EDWARD E. AMOS,

Grievant,

v. **Docket No. 98-CORR-389**

DIVISION OF CORRECTIONS/NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY,

Respondent.

D E C I S I O N

Grievant Edward E. Amos, employed by the Division of Corrections as a Correctional Officer at the Northern Regional Jail and Correctional Facility (Respondent), filed a level one grievance on July 29, 1998, following the imposition of a five (5) day suspension. Grievant's immediate supervisor lacked authority to grant the requested relief at level one (1), and the complaint was denied at levels two (2), and three (3). The matter was advanced to level four (4) on October 5, 1998. An evidentiary hearing was conducted at the Grievance Board's Wheeling office on December 4, 1998, at which time Grievant was represented by Barry Milbert, and Respondent was represented by Charles Houdyschell, Assistant Attorney General. The matter became mature for decision with the submission of the level three (3) hearing tape by Respondent on December 14, 1998. (See footnote 1)

The facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant is employed by the Division of Corrections as a Correctional Officer II at the Northern Regional Jail and Correctional Facility (NRJCF). 2. On May 23, 1998, Grievant left three inmates in the crossover area, without supervision, while he went to get a shot of insulin. (See footnote 2)

3. Lieutenant Donnie Stonebreaker filed an Incident Report of May 23, 1998, stating:

On 23 May 1998 at approximately 1645 hrs. I, Lt. Donnie Stonebreaker (working as Asst. Operations Officer) was advised by COI Ted Miller that three inmates were outside the crossover without supervision. Upon receiving this information I, Lt. Stonebreaker proceeded to the crossover where inmates [Fields, Leek, and Stuckey] were outside the “C” (Charlie) door. Lt. Eddie Littell proceeded to

the infirmary where COII Eric Amos was located. Upon entering the crossover, I, Lt. Stonebreaker asked who was supervising them. All three inmates stated 'Officer Amos'. As COII Eric Amos came back from the infirmary I, Lt. Stonebreaker asked this officer if he (Amos) was aware of inmates outside the crossover “C” door. Officer Amos stated 'Yes, I forgot about them, I went to get my shot.' This incident is in violation of Policy Directive 400.00 Class “C” violation C 16 - Leaving a security post without permission and C 22 - Breach of facility security. It is recommended that necessary disciplinary action be taken. A flex count was called at 1655 hrs and cleared at 1700 hrs. to verify accountability of all inmates.

4. Chief Correctional Officer Richard Lohr reviewed the Incident Report and recommended that Grievant be suspended (30) days.

5. Warden Paul Kirby reviewed the matter and imposed a five (5) day suspension from July 18-22, 1998.

Discussion

In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va.Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Warden Kirby advised Grievant by letter dated June 24, 1998, that he would be suspended for five (5) days based upon actions which were determined to be violations of Policy Directive #400, Paragraphs C-16 “Leaving a security post without permission”, and C-22, “Breach of facility security or failure to report any breach of possible breach of facility security.” (See footnote 3) The Warden noted that by leaving the inmates unsupervised, Grievant had compromised the security of the institution.

At hearing, Chief Lohr testified that after reading the Incident Report filed by Lieutenant Donnie Stonebreaker, he made the recommendation that Grievant be suspended. Chief Lohr emphasized that he did not conduct an investigation because the facts in the Incident Report were adequate for his determination that discipline should be imposed.

Grievant concedes that he left the inmates unsupervised. He stated that he had only recently been started on insulin therapy and was still apprehensive about when it was needed. When a health care employee passed by and suggested that he come in for a shot, he simply left the inmates to receive the medication. Nevertheless, Grievant assertsthat the suspension was improper because a due process violation occurred when he was not given administrative warning that an investigation was being conducted.

Grievant also alleges that he has suffered discrimination, as evidenced by lesser discipline imposed on other employees for similar, or worse, infractions. Grievant notes that the Warden received only a written reprimand “for the breach of security that resulted in the escape of an inmate from the confines of this facility on 11/19/94", and that a Correctional Officer received only a two (2) day suspension after loaning a pen knife to an inmate. The inmate “manufactured a weapon, a sharpened broomstick, to be used to assault another inmate.”

NRJCF Operational Procedure #1.29-4 provides that an Administrative Rights Warning be given to employees “who are about to be questioned as part of an official investigation and/or . . . employees who are the subject of an interdepartmental investigation.” The Policy also provides that when it is determined that an employee will be subject to an official investigation, a NRJ&CF Memorandum of Investigation or Inquiry shall be issued. These documents, which advise employees when they are subject to an investigation and list their rights during the process, were not issued in this matter because no investigation was conducted, according to Chief Lohr. Grievant disagrees, noting that Chief Lohr had spoken with Lieutenant Stonebreaker.

The American Heritage Dictionary of the English Language (3rd edition), defines “investigation” as “a detailed inquiry or systematic examination”. Clearly, that did not occur in this situation. Chief Lohr credibly testified that he only read the Incident Report filed by Lieutenant Stonebreaker, and spoke with the Lieutenant about the matter, prior to recommending the suspension. The facts of this case would indicate that the traditionalinvestigation conducted by the Division of Corrections, involving interviews of a number of individuals, was not necessary, or even possible in this matter. Therefore, Grievant's characterization of the limited contact with Lieutenant Stonebreaker as an investigation is not supported by the evidence.

“Discrimination” is defined by W. Va. Code §29-6A-2(d) as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or

agreed to in writing by the employees." Grievant's comparison of his situation to those of two other employees initially indicates that lesser punishments were imposed on individuals who had engaged in actions at least as serious as that of Grievant. However, the limited facts presented regarding the two incidents makes it impossible to fully or fairly evaluate whether Grievant was treated more harshly than the other employees.

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

Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

2. Respondent proved by a preponderance of the evidence that Grievant leftthree inmates unsupervised.

3. Grievant failed to prove that he had been deprived of any due process rights relating to an investigation.

4. Grievant failed to prove that he had been subject to discrimination, as defined by W. Va. Code §29-6A-2(d).

Accordingly, the 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. Any 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. 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: December 28, 1998 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Grievant asserted that the level three transcript contained inaccuracies, and requested that the tape be reviewed. Grievant's request was granted; however, any errors that were made in the production of the level three transcript has no effect on the level four review, and no effect on the outcome of this decision.

Footnote: 2

The crossover area apparently is in a secured location, but gives access to other areas.

Footnote: 3

This Section lists Class C offenses and provides the level of discipline for the first three occurrences. Punishment for a first offense is a sixteen (16) to thirty (30) day suspension, a second offense warrants a thirty-one (31) day to six (6) month suspension, and a third offense merits dismissal.