TERRY KNUCKLES and

ROGER BURDETTE,

Grievants,

v.

DOCKET NO. 99-BOD-123/131

WEST VIRGINIA BOARD OF DIRECTORS/

WEST VIRGINIA STATE COLLEGE,

Respondent.

D E C I S I O N

Grievants, Terry Knuckles and Roger Burdette, filed grievances protesting their suspensions for five (5) and ten (10) days, respectively, for incidents which occurred at West Virginia State College ("State") on or about December 14 and 15, 1998. The grievances were denied at level one by Mr. Phil Judd, Director of Physical Facilities. Level two hearings were conducted on February 22, March 8, and March 9, 1999. Level two decisions denying the grievances were issued by Mr. Robert Parker, the designated grievance evaluator, on March 17, 1999 (Knuckles grievance) and March 18, 1999 (Burdette grievance). Both grievances were denied at level three by President Hazo W. Carter, Jr. Grievants appealed to level four on March 25 and 26, 1999, respectively, and the grievances were consolidated for purposes of hearing and decision by Order dated June 3, 1999. A level four hearing was held on July 12, 1999, and this matter becamemature for decision on September 20, 1999, the deadline for the parties' submissions of proposed findings of fact and conclusions of law. (See footnote 1)

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts:

1. Grievants are employed by West Virginia State College as trade workers doing construction and maintenance work.

2. Prior to the incidents which form the basis of this grievance, Grievants had excellent work records.

3. On December 14, 1998, two groundskeepers, James Booker and James Moss, entered the groundskeeper lunch room when Grievant Burdette, stated, “[w]e shouldn't be out in the cold doing this job. This was a job for the two black guys to do out in the cold.” Burdette LII State Ex. 19; LIV Burdette Ex. 2. (See footnote 2)

4.

Mr. Booker and Mr. Moss are black. Grievants are white.

5. Mr. Booker and Mr. Moss are groundskeepers. Groundskeepers are issued cold weather coveralls for working outside. Maintenance employees, including Grievants, are not issued cold weather coveralls, as the majority of their work is inside the buildings.

6. On December 14, 1998, Grievants were assigned to work out of doors laying concrete. 7. On December 15, 1998, while in the groundskeeper lunch room, Grievant Burdette stated, “I should tar and feather the big, black guy standing behind me,” referring to Mr. Booker. Grievant Knuckles added, “with goose feathers.” Burdette LII State Ex. 19; LIV Burdette Ex. 2.

8. Mr. Moss asked his supervisor, Steve Young, who was present in the groundskeeper lunch room during the December 15, 1998 incident, what he was going to do about the statements made by Grievants.

9.

Mr. Young told Mr. Moss he was not going to get involved.

10. There was a fair amount of joking and horseplay that occurred in the Physical Facilities Department, and Mr. Young did not take Grievants' statements seriously.

11. On December 21, 1998, Mr. Booker filed a complaint with Phil Judd, Director of Physical Facilities, alleging discrimination, violation of civil rights, and harassment, regarding two incidents involving Grievants.

11. Mr. Judd conducted an investigation of Mr. Booker's complaints, including taking statements from other employees.

12. On January 21, 1999, Mr. Judd issued a First Letter of Warning and ten (10) day suspension to Grievant Burdette for violating the West Virginia State College Staff Handbook, specifically the Sexual Harassment Policy. Burdette LII Ex. 23a; LIV Burdette Ex. 4.

13. On January 21, 1999, Mr. Judd issued a First Letter of Warning and five (5) day suspension to Grievant Knuckles for violating the West Virginia State College Staff Handbook, specifically the Sexual Harassment Policy. Knuckles LII Ex. 24a. 14. Mr. Booker later filed a Human Rights Complaint against State over these incidences.

DISCUSSION

Grievants' letters of suspensions provide, in pertinent part:

> On December 22, 1998, a written complaint was received from Joe Booker concerning derogatory statements you and another employee made about him on December 14 and 15, 1998. An investigation has been conducted which confirms you did make inappropriate statements. These statements constituted creating a hostile work environment, which is in violation of the college policy. Page 28 of the Staff Handbook states, “West Virginia State College has the commitment to provide every student and employee with an environment which is not only conducive to working and learning but, is free of any conditions which would negate that commitment.” Any behavior which violates this commitment is considered inappropriate and will not be tolerated by the college.
>
> The investigation did reveal you violated this commitment. Therefore, effective Monday, January 25, 1999, you are suspended for . . . . . Upon your return to work, you will be scheduled by your supervisor, Marvin Smith, to attend mandatory EARS counseling. This counseling will provide you the training for you to improve this aspect of your job.
>
> This letter constitutes a **First Letter of Warning** and will remain a part of your personnel file for a period of twelve (12) months. Any future violations of WVSC policy and procedures could result in further corrective action up to and including termination.

Burdette LII Ex. 23a; LIV Burdette Ex. 4; Knuckles LII Ex. 24a.

Page 28 of the West Virginia State College Staff Handbook reads as follows:

Sexual Harassment Policy

General: West Virginia State College has the commitment to provide every student and employee with an environment which is not only conducive to working and learning but, is free of any conditions which would negate that commitment.

West Virginia State College expressly prohibits:

1) Any student or employee from subjecting another person to unwanted verbal and/or physical sexual attention.

2) Any student or employee who is in a position of authority or who is able to control or affect another person's job, academic career, grades, or emotional well-being from attempting to, or actually coercing any individual into sexual relations.

3) Any student or employee who is in a position of authority, or who is able to control or affect another person's job, academic career, grades, or emotional well-being from creating or imposting any punitive measures or conditions upon individuals who refuse or report such unwanted verbal and/or physical sexual attention.

Any student or employee of the College who, after a thorough investigation, has been found to have subjected an individual to sexual harassment and/or attempts to prevent the reporting of such incidence shall be subject to severance from his/her relationship with the College.

LIV R. Ex. 3.

Imagine Grievants' surprise when they took a closer look at the policy described to them in their suspension letters and found they were being charged with sexual harassment. For some reason, State cannot fathom why this bothers Grievants, explaining it is the general statement in the policy, not the specific examples, which Grievants' statements to Mr. Booker have violated. No doubt, years from now when the incidents of December 14 and 15, 1998, are long forgotten, someone reviewing Grievants' suspension letters in their personnel files is not going to be aware that Grievants did not, in fact, subject anyone to sexual harassment, but instead made derogatory racial comments to a co-worker. Nowhere in the suspension letters does it make this distinction.

Having said that, State has every right and interest in attempting to preserve the integrity of the institution and create a harassment-free environment, sexual, racial orotherwise, and was within its bounds of authority in investigating the complaint made by Mr. Booker against Grievants.

There does not appear to be any dispute the alleged comments were made by Grievants to Mr. Booker, although neither Grievant clearly remembers saying them. A co- worker, Mike Foster, testified he was probably present in the lunchroom when these comments were made, but they weren't anything so unusual that it would cause him to commit them to memory.

It is also undisputed the general atmosphere in the Physical Facilities Department, for at least 15 years prior to these incidents, involved joke-telling, name-calling, horseplay, and other various types of crude “locker room” behavior. All participated in this behavior, black and white alike. Mr. Booker was heard to have called Grievants, as well as other white workers, “cracker”, “marshmallow”, and “white boy.” At no time had anyone been warned, counseled, or disciplined for this type of behavior, nor at any time had anyone complained they were offended by this type of behavior. It was only on December 14 and 15, 1998, that Mr. Booker apparently decided he did not want to participate anymore, and filed his complaint to his supervisors about Grievants' comments.

Grievant Burdette testified his comment on December 14, 1998, about the outside concrete job being for the black guys, referred to the fact that Mr. Booker and Mr. Moss had insulated coveralls and other appropriate foul-weather clothing, while Mr. Burdette and the maintenance crew did not.

Grievant Burdette testified his comment on December 15, 1998, about “tar and feathering the big black guy behind me”, was not meant to be a racist remark. Mr. Burdettetestified he has heard the phrase “tar and feather” all his life, in reference to traveling salesman being “tarred and feathered and run out of town on a rail.” Grievant Knuckles testified he had no independent recollection of saying anything to Mr. Booker on December 15, 1998, but nonetheless, if he offended him, he was sorry.

Indeed, both Grievants had written letters of apology to Mr. Booker during the investigation, and had given them to Mr. Judd. Mr. Judd never forwarded those letters or their content on to Mr. Booker, and the first time Mr. Booker became aware that the two had apologized to him in writing was at the level two hearings. At that point, Mr. Booker stated he accepted the apology and just hoped everyone could “move on from here.” Mr. Judd had told Grievants to stay away from Mr. Booker and not speak to him during the course of the investigation. Grievants wish they had been given an opportunity to speak to Mr. Booker in order to apologize in person.

In a disciplinary matter, the employer must prove the charges against the employee by a preponderance of the evidence. W. Va. Code § 18-29-6; Latassa v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-477 (July 24, 1997). Grievants do not dispute the substance or accuracy of the

offensive statements which have been attributed to them.

Grievants want the suspension letters removed from their personnel files, as they inaccurately cite to violations of State's Sexual Harassment Policy. Further, Grievants contend the discipline imposed was too severe given the fact this behavior had been tolerated for years, and no prior complaints had been registered about this behavior. Grievants allege the Sexual Harassment Policy cited in their suspension letters is not applicable to them, and their conduct should be reviewed against the GrievanceBoard's definition of harassment found in W. Va. Code § 18-29-2(n). The Grievance statute defines “harassment” to mean “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” Grievants argue that, under this definition, the two isolated incidents on December 14 and 15, 1998, do not amount to “repeated or continual disturbance”, and thus, would not amount to harassment under the statute.

While I agree with Grievants that State's Sexual Harassment Policy does not apply to the facts in this grievance, and the incidents would not arise to the strict definition of “harassment” under the Grievance statute, it is common knowledge in the 1990's that racially derogatory remarks are discriminatory, and not to be tolerated. Thus, while Grievants' conduct certainly is not sexual harassment, it does violate the spirit and letter of State's mission to provide a conducive learning and working environment free from discrimination. Therefore, with regard to the suspension letters themselves, State shall remove them from Grievants' personnel files, and replace them with letters that more accurately describe their violations, and why they will not go unpunished, but delete any reference to the Sexual Harassment Policy.

With regard to Grievants' suspensions, they argue their discipline is too severe and should be mitigated. The undersigned may mitigate the discipline imposed if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in this 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 mitigating circumstances. Jarvis v. W. Va. Dept. of Health and HumanResources, Docket No. 97-HHR-318 (July 22, 1999); Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991).

The Staff Handbook policy on Conduct, Discipline and Grievances, which was relied upon in imposing Grievants' suspensions, provides in pertinent part:

Types of Disciplinary Action:

Disciplinary action, including suspension or dismissal, may be taken whenever an employee's conduct interferes with the orderly operation of his/her unit or is contrary to WVSC policies, board policies, or state, federal or local laws.

Suspension:

A supervisor may recommend suspension without pay for a period varying from one to fifteen days, depending on the gravity of the offense and the employee's previous record. Suspension may be applied in cases of first serious offenses or repeated minor ones when, in the supervisor's judgment, proper conduct can be attained without resorting to dismissal.

Disciplinary Action:

Disciplinary action, including suspension or dismissal, shall be taken immediately whenever the conduct of the staff member interferes with the operation of the staff member's unit or brings discredit to the College. The unit head or supervisor shall have the right to recommend discipline for “just cause.”

. . .

Just causes for disciplinary action shall include, but not be limited to the following actions. It should be noted that all of the following offenses may result in the disciplinary action of immediate dismissal:

. . .

3) refusing to comply with or violating College rules and regulations;

LIV R. Ex. 2.

Dr. Cassandra Whyte, Vice President of Administrative Affairs, and Mr. Judd's supervisor, made the recommendation to suspend Grievants to President Hazo Carter, after several meetings with Mr.

Judd and Barbara Rowell, the College's Human Resources Director. She testified Grievants' statements violated the very mission of the College, and violated the general statement of the Sexual Harassment Policy. Based on these authorities, and Mr. Judd's investigation, Dr. Whyte imposed the five (5) and ten (10) days suspensions in order communicate to Grievants the severity of their behavior, and its affect on the College, as Mr. Booker ultimately filed a Human Rights Complaint against the College.

Grievants had no prior disciplinary record. In fact, State stipulates Grievants are excellent employees. The record is clear no prior warnings had been given to Grievants or anyone else in the Physical Facilities Department, about making derogatory or racially- charged comments to other co-workers. It is also clear that joking, horseplay, and crude “locker room” talk was common in the Department, and had been going on for at least the 15 years that Grievant Burdette and Mr. Booker worked together. The fact is no employee complained of this behavior until Mr. Booker filed his complaint with Mr. Judd on December 21, 1998. Prior to that time, Grievants, nor anyone else, had any reason to believe their behavior was unwelcome or offensive to any other employee. Grievants' supervisors were aware of this behavior, and, despite at least one query by Mr. Booker as to what they were going to do about it, took no action to warn, counsel, or discipline the employees in the Physical Facilities Department. To give Grievants five and ten day suspensions for a first “offense” in this instance is clearly excessive. Any deprivation of a worker's pay for any amount of time is serious discipline. To do so without any prior warnings that previously accepted behavior will no longer be tolerated is unfair. Therefore, the undersigned finds that Grievants' suspensions should be revoked and a first written letter of warning be placed in their personnel files, with the changes noted above.

CONCLUSIONS OF LAW

1. In a disciplinary matter, the employer must prove the charges against the employee by a preponderance of the evidence. W. Va. Code § 18-29-6; Latassa v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-477 (July 24, 1997).

2. State has proven Grievants made the statements to Mr. Booker and Mr. Moss which were attributed to them in their suspension letters.

3. State has failed to prove by a preponderance of the evidence that those statements violated

State's Sexual Harassment Policy, identified in Grievants' suspensions letters.

4. State has proven by a preponderance of the evidence that those statements violate the mission and the spirit of State to provide a conducive learning and working environment free from any type of discrimination, including racial discrimination.

5. Discipline imposed by an employer may be mitigated if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in this 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, andmitigating circumstances. Jarvis v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-318 (July 22, 1999); Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991).

6. Based on Grievants' previous excellent work record, the ambiguity of the charges against them as stated in their suspension letters, the undisputed past acceptance of the type of offensive behavior with which Grievants were charged, and the lack of any prior warnings that such behavior would no longer be tolerated, Grievants have demonstrated that the penalty imposed on them, five (5) and (10) day suspensions, is clearly excessive and disproportionate to the offense.

Accordingly, this grievance is **GRANTED** insofar as State is hereby **ORDERED** to remove Grievants' suspension letters from their personnel files, and replace them with letters that more accurately describe the violations with which they have been charged, deleting any reference to violation of the Sexual Harassment Policy. Further, State is hereby **ORDERED** to reduce Grievant's penalty to first written letters of warning, and reimburse Grievants all back pay, benefits, and interest to which they are entitled for their respective five (5) and (10) days suspensions.

ADDENDUM A

SUMMARY OF EVIDENCE

Level Two State Exhibits offered in Knuckles hearing.

Exs. 1 - 9 -

February 9, 1999 Grievance form, with attached lower level grievance procedural documents.

Ex. 10 -

December 21, 1998 statement by Joseph L. Booker, Sr.

Ex. 11 -

December 21, 1998 memorandum from Joseph L. Booker, Sr. to Phil Judd.

Ex. 12 -

January 4, 1999 response by Roger Burdette.

Ex. 13 -

January 4, 1999 response by Terry Knuckles.

Ex. 14 -

January 4, 1999 statement by Anthony Cooper.

Ex. 15 -

January 4, 1999 statement by James Moss.

Ex. 16 -

January 8, 1999 statement by Steve Young.

Ex. 17 -

Excluded.

Ex. 18 -

Excluded.

Ex. 19 -

Excluded.

Ex. 20 -

December 21, 1998 statement by Joseph L. Booker, Sr.

Ex. 21 -

West Virginia State College Staff Handbook.

Ex. 22 -

March 5, 1999 Notice of Hearing.

Ex. 23 -

March 8, 1999 request by hearing examiner to Director of Human Resources.

Ex. 24 -

March 8, 1999 receipt of personnel information from Office of Human Resources.

Ex. 24a -

January 21, 1999 letter of suspension.

Ex. 24b -

January 22, 1999 internal employee payroll information.

Ex. 24c -

January 25, 1999 memorandum to Roger Knuckles.

Ex. 24d -

February 15, 1999 memorandum from Phil Judd to Roger Knuckles.

Ex. 24e -

December 21, 1998 memorandum from Joseph Booker to Phil Judd.

Ex. 24f -

December 21, 1998 statement by Joseph Booker to Phil Judd.

Ex. 24g -

January 4, 1999 statement by Anthony Cooper.

Ex. 24h -

January 4, 1999 statement by James Moss.

Ex. 24i -

January 4, 1999 statement by Roger Knuckles.

Ex. 24j -

February 9, 1999 notes from level one grievance meeting.

Level Two State Exhibits offered in Burdette Hearing

Exs. 1-8 -

Grievance statement and lower level grievance procedure documents.

Ex. 9 -

December 21, 1998 statement by Joseph L. Booker, Sr.

Ex. 10 -

December 21, 1998 memo from Joseph L. Booker to Phil Judd.

Ex. 11 -

January 4, 1999 response by Roger Burdette.

Ex. 12 -

January 4, 1999 response by Terry Knuckles.Ex. 13 -
January 4, 1999 statement by Anthony Cooper.

Ex. 14 -

January 4, 1999 statement by James Moss.

Ex. 15 -

January 8, 1999 statement by Steve Young.

Ex. 16 -

Excluded.

Ex. 17 -

Excluded.

Ex. 18 -

Excluded.

Ex. 19 -

December 21, 1998 statement by Joseph Booker.

Ex. 20 -

West Virginia State College Staff Handbook.

Ex. 21 -

March 5, 1999 notice of hearing.

Ex. 22 -

March 8, 1999 request by Hearing Examiner to Director of Human Resources for information.

Ex. 23 -

March 8, 1999 receipt of personnel information of Roger Burdette.

Ex. 23a -

January 21, 1999 letter of suspension.

Ex. 23b -

January 22, 1999 internal employee payroll information.

Ex. 23c -

January 25, 1999 memorandum to Roger Burdette.

Ex. 23d -

February 15, 1999 memorandum from Phil Judd to Roger Burdette.

Ex. 23e -

December 21, 1998 memorandum from Joseph Booker to Phil Judd.

Ex. 23f -

December 21, 1998 statement by Joseph Booker.

Ex. 23g -

January 4, 1999 statement by Anthony Cooper.

Ex. 23h -

January 4, 1999 statement by James Moss.

Ex. 23i -

January 4, 1999 statement by Roger Burdette.

Ex. 23j -

February 9, 1999 notes from level one grievance meeting.

State Level Four Exhibits

Ex. 1 -

West Virginia State College Mission Statement.

Ex. 2 -

West Virginia State Staff Handbook, pp. 30-33, Discipline.

Ex. 3 -

West Virginia State Staff Handbook, pp. 28-29, Sexual Harassment.

Level Four Knuckles Exhibits

Ex. 1 -

West Virginia State Staff Handbook, Glossary of Terms.

Level Four Burdette Exhibits

Ex. 1 -

January 24, 1999 memorandum from Phil Judd regarding physical facilities work environment.

Ex. 2 -

December 21, 1998 statement from Joseph Booker to Phil Judd.

Ex. 3 -

Statements made by Joseph Booker.

Ex. 4 -

January 21, 1999 memorandum from Phil Judd to Roger Burdette.

Testimony

State presented the testimony of Joseph Booker, Steve Young, Anthony Cooper, James R. Moss, Marvin Smith, Phil Judd, and Cassandra Whyte. Grievants testified in their own behalf, and presented the testimony of Steve Young, Mike Foster, Billy Scott Phillips, and Clyde Leedy.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: September 28, 1999

Footnote: 1

Grievant Knuckles was represented by Andrew Nason, Esq., Pepper & Nason, Grievant Burdette was represented by David D. Molgaard, Esq., and State was represented by Gregory G. Skinner, Esq., Assistant Attorney General.

Footnote: 2

A Summary of Evidence is included in this decision as Addendum A.