DAVID THORN,

Grievant,

v. Docket No. 03-DJS-283

DIVISION OF JUVENILE SERVICES/

INDUSTRIAL HOME FOR YOUTH,

Respondent.

D E C I S I O N

David Thorn ("Grievant"), employed by the Division of Juvenile Services ("DJS") as a Correctional Officer, filed a level one grievance on August 3, 2003, following his demotion. Grievant requests reinstatement to Sergeant, and back pay. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied at level two, and appeal was made to level three. Grievant refused to participate in the level three proceedings, and a decision denying the grievance was issued. The grievance was advanced to level four on September 17, 2003. An evidentiary hearing was conducted in the Grievance Board's Westover office on February 17, 2004. Grievant was represented by Peter D. Dinardi, Esq., and DJS was represented by Assistant Attorney General Steven E. Dragisich. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before May 3, 2004.

The following facts are derived from a preponderance of the evidence submitted at level four.

Findings of Fact

1. Grievant has been employed by DJS as a Correctional Officer at the Industrial Home for Youth (IHY) since June 1998. In January 2003, Grievant was promoted to Sergeant. 2. Grievant frequently engaged in touching female coworkers who were his subordinates. On multiple occasions, Grievant would approach the female employees and take hold of their earlobes with his thumb and forefinger, and either pulled or rubbed them.

3. On April 26, 2003, Grievant engaged in horseplay with a female Correctional Officer 1 (CO1) resulting in physical contact by pulling on her pants and shirt. The employee also

suffered some minor physical discomfort when she backed into a hook used for handcuffs.

4. The female employee subsequently filed an Equal Employment Opportunity (EEO) complaint regarding the incident, stating,

While working in Control Sgt. David Thorn rubbed [complainant's] earlobe at which point I asked him if he had an ear fetish. Sgt. Thorn replied, 'I have a woman body fetish.' [Complainant] responded, 'That's a need to know and I don't need to know.' Sgt. Thorn threatened to give [complainant] an atomic wedgey [sic].

5. While conducting interviews, the EEO investigators learned that Grievant had engaged in unwanted touching of other female employees. Cited examples included rubbing his shoulder against a female Office Assistant's shoulder, giving neck/shoulder massages, and snapping the bra strap of another CO1. A male CO1 complained that one day after he ordered a sausage hoagie for lunch, Grievant also ordered one, and commented to the effect that, "we can put our sausages together."

6. After the EEO complaint was filed, Grievant advised a coworker of the claim and asked that he defend Grievant, contrary to a directive by DJS Investigators to not discuss the matter with any employees at the IHY. If Grievant wished for the investigators to interview or receive information from any person, he was to provide the name(s) to them. 7. By letter dated July 22, 2003, DJS Director Manfred G. Holland notified Grievant that he would be demoted from the position of Correctional Officer 4 (Sergeant) to Correctional Officer 3 (Corporal), effective August 1, 2003. The basis for this action was the finding that Grievant had engaged in two counts of sexual harassment toward the Complainant, that he had created a hostile work environment for the Complainant, that he had violated standards of conduct by making an offensive statement to a male employee, and had tampered with a witness, interfering with an official investigation.

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; 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. Dep't of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met is burden of proof. Hammer, supra.

Respondent asserts that the demotion was warranted because Grievant violated DJS Policy Directive 4.01, Section 6.01, Section 7, A6 and C1 by engaging in sexual harassment and creating a hostile work environment, by making an offensive statement to a male employee, and by interfering with the EEO investigation. Grievant concedes that inappropriate horseplay took place, but denies that he engaged in sexual harassment, or created a hostile work environment. Grievant also concedes the comment to the maleCO1 may have been inappropriate, but does not constitute a violation of DJS guidelines. Finally, Grievant denies that he tampered with a witness or interfered with the EEO investigation, and that no statutory or constitutional prohibition exists regarding his right to discuss the matter with potential witnesses.

DJS Policy 4.03 "Sexual Harassment in the Workplace," defines sexually harassing behavior as:

> **verbal and/or physical conduct which includes, but is not limited to, the following:**
>
> **1. Sexually explicit or implicit proposition;**
>
> **2. Improper questions about an employee's private life;**
>
> **3. Sexually discriminatory ridicule; insults, jokes or drawings;**
>
> **4. Undesired, intentional touching such as embracing, patting or pinching;**
>
> **5. Remarks directed against one's sex as a class or group;**
>
> **6. Threat of rape, attempted or actual sexual assault;**
>
> **7. Repeated sexually explicit or implicit comments or obscene and suggestive remarks that are objectionable or disconcerting to the employee; and,**
>
> **8. Offers of employment benefits in exchange for sexual favors, or threats or reprisals for negative responses to sexual advances.**

* * *

> **Other sexually harassing conduct in the workplace, whether committed by supervisors or non-supervisory personnel, is also prohibited. This includes: offensive sexual flirtations, advances, propositions, verbal abuse of a sexual nature, graphic verbal commentaries about an individual's body. sexually degrading words used to describe an individual, and the display in the workplace of sexually suggestive objects or pictures.**

Grievant admits that he would grasp female employees' earlobes "to get their attention." He opined that it was difficult to get the attention of some employees, the Complainant in particular. Grievant explained had seen a television commercial in which an Italian grandmother had hold of her grandson's ear, and decided he would use it at work. Another female employee testified that Grievant had told her it was a stress reliever. Grievant also admits to engaging in horseplay which the Complainant started. Apparently, Complainant made a comment that Grievant was leaving the building, to which he responded that he was going to give her an atomic wedgie. She was backing up and bumped into a hook on the wall. Grievant grabbed at her waist, causing her shirt to be somewhat pulled up from her trousers. Grievant also admits to snapping the bra of another CO1. He explained that she had been "male bashing" all day, and it was simply a playful act in return. At the level four hearing, Grievant changed his explanation, stating that he had simply placed his hand on her back while looking over her shoulder, and his thumb became entangled in her strap. During the EEO interview, Grievant stated, "definitely, emphatically" that he had never made a statement regarding rubbing/putting two sausages together; however, both the CO1 and the Office Assistant reported that he did make such a comment.

Grievant's actions with Complainant, and with the male CO1, constitute sexual harassment, as defined by DJS Policy. Grievant's testimony that the Complainant, and others, engaged in touching and sexual innuendo does not abrogate his fault in this matter. Grievant's testimony indicates that he prefers to use a casual managerial style; however, Respondent has proven that the cited actions are offensive, unwanted, and by definition, constitute sexual harassment.

Grievant also denied discussing the complaint with coworkers. Corporal Richard Friscenda stated unequivocally during the EEO interview that Grievant had told him about the EEO complaint, and wanted the Corporal to defend him. DJS Policy 4.01, Section 7, Subsection C1

provides that the "[r]efusal to cooperate in any official state inquiry or investigation, including a refusal to answer work-related questions or attempting toinfluence others involved in an inquiry or investigation" is a Class C Offense. Grievant attempted to influence the testimony of Corporal Friscenda during the EEO investigation in violation of Policy 4.01.

DJS Policy 4.01, "Employee Standards of Conduct and Performance," Section 6.01 provides that employees found to have engaged in sexual harassment "shall be counseled and shall be disciplined for a Class B or C offense, depending on the specific facts and circumstances surrounding the incident." Section 7 provides a list of offenses (Class A, B, and C, according to severity) and sanctions. These lists are not all inclusive, as evidenced by the fact that the sanctions are limited to a reprimand, suspension, and dismissal. Section 4.02 provides that the Director may increase sanctions when aggravating circumstances exist. In this case, Respondent has proven that Grievant engaged in two Class A offenses, disrespectful conduct and disruptive behavior, and a Class C offense, attempting to influence others involved in an inquiry or investigation. Respondent did not act in violation of any policy or procedure by demoting Grievant for these offenses.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

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; 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 acontested 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. Dep't of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993).

2. DJS Policy 4.03 "Sexual Harassment in the Workplace," defines sexually harassing behavior as verbal and/or physical conduct, including, but is not limited to, sexually explicit or implicit proposition and undesired, intentional touching such as embracing, patting or pinching.

3. Respondent proved by a preponderance of the evidence that Grievant violated Policy

4.03 by grasping female employees' earlobes, grabbing at and pulling the Complainant's shirt, and making a sexually implicit statement to a male employee.

4. DJS Policy 4.01, Section 7, Subsection C1 provides that the "[r]efusal to cooperate in any official state inquiry or investigation, including a refusal to answer work- related questions or attempting to influence others involved in an inquiry or investigation," 5.

Respondent proved by a preponderance of the evidence that Grievant violated Section 7 of Policy 4.01, when he attempted to solicit favorable testimony from Corporal Friscenda.

Accordingly, the 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. 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 10, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE