MARK HALE,

Grievant,

v. **DOCKET NO. 97-CORR-353**

DIVISION OF CORRECTIONS/

MT. OLIVE CORRECTIONAL CENTER,

Respondent.

DECISION

This grievance was filed at Level IV (See footnote 1) on July 30, 1997, by Grievant Mark Hale against Respondent, Division of Corrections ("Corrections"), following termination of his employment from Mount Olive Correctional Center ("MOCC"), prior to completion of his six month probationary period. Grievant challenged his termination as unjust, and alleged he had been harassed, slandered,and subject to race and handicap discrimination. He sought reinstatement, that the harassment and discrimination be stopped, and that action be taken against those who had slandered him. (See footnote 2)

Grievant was employed by Corrections on May 13, 1997, for a six month probationary period, as a Correctional Counselor at MOCC. He was dismissed by Corrections on July 30, 1997. Section 10.05 of the West Virginia Division of Personnel's Administrative Rules provides that an employee may be dismissed at any time during the probationary period when the employer determines that his services are unsatisfactory. Termination for unsatisfactory performance is not disciplinary, per se, and the burden of proof is upon the probationary employee to prove by a preponderance of the evidence that his performance was satisfactory, and he should not have been dismissed. Goard v. W. Va. Div. of Corrections, Docket No. 95-CORR-068 (Mar. 20, 1995); Smith v. W. Va. Div. of Labor, Docket No. 93-LABOR-347 (Oct. 29, 1993).

However, if misconduct is alleged by the employer, the dismissal is disciplinary, and the burden of proof is upon the employer to prove the charges by a preponderance of the evidence. Wolfe v. Dept. of Transp./Div. of Highways, Docket No. 95-DOH-491 (July 31, 1996), citing Skinner v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 91-DOH-339 (Apr. 28, 1992). Grievant argued the dismissal

was disciplinary in nature, and that the employer should bear the burden of proof. Respondent argued Grievant was dismissed because he failed to meet the standards of conduct set forth by Corrections in Policy Directive 400, and therefore his dismissal was for unsatisfactory performance. In this case, Respondent volunteered to go forward with its case presentation first, and the undersigned made a preliminary ruling at the conclusion of Respondent's presentation that, although some of the reasons for Grievant's dismissal could be considered disciplinary, the third one in particular, the first two reasons did not appear to be disciplinary per se, and that Grievant had therefore, not yet met his burden of proving the dismissal was disciplinary.

As will be discussed, Grievant was not dismissed because he could not perform the essential duties of the position for which he was hired, but because he could not be trusted by Corrections, was not cooperative, and did not do what he was told to do. While dismissal for each of the three Policy Directive 400 violations cited by Respondent in the dismissal letter could be considered disciplinary, each can also be considered failure to meet agency standards. The undersigned concludes that when Corrections discovered Grievant had intentionally failed to fully and accurately disclose pertinent medical information asked for by Corrections' personnel, Corrections had lost something crucial to operations at the state's maximum security prison: the ability to trust the employee. Grievant's reaction to MOCC's investigator when she attempted to interview him, and his decision to call off work to contact a lawyer, rather than reporting to Deputy Warden Painter as directed, only served to make Corrections more wary of Grievant's integrity. Grievant's actions while on the job, and his own testimony demonstrated that he had no faith in his employer. The undersigned concludes that the dismissal was for unsatisfactory performance, and the burden of proof was upon Grievant to demonstrate his performance was satisfactory. (See footnote 3)

Respondent's first witness, Howard Painter, Deputy Warden at MOCC, made the decision to dismiss Grievant. He is a 28 year employee of Corrections, and is in charge of employee discipline at the maximum security prison. He explained that the probationary employment period allows personnel at MOCC to observe a new employee's work habits and characteristics, so they can determine whether the employee can adapt to employment at the prison. He explained that Corrections has adopted Policy Directive 400, which sets forth employee standards of conduct and performance, and that Grievant did not meet those standards.

Grievant's dismissal letter signed by Deputy Warden Painter recites three violations of Policy

Directive 400.00, Section 7.00, and then states:

> You were advised during the interviewing and orientation process that it would be necessary for you to successfully complete a probationary period. This period is a trial work period designed to allow the agency an opportunity to evaluate the ability of the new employee to effectively perform the work of the position and to adjust to the organization and the programs of this agency. The probationary period is an integral part of the examination process and is utilized for the most effective adjustment of a new employee and for the elimination of those who do not meet the standards of work required by the employer.
>
> Based on the facts contained in this letter, it is apparent to me that you do not meet the standards required for the position of a Correctional Counselor II.

The three violations cited in the dismissal letter were, 1) "[f]alsifying any records whether through misstatement, exaggeration, or concealment of facts;" 2) "[r]efusal to cooperate in any official state inquiry or investigation, including a refusal to answer work related questions or attempting to influence others involved in an [o]ngoing investigation;" and, 3) "[f]ailure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable established written policy or procedures." The undersigned finds the first violation to be the most serious of the three, as the evidence presented by Respondent, and Grievant's attempts toexplain what occurred in relation to this violation, reveal that Grievant intentionally did not disclose pertinent information about his medical condition and prescribed medications to his new employer, or to his employer's physician. As the facts are laid out, it will become obvious that Grievant may have been hesitant or even embarrassed to reveal all the facts about his medical condition, but his intentional omission of information calls into question his honesty. While he may not have technically lied, he was certainly less than forthright. Employee honesty is critical to the state's maximum security prison. Even if the dismissal were found to be disciplinary in nature, the undersigned would find that Respondent proved this charge, and it was sufficiently serious to warrant the dismissal of a probationary employee. See Bowman v. W. Va. Educational Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997).

The first violation of the standards of conduct involved Grievant's disclosure to MOCC's Human Resources Department and physician of the number and type of medications he was taking, and his failure to advise MOCC, and in particular, MOCC medical staff, that he had been treated for Post Traumatic Stress Disorder and was prone to violent behavior. Deputy Warden Painter stated that

Cheryl Chandler, an investigator for MOCC, had investigated this matter and confirmed that falsification had occurred. He stated the failure to disclose medication Grievant was taking was not satisfactory job performance, because MOCC needs to know what medication is in or could possibly be in the facility, what medication needs to be available if an employee becomes ill on the job, and if an employee is taken hostage, this information is needed so they can make better decisions regarding the employee's welfare. He explained that all medications at the prison are controlled and must be accounted for. He stated employees are advised during orientation that they must reveal all medical conditions, and all medications they are taking. Deputy Warden Painter further stated that part of the employee's job is to accurately complete pre-Academy forms, and employees are instructed to accurately complete the forms. He explained it concerns him when an employee falsifies information, because it calls into question the individual's honesty and integrity. He pointed out that the prison's clientele are not the most honest individuals, and Corrections must rely on the honesty and integrity of staff in dealing with these individuals.

Ms. Chandler explained that her investigation was initiated when the warden received information from Sergeant Jeffrey Wroten, Correctional Trainer at the Corrections Academy, and Lieutenant Roger Elder, supervisor of Academy operations, that Grievant did not give all his medical prescription information to the physician at MOCC during his pre-Academy physical. After working at MOCC for a little over a month, Grievant had been assigned to the Corrections Academy, housed at West Virginia Institute of Technology, for six weeks, beginning July 7, 1997. The Academy was established by Corrections for training all correctional officers and staff, and county and regional jail staff. Persons assigned to train at the Academy are housed on site. Completion of the Academy is mandatory for any employee of Corrections.

Ms. Chandler stated her investigation caused her to compare three instances involving Grievant's reporting of his medications and medical condition. The first instance occurred May 20, 1997. Terry Arthur, Office Assistant II, Human Resources Department at MOCC, testified she advised Grievant and other new employees during orientation, that Human Resources had to have a list of any medications they were taking. She did not indicate she had asked for information on medical conditions. On May 20, 1997, Grievant advised the Human Resources Department atMOCC in writing that he was taking medications for medical reasons, and that he "must have present in my POV (See footnote 4)," Imitrex, Serzone and Lithium.

While Grievant was at the Academy, Corrections discovered he had also been prescribed Ambien and Epitol, and had refilled his prescription for 20, 10mg tablets of Ambien, on May 21, 1997. When he reported to the Academy on July 7, 1997, the Ambien bottle was empty. Grievant did not report to the Human Resources Department that he had been prescribed or that he was taking Ambien or Epitol. Grievant testified he had last taken Ambien in early June 1997, and he was taken off Epitol by his doctor in February 1997, and had not taken it since then. (See footnote 5)

On June 17, 1997, Grievant reported for his pre-Academy medical examination. Dr. Essa Abdulla, a Corrections employee, performed the examination. (See footnote 6) The medications Grievant listed on the medical form completed by Grievant at that time, as medications he was currently taking, were Imitrex, Serzone and Lithium, and he identified a pre-existing condition on the form: post-traumatic brain injury. While Lt. Elder was concerned that Grievant had placed this information on the form after his examination, Dr. Abdulla confirmed that Grievant had told him he had a head injury resulting in some type of trauma to the brain, and he was aware Grievant was taking the medications listed on the form for headache and psychological treatment. He explained, however, that post- traumatic brain injury is a very broad term, and simply refers to the period after a traumatic braininjury. He explained some persons with a traumatic brain injury could be paralyzed for life, and others not affected at all. He stated he carefully assessed Grievant after learning of his injury, taking into account the medications he was on, and he felt he was qualified to undergo the physical and mental stresses of the Academy. He stated his evaluation did not reveal that Grievant required any special accommodations by Corrections. He stated many people take Imitrex for relief of migraine headaches, and a lot of people function very effectively as long as they are taking Lithium.

Grievant stated he explained to Dr. Abdulla that he was not taking his prescribed medication, and that he was stable. He stated Dr. Abdulla asked him if he felt he could handle the stress of the Academy, and he had responded that it would not be a problem. However, Dr. Abdulla testified that if Grievant were not on his medication and not stable, he would have been more apprehensive, but Grievant was on medication and controlling his problems. He stated he had rejected an applicant to the Academy with a similar medical condition at the same time he had found Grievant able to attend. He did not recall whether Grievant had disclosed he had other medications prescribed to him that he was not taking. He did not recall Grievant telling him he took Lithium only when Serzone was not effective, and that he was not taking Serzone because he was stable. The form asks for a listing of

"Other Medications Currently Being Taken and Reasons For."

The Academy application form which Grievant completed, dated June 19, 1997, states:

> "THE FOLLOWING INFORMATION IS NEEDED FOR ROOM ASSIGNMENT: Male: _____ Female _____
>
> Special Accommodations Required: _____."

Grievant checked the blank beside "Male," but did not disclose a need for special accommodations. Grievant reported to the Academy on July 7, 1997. In response to an inquiry during orientation atthe Academy regarding any type of medical problem which had developed since the pre-Academy medical examination, Grievant submitted a hand-written memorandum to Lt. Elder, dated July 7, 1997, in which he noted his pre-existing medical condition for which he was being treated as "post traumatic brain injury, PTSD [post traumatic stress disorder]," and stated he was currently taking Serzone, Lithium and Imitrex. He further stated, "[i]t is recommended that certain accom[mo]dations be made. 1) Room with someone who understands my condition. 2) Problems with sleep/disturb."

Grievant had reported to the Academy without his medication. Sgt. Wroten testified he asked Grievant if the medications and what they were for was on the medical form filled out when he had his pre-Academy medical examination, and Grievant responded that he did not want to put his business on the street at Mount Olive, and that some of the information had intentionally not been placed on the medical form. Sgt. Wroten stated Grievant then told him he had not been taking his medication and was concerned, that he was prone to bad dreams and flashbacks, and his wife had to take a special course to learn how to deal with him if this occurred during the night. He stated Grievant had expressed concern for his roommate. He stated Grievant told him he was occasionally prone to aggressive behavior. He did not recall Grievant requesting a room by himself.

Grievant was allowed to go home to retrieve his medication. Sgt. Wroten told him to get all his medication, and that if the information was not on the medical form already, he would need to know the dosage and what the medication was for. Upon returning to the Academy Grievant produced the following prescription bottles: Imitrex, Ambien, Serzone, and Epitol. Grievant did not bring his Lithium. Sgt. Wroten stated Grievant told him he was not taking all the medications, andhad not been taking them for a period of time, but that with the possible stress he might undergo in the Academy situation he had decided to start taking his medication.

Sgt. Wroten reported his conversations with Grievant to Lt. Elder, who then interviewed Grievant.

Lt. Elder inquired about Grievant's medications and medical condition. Lt. Elder stated Grievant told him he suffered from post traumatic brain injury and post traumatic stress disorder, he was in constant concern about losing his temper, that he was known to have violent episodes, and his wife had to have special training to deal with his loss of control. He stated the medication Grievant produced was different from what was listed on his medical evaluation form, and he inquired about this so he could record what Grievant was taking. He stated he did not ask Grievant to explain the discrepancy, because he felt Grievant was becoming agitated. He said he became concerned that Grievant had not disclosed his medications or medical condition to Dr. Abdulla, but had written the information on the medical evaluation form regarding his medications and injury after his medical examination by Dr. Abdulla, because when Grievant told him he filled out this part of the form, that did not seem appropriate, and he felt that Dr. Abdulla would have taken some action to make the Academy aware of Grievant's medical condition had Grievant told Dr. Abdulla of his condition. He stated Grievant told him he was not taking the medicine as prescribed, that he did not like to take medicine, and that this was a problem with his treatment process. Grievant told him he had not taken his medication for about two months. Lt. Elder stated he was concerned about pushing Grievant into a hostile situation. He also noted the Academy training requires that trainees be purposefully placed in very stressful situations to see how they will respond. Lt. Elder's July 8, 1997 memorandum to Kathryn Lucas, Director of Training at the Academy, sheds further light on why he was so concerned about Grievant's medical condition. The memorandum states:

> During the course of the interview, student Hale showed me medicine prescription bottles containing the following medications, listed with the following dosages and prescribed by:
>
> 1. Imitrex Injection - 6 mg/0.5ml, used for migraine headaches. Self injected into large muscle mass. Prescribed by Dr. Sidney Lerfald, as needed.
>
> 2. Ambien - 10mg tablet, used as a sleeping aide, last filled on 5/21/97 with 20 tablets. This prescription was empty, Student Hale stated that he needed to have it refilled. Prescription bottle listed "No Refills". Prescribed by Dr. Lim Mely, Charleston, WV.
>
> 3. Serzone - 150mg tablets, used as a temper control medicine/anti depressant medicine. Prescribed by Dr. Lerfald. Last filled on 12/12/96 with 62 tablets, 1 refill remaining. Dosage of 1 1/2 tablets at bedtime.
>
> 4. Epitol - generic drug for Tegretol, 200mg tablet, used for manic depressive disorder, prescribed by Dr. Lerfald. Last filled on 11/6/96, unknown number of tablets, 1 refill remaining. Dosage of 1 tablet at 1800 hours and 2 tablets at bedtime. Numerous tablets in medicine bottle.

> 5. Lithium - student Hale stated that he was prescribed this medicine by Dr. Kamtham of Charleston, but that he did not bring the medicine with him to the WVCA.

Respondent's Exhibit 3. Obviously, Lt. Elder would be concerned that Grievant had prescriptions from three different doctors, and that he was not taking the medicine as prescribed, given the conditions for which the medicine was stated to be prescribed. While Grievant testified at the hearing that his doctor had told him he did not need to take the Serzone or Lithium because he was stable, he told Lt. Elder only that he did not like to take it and had not taken it for two months. Lt. Elder's memorandum explains that Grievant told him that due to his change in health insurance carriers, "he was having difficulty with being treated by the same Doctor for his condition." Grievant stated he requested special accommodations because of his nightmares, and he did not want to be embarrassed. He stated he asked for a private room or a roommate who understood his medical condition. He did not explain why he had not noted his need for special accommodations on the Academy application, nor did he offer an explanation as to why Dr. Abdulla would not see a need for any special accommodations. He stated the more he told Sgt. Wroten and Lt. Elder about his condition, the more it made them rush to judgment about his behavior.

Grievant testified his doctor had prescribed Serzone in place of Epitol, due to the side effects he had experienced with Epitol, and he had not taken Epitol since February 1997. He placed into evidence a letter from Dr. Sidney C. Lerfald, dated February 21, 1997, to confirm this. This letter also stated that he had been treating Grievant since July 18, 1996, for Bipolar Disorder, Mixed, Post Concussive Syndrome, and Organic Personality Changes as well as Post Traumatic Migraine.

Grievant focused on the language used on the medical form he filled out and on the memorandum he provided to the Human Resources Department. The medical form did not ask what medications were prescribed, but what medications he was currently taking. Likewise, the memorandum he submitted to Human Resources stated he was currently taking the listed medications, and did not address prescribed medications. While Grievant's argument is plausible at first glance, a close examination of Grievant's testimony makes it clear that Grievant was playing word games, and intentionally did not disclose all the information about his medications. This is supported by his statement to Sgt. Wroten that he did not want his business "on the street."

Grievant stated he did not mention Ambien on the medical form because it is prescribed to be taken as needed for insomnia or sleep problems, which he had sometimes, but not always, and he

was not taking it at the time. Apparently, this is also why he did not list Ambien on thememorandum submitted to the Human Resources Department, even though he refilled the prescription the very next day, and was obviously taking this medication regularly, as it was gone by July 7, 1997. However, he did not inform the Human Resources Department of this change.

Grievant likewise explained that Imitrex was also a medication which is prescribed to be taken only as needed for migraine headaches, yet he listed it. Grievant stated he carries Imitrex in his car. Grievant would not take the Ambien while he was at work, and apparently, made a distinction based upon this fact. He further stated he had last taken Serzone two months prior to entering the Academy, because his doctor had told him not to take it if he was stable. He stated he takes Lithium only when Serzone is not effective. He stated he keeps the Lithium and Serzone handy so he can take them if he starts having problems. Thus, he listed these two drugs as medication he was currently taking when he was not taking them, but failed to list Ambien, which he was taking. Grievant stated at another point, however, that he wrote down medications which were currently prescribed.

Grievant cannot be faulted for his failure to disclose his prescription for Epitol, so long as he did not bring it to the institution, was not taking it, and was not supposed to be taking it.

As to the failure to disclose to the Human Resources Department that he was taking Ambien, and the disclosure that he was taking Serzone and Lithium when he was not, while Grievant may have believed that to explain all of this might be confusing, he had an obligation to truthfully and honestly disclose all of the information about the medicine prescribed for him, and whether he was taking the medicine, and under what circumstances.

More importantly, Grievant had a duty to fully disclose the medications he was taking to Dr. Abdulla so that he could properly evaluate his mental and physical ability to go through training atthe Academy, and so the Academy would know whether Grievant required special accommodations. Grievant's story differed from Dr. Abdulla's, and requires a credibility determination. The undersigned concludes that Grievant did not tell Dr. Abdulla he was taking Ambien, and did not disclose that he was not taking either Serzone or Lithium as prescribed.

Dr. Abdulla's testimony was straightforward in responding that he believed Grievant could attend the Academy, noting, without being prompted, that if Grievant were not on his medication and not stable, he would have been more apprehensive, but Grievant was on medication and controlling his problems. Although Dr. Abdulla had an interest in protecting his medical recommendation regarding

Grievant, he did not flatly deny that Grievant had told him he was prescribed other medications, and that he was not taking Serzone. His testimony indicates that, had he known this, he would have at least been more apprehensive. The medical form itself, which Dr. Abdulla signed at the time of the examination does not list Ambien, but does list Serzone and Lithium as medications currently being taken, and is the best evidence of what Grievant disclosed to Dr. Abdulla. Also telling is that Grievant told Dr. Abdulla he was stable and could handle the stress of the Academy, but told Sgt. Wroten he was concerned about the stress of the Academy on his medical condition, and that because of this, he had started taking medication, which by Grievant's testimony he had told Dr. Abdulla he was not taking. Any way you look at it, Grievant misrepresented his medical condition to Dr. Abdulla.

The undersigned must conclude, as Corrections apparently did, that Grievant was not honest in the disclosure of his medical information. While he may not have lied, he intentionally did not tell the whole truth. The dismissal letter accurately concludes on this point, "[i]t is obvious that youwithheld pertinent medical information about yourself from both the MOCC Human Resources Department and the MOCC Medical Staff."

The second charge arose when Ms. Chandler went to the Academy to interview Grievant in connection with her internal investigation of Grievant, and he refused to be interviewed. Deputy Warden Painter stated that participation in official investigations is part of an employee's job, and employees are advised of this. He stated failure to cooperate in an official investigation is not satisfactory job performance.

Ms. Chandler stated on July 10, 1997, she reported to the Academy to obtain the interviews needed to complete her investigation. She stated she interviewed Sgt. Wroten and Lt. Elder, and then attempted to interview Grievant in a conference room. She stated Grievant was taken from his class, and escorted by Sgt. Wroten to the conference room. She related that she stood up to greet Grievant, and asked him if he remembered her from Mount Olive. She stated Grievant responded, "[y]es, you're the investigator, and what do you want with me?" She concluded from his response and his body language that he was defensive. She told him she needed to ask him a few questions regarding a report by staff at the Academy that he had listed some medications which he did not reveal to Dr. Abdulla during his pre-Academy physical. Grievant responded, "That's a lie! That's a lie! Who told you that?" She stated she told Grievant it was not important who told her, but she needed to know whether it was true.

She stated she believed Grievant was angry and upset, and asked him several times to calm down and tried to explain the investigation to him. Grievant then pointed to the presence of the tape recorder and told her he was not talking to her without his lawyer. She told him he could not have a lawyer present during the interview, that it was an internal investigation, and she tried to explainthe difference between an internal administrative investigation and a criminal investigation. Grievant said he would not talk to her because he did not know what his rights were. She then pointed to the written administrative rights warning, which was on the table for Grievant to review and sign, and told Grievant these were his rights. Grievant pushed the paper towards her, and said, "I'm not reading that, and I'm not going to talk to you until I talk to someone at the DOC." She told him Deputy Warden Painter was the Acting Warden that day, and asked if he wanted to talk to him. Grievant simply responded he wanted to talk to someone at the DOC. She did not ask him with whom at the DOC he wanted to speak.

She stated she asked Grievant to calm down, and he said she was harassing him. He said, "are you telling me I can't call a lawyer," and she stated she responded, "[n]o, sir. You can contact as many lawyers as you'd like to, but you cannot have one while, uh, in the interview." She stated she would have let him call a lawyer from the conference room to ask if he needed to go forward with the interview, and she has allowed that in other cases. She then asked him if he was telling her he was not going to continue the interview, and he responded, "[n]ot until I talk to someone at the DOC." She stated at that point she decided not to argue with him further, and told him to report back to class. He told her he wanted to make a telephone call, and she told him he could make as many calls as he deemed appropriate after class.

Ms. Chandler stated she had conducted numerous investigations, and viewed Grievant's behavior as refusal to cooperate. She stated his behavior impaired her ability to complete the investigation, because she could not obtain his side of the story. Grievant did not try to contact her at any time after the attempted interview in an effort to complete the interview, nor did she make any further attempt to contact Grievant. Grievant did not report to his class, but instead asked Lt. Elder for permission to call the DOC central office, which he allowed. Grievant went into the Staff break room to make the call, and then went to the student break area, rather than returning to class. Lt. Elder observed Grievant in the break area smoking and shaking violently. Lt. Elder asked Grievant twice if he was okay, and Grievant responded he just needed to get himself together.

Grievant explained at the hearing that he did not want to talk to Deputy Warden Painter, because he had failed to respond to two incident reports Grievant had filed. He stated he wanted to talk to someone at Corrections' personnel office, like Hilda Williams or Manfred Holland, to ask about the investigative process. He stated he never said he would not cooperate. He stated no one tried to contact him after that to try to get his side of the story. He stated he had made telephone calls to the institution to try to find out whether someone was going to talk to him, after he was suspended on July 11, 1997, pending the results of an investigation.

Grievant believed that someone should have just asked him questions about his medical condition. He stated he is a hyperactive individual, and has an intimidating demeanor. He admitted he was "antsy" about Ms. Chandler's investigation, but explained it was because of other incidents during his tenure at Mount Olive which he considered to constitute harassment. He later stated he was "teed off" because his integrity was being questioned, and that he was leery of what was going on because of other incidents at MOCC. Grievant related these incidents to explain why he reacted as he did, as well as in support of his claims of harassment and racial discrimination. The undersigned finds that these other "incidents" did not excuse Grievant from a duty to control his behavior, to respond to Investigator Chandler in a professional manner, and to cooperate in an internal investigation. Grievant did not place blame for his actions on his medical condition. This Grievance Board has previously addressed the issue of employee cooperation in an internal investigation, in Tolley v. W. Va. Div. of Natural Resources, Docket No. 94-DNR-629 (May 18, 1995). That case noted that in a line of cases following Garrity v. New Jersey, 385 U.S. 493 (1967), the United States Supreme Court

> has held a public employee may be compelled (i.e., the agency states that the employee must answer the questions on the pain of disciplinary action if he refuses) to answer questions if there is immunity from federal and state use of the compelled testimony or fruits of that testimony in connection with criminal proceedings against the person testifying. Gardner v. Broderick, 392 U.S. 273 (1968). The questions to the public employee must be specifically, directly, and narrowly related to the performance of official duties. Uniformed Sanitation Men Ass'n. v. Commissioner of Sanitation, 392 U.S. 280 (1968).
>
> It is improper to require responses to these questions and at the same time require a waiver of immunity from prosecution. Only in a proper proceeding is an employer warranted in dismissing a public employee upon his refusal to answer questions. A "proper proceeding" means such proceedings in which the employee is asked only pertinent questions about the performance of his duties and is duly advised of his options and the consequences of his choice. Id. More specifically, "given adequate

> immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment." Lefkowitz v. Turley, 414 U.S. 70, 84 (1973).

In Tolley, the grievant had stated he wished to have an attorney present, and the interview had ended at that point. Tolley did not directly address the issue of whether an employee has the right to request the presence of an attorney, because it found the grievant could not be dismissed for failure to cooperate in an internal investigation when the agency had not advised him of his rights. Tolley, however, indirectly indicates that an employee who has been properly advised that his statements or fruits thereof cannot be used in a criminal proceeding, cannot demand the presence of an attorney. The right to an attorney arises out of the Sixth Amendment right to counsel, and the Fifth Amendment privilege against self-incrimination, and in West Virginia, out of Article III, § 14 of our state Constitution. These constitutional rights specifically apply only to criminal proceedings. See Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); and Committee on Legal Ethics, Etc., v. Pence, 240 S.E.2d 668 (W. Va. 1977). Thus, if an employee is assured that his answers, or any evidence discovered as a result of his answers, cannot be used against him in a criminal proceeding, the employer may require the employee to answer pertinent questions posed in an internal investigation, without the presence of an attorney.

Grievant was presented with a written statement of his rights, which he refused to read. That statement would have fully advised Grievant, had he read it, that his answers to questions, and any evidence gleaned from the investigation,

> cannot by law, be used against you in any subsequent criminal proceedings, however, your answers, subsequent evidence, and information may be used against you in relation to Division administrative charges for violations of regulations promulgated by the Department of Military Affairs and Public Safety, Division of Corrections and/or Mount Olive Correctional Complex.
>
> Refusing to answer questions in relation to any official Division investigation is a violation of Division Policy and Procedure, and may result in discharge from employment.
>
> Answering questions untruthfully is a violation of the West Virginia Code and Operational Policy and Procedure. If you elect to be untruthful, you may be discharged from employment.

Respondent's Exhibit 5.

The undersigned concludes that Ms. Chandler's evaluation of Grievant as uncooperative is fully supported by the evidence, and her conclusion that there was no point in trying to continue theinterview was reasonable. While she could have tried to conduct the interview at another time, she had no obligation to do so, and there is nothing to suggest that the outcome would have been any different. Once it had advised Grievant of his immunity from criminal prosecution, Corrections could demand that Grievant participate in the internal investigation, and could dismiss him for failure to cooperate.

The next question is whether Grievant was justified in his refusal to cooperate because he had previously been subjected to harassment at MOCC. The first incident he related occurred during his first week at MOCC. He stated Walt Jackson, a case manager, came up behind his orientation group and yelled, "Spook! Spook! Spook!" When Grievant, who is of African-American descent, turned around, Mr. Jackson said, "I'm not talking to you. I'm talking to this guy over here." Grievant saw this as a racial slur, which he did not like, and he also felt this was harassment, and he reported it to his supervisor. Grievant was further upset because no action was taken on his complaint, and because some unidentified person told him that was the way people who wore cowboy boots and rub snuff talked, and that person would be gone soon anyway, so it wasn't a big deal. He stated his supervisor did not take him seriously, so he went to the Associate Warden.

Michael Milhollen, Executive Assistant to Teresa Waid, Associate Warden of Treatment, stated he spoke to Mr. Jackson the day of this incident in response to Grievant's complaint. He stated Mr. Jackson explained to him that Frank Williams, a Counselor, was in the hallway at the same time as Grievant, and he knew Mr. Williams from Vietnam, where they had both worked in intelligence. He admitted he had called Mr. Williams "spook," referring to his former status as an intelligence officer. He stated he had no intention to use the term in a derogatory fashion. Mr. Milhollen testified he had heard the word used before in reference to military intelligence. While Mr. Jackson should know better than to use a word which is so offensive to a large percentage of the population in the manner he did, his explanation is perfectly plausible, and should have been accepted by Grievant as not being directed at him, or any other person of African- American descent. Mr. Jackson should have apologized, but nothing required him to do so. Neither Grievant's supervisor nor the Deputy Warden took the investigation further than Mr. Milhollen had, because there was no reason to do so.

Grievant submitted into evidence a memorandum from a Dorothy Kerr, a Case Manager at Birch Hall, to Teresa Waid and Ralph Terry, Unit Manager Birch Hall, on May 29, 1997, reporting on this incident, and noting that she had told Grievant Mr. Jackson would never refer to a black person as a "spook." It states that she had told Grievant where she came from a "spook" was a dead person, indicating he should not be so sensitive to the use of this offensive word. Then, after relating a comment by Grievant that his aunt's name might be in the institution's records, she states, "Counselor Hale seems to know all the black convicts, and he's been in the records room `checking things out.'" Grievant's Exhibit 4. This type of comment, absent some documentation to support it, seems to the undersigned to be an uncalled for exaggeration, which could understandably be considered racially motivated. Grievant was justified in his concerns about this memorandum, although there is no indication that anyone at MOCC ever gave this memorandum a second thought.

The same afternoon he reported Mr. Jackson's action to the Associate Warden, Grievant was called to the institution entrance because the drug dog had indicated it had smelled drugs in his car. He unlocked the vehicle and no drugs were found. When he asked how "they" knew it was his car, Grievant testified that Lt. Paul Simmons told him the license plate had been run through the Department of Motor Vehicles. Lt. Simmons testified, however, he had told Grievant the licensewas probably run through DMV. The car belonged to Grievant's father-in-law, and he told Lt. Simmons this. Lt. Simmons stated he then told Grievant they could have found out whose car it was by a number of methods, but he did not know how they found out. He stated he now believes it was identified by someone who had seen Grievant drive the car into the lot.

Grievant concluded that because the dog had alerted on his car the same day as his incident report, and because Lt. Simmons had told him the car had been identified as his by the license number when this was not possible, he had been set up, and was being harassed. Grievant's conclusions on this incident are without merit.

Lt. Simmons stated that when the dog alerted on the car, he went out with Corporal Delana Sanford, Canine Officer, to try to identify the car. He stated they looked for the state tag in the windshield and there was not one. He stated he had Corporal Sanford walk the dog past the car again, and the dog again gave a positive indication there may be narcotics there. He stated the dog alerts when it detects the odor of narcotics. He stated Corporal Sanford walks the dog through the parking lot randomly doing spot checks, trying to avoid a pattern. He stated he did not know who

Mark Hale was at that time. He stated it was standard procedure to search the car when a dog alerts on it.

Corporal Sanford stated Grievant was identified as the driver by a pink interdepartmental envelope on the console with Grievant's name on it. She stated she had decided to take the dog to the parking lot that day, and was not directed to do so, and she did not know the car was driven by Grievant at the time the dog alerted on it. Grievant filed an incident report, because he thought it was odd. He stated no one ever followed up with him on his incident report. The reason for this is obvious. Grievant then pointed to a memorandum from Michael Ong to Teresa Waid, dated May 14, 1997, reporting he was concerned about comments made by Grievant during an orientation tour. Mr. Ong reported that Grievant had asked what number of minorities were employed in the inmate work program, as compared to white inmates, and when he replied he did not know, Grievant had explained that employment statistics were watched closely at his previous job and he thought Mr. Ong should do the same. Grievant's Exhibit 8. While the undersigned can understand why Grievant might have some concern about this being reported, Grievant should expect that if he is going to publicly question the way in which someone performs his duties, that person may take some action to cover himself.

Finally, Grievant related he had applied for a Case Manager position, and was told he could not have that position. He had then called Hilda Williams in early June, 1997, at Corrections' central office, and he testified that she told him if he was on the register he was supposed to get an interview, and she directed "them" to give him an interview. He stated he was told by the personnel director that Corrections was continuing to investigate him, because the standard background investigation had shown he had been arrested in Dunbar. Grievant stated he told her those charges were dropped, and were misdemeanor charges, but she responded that Corrections was still going to investigate him. He felt maybe this was being done because he went over "their heads."

Rita Albury, Human Resources Director at MOCC during this time, testified quite clearly and plausibly that she had told Grievant his background investigation revealed one charge with no disposition, and she asked him if it had a disposition, to which he responded that it had been settled and dismissed. She stated she told him everything had to be cleared, and she would check to make sure it had been dismissed. She stated it is standard procedure for her to ask the investigator to checkmisdemeanor charges for disposition, which she did in this case, and the investigator found the

charge was still pending in the judge's court, and she advised Grievant of this.

Grievant did not indicate whether he had checked with the court to see if this was true, and he did not present a dismissal order either to Ms. Albury or to the undersigned. While it is understandable that someone not familiar with the disposition of misdemeanor charges would not know to make sure the appropriate order was entered to dispose of the case, Grievant's lack of knowledge of this process does not provide him with an excuse to accuse Ms. Albury, or Corrections in general, of wrongdoing.

Ms. Albury further explained that Grievant was not interviewed for the Case Manager position because he was a probationary employee. She explained the job had been posted internally for certified permanent employees, and those employees were being interviewed at that time. Grievant did not dispute this. She stated when Grievant asked about it and told her his name was on the register, she asked Hilda Williams if they could change their policy and interview Grievant, and Ms. Williams told her to interview Grievant because his name was on the register, and he was given an interview.

The undersigned concludes that Grievant was not justified in his reaction to this series of events. While some of them understandably upset him at the time, there is no pattern here of harassment, or of an agency out to get him. He was not justified in responding to Ms. Chandler in the manner he did.

The third violation relates to Grievant's failure to report to Deputy Warden Painter at 8:00 a.m., on July 11, 1997, as ordered. Deputy Warden Painter explained Grievant was dismissed from the Corrections Academy, and he was instructed to report to him at 0800 hours the next day, and didnot do so. He characterized this as failure to follow a mandatory instruction from a supervisor, which is a critical part of an employee's job performance. He explained Corrections is a para- military organization with a chain of command. Manfred G. Holland, Deputy Commissioner of Community Operations, echoed Deputy Warden Painter's remarks, noting that failure to follow orders can cost lives. Deputy Warden Painter pointed out that MOCC is a maximum security prison, and the prisoners are manipulative and dangerous. This makes good communications with staff and control of staff essential.

Lt. Elder stated that Kathryn Lucas decided that Grievant should be dropped from the Academy due to the information Grievant had provided to him and St. Wroten about his medical condition, the fact Grievant was not taking his medication as prescribed, and Lt. Elder's observations of Grievant.

They felt it was in Grievant's best interest for him to be dropped from the Academy at that time, for his own safety and the safety of others, and that he should receive another medical examination.

Lt. Elder's July 10, 1997 memorandum to Director Lucas explains what Grievant was to be told about reporting to Deputy Warden Painter. It states:

> At approximately 1635 hours you contacted me and issued me the following instructions: . . .
>
> 3. Give Student Hale the following Reporting for Duty Instructions: Report to Deputy Warden Howard Painter at 0800 hours on 11 July 1997.

Respondent' Exhibit 4. The memorandum does not state that Lt. Elder relayed this instruction in exactly this manner, but concludes,

> I again asked Mr. Hale if he remembered his reporting instructions to which he verbally related to me what the instructions were. Grievant admitted he had not reported to Deputy Warden Painter at 8:00 a.m., on July 11, 1997. He explained he had called in the night before to report off work to take care of personal matters, giving plenty of advance notice. He stated he was within his rights to call in and say he was not coming in so he could take care of his personal matters, so long as there was no crisis situation at Mount Olive which required his presence. He pointed out that Deputy Warden Painter did not call him and tell him it was very important that he come in. He stated he had just been released from the Academy for medical reasons, and he needed to find out what his rights were in the investigative process, and described these as pressing matters. He testified he first called his doctor and explained the situation and asked whether the doctor needed to see him. The doctor scheduled him for an appointment on another date. He testified he then started making telephone calls to Corrections and Personnel. He did not indicate how long it took him to place these telephone calls.

Deputy Warden Painter acknowledged that he had received a message from an officer the morning Grievant was to report to him, indicating Grievant was going to Charleston to see a lawyer or someone, and if he was done by a particular time, Grievant would come and talk to him, but otherwise, he would not be in. Deputy Warden Painter characterized this as refusal to report.

The message was taken by CO Kevin Higginbotham on July 10, 1997, at 2212 hours, and was directed to Deputy Warden Painter. The message given to the Deputy Warden was that Grievant "had some `legal work' to take care of on 11 July 1997 and if that work was completed by noon that he would be in. If not he would <u>not</u> be in." Grievant's Exhibit 12.

Deputy Warden Painter agreed it was acceptable for an employee to call in to report he would not be in due to illness or because something had come up, but stated, "I think a normal person, who is under these circumstances, knowing that their job may be on the line, would make a special effortto, to follow that order, instead of basically calling and sloughing off." He stated Grievant should have

known his job was on the line because he had been released from the Academy. He stated no extenuating circumstances were explained to him. He also stated Grievant should have called in closer to 8:00 a.m., and talked directly to him, rather than leaving a message. Grievant stated he tried to call Deputy Warden Painter later, but he was out of the office from July 11 through 19, 1997.

It is apparent that Grievant followed the standard, accepted procedure for reporting off work, and was not told his request for leave was denied, and to report immediately. While Grievant may have exhibited a lack of good judgment, the undersigned cannot conclude from the evidence that Grievant refused to obey an order.

Grievant countered with testimony from four witnesses, including his supervisor at MOCC, that his training at MOCC had gone very well, his performance was satisfactory, and he had exhibited no behavior problems in his training. This evidence, however, is insufficient to outweigh the severity of the acts which led to his dismissal for unsatisfactory performance. Regardless of how well Grievant performed his assigned tasks, if his employer had lost confidence in its ability to trust him, Corrections was justified in dismissing Grievant during his probationary period.

Grievant's allegations of harassment and discrimination will be addressed solely to evaluate whether there was a pattern which led to his dismissal. W. Va. Code § 29-6A-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." The incidents related by Grievant have been discussed in detail previously, and no further discussion is warranted. Grievant did not prove the charge of harassment.

Grievant alleged he was unlawfully discriminated against because of his race and handicap.

> Public employers are prohibited from discriminating in terms and conditions of employment because of "handicap" under the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1, et seq., or "disability" under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12112-14 (1994). This Grievance Board does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act, which would include a claim of handicap discrimination. Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination," "favoritism", and "harassment", as those terms are defined in W. Va. Code § 29-6A- 2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act.

Bowman, supra, citing Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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.

This definition encompasses all types of discrimination, including discrimination based upon race and handicap. See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, W. Va. Univ., Docket No. 95-BOT-387 (Jan. 31, 1995).

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant failed to present a prima facie case of discrimination. He presented no evidence that he was treated in a manner that other similarly situated employees were not. It is further clear that Grievant was dismissed for valid job related reasons, as outlined above. The undersigned concludes that Grievant's race played no role in his dismissal.

It is clear that Grievant's medical condition and how he chose to deal with it did play a role in how events transpired. While Sgt. Wroten and Lt. Elder may have been more cautious with Grievant than they would have been had they not been made aware of Grievant's medical condition, it was not the condition itself which caused them to be apprehensive, but the fact that they had no way to evaluate where the truth began. Grievant was not dismissed because he had a medical condition. (See footnote 7)

Finally, as to Grievant's claim of slander, the evidence reveals that this claim did not arise during Grievant's employment. Grievant presented evidence that a rumor had been started to the effect that

he was dismissed for drug usage. As this occurred after Grievant's dismissal, and the undersigned has declined to reinstate Grievant, it is not a claim which can be pursued through the grievance procedure. W. Va. Code § 29-6A-2. Whether such a claim may be pursued through the grievance procedure at all as a stand alone claim is questionable, although it could fall under harassment. Further, the relief sought, that action be taken against those who slandered Grievant,is not possible through the grievance procedure. This Grievance Board has ruled that it has no authority to require an employer to take action against another employee. Rice v. W. Va. Dept. of Transp., Div. of Highways, Docket No. 96-DOH-288 (Apr. 30, 1997).

The following Findings of Fact are made based upon the evidence presented at the Level IV hearings held on October 22, and December 1, 1997.

Findings of Fact

1. Grievant was employed by Corrections on May 13, 1997, as a Correctional Counselor II, for a six month probationary period at MOCC.

2. MOCC is a maximum security prison.

3. Grievant was dismissed from his employment for failure to meet the standards required for the position of a Correctional Counselor II, specifically, 1) "[f]alsifying any records whether through misstatement, exaggeration, or concealment of facts;" 2) "[r]efusal to cooperate in any official state inquiry or investigation, including a refusal to answer work related questions or attempting to influence others involved in an [o]ngoing investigation;" and, 3) "[f]ailure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable established written policy or procedures."

4. Grievant suffers from a medical condition described broadly as Post Traumatic Brain Injury. He has been diagnosed as having bi-polar disorder, has been treated for Post Traumatic Stress Disorder, is prone to violent behavior, and has had violent episodes in his sleep. Stress could trigger a violent episode while Grievant is awake. He has been prescribed Serzone and Lithium to control the behavior which occurs as a result of his medical condition. The Lithium is to be takenonly when the Serzone is not effective. He also takes Imitrex in injectable form as needed for relief from migraine headaches.

5. On May 20, 1997, or immediately thereafter, Grievant was taking Ambien at night as needed

for insomnia, as his prescription for 20, 10mg tablets was filled on May 21, 1997, and was empty on July 7, 1997. He was not taking the Serzone or Lithium at that time, as he believed he was stable.

6. Grievant had been prescribed Epitol, but his doctor had taken him off Epitol in February 1997, and prescribed Serzone and Lithium in its place.

7. Grievant was directed by Terry Arthur, an employee in MOCC's Human Resources Department, to provide a list of all medications he was taking. On May 20, 1997, Grievant provided this list, stating he was taking medications for medical reasons, and that he "must have present in my POV," Imitrex, Serzone and Lithium. Grievant did not disclose he had been prescribed Epitol, or that he was prescribed and was taking Ambien. He did not update this information on May 21, 1997, when he filled his Ambien prescription.

8. MOCC needs information on the medications taken by staff, because all medications at the prison are controlled and must be accounted for, staff needs to know what medication needs to be available if an employee becomes ill on the job, and if an employee is taken hostage, this information is needed so they can make better decisions regarding the employee's welfare.

9. Grievant was assigned to the Corrections Academy, housed at West Virginia Institute of Technology, for six weeks, beginning July 7, 1997. Academy training requires that trainees be purposefully placed in very stressful situations to see how they will respond. 10. On June 17, 1997, Grievant reported for his pre-Academy medical examination. Dr. Essa Abdulla, a Corrections employee, performed the examination. The medications Grievant listed on the medical form completed by Grievant at that time, and disclosed to Dr. Abdulla, as medications he was currently taking, were Imitrex, Serzone and Lithium, and he identified a pre- existing condition on the form: post-traumatic brain injury. Grievant did not tell Dr. Abdulla he was taking Ambien, or that he was not taking Serzone or Lithium.

11. Dr. Abdulla carefully assessed Grievant after learning of his injury, taking into account the medications he was on, and he felt he was qualified to undergo the physical and mental stresses of the Academy. His evaluation did not reveal that Grievant required any special accommodations by Corrections. If Dr. Abdulla had known Grievant was not taking his medication, he would have been more apprehensive.

12. Grievant did not disclose a need for special accommodations on his Academy application form, dated June 19, 1997, even though the form specifically requested this information.

13. Grievant reported to the Academy on July 7, 1997. In response to an inquiry during orientation at the Academy regarding any type of medical problem which had developed since the pre-Academy medical examination, Grievant submitted a hand-written memorandum to Lt. Roger Elder, dated July 7, 1997, in which he noted his pre-existing medical condition for which he was being treated as "post traumatic brain injury, PTSD [post traumatic stress disorder]," and stated he was currently taking Serzone, Lithium and Imitrex. He further stated, "[i]t is recommended that certain accom[mo]dations be made. 1) Room with someone who understands my condition. 2) Problems with sleep/disturb." 14. Grievant reported to the Academy without his medication. Sgt. Jeffrey Wroten asked Grievant if the medications and what they were for was on the medical form filled out when he had his pre-Academy medical examination, and Grievant responded that he did not want to put his business on the street at Mount Olive, and that some of the information had intentionally not been placed on the medical form. Grievant then told him he had not been taking his medication and was concerned, that he was prone to bad dreams and flashbacks, and his wife had to take a special course to learn how to deal with him if this occurred during the night. Grievant had expressed concern for his roommate, and told him he was occasionally prone to aggressive behavior. Grievant told him he had not been taking his medication for a period of time, but that with the possible stress he might undergo in the Academy situation he had decided to start taking his medication.

15. Grievant told Lt. Elder he suffered from post traumatic brain injury and post traumatic stress disorder, he was in constant concern about losing his temper, that he was known to have violent episodes, and his wife had to have special training to deal with his loss of control.

16. Grievant had no duty to disclose to MOCC staff or medical staff that he had been prescribed Epitol, and his doctor had taken him off that medication.

17. Grievant had a duty to disclose to MOCC's Human Resources Department that he was taking Ambien as needed at night, and that while he was carrying Lithium and Serzone to be taken as needed, he was not taking either medication at that time. Grievant intentionally failed to carry out this duty.

18. Grievant had a duty to disclose to Dr. Abdulla that he was taking Ambien at night for insomnia, that he was not taking Serzone or Lithium, and that he is prone to violent behavior, andhas had violent episodes in his sleep, so Dr. Abdulla could evaluate Grievant's physical and mental ability to attend the Corrections Academy. Grievant intentionally failed to carry out this duty.

19. Participation in official investigations is part of an employee's job, and employees are advised of this.

20. Cheryl Chandler, an investigator for MOCC, reported to the Academy on July 10, 1997, to obtain the interviews needed to complete her investigation of allegations against Grievant regarding his falsification of medical information. She attempted to interview Grievant in a conference room. When she stood up to greet Grievant, and asked him if he remembered her from Mount Olive, Grievant responded, "[y]es, you're the investigator, and what do you want with me?" She concluded from his response and his body language that he was defensive, angry and upset, and asked him several times to calm down and tried to explain the investigation to him. Grievant then pointed to the presence of the tape recorder and told her he was not talking to her without his lawyer. She told him he could not have a lawyer present during the interview, that it was an internal investigation, and she tried to explain the difference between an internal administrative investigation and a criminal investigation. Grievant said he would not talk to her because he did not know what his rights were. She then pointed to the written administrative rights warning, which was on the table for Grievant to review and sign, and told Grievant these were his rights. Grievant pushed the paper towards her, and said, "I'm not reading that, and I'm not going to talk to you until I talk to someone at the DOC." She told him Deputy Warden Painter was the Acting Warden that day, and asked if he wanted to talk to him. Grievant responded he wanted to talk to someone at the DOC. She asked Grievant to calm down, and he said she was harassing him. He said, "are you telling me I can't call a lawyer," and she responded, "[n]o, sir. You can contact as many lawyers as you'd liketo, but you cannot have one while, uh, in the interview." She then asked him if he was telling her he was not going to continue the interview, and he responded, "[n]ot until I talk to someone at the DOC." At that point she concluded Grievant was being too uncooperative to continue the interview, and concluded it.

21. Grievant was presented with a written statement of his rights, which he refused to read. That statement would have fully advised Grievant, had he read it, that his answers to questions, and any evidence gleaned from the investigation, could not be used against him in any subsequent criminal proceedings.

22. Grievant refused to cooperate in an internal investigation.

23. During Grievant's first week at MOCC, Walt Jackson, a case manager, came up behind his orientation group and yelled, "Spook! Spook! Spook!" Mr. Jackson was not talking to Grievant, who is

of African-American descent. Grievant reported it to his supervisor, and to the Associate Warden. Frank Williams, a Counselor, was in the hallway at the same time as Grievant, and Mr. Jackson knew Mr. Williams from Vietnam, where they had both worked in intelligence. Mr. Jackson called Mr. Williams a "spook," referring to his former status as an intelligence officer. He had no intention to use the term in a derogatory fashion. There was no reason for Corrections to investigate this matter further.

24. In a memorandum from a Dorothy Kerr, a Case Manager at Birch Hall, to Teresa Waid and Ralph Terry, Unit Manager Birch Hall, on May 29, 1997, Ms. Kerr stated, "Counselor Hale seems to know all the black convicts, and he's been in the records room `checking things out.'" Grievant's Exhibit 4. 25. The same afternoon Grievant reported Mr. Jackson's action to the Associate Warden, Grievant was called to the institution entrance because the drug dog had indicated it had smelled drugs in his car. Corporal Delana Sanford, Canine Officer, had decided to take the dog to the parking lot that day. She did not know the car was driven by Grievant at the time the dog alerted on it. Grievant was identified as the driver by a pink interdepartmental envelope on the console with Grievant's name on it. Grievant filed an incident report.

26. A memorandum from Michael Ong to Teresa Waid, dated May 14, 1997, reported he was concerned about comments made by Grievant during an orientation tour. Mr. Ong reported that Grievant had asked what number of minorities were employed in the inmate work program, as compared to white inmates, and when he replied he did not know, Grievant had explained that employment statistics were watched closely at his previous job and he thought Mr. Ong should do the same. Grievant's Exhibit 8.

27. Grievant had applied for a Case Manager position, and was told he could not have that position. Rita Albury, Human Resources Director at MOCC during this time, explained that Grievant was not interviewed for the Case Manager position because he was a probationary employee, but the job had been posted internally for certified permanent employees, and those employees were being interviewed at that time. When Grievant asked about it and told her his name was on the register, she asked Hilda Williams if they could change their policy and interview Grievant, and Ms. Williams told her to interview Grievant because his name was on the register, and he was given an interview.

28. Ms. Albury told Grievant his background investigation revealed one charge with no disposition, and she asked him if it had a disposition, to which he responded that it had been

settledand dismissed. The background investigation is standard procedure, and everything must be cleared. It is standard procedure for her to ask the investigator to check misdemeanor charges for disposition, which she did in this case, and the investigator found the charge was still pending in the judge's court, and she advised Grievant of this.

29. The incidents related in Findings of Fact Numbers 24 through 29 did not excuse Grievant from a duty to control his behavior, to respond to Investigator Chandler in a professional manner, and to cooperate in an internal investigation.

30. Grievant was dismissed from the Corrections Academy, and he was instructed to report to Deputy Warden Painter at 0800 hours the next day, July 11, 1997, and did not do so. Grievant had called the institution the night before and left a message for the Deputy Warden that he had some legal matters to attend to and would be in later if he was finished by noon. Employees are allowed to call in to report they will not be in due to illness or because something has come up. Deputy Warden Painter received Grievant's message. No one instructed Grievant that he could not take leave to attend to these personal matters.

31. After Grievant's dismissal, a rumor was started at MOCC to the effect that he was dismissed for drug usage.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Section 10.05 of the West Virginia Division of Personnel's Rules and Regulations provides that an employee may be terminated at any time during the probationary period when it is determined by the employer that his services are unsatisfactory. Termination for unsatisfactory performance is not disciplinary, per se, and the burden of proof is upon the probationary employeeto prove by a preponderance of the evidence that his performance was satisfactory, and he should not have been dismissed. Goard v. W. Va. Div. of Corrections, Docket No. 95-CORR-068 (Mar. 20, 1995); Smith v. W. Va. Div. of Labor, Docket No. 93-LABOR-347 (Oct. 29, 1993).

2. Grievant was dismissed for unsatisfactory performance.

3. Grievant failed to prove it was satisfactory performance to fail to honestly and truthfully disclose pertinent medical information to Corrections' staff.

4. An employee may be compelled to cooperate in an internal investigation, provided he is

informed that nothing he says, and no evidence obtained as a result of his statements, can be used against him in a criminal proceeding. Tolley v. W. Va. Div. of Natural Resources, Docket No. 94-DNR-629 (May 18, 1995), citing Garrity v. New Jersey, 385 U.S. 493 (1967).

5. The right to an attorney arises out of the Sixth Amendment right to counsel, and the Fifth Amendment privilege against self-incrimination, and in West Virginia, out of Article III, § 14 of our state Constitution. These constitutional rights specifically apply only to criminal proceedings. See Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); and Committee on Legal Ethics, Etc., v. Pence, 240 S.E.2d 668 (W. Va. 1977). Thus, if an employee is assured that his answers, or any evidence discovered as a result of his answers, cannot be used against him in a criminal proceeding, the employer may require the employee to answer pertinent questions posed in an internal investigation, without the presence of an attorney.

6. Corrections was not obligated to allow Grievant to have an attorney present during questioning, and could compel Grievant to answer the questions posed to him. Grievant's refusal to cooperate in an internal investigation under these circumstances is grounds for dismissal. 7. Grievant failed to prove it was satisfactory performance to refuse to cooperate in an internal investigation.

8. Grievant proved he was not required to report to duty when he had asked for leave, and that request had not been denied.

9. W. Va. Code § 29-6A-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." Grievant failed to prove harassment.

10. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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.

This definition encompasses all types of discrimination, including discrimination based upon race and handicap. See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, W. Va. Univ., Docket No. 95-BOT-387 (Jan. 31, 1995).

11. A grievant alleging discrimination must establish a prima facie case by demonstrating:

(a) that he is similarly situated in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

12. Grievant failed to present a prima facie case of discrimination. He presented no evidence that he was treated in a manner that other similarly situated employees were not.

13. Grievant failed to prove he was dismissed because of his race or handicap.

14. Grievant's slander claim did not arise during Grievant's employment. As this occurred after Grievant's dismissal, and the undersigned has declined to reinstate Grievant, it is not a claim which can be pursued through the grievance procedure. W. Va. Code § 29-6A-2.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision 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. 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: February 20, 1998

Footnote: 1

Grievant bypassed the lower levels of the grievance procedure, relying upon W. Va. Code § 29- 6A-4(e). Grievant, however, as a probationary employee had no right to appeal directly to Level IV, as the dismissal of a probationary employee is not disciplinary, per se. Smith v. W. Va. Div. of Labor, Docket No. 93-LABOR-347 (Oct. 29, 1993). Neither party brought Grievant's employment status to the undersigned's attention until Respondent had asked for and been granted a two month continuance of the Level IV hearing, subpoenas had been served on witnesses to attend the hearing, and this grievance had been on the Grievance Board's docket for nearly three months. When the undersigned was made aware of Grievant's employment status, this issue was taken up at a conference call, at which time Grievant asked that this grievance be allowed to proceed at Level IV, rather than being remanded to Level I, due to the amount of time which had elapsed and the cost he had incurred in serving subpoenas. He also contended that his dismissal was disciplinary. Respondent had no objection to the grievance proceeding at Level IV. Given the long period of time which had elapsed, and that neither party objected to the grievance being processed at Level IV, the undersigned allowed this grievance to proceed at Level IV as an unusual exception to the rule.

Footnote: 2

This matter became mature for decision on December 29, 1997, upon receipt of Respondent's written argument. Thereafter, Grievant made an oral request for an extension of time to submit his written argument. This request was never reduced to writing, and was orally withdrawn in late January, 1998.

Footnote: 3

While it is important to determine which party bears the burden of proof in this case, the outcome would not be any different if the burden were upon Respondent. Corrections presented sufficient evidence to prove the charges against Grievant.

Footnote: 4

Grievant did not explain what he meant by "POV." Given that Corrections is a para-military organization, and Grievant had a military background, it is likely the abbreviation is of military derivation, and stands for "privately owned vehicle."

Footnote: 5

See the discussion on page 11 of this decision for a description of the medical conditions for which these medications were prescribed.

Footnote: 6

Corrections does not require employees to utilize its physician for this examination, but an examination by a licensed medical doctor is a pre-requisite to Academy attendance.

Footnote: 7

As to Grievant's claim under the ADA, see the discussion of "disability" in Bowman, supra. Grievant did not prove his medical condition is covered by the ADA's definition of disability.