

ROBERT PRIDEMORE,

Grievant,

v.

Docket No. 95-HHR-561

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES, HUNTINGTON

STATE HOSPITAL,

Respondent.

DECISION

Robert Pridemore (Grievant) filed this grievance on July 21, 1995, complaining that his employer, Respondent Department of Health and Human Resources (DHHR), had unfairly documented his absence on July 14, 1995, as an "incident" under the Leave Authorization and Absence Control Policy then in effect at Huntington State Hospital (HSH). Following denial of the grievance at Level I, Grievant appealed to Level II on August 1, 1995. The grievance was again denied, and Grievant proceeded to Level III where an evidentiary hearing was conducted on November 9, 1995. Garrett E. Moran, Commissioner of DHHR's Bureau for Community Support, issued a decision denying the grievance at Level III on December 7, 1995. Grievant appealed to Level IV on December 15, 1995. Following a series of continuances, each of which was granted for good cause, a Level IV evidentiary hearing was conducted in this Board's office in Charleston, West Virginia, on August 8, 1996. The parties made oral closing arguments at the conclusion of the hearing, and this matter became mature for decision at that time.

On June 1, 1995, Respondent HSH enacted "Pilot Policy" Number 45C2, entitled "Leave Authorization and Absence Control." G Ex 9 at L III. Grievant contends that Sections 2 and 5 of that policy are unfairly restrictive and are inconsistent with the West Virginia Division of Personnel (DOP)

Administrative Rule governing employee leave, 143 C.S.R. 1 (1995). [\(See footnote 1\)](#) Pertinent portions of Policy 45C2 are quoted below.

RESPONSIBILITY: Employees:

Employees are expected to adhere to their assigned work schedules. If an employee must be absent, it is his/her responsibility to request prior authorization when possible, or to request approval upon return to duty from an unscheduled absence. The employee must complete and submit a leave request form (HSH-300-50, Request for Leave Form) to their supervisor in advance of the date the absence is to begin, when applicable, or within 24 consecutive hours after return to duty from an unscheduled absence.

Supervisors:

It is the supervisor's responsibility to carry out the procedures detailed in this policy. The Director of Human Resources will monitor compliance by conducting three (3) month audits of attendance. If the audit reveals that the procedures of this policy are not being followed, the Director of Human Resources will refer situations of noncompliance to the Department Director or Administrator for resolution.

PROCEDURE: The following procedures are established for employees when requesting scheduled annual, sick, or holiday leave and/or for employees who are required to report absences from work for "unsched uled" sick, annual, or holiday leave or tardiness.

1. All employees must report all absences and tardiness to their supervisor or designee in the time frame required by the employee's respective department and work unit (usually one hour prior to the beginning of their scheduled shift). The supervisor or designee will document the absence and submit it to the Human Resources Office. It is the employee's responsibility to contact the supervisor immediately upon their return to work from any unscheduled absence; to complete and submit the appropriate leave request form to their supervisor within the day that they return, and provide any required verification forms.

If the employee has been absent due to personal illness or injury for more than 24 consecutive work hours, he/she must bring a completed Physi cian[s] Statement (form DOP Form XX) to his/her immediate supervisor immediately upon return to duty. The employee will not be allowed to work until this Physician's Statement is received. If the Physician's Statement indicates that the employee may return at full capacity, the form shall be sent to the Human Resources Office for processing. If the Physician's Statement reflects that the employee may return with specific physical limitations (temporary or permanent), the supervisor shall contact the Human Resources Director to determine if reasonable accomodations (sic) can be made to assist this employee to return to work. It is the super visor's responsibility to either approve or disapprove any leave request and to verify the return to work of their staff. The supervisor then forwards the leave request and other forms to the Human Resources Office for appropriate processing by Monday of the following week.

2. The supervisor may accept the reasons for any unscheduled absence of an individual employee and approve the Request For Leave Form as being a legitimate "for good cause" absence. Appropriate documentation of such absence shall be given to the supervisor by the employee. **The supervisor shall submit to the Human Resources Office, within one week from the time the employee returns to work, a narrative explaining the reasons why the employee should be excused from counting a specific absence as an "occurrence" as outlined in Section 5 of this policy.**

3. Any employee who does not follow these procedures may be given an unauthorized absence for the period in question.

4. All supervisors have an obligation and responsibility to read, comply, and enforce the provisions of this attendance policy to ensure employee dependability. The supervisor will monitor attendance records by performing monthly audits; if an employee's pattern of leave usage is such that leave abuse may be occurring (sic), the supervisor will initiate corrective action as necessary. Policy compliance of the supervisors will be monitored by the Human Resources Director to ensure that supervisors are consistent with all employees. Inadequate performance will be reported as specified in Section 5 below.

5. Guidelines for recognizing and managing leave abuse patterns are as follows:

EACH OCCURRENCE OF LEAVE (WHICH HAS NOT BEEN VERIFIED) EQUALS AN INCIDENT. The number of occurrences is determined by the separation of work time and leave time, i.e., to be sick with the flu for three consecutive days would count as one occurrence. If an employee were sick one day with a headache, worked the next two days and called in sick on the 4th and 5th days, that would establish two occurrences in that week.

A. **Sick Leave:** Three (3) occurrences of call-in sick leave usage within a six-month period which is not verified by a physician's statement:

Third occurrence - verbal warning

Next occurrence - written warning

Next occurrence - 3-day suspension

Next occurrence - 10-day suspension

Next occurrence - dismissal

Exception: Sick leave for scheduled doctor's appointments will be considered excused if accompanied by verification of the appointment, i.e. appointment card. If the supervisor sends an employee home due to sickness, this, too, is considered excused (for that day only) and must be documented on the leave form by the supervisor. Family sick (up to 40 hours per year) or death of a family member may also be excused if verified by appropriate documentation.

B. Emergency Annual Leave: Three (3) occurrences in any continuous six-month period of any emergency leave usage not requested and approved in advance:

Third occurrence- verbal warning

Next occurrence - written warning

Next occurrence - 3-day suspension

Next occurrence - 10-day suspension

Next occurrence - dismissal

Exception: Any emergency leave due to inclement weather may be excused if it is verified, in compliance with WV Department of Health and Human Resources Policy 2103.

C. Holiday Leave: Two (2) occurrences in any continuous six-month period of emergency (sick or annual) leave on any holiday that an employee is scheduled to work which is not verified:

Second occurrence - verbal warning

Next occurrence - written warning

Next occurrence - 10-day suspension

Next occurrence - dismissal

D. Excessive Absenteeism in General: Four (4) occurrences in any continuous six-month period of any unscheduled (sic, emergency annual, holiday) leave establishes excessive absenteeism. This includes any combination of leave not requested in advance:

Fourth occurrence - verbal warning

Next occurrence - written warning

Next occurrence - 3-day suspension

Next occurrence - 10-day suspension

Next occurrence - dismissal

Note: Emergency leave is defined as any time taken off that is not requested and approved in advance.

E. Tardiness: Five (5) occurrences in any continuous six-month period. Includes being 8 minutes' or more late for the assigned shift as indicated by the department sign-in sheet and requires the completion of a Leave Request Form:

Fifth occurrence - verbal warning

Next occurrence - written warning

Next occurrence - 3-day suspension

Next occurrence - 10-day suspension

Next occurrence - dismissal

Exception: Tardiness due to inclement weather may be excused if it is verified, in compliance with WV Department of Health and Human Resources Policy 2103.

F. Failure to Call: If the employee or representative fails to notify the facility of his/her absence, without good cause, as outlined in #1 of the Procedure section, the absence will be documented as a "failure to call" and the following disciplinary guidelines will be followed in any continuous twelve (12) month period.

First Day - 15-day suspension.

Second Consecutive Day - dismissal for abandonment of position.

Second Occasion - Dismissal.

Failure to call-in two (2) or more consecutive days constitutes abandonment of position and may result in dismissal.

Each case of suspected leave abuse, excessive absenteeism, tardiness, and/or failure to call shall be evaluated individually based on the guidelines of this policy. In order to ensure fairness and consistency between departments, the Human Resources Director shall closely monitor supervisory decisions concerning attendance issues.

G Ex 9 at L II (emphasis in original).

Section 15 of DOP's Administrative Rule addresses attendance and leave in considerable detail, but authorizes supplementation as follows:

Each agency shall prepare supplemental regulations as may be required. The regulations shall not enhance nor diminish the benefits afforded by this section. Copies of all regulations shall be filed with the Director who may approve, amend or disapprove the supplemental regulations.

143 C.S.R. 1 § 15.13 (1995).

Pursuant to the foregoing provision, DHHR submitted HSH Policy 45C2 to DOP for review on August 15, 1995. On September 25, 1995, DOP Director Robert L. Stephens, Jr., notified HSH that Policy 45C2 had been reviewed and approved, provided that certain revisions and deletions were made, none of which involve the particular sections challenged by Grievant. R Ex 1 at L III. Jack Sells, a Senior Personnel Specialist with DOP, testified at Level III regarding this review process. He affirmed Director Stephens' determination that Sections 2 and 5 of HSH Policy 45C2 were not inconsistent with the requirements of Section 15 of DOP's Administrative Rule governing leave and attendance.

Grievant is employed as a carpenter at HSH, presently assigned to work in Central Receiving. On July 13, 1995, he visited a sick friend and neighbor in the Intensive Care Unit at Cabell Huntington Hospital until 3:00 a.m. He called the HSH switchboard around 4:00 a.m. to advise that he would not be able to work that day as scheduled. When Grievant returned to duty on July 14, 1995, he brought in his "Visitor's Pass" from the hospital to verify where he had been. See G Ex 11 at L II. His immediate supervisor, Gene Barnett, completed a Request for Leave Form (HSH-300-50) for July 13, 1995. G Ex 1 at L II. Mr. Barnett approved annual leave for Grievant on July 13, 1995, noting that

the leave was "requested after absence." Id. The leave form was reviewed by Todd Deal, the Department Supervisor, who likewise approved the leave, but determined that the unscheduled leave should be "counted as an incident" in accordance with Policy 45C2.

As of the Level IV hearing in this matter, the foregoing "incident" had been removed from Grievant's record in accordance with Policy 45C2, because no further infractions regarding leave had occurred for six months. Accordingly, Grievant concedes that the issue of whether his approved emergency annual leave on July 14, 1995, had been improperly categorized as an "incident" is now moot. See Coddington v. W. Va. Dept. of Health & Human Resources, Docket Nos. 93-HHR-265/266/267 (May 19, 1994); Maxey v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-504 (Feb. 4, 1993). Nonetheless, Policy 45C2 remains in effect and continues to establish conditions under which Grievant can take unscheduled leave. Thus, Grievant may challenge the legality of the Policy without establishing a specific instance where the Policy has been applied. Dooley v. W. Va. Dept. of Transp., Docket No. 95-DOH-214 (Jan. 23, 1996). See also Peters v. Raleigh County Bd. of Educ., Docket No. 94-DOE-043 (Sept. 27, 1994).

DHHR presented evidence at Level IV which indicated that HSH Policy 45C2 had been developed to address a problem of excessive use of unscheduled leave and the policy has had a positive remedial effect. While this evidence has no bearing on whether the policy is in conflict with DOP's Administrative Rule, it does demonstrate that DHHR's actions in enacting the policy at issue was not simply arbitrary and capricious.

Discussion

In a grievance of this nature, Grievant has the burden of proving each allegation by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). Grievant contends that HSH Policy 45C2 establishes a stringent leave and attendance policy which is improperly inconsistent with superseding DOP policy contained in § 15 of DOP's Administrative Rule.

It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 328 S.E.2d 164 (W. Va. 1985). See W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Security Nat'l Bank v. W. Va. Bancorp., 277 S.E.2d 613 (W. Va. 1981). In this case, DOP has declared that another state agency may not issue a supplemental regulation

which either enhances or diminishes the benefits afforded to state employees under Section 15 of DOP's Administrative Rule. 143 C.S.R. 1 § 15.13 (1995). Grievant claims that Policy 45C2 governing leave and attendance by HSH employees is inconsistent with DOP's policy, but DOP has critically reviewed this policy and determined otherwise. In these circumstances, the undersigned administrative law judge must defer to DOP's interpretation of its regulations, as Grievant has not demonstrated that such interpretation is clearly wrong. See Blankenship, supra.

It may nonetheless be possible for HSH to apply Policy 45C2 in a manner which is inconsistent with DOP's Administrative Rule. The only specific factual incident which Grievant can point to as an inconsistent application of the policy is moot. In the context of this grievance, Grievant simply failed to demonstrate that Policy 45C2 is inherently inconsistent with DOP's superseding rule. See Dooley, supra; Peters, supra.

Grievant complains that first-level supervisors are overruled by their superiors or the Human Resources Director when they decide not to count an unscheduled absence as an incident under Policy 45C2. However, Grievant has not shown that there is any provision in DOP's Administrative Rule, or any other applicable law, rule, policy, or regulation, which prohibits higher level managers from overruling decisions made by supervisors at a subordinate level.

Consistent with the foregoing, the following findings of fact and conclusions of law are made in this matter.

FINDINGS OF FACT

1. Grievant is employed by the West Virginia Department of Health and Human Resources at Huntington State Hospital (HSH). 2. HSH enacted "Pilot Policy" 45C2, Leave Authorization and Absence Control, on June 1, 1995. G Ex 9 at L II.

3. On August 15, 1995, HSH Human Resources Director Keith Anne Dressler submitted HSH Policy 45C2 to the West Virginia Division of Personnel (DOP) for review in accordance with DOP Administrative Rule § 15.13. R Ex 1 at L II. See 143 C.S.R. 1 § 15.13 (1995).

4. On September 25, 1995, DOP Director Robert L. Stephens, Jr., approved HSH Policy 45C2, subject to certain revisions. R Ex 1 at L II. Policy 45C2 has since been revised to comply with Director Stephens' instructions.

5. On July 13, 1995, Grievant called in to advise that he was taking unscheduled annual leave as a result of visiting a sick friend and neighbor in the critical care unit of a local hospital.

6. Grievant returned to work on July 14, 1995, providing written documentation of his visit to Cabell Huntington Hospital on July 13, 1995. See G Ex 11 at L II.

7. Grievant's supervisor, Gene Barnett, and Department Supervisor, Todd Deal, approved Grievant's requested annual leave, but Mr. Deal determined that Grievant's unscheduled absence should "count as an incident" in accordance with HSH Policy 45C2.

8. As of the time of the Level IV hearing on August 8, 1996, this "incident" had been removed from Grievant's record because there were no further occurrences within six months.

CONCLUSIONS OF LAW

1. In order to prevail in a grievance of this nature, Grievant must prove the allegations in his complaint by a preponderance of the evidence. Dooley v. W. Va. Dept. of Transp., Docket No. 95-DOH-214 (Jan. 23, 1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable by a court. Harrison v. Cabell County Bd. of Educ., 351 S.E.2d 604 (W. Va. 1985). See Deem v. W. Va. Div. of Env'tl. Protection, Docket No. 96-CLER- 033 (June 19, 1996).

3. As Grievant's "incident" record regarding an unscheduled absence has been removed from his employment records, the propriety of that specific decision is now a moot issue. The West Virginia Education and State Employee Grievance Board does not issue advisory opinions. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.20 (1996). See Coddington v. W. Va. Dept. of Health & Human Resources, Docket Nos. 93-HHR-265/266/267 (May 19, 1994); Maxey v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-504 (Feb. 4, 1993).

4. A government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 328 S.E.2d 164 (W. Va. 1985). See W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (W. Va. 1993); Security Nat'l Bank v. W. Va. Bancorp., 277 S.E.2d 613 (W. Va. 1981). 5. Grievant failed to demonstrate by a preponderance of the evidence that any provision in Sections 2 and 5, "Procedure," of HSH Policy 45C2, Leave Authorization and Absence Control, is in violation of DOP Administrative Rule § 15.13, because such procedures neither enhance nor diminish any specific

benefits provided under § 15 of the Administrative Rule.

6. Grievant likewise failed to demonstrate by a preponderance of the evidence that HSH Policy 45C2 is contrary to any applicable law, rule, policy, or regulation, or that any provision in Sections 2 and 5 is arbitrary and capricious as written. See generally *Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980); *Smith v. W. Va. Div. of Corrections*, Docket No. 94-CORR-624 (Feb. 27, 1995).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision "to the circuit court of the county in which the grievance occurred" 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: September 30, 1996

[Footnote: 1](#)

Consistent with W. Va. Code § 29-6A-3(j), Respondent permitted Grievant to amend his grievance at the lower levels to encompass a general challenge to HSH Policy 45C2. L III HT at 1; L III decision at 2. See generally, W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993).