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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
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JAMES MCELFRISH

v.

Docket No. 89-BOR-505

UNIVERSITY OF WEST VIRGINIA/WEST VIRGINIA UNIVERSITY

DECISION

James McElfresh, a senior custodian employed by Respondent University of West Virginia¹ at the West Virginia University (WVU) Hospitals, Inc. (WVUH), in Morgantown, filed the following grievance at Level I:

The grievant received a "First Warning Letter" regarding reporting off. The letter should be removed.

After denials at Levels I and II² and apparent bypass of

¹ As of July 1, 1989, the West Virginia Board of Regents was disbanded and replaced by the University of West Virginia Board of Trustees. References to either name in this Decision should be understood to be to what in essence is the same organization.

² The Level I and II decisions, and the Level II hearing transcript with attached Union Exhibits 1 through 4 and Management Exhibits 1 through 4 have been provided at
(Footnote Continued)

Level III,³ Grievant advanced his claim to Level IV August 29, 1989, for resolution on the record compiled below. With the presentation of fact-law proposals from Grievant on October 16, the matter is mature.⁴

It is stipulated that on two occasions, namely, June 9 and 11, 1989, Grievant did not contact Respondent to report his absence from work until after the start of his daily shift. Specifically, on June 9, Grievant, who was to have commenced duty at 7:00 a.m., telephoned his superior at 8:20 a.m. to report he had overslept, he would not be in and he

(Footnote Continued)

Level IV. Confusingly, the Level II decision lists nine joint exhibits, four Grievant's exhibits, and one exhibit from Respondent; however, a review of the transcript reveals four documents were submitted by each party during the Level II hearing, with no joint exhibits being offered.

The aforementioned list includes a brief explanation of each of the exhibits referenced, and it appears clear that none of them, had they been provided, would have altered the outcome of this case. This is true even of WVUH's Housekeeping Department Policy IV.06, under which, according to Grievant, "management issued the First Letter of Warning." Proposed Finding of Fact 12.

³ W.Va. Code §18-29-4(c) gives grievants who are "classified employees of. . .any state institution of higher education. . .the option to proceed directly to level four [from Level II]." Apparently, Grievant chose this option and sidestepped Level III, the University of West Virginia Board of Trustees, to Level IV, this Grievance Board.

⁴ By correspondence of September 18, the parties were advised they would each be required to prepare and offer proposed findings of fact and conclusions of law by October 15. Despite the fact that October 15 is past, Respondent has failed to present its version. Since October 15 was a Sunday, Grievant's submission was timely submitted.

wanted to be charged holiday time for the day.⁵ Two days later, he first advised his employer, by an 8:10 a.m. call, that his car had broken down on the interstate highway. He did not appear at all for his shift on that date, although he had not stated he would not be in.

Grievant concedes that Respondent's policy provides that an employee must report-off prior to the commencement of his shift, but argues that the "first letter of warning" placed in his personnel file was an inappropriate response to his violations. Instead, he urges the applicability of WVUH Policy V.171, which provides, in pertinent part:

SICK LEAVE
WVUH EMPLOYEES ON
BOARD OF REGENTS PAYROLL

POLICY

- A. The Use of Sick Leave. . . "Sick leave may be used when ill or injured or when a member of the immediate family is seriously ill or dies. . . . Sick leave also may be used for doctor or dentist appointments which are pre-arranged and approved in advance by the supervisor."
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- B. Verification of Disability: "An employee is required to notify his or her supervisor immediately if ill or unable to work for any reason. The notification must be before the employee's normal starting time and should include the approximate length of the illness."

⁵ According to the Level II testimony of Mr. Crae Clements, Grievant's immediate supervisor, holiday time generally must be applied for at least two weeks in advance.
T. 23.

WVU Hospitals Policy: The employee (under usual circumstances) must call in to a designated supervisor to report off for illness. At that time, the designated person receiving the call should ascertain the nature of the illness and the estimated duration of absence. Advance notice may be required according to departmental policy. Failure to report in advance will result in an unexcused absence."

PROCEDURE

. . .
B. Enforcement of Standards for Usage of Ill Time

. . .If abuse of sick leave is identified, the following procedure will be followed:

1. A letter of information will be sent to the employee. . .to inform him/her of use of sick leave. This letter will not be sent to Office of Personnel for the permanent file but will be maintained in the department file for future reference if necessary. The letter of information will serve as verification of counselling to the employee regarding use of sick leave. At that time, the employee will be informed that his/her use of sick leave will be reviewed on a routine basis.

2. Upon documentation of a second incident, a first warning letter will be sent. The third incident will warrant a second warning letter and a fourth incident will warrant termination. . . .

Samples of a letter of information and first and second warning letters are appended to Policy V.171. Grievant's position is that he never received a letter of information, or the informal counselling evidenced thereby, so the harsher first letter of warning must be invalidated. He specifically points to the portion of Policy V.171, requiring an employee to immediately notify his supervisor if he finds himself unable to work "if ill or. . .for any reason."

T. 27.

Respondent counters that the incidents of June 9 and June 11 do not involve the use of sick leave or its abuse, and that Policy V.171 is thus irrelevant. Instead, it holds forth the following policy statements as applicable:

From West Virginia Board of Regents (BOR) Classified Employees Handbook, Section 7.3:

Absence from Work

An employee must notify his/her immediate supervisor and follow established procedures for absences from work. Under certain conditions disciplinary action may result when the employee provides an invalid reason for an absence. [Cite omitted].

From BOR Policy Bulletin 35, Procedural Rule 18-26, Section 8.9:

An employee is required to notify his supervisor immediately if ill or unable to work for any reason. The notification shall be given to the immediate supervisor prior to the employee's normal starting time and should include the approximate length of absence. Following two written warnings, failure to report off from work shall be a basis for disciplinary action, which may include suspension, demotion, or discharge.

From WVU Employees Handbook, "Disciplinary Action," p. 52:

Written Warnings

Written warnings may be given an employee when a . . . supervisor decides that the nature of the offense required such action. Copies will be forwarded to the Office of Personnel for inclusion in the employee's record unless review of the case causes them to be removed.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant, due at work at WVUH at 7:00 a.m. on June 9, 1989, did not appear on time and did not call in until 8:20 a.m. He advised that he had overslept, would not be in and wished to claim a holiday.

2. Grievant, due at work at WVUH at 7:00 a.m. on June 11, 1989, did not appear on time and did not call in until 8:10 a.m. He reported that his car had broken down on the highway. Although he did not indicate he would be off his entire shift, he did not come to work at all that day.

3. On June 20, Respondent, due to these two incidents, placed a "First Warning Letter" in Grievant's personnel file. This "Letter" is the first step of a progressive discipline program.

4. The parties have stipulated that Grievant violated Respondent's policies by failing to call prior to the start of his shift on each of June 9 and June 11.

5. Grievant's "major [and sole] contention is that V.171 is the controlling policy and that the hospital has failed to follow that policy." T. 28.

CONCLUSIONS OF LAW

1. In order to prevail, a grievant must establish the allegations of his claim by a preponderance of the evidence. Stover v. Kanawha Co. Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

2. WVUH Policy V.171 relates exclusively to sick leave and its abuse and is thus inapplicable to this case, which does not involve sick leave.⁶

3. "Neither an institution, individual school, division or department may promulgate policies contradictory to those of the Board of Regents." Straight v. WVU, Docket No. 30-86-184-2 (May 26, 1987); see also Howard v. MU, Docket No. BOR-88-094 (Oct. 18, 1988); Graf v. WVU, Docket No. 30-86-047 (Sept. 26, 1986). No such conflict is apparent among the BOR, WVU and WVUH policies of record, which support that Respondent acted within its authority in placing a "First Letter of Warning" letter in Grievant's personnel file.⁷

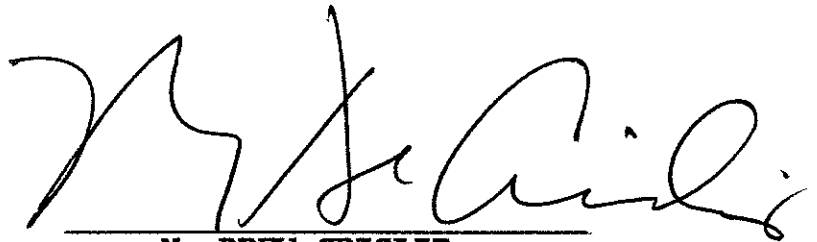
⁶ Grievant's argument that the policy relates to reporting off work "for any reason" is without merit. When that phrase is read in context, it is clear that the "reasons" referenced are limited to the other justifications for utilization of sick leave besides personal illness, i.e., immediate-family death or serious illness or doctor or dental appointments.

⁷ Respondent also cited the following language from the WVU Employees Handbook, at p. 34:

(Footnote Continued)

Accordingly, this 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. 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.



M. DREW CRISLIP
HEARING EXAMINER

Date: November 6, 1989

(Footnote Continued)

An employee is required to notify his or her supervisor immediately if ill or unable to work for any reason. The notification must be made before the employee's normal starting time and should include the approximate length of the absence. Failure to report off from work for illness is cause for disciplinary action which may include suspension, demotion or discharge.

While this may have some relevance to the within case, its reference to discipline relates only to failure to properly report off work "when ill." Thus, at least that portion of the excerpt, like Policy V.171, is inapplicable.