RANDY STEMPLE,

Grievant,

v. **Docket No. 03-CORR-116**

DIVISION OF CORRECTIONS/

DENMAR CORRECTIONAL CENTER,

Respondent.

DECISION

Randy Stemple ("Grievant") initiated this proceeding on March 20, 2003, challenging a three-day suspension. He seeks to have the suspension rescinded, with back pay and benefits. The grievance was denied at levels one and two on March 25, 2003. A level three hearing was held on April 22, 2003, and the grievance was denied in a written decision bearing the same date. Grievant appealed to level four on April 29, 2003. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on August 4, 2003. Grievant was represented by Jack Ferrell, CWA representative, and Respondent was represented by Assistant Attorney General Charles Houdyschell. This matter became mature for consideration upon receipt of the parties' fact/law proposals on August 22, 2003.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant is employed at Denmar Correctional Center ("Denmar") as a correctional officer.

2. During his five years of employment, Grievant has been an exemplary employee with an unblemished record.

3. Cynthia Kelley was employed (See footnote 1) by Denmar as an office assistant, beginning in October of 2001.

4. Grievant often came into Ms. Kelley's office, and the two of them engaged in casual

conversation. Grievant and Ms. Kelley had a friendly working relationship and frequently “joked around” with one another. Many of these jokes included emails and cartoons which contained sexual content, which were circulated among employees at the institution on a regular basis. Grievant and Ms. Kelley both initiated and/or forwarded such emails.

5. Employees of Denmar, just as all other state employees, are required to attend training regarding prohibited sexual harassment in the workplace. Grievant and Ms. Kelley both attended such training.

6. Denmar had postings around the institution stating that “sexual harassment on the job is sex discrimination that violates Title VII of the Civil Rights Act.” These postings also contained the following examples of sexual harassment: suggestive or lewd remarks; unwanted hugs, touches or kisses; requests for sexual favors; retaliation for complaining about sexual harassment; derogatory or pornographic posters, cartoons, or drawings; or unwanted sexual advances. In addition, the postings defined sexual harassment as “any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature.” 7. On or about January 29, 2003, Grievant and Ms. Kelley were having a casual conversation at her desk. Grievant off-handedly said to her: “Want to have sex?” Ms. Kelley replied: “What?” Grievant responded by saying: “I mean, can I have a pretzel [referring to the bag of pretzels on Ms. Kelley's desk]?”

8. Within a few days of the January 29 conversation, Grievant and Ms. Kelley were again having a casual conversation in her office, when Grievant asked the same question. Ms. Kelley responded by saying something like “I don't appreciate that -- you know I'm married.” Grievant assumed Ms. Kelley knew he was joking.

9. On another occasion, within a day or two of the conversations described above, Ms. Kelley was leaving the building to pick up her infant children, who were sick. As she was walking by him, Grievant asked her: “Do you want to have sex?” Ms. Kelley responded that she “[didn't] have time for this shit . . . my kids are sick.”

10. Grievant's statements “aggravated” Ms. Kelley, so she went to Unit Manager Mark Wegman to ask him to tell Grievant to stop making these remarks. Because Mr. Wegman is the EEO officer, he was required to initiate a formal investigation, and he instructed Ms. Kelley to file reports regarding the incidents.

11. Ms. Kelley had not wanted to file a formal complaint or report against Grievant, but she was

required to as part of the EEO investigation.

12. Grievant does not deny that he made the remarks in question. He was joking with Ms. Kelley, did not expect her to say “yes,” and he did not actually want to have sex with her. After Grievant was informed of Ms. Kelley's complaint, he immediately apologized to her, and she accepted his apology. She, in turn, apologized to Grievant that “it had gone so far,” meaning that he had been suspended after the investigation. 13. Grievant did not intend to offend Ms. Kelley or make her uncomfortable.

14. Grievant was suspended for three days for making statements which constituted sexual harassment.

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.

Respondent contended at level four that Grievant was properly disciplined for “unprofessional conduct” in violation of Division of Corrections policies, and he was not charged “per se” with sexual harassment. However, the clear statements in the suspension letter addressed to Grievant inform him that his “conduct toward Office Assistant Cynthia Kelly constituted sexual harassment” and that “statements made by you were unwelcome and of a sexual nature.” Finally, the suspension letter states “[a]ny future incident in which an allegation of sexual harassment/discrimination made against you can be sustained could result in further disciplinary action.” Accordingly, the undersigned is compelled to conclude that Grievant has been disciplined for sexual harassment. There is no mention in the disciplinary letter of any DOC policy violation, so the action taken against Grievant must be analyzed as a sexual harassment case. "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") has in place a policy on sexual harassment. 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 or conduct, 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 orcreating 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.

It is clear all state employees are expected to comply with all relevant federal, state and local laws; comply with all DOP and employer policies; follow directives of their superiors; and conduct themselves professionally in the presence of fellow employees and the public. See Worden, supra. However, it is obvious that, pursuant to DOC and DOP policy, sexual harassment must contain the key element of being offensive, intimidating or hostile to the victim in order to constitute prohibited conduct. When specifically asked how Grievant's comments made her feel, Ms. Kelley stated “it aggravated me, more than anything.” Ms. Kelley's demeanor and the tone of her testimony did not come across as that of a person who felt they were being exposed to an offensive or hostile working

environment, and “aggravation” is certainly a milder state of affairs.

Although Ms. Kelley testified that she told Grievant on the second occasion that she didn't appreciate his comments, this clearly did not “register” with Grievant. While the undersigned does not doubt that Ms. Kelley made the statement, Grievant credibly testified repeatedly that if he had known she was offended or uncomfortable, he would immediately have stopped and apologized. Because their conversations were lighthearted, joking types of discussions, it is not difficult to imagine that Ms. Kelley's response to Grievant seemed to flow with the overall casual air of the conversation, and he did not “get the message” that she was actually uncomfortable with his remark. Once Ms. Kelley's discomfort was brought to his attention, Grievant apologized, and the apology was accepted. Grievant and Ms.Kelley clearly were and remain friends, and Respondent has failed to prove by a preponderance of the evidence that the exchange between them fulfilled all the criteria of a sexual harassment incident.

As the United States Supreme Court has made clear, “Title VII does not prohibit all verbal or physical harassment in the workplace.” Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 140 L.Ed.2d 201, 118 S.Ct. 998 (1998). As noted in that case:

We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. “The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”

523 U.S. at 80 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 25, 126 L.Ed.2d 295, 114 S.Ct. 367 (1993)); see also Quick v. Donaldson Co., 895 F.Supp. 1288, 1296 (S.D. Iowa 1995), judgment rev'd on other grounds, 90 F.3d 1372 (8th Cir. 1996)(observing that while “under Title VII, employers have an affirmative duty to maintain a working 'environment free of discriminatory intimidation, ridicule, and insult[,]'” they do not have a corresponding affirmative duty “to maintain a working environment free of all non- discriminatory juvenile mischief and immature behavior”)(quoting Meritor Savings Bank v. Vinson, 477 U.S. 57, 65, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986)). The instant case is a perfect example of a work environment where employees, including the alleged victim herself, were engaging in “juvenile” and “immature” behavior by exchanging sexual jokes and cartoons, all of which was unprofessional on the part of the employees involved. To discipline Grievant for “taking it a step

further," so to speak, seems quite harsh under these circumstances. Grievant has been forthright about his conduct, but alleges that the suspension he received for it was excessive for the offense committed. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989)." Meadows v. Logan County Bd. of Educ., Docket No. 00-23-202 (Jan. 31, 2001).

"Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted). "[T]he appropriateness of a penalty, while depending upon resolution of questions of fact, is by no means a mere factual determination. Douglas v. Veterans Administration, 5 M.S.P.B. 280 (1981). Such a decision 'involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgement and discretion.' Id. citing Kulkin v.Bergland, 626 F.2d 181, 185 (1st Cir. 1980); Beall Const. Co. v. OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974). Because the imposition of a penalty results from an employer's administrative exercise of its discretion, said action may be the result of arbitrary and capricious decision-making or an abuse of discretion. See, Thompson v. U.S. Postal Service, 596 F. Supp. 628 (D.C. Va. 1984)." Feicht v. W. Va. Bureau of Employment Programs, Docket No. 93-BEP-253 (Dec. 9, 1993). "[M]itigation of the punishment imposed by an employer is extraordinary relief, and isgranted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Even if this case were analyzed as a violation of DOC Policy Directive 129.00, "Progressive Discipline," as "unprofessional conduct," that policy allows ample discretion on the part of the employer in deciding what punishment to impose. Although that policy was not introduced into the record as the basis for DOC's suspension of Grievant, the undersigned takes administrative notice

that Policy Directive 129.00 provides for a continuum of disciplinary action, ranging from the least severe verbal warning to the most severe penalty of dismissal. Although Grievant's conduct did not fit the definition of sexual harassment, it could easily be described as unprofessional and inappropriate for the workplace.

Accordingly, the undersigned finds that Grievant has established that mitigation is appropriate in this case. Grievant's conduct did not constitute sexual harassment, so a three-day suspension is too severe a penalty, and the undersigned finds that a verbal reprimand is appropriate. Since Grievant did not know his statements were offensive, but they were undisputedly inappropriate in the workplace, a reprimand would serve to notify him of his improper conduct and the need to correct it.

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 failed to establish by a preponderance of the evidence that Grievant's conduct was sexual harassment.

4. Respondent has proven that Grievant's conduct toward a coworker was unprofessional and inappropriate for the workplace.

5. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted). 6. Grievant has proven that a three-day suspension

for the conduct at issue was excessive under the circumstances.

Accordingly, this grievance is **GRANTED IN PART**, and Respondent is **ORDERED** to remove all reference to Grievant's suspension from its records, with any applicable back pay and/or benefits. A verbal reprimand is to be placed in an administrative file for one year from the date of the initial suspension, in accordance with DOC Policy Directive 129.00.

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: September 5, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Ms. Kelley resigned from her employment at Denmar in early August of this year, for reasons unrelated to the subject matter of this grievance.