THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

SHAN YUSUFF,
Grievant,

v.

Docket No. 06-HE-328
Sue Keller
Senior Administrative Law Judge

WEST VIRGINIA UNIVERSITY,
Respondent.

D E C I S I O N

Shan Yusuff ("Grievant"), employed by West Virginia University ("WVU") as an Academic Advisor, filed a level one grievance on July 5, 2006, after she had received a second letter of warning for actions contrary to the institution's sexual harassment policy.[1] Grievant requested that the letter be removed from her personnel records, along with all other documents referencing her alleged activities. The grievance was denied at level one on July 10, 2006, and at level two on August 7, 2006. Appeal to level three was made on August 9, 2006.

A second grievance was filed directly to level four, as is permitted by *W. Va. Code* § 29-6A-4(e), on September 26, 2006, following Grievant's dismissal. Grievant seeks reinstatement, back pay and benefits, and that her personnel records be expunged of all references to sexual harassment. The grievances were consolidated for hearing at level four conducted on November 30, 2006, and January 23, and 25, 2007. Grievant was represented by Christine Barr, Staff Representative, American Federation of Teachers, and WVU was represented by Samuel R. Spatafore, Assistant Attorney General. The

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[1]This grievance was assigned Docket No. 06-HE-335 by the Grievance Board.

grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on May 23, 2007.

Synopsis

Grievant's employment was terminated after she had received a letter of warning regarding her interactions with coworkers, a second letter of warning based on a finding that she had engaged in sexual harassment with a coworker, and her continued unacceptable behavior. There was no evidence that Grievant had been targeted for dismissal, or that WVU was obligated to take any further action to rehabilitate Grievant as an employee.

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

Findings of Fact

1. Grievant was employed by WVU for approximately eleven and one-half years, and was assigned as an Academic Advisor at the Undergraduate Academic Service Center ("UASC") at all times pertinent to this grievance.

2. Beginning in Fall 2004, Grievant's job performance and relationships with her co-workers began to deteriorate. Grievant was particularly experiencing difficulties with Julian Nguyen, a coworker who, she believed, had developed romantic notions about her. Although he attempted to disabuse her of this idea, going so far as to reveal his homosexual orientation, Grievant continued to pursue him.

3. On February 27, 2006, Buffy Vehse, Assistant Director of Academic Advising, met with Grievant and Mr. Nguyen, regarding their office communication. Mr. Nguyen requested that Grievant not spend time in his office engaging him in personal

conversations. He also requested that she stop quizzing the other employees as to his location, as it looked as though he was not doing his work. He further recalled that she once was crying in his office in front of graduate assistants, and opined that this behavior was unprofessional. Ms. Vehse directed Grievant to communicate with Mr. Nguyen by e-mail or telephone, except for truly immediate work issues.

4. Throughout this period of time, Grievant's behavior was detrimental to office productivity. Ms. Vehse received seven reports that Grievant had been inquiring as to what staff knew about her and Mr. Nguyen, how she was performing as a supervisor, and inquiring whether she was liked as a supervisor. When Ms. Vehse directed Grievant to act in a more appropriate manner, Grievant responded that she didn't have to listen to her.

5. On March 9, 2006, Ms. Vehse and USAC Director Anita Mayer, met with Grievant and Mr. Nguyen. At this time, Mr. Nguyen complained that Grievant was coming to his office to discuss personal matters of a sexual nature. Both parties were advised to discuss only work issues, and Grievant was again directed to contact Mr. Nguyen by e-mail or telephone.

6. Contrary to the directive of Ms. Vehse, Grievant approached Mr. Nguyen on April 10, 2006, while he was in his office advising a student. A subsequent meeting was conducted with Ms. Mayer, Grievant and Mr. Nguyen to discuss Grievant's failure to comply with the administrative directives. Mr. Nguyen warned Grievant at that time that he would contact Social Justice if she did not stop harassing him. Grievant accused him of misconduct, and of denying his feelings for her. Ms. Vehse reported the allegation of sexual harassment to Social Justice as she is required to do.

7. Grievant's relationship with other workers had also been deteriorating. Ms. Vehse and Ms. Mayer had received e-mails and verbal reports from employees who had experienced negative encounters with Grievant. These reports included incidents when Grievant shouted at individuals, pointed her finger in their faces, and threatened to file complaints with the Social Justice Office, if they didn't do whatever she wanted at the time. One employee had called Security during an encounter with Grievant.

8. Ms. Vehse issued Grievant a First Letter of Warning dated May 4, 2006, regarding her behavior towards co-workers, stating:

> It has been reported to me that you have been intimidating and questioning graduate assistants, work-study students, and full-time staff of the UASC regarding matters unrelated to the work you are charged with performing. I have received reports of your doing so with no less than seven co-workers in the past three weeks; our director, Anita Mayer, has received e-mail reports from three of these staff members, dated April 14 and 18, 2006. You have been taking up an inordinate amount of administrative time (yours and that of other staff and supervisors) with discussions surrounding interpersonal conflict and questions regarding that conflict.
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> In addition, you have been complaining of problems with staff that do not warrant any supervisory intervention and are due to your impatient and inflexible approach to communication. This inflexibility with communication and the time you are spending pursuing staff input into your interpersonal conflict are an inappropriate use of work time and are interfering with staff performance of duties.
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> Here are two examples:
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> > 1) You reported to me three weeks ago that a coworker was not responding to your e-mail regarding revisions for a training manual, just a little over 24 hours after your e-mail to him. You had approached him in the front office to tell him what was in the e-mail and complained to me that he would not discuss the e-mail with you. Before I could ask him about the matter and within less than a half hour, you received his e-mail response, a timely response during a busy work period in our unit. As I told you that day (and in previous conversations on similar issues), you did not give the coworker appropriate

> response time before approaching him or before asking me to get involved. You spent unnecessary work time on this issue, and even more time when you brought it up again as a complaint in a meeting with Anita and me two weeks ago.
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> 2) You made a request of a coworker for additional training time [in] an advisor training session. He replied that the schedule was full. You returned to him later to request that you be able to ask those already assigned to train if they would switch times with you. He agreed, you made the request, and the schedule was finalized. This exchange worked well in accomplishing the desired training goal; yet, you complained to Anita and me that the coworker had not communicated properly with you. You also refused to recognize his spoken word as verification of the new training schedule, saying that you didn't trust him and that he must reply to you by e-mail. He had already placed a revised schedule in your mailbox (April 19) by the time you made the complaint, but you had not checked your mailbox. Again, this request for extra verification and pursuant complaint to your supervisors were unwarranted and time consuming and based on your impatience and inflexibility in communicating with this coworker.

Recently, you refused to e-mail factual information from a student file to another advisor, when doing so would have facilitated a solution to an advising problem. The information in question was evidence of an advising mistake by another advisor, which you did not record for correction but, rather, let the file go to back to the records office with no follow-up. As you know, it is every staff member's duty to correct, or bring to the attention of their supervisor, advising mistakes. You said that correcting the mistake was not your purpose for mentioning it to me; rather, you were citing an example of your intentional unwillingness to communicate by e-mail with a co-worker (which would have taken care of the problem). In focusing on this issue, you neglected to perform your advising duty to a student and to the unit. It is expected that you would correct the mistake and make sure the student was contacted with the correct information.

In addition, several staff members witnessed you addressing another staff member on February 27 in an inappropriate manner in the front office, following him onto the parking lot, and aggressively addressing him there, where staff and students regularly pass. You also addressed this same staff member on April 10, standing outside his office and continuing to speak to him, even though he asked you to wait until he completed his appointment with the student in his office. Your continued interruption distracted the staff member from his work with the student, causing him to make two mistakes,

which he later had to contact the student to correct. Your interruption, in these two cases, directly and negatively affected the work of the unit. We have discussed with you several times in meetings (including the meeting in my office with this coworker, you, and me on February 27; the meeting with Anita, this coworker, you, and me on March 9; and in yet another meeting with Anita, you, and me two weeks ago) the need for you to curtail such inappropriate and disruptive communication, especially when students are present.

You said at a recent staff meeting that you needed to block time in your schedule for updating advising training materials; however, several staff members have mentioned to me that you spend a great deal of time sitting idly at your desk or computer, without students or other work in front of you. Most recently, I saw you behaving in this manner this week. This behavior is unacceptable and impacts your ability to meet the expectations of your position.

I received a serious complaint on April 13 from a student (KJF) who was particularly angry at your unwillingness to assist her in any but the most brief and abrupt manner; in fact, you did not address any of her advising questions (which I did address at a subsequent meeting requested by this student). She filed a request to change advisors citing the reasons stated above.

You are expected to improve your working habits with regard to all these areas, in order to be an effective advisor and member of the unit team; to supervise and assist graduate student academic advisors appropriately, while demonstrating appropriate good working habits and accomplishing the work you are charged with doing; to focus on getting correct advising information to students as your main duty; to refrain from interrupting the work of others; to refrain from bringing non-work-related interpersonal issues to the workplace; to engage in effective and efficient communication with coworkers and all our advising constituencies; and to use Groupwise e-mail and the WVU telephone to communicate information, when doing so is the most effective and efficient way to get the information to others. If you have any questions about what is expected of you, please see me immediately.

This letter will remain in your personnel file for twelve months.

9. Grievant did not file a grievance challenging the letter of warning, but filed a rebuttal on June 19, 2006, in which she responded to the various issues. The bulk of the letter was dedicated to an explanation that she had filed sexual harassment charges

against Mr. Nguyen prior to the date of the letter of warning. Grievant stated that Mr. Nguyen had threatened that if she did not enter into a sexual relationship with him, he would become her enemy and cause her trouble at work. Notwithstanding the threats, she rejected his demand. She attributed certain subsequent events cited by Ms. Vehse as actual attempts by Mr. Nguyen to carry out his threats. Grievant also denied sitting idly at her desk, or that she failed to correct an advising mistake. She opined that the student complaint filed against her was not unusual for any advisor.

10. Grievant's interaction with Mr. Nguyen continued to deteriorate, and Ms. Vehse was required to frequently intervene. She again directed Grievant not to talk directly with Mr. Nguyen, but to communicate only by e-mail or voice mail. Grievant continued to insist that Mr. Nguyen was ignoring his feelings for her.

11. Grievant was notified that a charge had been filed with the Office for Social Justice, and that she was not to contact individuals regarding the investigation. She was also directed to provide a list of individuals she believed might have knowledge of the complaint. Grievant proceeded to contact individuals asking them what they knew, and if they would testify on her behalf.

12. Mr. Nguyen filed a statement with the Social Justice Office stating that he had become friendly with Grievant and other graduate assistants at work, socializing at lunch and after work. In Spring 2004, while Grievant was absent from work on extended sick leave, she would call him for long conversations several times a week. He continued:

> In the middle of March 2004, I recall, Ms. Yusuff came back to work. Our group started going out for dinner again. During that time, Ms. Yusuff kept saying that her parents and sister would not be happy if they knew she befriended men (because of her family's religion). On several occasions, when our group met her family (in supermarkets . . .)I had to walk away from

our group so her family would not see me. Even though I thought it was ridiculous, I respected her family's belief so I did that.

By the end of April of 2004, I noticed that Ms. Yusuff kept saying to everyone that I was her "special friend". I thought to myself, and actually told her on several occasions, that it was very nice of her to regard me as her good friend.

* * *

One day in late October 2004, Ms. Yusuff and I went out for lunch . . .[when] she started crying and saying that I did not care for her, that I had been hanging out with other female co-workers more than with her, that I did not remember that she was the one who had helped me a lot in applying for the advising position. I was very embarrassed, because the people who were having lunch there were watching us. . . On the way back to the center, I decided to come out to Ms. Yusuff by asking her if she know that I was gay and that I was living with Aric. She told me that there were rumors in the center that I was gay. However, she said that she did not believe so since I looked quite masculine and treated her quite special.

On that same day, I came to her office and asked her what she meant when she said that I treated her quite special. . . she said that a special friend was more than a good friend. I told her that I treated her as my good friend and as my older sister whom I respected.

* * *

June 2005, during the New Student Orientation, Ms. Yusuff kept pointing out and saying to me that Graduate Assistants liked me, that other Graduate Assistants flirted with me and that she did not like them to do that. I told her that I did not think they were flirting with me and that it would be very embarrassing if they had heard that. . . .

In September or early October . . . I wore a long-sleeved shirt with two buttons down. Ms. Yusuff . . . told me that I looked very sexy with the two buttons down. . . .

Toward the end of Fall 2005 semester, Ms. Yusuff kept coming to my office and telling some very disturbing stories. For instance, Ms. Yusuff said that I once told her that I was her boyfriend and she was my girlfriend. I was quite shocked. I replied that 'it must have happened in your dream, Shan; I would never say that.' I added, 'I am gay, Shan. I thought I had told you that a long time ago.' She told me that it did not matter as long as I had feelings toward her. I was very upset and spoke a little loudly at that time.

I asked her: 'How could I have feelings toward you if I am a gay guy?' She told me that some gay men found women sexually attractive. I then told her that I was not one of those men. Then I asked her: 'Why do you think I told you that I am gay?' She said: 'I took it as you letting me know about your past.' My anger developed so high that I could not say anything but, 'I am gay, one hundred percent gay. I am not confused or curious or whatever.' Then I asked her to leave my office. She did not leave my office and continued saying that I hid my feeling and that I twisted my words. I walked out of my office and went to the [the] washroom . . .

In another instance, Ms. Yusuff told me that she has noticed that ever since she had told be about the 'female' problem that prevented her from having sexual contact, I changed. This was purely her imagination she never told me that before. I was very upset and told her that I would never allow anyone to tell me their sexually related issues . . . The next day Ms. Yusuff came up to my office for a conversation. She told me that one time I told her that I wanted to leave my partner. She said that she felt so guilty that because of her that I had decided to leave my partner. I was very surprised and upset because I had never said that. I said: 'I never said that, Shan. Not in a million years I would want to leave Aric.' Ms. Yususff again accused me of twisting my words and hiding my feelings. I was very upset and told her that if she kept saying such things, I would ask her to leave my office.

Sometime in January 2006, Ms. Yusuff told me that I was very nice and better than her ex-husband, even though her ex-husband was very nice to her. I told Ms. Yusuff that she should not compare me with her husband because I was just her friend. I was so upset that I told her that from that time on, whenever she started to talk something that related to those issues, I would have to ask her to leave my office.

Ms. Yusuff has said many more things similar to the above stories. However, I do not have time to tell it all in detail. I would like to say that Ms. Yusuff always found time to come to my office. She would come to my office at least three times a day. If she could not find my in my office (sometimes I closed the door so she could not come in), she would ask the GA's where I was. . . .

On February 27, 2006, Ms. Yusuff came to my office and started those conversations again. I immediately stopped her. However, she did not stop but continued saying that I was just like other ordinary men, that I have changed after getting bored with her. I told her if she did not stop saying such things, I would have to go to my supervisor's office. At that point, she started to point her index finger at my face saying that I was a 'stupid jerk.' I walked out of my office and went downstairs. Ms. Yusuff followed me and kept saying 'Julian I need to talk to you.' I went to the main office and asked

Ms. Donna Williams, the center's secretary to schedule an appointment for me with my supervisor. While Donna and I were looking up my supervisor's schedule, Ms. Yusuff continued asking me to talk with her in her office. I replied to her that I did not have any business coming to her office to talk to her. I also said that if she needed to talk to me, I would meet with her in my supervisor's office and talk. After that, I left the office and planned to go back upstairs to my office. However, Ms. Yusuff kept following me and saying that she needed to talk to me in her office. At that time, I changed my direction and walked toward the Mountainlair hoping that Ms. Yusuff would not follow me. However, [she] continued following me and saying the same thing. When I got outside of the UASC building, I saw a full-time staff, Ms. Sandy Christopher walking in. I was so embarrassed that I stopped walking and turned back to face Ms. Yusuff. At that time, Ms. Yusuff got very close to me and continued saying the same. I kept backing up whenever Ms. Yusuff got closer to me. She kept pointing and waving her hand toward me. I saw Ms. Christopher standing inside the building (behind the door). I then walked very fast back into the building. Ms. Yusuff, at that point could not follow me. I went to my office and closed the door. About five minutes later, I got a phone call from my supervisor (Ms. Vehse) asking me to go down to her office. When I came to my supervisor's office, Ms. Yusuff was in there. After I told my supervisor what had happened, Ms. Yusuff told my supervisor that I was not professional, that I shouted at her in front of students. . . This of course was a fabrication. At the end of the meeting, I requested my supervisor to allow me not to communicate with Ms. Yusuff in person . . . .

A few days later, Ms. Yusuff e-mailed me and asked for some suggestions related to her work, but I was so busy meeting with my students that I did not have time to respond to her. The very next day, Ms. Yusuff approached me when I was in the main office and asked me if I had received her e-mail. I told that my schedule was booked back-to-back with students so I did not have a chance to read it. Ms. Yusuff then told me that she would tell me what was in the e-mail. I immediately told her that I would read the e-mail and then respond to her. A day later, my supervisor told me that Ms. Yusuff had come to her and complained that I had not responded to her e-mail yet . . . .

On March 8, 2006 . . . Ms. Yusuff came to my office . . . [and] told me that she needed her student's file, which was in the workshop at that time. I told her that she should have gone to the workshop and got it herself. She told me that she did not want to interrupt the workshop and since I was in charge of the workshop, I would have no problem going in there. I went to the workshop and got the file for her. Half and [sic] hour later, my supervisor told me that Ms. Yusuff complained to her that I shouted at her in front of the students when she came to my office with [a] work related matter. I should

> emphasize that there were no students in the vicinity during my conversation with Ms. Yusuff . . . .
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> On March 9, 2006 at 2:30 pm, in the meeting in the director's office, Ms.Yusuff told my supervisor and the director that I shouted at her in front of several students and that I 'shooed' her out of my office. I told them that I would never shout at anyone. . . Ms. Yusuff again accused me of twisting my words. I was so upset that I told my supervisor and the director some of the things that Ms. Yusuff had said to me. Ms. Yusuff denied all of that. I was so angry that I told her that our next meeting would not be in the director's office, implying that I might bring up these matter to the Social Justice office, and warning her that I may consider filing a sexual harassment complaint against her.

13. On April 25, 2006, Grievant completed the following statement for the WVU Social Justice Office investigation:

> Julian and I first began our friendship in 2003. He left the Advising Center and he came back as a full time academic advisor in 2004. We went to each others houses for dinner, went to lunch, called each other, exchanged Christmas gifts, and Christmas cards. At work he would come often to my office to chat and I would go to his. Since I am the only full time advisor working downstairs at least once or twice a day, I go to the second floor and visit with the other advisors to see how things are. This would also include Julian up until sometime in March 2006.
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> During the early part of 2005, Julian and I were experiencing some difficulty communicating. We decided to go to the Boston Beanery for lunch. I asked Julian at that time if there was anything wrong. He then proceeded to tell me that he wanted our friendship to go further. He indicated that if this did not happen, our friendship would stop. He would be busy and he was not sure if he would have the time to invite me to his house anymore or continue with our friendship. He also stated that he could be mean. This was on a Friday. I felt taken aback not knowing what to do and feeling stunned. On Monday, Julian acted as if nothing had happened but at this time, the interactions between us began to change. In our conversations he told me that he cared very much for me and that he was gay and that I could ask him any questions I wanted to know. He told me about some of his relationships with prior boyfriends and said that at one time he did have a girlfriend. It was at that time that he indicated he met his current partner. He then said to me, 'I don't want to lose you as a result of anything I have disclosed.' Julian and I continued to be friends but the interactions between us changed and he sometimes acted as if I had become his girlfriend.

During 2005, Julian and I continued to be close friends. He came to my house for dinner on at least three different occasions, the last being December 2005 and I went to this house on several different occasions. The last time that we had dinner was when we went to dinner with a group of friends in February 2006. During several conversations, I informed Julian that I only wanted friendship with him. I even asked Julian several more times if there was anything that I had said or done that led him to believe that I wanted more than a friendship and he said no.

While Julian was dissuaded in having more than a friendship with me, on one particular occasion, he suggested that we were boyfriend and girlfriend and I said we were not. On a few occasions he would stare at my breasts. I remember one particular incident where he stared at me looking at my thighs all the way up on to my breasts so intensely that I felt uncomfortable. I hid behind my desk and closed my arms together to cover my breasts. While passing him by in the hallway, he at times would look at me up and down. At times, Julian would become hostile and angry, intimidating me by stating he would become my enemy. I was many times afraid of Julian, but did not know what to do. Our working relationship began to suffer. For me, it created an atmosphere of fear, intimidation and hostility.

During the early part of 2006, Julian invited me to his house for Chinese New Year. Not long after he said he was no longer going to tell me anything more about his personal life. I said to him that this did not seem to me like a real friendship and suggested that we were now co-workers. I asked him if he still wanted me to come to his house for Chinese New Year, and he said yes. Sometime before his dinner, I called Julian and told him that I had decided not to come to his house. I said that we no longer had a friendship and that I would no longer go to his house nor would he be invited to mine. He was angry.

Julian became hostile at work. He would shout at me and walk away from me while I was discussing business. He would not be cooperative or helpful. I was so distraught that I even spoke to a co-worker about my situation. I also informed my supervisor on several occasions that Julian was showing me a lack of respect and cooperation. In fact, he was making things difficult for me. Julian indicated to me that he did not have to talk to me at all. I informed my supervisor of this and indicated to my supervisor that because we worked together, there would be occasions when we would have to talk to one another in person. My supervisor and I both agreed. My supervisor and I met with Julian to set up some tentative parameters to follow for communicating with one another. We tried this, but once again I felt that Julian's behavior was not one of cooperation or timeliness. I reported this to my supervisor. We then had another meeting with my supervisor, her immediate supervisor and Julian. At this meeting we elaborated on a further

> set of parameters from which to communicate. In the meeting, Julian threatened that he would take this further.

14. By letter dated June 19, 2006, Jacqueline Dooley notified the parties that the investigation into allegations of sexual harassment had been concluded with a finding that Grievant's actions toward Mr. Nguyen were in violation of WVU Sexual Harassment Policy. The matter was returned to Ms. Mayer for appropriate disposition.

15. Ms. Mayer notified Ms. Vehse on June 21, 2006, that another employee, Joe Wiles, had complained "on a number of occasions over the last two weeks" that Grievant was spending an inordinate amount of time at the front desk. He opined that Grievant was discussing inappropriate issues. Mr. Nguyen had that day also expressed a concern that Grievant was discussing inappropriate matters with graduate assistant advisors. Because Grievant had a history of such behavior, and had recently received a written warning regarding said behavior, Ms. Mayer asked that Ms. Vehse meet privately with the graduate assistants to determine whether Grievant was acting inappropriately.

16. On June 28, 2006, Ms. Vehse issued Grievant a second letter of warning, stating in part:

> This is a Second Letter of Warning. Based on the decision by the President's Office for Social Justice, issued June 19, 2006, you have been found in violation of WVU's sexual harassment policy. This is an extremely serious matter, and it is required that you comply with all WVU policies and procedures relating to sexual harassment.
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> You are hereby required to attend the next available training session on sexual harassment conducted by the President's Office for Social Justice. You are further directed not to have any face-to-face communication with Julian Nguyen without your supervisor or the unit director present. You may use other means of communication, such as e-mail or memo, when necessary, to carry out duties directly related to your academic advising position. You are to refrain from any non-work-related communication with Mr. Nguyen during work hours.

> Please carefully note that any retaliation against Mr. Nguyen or anyone involved with, including anyone who provided testimony for, this investigation will lead to further disciplinary action, which could include termination of your employment.

17. Mr. Nguyen next complained that Grievant made him feel very uncomfortable during Orientation on August 18, 2006, when she sat at the greeter desk and stared at him while he was working. At this point, he was considering resigning to extricate himself from the turmoil with Grievant.

18. Also in August, Grievant was involved in a dispute with the First Year Experience Office when she was assigned a student assistant, contrary to her request. The student resident assistants were required to participate in the orientation/advising program. Grievant had ignored three e-mails from Professor Bob Whitmore regarding the matter because she did not want a student assistant, and did not believe the messages pertained to her.

19. On September 6, 2006, after conferring with the WVU Human Resources department, Ms. Vehse issued Grievant a Letter of Intent to Terminate her employment, effective September 13, 2006. In this letter, Ms. Vehse reviewed meetings with Grievant regarding her behavior on February 27 and March 9, 2006, the First Letter of Warning issued as a result of Grievant "intimidating and questioning graduate students and work-study students and interrupting the work of others," and the Second Letter of Warning, issued based on the finding by the Office of Social Justice that Grievant had engaged in sexual harassment of a co-worker. She continued:

> [Y]ou have continued to interrupt the work of others by engaging in disruptive conversation that negatively affects the workplace. You have repeatedly approached the front desk staff (JL and LA) during their work time, as reported on July 7, among other times, with negative conversation about that

staff's supervisor and about the unit's 'upper management.' These staff members reported that your comments made them uncomfortable, especially when you told them 'this conversation doesn't leave this room.' Since these staff members are a graduate assistant (JL) and a work-study student (LA) and you hold a full-time supervisory position, your behavior constitutes intimidation of part-time staff and intentional undermining of the work unit. In addition, on several occasions that same week, you left the building between 7:30 a.m. and 8:15 a.m. to chat with a WVU employee (PD) from another unit. You left your work during your regular working hours without your supervisor's permission on personal business. (This employee reported to Anita Mayer that she has since told you not to continue visiting her during work time.) Your behavior constitutes neglect of duties and repeated disruption of the work of WVU staff.

On August 18, 2006, during general registration, Julian Nguyen reported that you made him uncomfortable by repeatedly staring into his office at him from the greeter desk outside his office, at times even turning the chair directly toward his office in order to do so. You have been instructed to stop engaging in interruptive behavior toward coworkers and to avoid unnecessary contact with Julian. Later that same day, around 4:15 pm. I heard you tell a graduate assistant (AW) in the hallway that you would give this GA a good work evaluation. You lowered your voice, but it was loud enough for me and anyone else in the hallway to hear, rolled your eyes, and said 'but that might not be the case with *your* supervisor.' This GA's supervisor is Julian Nguyen, and your comment in this context clearly constitutes an attempt to undermine the supervisory authority of a coworker and coerce a GA to choose sides in the workplace.

On September 4, 2006, Anita Mayer received an e-mail from Dr. Bob Whitmore, resident faculty leader, saying that you had not responded to three recent e-mails (8/1/06, 8/22/06, and 8/31/06) from him regarding the assignment of a resident assistant to your University 101 class. He explained to you twice before your class had its first meeting that 'all of our Braxton Tower RAs are assigned as assistants to UNIV 101. My assistants . . . attend all of the meetings of the class . . . they serve as role models for the freshmen . . . It is very important for morale if all of the RAs are assigned to UNIV 101 sections and that they all carry out their duties. Could you please work closely with Megan?' On September 4, Dr. Whitmore met with the RA, who said you told her not to come to the class. You did not discuss this situation with Dr. Whitmore, me, or any other supervisor; it was not your place to make this decision. It was made clear to you that morale would be affected if all assistants did not participate. By ignoring Dr. Whitmore's directive in this matter, you have once again undermined the chain of authority and disrupted the work process.

> We will no longer tolerate this disruptive and inappropriate behavior. It is our intention to terminate your employment with West Virginia University. If you wish to provide information that you feel would influence our decision on this matter, you must schedule a meeting . . . .

18. Grievant was subsequently notified by memorandum dated September 12, 2006, that her employment was terminated effective the following day.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *W. Va. Code* §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which is allocated based on the witnesses' opportunity for knowledge, information possessed, and manner of testifying. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). *See Black's Law Dictionary*, 5th ed. at 1064. In other words, "[t]he 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).

WVU asserts that it properly terminated Grievant's employment pursuant to its Human Resources Policy 9, which provides that a non-probationary employee may be dismissed under progressive discipline after the prior issuance of two written warnings for

similar offenses. Grievant argues that she was, in fact, targeted for dismissal as evidenced by a meeting in early April 2006, which included representatives from the Human Resources, Social Justice, and Medical Management departments, and the testimony of a co-worker that Ms. Mayer had directed her to document Grievant's behavior.[2] Grievant further argues that there were no further incidents with Mr. Nguyen of the type addressed in the first disciplinary letter, and the remaining matters were unsubstantiated or minor work complaints.

Grievant's testimony at level four was very nearly the converse of that by Mr. Ngugen. Beginning with their luncheon on February 27, 2005, Grievant states that he expressed a desire for a sexual relationship, and threatened that their friendship would end if she did not agree. She also testified that he shouted at her at work, and became increasingly hostile towards her. She presented a number of witnesses who testified that they had not seen or heard any altercations between the two. Grievant admitted that she did not read Professor Whitmore's e-mails because they had been sent to many people, and she did not think they pertained to her. On cross-examination, Grievant opined that the remainder of WVU's witnesses were dishonest in their testimony.

In a busy office, it is entirely possible that a number of employees did not see or hear any untoward interaction between Grievant and Mr. Ngygen. However, because the testimony of the two primary participants is so diametrically opposed, a determination of credibility is required. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility

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[2]Although mention is made in the record of this meeting, there is no specific information as to why it was held, or what occurred.

determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, 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 Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." *Browning v. Mingo County Bd. of Educ.*, Docket No. 96-29-154 (Sept. 30, 1996).

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 Holmes v. Bd. of Directors/W.Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra.*

As a witness, Mr. Nguyen was soft-spoken, direct, and sincere. He appeared to be genuinely confused by Grievant's behavior towards him. Ms. Vehse and Ms. Mayer, who are very familiar with both Grievant and Mr. Nguyen, believed him to be credible, and had heard comments directly from Grievant regarding Mr. Ngygen's perceived desire to have a personal relationship with her. Finally, it is unrealistic to believe that a gay man would be interested in pursuing a romantic relationship with a woman who can not engage in

sexual activities, and is approximately twenty years his senior. Grievant's representation of the facts regarding that situation are simply not credible.

Although the bulk of charges against Grievant involved Mr. Nguyen, the evidence also establishes that she had engaged in conflicts with other employees such as Mr. Wiles and Professor Whitmore. These encounters interfered with the ability of other employees to complete their work, as well as her own. Grievant's behavior, which she did not correct despite numerous counselings and two letters of warning, constitute insubordination and unsatisfactory performance.

Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). Grievant clearly did not comply with the directives of Ms. Vehse and Ms. Mayer relating to Mr. Nguyen, as her interactions, or attempted interactions, with him were ongoing.

Grievant was also found to have violated the WVU Sexual Harassment Policy which is defines sexual harassment, in part, as

> Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:
>
> * * *

3. Such conduct has the purpose or effect of:

a. unreasonably interfering with an individual's work or educational performance; or

b. creating an intimidating, hostile, or offensive work or educational environment.

Grievant's argument that she was targeted for dismissal prior to her receiving the first written warning, and that no valid progressive discipline had been followed with a sincere intent to correct any deficiencies, is not supported by the evidence. To the contrary, efforts were made over a period of nearly two years to redirect Grievant in a positive manner regarding her duties and coworkers. The first letter of warning placed Grievant on notice that her behavior was unacceptable. The second letter of warning placed her on notice that her behavior was contrary to the Sexual Harassment Policy, and was even more serious than that addressed in the first letter. Still, Grievant failed to correct her inappropriate behavior with various employees. Grievant has not alleged that she suffers from any disability, and it is unclear what she expects WVU to have done to correct her actions.

There is no evidence that anyone at WVU was motivated to dismiss Grievant. To the contrary, efforts were made over an extended period of time, requiring a significant amount of time on the part of Ms. Vehse and Ms. Mayer, to assist Grievant. Unfortunately, it was impossible to correct the situation without Grievant's cooperation.

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. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *W. Va. Code* §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which is allocated based on the witnesses' opportunity for knowledge, information possessed, and manner of testifying. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). *See Black's Law Dictionary*, 5th ed. at 1064. In other words, "[t]he 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).

2. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

3. Grievant's failure to abide by the directives of the first letter of warning constituted insubordination.

4. Grievant acted in violation of the WVU Sexual Harassment Policy which defines sexual harassment to include:

WVU Sexual Harassment Policy which is defines sexual harassment, in part, as

> Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:
>
> * * *
>
> 3. Such conduct has the purpose or effect of:
>
> a. unreasonably interfering with an individual's work or educational performance; or
>
> b. creating an intimidating, hostile, or offensive work or educational environment.

5. WVU properly terminated Grievant's employment after her behavior was not corrected following two letters of warning.

Accordingly, the grievance is **DENIED.**

Any party 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. 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 26, 2007

SUE KELLER
SENIOR ADMINISTRATIVE LAW JUDGE