WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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REBEKAH MORRISON

v. Docket No. 90-H-013

WEST VIRGINIA DIVISION OF HEALTH/HUNTINGTON STATE HOSPITAL

D E C I S I O N

Rebekah Morrison, formerly a Health Service Worker (HSW) for Respondent West Virginia Division of Health at its Huntington State Hospital (HSH) facility, initiated the following grievance at Level IV on January 11, 1990:[1]

> I am not in agreement with the termination or reasons for my termination. I wish to be reinstated and all articles pertaining to my dismissal removed from my file and all pay reinstated and time reinst[ated].

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[1] Since the grieved personnel action herein is an employment termination, the expedited procedure of W.Va. Code §29-6A-4(e) is available to Grievant.

On March 12, a hearing was conducted at HSH.[2] The parties opted not to present fact-law proposals, so the matter is mature for disposition.

Grievant was employed by Respondent continuously from April 16, 1980, until her termination on January 11, 1990.

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[2] A February 15 hearing was continued due to circumstances of Grievant's representation. On that date, Respondent's counsel and a witness appeared in Charleston for Level IV hearing; the undersigned also fully expected for the hearing to proceed that day. Although Grievant's representative had previously inquired about the possibility of continuance, she had not, as requested, contacted either Respondent's attorney or the undersigned to confirm her desire for delay. She later admitted she fully understood the hearing would still be held on February 15 if she did not telephone the undersigned by the end of the day, February 14, which she concededly did not.

On February 15, Respondent's counsel made two motions: first, that the case be dismissed for failure to prosecute, and second, that Grievant's union be required to reimburse Respondent for the mileage and salary expenses of its witness, Keith Ann Dressler, for time and travel on that day. Grievant's representative was promptly made aware of these motions and that at least the latter one would be held in abeyance until March 12 so that she could present argument and/or evidence in opposition; the dismissal requested was denied on February 22. At the March 12 hearing, after Grievant's representative was given opportunity to respond to the remaining motion, it was granted to the extent that District 1199 was ordered to reimburse Respondent twenty dollars (100 miles x $0.20). Grievant's consultant was allowed an additional period, until March 30, to provide written opposition to the remainder of the motion, and was informed it would be considered she had no objection thereto if nothing was by then forthcoming. In the meantime, Respondent's attorney advised all concerned that the salary paid Ms. Dressler by Respondent for the period in question was less than $20.00, and Grievant's representative, to date, has registered no written objection. Therefore, in accordance with the agreement reached at the hearing, it is deemed that Grievant's union has consented to reimburse Respondent $19.84 to cover Ms. Dressler's wages for the morning of

(Footnote Continued)

It is uncontroverted that she had never been subjected to employee discipline until May 1988, when she was informally counselled for problems with her usage of sick-leave time, see Respondent's Exhibit 6. This was to be but the first installment in a pattern of warnings and suspensions, Resp. Ex. 2-5, culminating in her dismissal, Resp. Ex. 1. Grievant does not allege that Respondent failed to correctly apply its own policies or the regulations of the West Virginia Division of Personnel (Personnel) regarding leave time and progressive discipline.[3] However, she characterizes those authorities to be unreasonable insofar as they required her to provide a doctor's excuse for each instance of illness-provoked work absence. In support of this contention, she cites her low HSW salary; her doctors'[4] unwillingness to

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(Footnote Continued)
February 15, 1990, and it is ordered to give effect to that consent, and additionally to pay the $20.00 in mileage expenses, no later than May 31, 1990.

On April 27, 1990, Ms. Ball orally informed the undersigned she found a problem with the union's being required to pay any of Respondent's costs; to the extent this was an objection, it is overruled as untimely.

[3] In particular, see Personnel Rules and Regulations, Sections 13.02, "Dismissals," 13.03, "Suspensions," 16.05, "Suspected Leave Abuse," and HSH Policy & Procedure Manual Sections 45D3, "Monitoring Use of Sick Leave," and 45C1, "Disciplinary Action."

Another recent Grievance Board decision, McCracken v. W.Va. Dept. of Health, Docket No. 89-H-720 (Mar. 27, 1990), also dealt with leave abuse and discipline in the state hospital system.

[4] Three doctors are mentioned in the record: Dr. Szendi, an orthopedic surgeon; Dr. Haught, a chiropractor; and Dr. Matheny.

provide her with a written excuse without examining her, and at a cost; her inability to leave her home on some occasions due to a back/neck affliction; her lack of a phone at home; and that often, her sick leave was precipitated by injuries she suffered in the pursuit of her duties at HSH. Ms. Morrison explained she was off work and on Workers' Compensation benefits for an extended period on two to four occasions since 1982. She also testified that she had had a "hot appendix" in November 1988, which necessitated emergency surgery and a recuperation period, and that many of her work absences during 1988 were related to her ailing appendix.

On May 12, 1988, R. Golice, R.N., Grievant's immediate supervisor, met with her to discuss problems with her work attendance from February 9 until May 4, 1988. During this period, Grievant used more than 65 hours in sick leave. The "General Agreement from Discussion," as recorded on Respondent's Exhibit 6, was "continued abuse of time will result in disciplinary action."

On September 2, 1988, Grievant was sent a "letter of warning relative [to] your pattern of absence and abuse of sick time" from HSH Director of Nursing Betty Lucente. Grievant was reminded of the May 12 counselling, and provided records of her subsequent usage of almost 135 hours sick-leave time, although 58 of those hours were accompanied

by a physician's statement.[5] Grievant was advised that any ensuing infraction could result in her suspension from employment for three to ten days. Resp. Ex. 5.

On November 4, 1988, Grievant was suspended without pay for three days. Resp. Ex. 4. The May 12 and September 2 contacts were cited, and Grievant's 51¼ hours of consumed sick time between September 3 and October 29 were cited. It is noted that, during some of this period, Grievant's sick-leave balance was spent, and her absences were either charged to vacation or unpaid time. Further, she was informed that, per Section 16.05, Personnel Rules and Regulations, she would "be required to provide a physicians' [(sic)] statement to substantiate any request for such leave or annual leave in lieu of sick leave for a period of six months." She was also "given an opportunity to either meet with" Dr. Charles J. Langan, HSH Administrator, "or to deliver to. . .[him] a written explanation of why you may think the facts and grounds contained in this letter are in error and why you may think this action is undeserved." Finally, she was advised "the services of the. . .Employee Assistance Program will be made available to you, should you request them" and that "[t]he purpose of this program is to help employees identify and overcome problems which prevent

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[5] It is assumed that these 58 hours were not counted against Grievant in any way. Certainly, they should not have been, see n. 7, infra.

them for adequately carrying out their duties and responsibilities." Id.

On February 22, 1989, Grievant was again suspended without pay by Dr. Langan, on this occasion for ten days. Resp. Ex. 3. The stated charges were "chronic absenteeism," nearly 52 hours between January 4 and February 22, 1989, "and repeated failure to provide a physician's statement for each absence due to personal illness or injury immediately upon your return to duty." Id. She was again offered the opportunity to object to the punishment in person or in writing, and to receive the services of the Employee Assistance Program.

On February 23, 1989, Grievant was "placed on Unauthorized [unpaid] Leave status." The reason given was her six absences, without physician's statement, between January 4 and February 21, 1989, totalling over 43 hours. Dr. Jack Sells, HSH Personnel Director, advised Grievant to contact him if she had "questions regarding this action." Resp. Ex. 2.

Finally, by letter dated December 28, 1989, Grievant's employment was terminated.[6] Between March 28 and December 16, Grievant missed over 95 hours in sick time; although the

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[6] Section 13.03, Personnel Rules and Regulations, was cited in Respondent's Exhibit 1, Grievant's dismissal letter. Apparently, this was a typographical error, and Section 13.02 was the intended cite. See n. 3.

record is unclear, it strongly suggests none of these hours were explained by a doctor's excuse.[7]

Grievant testified that she had explained her various health problems to the two immediate supervisors over her during the period May 1988-December 1989, and that she had also spoken to Ms. Lucente and Dr. Sells about them. The record is unclear as to precisely when Grievant spoke to each of these persons, and the depth of their conversations; with regard to Dr. Sells, the context apparently was not the disciplinary action against her, but her desire to move from HSW status to a switchboard operator's job. She also stated that although Ms. Golice was replaced by another nurse at a point in the progressive discipline beyond the first, or informal conference/warning, level, see Resp. Ex. 6, she, Grievant, continued to discuss related matters with only her immediate supervisor and not higher officials. Grievant presented uncontroverted testimony that she had, on one

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[7] In Respondent's Exhibit 1, immediately following the recounting of Grievant's March 28-December 16, 1989, leave record, her November 4, 1988, citation "to provide a physician's statement immediately upon your return to duty" is referenced.

Grievant also was on leave of absence from April 12 through May 22, 1989. It is inexplicable why Respondent would allow Grievant a leave of absence and then criticize her for that leave. In another context, it has been held "against public policy. . .to consider an employee's proper use of. . .her leave to which he or she is entitled" against her. Mitchem v. Wayne Co. Bd. of Educ., Docket No. 50-88-244 (Mar. 23, 1989). However, due to the rather extreme circumstances of this case beyond this, the outcome of this Decision is not affected.

occasion, made 'an appointment to talk to Dr. Langan; however, in her own words, "I wasn't able to get out there so I thought well. . .."[8] Grievant conceded that she had not called to talk to Dr. Langan or any of his assistants on this or other occasions.

Grievant admitted that she could have gotten doctor's excuses on several instances when she was away from work, but, as she said, "I didn't ask because I didn't go in to see them." She again cited her low pay, lack of a home phone, and recurrent "inability to move." Regarding her November 1988 suspension, which was around the time of her appendicitis operation, she admitted she "probably could've gotten a physician's statement but I didn't think about it -- I just felt bad." Grievant concluded her testimony by reporting she had been recently before the Level IV hearing released from her physician's care and that "I feel better now than I have in a long while."

In closing, Grievant's representative characterized this scenario as a "classic example of the State using an employee up, breaking them down due to short staffing. . .[and] then, when she's sick and can't carry the load, she's thrown out the door." She expressed "hope that there's some compassion somewhere and now that she [Grievant] has been

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[8] Throughout this Decision, the undersigned has attempted to capture the essence of pertinent statements rather than quote them verbatim.

released from her doctor," HSH would recognize it would be less expensive to put Grievant, a trained staffer, back to work, than to hire an outsider. She also stated that Grievant now "realizes her mistakes," but opined, "you have to admit, on a Health Service Worker's salary, it's impossible to go to the doctor every time you're sick."[9]

While Grievant's situation is a difficult one for her, her repeated failures to follow Respondent's directives regarding physician's statements, in these circumstances, cannot be overlooked. It certainly could be argued that it would be difficult for an employee, particularly a lower-salaried one, to provide such a statement upon each instance of illness; it has been accepted such was true of Grievant, n. 9. However, Personnel Rules & Regulations Section 16.05 is not designed to be applicable until certain problems and/or abuses are already evident, and is a reasonable protection for the employer in those extremes. Furthermore, and quite significantly, Grievant did not take advantage of the Employee Assistance Program or adequately explain her plight to anyone, much less the appropriate officials, despite repeated invitations to do so. It is unfortunate that she has been visited by numerous maladies, injured at work, and unable to have a telephone installed in her home;

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[9] No evidence was presented as to what a HSW's salary is; however, Grievant's testimony that she could not afford a medical visit every time she was ill was undisputed and is accepted.

however, Respondent made several efforts over a year-and-a-half period to provide accommodations to Grievant's situation. She simply did not follow up on those offers of help, and Respondent could not be expected to extend them forever. While it might be said Grievant's failure "to fully disclose her circumstances" to the correct parties was "understandable from a personal viewpoint," it was "clearly inappropriate from a professional stance." See Duncan v. Lincoln Co. Bd. of Educ., Docket No. 89-22-147 (May 1, 1989).

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

FINDINGS OF FACT

1. Grievant, a Health Service Worker at Huntington State Hospital (HSH), was terminated effective January 11, 1990. Her termination was the result of a plan of progressive discipline which commenced May 12, 1988, and related to problems with excessive and unauthorized use of sick leave.

2. Upon the third instance of the problem being called to Grievant's attention, in November 1988, she was suspended and required to provide a physician's excuse for each instance of illness-caused work absence. At this time, she was invited to discuss the situation with HSH Administrator Langan, either in person or in writing, and/or to participate in the Employee Assistance Program (EAP). Grievant took advantage of neither option.

3. Grievant was again suspended in February 1989 for a continued pattern of excessive usage of sick leave without a doctor's excuse being provided. She was again invited to discuss the situation with Dr. Langan and/or participate in the EAP, and again, she did neither.

4. Grievant was absent, without doctor's excuse, from work due to illness for more than 95 hours between March 28 and December 16, 1989.

5. It is stipulated that Respondent correctly followed the progressive discipline and leave-abuse policies and regulations of HSH and the West Virginia Division of Personnel (Personnel).

6. Grievant could not afford to obtain a doctor's statement each time she was ill in 1988 and 1989; however, she did not adequately explain this to appropriate officials. Further, on several of the occasions when she was sick and away from work, she could have obtained such a statement, sometimes rather readily.

CONCLUSIONS OF LAW

1. In disciplinary matters such as this, the employer has the burden to prove, by a preponderance of the evidence, that its actions were warranted. McCracken v. W.Va. Dept. of Health, Docket No. 89-H-720 (Mar. 27, 1990).

2. When an employer has established, by a preponderance of the evidence, that an employee has continuously abused sick-leave time; has not provided doctor's excuses, although reasonably required to do so per Personnel Rules and

Regulations 16.05; has not explained, after repeated invitation, why she could not comply with that directive; and that it has comported with applicable progressive discipline regulations, its decision to terminate the employee will be upheld.

Accordingly, this grievance is **DENIED.**[10]

Any party or the West Virginia Division of Personnel 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. This office should be advised of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

M. DREW CRISLIP
Hearing Examiner

Date: April 30, 1990

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[10] The undersigned is aware that a settlement of this grievance may be pending. Since this may require some time to complete, the parties have agreed this Decision may nonetheless be issued, and that if settlement is finalized the Decision will be null and void. Respondent's counsel has represented that the settlement offer heretofore made by her client will not be withdrawn as a result of this Decision. In any event, the award of costs to Respondent will remain viable, see n. 2, unless of course the parties reach an independent alternative agreement on that issue.