JOYCE HALL,

Grievant,

v. **Docket No. 96-DOH-433**

WEST VIRGINIA DEPARTMENT

OF TRANSPORTATION/DIVISION

OF HIGHWAYS,

Respondent.

D E C I S I O N

This is a grievance by Joyce Hall (Grievant) against the West Virginia Department of Transportation, Division of Highways (DOH), alleging harassment in violation of W. Va. Code § 29-6A-2(l), creation of a working environment which constituted a substantial detriment to or interference with her effective job performance in violation of W. Va. Code § 29-6A-2(i), and sexual harassment. This grievance was initiated in accordance with W. Va. Code §§ 29-6A-1, et seq., and processed through Levels I and II without resolution. Grievant's original grievance statement, submitted on October 27, 1995, contains the following claims:

> **I have been forced to work under extremely stressful and intolerable conditions for the past two years. My supervisor, Aubrey Smith, habitually appeared at work in an intoxicated state. He continually subjected me toharassment, irritation and annoyance. His abusive conduct towards me substantially interfered with my effective job performance and has substantially interfered with my health. The abusive conduct directed toward me by Mr. Smith has included tirades, requests to perform certain work that I knew was illegal and undue pressure to take work that Mr. Smith was responsible for, including signing off for Mr. Smith on matters which he refused to attend to although he was directly responsible for them.**
>
> **In addition, Mr. Smith subjected me to sexual harassment in the form of off color remarks and unwelcome and offensive sexually oriented comments such**

as to create a hostile environment.

As a result of this abusive treatment, I have suffered severe anxiety and depression to the point that I have been hospitalized and I am currently being treated by my physician for a nervous disorder. I believe that Mr. Smith's conduct violated the Drug-Free Work Place Act of 1988. In addition, his actions toward me have violated West Virginia Code §29-6A-2(i) and (l). I have reported the conduct of Mr. Smith to our supervisor, Marvin Murphy, several times over the last year, however no action has been taken.

I am seeking reinstatement to my position, where I am not subject to abusive conduct, with full backpay for all days missed over the past two years on account of anxiety and depression caused at the work place and full reinstatement of all used sick days and vacation days. I am seeking compensation for all out-of-pocket medical expenses incurred as a result of the stress and depression I have suffered at the hands of Mr. Smith. I am further seeking compensation for emotional pain and suffering.

At Level III, following an extensive evidentiary hearing, the grievance was granted in part. DOH Commissioner Fred VanKirk awarded Grievant reinstatement of sick and annual leave used between September 14, 1995, and November 10, 1995, as well as reimbursement for out-of-pocket medical expenses incurred by Grievant during the same time period. Grievant appealed to Level IV, seeking reinstatement of all sick and annual leave from February 1995 until an unspecified date when Grievant "returns to work." In addition, Grievant seeks to be paid her full salary until her doctor verifies that she is able to return to work, as well as her costs and attorney fees for alleged bad-faith defense of this claim by DOH. At the Level IV hearing, the parties supplemented the Level III recordwith additional testimony, thereafter filing proposed findings of fact and conclusions of law to complete the record in this matter.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. Although many facts pertinent to resolution of this grievance were resolved at Level III and remain uncontroverted, several significant matters remain in contention. Therefore, a detailed analysis of the relevant facts is necessary, and credibility determinations are required, in

some instances. See Pine v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995).

Grievant has been employed by DOH for over nineteen years, and is presently assigned to District Seven Headquarters in Weston, West Virginia, as an Office Assistant. During the relevant time period of this grievance, from September-October of 1993 until September 1995, Grievant's duties were divided between the Sign Shop and the Permits Department. However, she spent the vast majority of her time (over seventy-five per cent) working in Permits where her immediate supervisor was Aubrey Smith.

According to Grievant, Mr. Smith began engaging in conduct which gave rise to this grievance in the fall of 1993, shortly after his state vehicle was taken away and reassigned to a pool. (See footnote 1) In particular, Mr. Smith would frequently neglect his duties, sometimes comingto work showing signs of prior indulgence in alcohol, often leaving the office for lunch or unscheduled breaks, only to return smelling of alcohol, or displaying other symptoms of intoxication.

Prior to the onset of Mr. Smith's alcohol problem, he trained Grievant on preparing and issuing permits, subsequently delegating authority which allowed Grievant to perform some of the tasks which he had previously accomplished. After Mr. Smith's alcohol and related problems developed, Grievant would do much of Mr. Smith's work, including signing documents "for" him under her signature. (See footnote 2) Grievant believed that Mr. Smith had political connections who might be helpful in obtaining employment for her son. She testified that she protected Mr. Smith in order to remain in his favor, although he made no threats or promises to her requiring such actions.

Grievant's unilateral initiative to keep Mr. Smith out of trouble was not especially appreciated by him. According to Grievant, when Mr. Smith was not under the influence, he took offense that people would call directly to Grievant for information on permits, by-passing him. She further described anecdotal incidents when Mr. Smith would attempt to perform his duties despite indulging in alcohol, and she would subsequently have to provide assistance to upset permittees whose wide or heavy loads had been stopped by an undersize bridge or other obstacle. This required Grievant to re-route the permitteeover the telephone, verifying with other DOH personnel that the corrected route did not violate any limitations for

that particular vehicle.

Grievant further recalled a situation where a check was missing and Mr. Smith told another employee (outside Grievant's presence) that Grievant "probably threw it away." Once Mr. Smith went out of the office, Grievant searched through paperwork for two hours, and located the missing check in a stack of checks on Mr. Smith's desk.

In August 1994, Mr. Smith was treated for alcohol abuse as a hospital inpatient. For a few months after he returned to work, he appeared to avoid alcohol, and performed his duties in a satisfactory manner. During the Summer of 1995, shortly after a prominent Weston citizen committed suicide, Mr. Smith made some comments in his office that led one or more employees to suspect he might also be contemplating suicide. However, Mr. Smith's supervisors determined that he was depressed, and he did not engage in any conduct that would constitute a suicidal gesture.

Nonetheless, Grievant's efforts to protect Mr. Smith from the adverse consequences of alcohol were effective to the point that the District Engineer, Marvin Murphy, did not become aware of the extent of Mr. Smith's problems until Grievant complained to him in September 1995. Mr. Murphy acknowledged that he suspected Mr. Smith of alcohol abuse. He approached Mr. Smith on five or six occasions without being able to independently observe sufficient evidence to confirm that Mr. Smith had been drinking. Mr. Murphy's suspicions were primarily based upon Mr. Smith's irregular hours, including frequent absences from work during the afternoon. Prior to September 14, 1995, Grievant had elected to "cover" for Mr. Smith, rather than reveal the stress she was under in the office, Grievant was then at the end of her rope, albeit a rope she helped to fashion. Grievant testified at Level III that she assumed Mr. Murphy was aware of Mr. Smith's problems because she thought other employees had been reporting what Mr. Smith was doing. She recalled a conversation with Mr. Murphy in 1994, after Mr. Smith had been hospitalized for alcohol rehabilitation by his family. According to Grievant, Mr. Murphy told her he had advised Mr. Smith's son he would have had to take action, had the family not done something about the drinking problem. Mr. Murphy agreed that he discussed Mr. Smith with Grievant in 1994, but Grievant only expressed concern regarding what could be done to help Mr. Smith overcome his problem. Grievant did not complain to Mr. Murphy that Mr. Smith's actions were causing her stress. Grievant

testified she was taking sick leave and annual leave during the entire two-year time frame to avoid Mr. Smith, but her medical records indicate she was also treated for various traumatic back injuries during this time. See A Ex 2 at L III. (See footnote 3)

On September 14, 1995, Grievant finally approached Mr. Murphy and told him what she had been experiencing in the Permits Department. Mr. Murphy recalled her stating, "I can't stand it any longer, I have to tell you." HT at 91. On that occasion, Grievant informed Mr. Murphy of the stress she was experiencing due to Mr. Smith's drinking on the job. Mr. Murphy assured Grievant she would be moved out of the office, away from Mr. Smith, on the following Monday. As Mr. Smith was scheduled to be on annual leave the following day, Mr. Murphy assured Grievant she could return to work the next day without having to deal with Mr. Smith. However, on the following day, while Mr. Murphy was attending a meeting in Charleston, Mr. Smith was in the Permits office. When Grievant entered the office, Mr. Smith greeted her by saying, "There she is, Miss America." Mr. Smith was aware that Grievant met with Mr. Murphy the previous day. Grievant tried to work and ignore Mr. Smith, but when she advised him she was going to the Sign Shop a few miles away, he threw the keys to a state vehicle to her and said, "Here, you better take the car while you can." Grievant went to the Sign Shop and returned to find Mr. Smith had left, only to learn that he was cashing a paycheck for another employee, and would be returning shortly.

At that point, Grievant was overwhelmed by the thought of having to deal with Mr. Smith, and believed Mr. Murphy had not been truthful when he indicated Mr. Smith would not be at work that day. She called her sister, a DOH employee who works at another location. Grievant's sister testified that when she arrived at the Permits office, she found Grievant hiding under her desk, hysterical and incoherent. The sister was able to coax her out from under the desk, and take her for medical treatment.

Grievant was subsequently admitted to St. Joseph's Hospital in Buckhannon, West Virginia, on September 18, 1995. She was treated for depression and diagnosed by Dr. David Colvin, a psychiatrist, as having "major depression, recurrent." A Ex 2 at L III.

On November 10, 1995, Grievant was released by her family physician, Dr. Orvik, to return to work. By that time, Mr. Smith had retired from DOH. However, Grievant indicated she was still unable to work, and sought assistance from a psychiatrist in Clarksburg, West Virginia, who

advised her not to return to work. However, this doctor's diagnosis was not made part of the record. Grievant also alleged that she was the victim of sexual harassment. This claim is supported by her testimony that Mr. Smith would frequently comment on the appearance of a woman who lived across the street from District VII Headquarters. Grievant described the woman as "very large busted," recounting how Mr. Smith would comment in her presence: "I don't think those things would fit in a gallon bucket" and "all over a mouthful is wasted unless you know what to do with it." On another occasion, Mr. Smith was outside the office, "yelling" across the street to the woman and commenting on her bra size. Grievant went outside and told Mr. Smith, "Aubrey, shut off, you're going to get all of us in trouble." In that instance, Grievant asked a male co-worker to report the incident to Mr. Murphy, but he declined. Grievant asserted that Mr. Smith subsequently engaged in similar conduct toward the same woman on several other occasions. However, the woman never complained to Mr. Smith's supervisors, or anyone else.

Mr. Smith also commented to Grievant regarding A.H. (See footnote 4) , a female college student who was working in the office during the summer of 1995, stating "her night life must be awfully interesting." On another occasion, Mr. Smith mentioned to Grievant during a telephone conversation that A.H.'s "boobs" were too small, and her hips were too wide. On that occasion, Grievant informed Mr. Smith that she did not want to hear any more comments because she liked A.H., and A.H. was "not like what you're talking about." Immediately after Mr. Smith's suspected suicidal episode in July 1995, Grievant told Mr.Murphy that Mr. Smith had been saying "some things" about A.H., but did not specify the comments made. (See footnote 5) Grievant likewise told Mr. Smith not to yell across the street, and specifically advised him in early July 1995 that she could no longer cover up for his drinking. Otherwise, Grievant did not relate any occasions when she informed Mr. Smith that his sexual comments were offensive to her.

Grievant began receiving medical treatment for stress on July 25, 1994, when she was treated by her family physician, Dr. Bennett Orvik, for depression. A Ex 2 at L III. Dr. Orvik subsequently treated Grievant for anxious depression on at least four occasions prior to August 25, 1995, when she reported an "acute anxiety attack and significant difficulty with the thoughts of going back to work." A Ex 2 at L III. In addition, between December 15, 1993, and

October 31, 1995, Grievant was treated by Dr. Phillip M. Spaur, a chiropractic physician, for pain related to her back and right knee on 14 separate occasions. A Ex 2 at L III. None of these injuries appear to be work-related.

Grievant is alleging that she was subjected to harassment by her supervisor in violation of W. Va. Code § 29-6A-2(l). Grievant further alleges Respondent violated W. Va. Code § 29-6A-2(i) by causing Grievant to suffer conditions of employment which constituted a substantial detriment to or interference with her effective job performance. Because these allegations involve the same series of actions by Grievant's supervisor, they will be addressed collectively. W. Va. Code § 29-6A-2(i) provides that employees may grieve "any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees." "Harassment" is defined as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." W. Va. Code § 29-6A- 2(l). The essence of Grievant's complaint was stated to her treating psychiatrist, Dr. David Colvin, as: "her boss is not doing his work so she has to do it." A Ex 2 at L III (Psychiatric Evaluation, Sept. 19, 1995). Grievant not only tolerated this situation over an extended period of time, she effectively promoted Mr. Smith's continued dereliction by performing some of his duties and failing to report his actions to supervisors over Mr. Smith.

Except for the evidence regarding sexual harassment, Mr. Smith's demeanor, at worst, could be described as a "grumpy old man." Beyond his sexually-oriented comments, there was no credible evidence that he engaged in a pattern of conduct directed toward Grievant with the intent, either direct or implied by the circumstances presented, of disturbing, irritating, or annoying her. See Phares v. W. Va. Dept. of Public Safety, Docket No. 91-CORR-275 (Dec. 31, 1991). See also White v. Monongalia County Bd. of Educ., Docket No. 93-30-371 (Mar. 30, 1994). In particular, to the extent Grievant claims entitlement to relief on the basis that her immediate supervisor came to work under the influence of alcohol, contrary to the employer's drug-free workplace policy, or a separate statute, this argument must be rejected. Although there are a variety of good reasons why an employer may adopt and enforce a policy which prohibits employees from appearing for duty under the influence of alcohol, subordinate employees working for an imbibing supervisor do not necessarily have grounds

for complaint on that basis alone. Therefore, Grievant is only entitled to relief under § 29-6A-2(l) to the extent she established a case of sexual harassment, as will be hereinafter discussed.

Nonetheless, the record indicates that Mr. Smith either reported to work, or returned to work following a break, under the influence of alcohol, on numerous occasions. Further, the record demonstrates that Mr. Smith's alcohol problem ultimately spilled over to Grievant, permeating the small office where they worked for DOH. Indeed, Grievant established that stress built up as she tried to perform her regularly assigned duties, in addition to the duties she assumed in order to keep the work flowing and her supervisor out of trouble, ultimately leading to her mental breakdown. Thus, Grievant demonstrated that, after September 14, 1995, DOH permitted conditions of employment to exist which constituted a substantial detriment, not to her effective job performance, but to her health, which likewise violates § 29-6A-2(i). See Guerin v. Mineral County Bd. of Educ., Docket Nos. 92-28-422/459 (Jan. 31, 1996).

In addition to claiming harassment in violation of W. Va. Code § 29-6A-2(l), Grievant alleges she was subjected to unlawful sexual harassment, a violation of Title VII of the federal Civil Rights Act. DOH did not challenge this Grievance Board's jurisdiction to consider a claim arising under Title VII. However, it should be noted that this Board has previously determined that the decision of the West Virginia Supreme Court of Appeals in Vest v. Board of Education, 193 W. Va. 222, 455 S.E.2d 781 (1995), does not preclude consideration of such allegations, because they involve a statute under which such employees work within the meaning of W. Va. Code § 29-6A-2(i). Rodak v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-536 (June 23, 1997). See Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). See generally Belcherv. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995). However, consistent with Vest, this Board's holding has no preclusive effect upon the parties in a forum with primary jurisdiction. See Harrison County Bd. of Educ. v. Carson-Leggett, 195 W. Va. 196, 466 S.E.2d 447 (1995). See also Asaad v. Res-Care, Inc., 478 S.E.2d 357 (W. Va. 1996). See generally Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

This Grievance Board has concluded that state employees may be disciplined for sexual harassment where their conduct creates an intimidating, hostile or offensive work environment for one or more employees. Turner v. W. Va. Div. of Highways, Docket No. 94-

DOH-594 (Feb. 27, 1995); Stonestreet v. W. Va. Dept. of Admin., Docket No. 93- ADMN-182 (Nov. 30, 1993). See also Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). In this grievance, Grievant seeks relief on the basis that she was a victim of unlawful sexual harassment.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., prohibits discrimination in respect to an individual's conditions of employment on the basis of such individual's sex. 42 U.S.C. § 2000e-2(a)(1). This language has been interpreted to preclude requiring people to work in a discriminatorily hostile or abusive environment. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). Whether a working environment is hostile or abusive can be determined only by looking at all of the circumstances. These may include the frequency and severity of the discriminatory conduct; whether it is physically threatening or humiliating, or if it constitutes an offensive utterance; and whether it reasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person'sreaction to a similar environment under similar or like circumstances. Harris, supra; Laneheart v. Logan County Bd. of Educ., Docket No. 97-23-088 (June 13, 1997).

Applying the foregoing principles to the evidence presented, the undersigned Administrative Law Judge finds that Grievant proved by a preponderance of the evidence that Mr. Smith's conduct created an offensive and hostile working environment for Grievant. Mr. Smith's sexually-oriented commentary and purported humor was in poor taste, at best. There is no evidence that such conduct was considered acceptable by Grievant, or that Grievant reciprocated or engaged in any other conduct which would suggest that these comments were anything but unwelcome.

In addition to proving her immediate supervisor engaged in conduct which created a hostile working environment in violation of Title VII, Grievant has concomitantly established that she was subjected to "harassment" prohibited by W. Va. Code § 29-6A- 2(l). Certainly, a supervisor whose conduct amounts to sexual harassment prohibited under federal law is acting "contrary to the demeanor expected by law, policy and profession." Because the hostile environment created in this situation was shown to have arisen from a series of

repeated comments and actions, the "repeated or continual" requirement of § 29-6A-2(l) has also been met. See Phares, supra; White, supra.

At Level III, Grievant was awarded reinstatement of her sick and annual leave used between September 14, 1995, and November 10, 1995, when she was released to return to work by Dr. Orvik. In addition, Grievant was awarded reimbursement for all out-of- pocket medical expenses (not covered by insurance) during the same time frame. At Level IV, Grievant seeks full pay from November 10, 1995, plus reimbursement of all out-of- pocket medical expenses, until she is released to return to work by her treating psychiatrist,to be assigned to the Sign Shop, rather than the Permits Department, until her retirement from DOH in four years, and reimbursement of all attorney's fees and costs.

In regard to the determination that Grievant was subjected to unlawful sexual harassment and, therefore, harassment prohibited by §§ 29-6A-2(l), the undersigned finds that this conduct did not substantially contribute to Grievant's mental breakdown. It is noted that Grievant never approached anyone in higher management regarding Mr. Smith's conduct, beyond an ambiguous comment that Mr. Smith had been talking about A.H. at the time of his purported suicide threat. Even when management was approached, the issue presented was Mr. Smith's drinking and neglect of duties, not any alleged sexual harassment.

Because the offending supervisor retired before this grievance was initiated, the usual "cease and desist" or "consider appropriate disciplinary action" remedies granted to victims of sexual harassment are moot. In these circumstances, Grievant has not established an entitlement to any further remedies based solely upon hostile environment sexual harassment, over and above those previously granted by DOH at Level III.

As for any further recovery based upon Respondent's violation of W. Va. Code § 29- 6A-2(i), the undersigned is authorized by W. Va. Code § 29-6A-5(b) to "provide such relief as is deemed fair and equitable." See Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 426 (1992); York v. Mingo County Bd. of Educ., Docket No. 95-29-519 (Apr. 23, 1996); Guerin, supra. In weighing the equities represented in this grievance, it is noted that Grievant did not seek meaningful assistance from Mr. Smith's supervisors until the situation had escalated to crisis proportions. Indeed, by her own admission she "covered" for Mr. Smith's alcohol abuse without threat or promise of benefit on his part. Moreover, it wasonly on September 15, 1995,

that Mr. Smith engaged in any overt conduct which would lead a reasonable person to be apprehensive of retaliation.

Further, while this Grievance Board has awarded appropriate relief to make an employee whole, the undersigned is not convinced that the grievance procedure represents the appropriate forum for obtaining tort-like damages for pain and suffering, mental anguish, and the like. See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-007 (June 30, 1997). Indeed, Grievant's claim that she remains unable to work and should receive compensation for her work-related injury involves an issue that falls under the purview of the workers' compensation statute, W. Va. Code §§ 23-1-1, et seq. Grievant was awarded compensatory relief in the Level III decision for those damages which directly resulted from her employer's violation of W. Va. Code § 29-6A-2(i). Grievant presented no medical evidence that would justify requiring DOH to transfer Grievant out of the Permits Department after the supervisor who offended her is long departed. Any further relief would be based upon undue speculation, and is not supported by a preponderance of the evidence.

Regarding Grievant's request for reimbursement of attorneys' fees, the undersigned is without authority under W. Va. Code § 29-6A-10 to award attorney fees at Level IV. Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996). See Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986). Under W. Va. Code § 29-6A- 7, the undersigned does have authority to allocate the costs of the hearing to a party found to be acting in extreme bad faith. Chafin, supra. Grievant received substantial relief at Level III. This decision finds that Grievant is not entitled to further relief. Therefore,Grievant neither established that Respondent proceeded to Level IV in bad faith, nor documented any specific costs which were incurred. See Harshbarger v. Bd. of Trustees, Docket No. 94-MBOT-900 (June 26, 1997); Cremeans, supra.

The remainder of this decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant has been employed by Respondent West Virginia Department of Transportation, Division of Highways (DOH), for over nineteen years. She is presently

assigned as an Office Assistant III at District VII Headquarters in Weston, West Virginia.

2. Grievant's duties are divided between the Sign Shop and the Permits Department. Between September 1993 and September 1995, Grievant normally spent no more than two hours at the beginning of the day in the Sign Shop, and the remainder of the day in the Permits Department.

3. Grievant's immediate supervisor during the time frame covered by this grievance was Aubrey Smith. Mr. Smith was in charge of the Permits Department and Grievant's desk was near his in a small office within the District VII office complex.

4. On multiple occasions, on unspecified dates between September 1993, and September 15, 1995, Mr. Smith appeared at work while under the influence of alcohol. Grievant became upset with Mr. Smith's "I don't care" attitude and loud talking when he was drinking. Mr. Smith would fall asleep at his desk and snore, further irritating Grievant. Mr. Smith would be jolly one day and irritable and "snappy" the next, the latter usually when he had not been drinking. Grievant voluntarily performed some of Mr. Smith's duties in addition to her own. 5. In August 1994, Mr. Smith was granted sick leave when he was admitted to a hospital for detoxification at the insistence of his family. Marvin Murphy, the District VII Engineer, discussed Mr. Smith's situation with Grievant at that time, and she agreed Mr. Smith needed assistance, but made no complaint that Mr. Smith's drinking was impacting on her working conditions.

6. On July 5, 1995, following the suicide of a prominent Weston resident, A.H., a college student employed during the summer in the Permits Department, reported that Mr. Smith was in his office talking and acting in a manner that caused her to conclude he might be contemplating suicide. On that date, Grievant first advised Mr. Murphy that she believed Mr. Smith had been drinking on the job. However, Mr. Murphy observed Mr. Smith without noting any signs of alcohol use. Mr. Murphy concluded that Mr. Smith was suffering from depression.

7. On repeated occasions during the summer of 1995, Mr. Smith would make comments in Grievant's presence regarding a large-busted, unidentified female who lived across the street from their office, including: "I don't think those things would fit in a gallon bucket," and "all over a mouthful is wasted unless you know what to do with it." HT at 11- 13.

8. On more than one occasion in Grievant's presence Mr. Smith shouted across the street at the unidentified female, remarking upon her bra size. HT at 12-13.

9. On multiple occasions during the summer of 1995, Mr. Smith made comments to Grievant regarding A.H., including "her night life must be something else," "I wish I was 20 years younger," and noting the size of her "boobs" and "butt." HT at 28, 39. 10. During a two-week period in 1984, Grievant was treated by a physician for"anxious depression." A Ex 2 at L III. This episode was generated by multiple deaths in Grievant's family.

11. Between December 15, 1993, and October 31, 1995, Grievant was treated by Dr. Phillip M. Spaur, a chiropractic physician, for pain related to her back and right knee on 14 separate occasions. A Ex 2 at L III.

12. Grievant began receiving medical treatment for stress on July 25, 1994, when she was treated by her family physician, Dr. Bennett Orvik, for depression. A Ex 2 at L III. Dr. Orvik subsequently treated Grievant for anxious depression on at least four occasions prior to August 25, 1995, when she reported an "acute anxiety attack and significant difficulty with the thoughts of going back to work." A Ex 2 at L III.

13. After returning to work in September 1995, Grievant discussed Mr. Smith's drinking problem and her stressful situation with Beverly Stalnaker, an Administrative Assistant assigned as the EEO Counselor for District VII. Ms. Stalnaker advised Grievant to report the situation directly to Mr. Murphy, or Richard Davis, the Assistant District Engineer. HT at 42.

14. Following Grievant's meeting with Ms. Stalnaker, Mr. Smith asked Grievant if she had talked to Mr. Murphy, and when was her appointment with Mr. Murphy, leading Grievant to believe Mr. Smith overheard at least part of her conversation with Ms. Stalnaker. HT at 42-43.

15. Prior to September 14, 1995, Mr. Murphy was aware Mr. Smith had a drinking problem, and suspected Mr. Smith was drinking on the job. Mr. Murphy personally observed Mr. Smith on six or seven occasions in an effort to confirm his suspicions, but did not find any outward signs of alcohol use to warrant further action. 16. On September 14, 1995, Grievant advised Mr. Murphy in detail about Mr. Smith's alcohol abuse over the previous two years, and the stress she was experiencing in her work as a result. Mr. Murphy assured Grievant she would be able to work outside Mr. Smith's presence until appropriate action could be taken.

17. On the following day, September 15, 1995, Mr. Smith came to work when he was

scheduled to be off on annual leave, and spoke to Grievant in a manner that led her to believe he knew she had reported him to Mr. Murphy. She concluded Mr. Smith would seek revenge against her. Grievant called her sister for assistance, and was taken to her doctor for treatment.

18. On September 18, 1995, Grievant was admitted to St. Joseph's Hospital in Buckhannon, West Virginia, for depression. On September 23, 1995, she was discharged from the hospital with a diagnosis by Dr. David Colvin of "major depression, recurrent." A Ex 2 at L III.

19. Grievant's medical record at St. Joseph's indicates she previously had "at least one or two other episodes of major depression." A Ex 2 at L III. She related to her psychiatrist she had been "shaky and depressed for the past ten or eleven years with it being worse over the past few months." A Ex 2 at L III.

20. On September 29, 1995, Grievant was again treated by Dr. Orvik for "acute anxious depression." A Ex 2 at L III. She has since continued treatment for depression. A Ex 2 at L III.

21. Mr. Smith retired from employment with DOH in October 1995. Thereafter, on October 27, 1995, Grievant initiated this grievance.

22. On November 10, 1995, Grievant was released to return to work by Dr. Orvik. 23. Grievant subsequently sought medical treatment from a psychiatrist in Clarksburg, West Virginia. Grievant believes that returning to the Permit Department would bring back her feelings about Mr. Smith, and be deleterious to her health.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her complaint by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

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

3. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., prohibits discrimination in respect to an individual's conditions of employment on the basis of such individual's sex. 42 U.S.C. § 2000e-2(a)(1). This proscription includes requiring employees to

work in a discriminatorily hostile or abusive environment. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). Whether a working environment is hostile or abusive can be determined only by looking at all of the circumstances, including the frequency and severity of the discriminatory conduct; whether it is physically threatening or humiliating, or if it constitutes an offensive utterance; and whether it reasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). In determining if a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similarenvironment under similar or like circumstances. Harris, supra; Laneheart v. Logan County Bd. of Educ., Docket No. 97-23-088 (June 13, 1997).

4. Grievant established by a preponderance of the evidence that, contrary to Title VII of the federal Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., her immediate supervisor created an offensive and hostile working environment for Grievant, by making sexually-oriented comments to Grievant concerning a female who resided across the street from their office, by making similar comments regarding a female college student who worked in their office during the summer, and by making public comments to the female neighbor regarding her bra size, all of which transpired on more than one occasion. See Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989); Hayden v. Cox Enter., 534 F. Supp. 1166 (N.D. Ga. 1982).

5. Based upon the same pattern of conduct which constituted sexual harassment in violation of Title VII, Grievant established by a preponderance of the evidence that she was subjected to harassment by her immediate supervisor in violation of W. Va. Code § 29-6A-2(l). See Phares v. W. Va. Dept. of Public Safety, Docket No. 91-CORR-275 (Dec. 31, 1991). See also White v. Monongalia County Bd. of Educ., Docket No. 93-30-371 (Mar. 30, 1994).

6. Grievant failed to establish that any of her absences from employment between September 1993 and October 1995, or thereafter, were due to unlawful sexual harassment prohibited by Title VII, or harassment prohibited by W. Va. Code § 29-6A-2(l).

7. Likewise, Grievant failed to establish that her severe depression and mental breakdown resulted from sexual harassment or other unlawful harassment by her supervisor or employer.

8. An employee may seek relief under W. Va. Code § 29-6A-2(i) where an employer's action, policy, or practice allegedly constitutes a substantial detriment to or interference with

effective job performance or the health and safety of the employee. W. Va. Code § 29-6A-2(i). See Smith v. Mingo County Bd. of Educ., Docket No. 96-29-492 (May 29, 1997); York v. Mingo County Bd. of Educ., Docket No. 95-29-519 (Apr. 23, 1996); Guerin v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996).

9. Grievant established by a preponderance of the evidence that, after September 14, 1995, Respondent DOH permitted a condition of employment to exist which constituted a substantial detriment to her health in violation of W. Va. Code § 29-6A-2(i). See Guerin, supra.

10. Grievant failed to establish any entitlement to relief as a result of Respondent's violation of W. Va. Code § 29-6A-2(i) beyond the reinstatement of sick and annual leave taken and reimbursement for out-of-pocket medical expenses incurred between September 14, 1995, and November 10, 1995, awarded to Grievant by the Level III decision in this matter. See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-007 (June 30, 1997).

11. An Administrative Law Judge of the West Virginia Education and State Employees Grievance Board is without authority under W. Va. Code § 29-6A-10 to award attorney fees at Level IV. Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996). See Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).

12. Under W. Va. Code § 29-6A-7, an Administrative Law Judge of the West Virginia Education and State Employees Grievance Board may allocate the cost of thehearing to a party acting in extreme bad faith. Chafin, supra. However, Grievant neither established that Respondent proceeded to Level IV in bad faith, nor documented any specific costs which were incurred. See Harshbarger v. Bd. of Trustees, Docket No. 94- MBOT-900 (June 26, 1997); Cremeans, supra.

Accordingly, this grievance is GRANTED, IN PART. Consistent with Commissioner VanKirk's Level III decision, Respondent is hereby ORDERED to reinstate all sick and annual leave taken by Grievant during the period from September 14, 1995, through November 10, 1995. Respondent is further ORDERED to pay Grievant's documented out- of-pocket medical expenses incurred between September 14, 1995, and November 10, 1995. All other relief 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE Dated: September 12, 1997

Footnote: 1

This action was taken as an economy measure. It did not result from involvement withalcohol or any other misconduct by Mr. Smith.

Footnote: 2

On occasion, Mr. Smith would refuse to sign documents that were ready for his signature, purportedly because his normal signature was reduced to an illegible scrawl due to drinking alcohol somewhere outside the office during the day.

Footnote: 3

Exhibits admitted at Level III will be cited as "A Ex at L III" for agency (employer) exhibits or "G Ex at L III" for Grievant's exhibits. The Level III hearing transcript will be cited as "HT at ."

Footnote: 4

Consistent with this Grievance Board's practice in such matters, this individual will be identified only by her initials. See, e.g., Pine v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995); Edwards v. McDowell County Bd. of Educ., Docket No. 93-33-188 (July 13, 1994); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).

Footnote: 5

As the emphasis of Grievant's conversation with Mr. Murphy was an allegation that Mr. Smith had been drinking and talking about possible suicide, Grievant's oblique reference to Mr. Smith's comments about A.H. were not sufficiently specific to place Mr. Murphy on notice that Grievant was complaining about sexual harassment.