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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**

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**BRENDA MOORE**

**v.**

**Docket No. 89-H-013**

**WEST VIRGINIA DEPARTMENT OF HEALTH**

**D E C I S I O N**

Grievant Brenda Moore had been employed by respondent Department of Health as a Health Service Worker at Colin Anderson Center (CAC) from approximately 1986 until her dismissal, by notice letter dated December 21, 1988, on charges of abandonment of position. Grievant protested respondent's action and a level four hearing was conducted March 22, 1989<sup>1</sup> pursuant to the expedited grievance procedures of W.Va. Code §29-6A-4(e). Rein Valdov, Administrator of CAC, and Betty Barron, Personnel Officer at CAC, testified on behalf of respondent. Grievant and her stepdaughter, Sha Yoho, testified on her behalf. Proposed findings of fact and conclusions of law were submitted by grievant prior to the hearing and respondent's proposals were filed April 3, 1989.

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<sup>1</sup>The parties continued hearings scheduled for February 2 and 24, 1989, respectively.

The basic facts leading to the dismissal are as follows: Grievant requested time off from work but was not given approval by any CAC authority. She missed four scheduled days and did not notify CAC officials of her intent to return to work when next scheduled despite having learned of possible disciplinary action for failure to report to work.

Respondent argues that grievant's failure to appear for work for four scheduled days and failure to notify CAC officials of her absence constituted abandonment of her position for which it had just cause and authority to terminate her employment. Conversely, among other things, grievant maintains and argues that she was entitled to an emergency leave to attend to a grave family illness and her dismissal was without just cause and violative of respondent's policy of progressive discipline.

The specific factual circumstances of the absence were reported differently by the parties. Mr. Valdov testified that on December 15, 1988 he was given a message that grievant had telephoned to request a personal leave of absence.<sup>2</sup> He stated that his facility was anticipating certification review and it was absolutely essential that employees report to work in order that the agency be prepared for review. When he returned grievant's call to deny the request for leave, grievant was not

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<sup>2</sup>Valdov testified that he had not been informed an emergency situation existed with grievant but admitted under cross-examination that he had been told that grievant indicated she had "illness to take care of."

home and he spoke with a baby-sitter tending grievant's young children. He left a message for grievant that personal leave could not be granted. He followed his telephone call with a letter, dated December 16, 1988, in which he denied the leave request and counseled grievant that disciplinary action would follow if she did not appear for work as scheduled.

Grievant did not appear for work as scheduled December 16, 17, 18 or 19<sup>3</sup> and she made no further contact with any CAC official, according to Valdov. Mr. Valdov testified that when grievant failed to respond to his December 16 letter, report to work or call the facility, he made the decision to terminate her.

Grievant's testimony provided more details about the circumstances which prompted her absence. She testified that when she called CAC on December 15, she told her supervisor, Paul Underwood, she needed four or five days off work as she had just gotten word that her stepdaughter had given birth and mother and infant were in serious condition. She said she told Underwood the baby had a blood infection, was being transferred from the birth hospital for specialized care and was not expected to live. She said she advised Mr. Underwood that she must leave for Richmond, Virginia, because her stepdaughter

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<sup>3</sup>According to unrebutted testimony, grievant was scheduled for a holiday leave day December 20. December 21 and 22 were her regular days off and she was scheduled for another holiday December 23. Thus her next regularly scheduled workday was Thursday, December 24, 1988.

needed her.<sup>4</sup> She testified that Underwood told her she had exhausted all her leave days and she would have to ask Mr. Valdov about a personal leave of absence.<sup>5</sup> She said her call was transferred to Mr. Valdov's office but he was in a meeting. Grievant said she waited for his return call approximately one hour and then departed for Virginia. She said she returned to her home late December 19 but did not call CAC officials or respond to Mr. Valdov's letter as she was not scheduled to work until December 24. She said she received the dismissal notice December 23, 1988.

Grievant proposes and argues that Civil Service regulations provide that an employee may use accumulated annual leave for personal illness or an illness of a family member when the employee has exhausted all sick leave and her two-and-one-half annual leave days should have been applied to her absences of December 16, 17 and 18. Wrongdoing on her part, if any, would include only her absences for the remaining one-and-one-half days which should have been charged as unauthorized leave per respondent's policy on the matter. She urges that respondent's

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<sup>4</sup>Grievant's stepdaughter, Sha Yoho, corroborated grievant's account of the family emergency. Grievant also produced a note from Mary Washington Hospital in Virginia which verified that she was attending her stepdaughter and Ms. Yoho's infant son December 19, 1988. Joint Ex. No. 4

<sup>5</sup>According to respondent's personnel documents, grievant had not exhausted her annual leave and had 2.5 days remaining at the time of her request for emergency time off from work. However, grievant relied on what Mr. Underwood told her and therefore requested the personal leave of absence. Joint Ex. No. 1

policy for progressive discipline in matters of absenteeism/abuse of leave was the appropriate measure to be applied to her unauthorized leave. Grievant requests reinstatement to her position with back wages and intact seniority.

Respondent claims that policy pertaining to emergency sick leave did not apply to grievant in the instant situation because she had requested personal leave, not sick or annual leave, did not have four days annual leave and did not verify her reasons for leave by a physician's statement. It argues that progressive disciplinary action pertains to abuse of sick and annual leave and does not affect personal leave of absence.

Respondent did not meet its burden of proof and show just cause for grievant's dismissal inasmuch as its application of policy authorizing dismissal of an employee for abandonment of position was not warranted under the circumstances. Grievant's position with respect to how respondent might have properly dealt with her absence is more compelling.

It is clear from the evidence that, in the first instance, grievant's supervisor erred when he informed grievant she had exhausted all leave time and therefore had to request a personal leave of absence. Mr. Valdov's concerns for CAC were valid, but grievant's entitlement to emergency leave and use of accrued annual leave for the reported life-threatening illness of a family member takes precedence. Moreover, had Mr. Valdov further investigated the situation and questioned Mr. Underwood

about grievant's "illness" problem, he would have known of the urgency of the situation.

However, grievant did not use good judgement in the matter either. Grievant should have contacted CAC officials as soon as possible to inform them of her intent to return to work December 24. While grievant's error of judgement further strained communications between her and Mr. Valdov, an error of judgement is not cause for dismissal under the circumstances of this record. See Totten v. Board of Educ. of County of Mingo, 301 S.E.2d 846 (W.Va. 1983). Respondent acted in haste to dismiss grievant, who had never been previously disciplined for leave abuse or absenteeism, without first investigating the circumstances and establishing that her absenteeism was permanent and not temporary as per her December 15 request.

In addition to the foregoing narration, the following specific findings of fact and conclusions of law are made. Proposed findings and conclusions of the parties have been analyzed and considered and are incorporated herein to the extent that they are consistent with the probative evidence and the determinations of the undersigned hearing examiner.

#### FINDINGS OF FACT

1. Grievant was employed by respondent as a health service trainee at the Colin Anderson Center (CAC) on or about November 16, 1986. In July 1988, grievant was promoted to health service worker and continued in her employment until her

receipt of respondent's dismissal notice dated December 21, 1988.

2. On December 15, 1988, grievant telephoned her supervisor at CAC to report off from work for several days due to a life-threatening illness of a family member which required travel to the Richmond, Virginia area. She was erroneously told she had exhausted all leave time and advised to contact CAC's administrator, Rein Valdov, to request a personal leave of absence. Grievant complied but Mr. Valdov was not available and she was told he would return her call. Grievant waited approximately one hour for the administrator's call and then left for Virginia, where her stepdaughter and newborn step-grandchild were hospitalized in two separate care facilities.

3. When grievant requested the emergency leave on December 15, 1988, she had exhausted all her sick leave but she had two-and-one-half days of annual leave remaining. Mr. Valdov was given a message that grievant had requested a personal leave of absence. He knew nothing of her annual leave reserve.

4. Valdov, who had not been fully informed that grievant's "illness" request was due to a life-threatening family health emergency, returned grievant's call after her departure. Mr. Valdov needed all available employees on-the-job for certification review purposes. He informed grievant's baby-sitter that grievant's request for leave could not be granted.

5. Mr. Valdov memorialized the call and statement by letter to grievant on December 16, 1988 and counseled her that

"we would take necessary disciplinary action" if she did not report for work as scheduled. Joint. Ex. No. 1. Respondent's administrator did not inform grievant that the contemplated "disciplinary action" might be discharge from her employment.

6. Grievant missed four scheduled work days December 16, 17, 18 and 19. She returned home from Virginia on December 19 and was not scheduled to return to work until December 24, 1988. However, she did not respond to Mr. Valdov's December 16 letter or contact CAC officials to inform them of her intentions to return to work when next scheduled on December 24.

7. By letter dated December 21, 1988, Mr. Valdov dismissed grievant without any further investigation on why grievant had originally requested the leave and without knowing whether she would appear for work when next scheduled several days subsequent to the date of dismissal. His action was premised on his perception that grievant's failure to respond to his letter of December 16, unauthorized four-day absence and failure to notify CAC amounted to her abandonment of her position.

8. Prior to her discharge, grievant had never been the subject of any discipline, verbal, written or otherwise, for abuse of leave, absenteeism or unauthorized leave. At no time prior to December 16, 1988 had grievant ever taken an unauthorized leave of absence.



## CONCLUSIONS OF LAW

1. Pursuant to Section 16.03(h) of the Civil Service Regulations, an employee must be granted any or all accumulated annual leave for illness in the employee's immediate family, including stepchildren, when the employee's sick leave is exhausted. Such leave must be verified if it extends beyond three days. Civil Service Regulations Section 16.03(h).

2. Reasons for absence and use of emergency annual leave must be reported by telephone at least thirty minutes before the employee is scheduled to report for duty on each day of such leave. Unless satisfactory emergency reasons are provided in writing by the employee within two days after absence, the incident will be regarded as unauthorized absence or leave and shall be cause for disciplinary action. Corrective and progressive steps of discipline can be used by the Department of Health for unauthorized absences. Department of Health Personnel Instructions 2630 (March 5, 1979); Civil Service Regulations Section 16.06.

3. An employee's taking of emergency annual leave for bona fide sick leave purposes, after a timely verbal request which was improperly denied by the employing agency, does not constitute an abandonment of position or cause for dismissal, especially where the employee gave notice that the anticipated absence was for only a few days. Item 24, Appendix A,

Disciplinary Action Guidelines, Department of Health Personnel Instruction 2750 (December 13, 1985); Civil Service Regulations Section 13.02; W.Va. Code §29-6-10(12).


4. Grievant's absence from work, prompted by the near fatal illness of her stepdaughter's newborn child, was due to extenuating circumstances beyond her control. Grievant's absence from work after she had exhausted her two-and-one-half days of annual leave cannot serve as grounds for discharge under W.Va. Code §28-6-10(12) where her absence was due to these extenuating circumstances and respondent had progressive disciplinary recourse to rehabilitate grievant's error of judgement.

5. Respondent did not meet its burden of proof that the discharge of grievant was for good cause within the meaning of W.Va. Code §29-6-10(12).

Accordingly, the grievance is **GRANTED** and respondent Department of Health is Ordered to reinstate grievant to her position with restoration of seniority, benefits and back wages less appropriate set off.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Pleasants 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.

DATED: May 22, 1989

  
NEDRA KOVAL  
Hearing Examiner