VIRGIL STEPHENSON,

Grievant,

v. **Docket No. 02-DJS-190**

DIVISION OF JUVENILE SERVICES,

Respondent.

DECISION

Virgil Stephenson ("Grievant") initiated this proceeding on April 16, 2002, challenging a three-day suspension without pay. Grievant seeks full back pay, his record cleared, and disciplinary action taken against the people who made allegations against him. After denials at the lower levels, Grievant appealed to level four on June 19, 2002. After numerous continuances requested by the parties and granted for good cause shown, a level four hearing was held in Westover, West Virginia, on September 15, 2003. Grievant was represented by Jack Ferrell of the Communications Workers of America, and Respondent was represented by Assistant Attorney General Barbara Elkins. This matter became mature for consideration upon receipt of the parties' fact/law proposals on October 16, 2003.

The following facts have been proven by a preponderance of the evidence.

Findings of Fact

1. During the relevant time period, Grievant was employed by the Division of Juvenile Services ("DJS") at the Industrial Home for Youth ("IHY") as Building and Grounds Manager. 2. Also during the relevant time period, Vickie Lowther was employed by IHY in the office of Assistant Superintendent Matthew Biggie as his assistant.

3. As Building and Grounds Manager, Grievant reported directly to Mr. Biggie.

4. In her capacity as Mr. Biggie's assistant, Ms. Lowther was required to interact with Grievant on a regular basis, often relaying communications back and forth between Mr. Biggie and Grievant

regarding projects in the maintenance department.

5. On October 29, 2001, Ms. Lowther was making copies in the lobby of the administration building. Grievant approached her and began a conversation, during which he asked her to have dinner with him so that he could “fill her in on some of the people she worked with.” During this conversation, Grievant was close in proximity to Ms. Lowther, and she gradually backed away from him, because she felt uncomfortable.

6. On October 30, 2001, Grievant and Ms. Lowther were having a conversation in her office. Grievant mentioned that he had to drive to Burnsville the following evening and asked if she would like to ride along with him. Ms. Lowther responded that she could not, because she was staying home with her children for Halloween trick-or-treating. Grievant then asked her if her phone number was listed in the telephone book, and she told him that it was.

7. On an unspecified date, as Ms. Lowther arrived for work, she stopped at the front of her building and engaged in casual conversation with Jerry Nelson, Mike Potocany, and Grievant. During the conversation, Mr. Nelson mentioned that Ms. Lowther smelled good, stating that her perfume was "sweet smelling stuff that makes men just want to grab you and kiss you." Ms. Lowther laughed at the comment, because she and Mr. Nelson are friends. 8. The following day, Ms. Lowther was standing outside the same building just prior to work, having a conversation with Mr. Nelson and Alvadore McCloy. Grievant came up behind Ms. Lowther, touching the back of her left hip with the front of his leg, placed his face in her hair, and said “Jerry, she has that sweet smelling perfume on again.”

9. Grievant denies that all of the above events took place.

10. Grievant and many other employees at IHY gather in the parking lot for a few minutes prior to and after work to smoke cigarettes and engage in casual conversation. Sometimes Grievant was in the parking lot when Ms. Lowther arrived at work or was leaving for the day.

11. An Equal Employment Opportunity investigation was conducted regarding Ms. Lowther's allegations concerning Grievant's conduct toward her, and it was found that Grievant had engaged in sexual harassment.

12. By letter dated March 27, 2002, Grievant was suspended for three days.

13. Subsequent to his suspension for sexual harassment, Grievant was moved to a different work location, due to problems with his performance and management of his division at IHY, after he

had failed to make progress pursuant to a previously-imposed improvement plan.

14. When Mr. Biggie perceived that Grievant was not accomplishing work which needed to be done by the maintenance division, he would ask Ms. Lowther to contact Mr. Nelson and ask that he work on those projects. Therefore, Ms. Lowther frequently called the maintenance shop to talk to Mr. Nelson.

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 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 Worden v. Dep't of Health and Human Resources, Docket No. 98-HHR-130 (Jan 29, 1999); 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).

The West Virginia Division of Personnel ("DOP"), which promulgates rules and regulations applicable to all state employees, has in place a policy on sexual harassment (See footnote 1). The purpose of this policy is:

> to provide a work environment free from sexual harassment whereby no employee is subjected to unsolicited and unwelcomed sexual overtures orconduct, either verbal or physical. Employees have the right to be free from sexual harassment on the job. Such conduct or harassment will not be tolerated within the workplace and is prohibited by State and federal anti- discrimination laws where: (1) submission to such conduct is made a term or condition of employment, either explicitly or implicitly, (2) submission to or rejection of such conduct by an individual is used as the basis for personnel actions affecting such individual, or (3) such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Conduct of this nature will result in appropriate disciplinary action which may include dismissal.

Further, the policy defines "Sexual Harassment" as “any unsolicited and unwelcomed sexual advances, requests for sexual favors, or other verbal, written, or physical conduct of a sexual nature when . . .” submission to such conduct is made a term or condition of employment, is the basis of personnel action against the employee, or the “conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.” Once an investigation is completed and charges substantiated, discipline may include a reprimand, suspension, or dismissal, depending on the severity of the conduct and situation.

In the instant case, the outcome hinges almost entirely upon the credibility of those involved. Grievant contends that Ms. Lowther had a “crush” on Mr. Nelson, and believes that they may have possibly been having an extramarital affair. He insists that none of the above-described events happened, and that Ms. Lowther and Mr. Nelson made the entire story up just to “get his job.” Conversely, Respondent contends that it has provided credible evidence that Grievant engaged in sexual harassment, for which he was properly disciplined. 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). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See 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 Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. 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. (See footnote 2) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Clearly, Grievant has good reason to deny that he engaged in this type of conduct. On the other hand, the undersigned simply cannot find sufficient evidence to conclude that Ms. Lowther and Mr.

Nelson concocted such an elaborate scheme to “get rid of Grievant.” Although Grievant has admittedly been subject to other discipline, ultimately resulting inhis transfer, none of those matters are related to the sexual harassment allegations which are the subject of his three-day suspension. While Grievant contended that Ms. Lowther's frequent phone calls to the maintenance shop evidenced her alleged extramarital relationship with Mr. Nelson, there is no evidence to support this claim, and a reasonable explanation for the conversations has been provided. There had been ongoing problems with Grievant's performance, and it is quite believable that Ms. Lowther was instructed by her supervisor to discuss projects with Mr. Nelson in order to get them accomplished.

As to the specific incidents cited, Grievant claims that none of them occurred. While there were no witnesses to the incidents during which Grievant asked Ms. Lowther to have dinner and to ride with him, Mr. Nelson did witness the incident regarding the “sweet smelling perfume.” While Mr. Nelson could not actually see whether or not Grievant actually touched Ms. Lowther from behind when he made the comment, he did note that Grievant was very close to her and had his head directly beside hers, looking over her left shoulder. The only other witness to this incident, Alvadore McCloy, testified that he did not see Grievant touch Ms. Lowther or make any such comment. However, the fact that he does not recall it does not mean that it did not occur. Moreover, because Ms. Lowther had previously told Mr. Nelson that Grievant's conduct toward her was making her uncomfortable, it is more likely that he would have paid heed to Grievant's actions on this particular occasion, while Mr. McCloy may have not been paying attention. Accordingly, the undersigned concludes that Ms. Lowther's testimony regarding this incident, as supported by Mr. Nelson, is credible.

Asking a coworker to dinner or to go for a short car ride for social reasons may not, standing alone, constitute sexual harassment. However, in this case, these incidents arecombined with a deliberate instance of “intimate” touching, in the vicinity of Ms. Lowther's hip, while (as Ms. Lowther described it) standing so close she could “feel his breath in her hair.” There can be no dispute that such unwanted touching constitutes sexual harassment, would create an offensive working environment, and is worthy of discipline. A three-day suspension for this act alone does not seem disproportionate to the offense committed.

The following conclusions of law support the decision reached.

Conclusions of Law

___1. 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).

___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 Worden v. Dep't of Health and Human Resources, Docket No. 98-HHR-130 (Jan 29, 1999); 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. Respondent has proven by a preponderance of the evidence that Grievant engaged in sexual harassment toward a coworker, for which he was properly disciplined.

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, 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: November 5, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Although Grievant was actually disciplined for violating specific DJS Policy Directives regarding Sexual Harassment in the Workplace, these policies were never introduced into the record, and Respondent's post-hearing brief cites only the DOP policy.

Footnote: 2

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See Borninkhof v. Dep't of Justice, 5 MSBP 150 (1981).