted by the 20th of the prior month so that it could be on the next month's schedule and Grievant's annual leave request did not comply with that requirement, in that Ms. Myers did not testify that that was the reason for denying Grievant his leave and Respondent does not rely on Ms. Myers's requirement as the basis for denial of the leave, this decision does not address any issue that requirement could give rise to.

⁴Grievant contends that the policy was arbitrarily applied because other nursing department employees were allowed annual leave in December. However, there was no evidence showing that any nursing department employee allowed December leave was involved in direct care, so there was no showing of unfair accommodation or otherwise arbitrary application of the policy. While the policy fails to state on its face that it applies only to direct care employees, any argument of vagueness need not be addressed due to the outcome herein.

Under CSR §16.03(c) an employer can deny an employee's request for annual leave when it would "materially affect the agency's efficient operation." Moreover, it is undeniable that an agency can promulgate policy if that policy is required for it to have an efficient operation. However, in order for a policy such as §12A.5 to be valid it must actually be necessary for such efficient operation since CSR §16.03 mandates that otherwise "annual leave shall be granted."⁵ Head Nurse Margaret Myers, Grievant's supervisor, and Personnel Director Jack Sells testified that the policy was promulgated⁶ because so many nursing employees were requesting annual leave at the end of the year. Granting the leave could leave the hospital short-handed; denying it could mean that the employee would lose annual leave.

In the absence of the policy, CSR §16.03 already allowed Respondent to deny any employee annual leave whenever its operations required it. Respondent was therefore free to deny all leave in December if the hospital's needs actually required it. The policy, on the other hand, mandates that an employee's request for annual leave be denied even if the hospital's operations would not be

⁵It is well-settled that "shall" must be interpreted as requiring, or mandating, action. See Weimer-Godwin v. Bd. of Educ. of Upshur Co., 369 S.E.2d 726, 730 (W.Va. 1988).

⁶Mr. Sells testified that the policy was put into effect November 25, 1987.

materially affected by his or her absence. Accordingly, the only authority Policy 12A.5 adds to the authority already granted under CSR §16.03 to deny leave whenever its operations require it is the authority to deny leave when its operations do not actually require the employee's presence. Denying leave when operations do not actually require it is contrary to CSR §16.03.

Moreover, while Respondent's witnesses testified that the policy was intended to prevent employees' losing accrued leave at the end of the year, application of the policy actually makes it more likely that employees would lose annual leave, for the policy simply shortens the amount of time during which an employee may take annual leave. Grievant's situation exemplifies that the policy exacerbates rather than answers the problem of employees' losing annual leave because of inability to take it in December. The only purpose the policy has served is that it notifies the employees that they must use their leave by a date certain, the end of November, or lose it. But this purpose could be served by clear notification that it is unlikely that leave will be granted in December because of the hospital's needs and that the employees are therefore advised to request their leave earlier. That Policy 12A.5 does not redress the problems it purports to correct renders it unreasonable and arbitrary.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate:

Findings of Fact

1. Grievant, a health service employee of Respondent at Huntington State Hospital, requested annual leave during December 1988.

2. Grievant's request was denied on the basis that Huntington State Hospital's Policy 12A.5 prohibited the granting of annual leave for direct care nursing staff during the month of December.

3. Due to the denial of his leave in December Grievant lost 22 days of annual leave because he could not carry over to the next year more than 40 days of annual leave.

4. Policy 12A.5 was promulgated because employees were requesting more days off in December than the needs of the hospital could allow.

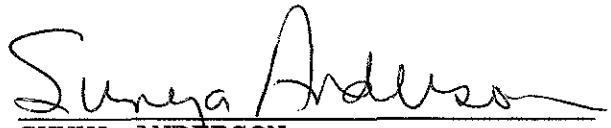
Conclusions of Law

1. CSR §16.03 mandates that an employee be granted annual leave unless his or her absence will "materially affect the agency's efficient operation."

2. Policy 12A.5's blanket proscription against allowing annual leave in December is contrary CSR §16.03 because it requires disallowing annual leave in December even when the hospital's operations do not in fact require such disallowance. Furthermore, in that Policy 12A.5 does not redress the problem of employees' waiting until the end of the year to request annual leave and losing it, it is unreasonable and arbitrary. Policy 12A.5 is accordingly invalid.

Accordingly, the grievance is **GRANTED**. Respondent is hereby ordered to compensate Grievant for 22 days of annual leave.

Any party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Cabell County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-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.


SUNYA ANDERSON
HEARING EXAMINER

DATED: May 18, 1989