CLARK PATTERSON,

Grievant,

v. **Docket No. 99-CORR-239**

DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Grievant, Clark Patterson, employed by the Division of Corrections (Respondent) as a Correctional Counselor II at the Northern Regional Jail and Correctional Facility, filed a level one grievance on April 26, 1999, in which he alleged violations of Operational Procedures 1.29-4, 8, and 14, ACA Standards 3-4048 and 4051 (discrimination). For relief, Grievant requested that a memorandum dated April 12, 1999, be rescinded, and $500 for legal expenses. The grievance was unresolved at levels one, two, or three, and appeal to level four was made on June 16, 1999. A level four hearing was conducted in the Grievance Board's Wheeling office on July 14, 1999, at which time Respondent was represented by Charles Houdyschell, Assistant Attorney General, and Grievant represented himself. The matter became mature for decision on July 19, 1999, when Mr. Houdyschell notified the undersigned that he was withdrawing his request to file proposed findings of fact and conclusions of law.

The following findings of fact are made based upon the credible evidence provided in the level three transcript, and during the level four hearing.

Findings of Fact

1. Grievant is employed by the Division of Corrections as a Correctional Counselor II at the Northern Regional Jail and Correctional Facility (NRJCF). 2. The NRJCF consists of two institutions, the Northern Regional Jail (NRJ), managed by the Regional Jail Authority (RJA), and the Northern Correctional Center (NCC), managed by the Division of Corrections (DOC). Both the RJA and the DOC have employees assigned to the facility.

3. On April 3, 1999, Grievant did not report to work.

4. Correctional Officer II Karen Highley filed an Incident Report dated April 3, 1999, stating: Approximately 1400 hrs, I, COII K.R. Highley, did call Clark Patterson's home phone number to see

why he hadn't come to work at noon as scheduled. I received no answer and left a message telling him why I called. I checked all Pods and control & no one had seen or heard from him. This was done as instructed by Warden Seifert. End of Report

COI J. Barrett in control had not seen or heard anything. Sgt. P. Rine in D-1 Pod had no information of [sic] Patterson. COII Fordyce in D-2 Pod had no information also. COII Tyrrell, Cpl. Huml, COII Whetzel, COII G. Highley, COII Kirby, COII R. Johnson, Nikki Seifert had not seen him (Patterson) or heard from him.

5. On April 4, 1999, Grievant filed the following Incident Report: “[o]n April 3, 1999, I (Clark Patterson) did call control to report off sick. My call was transferred to A- Tower, that line was busy, so I reported off to the control officer. I do not know who that staff member was (Jail or DOC).”

6. By memorandum dated April 12, 1999, Unit Manager Leonard Wellman advised Grievant as follows:

Be advised that April 5, 1999, I was informed that you failed to report to work as scheduled on April 3, 1999 (See attached Incident Report #CC10276).

Upon discussing this issue with you, you provided me with an unnumbered incident report concerning your call off (See attachment). Further, you relayed additional information to me about your call off. You claimed that sometime between 6:00 a.m. and 7:30 a.m. is when you phoned into the facility on April 3, 1999.

As instructed by Warden Seifert, I have been in contact with both midnight shift officers assigned to the Control Center - Mark Parker, NCC and T. Logston, NRJ. I have also been in contact with both day shift officers assigned to the Control Center - J. Barrett, NCC and E. Mason, NRJ.

These four (4) officers all reported 'not speaking with you', and that between the time frame in question they were not relieved for any type of breaks.

In attempting to better understand this incident the following are possibilities:

1. Someone is mistaken, to either calling off or taking the call.
2. Someone is not being truthful, to either calling in or taking the call.

Clark, for the calendar year 1999, your absentee record reflects two (2) sick days used in January

and one (1) used in April, along with a couple of occasions where 'hours' were used for doctor's appointments.

To avoid any similar confusion when calling off sick, be sure to do it in a timely fashion and keep documentation as to what staff member you speak with when phoning in.

7. By memorandum dated May 27, 1999, Warden Seifert advised all DOC staff that effective May 31, 1999, Operational Procedure 1.29-8, “Unscheduled Leave/Absenteeism/Tardiness” would be modified to include the requirement that theemployee calling off must note the name and rank of the employee receiving the call for later confirmation purposes as appropriate.

Discussion

Although Respondent denies that the memorandum was disciplinary in nature, it does in fact appear to be a written warning, and is determined to be disciplinary for purposes of this decision. 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).

Respondent argues that the memorandum was proper because none of the employees on duty recalled Grievant reporting off work on April 3, 1999. Grievant asserts that he did call, although he does not know the identity of the individual with whom he spoke.

As noted in the level three decision, none of the Operational Procedures cited in the statement were made part of the record, and cannot be addressed. At level three, Grievant claimed discrimination because none of the four officers on duty at the time were “written up”, and because no other employee was required to obtain the name of the individual he or she spoke with when reporting off work. Grievant concedes he has incurred no legal expenses. The facts of this case indicate that some refinement of Respondent's procedure for calling off is warranted. Grievant's claim that there had been no previous requirement that the employee get the name of the individual to whom he reported, is not disputed by Respondent. However, none of the employees, both NRJ and NCC, who were on duty during the time period Grievant states he called in, recalls speaking with him.

None of these employees were called to testify, and Grievant does not assert they had any reason to be untruthful. Therefore, it is determined, based upon the evidence of record, that Grievant did not call to report off work on April 3, 1999, and the April 12, 1999, memorandum is upheld.

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).

2. 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).

3. Respondent has established by a preponderance of the evidence that Grievant did not call to report off work on April 3, 1999. 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. However, the appealing party is required by W. Va. Code §29- 5A-4(b) to serve a copy of the app eal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: August 3, 1999 _____

Sue Keller

Senior Administrative Law Judge