**KIM HICKMAN.**

**Grievant**

**v.** **Docket No. 97-BOT-241**

**BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,**

**Respondent**

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

___Grievant, Kim Hickman, employed by West Virginia University (Respondent), filed a level one grievance on December 9, 1996, after she was dismissed as a Scheduling Clerk at West Virginia University Hospitals, Inc. (WVUH), effective November 26, 1996, for reasons of a high absentee rate/reliability. Following denials at level one on December 24, 1996, and level two on May 6, 1997, Grievant waived consideration at level three in accordance with W. Va. Code §18-29-4(c), and the grievance was advanced to level four on May 14, 1997. Both parties agreed that a decision could be rendered based upon the record developed at level two, with additional proposed findings of fact and conclusions of law submitted simultaneously on August 19, 1997.

The following Findings of Fact have been determined based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant was first employed by Respondent in 1978 as a nurse's aide at the WVU Hospital. When the Hospital divested from WVU in 1985, Grievant chose to remain an employee of the university.

2. On September 6, 1994, Grievant was assigned as an Operating Room (OR) Scheduling Clerk when she received a counseling letter regarding her high rate of sick leave usage. Jacqueline Sions, Manager of OR Scheduling, noted that Grievant had used 30 hours of sick leavebetween June 1 and August 31, 1994, and that this amount exceeded 4.6% of her scheduled work time. Ms. Sions also provided Grievant a copy of a sick leave policy.

3. Ms. Sions issued a first letter of warning to Grievant on February 9, 1995, noting that her

use of sick leave had not improved. Ms. Sions cited Grievant's absences in November 1994 (one special need usage from Grievant's illness exceeding three consecutive days), December (7.5 hours of unscheduled absence), and January 1995 (30 hours of unscheduled absence and four days late clocking in for work). (See footnote 1)

4. Grievant lives approximately 25 miles from her work site. She and her husband, who she indicated is disabled from an accident at work, have three children, including a twenty-two year old severely mentally and physically handicapped daughter. (See footnote 2)

5. Grievant has suffered from chronic kidney infection, abscessed teeth leading to cellulitis, chronic respiratory problems, and chronic carpal tunnel syndrome.

6. On February 2, 1996, Grievant was issued a second letter of warning regarding her “habitual absence from work without permission” from Martha DiGiovine, Business Manager of Surgical Services. Ms. DiGiovine reviewed a meeting held with Grievant and her union representative in May 1995, at which time she was advised that her attendance needed to improve. Grievant's absentee rate for the six month period of August 1, 1995, through January 31, 1996, was calculated to be at 15%, with the last three months at 26%. In addition to absences on August 21, 22, 25, November 2, 3, 8, 9, 10, 27, and 29, 1995, January 2, 3, 4, 5, 10, 11, 12, 15, 16, and 31, 1996, Grievant reported to work tardy 7 times.

7. Upon receipt of the February 2, 1996, letter of warning, based upon a stated need to have a reliable employee working in OR scheduling, Respondent transferred Grievant to the Same Day Surgery Center, and her hours changed from 5:45 a.m. - 1:45 p.m., to 11:30 a.m. - 7:30 p.m.

8. By letter dated November 26, 1996, Ms. DiGiovine advised Grievant that because her attendance record had not improved, her employment was terminated, effectively immediately.

9. At the time of her dismissal, Grievant held a combined sick and annual leave balance of 77 hours.

Respondent argues that Grievant's position, and therefore her attendance and punctuality, is integral to the daily operations of the Same Day Surgery Center, in that she was responsible for scheduling. Respondent asserts that Grievant was accorded fair and proper counseling on her excessive regular, not special, needs usage. Whether the absence was designated "special needs usage" or "regular needs" was determined by Grievant's designation when she reported off work. Because her absenteeism did not improve after progressive discipline consisting of a letter of

counseling and two letters of warning, Respondent asserts that Grievant was properly terminated from employment.

Grievant argues that the dismissal was improperly computed under a corporate policy which is not applicable to university employees. She further asserts that because she had not exhausted her earned leave time, and could have received an additional twelve weeks of unpaid leave under theprovisions of W. Va. Code §§21-5D-1, et seq., and the federal Family and Medical Leave Act.

Discussion

The letter of counseling dated September 6, 1994, does not refer to any specific policy or regulation regarding sick leave, but the calculation of the hours used to exceed 4.6% indicates a reference to WVUH Policy No. V.171 “Sick Leave WVUH Employees on Board of Trustees Payroll”. The first letter of warning specifically referred to Policy V.171, which defines excessive use of sick leave as “[r]egular needs usage of more than 4.6% of scheduled work time during the review period.” Applied to a full-time employee such as Grievant, 4.6% is equal to 22.5 hours over three consecutive months. Ms. Sions also cited the Board of Trustees Classified Employee Handbook to state that disciplinary action may be taken whenever an employee's conduct interferes with the operation of his/her unit. In the second letter of warning, Ms. DiGiovine did not refer to WVUH Policy V.171, but relied on the prior reference to the Board of Trustees Classified Employee Handbook. The letter of termination did not refer to any policy as the basis for the action.

State employees who remained university, rather than corporate, employees at the time of divestiture are to be treated as university employees in all respects, W. Va. Code §18-11C-4(d). Further, neither an institution, division, or department may promulgate policies contradictory to those of the Board of Trustees. Graf v. W. Va. University, Docket No. 30-86-047 (Sept. 26, 1986); Straight v. W. Va. University Docket No. 30-86-184-2 (May 26, 1987). Board of Trustees Procedural Rules, 128 CSR 35, provides that “sick leave may be used by the employee when injured or ill, when a member of the immediate family is seriously ill, or when death occurs in the immediate family.” WVUH Policy V.171 seeks to curb disruptive employee absences and specifically includes a percentage of use considered excessive. The language of this provision may reasonably beconstrued to limit justified sick leave usage, contrary to BOT Policy.

It has previously been determined that an employer has a legitimate interest in prohibiting

employee abuse of sick leave time, and that such action by an employee will justify dismissal. Brown v. W. Va. Bd. of Directors, Bluefield State College, Docket No. 92-BOD-128 (March 30, 1994). Certainly, the limitation of unwarranted, abusive, and disruptive unscheduled employee absences must be limited, and the employer may require medically verified sick leave. Luzader v. W. Va. Univ., Docket No. BOR1-86-345-2 (Apr. 12, 1987). Discipline, suspension, or dismissal of a employee in cases of excessive absences from work without permission or proper explanation is permissible. Straight, supra.

However, in the present matter, there is no allegation that Grievant used the leave time for other than legitimate reasons. The evidence shows that Grievant was not dismissed for improper use of sick leave, but rather because the use of her sick leave created an inconvenience for WVUH. While acknowledging the vital work completed at WVUH, an individual employee may not face dismissal for proper use of the state-provided sick leave benefit. It is also noted that after Grievant received the letter of counseling in September 1994, she was cited for 5 days of regular needs usage, and 4 incidents of tardiness in the first letter of warning, dated February 9, 1995. Of those 5 days, three days occurred following a particularly heavy snowfall which kept the WVU campus and many other offices closed for the better part of the week. It would seem that some consideration should be given that Grievant, like so many others, was unable to get to work at that time.

Reporting late for work is undesirable, and was particularly a problem considering Grievant's work assignments. The record does not indicate how late Grievant was; however, this time may be deducted from her leave. While Grievant bears a considerable burden at home, if she wishes tocontinue working, she is advised to make every effort to arrive on time. (See footnote 3)

Grievant's request for relief is that she be reinstated to her former position and original hours of work, with any promotions or salary increases which she may have earned during the time she has not been at work, back pay with interest, compensation for medical and life insurance, pension, and other payroll contributions, that her personnel file be purged of any and all documents which led to the dismissal. The record indicates that the position held by Grievant in the OR is no longer in existence. Therefore, reassignment is necessary for the hours Grievant initially was assigned, 5:45 a.m. to 1:45 p.m. Grievant is entitled to all backpay, with interest, and complete reinstatement of insurance and pension benefits. Her personnel file is to be purged of the letters relating to this matter.

In addition to the foregoing findings of fact and discussion it is appropriate to make the following

formal conclusions of law.

## Conclusions of Law

1. In disciplinary matters, the burden of proof is upon the employer and the employer must meet that burden by proving the charges against the employee by a preponderance of the evidence. Burdell v. Bd. of Directors, W. Va. State College, 96-BOD-023 (Dec. 10, 1996).

2. Respondent has failed to prove that Grievant has used sick leave improperly or contrary to any Board of Trustees policy or regulation, or that it had just cause to dismiss her from employment. Accordingly, the grievance is GRANTED. Respondent is Ordered to reinstate Grievant consistent with the provisions of this decision.

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: October 21, 1997 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

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*Footnote: 1*

*WVUH Policy V.171 defines special needs usage to be employee on-the-job injuries, employee hospitalization, employee appointments with a treating licensed physician, approved in advance by the supervisor, employee extended illness of more than three consecutive days, funeral leave, and approved time used when a member of the employee's immediate family is seriously ill, as determined by the treating licensed physician.*

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*Footnote: 2*

*Grievant's twenty-two year old daughter, Tonya, has been diagnosed with microcephalia and cerebral palsy. She is severely mentally retarded, suffers from scoliosis and gastroesophageal reflux. Grievant testified that she develops pneumonia periodically. Tonya is primarily non-communicative, does not move her limbs, and totally relies upon Grievant, her primary caregiver.*

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*Footnote: 3*

*Grievant's reliance on The Family and Medical Leave Act of 1993, and the Parental Leave Act set forth in W.Va. Code §§21-5D-1, et seq., requires no discussion because both provide for unpaid leave, which she does not request, and they both become effective after the employee's accrued leave is exhausted.*