

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
UNITED ELECTRICAL, RADIO)	
AND MACHINE WORKERS OF)	DOCKET NO. 98-84
AMERICA, LOCAL 267 and JAMES)	
BRULEY)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 30, 1998, the United Electrical, Radio and Machine Workers of America, Local 267 ("Union") filed a grievance with the Vermont Labor Relations Board on behalf of the Union and James Bruley ("Grievant"), an employee of the University of Vermont ("Employer"). Therein, the Union alleged that the University of Vermont had disciplined Grievant in violation of the Employer's just cause standard for discipline, and had discriminatorily applied the Employer's rules governing discipline and medical leave, by issuing Grievant a performance evaluation in March 1998 which contained the following statements: "Jim has been absent 72 hours since his last evaluation, which indicated at that time that his attendance was a problem. If it does not improve immediately he will receive disciplinary action." The grievance also alleged that the disciplinary application of rules governing discipline and medical leave had resulted in Grievant being denied a promotion to a Solid Waste Specialist position.

A hearing was held on June 24, 1999, before Labor Relations Board Members Catherine Frank, Chairperson; Carroll Comstock and Edward Zuccaro in the Board hearing room in Montpelier. Kimberly Lawson, Union International Representative, represented the Union and Grievant. Thomas Mercurio, Senior Associate Counsel for the Employer, represented the Employer. At the hearing, the Union and Grievant withdrew

the allegations concerning Grievant not being promoted to the Solid Waste Specialist position.

The Employer filed a brief on July 16, 1999. The Union filed a brief on July 19, 1999.

FINDINGS OF FACT

1. The University of Vermont is an employer covered by the State Employees Labor Relations Act, 3 V.S.A. Section 901 *et seq.* The Union was certified as the exclusive bargaining representative of service and maintenance employees of the University on December 29, 1997. Service and maintenance employees of the University's Physical Plant Department are included in the bargaining unit. As of the date of the hearing in this matter, no collective bargaining agreement had been negotiated covering the employees represented by the Union (Labor Relations Board Docket No. 97-23).

2. The Employer has set forth its personnel policies and staff employees' rights and responsibilities in its Staff Handbook. The Staff Handbook applies to the service and maintenance employees represented by the Union. The Handbook contains the following pertinent provisions on the Employer's medical leave policy:

You may take medical leave during illness, to attend medical and dental appointments, or to actively care for a seriously ill immediate family member. An immediate family member is defined as a spouse, dependent child, or relative living in the same household.

...

(Y)ou are entitled to 12 medical leave days per year with unlimited accrual. Medical leave accrues at the rate of 1 day per month.

...

When you use medical leave, you may be required, at the discretion of your supervisor or an appropriate administrative officer, to provide a physician's statement indicating the reason for your absence. In all cases,

if you are absent more than five consecutive workdays, you are required to provide a doctor's statement indicating the reason for your absence.

....
(Union Exhibit A, pp. 105-107)

3. The Staff Handbook contains the following pertinent provisions on the Employer's performance appraisal policy:

The performance appraisal is a communication tool designed to support your individual contributions to the University. It provides a way to measure skills and accomplishments with reasonable accuracy and uniformity. It provides a key to identify obstacles to top performance. It should help identify areas for professional growth . . .

University practice is for you to receive a thoughtful appraisal each year although you may be evaluated more than once a year . . .

Along with a written appraisal, your supervisor will discuss your performance with you . . .

(Union Exhibit A, p.132)

4. The Staff Handbook contains the following pertinent provisions concerning the Employer's constructive discipline policy:

All UVM employees will be disciplined according to the principles of constructive discipline, not punishment. This is administered to help you overcome behavior which has caused problems in your job. The goal is to help you continue to work productively and effectively as a UVM employee.

Constructive action must be fair, not punitive and not discriminatory. The same standards must be applied to all employees who do similar jobs. All constructive action must be undertaken with the goal to develop and retain employees.

....
A detailed guide to constructive discipline . . . is contained in the supervisor's handbook, Constructive Discipline . . .

(Union Exhibit A, p. 139)

5. The Staff Handbook contains the following pertinent provisions on "involuntary termination" of employees "for cause":

Your employment may be terminated because of poor job performance, improper attitude, misuse of medical leave, habitual lateness, illegal possession or use of alcohol or drugs in the work place, theft, fighting, possession of dangerous weapons, misconduct, violation of UVM policies, unauthorized access or use of computerized information or files, or for other serious circumstances.

...
(Union Exhibit A, p.146)

6. The Constructive Discipline Handbook for Management, referenced in the constructive discipline provisions of the Staff Handbook, provides in pertinent part as follows:

...
The Purpose of Constructive Discipline

...
The most common forms of constructive discipline, oral and written counseling, are used to inform employees that problems exist, and to define what needs to be done to correct them. Suspension and discharge are more severe forms of correction, and must be used only as a last resort when other methods of resolving the problem have not been effective.

...
The Four Types of Constructive Discipline

...
The following (are) . . . "definitions" of what constitutes . . . kinds of constructive discipline . . .

1. **Oral Counseling** – Any instance in which a supervisor orally notifies (counsels) an employee about inadequate work, a violation of work rules or practices, or a failure to follow orders constitutes oral counseling.

2. **Written Counseling** – Any letter or document regarding an employee's shortcomings that appears in her/his file is written counseling. Properly prepared written counseling is a dated letter to the employee listing violations or failures, as well as previous related counselings, and detailing what needs to be done to avoid further corrective action.

...
The Process and Standards of Constructive Discipline

...
1. The Standard of Just Cause

Management has the burden to prove just cause . . .

a) Whenever possible, the employee should have been given advance notification that the particular behavior would result in constructive discipline . . .

Correcting Difficult Problems: Insubordination and Absenteeism

II. Absenteeism

1. **The length of time during which there has been an attendance problem is significant.** A sudden change from good attendance to bad may be caused by one particular problem and may be easily handled. A pattern of absenteeism over a period of time is generally more serious.

2. **The reasons for absences may be significant and should be investigated before constructive action.** Sometimes there may be a legitimate reason for absenteeism . . . (C)ommon causes of absenteeism and lateness, other than legitimate illness, are job dissatisfaction and low morale, child-care problems, overinvolvement in personal problems, and fatigue and stress related to the job . . .

3. **The seriousness of absenteeism varies with the nature of the job.** For example, when a person works as part of a team, even one unexplained absence may be a serious matter. A single absence may be much less serious for someone who usually works alone on long-term projects. Tracking absenteeism, however, must be consistent for all employees.

4. **Constructive actions for absenteeism (as in other areas) must be fair and non-discriminatory.** To the extent possible and reasonable, the same standards should be applied to all employees who do similar jobs.

...
(University Exhibit B, pp. 1, 2, 5, 7)

7. Maureen Pelkey has worked for the Employer for many years. She began as a custodian and progressed through the ranks to her current position, Assistant Director of Physical Plant Services, which she has held since 1996. Pelkey is one of two Assistant Directors in the Department. Pelkey oversees the work of approximately 175 employees in the Custodial Unit, the Automotive Shop, the Solid Waste Unit, the Material Managerial Unit and Grounds. Approximately 150 employees under Pelkey's direction are in the bargaining unit represented by the Union.

8. Among Pelkey's responsibilities are overseeing the completion of periodic written performance evaluations of all employees under her direction. Evaluations are

generally conducted on employees every six months, although some times evaluations are done annually. During the performance evaluation process, Pelkey meets with the supervisors reporting to her to discuss the performance of the employees being evaluated. The performance evaluation document is exchanged between Pelkey and the involved supervisor before it is signed by both of them and presented to the evaluated employee. Pelkey may add written comments to the performance evaluation forms prepared by the supervisors reporting to her.

9. The evaluation form used in the Physical Plant Department includes an opportunity for the evaluating supervisor to check "yes" or "no" to whether the employee was "Absent Excessively". Pelkey encourages the supervisors reporting to her to check "yes" to "Absent Excessively", and to add a written comment of explanation on the absences, for employees who have used large amounts of medical leave, even if the reason for the medical leave was a legitimate illness or injury. Pelkey does not necessarily know the specific medical leave usage of an employee when she reviews evaluations (Union Exhibit E).

10. The Employer does not prohibit, or require, comments on performance evaluations concerning use of medical leave by employees. The Employer also does not require that managers and supervisors require doctor's statements if employees have extensive medical leave usage. The Employer's Human Resources Department encourages managers and supervisors to use their discretion to be able to address individual situations as they see fit. The Human Resources Department views it as permissible for employee misuse of medical leave to be noted on a performance evaluation, and appropriate for an employee to eventually be disciplined for misuse of

medical leave. The Human Resources Department advises supervisors and managers to examine the reasons for the leave usage, the impact on the employing unit and whether there is a chronic problem. Although practices vary at the University, managers and supervisors other than Pelkey have noted absenteeism problems on performance evaluations, and employees have been disciplined for misuse of medical leave.

11. Pelkey uses the performance evaluation process to determine whether employees will receive merit raises as part of their annual raises. She reviews the year's evaluations and decides what merit raise to award. An employee's absenteeism can affect the overall performance rating and the merit pay determination.

12. Grievant has been employed at the University of Vermont since 1985. He has worked in the grounds, custodial and recycling units of the Physical Plant Department over the course of his employment. In 1997 and 1998, Grievant was employed in Custodial Services, where he was one of three members of the recycling unit. Throughout Grievant's employment at the University, he has reported either directly or indirectly to Pelkey.

13. In the 22 performance evaluations Grievant received from the beginning of his employment through February 1997, Grievant was rated as "Absent Excessively" in 9 evaluations (University Exhibit C, pp. 76-97).

14. In September 1987, Grievant's supervisor gave him a verbal warning for using 61 hours of medical leave in less than six months (University Exhibit C, p. 40).

15. In January 1988, Grievant's supervisor gave him a written reprimand because of his absenteeism. In the reprimand, the supervisor noted that Grievant had used

32 hours of medical leave, and had been on unpaid leave for 16 hours, since receiving the verbal warning in September 1987 (University Exhibit C, p.41).

16. By letter of February 14, 1989, Pelkey informed Grievant that his position would be terminated if his absenteeism problem did not improve. Grievant had used 104 hours of medical leave in the previous 13 months since he had received his written reprimand (University Exhibit C, pp. 37, 38, 44).

17. On September 25, 1989, Grievant's immediate supervisor and Pelkey gave Grievant a written warning because of his absenteeism. They noted that Grievant had used 56 hours of medical leave, and had been on unpaid leave for 24 hours, in the preceding six months (University Exhibit C, p. 46-47).

18. On April 5, 1990, Grievant's immediate supervisor and Pelkey suspended Grievant for 5 days "because of your continuing repeated absences which have established a predictable pattern". They noted that Grievant had used 40 hours of medical leave in the preceding five months. 32 hours of the medical leave were used on Mondays following Grievant not working on the weekend (University Exhibit C, p.48).

19. Effective March 26, 1993, Pelkey required Grievant to bring in a doctor's statement for future absences "due to (his) high rate of absenteeism". Grievant had used 81.5 hours of medical leave during the preceding 12 months (University Exhibit C, pp. 33,35, 49).

20. Grievant received a performance evaluation in April 1994, which indicated that he was not absent excessively. However, under "Supervisor's comments", there was a statement that Grievant "has been spoken to about pattern of Wednesdays off". During the 6 month period covered by the evaluation, Grievant did not work on

Monday and Tuesday, and Wednesday was the first day of his workweek. Grievant had used medical leave on five Wednesdays during the rating period (University Exhibit C, pp. 33, 83).

21. In April 1996, Grievant received oral counseling for excessive absenteeism due to using 71 hours of medical leave in the previous six months (University Exhibit C, pp. 31, 52).

22. In January 1997, Grievant received oral counseling for excessive absenteeism due to using 112 hours of leave in the previous six months (University Exhibit C, pp. 29, 30, 56).

23. In March 1997, Grievant received a performance evaluation indicating that he was "Absent Excessively", and noting that he had received disciplinary action for his absenteeism (University Exhibit C, p. 16, 76).

24. On Friday, November 14, 1997, Grievant called in sick. He was scheduled to work the following day. One of the other two members of his recycling team was on vacation, and the other member was scheduled to have the following day off. Grievant's immediate supervisor, Erica Spiegel, was concerned that Grievant may not work on the following day and thus there would be no one to pick up the trash and recycling. Due to this concern, Spiegel called Grievant at his home. When she first attempted to reach Grievant, he was not at his home. A few hours later, she tried again and reached Grievant. Grievant acted defensive; he answered the telephone call from Spiegel, and told Spiegel she had no right to call him at home. Grievant did appear for work as scheduled on Saturday, November 15.

25. In March 1998, Grievant received a performance evaluation signed by Spiegel and Pelkey indicating that he was "Absent Excessively". The evaluation also contained the following under "Supervisor's comments":

Jim has been absent 72 hours since his last evaluation, which indicated at that time that his attendance was a problem. If it does not improve immediately he will receive disciplinary action.

The first sentence of these comments was written by Spiegel. Pelkey wrote the second sentence. This was the first performance evaluation Grievant had received since the March 1997 evaluation (University Exhibit C, pp. 15, 74).

26. Neither Spiegel nor Pelkey asked Grievant to bring in doctor's statements to verify the medical reasons for his absences, or questioned him about whether he was ill, during the time period covered by the March 1998 evaluation. Pelkey believed Grievant when he claimed to be ill. Pelkey warned Grievant on the performance evaluation that he would be disciplined if his absenteeism record did not improve because of his pattern of extensive medical leave usage during his employment. Pelkey also considered Grievant's absenteeism to be a problem because he worked in a small work unit in which he performed a function (i.e., picking up trash and recycling) which could not be postponed until his return. Pelkey did not consider the comment on the performance evaluation to constitute discipline.

27. Pelkey spoke with Grievant many times over the years about his medical leave usage. On some of these occasions, Grievant told Pelkey that he would try to improve his absenteeism record. There were occasions over the years when Grievant brought in doctor's statements to justify his medical leave when there was no requirement

that he do so. Pelkey considers Grievant an excellent employee with the exception of his absenteeism record.

28. Evidence was presented on 38 performance evaluations, involving 24 employees, issued in the Physical Plant Department during the period January 1997 through June 1998 in which employees were rated as "Absent Excessively". This total does not include the two evaluations issued to Grievant during this period in which he was rated as "Absent Excessively". It is not clear that these 38 evaluations represent all of the evaluations in which employees were rated as "Absent Excessively". In evaluations which covered the previous six months and the number of medical leave hours were noted, the range of medical leave hours used ranged between 52 and 110. When the 38 performance evaluations are compared with records of medical leave hours used by the involved employees for calendar year 1997, medical leave usage ranged between 59 and 406 hours. Two employees had less than 72 hours, six employees used between 73 – 100 medical leave hours, and six employees had between 101 – 150 hours. The remaining employees either used greater than 150 hours of medical leave or their medical leave usage for 1997 was not entered into evidence (University Exhibit D, pp. 6, 11, 12, 17, 18, 22, 31, 32, 33, 35, 36, 37, 40, 50, 52, 55, 64, 73, 76, 82, 83, 84, 86, 88, 89, 93, 94, 98, 101, 104; Union Exhibit G, pp. 4, 25, 50; Union Exhibit I, pp.23, 34, 175, 186, 188).

29. 35 of the 38 evaluations which were rated "Absent Excessively" also contained comments about medical leave usage. The comments ranged from excessive absenteeism being brought to the employee's attention, notice that disciplinary action will result if improvement does not occur, notations that a "friendly warning" was given concerning absenteeism, statements as to the cause of the absence such as a work-related

injury, statements of the number of hours missed during the rating period, and notice that failure to improve on absenteeism will affect the next evaluation (University Exhibit D, pp. 6, 11, 12, 17, 18, 22, 31, 32, 33, 35, 36, 37, 40, 50, 52, 55, 64, 73, 76, 82, 83, 84, 86, 88, 89, 93, 94, 98, 101, 104; Union Exhibit G, pp. 4, 25, 50; Union Exhibit I, pp.23, 34, 175, 186, 188).

30. Pelkey signed 34 of the 38 evaluations in which employees were rated as "Absent Excessively". She was not involved in the other four evaluations as the involved employees were not under her direction (University Exhibit D, pp. 6, 11, 12, 17, 18, 22, 31, 32, 33, 35, 36, 37, 40, 50, 52, 55, 64, 73, 76, 82, 83, 84, 86, 88, 89, 93, 94, 98, 101, 104; Union Exhibit G, pp. 4, 25, 50; Union Exhibit I, pp.23, 34, 175, 186, 188).

31. Evidence was presented on 37 employees in the Physical Plant Department who used more than 72 hours of medical leave during calendar year 1997 and were not rated as "Absent Excessively" on any of the performance evaluations covering that period. This total includes only those employees for whom performance evaluations covering all of the 1997 were presented into evidence. It is not clear that these 37 employees represent all the employees who used more than 72 hours of medical leave during calendar year 1997 and were not rated as "Absent Excessively" on their performance evaluations. Nineteen of these employees used between 73 – 100 hours of medical leave during 1997, twelve employees used between 101 – 150 hours, four employees used between 151 – 200 hours, one employee used 250 hours and one employee used 318 hours (Union Exhibit F, Union Exhibit G, pp. 2, 8, 9, 12, 15, 16, 20, 21, 22, 23, 26, 27, 30, 31, 33, 34, 39, 40, 60, 61, 72, 73, 74, 79, 80, 85, 87, 89, 93, 95, 97, 98, 99, 101, 103, 105, 111, 112, 113, 114, 121, 122, 123, 124, 125, 126, 127, 128, 129,

130, 131, 133, 137, 140, 141, 142, 143, 144, 145, 149, 150, 153, 154; Union Exhibit I, pp. 2, 6, 8, 9, 17, 21, 25, 30, 43, 65, 92, 106, 107, 115, 123, 126, 130, 134, 136, 137, 140, 144, 146, 153, 155, 161, 166, 167, 169, 173, 177, 180, 182, 184, 194).

32. On evaluations of three of the 37 employees who used more than 72 hours of medical leave during calendar year 1997 and were not rated as "Absent Excessively", notations were made on the evaluations concerning the employee's medical leave usage. On one evaluation, in which the involved employee had used 250 hours of medical leave during 1997, a comment was made that the employee had been absent due to an injury. On another evaluation, in which the involved employee had used 48 hours of medical leave during the preceding six months, the employee's medical leave usage was termed "borderline". On the third evaluation, issued in March 1997, in which the involved employee used 113 hours of medical leave during 1997, a comment was made that the employee's absenteeism "was high, but not excessive" (Union Exhibit G, p. 30, 122; Union Exhibit I, p.106).

33. Pelkey signed the evaluations of 14 of the 37 employees who used more than 72 hours of medical leave during calendar year 1997 and were not rated as "Absent Excessively". She was not involved in the evaluations of the other 23 employees as the involved employees were not under her direction (Union Exhibit F, Union Exhibit G, pp. 2, 8, 9, 12, 15, 16, 20, 21, 22, 23, 26, 27, 30, 31, 33, 34, 39, 40, 60, 61, 72, 73, 74, 79, 80, 85, 87, 89, 93, 95, 97, 98, 99, 101, 103, 105, 111, 112, 113, 114, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 133, 137, 140, 141, 142, 143, 144, 145, 149, 150, 153, 154; Union Exhibit I, pp. 2, 6, 8, 9, 17, 21, 25, 30, 43, 65, 92, 106, 107, 115, 123, 126, 130,

134, 136, 137, 140, 144, 146, 153, 155, 161, 166, 167, 169, 173, 177, 180, 182, 184, 194).

OPINION

The Union alleges that the Employer disciplined Grievant in violation of the Employer's just cause standard for discipline, and discriminatorily applied the Employer's rules governing discipline and medical leave, by issuing Grievant a performance evaluation in March 1998 which contained the following statements: "Jim has been absent 72 hours since his last evaluation, which indicated at that time that his attendance was a problem. If it does not improve immediately he will receive disciplinary action."

In deciding grievances, the Board is limited by the statutory definition of grievance. Boynton v. Snelling, 147 Vt. 564, 565 (1987). 3 V.S.A. Section 902(14) defines "grievance" as "an employee's, group of employees', or the employee's collective bargaining representative's expressed dissatisfaction with aspects of employment or the discriminatory application of a rule or regulation". Since there is no collective bargaining agreement here, the Union must allege and prove the discriminatory application of a rule or regulation. In re Grievance of Gobin, 158 Vt. 432, 434 (1992). Discrimination in this instance simply means unequal treatment of individuals in the same circumstances under the applicable rule. Nzomo v. Vermont State Colleges, 136 Vt. 97, 102 (1978). Grievance of Imburgio, 11 VLRB 168 (1988). Failure of an employer to follow a binding rule constitutes an actionable grievance. Gobin, 158 Vt. at 434.

The Union alleges that the Employer violated provisions of its Staff Handbook and its Constructive Discipline Handbook. The provisions of the Staff Handbook and

Constructive Discipline Handbook constitute binding rules. Grievance of Jameson, 18 VLRB 331, 345-46 (1995). Grievance of Lightburn, 15 VLRB 372, 392 (1992). Thus, we need to decide whether the Employer violated its binding rules governing discipline and medical leave by including the statements on Grievant's performance evaluation concerning his absenteeism.

We first consider whether the statements on Grievant's performance evaluation constituted disciplinary action. The Union contends that the statements made on Grievant's performance evaluation constituted an early step of the Employer's progressive discipline procedure. We disagree. It is clear by a reading of the statements themselves that discipline was not being imposed. The statement - "if (Grievant's absenteeism) does not improve immediately he will receive disciplinary action" - provides notice to Grievant that the constructive discipline process would be initiated if his absenteeism record did not improve. The evaluation itself, though, clearly is not initiating the constructive discipline process. The statement in the performance evaluation is consistent with the Constructive Discipline Handbook provision that, "whenever possible, the employee should have been given advance notification that the particular behavior would result in constructive discipline".

The Union next contends that the comments on the performance evaluation violated the federal Family and Medical Leave Act prohibition on disciplining employees for missing work for legitimate medical reasons. We reject this contention on several grounds. As indicated above, the comments did not constitute disciplinary action. Moreover, the Union did not make this allegation in the grievance filed with the Board and it is untimely to raise it now. Grievance of Sklar, 19 VLRB 183, 206-208 (1996).

Affirmed, Sup. Ct. Dock. No. 96-315 (June 24, 1997). Further, the Board has such adjudicatory jurisdiction as is conferred on us by statute, and we do not have jurisdiction over the Family and Medical Leave Act claims of the Union. Grievance of Woolaver, 21 VLRB 219 (1998). Grievance of VSCSE and Laflin, 16 VLRB 276, 280-81 (1993).

The Union's final contention is that the Employer discriminatorily applied its medical leave policy to Grievant by including adverse comments on his performance evaluation as a result of using earned medical leave. The Union contends that the Employer approved Grievant's use of medical leave in all instances and should not be able to make adverse comments on his performance evaluation due to his approved use of earned leave. The Union also points to the evidence of numerous other employees in the Physical Plant Department who were allowed to take as much or more medical leave as Grievant without having adverse comments placed on their performance evaluation. The Union contends that the Board already has decided this issue through its decision in Grievance of Graham, 11 VLRB 49 (1988). Therein, the Board, by a 2-1 majority, determined that the State violated the collective bargaining agreement between the State and the Vermont State Employees' Association by relying on an employee's authorized use of sick leave in giving the employee an adverse performance evaluation.

The facts of this case are readily distinguished from the situation in the Graham case. In that case, the employer relied on an employee's authorized use of sick leave supported by doctor's certificates as a basis for giving the employee an overall adverse performance rating and placing her in a period of remediation. This was a step under the collective bargaining agreement's progressive corrective action procedure that may lead to an employee's dismissal. 11 VLRB at 59-60. In the case before us, no action actually

was taken against Grievant due to his use of medical leave. Instead, the performance evaluation served to place him on notice that disciplinary action would result if his absenteeism record did not improve. Thus, the effect on the employee in the Graham case was much greater than this case.

We note that the majority decision in the Graham case may have overreached to the extent that it can be read as categorically prohibiting reliance on authorized use of sick leave as a basis for any adverse comments on a performance evaluation. There are circumstances where extensive and continual use of sick leave can be a legitimate basis for adverse comments on a performance evaluation. If an employee develops a pattern of prolonged maximum use of medical leave, then an employer is entitled to examine the effect on the employee's productivity and the ability to work as a member of a team, and seek to redress the problem. The performance evaluation process provides an appropriate avenue for an employer to address the issue.

The case before us presents an instance where an employee's history of medical leave usage justified a comment on a performance evaluation providing notice to an employee that action would be taken against the employee if absenteeism did not improve. Throughout the course of his employment over many years, Grievant has had a continuous and extensive problem with absenteeism. In nearly half of his performance evaluations, he has been rated as being excessively absent. He has received verbal warnings, oral counselings, a written warning, a written reprimand, and a suspension due to his medical leave usage and other absences. He has been spoken to by his supervisors about a pattern of using medical leave on the first work day following days off. He has been required to bring in doctor's statements to justify his absences due to his high rate of

absenteeism. He has been warned that he would be terminated if his absenteeism problem did not improve.

Given Grievant's continuous and prolonged absenteeism problem, the Employer was justified in again providing notice to Grievant through his performance evaluation that he needed to improve his absenteeism record. The Employer had legitimate concerns about Grievant's productivity and the adverse affects of his absences on his small work team.

Our conclusion should not be construed as approval of the manner in which medical leave usage is handled in the Physical Plant Department. The evidence indicated an inconsistency in the treatment of employees based on their medical leave usage. Although numerous employees in the Department have been rated excessively absent on their performance evaluations due to their medical leave usage, numerous other Department employees have not been so rated even though their use of medical leave is similar to, or greater than, the employees rated excessively absent. In this regard, it is noteworthy that Department Assistant Director Maureen Pelkey, who oversees many of the Department employees, does not necessarily know the medical leave usage of employees when she reviews and approves their performance evaluations. Closer monitoring of employees' medical leave usage, and management acting to ensure supervisors employ similar standards in evaluating employees, would provide a more consistent approach to handling medical leave usage throughout the Department.

However, the Employer's failings in this regard do not justify a conclusion that the Employer's medical leave usage rules were discriminatorily applied to Grievant. There is no evidence of other Department employees with an absenteeism problem

similar in severity and duration to Grievant not being rated excessively absent. Thus, Grievant was not treated unequally to individuals in the same circumstances under the applicable rule and he cannot sustain a claim of discriminatory application of a rule.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of the United Electrical, Radio and Machine Workers of America, Local 267 and James Bruley is DISMISSED.

Dated this 14th day of September, 1999, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Catherine L. Frank, Chairperson


Carroll P. Cornstock


Edward R. Zuccato