JEFFREY W. LANHAM,

Grievant,

v. **Docket No. 98-DOH-369**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

On September 23, 1998, Jeffrey Lanham (Grievant) filed this grievance directly at Level IV, as authorized under W. Va. Code § 29-6A-4(e), challenging his sixty-day suspension by Respondent Division of Highways (DOH). Following a continuance for good cause shown, a Level IV evidentiary hearing in this matter was conducted at DOH Headquarters in Charleston, West Virginia, on November 13, 1998. (See footnote 1) The parties made oral closing arguments, waiving written argument, and this matter became mature for decision at the conclusion of that hearing. Consistent with W. Va. Code § 29-6A-4, and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.

DISCUSSION

On September 3, 1998, DOH Human Resources Division Director Jeff Black notified Grievant that he was being suspended for sexual harassment. Mr. Black provided the following notice relating to this action:

> Pursuant to Section 12.03 of the State Division of Personnel's Administrative Rule, you are hereby suspended from your duties as a Transportation Technician 3 with the Department of Transportation, Division of Highways.
>
> The reason for your suspension is that in November 1996, February 1998 and June 1998 you participated in behavior which was sexual in nature and a direct violation of the Department of Transportation Sexual Harassment Policy. More specifically:

> In November 1996 you attempted to put your hand up the skirt of a female co-worker. In February 1998 you made a vulgar comment about the same female co-worker, to another co-worker, within hearing distance of the female employee. In June 1998 you requested the female co-worker to give you an item of her jewelry so you could place it on your genitals.
>
> Any future infractions of this nature will result in more severe disciplinary action up to and including dismissal.
>
> Your suspension will begin at 7:30 a.m. on Friday, September 11, 1998. You should report back to work on December 4, 1998 at your regular scheduled time. This suspension will result in a loss of sixty (60) days of pay and eighty-four (84) days of tenure.

J Ex 1.

In disciplinary matters, W. Va. Code § 29-6A-6 places the burden of proof on the employer. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). More particularly, the employer has the burden of proving each element of a disciplinary action by a preponderance of the evidence. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998). A preponderance of the evidenceis generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR- 066 (May 12, 1995). See Harper v. Dep't of the Navy, 33 M.S.P.R. 490 (1987). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior

statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. See Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). See generally, Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit System Protection Board 152-53 (1984). Accordingly, it is necessary to discuss the evidence presented by the parties in some detail. DOH presented testimony from Grievant's co-worker, M.H., (See footnote 2) who stated that her first encounter with Grievant occurred in approximately November of 1996, a few months after she began working with him. According to M.H., Grievant came up behind her while she was leaning over a map table and attempted to put his hand up her skirt. She immediately jumped back and told Grievant not to do that. M.H. did not complain to anyone at the time, and the conduct was not repeated within the following year.

On a later occasion, sometime in February 1998, M.H. was complaining to her co- workers about pain she was experiencing from an incoming wisdom tooth. She came up behind Grievant without his knowledge while he was telling one of their co-workers, Doug Casto, that all M.H. needed was “some cum in her mouth to ease the pain.” M.H. told Grievant, “that's disgusting,” and walked out of their work area. She took sick leave and went to see her doctor who was treating her for work-related stress unrelated to Grievant's conduct. Again, M.H. did not bring this incident to the attention of any supervisor.

Finally, in July 1998, Grievant was casually discussing other people he knew who had various parts of their anatomy pierced. Grievant told M.H. that he was born with a hole in his penis, asking her for one of her earrings, so that he could place it through his penis. Mr. Casto was also present during this conversation. In addition, Bella Haynes, an Office Assistant II who worked on the same floor as Grievant and M.H., came in and overheard a portion of the conversation relating to the earring. She testified that M.H. wasvisibly upset by the conversation, and told Grievant “that's disgusting,” before she walked out of the room.

Following this third incident, M.H. went to Jesse Haynes, (See footnote 3) EEO Director for DOH, complaining about Grievant's conduct. Mr. Haynes took a statement from M.H., and subsequently spoke with Mr. Casto, who wrote his comments on M.H.'s typed statement, noting that he had heard the statements by Grievant during each of the 1998 incidents, and was told about the November 1996 incident by both Grievant and M.H. See R Ex 1.

Through the testimony of Mr. Haynes, Respondent introduced Mr. Casto's written notations

indicating agreement with the allegations M.H. made against Grievant. See R Ex 1. Mr. Casto's statements constitute hearsay evidence. Ordinarily, formal rules of evidence, excepting the rules of privilege recognized by law, are not applied in grievance proceedings. Therefore, hearsay evidence is generally admissible. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997). See W. Va. Code § 29-6A-6; Seddon v. W. Va. Dep't of Health, Docket No. 90-H-115 (June 8, 1990). Nonetheless, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. See Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996); Seddon, supra.

In evaluating this hearsay evidence, the undersigned notes that neither side called Mr. Casto, nor made any effort to explain his absence or unavailability. Grievant, who was pro se, did not object to the introduction of the exhibit containing Mr. Casto's notations, but did introduce testimony from other witnesses that M.H. and Mr. Casto were friends, or“drinking buddies,” suggesting that Mr. Casto would back up a falsehood by M.H. out of friendship.

Grievant contended that M.H. fabricated all of these allegations against him in retaliation for his persistence in requiring her to complete leave slips when she reported late to work. Grievant was assigned timekeeper duties which required him to account for the time of M.H. and other co-workers. There was credible evidence that M.H. had a long- standing problem of getting to work on time. Marvin Christian, a retired employee who previously supervised Grievant and M.H., testified that he had to request leave slips from M.H. on occasion, and that she usually used all of her available leave as she earned it. Mr. Christian recalled one occasion when it was necessary to dock M.H.'s pay because she used more leave than she had accrued. He also recalled that M.H. sometimes provided inconsistent reasons for her absences and illnesses, and had failed to pay him fifty dollars for a piece of used exercise equipment she purchased before he retired. However, he did not have an opinion regarding her truthfulness and veracity generally. Doreen Baria, a former friend of M.H., testified that M.H. had told her several years earlier that she did not like Grievant, and wanted to file a grievance against him. In her opinion, M.H. would be capable of making up a story against Grievant.

Although Mr. Christian did not recall warning M.H. about Grievant or warning Grievant about sexual comments, he believed that “someone” had spoken with Grievant about “dirty talk” that was not of a sexual nature. Mr. Christian noted that his memory of events that occurred in the workplace prior to his retirement was not very good. During her testimony, M.H. admitted that Grievant

confronted her about being over 40 minutes lateto work and failing to complete a leave request. M.H. told Grievant that she would file a grievance, and Grievant told her to go ahead.

Grievant called Jeffrey Williams to testify in regard to these events. Mr. Williams recalled that M.H. came to him complaining about Grievant's sexual comments on July 20, 1998. At that time, he had been serving as acting supervisor over M.H. and Grievant for less than ten working days. He further recalled that the incident involving the dispute between M.H. and Grievant over a leave slip occurred the following day, July 21, 1998. It was after the latter incident that M.H. went to Mr. Haynes to formally complain about Grievant's conduct.

Brenda Miller, a co-worker called as a witness by Grievant, acknowledged that, in the five years she had been working with Grievant, he regularly used profanity, but never said anything to offend her. She also noted that the employees who work with Grievant and M.H. work in a single room which is divided into cubicles with partitions which rise approximately five feet from the floor. Thus, it is easy to hear conversations between employees in an individual cubicle when they are speaking in a normal tone of voice.

Grievant correctly notes that this disciplinary action was the first time any of his supervisors has ever admonished him for sexual harassment in regard to M.H. or any other employee. Indeed, Grievant's performance evaluations indicate that he was considered an excellent employee before these incidents were reported by M.H. See G Ex A.

Consistent with the standards discussed earlier in this decision, the undersigned finds that Respondent established by a preponderance of the evidence that Grievant engaged in prohibited sexual harassment of M.H. substantially as alleged. Grievant presented credible evidence that M.H. might have fabricated these allegations based upontheir disagreements over her leave accounting. The testimony of Ms. Baria and Mr. Christian indicated that M.H. may have a propensity to distort or mislead on occasion. However, because Mr. Williams was definite in his testimony that M.H. came to him complaining about Grievant's conduct before their dispute arose over a particular leave slip, Grievant's argument that M.H. totally fabricated these events is not persuasive.

The testimony presented by M.H. was clear and forthright. She was not hesitant or evasive. Not only did M.H. appear credible while testifying before the undersigned at the Level IV hearing in this matter, the testimony she gave at hearing was substantially consistent with the information she initially provided to Mr. Williams, her acting supervisor, and later submitted to Mr. Haynes, when filing

her written complaint. Moreover, her testimony was at least partially corroborated by Ms. Haynes. Although Ms. Haynes is a friend of M.H., an ordinary friendship will not necessarily provide a motive to lie under oath in a hearing.

Further, Ms. Haynes has no apparent animosity toward Grievant which would cause her to fabricate her testimony. As with Ms. Haynes, Mr. Casto's friendship with M.H. is not considered a basis for rejecting his hearsay statements to Mr. Haynes. Therefore, Mr. Casto's notations may appropriately be considered as substantiating the otherwise credible testimony of M.H.

Grievant elected not to testify, as is his right under W. Va. Code § 29-6A-6(e). Therefore, his credibility under oath may not be compared against that of M.H. The employer is only required to establish the basis for this disciplinary action by a preponderance of the evidence, not by proof beyond a reasonable doubt. Accordingly, theundersigned concludes that DOH presented preponderant credible evidence that Grievant engaged in prohibited sexual harassment on three separate occasions.

Grievant argues that the first of these incidents, which occurred sometime around November of 1996, should not be used to discipline him, since M.H. did not complain to any of her superiors, and no action was taken. DOH contends that the first event can be considered because it is part of a continuing course of conduct. The undersigned finds that the 1996 event was admissible to establish that Grievant was on notice that M.H. found his conduct to be offensive. However, because the incident occurred over one year before the next event alleged, it is too far removed in time from the other events to be alleged as a separate offense warranting disciplinary action, or to be charged as part of a pattern or practice.

Grievant also argued that a sixty-day suspension was an unduly harsh penalty. An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dep't of Health & Human Serv., Docket No. 94-HHR- 254 (Jan. 20, 1995). See Martin v. W. Va. State Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989); Schmidt v. W. Va. Dep't of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

Grievant did not provide evidence of particular cases where other DOH employees found to have

engaged in similar acts of sexual harassment had received lesserpunishments. To the contrary, Mr. Black and Mr. Haynes testified that Grievant's conduct was perceived as particularly egregious among the cases they had reviewed, and noted that the most recent disciplinary actions taken for sexual harassment involved a demotion, in addition to a thirty-day suspension. In comparison with a demotion, Grievant's penalty is considerably less severe. Indeed, Mr. Haynes indicated that he had intended to recommend Grievant's termination, but M.H. indicated that she did not want to see Grievant fired, only to cease his unacceptable actions. The DOH policy on sexual harassment places all employees on notice that they are subject to termination for a first offense of sexual harassment. See R Ex 3.

W. Va. Code § 29-6A-5(b) provides authority to the undersigned to "provide such relief as is deemed fair and equitable" in accordance with the provisions of W. Va. Code §§ 29-6A-1, et seq. Where the employer fails to establish all of the charges which were alleged to support a particular disciplinary action, the penalty imposed must be reviewed to determine if it is excessive in the circumstances. See Walters v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-086 (Jan. 23, 1995), aff'd, Cir. Ct. of Kanawha County, No. 95-AA-23 (Dec. 18, 1996); Schmidt, supra. See generally Douglas v. Veterans Admin., 5 M.S.P.B. 313 (1981). Notwithstanding Grievant's previously good work record, DOH has advised its employees that sexual harassment in the workplace represents a serious matter which will not be tolerated. In the circumstances presented by this case, the two established incidents of misconduct in 1998 are sufficiently egregious that the undersigned is unable to conclude that DOH abused its discretion by imposing a penalty on Grievant that was necessarily excessive. Accordingly, Grievant has not established that he is entitled to any relief in this grievance. Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are made in this matter.

FINDINGS OF FACT

1. Grievant is employed by DOH as a Transportation Technician III in its Headquarters in Charleston, West Virginia.

2. Sometime around November of 1996, Grievant placed his hand up the skirt of a female co-worker, M.H., while she was leaning over a map table in their work area. M.H. jumped back in a startled manner and indicated to Grievant that such conduct was neither welcome nor acceptable.

3. Sometime in February of 1998, Grievant commented to a co-worker that M.H. simply

"needed some cum in her mouth" to alleviate discomfort from an incoming wisdom tooth. M.H. overheard Grievant's comments, and left the work area in distress.

4. In June of 1998, Grievant asked M.H. for one of her earrings, so that he could place it through a hole in his penis. M.H. told Grievant, "that's disgusting," and walked out of the room.

5. Grievant did not report any of these incidents until July 20, 1998, when she complained to Jeffrey Williams, their acting supervisor, concerning Grievant's conduct, and a number of other matters.

6. Prior to these incidents, Grievant had performed his duties in a generally exceptional manner and had not been disciplined for any misconduct.

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code § 29-6A-6, 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. Wellman v. W. Va. Dep't of Health & Human Services, Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. State employees may be disciplined for sexual harassment where their conduct creates an intimidating, hostile or offensive work environment for one or more employees. Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Turner v. W. Va. Div. of Highways, Docket No. 94-DOH-594 (Feb. 27, 1995); Stonestreet v. W. Va. Dep't 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). 3. The employer established by a preponderance of the evidence that Grievant engaged in behavior which created a hostile, intimidating, or offensive work environment for a female employee, M.H., in violation of the DOH policy prohibiting sexual harassment.

4. An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and the grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dep't of Health &

Human Services, Docket No. 94-HHR-254 (Jan. 20, 1995). See Martin v. W. Va. State FireComm'n, Docket No. 89-SFC-145 (Aug. 8, 1989); Schmidt v. W. Va. Dep't of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

5. Grievant failed to demonstrate that a sixty-day suspension for two acts of sexual harassment of a co-worker was clearly excessive or unduly harsh under the circumstances presented in this grievance.

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: December 30, 1998

Footnote: 1

Grievant appeared pro se. Respondent was represented by counsel, Timbera Carrico.

Footnote: 2

The employee who is the alleged victim in this matter will be identified only by her initials, consistent with this Board's policy respecting the privacy of individuals in such circumstances. See Parks v. W. Va. Dep't of Health & Human Resources, Docket No. 94- HHR-109 (Oct. 31, 1994); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).

Footnote: 3

There is no evidence that Mr. Haynes is related to Bella Haynes.