CYNTHIA WOODY,
Grievant,

v. **DOCKET NO. 02-RS-382**

DIVISION OF REHABILITATION SERVICES,
Respondent.

DECISION

Grievant Cynthia L. Woody filed this grievance directly at level four on November 20, 2002, stating, "Improper demotion, transfer, and reduction in pay. Progressive discipline procedures and other procedural protections not followed. Underlying allegations untrue." Her stated relief sought is "Reinstatement to former position. Back pay."

A level four hearing was held in the Grievance Board's office on June 10 and 11, 2004, August 23, 25 and 26, 2004, and November 10, 2004. Grievant was represented by Todd Wiseman, Esq.,[1] and DRS was represented by Warren N. Morford, Jr., its Training and Employee Relations Coordinator. The case became mature for decision on March 11, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

This grievance arises out of the Department of Rehabilitation Services' (DRS') actions in responding to a complaint by one of Ms. Woody's supervisees, Charlana

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[1]By Order entered May 13, 2004, Grievant's previous counsel, Michele Rusen, was disqualified.

Layfield. In September 2002, Ms. Layfield filed a complaint alleging Ms. Woody had caused a hostile work environment and had sexually harassed her. DRS had received other, anonymous complaints about Ms. Woody's workplace conduct. Following an investigation by Mr. Morford, DRS demoted Ms. Woody and transferred her to a different office. Ms. Woody charges that the investigation was incomplete and based on unreliable information. She denies the allegations of the original complaint against her, and believes the progressive discipline policy was not followed. DRS stands by its investigation and contends its actions were appropriate and justified.

Based on a preponderance of the evidence adduced at the hearing, I find the following material facts have been proven:

Findings of Fact

1. Ms. Woody was employed by DRS in its Parkersburg Office as its Rehabilitation Office Supervisor. On October 31, 2002, she was demoted to Certified Rehabilitation Counselor, her pay was decreased by five percent, and she was transferred to the Sistersville branch office.

2. Charlana Layfield has been employed by DRS in its Parkersburg office as a Rehabilitation Counselor since December, 1999. Ms. Woody was her immediate Supervisor.

3. In summer 2002, Michael Meadows served DRS in the position of Assistant Director for Client Services.

4. In early July 2002, Mr. Meadows received an anonymous telephone call from a lady who complained that Cynthia Woody was loud; that Cynthia Woody yelled at her employees; that Cynthia Woody used foul language directed at her staff; and that Cynthia Woody was subject to tantrums and intimidation of her staff. This caller identified herself

as an employee of the Department of Health and Human Resources, which shares office space in the same building on the same floor in Parkersburg as DRS.

5. A second telephone call was received by DRS at its headquarters in Institute in late July 2002 that related complaints with respect to the way Grievant was treating her employees or staff in the Parkersburg Branch Office

6. Mr. Meadows met in August 2002 with Grievant and Grievant's two immediate supervisors, Robert Kinnick (District II District Manager) and Charles Lovely (Senior Manager, Field Services).

7. The purpose of the meeting was to communicate the complaints received to Ms. Woody and to her supervisors, and to communicate the expectations of Mr. Meadows – that he wanted staff treated with respect.

8. Mr. Meadows also directed Ms. Woody to attend two training programs that were offered by the Division of Personnel.

9. Mr. Meadows followed up the August 2002 meeting with a letter to Ms. Woody, wherein his expectations were again communicated to her.

10. In late August 2002, Ms. Layfield made, to Mr. Meadows and Mr. Lovely, a charge or claim of sexual harassment by Ms. Woody, which occurred in the Parkersburg Branch Office, during a conference at Canaan Valley, and at other places and times. Charlana Layfield was unaware, at the time she made this claim of sexual harassment, that other complaints had recently been made against Ms. Woody.

11. Subsequent to receiving notice of the Layfield complaints, the Division launched an investigation to determine the truth of the allegations presented in her complaint and to determine the proper course of discipline, if any, in the event that the

investigation uncovered evidence which established that the allegations made by Ms. Layfield were truthful.

12. The Division appointed Mr. Morford to investigate the truth of the Layfield complaint and to report his findings to the management team of James Quarles, Human Resources Manager, and Janis Holland, Interim Director.

13. Ms. Layfield's written complaint, in an email dated September 26, 2002, stated:

> I am sending this to you [Mr. Quarles] to officially submit a complaint on my supervisor, C. Woody. During the past 2 ½ years [she] has abused me mentally and verbally often times almost assaultive. I have had to visit a Dr. and was prescribed anti-anxiety [medicine]. She has caused me great stress and loss of pleasure in my job. I felt like I was working in a prison. I was scared every time she came near me. She threatened to place me on a 3 day suspension, she dangled that over my head for anything I might do.
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> I would also like to file sexual harassment Charges [sic] against her for her behavior on the job and her intrusion into my personal life (C. Woody). Warren [Morford] has all my paperwork as to the actual claims of what happened. Thank you.

14. On October 10, 2002, Mr. Morford interviewed Ms. Woody as part of his investigation. He informed her that the allegations against her included a hostile workplace and unwanted sexual advances to Ms. Layfield.

15. Mr. Morford produced a report of his investigation on October 11, 2002, for Ms. Holland and Mr. Quarles. The report went through several drafts, but DRS's Exhibit No. 5 is the final report. Mr. Morford reported the following conclusions, after listing the witnesses he spoke to and the evidence he collected:

> There is no doubt in my mind that Cynthia Woody has created a hostile workplace in the Parkersburg Branch Office, which has negatively impacted worker productivity and morale. From the descriptions given to me, and in the opinions of some of her coworkers, Woody's problems lie deep within her psychological makeup. I am also of the opinion that Cynthia Woody has

> shown favoritism. I find a good relationship between the two [Ms. Woody and Ms. Layfield] until sometime this year, and, then, about the time Layfield had knee surgery, a turn for the worse occurred.
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> With respect to the sexual harassment charges, I [am] unable to find a witness to any of the overt acts and statements made by Woody to Layfield. However, parts of her story are corroborated by those present at Canaan.
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> Finally, I believe that the claims of Ethics Act violations would be difficult to establish.

16. For the most part, from December 1999 until sometime after the Canaan Valley conference in 2001, Ms. Layfield and the grievant enjoyed a good working relationship within the Office and enjoyed a congenial relationship outside the office—where Ms. Layfield served as assistant coach of the Parkersburg Catholic girls softball and basketball teams with David Woody, who is Grievant's husband. During this time period, Ms. Woody gave Ms. Layfield favored treatment in several respects.

17. The relationship between Ms. Layfield and Ms. Woody began to deteriorate shortly after an incident that occurred around Memorial Day, 2001. Ms. Layfield was unable to locate Ms. Woody, and called the Wheeling District office to ask about compensatory time off. Faith Hicks, the person Ms. Layfield spoke to, sent an email to Robert Kinnick, Ms. Woody's supervisor, asking him if he was aware the Parkersburg office was operating without a supervisor. He, in turn, contacted Ms. Woody about the email, and Ms. Woody then confronted Ms. Layfield, saying she had "ruined her life."

18. In conducting his investigation on behalf of the Division, Mr. Morford interviewed the following individuals, current and former Parkersburg office employees: Charlana Layfield, Joyce Trimble, Donald Howerton, Shannon Miller, Pat Starcher, Christopher Northrup, Phyllis Risher and Robert Risher. He interviewed Grievant after she had been transferred, prior to the final disciplinary action.

19. Ms. Layfield's credible testimony established that she was not disciplined in the first year of her employment with the Division, that Grievant yelled at everyone in the office, except Don Howerton; that Grievant suggested that she and Layfield were sleeping together at a State function in Canaan Valley by stating to others that Ms. Layfield was "noisy in bed;" that others were teasing her about "sleeping" with Grievant; that Grievant followed Layfield around at Canaan Valley in an open and obvious manner, and in a manner that Layfield felt was threatening; that others witnessed Grievant follow Layfield around at Canaan Valley and make repeated phone calls to rooms looking for Layfield; that Grievant was intoxicated at the Canaan Valley function and that she made lewd advances toward Layfield which Layfield has reported to be sexual overtures toward her; that Grievant was habitually absent from work; that Grievant insisted that her staff provide her with personal favors; that Grievant made specific threats of reprisal against her; that Grievant's motivation for sharing a room with her at Canaan was for the sexual gratification of Grievant; that Grievant used profanity, was unprofessional, slammed doors, threw things, was very volatile and that she was feared by the entire office of subordinate employees.

20. From his interviews of Ms. Trimble, Morford reported that Ms. Layfield was rude to everyone and that Grievant let her get away with a lot of stuff. He also reported his opinion that Ms. Trimble was "an ally" of Grievant.

21. Mr. Howerton alleged Grievant was moody, that Layfield was the only one who told him Grievant was interested in her sexually, otherwise he possessed no information of that allegation; that he never witnessed any physical contact between Grievant and Layfield, but Ms. Layfield did report to him that Grievant rubbed her leg, and not in a playful way; that he did not report Grievant was intoxicated at Canaan Valley and

that he never witnessed any inappropriate touching or any sexual overtures made by Grievant toward Layfield; that he did not know if Grievant was intoxicated at Canaan Valley; that he did not witness Grievant follow Layfield around at Canaan Valley or make phone calls to rooms looking for Layfield. He did recall that Ms. Layfield retreated to his room for one or two hours during the conference, complaining that Grievant was following her around and would not leave her alone, and that she was "afraid." His opinion of Grievant is that she is malicious, and "just mean." She often bragged that she could get anyone out of the office anytime she wanted to.

22. Mr. Morford related Ms. Miller's opinions that she doubted the veracity of Layfield's allegations; that she did not believe that Grievant was interested in sexual intimacy with Layfield; that Layfield has created problems in the office; that she would not know if Grievant was intoxicated at Canaan Valley; and that she did not witness Grievant follow Layfield around at Canaan Valley as described by Layfield, but did see Ms. Layfield "sneaking off" from Ms. Woody, and Ms. Layfield came to her room at one point saying she was "trying to hide" from Ms. Woody. Ms. Miller testified that Ms. Woody treated the staff as if their opinions and ideas were not of much importance, and "made you feel stupid if you disagreed with her." She described Ms. Woody's management style as a "dictatorship," "intimidating," and with a lot of "emotions, conflict and chaos." She described Ms. Layfield as a manipulative opportunist, who is sometimes dishonest and deceitful, but also stated she is not easily agitated and does not "make mountains out of molehills."

23. Among other things, from his interviews of Mr. Northrup, Morford heard that Grievant created an unhappy work environment.

24. Among other things, in his interviews of Robert Risher, Morford heard testimony from him which alleged that he had personal knowledge that Layfield was an employee who had performance issues regarding her ability to perform the tasks of her job correctly; that he had known Grievant for a long period of time and that his management style was not unlike the grievant's management style; that he reported to Morford his concern of the mental instability of Layfield. At the time of his interview, Mr. Risher had not worked in the Parkersburg office for several years, but he has heard both Ms. Woody and Ms. Layfield raise their voices, and has heard Ms. Woody use profanity in the office.

25. Phyllis Risher, Mr. Risher's wife, is a secretary in the Parkersburg office, and she does not recall Ms. Woody being any different than prior supervisors, and she does not feel that the work environment is hostile. Although she has heard coworkers complain about Grievant, she attributed the complaints to inexperience.

26. Mr. Kinnick believed Ms. Woody started out well as a manager, but found out that, after an uneventful meeting with him, Ms. Woody would report to her staff that she had had a "knock-down" argument with Mr. Kinnick, but that she had stood up for her subordinates. In a conversation with Mr. Casto, a former employee in the Parkersburg office, Mr. Kinnick learned that Ms. Woody yelled at and was rude to her staff, and often used inappropriate language. He instructed Grievant that this type of behavior was inappropriate, and she assured him it would end.

27. Mr. Kinnick was aware of Ms. Layfield's bipolar personality, but has not had any occasion to doubt her credibility. He does have problems trusting Ms. Woody's credibility.

28. Ms. Woody exaggerated her authority over her staff by constantly implying that she had run people she did not like out of the office. This had the effect of muting any complaints by the staff to higher levels of management, due to a very real fear of reprisal.

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.[2] As neither party saw fit to enter into evidence the letter given to Ms. Woody that stated the charges against her justifying the disciplinary action, it will be assumed that the matters reported by Mr. Morford in his investigative report formed the basis for the action. DRS cited no performance-based factors in disciplining Grievant, so those will not be discussed, although much information about Grievant's work performance and the performance of the office under her management is in evidence.

Credibility

A major issue in this matter is the credibility of Ms. Layfield and other witnesses to Ms. Woody's conduct, and the reliance on their statements as part of the investigatory process, as a basis of the disciplinary action, and during this grievance proceeding. 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.[3] The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. Nevertheless,

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[2] W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (1988).

[3] *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (1996); *Pine v. W. Va. Dep't of Health and Human Res.*, Docket No. 95-HHR-066 (1995).

demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information.[4]

Different factors should be considered depending on what it is that makes a particular witness not credible. Ms. Woody charges, for example, both that Ms. Layfield's testimony is prevarication and a result of misperception. While elements such as bias, motive, demeanor and reputation are weighted more heavily when attempting to determine if someone is lying, logical factors such as consistency and plausibility are more determinative in sorting out whether discrepancies are based on misperception, mistake or lack of complete information.

Ms. Woody asserts that Ms. Layfield is not a credible witness, for several reasons. First, she is biased against Ms. Woody, because she lost her "favorite employee" status and began to be subject to valid criticism of her work performance. Second, Grievant points to Ms. Layfield's bipolar personality, her medication for treatment of that disorder, and admitted use of marijuana as indicators of her lack of credibility. While Ms. Layfield does demonstrate a considerable level of bias owing to her loss of gloss in Ms. Woody's eye and her descent to normal employee status, her testimony about Grievant's workplace conduct was both plausible and corroborated by most of her coworkers.

DRS also attacks Mr. Morford's credibility on the grounds that he conducted an incomplete investigation, and reported only the negative aspects of Ms. Woody's reign over

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[4] *See Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (1994).

the Parkersburg office. Mr. Morford interviewed a number of current and former Parkersburg office employees: Charlana Layfield, Joyce Trimble, Donald Howerton, Shannon Miller, Pat Starcher, Christopher Northrup, Phyllis Risher and Robert Risher. He also interviewed Ms. Woody. Mr. Morford's investigation, while not exhaustive, was sufficient to establish the facts he reported. It should be noted, his report to the decision-makers, Ms. Holland and Mr. Quarles, fully apprised them of how the information was gathered and from whom, and made no recommendations as to what they should do with the information, except to the extent he opined that some actions could not be upheld by the evidence he gathered.

Merits

The anonymous complaints and Ms. Layfield's complaints about Ms. Woody's conduct as a supervisor were a catalyst for investigation conducted by Mr. Morford, the results of which he reported to Ms. Holland and Mr. Quarles. However, it is important to distinguish the charges made by Ms. Layfield and her coworkers from the charges made by DRS and upon which the actual disciplinary actions were based.

Sexual Harassment

As Mr. Morford pointed out, direct evidence supporting Ms. Layfield's allegations of sexual harassment, at the Canaan Valley conference and elsewhere, are uncorroborated. When a person complaining of sexual harassment is a party to an action, the elements of a sexual harassment-based hostile work environment claim are fairly clear. In *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996), a threshold was established:

> To establish a claim for sexual harassment . . . based upon a hostile or abusive work environment, a plaintiff-employee must prove that
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> (1) the subject conduct was unwelcome;

> (2) it was based on the sex of the plaintiff;
>
> (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and
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> (4) it was imputable on some factual basis to the employer.

The elements outlined in *Conrad* are conjunctive.[5] It is insufficient to say that one element alone is proof of sexual harassment. All four elements must be established. When it is the employer attempting to establish the claim, all but the fourth element are logically necessary.

Further the West Virginia Division of Personnel ("DOP") has promulgated 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

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[5]*See also Syl. pt. 5, Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995).

"conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

In this case, it is evident that Ms. Woody's conduct was unwelcome, but none that it was based on the sex of the complainant, Ms. Layfield. Ms. Woody never requested any sexual favors from Ms. Layfield. Her conduct borders closely on being of a sexual nature, as mentioned in the DOP policy, -- innuendo, repeated touching, immodestly undressing in the shared hotel room -- but not in such a definite matter that a reasonable conclusion may be drawn from the actions. DRS's own investigator could not establish any proof, other than Ms. Layfield's allegations, of this charge. Again, there is no direct evidence that the disciplinary action alleged sexual harassment, but it would be unreasonable for DRS to act on a claim its own, independent investigator found to be unsubstantiated. As such, DRS has not met is burden of proving that Ms. Woody sexually harassed Ms. Layfield. It should be noted, however, while the evidence does not support sexual harassment occurred, some of the same evidence does support a finding of harassment and hostile work environment, as discussed below.

Hostile Work Environment

"To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment."[6] Mr. Morford's investigation and the evidence adduced at the level four hearing do support a finding that Ms. Woody cultivated and perpetuated a hostile work environment for her subordinates. The employees of the Parkersburg Branch Office consistently and independently described

[6] *Napier v. Stratton*, 513 S.E.2d 463, 467 (1998).

a culture in which Ms. Woody abused her position of authority, exaggerated her level of authority, and generally fostered a work environment characterized by intimidation, stress and gloom.

As for Ms. Woody's treatment of Ms. Layfield in particular, her actions fit well within the definition of "[h]arassment," which means "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."[7] This harassment, while never severe in any sense, certainly was pervasive and continual. Ms. Woody essentially "dominated" Ms. Layfield for no other apparent reason than that Ms. Layfield began to see through the veneer of favoritism to Ms. Woody's true character. And, here the issue is all about perception -- the perception of the maltreated employee, rather than the actual intent of actor's conduct. Ms. Layfield clearly was intimidated and even frightened by Ms. Woody, and not unreasonably so.

DRS proved by a preponderance of the evidence that Ms. Woody was unfit for the supervisorial assignment to which her otherwise good work performance had catapulted her. She operated the Parkersburg office with a commendable attention to the mission of the organization, but with a detrimental effect on employee morale and performance. She abused her modicum of power by demeaning and bullying her supervisees. She exaggerated her authority to boost her own self-esteem. Her actions were noticed and felt by the employees entrusted to her guidance and to the clients dependent on her office. Most egregiously, she appeared to take advantage of Ms. Layfield's perceived vulnerability in order to have a victim she assumed no one would believe. The consistent reports that

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[7]W. VA. CODE § 29-6A-2(l).

employees of the Parkersburg office felt she was unapproachable on a daily basis until someone had reconnoitered her mood, that everyone felt they were cut off from contact with outside offices and higher levels of management at the district level, and that it was always someone's turn to be "in the doghouse," all indicate a constant, widespread effect created by Ms. Woody's attitude toward the employees in her charge.

Grievant's constant bragging about how many people she had run out of the office was also a major problem, even though her boasts were not accurate. The actual circumstances of those events have little relevance as long as Ms. Woody put a fearsome spin on them to everyone else – the environment she fostered by doing so is what matters. By constantly being confrontational and unprofessional, Ms. Woody failed to demonstrate the leadership qualities DRS had a right to expect from her.

Level of discipline

Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation.[8] DRS has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgement for that of the employer.[9] Nevertheless, the punishment here quite fits the offense, and is possibly a bit lenient, given the breach of trust committed by Ms. Woody. She was entrusted with the supervision of

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[8] *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.,* Docket No. 96-HHR-183 (1996).

[9] *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-8 (1999); *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (1997).

an important office, and instead of carrying out her duties with responsibility, she severely damaged the morale of the office, demeaned and belittled her supervisees, exposed the agency to liability, and fomented an atmosphere of distrust between her office and the district-level supervision. Removing her from supervision and from the office in which she had wreaked such havoc was reasonable and necessary.

An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action.[10] Grievant, rather than arguing the punishment did not fit the offense, contended there was no offense. Accordingly, she has not met her burden of proving the discipline should be mitigated to something less severe.

The following Conclusions of Law support this decision:

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). "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 & Human Res.*, Docket No.

[10] *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 513 S.E.2d 463, 467 (1998).

3. "Harassment" means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession. W. Va. Code § 29-6A-2(l).

4. To establish a claim for sexual harassment . . . based upon a hostile or abusive work environment, a plaintiff-employee must prove that

(1) the subject conduct was unwelcome;

(2) it was based on the sex of the plaintiff;

(3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and

(4) it was imputable on some factual basis to the employer.

Conrad v. ARA Szabo, 198 W. Va. 362, 480 S.E.2d 801 (1996).

5. DRS disciplined Grievant for creating a hostile work environment and for sexually harassing one of her subordinates. DRS did not meet its burden of proving the sexual harassment charge, but did prove, by a preponderance of the credible and material

evidence, that Grievant created a hostile work environment for the employees under her supervision.

6. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." O*verbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). DRS has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgement for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-8 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

7. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

8. Grievant failed to prove the discipline in this case was unwarranted by the circumstances or should be mitigated.

For the foregoing reasons, this grievance is **DENIED**.

It is ordered that, due to discussions and evidence of a sensitive nature relating to normally-confidential health information of non-parties and confidential client information,

the record is hereby sealed and shall be opened only by parties and reviewing courts for purposes of furthering this grievance.

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.

June 8, 2005

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M. Paul Marteney
Administrative Law Judge