PAUL R. DEVORE and DAVID A. CLINE,

Grievants,

v. **Docket No. 98-DOH-277/278**

WEST VIRGINIA DIVISION OF HIGHWAYS,

Respondent.

DECISION

Paul R. Devore and David A. Cline (Grievants) filed this joint grievance directly at level four, as is permitted by W. Va. Code § 29-6A-4(e), on July 31, 1998. They challenge their suspensions of thirty calendar days, along with their demotions from Transportation Crew Chief to Transportation Worker III/Equipment Operator. Grievants seek full back pay since their demotions, along with restoration of all lost salary and other benefits during their suspensions, and that the discipline be removed from their records. After numerous continuances granted for good cause shown, a level four hearing was conducted by the undersigned in this Grievance Board's office in Wheeling, West Virginia, on May 7, 1999. Grievants were represented by counsel, Lawrence Manypenny, and Respondent Division of Highways (DOH) was represented by counsel, Timbera Wilcox. The parties declined to submit post-hearing arguments, so this grievance became mature for consideration at the conclusion of the level four hearing.

Background

The incident which was the basis for the discipline imposed against Grievants occurred on March 10, 1998, in the lunch room of the district office where Grievants work. On that day, while several employees, including Grievants, were taking their lunch break,employee Thomas Ravoria entered the room. Lisa Edwards, also a DOH employee, questioned Mr. Ravoria as to why he was nicknamed “Bone.” Several witnesses testified that Mr. Ravoria did not answer her, but that he laughed, along with everyone else in the room, as will be discussed later in this Decision.

DOH alleges that Mr. Ravoria was offended by this incident and by the use of the nickname itself, which purportedly referred to his genitals. (See footnote 1) Grievant Cline was disciplined for "encourag[ing] and participat[ing] in behavior which was sexual in nature and a direct violation of the [DOH] Sexual Harassment Policy." Resp. Ex. 1. Grievant Devore was similarly disciplined for "encourag[ing] employees under your supervision to engage in behavior which was sexual in nature and a direct violation of the [DOH] Sexual Harassment Policy." Specifically, both Grievants were charged with instructing or encouraging Ms. Edwards to make the inquiry regarding Mr. Ravoria's nickname, and Grievant Cline was also charged with making "other inappropriate comments regarding [Mr. Ravoria's] genitals."

Grievants contend that no sexual harassment occurred, because Mr. Ravoria actively participated in and encouraged the use of the nickname "Bone." They also argue that Mr. Ravoria was clearly unoffended by the incident on March 10. Finally, they contend that the evidence does not establish that they participated in or encouraged the March 10 incident in any way. Accordingly, the discipline against them was improper and withoutbasis.

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-HHR-501 (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.

DOH alleges that Grievants were properly disciplined for violating the Sexual Harassment Policy, specifically by being present in the room when the sexually explicit nickname was used, participating in its use, and taking no action to stop it. As explained by Jeff Black, DOH Human Resources Director, the specific conduct was Grievants' encouragement of Ms. Edwards in using the name, which everyone knew was sexual in nature, and to the use of which Mr. Ravoria objected. Mr. Black also stated that Grievants' conduct specifically caused a hostile work environment for Mr. Ravoria,

and that, as supervisors, they were obligated to prevent the harassment and take action against it.

DOH's Administrative Procedures Policy, Volume III, Chapter 6, defines sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbalor 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.
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> 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 is interfering 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." Resp. Ex. 4.

Several witnesses who were present in the lunch room on March 10, 1998, testified at the level four hearing, including Robert McCormick, Sam DeCapio, David Dixon, Don Willey, and Ray Cooper. (See footnote 2) With the exception of Mr. Dixon, all of these witnesses testified that Mr. Ravoria reacted to Ms. Edwards' question by laughing and/or grinning and that he showed absolutely no evidence of being embarrassed or offended. In addition, all of these individuals stated, in varying terms, that the atmosphere in the room was quite jovial, and that everyone was “kidding” or “horsing around”, including Mr. Ravoria, regarding the “Bone” question. Only Mr. Dixon, contrary to all of the other witnesses, stated that Mr. Ravoria seemed embarrassed, and he did not recall that Mr. Ravoria laughed.

However, even Mr. Dixon, along with all the other witnesses, testified that Mr. Ravoria openly encouraged the use of the nickname, had placed it on his hard hat and locker, and that he even

introduced himself to strangers as “Bone.” Mr. Ravoria never instructed any of his co-workers to refrain from using the name, nor did he give any indication that he was offended by it. On the contrary, his voluntary use of it himself would indicate just the opposite. In fact, Mr. Willey testified that, without being asked, Mr. Ravoria had displayed his penis to Mr. Willey on one occasion, presumably in an effort to explain the source of the nickname. The record contains no evidence to support the conclusion that this nickname was offensive to Mr. Ravoria, neither on March 10 nor at any other time.

As noted in the grievance decision of Samuel DeCapio, arising from the same incident regarding Mr. Ravoria's nickname, the only possible element of the sexual harassment policy which could have possibly been violated by Grievants' conduct was the creation of an intimidating, hostile, and offensive working environment, which the evidence does not show existed. “Respondent's efforts to eliminate sexual harassment from the workplace are to be commended; however, . . . [Grievants] should not be held accountable for knowledge that an employee used a nickname with a sexual connotation.” DeCapio, supra.

The evidence in this case fails to establish, or even indicate, that Mr. Ravoria wasoffended by the use of the nickname “Bone.” Accordingly, Grievants cannot be found to have failed to perform their supervisory responsibilities under DOH's Sexual Harassment Policy. In addition, there is no evidence that Grievants encouraged or participated in any conduct which was offensive to Mr. Ravoria or constituted harassment. Accordingly, “Grievant[s] did not fail to perform [their] supervisory duties.” DeCapio, supra. (See footnote 3)

Consistent with the foregoing narration, it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Prior to the discipline which is the subject of this grievance, Grievants were employed by DOH as Transportation Crew Chiefs, and Thomas Ravoria was often assigned to their crews.

2. Mr. Ravoria was commonly referred to by the nickname “Bone,” which other employees understood to refer to his genitals.

3. Mr. Ravoria fully participated in and promoted the use of the nickname, labeling his locker and hard hat with it, introducing himself to strangers as “Bone,” and even exposing his genitals to

other employees.

4. On March 10, 1998, in the lunch room and in the presence of several other DOH employees, Lisa Edwards asked Mr. Ravoria why he was called “Bone.” In response,Mr. Ravoria laughed, along with the other employees present in the room. Mr. Ravoria did not appear to be embarrassed about the incident.

5. On March 23, 1998, Mr. Ravoria filed a sexual harassment complaint against several employees, including Grievants.

6. In response to the sexual harassment accusations, Grievants were suspended for thirty days and demoted to Transportation Worker III/Equipment Operators, because they were present in the room on March 10, 1998, and took no action regarding the incident. Grievants were also accused of participating in and encouraging sexual harassment of Mr. Ravoria.

7. At no time has Mr. Ravoria complained about the use of the nickname, exhibited any embarrassment about its use, or asked his coworkers to refrain from using 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-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. DOH's Sexual Harassment Policy defines such 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 foremployment 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.”

3. Respondent failed to prove that Grievants were aware of or participated in any actions or comments made to Mr. Ravoria which created an intimidating, hostile, or offensive working environment, or that they neglected to perform their supervisory duties relating to the enforcement of Respondent's sexual harassment policy.

Accordingly, this grievance is **GRANTED**, and Respondent is **Ordered** to purge Grievants' records of all documentation addressing their suspensions and demotions; reinstate Grievants to their prior positions as Transportation Crew Chiefs; and reimburse Grievants for all lost pay and benefits during their suspensions and demotion periods.

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, and 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. 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.

Date: June 9, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Samuel DeCapio, Mr. Ravoria's supervisor, was also suspended for similar reasons regarding the same incident, and his grievance was granted by this Grievance Board at level four. DeCapio v. Div. of Highways, Docket No. 98-DOH-279 (Feb. 18, 1999).

Footnote: 2

Mr. Ravoria was subpoenaed, but refused to testify at the level four hearing. DOH moved for a continuance at the beginning of the level four hearing in Wheeling, which was denied, due to the numerous times this grievance had been continued. DOH did not request enforcement of the subpoena.

Footnote: 3

There was also evidence from some witnesses indicating that Mr. Ravoria filed the sexual harassment complaints only because he resented having to do flagging duties when assigned to Grievants' crews, and that the complaints were his way of retaliating. However, because sexual harassment has not been proven, it is not necessary to delve into the details of these allegations.