MARK KOERBER

v. Docket No. 95-BOT-470

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY

D E C I S I O N

___Grievant, Mark Koerber, filed a level one grievance on August 10, 1995, following the termination of his employment as Extension Specialist-Computer Programming and Systems Analysis at West Virginia University (Respondent), effective May 26, 1995. Following denials at levels one and two the grievance was advanced to level four on October 30, 1995. Evidentiary hearings scheduled for November 29, 1995, January 5, 1996, and April 1, 1996, were continued for cause shown. Grievant failed to appear, without notice, for proceedings scheduled on May 9, 1996, and Respondent filed a Motion to Dismiss. ALJ Nedra Koval issued a Show Cause Order dated May 9, 1996. Grievant responded that severe stormy weather had interrupted his electric power and telephone service for most of the day on May 9. As a result, his alarm clock did not ring to awaken him on time to reach the hearing, and thereafter he did not believe it was “of any use” to drive to a functional phone to report his non-appearance.

Based upon a review of the pleadings and correspondence relating to that issue the Motion was denied. The grievance was transferred to the undersigned for administrative reasons in late August and the hearing was scheduled for October 31, 1996. A continuance was granted pursuantto a joint request for continuance, and the hearing was eventually conducted on January 10, 1997. The matter became mature for decision with the filing of post-hearing submissions by March 19, 1997.

The essential facts of this matter are undisputed. Grievant has been regularly employed by Respondent for eight years by the Cooperative Extension Service. He had also been employed by this Division in 1986 as a Graduate Assistant. Grievant's employment was apparently uneventful until on or about January 19, 1995, when he refused to sign his 1994 performance evaluation review. The limited purpose of this signature is for the employee to acknowledge that his supervisor has reviewed

the evaluation with him, and does not necessarily indicate his concurrence with the results. On April 3, 1995, Dennis Godfrey, Program Leader and Grievant's immediate supervisor, forwarded the review to Interim Director Charles Morris with an explanation that he had twice requested Grievant to sign the document, and provide any written comments, but that he had failed to do so.

During the Spring of 1995, Grievant was assigned to work on a computer project at Jackson's Mill. On April 11, 1995, Mr. Godfrey issued Grievant a letter of warning after Grievant had failed to report for duty at Jackson's Mill on April 10, or to provide a reason for his absence. Both actions were characterized as insubordination. Additionally, he was offered the opportunity to take annual leave for that day, but failed to file any request. Mr. Godfrey noted that Grievant had alluded to a potential medical problem that might prevent him from completing some assigned duties, and requested that he call them to the supervisor's attention so that options could be evaluated.

By memorandum dated April 17, 1995, Mr. Godfrey notified Interim Assistant Director Ora Drake that Grievant had refused to work on the Jackson's Mill project the prior week, even after hehad been advised that refusal would constitute insubordination. Mr. Godfrey noted that Grievant reported to work at Knapp Hall in Morgantown on Wednesday and stated that he planned to remain there to work on other projects. After being advised that his priority assignment was the Jackson's Mill project, unless illness prevented, he refused to accept that directive. On Thursday he failed to attend a unit meeting scheduled for 11:00 a.m. When the afternoon session convened at 3:45, Grievant had left the building. In a memorandum dated April 17, 1995, to Mr. Drake, Mr. Godfrey concluded that Grievant's continual refusal to follow policies and procedures resulted in unit inefficiencies, leaving him no recourse other than to recommend his termination. Notwithstanding this recommendation, Mr. Godfrey indicated a willingness to discuss other options.

By letter to Grievant of April 18, 1995, Mr. Drake responded to a request from Grievant that another programmer be assigned to complete the Jackson's Mill project. Mr. Drake briefly reviewed the chronology of the project, noting that the work was a priority and that another programmer was not available to work on the project. On April 24, 1995, Charles G. Morris, Interim Associate Provost, issued a memorandum to Grievant directing him to provide Mr. Godfrey with the password to the local area network. Mr. Morris advised that failure to provide the information would be considered insubordination which was grounds for termination.

Mr. Drake again responded, by letter of April 26, 1995, to issues raised by Grievant. He reminded

Grievant that he did “not see the need to establish another unit within our organization to take responsibility for computer work” and noted that an additional individual had been employed in the unit. Mr. Drake advised Grievant that he would need to continue to work with Mr. Godfrey as part of a team effort on the Jackson's Mill project, and expressed his disappointment that the issue of Mr. Godfrey's supervision had become an overriding factor in completion of the project. Mr. Godfrey issued Grievant a second letter of insubordination, dated May 9, 1995, as a result of actions which delayed the progress of the Jackson's Mill project. Those actions were stated as the refusal to “follow directions to provide programming support for the Jackson's Mill computerization effort” and his refusal to comply with two requests to provide “the local area network password to obtain administrative access to data.” Detailed instructions as to Mr. Godfrey's expectations of Grievant were included, as well as notification that further inappropriate action would result in termination. In the same letter, Mr. Godfrey notified Grievant that a physician's statement was needed for the five days of sick leave taken the previous week. (See footnote 1)

Prior to 1995, Grievant's use of sick leave was negligible, allowing him to accrue eight hundred, six and one-quarter hours of leave, effective January 1995. In 1995 Grievant claimed the following hours as sick leave: January - 35; February - 7.5; March - 22.5; April - 18; and May - 25.5. Grievant works a four day week, Tuesday through Friday, with the understanding that he would work on Mondays, “when necessary”. Grievant had been requested to work on Monday, May 1, 1995; however, he was absent Monday through Friday, May 5, 1995. When he returned to work on Tuesday, May 9, 1995, Mr. Godfrey requested medical verification of his illness. Grievant provided an undated slip from a certified registered nurse practitioner which stated “excuse from work 5/1 . 5/5. In my care.” Grievant stated that he was ill and left work at noon on May 9, 1995. He provided a second note from the nurse practitioner, dated May 11, 1995, which stated “Mark has been under my care for acute bronchitis since 5/4/95. He is currently being treated with numerous medications for this.”

Grievant called his office on May 11, 1995, at 12:17 a.m., and left the following message on voice mail:

Hello, Sheri, this is Mark. I will be on medical leave until further notice. I have scheduled appointments and diagnostic procedures over the next few weeks including overnight hospital stays and I don't know at this time when I will be able to return to work. I will let you know as soon as I'm

able to return to work. Once again, I don't know when that will be. Any further correspondence by Mr. Godfrey will need to be done through my attorney until this matter is resolved. Talk to you later. Bye.

By letter dated May 12, 1995, and sent by certified mail, Mr. Godfrey advised Grievant that the notes did not meet university standards which require “a statement signed by a physician listing the diagnosis and prognosis of the illness, period of time employee is unable to perform duties, and any limitations as a result of the illness.” Mr. Godfrey further noted that Grievant's request for additional medical leave had been received through voice mail the preceding day, and that it would be necessary for him to submit “satisfactory proof of illness” before the request could be approved. Grievant was informed that until such time that proof was provided, these days would be charged against his annual leave. Grievant did not return to work but left the following message on voice mail on May 22, 1995, at 6:03 a.m.:

Hello, Sheri, this is Mark. I'm scheduled to go into the hospital this week so I don't know when I'll be in but I'll be off probably definitely this week and possibly longer. So, I'll let you know when I find anything out. Thank you. Talk to you later.

Grievant left a second message on May 22, 1995, in which he requested that Sheri or Suzanne could provide him with a name and phone number of a person at the university who could inform him of the guidelines for the doctor's statement needed in order for him to return to work.

By letter to Grievant dated May 23, 1995, and sent via U. S. Mail, Mr. Godfrey reviewed the contents of the May 12 letter and notified Grievant that his annual leave would be exhausted after May 25. Grievant was further advised that he would be on unexcused leave beginning May 26, and that “failure to report promptly at the expiration of your annual leave shall be cause for termination of employment.”

By memorandum dated May 26, 1995, Grievant requested that the nurse practitioner complete the official verification forms. His request stated in pertinent part:

I have been informed by my employer, West Virginia University, that I need to have the medical leave form that they have provided to me filled out in order to justify my medical leave time for the weeks of May 1-5 and May 8-12.

You previously provided me with two prescription forms stating the following. Slip #1 - 'Excuse from work 5/1 - 5/5. In my care.' And slip #2 dated 5/11/95 - 'Mark has been under my care for acute

Bronchitis since 5/4/95. He is currently being treated with numerous medications for this.' These were not acceptable to them.

The medication that you prescribed appears to have resolved my bronchitis. As we discussed on May 11th, I participated in a sleep disorder evaluation on the evening of May 24th and will be interested in the results of that test. As I had also indicated to you on May 11th, I was continuing to experience anxiety due to job related stress.

I have been able to secure another job opportunity which will enable me to terminate my need to continue my employment with WVU effective the first week of June. Therefore, I need to finalize my records with them as soon as possible. . . .

It is my opinion that my coughing, headaches, and lack of sleep during this two week period were severe enough that I was unable toperform my job duties which at the time required extensive driving and overnight out of town stays. Please send your diagnosis and prognosis to them.

I was on vacation during the week of May 15th, but it may be helpful to mention that I started with sleep disorder therapy on May 24th even though I am not requesting medical leave for that.

The university has requested that they receive the filled out form as soon as possible and hopefully by May 31st. I hope that this will not present a problem for you . . . .

Grievant did not report to work at any time after May 9, 1995. By letter dated June 2, 1995, Mr. Godfrey advised Grievant in pertinent part:

[y]our annual leave coverage expired May 25. You have reported the cause of your absence beginning May 1 is due to personal illness (you returned to work for half a day on Tuesday, May 11[sic]). On May 12, 23 and 25, you were informed that satisfactory medical assessment was required for absence due to personal illness for more than five days, and in order to charge this time away from the work site to sick leave. You were advised it is your responsibility to obtain and provide the medical verification, and were provided a copy of the WVU Medical Leave Verification/Medical Assessment Form. You were informed that failure to provide the proper documentation puts you in an unauthorized leave status, which jeopardizes your continued employment.

As outlined in my correspondence of May 23, failure to return to work and/or promptly provide the

proper medical susbtantiation [sic] for continued absence would result in termination of your employment. To date, you have not returned to work and we have not received the medical verification required for either continuation of your absence, or, to substantiate your return to work. This letter is to serve as confirmation of your termination effective May 26.

On June 5, Respondent received a “Medical Leave Verification, Medical Assessment Form”, dated by the nurse practitioner on June 1, 1995. This form noted that Grievant was last seen on May 11, 1995, and was being treated for bronchitis. The query of whether any behavioral and/ormedically-based functional limitation currently existed, was answered affirmatively with an explanation that “Mark presented with a severe cough on May 11, 1995. As he stated he would need to do an extensive amount of driving and out-of-town stays, I believe it was in his best interest to remain off work till his bronchitis was resolved.” Functional limitations were stated as “bronchio spasms from overexertion”. The nurse indicated there to be no medically-based factors that would contraindicate reasonable accommodation to Grievant's limitations, but noted that “Mark appears to be having a great deal of difficultly dealing with stressors at work. This may have played a role in both his recovery and improvement”.

Upon receipt of the medical verification form, Respondent re-evaluated Grievant's leave usage. Noting that Grievant performs sedentary work with limited physical exertion, it was determined that the nurse's statement did not substantiate medical restrictions which would prohibit his ability to perform the essential duties of his position throughout May. However, 25.5 hours of leave coverage, from noon on May 9 through May 11, was converted to sick leave, based upon Grievant's claim of illness and subsequent medical appointment. This adjustment did not affect the termination of Grievant's employment, but amended the effective date to May 31, 1995. Grievant was apprised of the outcome of this review by letter of June 21, 1995. In the same document, Mr. Godfrey advised Grievant of his rights to pursue the issue through the grievance procedure and that if he chose to exercise those rights, a complaint should be filed by June 30.

Grievant eventually filed a level one grievance on August 10, 1995. (See footnote 2) He stated three complaints which may be summarized as follows: 1) A violation, misapplication, and misinterpretation of policy governing medical leave for the week of May 1 - 5. Grievant stated that he provided two notes from his medical professional and had made “every effort to provide all information which was requested.” Grievant claimed that Mr. Godfrey failed to provide clear and

consistent instructions and misused his position to create a sequence of events used as a reason for his termination.

2) Grievant complains of an inconsistent application of policy in that Policy Bulletin 35 requires that an employee obtain medical clearance prior to returning to duty, but that Mr. Godfrey advised that his failure to report to work at the expiration of his annual leave would be cause for termination of his employment. He asserts that the termination was effectuated prior to his being released to return to work.

3) Finally, Grievant claims that the letter of May 9, 1995, was an incident of harassment in that "[t]here was no indication at any time that I was not willing to see that these items were completed as requested." He characterized the charge that he failed to provide support for the Jackson's Mill project as a "flat out lie", and noted that he had spent many long hours there and had volunteered to work on the project at home. Grievant stated that the letter was one of many instances of harassment which had occurred over a six month period, despite his numerous attempts to resolve the matter. (See footnote 3)

Respondent argues that sick leave is an earned benefit, which an employee is entitled to use, but not abuse. Because Grievant was claiming extended periods of sick leave, and failed to provide the proper medical verification, Respondent argues that the termination of his employment was consistent with Board of Regents Policy Bulletin No. 35, Sections, 8.5 Sick leave for more than five consecutive days shall not be granted to an employee for illness without satisfactory proof of illness or injury, as evidenced by a statement of the attending physician or by other proof satisfactory to the institution. An employee having an extended illness or serious injury shall, before returning to duty, obtain medical clearance to help ensure adequate protection.

and

8.6 The institution may require evidence from an employee for verification of an illness or other causes for which leave may be granted under this policy, regardless of the duration of the leave.

as well as West Virginia University Policy ER-11 "Medical Leave Verification".

Policy ER-11 defines medical leave verification as "a signed statement from the employee's treating licensed physician . . . stat[ing] that the employee is unable to work due to an existing medical condition, provide a diagnosis, prognosis and expected return to work date." A medical

release is defined as “a signed statement from the employee's treating licensed physician which indicates the employee's ability to return to work.” It must also indicate limitations, if any, for the employee to perform work-related duties, and specify the duration and type of required accommodation. End dates should be provided for temporary limitations. The Policy requires a medical verification/release if an employee is absent from work more than five consecutive days under the sick leave policy. If informed in advance of returning to work, verification may be required regardless of the duration of the leave. Failure on the part of the employee to provide appropriate, satisfactory medical information “will result in the inability to charge the time in question to sick leave accruals and potential disciplinary action.”

Respondent asserts that Grievant continues to offer no explanation as to how or why he was suffering on the days in question, and, at best, he provided a medical claim which he submitted toa nurse practitioner for completion well after his visit, and with a letter of self diagnosis. Even conceding that Grievant was suffering from bronchitis, Respondent asserts that there is no indication that Grievant could not perform the primary functions of his sedentary job.

Grievant's response to the charges are that Mr. Godfrey initially only requested a physician's statement for the period of May 1 - 5, and that he provided such a statement on the same day, and later provided a second note which included information relating to appointment dates, diagnosis and that medication had been prescribed. Further he asserts that he provided a medical leave verification form for the period of May 9 - 31, as required by Policy No. 35. Addressing his tardiness in submitting the medical verification form, Grievant denies that he ever received notice that Respondent had issued a certified letter to him dated May 12, 1995, and claims that he learned of it only when talking to office staff. He asserts that he made all diligent effort in obtaining the forms, once he was aware of what was expected, but that his nurse practitioner was out of the country, a factor over which he held no control. (See footnote 4)

Discussion

Respondent's request for sick leave verification is entirely consistent with Board of Trustees Policy No. 35 and its own in-house policy. The request for verification of illness by a medical professional in certain instances of sick leave usage has been uniformly upheld by this Board. Uphold v. W.Va. Bd. of Trustees/W.Va. Univ., Docket No. 93-BOT-472 (Oct. 31, 1994); Brown v. W.Va. Bd.

of Directors, Bluefield State College, Docket No. 92-BOD-128 (March 30, 1994). Grievant has failed to offer any evidence in support of the claims set forth in this grievance. First, Respondent properly requested the medical verification after Grievant had been absent five days. Grievant's assertion that he did not work Mondays, and therefore was not absent five days, lacks merit in that his 1994 performance evaluation clearly states that "[t]he flexible work schedule whereby up to half of your weekly work hours have been after normal work hours no longer provides adequate access to your services. I will honor your preference for a four-day work week, provided . . . you are available to provide support on Mondays when needed." Grievant had been advised that his services were required at Jackson's Mill on Monday, yet he did not report to that site.

Second, Grievant's claim that he provided two notes from the nurse practitioner, and had made every effort to comply with Mr. Godfrey's requests, is specious in nature. While it is true that Grievant did provide two notes, neither contained the information required by University and Board of Trustees policies. After Grievant spoke with WVU Employee Relations Specialist Colleen Lankford on May 26, 1995, and she provided him with detailed information on the policies and forms necessary for him to submit, he leisurely made a written request to the nurse practitioner requesting their completion. Grievant did not state why office personnel could not complete the form, nor did he advise Respondent that submission of the forms would be delayed pending the nurse's return to work.

Third, Grievant offered no evidence supportive of the claim that Mr. Godfrey had "misused his position to create a sequence of events used as reasons for his termination."

Fourth, contrary to Grievant's claim, there was no inconsistent application of policy in that he was terminated prior to being released to return to work. Grievant was terminated for his failure to provide medical verification for his absence May 1 - 5, 1995. He had returned to work on May9. Any recurring illness did not alter the fact that he failed to provide the documentation for the initial absence. His assertion that he could not return to work without the medical statement is unsupported by the evidence in that he had already returned on May 9.

Fifth, W.Va. Code §18-29-2(n) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." Grievant did not provide any evidence that Mr. Godfrey had acted in such a manner toward him on even one occasion, much less repeatedly or continually.

The evidence of record supports findings that Grievant was not working cooperatively with his

supervisor, and that he did not wish to travel to Jackson's Mill to work on that project. Because Grievant lives in Eighty-Four, Pennsylvania, travel to the Mill would entail approximately two and one-half hours, one way. Grievant had also declined to stay on site, finding the facilities unacceptable. These facts, plus the medical verification that would not indicate Grievant was impaired to the point he was incapable of performing his duties, the letter to the nurse stating he had secured other employment, and the statement that he was on vacation the week of May 15, yet submitted medical verification for that period of time, establish that Grievant's assertions were not credible and the sick leave was not justified.

In addition to the foregoing discussion it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant has been employed by the Board of Trustees as an Extension Specialist- Computer Programming and Systems Analysis at West Virginia University since 1986. 2. Grievant was absent from work May 1 - 5, 1995. Because he was allegedly ill, Grievant was directed to provide medical verification of his condition.

3. Upon his return to work on May 9, Grievant provided a statement from the attending nurse practitioner; however, the document did not provide information required by Board of Trustees Policy No. 35 and WVU's Medical Leave Verification Policy.

4. Claiming illness, Grievant departed from work at noon, May 9, and did not return.

5. By letter dated May 12, 1995, and sent via certified mail, Grievant was advised of the medical leave requirements. Grievant denies ever receiving this letter.

6. Grievant traveled to the west coast on vacation, using pre-approved annual leave, the week of May 15, 1995.

7. Respondent sent Grievant a follow-up letter regarding the medical leave verification on May 23, 1995. Grievant was also advised that his absences were being deducted from his annual leave, pending receipt of medical verification, that his annual leave would be exhausted effective May 25, 1995, and that he would be terminated if he did not report to work on May 26, 1995.

8. Grievant did not appear for work, but contacted an Employee Relations Specialist on May 26, 1995, to inquire as to what documentation he needed to submit for the medical verification.

9. Grievant provided the nurse practitioner with a letter which included a self-diagnosis for the month of May and stated that he had secured other employment beginning in June.

10. Grievant was advised of the termination of his employment, effective May 26, 1995, by letter from his supervisor, dated June 2, 1995.

11. On June 5, 1995, Respondent received a medical verification form from the nurse practitioner addressing Grievant's illness throughout the month of May. This statement did notinclude any limitations on Grievant's sedentary duties, nor did it include any accommodations which would be necessary for him to perform his duties.

12. Upon review of the matter, Grievant was allowed to charge May 9-11 to sick leave, and the date of his termination was adjusted to May 31, 1995.

Conclusions of Law

1. In disciplinary matters, including dismissals, an employer must establish the charges which provide the basis for the action by a preponderance of the evidence. W.Va. Code §18-29-6; Burdell v. Bd. of Directors/W.Va. State College, Docket No. 96-BOD-023 (Dec. 10, 1996).

2. Respondent may dismiss an employee for abuse of sick leave as evidenced by the failure of the employee to provide medical verification of illness in compliance with Board of Trustees Policy No. 35. Uphold v. W.Va. Bd. of Trustees/W.Va. Univ., Docket No. 93-BOT-472 (Oct. 31, 1994).

3. Respondent has proven by a preponderance of the evidence that Grievant failed to comply with his supervisor's directive to provide medical verification for five consecutive work days in which sick leave was claimed, as provided by Board of Trustees Policy No. 35 and West Virginia University Medical Leave Verification Policy.

4. Respondent has established that Grievant's conduct constituted just cause for his dismissal, and said determination was neither arbitrary or capricious nor an improper exercise of administrative discretion. See Scragg v. W.Va. Bd. of Directors, W.Va. State College, Docket No.93-BOD-436 (Dec. 30, 1994).

5. Grievant failed to prove claims that the Policies were improperly applied, or that the termination of his employment was the result of harassment, as defined by W.Va. Code §18-29-2(n). Accordingly, the grievance is **DENIED**.

Any 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 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.

Date: April 11, 1997 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Neither Grievant's failure to sign the performance evaluation, nor his refusal to travel to Jackson's Mill were listed as the basis for his termination. Respondent indicates that these matters are included to provide a complete picture of Grievant's failure to comply with applicable rules and to satisfactorily perform his duties. Accordingly, these issues will not be considered in determining whether Respondent met its burden of proof relating to the charge given as the basis for the termination.

Footnote: 2

Respondent does not raise the issue of timeliness in this matter.

Footnote: 3

Grievant had not filed any prior grievances citing the alleged incidents of harassment.

Footnote: 4

The record indicates that Respondent may have initially refused to accept a statement from a nurse practitioner, not recognizing that as a valid medical professional. However, having ascertained that in Pennsylvania nurse practitioners are licensed and may prescribe medication, this no longer appears to be an issue.