JOHN BOYES,

Grievant,

v. **DOCKET NO. 01-HEPC-433**

HIGHER EDUCATION POLICY COMMISSION/

MARSHALL UNIVERSITY BOARD OF GOVERNORS,

Respondent.

D E C I S I O N

This grievance was filed by Grievant John Boyes contesting his five day suspension without pay by Marshall University ("Marshall"). As relief he sought to have the suspension rescinded. (See footnote 1)

The following formal Findings of Fact are properly made from the record developed at Levels II and IV.

Findings of Fact

1. Grievant has been employed by Marshall for eight years. He is an HVAC Mechanic in the Physical Plant, and his work hours are 8:00 a.m. to 4:00 p.m., Monday through Friday.

2. The Physical Plant's written policy requires employees to call in when they are sick, to report that they will not be at work.

3. On November 9, 2000, a memorandum was issued to all Physical Plant employees informing them they were to notify their supervisor and someone in the main office if they were going to be off work. Grievant was aware of this memorandum.

4. On January 12, 2001, Grievant called Marshall at 8:32 a.m., 32 minutes after he was scheduled to begin work, to report he would not be coming to work that day, because he had a migraine headache.

5. Grievant's supervisor gave him an oral warning for failing to call in before his shift began on

January 12, and told him he needed to call in to report off work prior to the beginning of his shift. Grievant did not grieve this oral warning.

6. On January 19, 2001, Grievant overslept. He did not report to work, nor did he call anyone at Marshall to report that he would not be at work that day. Grievant was not unable to call. He chose not to call because he knew he was going to be disciplined whether he called or not, because he did not wake up until after 8:00 a.m. Grievant received a written warning for his failure to report he would not be at work. Grievant did not grieve the written warning.

7. One day in February 2001, Grievant did not report to work, and he did not call anyone at Marshall to report that he would not be at work that day. On March 5, 2001, Grievant was suspended for two days without pay for failing to report to work, and failure to timely report that he would not be at work. Grievant did not grieve this suspension. 8. On April 6, 2001, Grievant did not report to work, and he did not call anyone at Marshall to report that he would not be at work that day. Tony Crislip, Grievant's second-level supervisor, recommended that Grievant be fired. On May 22, 2001, Grievant was suspended for five days without pay for failing to call in on April 6, 2001, to report that he would not be at work.

9. Grievant has a history of having migraine headaches. Grievant does not have a telephone. He had a migraine headache on April 6, 2001, and was unable to report to work. He called his doctor on April 6, 2001, in the afternoon from his next door neighbor's house. He did not call anyone at Marshall at that time.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Latassa v. Bd. of Trustees, Docket No. 96-BOT-477 (July 24, 1997). Respondent proved Grievant failed to report to work on April 6, 2001; he failed to call anyone at Marshall to report he would not be at work that day; Physical Plant policy required that he notify his supervisor and the main office that he would not be at work; and Grievant was aware of this policy.

Grievant argued the Physical Plant's written policy does not require an employee to call in to report off work prior to the beginning of his shift. While this may have been a valid point after his oral warning, Grievant did not grieve the oral warning at the time he received it, and “the merits of [that

action] cannot be placed in issue now. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); See Stamper v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-144 (Mar. 20, 1996); Womack v. Dept. of Admin., Docket No. 93-ADMN-430 (Mar. 30, 1994). Furthermore, all the information contained in the documentation of Grievant's prior discipline must be accepted as true. See Perdue v. Dept. of Health & Human Resources,Docket No. 93-HHR-050 (Feb. 4, 1994)." Aglinsky v. Bd. of Trustees, Docket No. 97-BOT- 256 (Oct. 27, 1997).

Grievant also felt he should be excused from calling in because he did not have a telephone and would have to drive four miles to get to a telephone, he was not required by his work to have a telephone, and on April 6, 2001, he had a migraine headache, which made it difficult for him to get to a telephone, because he did not feel like doing anything when he had a migraine. He was able to call his doctor that afternoon from his next door neighbor's house, but he did not call anyone at Marshall. Grievant's neighbor sometimes was not at home during the day, so using this telephone was often not an option.

While the undersigned can certainly understand that Grievant would not want to drive four miles to a telephone when he had a migraine headache, and perhaps would be unable to drive, Grievant was aware that he had migraine headaches, and that he was required to call in to report off work. It was his obligation as an employee to see that his employer was notified that he would not be at work.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The employer bears the burden of proving the charges in a disciplinary proceeding by a preponderance of the evidence. W. Va. Code § 18-29-6. Latassa v. Bd. of Trustees, Docket No. 96-BOT-477 (July 24, 1997).

2. Respondent proved the charges against Grievant.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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.

However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: February 5, 2002

Footnote: 1

This grievance was filed on May 22, 2001, and was denied at Level I on June 18, 2001. Grievant appealed to Level II, where a hearing was held on June 25, 2001. The grievance was denied at Level II, and Grievant waived Level III, appealing to Level IV on July 10, 2001. The Level IV hearing was delayed at Grievant's request while he was on jury duty. A Level IV hearing was held on January 22, 2002. Grievant represented himself, and Respondent was represented by Paula L. Wilson, Esquire. This grievance became mature for decision upon receipt of Respondent's written argument on January 29, 2002. Grievant declined to submit written argument.