ROBERT KISNER,

Grievant,

v. **Docket No. 98-CORR-518**

DIVISION OF CORRECTIONS,

Respondent.

DECISION

Robert Kisner (Grievant) initiated the following grievance on October 30, 1998:

> Reprimand issued does not address substance of EEO complaint findings as issued by exeutive (sic) officer (Warden).

Grievant listed as the relief sought: “to be provided all documents, reports, tapes, etc. upon which reprimand was issued, including records of all persons interviewed.” Grievant's immediate supervisor was without authority to grant relief and denied the grievance on November 3, 1998. Upon appeal to level two, the grievance was again denied on November 12, 1998. A level three hearing was held on December 8, 1998, followed by a written decision, denying the grievance, dated December 14, 1998. Grievant appealed to level four on December 22, 1998. A hearing was convened in the Grievance Board's office in Morgantown, West Virginia, on March 16, 1999. (See footnote 1) At that time, the parties agreed to attempt to obtain the documents and other information requested by Grievant via a subpoena duces tecum, issued to the state Equal Employment Opportunity (EEO) office. After receiving a response from the EEO office, which stated that they did not havethe requested information in their possession, (See footnote 2) a conference call was held on April 9, 1999. At that time, the parties agreed that no additional evidence need be submitted, and requested a decision based upon the lower level record. This matter became mature for consideration on April 23, 1999, the deadline for submission of the parties' fact/law proposals.

The following findings of fact are made from a preponderance of the evidence submitted at level three.

Findings of Fact

1. On October 26, 1998, Grievant, who is employed as a Correctional Officer at Pruntytown Correctional Center, received a letter of reprimand for violating Division of Corrections (DOC) policies regarding disrespectful conduct and the use of insulting, abusive, or obscene language.

2. The reprimand was issued in response to the findings of an EEO investigation into complaints that Grievant had made inappropriate statements of a sexual nature to and around other employees; the reprimand listed specific statements Grievant had made which violated the policy.

3. Grievant is not grieving the fact that he received a reprimand.

4. Grievant admits that he did make some of the remarks which were the basis for the reprimand.

Discussion

The instant case presents a perplexing situation. Grievant testified at level three that he was not grieving the fact that he received a reprimand, but that he only wanted to see the information upon which it was based. He felt this was important, because he needed to find out “the truth in the whole matter,” and was under the impression that it may have been a “one sided investigation.” Level III Tr. at 2.

“Grievance” is defined by W. Va. Code § 29-6A-2(i) as:

> any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of employees.

In Grievant's written submission at level four, he stated that he felt his “civil rights were violated in the manner in which [Pruntytown officials] handled the EEO complaint.” However, once again, he does not allege that the reprimand itself was improper or without basis. It appears that Grievant's focus is the manner in which the investigation was conducted, not the fact that he was reprimanded as a result of it. Therefore, it must be concluded that Grievant agrees with at least some of the

allegations contained within the reprimand.

Grievant has provided no basis for entitlement to the statements, tapes, and other documents obtained during the EEO investigation. If Grievant were challenging thereprimand itself, he could have availed himself of the benefits of W. Va. Code § 29-6A-6(b), which requires the employer to produce, prior to hearing, any documents requested by the grievant, in writing, which are not privileged and "relevant to the subject matter involved in the pending grievance." However, because Grievant has not alleged that the reprimand itself was improper, this provision would not apply. Grievant has cited no provision which would entitle an employee to the information which formed the basis for discipline which has not been challenged.

Grievant has failed to state a claim upon which relief can be granted. He has alleged no violation, misapplication or misinterpretation of a statute, policy, rule or agreement, which would entitle him to the information requested. Accordingly, there is no basis upon which to grant this grievance.

Conclusions of Law

1. In a non-disciplinary matter, a grievant must prove the allegations in his complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Grievant has failed to prove by a preponderance of the evidence that DOC violated, misapplied or misinterpreted a statute, policy, rule or agreement, which would entitle him to the information which was the subject of this grievance.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (1998). 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: May 5, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant represented himself, and the Division of Corrections was represented by counsel, Charles Houdyschell.

Footnote: 2

DOC was unsure whether the documents were in the possession of Pruntytown officials. However, if they were, DOC contends that they have no duty to release them to Grievant.