SAMUEL J. DECAPIO,

Grievant,

v. **Docket No. 98-DOH-279**

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Samuel J. DeCapio, employed by the Division of Highways (Respondent) as a County Maintenance Superintendent II, filed a complaint directly to level four, as is permitted by W. Va. Code §29-6A-4(e), on August 3, 1998, after being suspended for a period of thirty calendar days. Grievant challenges the suspension and requests that the disciplinary letter be removed from his records, reinstatement of lost wages and benefits, and attorney fees. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on February 3, 1999, and the matter became mature on that date when the parties declined the opportunity to submit proposed findings of fact and conclusions of law. (See footnote 1)

Background

On March 23, 1998, Respondent employee Thomas Ravoria filed a complaint in which he alleged: I would like Paul Devore, Kathy Sobel and Donny Kimble to stop harassing me because they have created a hostile work environment. They have made derogatory statements that was [sic] both insulting and unacceptable. Also, I would like for Paul Devore to receive a written reprimand for the stress thathe has caused me because I believe that he is abusing his authority. If this treatment of me continues, I would like to see further disciplinary action taken against the above named individuals, up to and including (suspension, demotion and/or discharge). Also, I feel that I want to be compensated for the mental stress that has been put on me. I am unable to sleep at night, have headaces [sic] during the day and nightmares.

Attached to this document was a list “of names of the people who has [sic] caused me harassment, sexual harassment, hostile working environment and mental stress.” Those names were Bob McCormick, Doug Hart, Harold Shepherd, Lisa Edwards, Kathy Sobel, Paul DeVore, Donny

Kimble, David Cline, Wayne Kaufman, Don Willey, Jim Dotson, and Jim Witherow.

Upon receiving this complaint, an investigation was completed by Jesse Haynes, then Director of Respondent's Equal Employment Opportunity Division. Thereafter, by letter dated July 10, 1998, Jeff Black, Director of Respondent's Human Resources Division, advised Grievant that he would be suspended for thirty calendar days. The letter stated in pertinent part:

The reason for your suspension is that an investigation into allegations of sexual harassment determined that on or about March 10, 1998 you became aware of certain actions and comments made to and by employees under your supervision which were sexual in nature and a violation of the Department of Transportation Sexual Harassment Policy. Once you became aware of the situation you failed to take any action to prevent or correct the sexually harassing behavior. As a supervisor, it is your responsibility to insure that this policy is implemented and adhered to.

Discussion

In disciplinary matters, the employer has the burden of proving 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-HHR0501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health & Human Serv. Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra.

Respondent argues that on either March 10 or 11, 1998, Grievant entered the employee lunch room and heard a conversation in which Mr. Ravoria was being referred to as “Bone”. Grievant took no action to stop the individuals from engaging in the action, or to discipline them for the improper behavior. Respondent insists the thirty day suspension was correctly imposed because Grievant viewed conduct which was inappropriate, i.e., the use of a sexually explicit nickname, and failed to take any action to ensure compliance with procedures and policies, a responsibility of a County Maintenance Superintendent. Grievant denies that he failed to follow any procedures or policies relating to incidents of sexual harassment because no such activity, as defined by Respondent's policies, occurred.

Respondent did not offer the investigative report into evidence. Neither Jesse Haynes nor Jeff

Black appeared as witnesses. However, Mr. Ravoria's co-workers, Robert McCormick, Don Willey, and Paul Devore, were called by Respondent to offer testimony. The testimony of these men was consistent regarding the events of March 10 or 11. They, along with Lisa Edwards and Mr. Ravoria were in the lunch room “kidding around”. The subject matter was Mr. Ravoria's nickname “Bone”. Ms. Edwards had asked Mr. Ravoriahow he had acquired the name. Everyone was laughing, when Grievant entered the room. When someone asked Grievant about the nickname, Grievant threw up his hands and left.

All of the witnesses stated that Mr. Ravoria was laughing throughout the incident. Grievant's testimony relating to the incident was identical to that of Respondent's witnesses. Additionally, he stated that Mr. Ravoria had never complained to him of this or any other behavior. Grievant claimed that he was unaware of any problem existing until Grievant refused to reassign Mr. Ravoria from flagging. By all accounts, Mr. Ravoria did not like to flag, but was not licensed or qualified to perform any other duties. When Grievant denied his request for another assignment, Mr. Ravoria stated that he wanted to file a sexual harassment claim. Grievant recalled that this was the first time he had heard such a complaint, and he immediately telephoned the appropriate person for Mr. Ravoria to pursue the matter.

Respondent Policy, Volume III, Chapter 6, “Discrimination Complaints” defines sexual harassment as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

In other words, if an employee feels that he/she is being forced to endure unwelcome sexual advances or conduct at the risk of being dismissed, demoted or passed over for raises or promotions, a case of sexual harassment may exist.

Or, if an employee feels that sexual advances or conduct isinterfering with his/her ability to perform a job, or have reasonable peace and calm at work, a case of sexual harassment may exist.

The policy further requires that supervisors “must take all steps necessary to prevent 'sexual and other forms of harassment,' and must take 'immediate and effective corrective action,' upon learning of such harassment. A supervisor may be liable in a case of harassment if he/she 'knew, or should have known of the conduct,' unless immediate and appropriate corrective actions are taken.”

Mr. Ravoria did not testify; however, by the accounts of all other witnesses, he did not object to the nickname “Bone”. On the contrary, testimony indicates that he was proud of, and encouraged the use of the nickname, which the witnesses indicated was a reference to his penis. The testimony is undisputed that Grievant would introduce himself to new employees as “Bone”, and labeled his locker and hardhat with the name. There was no testimony that Mr. Ravoria had ever asked that his coworkers stop referring to him by the nickname, or that he had expressed any other concern regarding its use.

Clearly, Mr. Ravoria's complaint does not relate to the submission of sexual conduct as a condition of employment, nor was the submission or rejection of such conduct used as the basis for employment decisions affecting the individual. The only issue to be addressed relating to this grievance is whether there was conduct which had the purpose or effect of unreasonably interfering with the individual's work performance or created an intimidating, hostile, or offensive working environment. There is no claim that the behavior cited in this case interfered with Mr. Ravoria's work performance, leaving only the complaint that it created an intimidating, hostile, and offensive working environment.

Respondent has failed to prove that such an environment existed. The undisputedtestimony of all the witnesses was that Grievant wanted to be called “Bone”, notwithstanding, and indeed perhaps because of, the sexual connotation. If the employee changed his mind, he needed to advise his coworkers of that fact. He had not made any such announcement. On the date in question, the complaining employee was laughing and fully participating in the discussion. Respondent's efforts to eliminate sexual harassment from the workplace are to be commended; however, in the present matter, Grievant should not be held accountable for knowledge that an employee used a nickname with a sexual connotation. The language of the policy does not contemplate that supervisors are to be responsible for monitoring and regulating the use of nicknames. (See footnote 2) There is simply no evidence that Mr. Ravoria found the nickname “Bone”, or the attention it generated, to be offensive. As such, Grievant did not fail to perform his supervisory duties.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

___1. Respondent employee Thomas Ravoria promoted the use of the nickname “Bone” at work. Mr. Ravoria introduced himself as “Bone”, and labeled his locker and hardhat “Bone”.

2. It was generally understood in the workplace that the nickname referred to Mr. Ravoria's penis, which was reportedly of astounding dimensions, and which he hadexposed to his coworkers upon occasion.

3. While in the lunchroom on March 10 or 11, 1998, Mr. Ravoria and his coworkers were engaging in a conversation regarding how he came to acquire the nickname. Mr. Ravoria was a full participant in the gaiety, laughing throughout the incident.

4. Grievant is employed by Respondent as a County Maintenance Superintendent II.

5. Grievant walked into the lunchroom during the conversation regarding the nickname. When asked about the name, Grievant did not respond, and left the room.

6. On March 23, 1998, Mr. Ravoria filed a sexual harassment complaint, accusing a number of his coworkers of causing him mental stress, sleeplessness, headaches, and nightmares. No specific incidents were described by Mr. Ravoria.

7. Subsequent to an investigation, Grievant was suspended for thirty calendar days based upon his knowledge of the March 10 or 11 incident, and his failure to take any action to prevent or correct the sexually harassing behavior.

8. Mr. Ravoria had not complained about the nickname, or asked his coworkers not to use the name or tease him about it.

Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving 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-HHR0501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, DocketNo. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health & Human Serv. Docket No. 92-HHR-486 (May 17, 1993).

2. Respondent failed to prove that Grievant was aware of any actions or comments made to Mr. Ravoria which created an intimidating, hostile, or offensive working environment, or that he neglected to perform his supervisory duties relating to the enforcement of Respondent's sexual harassment policy.

Accordingly, the grievance is **GRANTED,** and Respondent Ordered to purge Grievant's file of all documentation addressing this suspension, and reimburse him for all lost pay and benefits. The Grievance Board lacks the authority to grant attorney fees.

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.

Date: February 18, 1999 _____

Sue Keller Senior Administrative Law Judge

Footnote: 1 *1Grievant was represented by David A. A. Jividen, Esq., and Respondent was represented by Timbera Wilcox, Assistant Attorney General.*

Footnote: 2

2The undersigned takes administrative notice that events other than that cited in this matter allegedly took place, and are subject to related pending level four grievances. However, Respondent apparently does not hold Grievant accountable for any actions other than the use of the nickname.