

**JAMES P. HARVEY,**

**Grievant,**

**v.**

**Docket No. 99-BOT-402**

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

**Respondent.**

### **DECISION**

Grievant, James P. Harvey, employed by the Board of Trustees as a Shipping and Receiving Assistant, Lead, at the Physical Plant of West Virginia University (Respondent), filed a level one grievance on August 23, 1999, in which he stated: "I was given a 3 day suspension without pay for using 3 hrs of vacation not accumulated even though I have a doctors slip for that day. Was made to pay for 3 hrs used by check. Letter placed in file. Was told not doing my job even though recent performance review was meets or exceeds." For relief, Grievant requested "3 days of pay back. Reimbursed for check paid for 3 hrs and letter removed from my file."

After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced the matter to level four on September 24, 1999. An evidentiary hearing was conducted in the Grievance Board's Morgantown office on November 4, 1999, at which time Grievant was represented by former co-worker David Walden, and Respondent was represented by Assistant Attorney General Samuel R. Spatafore. The matter became mature for decision upon the receipt of Respondent's proposed findings of fact and conclusions of law on December 2, 1999. Grievant elected to not file post-hearing submissions.

The following findings of fact are made from a preponderance of the credible evidence of record, including the level two transcript and exhibits, as well as evidence submitted at the level four proceeding.

#### **Findings of Fact**

1. Grievant has been employed by the Board of Trustees for approximately fifteen years, and held the position of Shipping and Receiving Assistant, Lead, assigned to the Physical Plant at West Virginia University, at all times pertinent to this decision.
2. Series 35 of the Procedural Rule enacted by the University System of West Virginia Board of

Trustees (Series 35), 128 C.S.R. 35 (1992), provides that annual (vacation) leave shall be arranged to fit operating schedules. However, consideration should be given to an employee's request. Leave may not be taken before it is earned. Series 35 additionally provides that "annual leave at the request of the employee may be granted to an employee because of illness, provided all earned sick leave has been used."

3. The West Virginia University Classified Employee Handbook provides that sick leave may be used for employee medical appointments which are approved in advance by the supervisor. It also provides that "[a]nnual leave must be approved in advance by the supervisor."

4. Physical Plant Policy for "Sick Leave Usage" provides that "[s]ick leave may be used by employees for doctor or dentist appointments which are pre-arranged and approved in advance by the supervisor."

5. By memorandum dated August 26, 1997, then Physical Plant Director Robert D. Cremer issued all employees a reminder regarding leave usage. That memo stated in pertinent part: Before an employee can use vacation time or sick leave, the employee must have earned an amount equal to or greater than the amount to be used. Sick leave and vacation are earned on the 16<sup>th</sup> of each month as long as the employee continues on payroll. Employees cannot use vacation or sick leave before it is earned. Absences without accrued leave require prior written approval of the President of West Virginia University, as defined through the medical, personal, family and parental leaves of absence provisions.

Taking personnel on and off payroll without proper authorization is not an acceptable practice through the University systems. Based on the above, it has been the policy of the Physical Plant since October 1, 1994 to terminate any employee who uses more vacation or sick leave than has been earned without prior written approval of the President of this institution. There are no provisions to do otherwise.

6. Robert Suppa, Supervisor/Warehouse, and Grievant's immediate supervisor, issued Grievant a letter of warning dated January 21, 1999. The letter referred to a counseling session held with Grievant on September 14, 1998, with a follow-up letter, regarding his use of time and resources. The January letter was the result of an incident in which an item ordered by the Roads & Grounds department had been reported as "lost", but had recently been found in the warehouse with

an incorrect stock number. The original shipping box had not been opened, indicating that Grievant had failed to inspect the shipment, as required. Mr. Suppa advised Grievant that it was "imperative that you take immediate steps to improve your job performance. Failure to do so will result in further disciplinary action, which could involve suspension."

7. By memorandum dated January 25, 1999, Paul Walden, Assistant Director of the Physical Plant, advised Grievant that he was placing himself in a difficult situation, and suggested that he "take a serious review of [his] behavior and make an effort to make changes." Mr. Walden concluded that should Grievant continue without improvement, further application of the disciplinary process could lead to the termination of his employment.

8. Mr. Walden contacted a number of individuals, including Mr. Suppa, by electronic mail on August 4, 1999, regarding "Unscheduled vacations and sick leave." Mr. Walden noted that approximately ten to fifteen per cent of Physical Plant employees had near zero balances in sick leave and vacation time accrued, impeding the ability of the department to function. He directed that the supervisors speak with their employees to advise them of the situation, and that disciplinary measures, up to and including termination, would be imposed to correct the behavior.

9. Mr. Suppa provided Grievant a copy of Mr. Walden's memorandum on the morning of August 6, 1999. Grievant read the document, and made no constructive comment, generally indicating to Mr. Suppa that he "could care less".

10. On the same date, at approximately 11:30 a.m., Grievant completed a leave reporting form on which he requested 3.75 hours of vacation time, placed the form on Mr. Suppa's desk, and proceeded to leave the premises. While clocking out Grievant encountered Mr. Suppa, but did not advise him of the leave request.

11. The following Monday, Mr. Suppa learned that Grievant was three hours short of the requested leave time. Because Grievant had already received approval to take that Monday, Tuesday, and Wednesday as vacation time, Mr. Suppa called his home that day to advise him of the situation, and give him the opportunity to return to work. Mr. Suppa left a message on an answering machine indicating that it was important for Grievant to return the call. Grievant did not return the call until Wednesday.

12. Upon his return to work, Grievant was advised of the situation, and that he would need to reimburse Respondent for the three hours of unearned leave time. In response, Grievant completed a second leave reporting form, dated August 20, 1999, in which he requested

3.75 hours of sick leave for August 6, 1999. Under "explanation", Grievant indicated that he had a dental appointment. Grievant also provided a handwritten note from A. Lamarr Weese, D.D.S., which stated, "Mr. Harvey 8/6/99 was at my office 1:00[.] Any questions call." Dr. Weese's office is in Belington, West Virginia, approximately seventy-five miles from Morgantown.

13. Respondent disallowed Grievant's attempt to change his leave request from vacation to sick leave because the initial request had already been processed.

14. By letter dated August 12, 1999, Mr. Suppa advised Grievant that as a result of his taking leave without prior notice or permission, and because he had taken time which he had not yet accrued without prior approval of the President, he would be suspended for three days. [\(See footnote 1\)](#)

15. WVU Human Resources Policy, HR-9 provides that "[g]ross misconduct may result in any level of discipline up to and including immediate dismissal at the supervisor's discretion . . . Behaviors considered gross misconduct and subject to immediate dismissal include, but are not limited to: . . . leaving the work site without authorization . . . ."

16. Respondent's Classified Employees' Handbook provides that a supervisor may recommend suspension without pay for a period of one to fifteen days, depending on the gravity of the offense, and the employee's previous record. "Suspension may be applied in cases of first serious offenses or repeated minor ones when, in the supervisor's judgement, proper conduct can be attained without resorting to dismissal."

### Discussion

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Wilson v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-115 (Dec. 21, 1999); Aglinsky v. Bd. of Trustees/ W. Va. Univ., Docket No. 97-BOT-256 (Oct. 27, 1997); Latassa v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-477 (July 24, 1997).

Respondent suspended Grievant for his failure to request vacation leave in advance, taking the leave before it was earned, and leaving the work site without authorization, in accordance with the West Virginia University's Classified Employees' Handbook, and Human Resources and Physical Plant policies. Grievant argues that he tried to find Mr. Suppa before leaving work, and left believing that it would be approved. Amending his original request for relief, Grievant asserts that the lost wages, suspension, and letter of warning is an excessive amount of discipline, and requests that the

suspension be rescinded, and that he be reimbursed for the three hours wages.

Respondent provided sufficient evidence to prove that Grievant failed to request leave before he left the workplace, and that he used annual leave before it was earned. Respondent has also proven that he had received two prior written warnings relating to job performance. In response, Grievant consistently testified at levels two and four that he initially elected to take vacation leave because he had used a great deal of sick leave during the past six or seven years, and he believed he had enough vacation time to cover the request.

Grievant additionally explained that he could not have requested the time off when he spoke with Mr. Suppa earlier in the day, because he did not know that he would have a dental appointment that afternoon. [\(See footnote 2\)](#) When he learned the time of the appointment, Grievant stated that he did not know Mr. Suppa's whereabouts, and neither did anyone he asked. At level two, when asked if he had asked permission to leave work, Grievant responded, "[t]o me asking permission is filling out a slip." Grievant did not offer a reason why he did not ask permission when he spoke to Mr. Suppa as he was clocking out, but his representative suggests that as a supervisor, it was Mr. Suppa's responsibility to ask Grievant where he was going. That simply is not how it works.

It was Grievant's obligation to get permission before leaving work. It was also his obligation to be aware of the amount of vacation leave available to him. Grievant's actions on the same day as the use of leave time was mentioned by his supervisor, indicate little concern for his continued employment. Respondent has proven that the suspension was properly imposed after Grievant engaged in gross misconduct by leaving work without permission, and was absent without adequate leave time to cover his request.

Grievant's complaint that he was subject to multiple forms of discipline is without merit. Although Mr. Suppa labeled the August 12, 1999, document a letter of warning, the content establishes that it was notification of the suspension. Documentation of a suspension, and the suspension itself, do not constitute multiple forms of discipline. As for the \$25.32 Grievant reimbursed Respondent for the three hours of unearned leave time, there is no basis upon which that request for relief may be granted. Grievant did not work the hours, and he had no accrued vacation. Respondent cannot pay an employee for work not performed.

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

### Conclusion Of Law

1. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Wilson v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-115 (Dec. 21, 1999); Aginsky v. Bd. of Trustees/ W. Va. Univ., Docket No. 97-BOT-256 (Oct. 27, 1997); Latassa v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-477 (July 24, 1997).
2. An employer has a legitimate interest in the limitation of unwarranted, abusive, and disruptive unscheduled employee absences. See generally, Luzader v. W. Va. Univ., Docket No. BOR1-86-345-2 (Apr. 12, 1987).
3. Discipline, including suspension or dismissal, of an employee in cases of absences from work without permission or proper explanation is permissible. Straight v. W. Va. Univ., Docket No. 30-86-184-2 (May 26, 1987); Luzader, supra.
4. Respondent has proven by a preponderance of the evidence that Grievant used vacation leave before it was accrued in violation of Series 35 of the Board of Trustees Procedural Rule, and that he engaged in gross misconduct when he left work without obtaining prior permission of his supervisor, in violation of West Virginia University and Physical Plant Policies.

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. Any 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: March 6, 2000 \_\_\_\_\_

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

[Footnote: 1](#)

*Other issues were addressed in the letter; however, their inclusion appears to provide historical perspective relating to Grievant's disciplinary record, and not to be the basis for the suspension.*

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[Footnote: 2](#)

*The appointment was made in response to a toothache. Grievant did not mention either the problem, or that he was attempting to schedule a dental appointment, when he spoke with Mr. Suppa regarding the use of leave time that morning.*