JAMES WORDEN,
Grievant,

v. **Docket No. 98-HHR-282**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
HUNTINGTON STATE HOSPITAL,
Respondent.

D E C I S I O N

Grievant, James Worden, states he was "wrongly discharged", and requests as relief to be "returned to my position as building maintenance supervisor with back pay [,] interest[,] and attorney fees." As this was a termination, the grievance was appealed directly to Level IV, and a Level IV hearing was held on September 28, 1998, and October 28, 1998. This case became mature for decision on December 7, 1998,[1] after receipt of the parties' proposed findings of fact and conclusions of law.[2]

---

[1]On January 19, 1999, Grievant requested he be granted a default at Level IV. Grievant was obviously unaware that the grievance did not become mature for decision until December 7, 1998, that the counting of days, means working days, and that there are no provisions for default at Level IV. Further, although W. Va. Code § 29-6A-4 (2) states the decision should be rendered within thirty days of the hearing, that would be impossible here as the parties requested to be allowed to submit findings of fact and conclusions of law which were not received until December 7, 1998. See Flint v. Harrision County Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998), aff'd Harrison County Cir. Ct. Civil Action No. 95-C-485-1 (Nov. 10, 1998).

[2]Grievant was represented by Attorney Steve Compton, and Respondent was represented by Assistant Attorney General B. Allen Campbell. Shortly after the first hearing, Mr. Compton went to work for the state, but Grievant was aware of this fact before

Grievant was terminated by letter dated July 23, 1998. This letter from Huntington State Hospital ("HSH") Administrator Desmond Byrne stated the following pertinent information:

> The findings of a sexual harassment (EEO) complaint investigation reveal that: (1) You created a sexually harassing environment by continually making sexual remarks about Huntington Hospital employee, DK.[3] More specifically you repeatedly made comments in the presence of co-workers Donald Porter, John Marks, Martin Shelton, Matthew Wright, and Jackie Jeffery to the effect that:
>
> * if you had a chance you would go to bed with her and that you are working on it;
> * boasting you had slept with her;
> * you would have her and you had her;
> * she wasn't all that good;
> * you had her and she wasn't much; and
> * she is not pregnant, but she is nothing to write home about.
>
> (2) You played an inappropriate cassette tape at Huntington Hospital. More specifically, you admit to bringing a cassette tape to the work place that contained explicit sexual and racial overtones. The content of the cassette tape is reported to have included discussion and/or song lyrics such as "There is nothing worse than a white girl and a nigger; how black men beat white women; and the similarities between women and the smell of catfish." Further, there was a song that had something to do with women giving a man oral sex.
>
> . . .
>
> (3) During this investigation it was also established by Robert Mills, Matthew Wright, and Martin Shelton that you had made sexually harassing comments regarding Jackie Jeffery's girl friend, Karen Wilburn. This revealed a pattern of sexual harassment thereby creating a hostile work environment.
>
> Previously, you were verbally reprimanded on April 9, 1996 for sexual harassment of Debbie Burnette. Specifically, you admitted posting pictures

---

the first hearing and agreed to have Mr. Compton represent him throughout the proceedings.

[3]The employee's name was used in the dismissal letter. Keeping with prior decisions, only the initials will be used in sensitive situations.

of nude women in the plumbing shop. As stated in my letter of April 9, 1996, you indicated to me ". . .that your behavior in this situation was not the right thing to do and it would not happen again." Additionally you received sexual harassment training at Huntington Hospital on the following dates: February 23, 1993; March 3, 1993; June 1993; June 16, 1994; June 27, 1995; January 14, 1997; July 1997; January 6, 1998; and June 25, 1998; and at Lakin Hospital on June 10, 1996.

You are reminded that supervisors serve as role models for employees. As a supervisor, it is your basic responsibility to create a model of how employees are to interpret and apply the Department's policies and procedures and how they are to respond to problems they confront in their daily activities. Your actions diminish the effect of your leadership, and is (sic) not acceptable behavior for your employees to emulate. As a supervisor, you should understand the importance of discipline in meeting Department objectives. It is as important to discipline yourself as it is for employees to exercise self-discipline in these matters.

You must realize that in your position as Building Maintenance Supervisor II, you have a responsibility to enforce the policies and procedures established by the Department. The employees under your supervision rely on you for training, leadership, and direction in complying with the rules and regulations. It is the subordinate's responsibility to apply your instruction in the work place. Obviously, if there is a lack of positive and supportive supervision, employees cannot perform their duties with confidence that their work product is in compliance with Department policy and/or procedure. It is your primary responsibility to plan, assign, supervise, evaluate, and secure the resources necessary to ensure the successful performance of the employees under your supervision. I conclude that your failure to exercise supervisory skills and to follow policy makes it difficult, if not impossible, to enforce compliance with policy by your staff. The examples above clearly demonstrate your inadequate leadership, supervisory performance, and judgement, as well as your repeated disregard for Department policy and/or procedure.

. . .

The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees' capability in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to cause me to conclude that you did not meet a reasonable standard of conduct as an employee of the Department of Health and Human Resources at Huntington Hospital. Considering the obligation of the Hospital to take appropriate action which will prevent the recurrence of such

> inappropriate behavior, and that a prior reprimand and repeated educational sessions did not cause you to alter your behavior, you have left me no alternative but to dismiss you to prevent any further reoccurrences.

Additionally, this letter discussed the obligation the state has to provide a work place free of sexual and racial discrimination, and cited the requirements of the state and federal sexual harassment laws.

After receiving this letter Grievant appealed his dismissal to Level IV.

Issues and Arguments

Respondent Department of Health and Human Resources ("HHR" or "Department") argues Grievant's behavior constituted sexual harassment and created a hostile work environment. Since Grievant was the supervisor, his actions were considered especially egregious as he failed to provide the required leadership for his subordinates. Additionally, because Grievant had received a prior verbal reprimand for sexual harassment and numerous hours of sexual harassment training, HHR did not believe dismissal was disproportionate to the offense.

Grievant argues he did not commit all the acts he was accused of, and that although he did play a tape containing sexually explicit material, he did not know what was on the cassette tape, and notes no one filed a complaint about this behavior. Grievant also believes HHR's actions were guided by its desire to prevent him from becoming the Director of Environmental Services. Further, he believes the disciplinary action was disproportionate to the charges and notes another employee was only demoted and suspended for theft.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Before his termination, Grievant was employed as a Building Maintenance Supervisor II at HSH which is under the direction and control of HHR. Grievant supervised approximately eight power house and plumbing employees, and had worked for HHR for 23 years.

2. In 1996, he received a verbal reprimand for sexual harassment.

3. In 1997, he was counseled by his supervisor, Sue Selby, about another incident of sexual harassment. This discussion did not lead to any disciplinary action.

4. During 1996, 1997, and 1998, Grievant made remarks to co-workers and supervisees that inferred and implied he had sex with DK, the Safety Director, and she was, "nothing to write home about." Grievant never stated directly that he had sexual relations with DK, but it is clear that his behavior and actions were meant to convey and did convey he had engaged in sexual activities with DK.

5. The inferences were untrue, and although DK noticed that at times employees would laugh when she walked by, she was not aware of Grievant's remarks.

6. In March 1998, Marty Shelton, one of Grievant's supervisees, told a group of employees in the canteen[4] about Grievant's remarks. One of these employees was Rhonda Nolan, Housekeeping Supervisor. Ms. Nolan went directly to DK and asked her if these rumors were true. DK was very upset about these remarks and slurs upon her character.

---

[4]The canteen is a place where employees and patients can obtain food and drinks and is frequently used for breaks.

7. Shortly thereafter, in March 1998, DK filed an EEO complaint with Donna Montie, the EEO counselor at HSH.

8. This complaint was investigated internally by Ms. Montie and Ms. Selby. The complaint was substantiated and corroborated by the testimony of multiple witnesses. After this initial finding, the written statements and report were reviewed by an external EEO counselor and confirmed.

9. Grievant brought a sexually explicit cassette tape, that he knew contained language inappropriate to the work place, and asked his supervisees to listen to it. This cassette tape lasted approximately 20 minutes and contained remarks about oral sex, negative remarks about African-Americans, and other sexual descriptions. Grievant locked or watched the door while the cassette tape was on to prevent anyone else from hearing the tape. During the EEO investigation into DK's complaint, HSH found out about the cassette tape.

10. No one filed a complaint about the playing of this cassette tape, even though several of the men present found the cassette tape to be inappropriate for the work place. Many employees were afraid to file a grievance or make a complaint against Grievant because of his long-term, live-in, romantic relationship with Ms. Kieth Anne Dressler, the Human Resources Director at HSH.

11. The employees in the Environmental Services Department frequently "teased" and harassed each other about a variety of issues. Often these discussions had sexual overtones. Grievant was also teased by several employees, especially about his relationship with Ms. Dressler. Ms. Dressler had polio as a child and is required to wear

braces to walk. Grievant also teased employees. For example, he frequently called Donald Porter, a supervisee, a faggot.

12. In 1996, Grievant, in front of other employees, called Jackie Jeffery's girlfriend a whore and told Mr. Jeffery his girlfriend had slept with many men. Mr. Jeffery asked Grievant to stop bad-mouthing his girlfriend, and Grievant's response was to direct another employee to get Mr. Jeffery a "cry towel."

13. Mr. Jeffery was very upset about this teasing and asked to be removed from Grievant's supervision. This request was granted. Mr. Jeffery also filed an EEO complaint, which was never investigated.[5]

14. Many supervisors at HSH have either left or retired, and Grievant was hopeful of becoming the Director of Environmental Services, as he was one of the few remaining supervisors in this area.

---

[5]Mr. Byrne indicated he had called the Charleston EEO office several times to ask why this complaint had not been investigated. At hearing, Mr. Jeffery was very upset and stated he did not wish to be a witness, that his sworn statement was not true, and that he had not reread the statement before he signed and initialed each page as correct. Mr. Jeffery then went through this statement at hearing and confirmed the majority of the statement was true. Among the statements confirmed by Mr. Jeffery were those which substantiated he had heard Grievant make remarks about DK, implying he had sex with her, and the remarks Grievant had made about Mr. Jeffery's girlfriend. It was clear from Mr. Jeffery's testimony that he is currently requesting reclassification to a higher pay grade and was afraid his testimony would effect this requested change. It is noted Grievant's live in girl friend, Ms. Dressler is the Director of Human Resources at HSH and is involved in reclassifications. Grievant had informed other employees they should not report him for any infractions "because of who I sleep with." Statements from Grievant to this effect are not cited to infer Ms. Dressler would actually effect Mr. Jeffery's reclassification, but to demonstrate that Mr. Jeffery <u>believed</u> she could or might.

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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985). See Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (W. Va. 1983); Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (W. Va. 1982). This grievance requires a determination of whether Respondent proved the facts upon which the dismissal was based.

In Grievant's dismissal letter, he was charged with sexual harassment, creating a hostile work environment, and failure to provide leadership to his supervisees, even after he had received a prior reprimand and attended many training sessions, some of which were specifically directed to supervisors. Grievant admitted playing the cassette tape and testified at hearing that this action on his part was incorrect, and if he were returned to his position, such acts would not be repeated. Grievant denied he made remarks about DK and stated his remarks to Mr. Jeffery were just teasing and were during the process of discussing AIDS and the dangers of having multiple sexual partners.

Since the issue of credibility is important in deciding this case, it will be examined first.[6]

1. Credibility

In order to decide whether HHR has met its burden of proof, it is first necessary to resolve the issue of witness credibility, as Grievant's testimony contradicts the testimony of Respondent's witnesses as well as some of the testimony of his witnesses. An Administrative Law Judge is charged with assessing the credibility of the witnesses who appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing

[6]As revealed in the previous Findings of Fact, the issue of credibility has been resolved against Grievant on the majority of the issues.

credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the Administrative Law Judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

The undersigned Administrative Law Judge had an opportunity to observe the demeanor of the witnesses and to assess their words and actions during their testimony. The testimony of Mr. Jeffery, Mr. Porter, Mr. Shelton, John Marks, and Matthew Wright all confirm Grievant made remarks which implied and were intended to imply he had sexual relations with DK. Although it was clear that some of these witnesses do not care greatly for Grievant, there was nothing to suggest that their testimony was untrue. It also appears Mr. Shelton was the ring leader in bringing the complaints to a head, but this again does not indicate the statements were untrue.[7] Many witnesses professed they were reluctant to report Grievant because he was their supervisor.

The statements of these witnesses were consistent with each other, consistent with their prior statements, and internally consistent. There was no indication that any of the witnesses was untruthful, in fact several of the witnesses, including those called by

[7]One of Grievant's witnesses, Bill Lawrence, submitted a statement and testified that Mr. Shelton had coordinated the witnesses and was pleased to have caused Grievant trouble. However, Mr. Lawrence did not indicate the charges against Grievant were not true, only that Mr. Shelton reported these events to cause Grievant trouble.

Grievant, indicated they had never heard Mr. Shelton lie. The demeanor of these witnesses was straightforward, and their testimony was plausible.

In fact, Mr. Marks indicated he thought the tape was very funny, and he was not offended in any way by it being played. However he did admit, with much reluctance, that the sexual harassment training he had received indicated this behavior on the part of Grievant was inappropriate. Mr. Marks also discussed the DK remarks and believed Grievant was trying to indicate he had sex with DK.

Mr. Jeffery reported he and Grievant had resolved all their difficulties, but he also indicated he had heard Grievant make remarks about having sex with DK, and that Grievant had made insulting remarks about his girlfriend.

The undersigned Administrative Law Judge finds Grievant's testimony to lack credibility. He explained he had never attempted to infer he had sexual relations with DK, but he had said she was not much to write home about in the area of supervision. Grievant also indicated DK was "a great little safety director." Further, the undersigned Administrative Law Judge also does not believe Grievant when he says he did not know what was on the tape. It makes no sense that Grievant would gather employees to listen to a cassette tape when he did not know what it contained.

2. Merits

Respondent has proven the charges against Grievant, and has demonstrated Grievant was dismissed for "good cause" and this "misconduct [was] of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes, supra. The West Virginia Division of Personnel

Policy, "Sexual Harassment Prohibited" states that sexual harassment will not be tolerated in the work place, and "conduct [which] has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" constitutes sexual harassment, creates a hostile work environment, and "will result in appropriate disciplinary action which may include dismissal." This Policy further defines sexual harassment as "sexually discriminatory ridicule, insults, jokes, or drawings."

HHR's Policy Memorandum 2108 also delineates employee conduct.

> Employees are expected to: comply with all relevant Federal, State and local laws; comply with all Division of Personnel and Department policies; comply with all applicable State and Federal Regulations governing their field of employment; follow directives of their superiors; conduct themselves professionally in the presence of residents/patients/clients, fellow employees and the public . . .; avoid physical abuse, harassment or intimidation of residents/patients/clients or fellow employees . . . .
>
> Employees are expected to: refrain from illegal or immoral acts while on State property or while engaged in activities related to their employment; refrain from disrupting the normal operations of the Agency; refrain from profane, threatening or abusive language towards others . . ; refrain from making unwanted or inappropriate sexual advances . . . .

"State employees may be disciplined for sexual harassment where their conduct creates an intimidating, hostile or offensive work environment for one or more employees." Lanham v. Dep't of Transp., Docket No. 98-DOH-369 (Dec. 30, 1998). See 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).

Respondent has demonstrated Grievant engaged in sexual harassment in his behavior with DK and Mr. Jeffery. For an employee to indicate he has a sexual relationship

with another supervisor, who was sometimes his supervisor, is an act of sexual harassment and demeans that person. This demeaning rumor can affect the supervisor's reputation and the supervisor's ability to manage, control, and relate to other employees and supervisees.

Grievant's treatment of Mr. Jeffery also constitutes sexual harassment. Grievant's explanation that he was merely trying to indicate to Mr. Jeffery that he should be careful, and this discussion was within the context of a discussion about AIDS, is not plausible and is not supported by the evidence. Even if the undersigned Administrative Law Judge accepts Grievant's explanation that his purpose was to warn Mr. Jeffery of the dangers of "sleeping around" or having sexual relations with "a loose woman", surely there are other ways to accomplish this intent without calling a supervisees's girlfriend a whore in front of co-workers, and then calling Mr. Jeffery a crybaby when he pleaded with Grievant to stop the insulting remarks. It was clearly inappropriate for Grievant to make these offensive remarks and clearly inappropriate to continue this behavior in the face of Mr. Jeffery's objections.

Grievant admitted he played the tape, and even if his statement that he did not know what was on it is to be believed, this answer would not explain why he continued to play the tape when he heard its contents. Grievant's explanation that sexual talk relieved the tension and stress among the workers, and that he did stop the talk when it got "too dirty," is insufficient to excuse his behavior.[8] Grievant created a hostile work environment and established an atmosphere in which Grievant's supervisees believed sexual harassment

---

[8]Talk that was considered "too dirty" by Grievant was discussion of oral sex between men.

was permitted and acceptable. Although no one filed a grievance or EEO complaint about the tape, Grievant's behavior in this instance was totally unacceptable.

3. Mitigation

The undersigned may mitigate the discipline if the imposed penalty is clearly excessive or disproportionate to the offense. W. Va. Code § 29-6A-5(b) provides authority for the undersigned Administrative Law Judge to "provide such relief as is deemed fair and equitable" in accordance with the provisions of W. Va. Code §§ 29-6A-1, et seq.

In assessing whether the discipline was excessive or disproportionate, the undersigned Administrative Law Judge must look at the totality of the circumstances. Some factors to be considered in the mitigating analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, whether the employee was warned about the conduct, and other mitigating circumstances. See Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). As previously stated, “the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct.” Buskirk, supra.

HHR advised its employees that sexual harassment in the workplace represented a serious matter which would not be tolerated. Employers have the right to expect employees to not engage in sexual harassment and to follow policies that are do not impinge on their health and safety. Hatfield v. Dep't of Corrections, Docket 98-CORR-020 (Apr. 30, 1998); See Scarberry v. Bureau of Employment Programs, Docket No. 94-BEP-625 (Jan. 31, 1995); Smith v. Dep't of Corrections, Docket No. 93-CORR-538 (May 17,

1994). Notwithstanding Grievant's prior work record and numerous years of service, as identified in the Findings of Fact, the incidents of misconduct in this situation are sufficiently egregious to conclude HHR did not abuse its discretion by dismissing Grievant. Although Respondent could have chosen to suspend and demote Grievant, the undersigned Administrative Law Judge will not substitute her judgement for Respondent and does not find that the discipline imposed here was clearly excessive. See e.g. Hammer v. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995).

Respondent previously reprimanded Grievant and required him to attend training on sexual harassment numerous times. Grievant was the supervisor, and as such, was to be a role model to his supervisees. This modeling included setting the proper example in how to interact and treat members of another gender or race, and how to interact with co-workers in a respectful manner. Grievant was well aware that his actions were unacceptable. Accordingly, Grievant has not established he is entitled to mitigation of the disciplinary action.

Grievant argument that another employee received lesser punishment in that he was only suspended and demoted for theft, is not applicable here. Grievant's situation is different from the other supervisor as this employee admitted his error and had no prior disciplinary action of any kind, much less for the same offense.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

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 Serv., 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." Lanham v. Dep't of Transp., Docket No. 98-DOH-369 (Dec. 30, 1998). See 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, and/or offensive work environment in violation of the HHR policy prohibiting sexual harassment.

4. Respondent demonstrated Grievant's behavior was incorrect for a supervisor, and Grievant did not serve as a proper role model.

5. 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 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 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).

5. Grievant failed to demonstrate that termination for the acts of sexual harassment of co-workers and creating a hostile work environment was clearly excessive or unduly harsh, given that he had received a prior verbal reprimand for sexual harassment and had attended numerous training sessions about sexual harassment.

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.

_____

JANIS I. REYNOLDS
Administrative Law Judge

Dated: January 29, 1999