

EARL GUTHRIE,
Grievant,

v. Docket No. 95-HHR-277

**DEPARTMENT OF HEALTH AND HUMAN
RESOURCES/OFFICE OF MATERNAL AND
CHILD HEALTH and DIVISION OF PERSONNEL,**
Respondents.

DECISION

Grievant, Earl Guthrie, alleges he was discriminated against when his request for sick leave to attend his companion's surgery was denied. He was required to take annual leave for this absence. He believes this act was taken because he is involved in a homosexual relationship. He requests as relief that the time "be charged against sick leave and removed from annual leave." This grievance was waived at Level I and denied at Levels II and III. It was appealed to Level IV, and a hearing was held November 11, 1995. The case became mature for decision on that date, as the parties elected to submit this grievance on the record and chose not to submit proposed findings of fact and conclusions of law.

The material facts in this grievance are not in dispute, and this case involves a question of law.

Findings of Fact

1. Grievant and his male companion participated in a "Service of Union" on May 12, 1990, performed by Rev. Judith Smith-Valley, the minister of the Unitarian Universalist Church of Charleston, West Virginia. G. Exh. 1.
2. This ceremony is "equivalent to marriage within [the Unitarian Universalist Church]." G. Exh. 1.
3. On September 7, 1994, Grievant filled out a request to take September 8 and 9, 1994, as sick leave for his "companion's" surgery. G. Exh. 1.

4. Grievant's supervisor, Ms. Joan Faris, approved his leave slip.
5. Some days later, the Personnel Coordinator in their office approved Grievant's leave.
6. On October 13, 1994, Ms. Edith Baker, in the Department of Health and Human Resources' ("HHR") Division of Personnel, denied Grievant's leave request and changed the sick leave to annual leave. She noted, "At this time, The Administrative Rules of The Division of Personnel do not address this particular situation in the list of family members."
7. Grievant received notice on October 17, 1994, that his request for sick leave had been denied.

Additionally, evidence taken at hearing revealed the following. Grievant testified that at least one other individual in Grievant's agency has been granted sick leave when she assisted her ex-husband during and after his surgery.

Mr. Joe E. Smith, Division of Personnel's ("DOP") representative, testified that no one should be allowed to take sick leave unless it is for themselves or a member of the immediate family as defined by DOP's Administrative Rules. He stated that if an individual had been allowed to use sick leave for significant others or "common law" spouses, this leave would be in violation of the rules. He further stated he knew of no instances where leave had been approved under these circumstances.

Discussion

At the time Grievant requested sick leave, employees were allowed to take sick leave for illness within the immediate family. W. Va. DOP Administrative Rules, §3(f)6. Immediate family included "only the father, mother, son, daughter, brother, sister, husband or wife, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandmother, grandfather, granddaughter, grandson, step-mother, step-father, and step-children." [\(See footnote 1\)](#) Id. at §3(f)2.

In West Virginia an individual is not considered legally married unless he or she has a license issued by the State. W. Va. Code §48-1-5. Other forms of union, including common-law marriage, are not recognized. Goode v. Goode, 183 W. Va. 468, 396 S.E.2d 430 (1990).

Accordingly, DOP's decision to refuse to allow Grievant to take sick leave for a companion's illness cannot be seen as violating any rule, regulation, or statute. Grievant and his companion do not meet the legal definitions of husband, wife, or spouse. However, if other individuals were allowed to take sick leave to be with their companions or significant others and Grievant was not, this could

establish a pattern of discrimination.

W. Va. Code §29-6A-2(d) defines discrimination as "any difference in the treatment of employees unless such differences are related to the actual job responsibilities of the employee or agreed to in writing." To prove discrimination a grievant is required to establish a prima facie case which consists of demonstrating.

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the Respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, the Grievant may still prevail if he can demonstrate the reason given by the Respondent was pretextual. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

The only evidence to support Grievant's claim that he was treated differently is his unrebutted hearsay testimony that one individual was allowed one time to take sick leave to be with her ex-husband. The undersigned does not necessarily disbelieve that this situation occurred, but without having further knowledge about the circumstances and dates, and without the form this individual filled out to verify that she clearly indicated she was no longer related to the gentleman in question, this hearsay testimony is insufficient to support a prima facie case.

Additionally, if this individual was knowingly approved for sick leave, this act by her supervisor would constitute an ultra vires act and as such could not be utilized to grant Grievant his requested relief. Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991).

The undersigned sympathizes with Grievant in his inability to utilize his sick leave to care for his life-companion and suggests a possible alternative may be to work with DOP and his employer to enact a change in the policy, within closely identified parameters.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. In a non-disciplinary action, a grievant has the burden of proving his case by a preponderance of the evidence. Tucci v. Dept. of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995).
2. Grievant has failed to demonstrate that Respondents violated any rule, regulation, or statute when they disallowed his sick leave.
3. Grievant did not meet his burden of proof and establish a prima facie case of discrimination.
4. Unauthorized actions by a governmental agency that violate policy are not binding and cannot be used to require an agency to violate the established policy again. Parker v. Summer County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991).

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: January 31, 1996

Footnote: 1 This section was rewritten in 1995. The term "only" was removed, and the terms "husband and wife" were replaced with the word "spouse."