THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

SPENCER WALKER,

Grievant,

v. **Docket No. 06-HHR-250**

Sue Keller

Senior Administrative Law Judge

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

WILLIAM R. SHARPE, JR. HOSPITAL,

Respondent.

D E C I S I O N

Spencer Walker ("Grievant"), employed by the Department of Health & Human Resources ("DHHR") as a Social Worker III at the William R. Sharpe, Jr. Hospital ("Sharpe"), filed a level one grievance on June 5, 2006, following a two-day suspension. For relief, Grievant requested that his personnel records be purged, compensation for the two days, and otherwise "to be made whole." The grievance was denied at all lower levels, and appeal to level four was made on July 24, 2006. A conference call was conducted with Grievant, who represented himself, and DHHR counsel, Senior Assistant Attorney General B. Allen Campbell on October 30, 2006, at which time the parties agreed to submit the grievance based on the record. The grievance became mature for decision upon receipt of written summations on November 22, 2006.

The following facts have been derived from a preponderance of the credible evidence made part of the level three record.

Findings of Fact

___1. Grievant was employed as a Social Worker III at the William R. Sharpe, Jr. Hospital at all times pertinent to this grievance. (See footnote 1)

2. Joan Danner, Sharpe Nurse Recruiter, was contacted by a nursing school administrator on

April 18, 2006, to discuss a situation which had been reported to her by a nursing student. (See footnote 2) Ms. Danner requested that a signed statement from the student be provided.

3. On April 18, 2006, the nursing student filed the following complaint:

First, I would like to tell you that I really enjoyed coming to Sharpe except for this one incidence. It was Friday March 24, [2006] at the afternoon rotation. I was sent to G2 by myself, which I believe you should go in pairs. When I first got there, I went outside with the patients for a smoke break. I was with the Health Service workers Earl, Ernie, and Tom. When we first got out that there [sic] Tom was talking to me, but he wasn't brothering [sic] me. Then Ernie and Earl told him to quit flirting with me that he was married. Earle told me to tell Tom that he had a nice butt, but I wouldn't do it. Ernie then had Tom walk over in front of me and turn around so I could see his butt. He said Tom is proud of his butt he works out. Earl then looked at me and told me that he had a foot fetish and asked to see my feet. I told him no and he asked me if my toenails were painted. He then kept asking me to show him my feet. I told him that I didn't like people to look at my feet or touch them, b/c I don't like feet period, and I wasn't going to show him mine. He told me that I just haven't had the right person touch my feet. We then went inside and all Ernie and Earl talked about was drinking and there [sic] parties they have had. I was then sitting at the desk reading a patient's chart and a guy came and sat on the desk I was at. He said hello my name is Spencer and I am a social worker. I said, 'I am just a student do you need me to get you someone who works here.' Spencer said, 'no I was just instructed to come over her and look at your pretty brown eyes.' I said 'well thank you.' He then said, 'I am going to be straight forward with you, would you like to go out sometime.' I said no I have someone. Hesaid, 'are you happy?' I said, 'yes'. He then said 'are you serious?' I said, 'Yes we're getting married when I get out of school.'" He then left. Ernie told me I had a nice tan and asked me if he could see my tan line. I told him you couldn't see any but on my shoulders and they were gone. He then said, 'I think you should pull down your bottoms and let me see you tan line.' I said no again. He just kept bothering me about it and kept asking to see them. When I asked about group therapy they said it had already started and I couldn't go in there because the Doctor gets mad it you interrupt his group. I said ok. Then one of the guys I don't remember who said, 'Well Spencer has a group therapy in about 10 minutes you can go with him.' I asked Spencer if it was ok and he said yes. About 5 minutes went by and then Spencer said, 'lets go get ready for group.' We walked back to his office and I stood at the door while he sat down and got on the computer. I said where is the group and he said, 'I really don't

have group therapy, I just wanted to get you back here so we could talk.' I have never felt so low in my life. He then kept asking me about my relationship with my boyfriend. I told him I was happy. He said I was too young to get married and that I needed to live my life and have fun first. I told him I do have fun and I am happy. A RN went by the door while I was there and he asked her if 21 was too young to get married and she told him no, she was married at 17. He then asked me if I was going to be coming back to Sharpe and I told him no, it was my last time. He said, 'Oh, I was going to let you take me to lunch so we can talk more, b/c it seems [you] don't know what you want in life.' I said, 'Yes I do. I want to graduate, become an RN, get married, and have four kids, I know what I want.' He then asked me where I lived and I just said Charleston. He said, 'what do you do for fun?" I said, "I go out with my boyfriend when I have time, I am usually to [sic] busy to do anything, with school ad work.' He said, "well that is too bad b/c I was going to have you show me around Charleston next time I cam down that way, but it seems you are too busy.' I said, 'yes.' Ernie then came running back to Spencer's office and said, 'Karen (I think that was here [sic] name, it was the RN that went by the door) is mad and wants to know why she is back her with you.' He then looked at me and said, 'If anyone asks, you are learning how to discharge a patient." I then said, 'well it is time for me to go, show me how to get out of here."

3. Jack Clohan, Administrator of Sharpe Hospital contacted the nursing instructor to verify the allegation. The instructor indicated the student was conscientious, not overly sensitive or someone who would overreact to a situation or a social encounter, and was reluctant to cause anyone trouble. 4. Mr. Clohan also spoke to the student via telephone, and she verified the allegations made in her complaint.

5. Mr. Clohan and several other administrators met with Grievant to discuss the allegations. Grievant admitted that he had commented the student had pretty brown eyes, and that he misled her when he said he ran a therapy group. Grievant also admitted talking to her about marriage, but stated that he did not believe she felt uncomfortable, and that she could have said so at any time. Grievant initially denied he asked the student out, but later stated that he could not recall whether he asked her out.

6. By letter dated May 25, 2006, Jack C. Clohan, Jr., Chief Executive Officer at Sharpe, advised Grievant that he would be suspended without pay for two days, June 14 & 15, 2006, as a result of his unprofessional conduct that created a perceived sexually hostile work environment.

Discussion

DHHR asserts that Grievant's actions were contrary to the general “Employee Conduct Policy,” and the more specific “Sexual Harassment Prohibition Policy,” as well as the Division of Personnel”s “Interpretative Bulletin on Prohibited Workplace Harassment.” Grievant argues that the complaint was not timely filed, and that the investigation was improperly conducted. Grievant further opines that the student was not shy, and questions whether she was guilty of similar behavior as she was laughing and joking with the male staff.

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 Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

This situation involves a student, rather than a coworker; however, policies addressing employee conduct and harassment apply to Grievant, without exception. Grievant's arguments relating to procedural and technical issues have been somewhat influenced by the complainant's status. For example, the delay between the actual occurrence and the imposition was due to the fact that the information was relayed to the student's academic supervisor, through Sharpe, which in turn requested the matter be documented prior to an investigation. Further, the investigation was not conducted in the traditional manner, as Mr. Clohan discussed the complaint with the parties personally. Neither of these issues affected the process of determining whether Grievant had acted improperly, and should be subject to discipline.

Grievant continues to assert in his level four written summary that he does not know why he was suspended. Grievant was suspended because his interaction with the student was inappropriate and in violation of Sharpe's policies regarding employee conduct and sexual harassment.

Sharpe Policy #34.305 “Employee Conduct” provides in pertinent part:

The Department of Health and Human Resources and Sharpe Hospital expect professional behavior from employees. In fairness to the employees, this policy was developed to provide general

guidelines concerning the nature of behavior expected of Department of Health and Human Resources and Sharpe Hospital employees.

Employees are expected to:

1. Comply with all relevant Federal, State and local laws.

2. Comply with all Division of Personnel, DHHR and Hospital policies.

* * *

5. Conduct himself/herself professionally in the presence of patients, fellow employees, and the public.

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11. Avoid physical abuse, harassment or intimidation of patients or fellow employees.

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19. Refrain from making unwanted or inappropriate verbal or physical contacts with patients, co-workers, visitors and others.

* * *

21. Avoid conflicts of interest between personal life and employment.

Sharpe's “Sexual Harassment Prohibition Policy” provides:

It is the intent of Sharpe Hospital 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. includes conduct which has the effect of interfering with an individuals's work performance or creating an intimidating, hostile or offensive working environment.

Additionally, 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 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 oreffect 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.

As was discussed in the Grievance Board's decision in *Stemple v. Division of Corrections*, Docket No. 03-CORR-116 (September 5, 2003), in order to constitute sexual harassment, an employee's conduct must contain the key element of being offensive, intimidating or hostile to the victim involved. Under the circumstances presented, Grievant's actions were unsolicited, unwelcome, and offensive.

Finally, Grievant's claim that the student's participation should exonerate him is without merit. Students are subordinate to employees and are particularly vulnerable as they are unfamiliar with the environment, procedures, and staff members. Because of her subordinate status and unfamiliarity, it is entirely possible that the student was simply trying to make the best of the situation without being rude. Any participation, intentional or not, by the student does not absolve Grievant of his responsibility to act professionally.

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; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. DHHR has proven that Grievant engaged in behavior which was offensive, intimidating or hostile to a female student, in violation of Sharpe Hospital's policies on employee conduct and sexual harassment, and the DOP policy on sexual harassment. 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: December 14, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant has since resigned his position with DHHR for reasons unrelated to this grievance.

Footnote: 2

Neither the school nor the individual was identified in the record.