# WEST VIRGINIA PUBLIC EMPLOYEES

# GRIEVANCE BOARD

**RICHARD CROUSER**

**Grievant,**

**v.** **Docket No. 2008-0982-DOR**

**TAX DEPARTMENT,**

**Respondent.**

## D E C I S I O N

This matter was filed as an expedited grievance at Level three of the grievance process by Grievant Richard W. Crouser, pursuant to W. Va. Code §6C-2-4(a)(4), on December 26, 2007, after he was terminated from his position of Tax Audit Clerk, Senior, with Respondent, West Virginia State Tax Department. Grievant contends he was fired for sexual harassment, but that nothing essential was ever proven, and he feels the firing was arbitrary and capricious. (See footnote 1) Grievant seeks to be reinstated.

A level three hearing was convened in the Public Employees Grievance Board's Charleston office on March 20, 2008. Grievant appeared *pro se* and Respondent was represented by A. M. “Fenway” Pollack, Assistant Attorney General. This case became mature for decision on May 1, 2008, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

## Synopsis

Respondent maintains Grievant's termination was proper. Grievant asserted there was no sexual harassment, that sexual harassment was not proven, and that termination was not warranted for his actions. Grievant had been advised over the course of his employment that certain types of contact

with female employees were unwelcome and unwarranted. Grievant was progressively warned and disciplined for his inappropriate behavior toward female co-workers. Respondent's witnesses were credible and truthful. Respondent established by a preponderance of the evidence that Grievant engaged in a pattern of conduct, which constituted sexual harassment, in violation of applicable Workplace Harassment principles. Grievant's actions created a hostile, intimidating environment for one or more of his fellow employees.

Having carefully reviewed the evidence presented in this case, the undersigned concludes that the charges against Grievant have been proven, and his dismissal should be upheld. Grievance DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact based upon a preponderance of the evidence presented.

## Findings of Fact

1 1. Respondent advises its employees that sexual harassment in the workplace represents a serious matter which will not be tolerated. All employees are required to attend sexual harassment training where the seriousness of these acts is impressed upon them. 2 2. Grievant was employed as an Audit Clerk with the Tax Department of the State of West Virginia from January 5, 1985, through December 14, 2007.

3 3. In October of 2001, Grievant was counseled regarding touching and making suggestive remarks to a female co-worker, Heather Haynes. Grievant's Unit Supervisor, Gail Stricklen, sent a memo outlining such behavior and warned Grievant, “In the future, please be aware of the consequences your actions towards your co-workers may have.”

4 4. On July 17, 2002, Grievant was issued a “Written Reprimand” regarding his behavior toward Heather Haynes.

5 5. Among other pertinent information, the July 17, 2002, written reprimand stated:

> The touching and suggestive remarks have ended; however, you continue to follow Ms. Haynes about the workplace during work time and on breaks, sit in the vacant work station adjacent to Ms. Haynes listening to her telephone conversations, and detour out of your way to pass her work station when conducting work.

6 6. Additionally in the written reprimand, Grievant was warned, “Should additional verified complaints be received alleging inappropriate conduct, further disciplinary action, up to and including suspension or dismissal, will be taken.”

7 7. On July 19, 2002, there was a meeting with Grievant regarding the July 17, 2002, written reprimand. Grievant was advised that the Division of Personnel had advised that Grievant should be suspended for this behavior, but, following the meeting, Respondent decided to give Grievant the opportunity to correct his behavior. 8 8. On April 25, 2006, Grievant attended a training class, *“Preventing Workplace Harassment: It's Not Just about Sex Anymore*,” presented by the Equal Employment Opportunity Office.

9 9. Encounters between Grievant and Jennelle Jones (another female co-worker) began to occur in November of 2007. The two engaged in polite small talk while walking toward the building in the morning and sometimes at lunch or after work. One afternoon, Grievant, who works on the third floor, went up to the fourth floor office of Mrs. Jones to talk. They talked about health food and a juice drink called “Fuze.” The next day, Grievant brought a Fuze to Mrs. Jones' office in the morning. She drank it at lunch and sent him an e-mail thanking him.

10 10. On the morning of November 15, 2007, Grievant called and asked Mrs. Jones if she would like to meet him for lunch. She declined. She later mentioned it to co-workers and they informed Mrs. Jones that Grievant had a history of inappropriate behavior with female employees.

11 11. Mrs. Jones e-mailed Grievant stating, “ I am not going to come down for lunch tomorrow. I am married, and I feel like you are interested in being more than friends. That wouldn't be right. Thanks for the invitation, though. No hard feelings.”

12 12. Later that afternoon, Grievant telephoned Mrs. Jones. He apologized and asked if they could still talk. Mrs. Jones said yes.

13 13. On or about December 6, 2007, Grievant and Mrs. Jones walked into the building about the same time and rode the elevator together alone. When the elevator came to the third floor, Grievant leaned over and hugged Mrs. Jones around the shoulders and wished her a Merry Christmas. 14 14. Mrs. Jones was somewhat disturbed by this encounter. She promptly told fellow employee Heather Kennedy about the unwelcome advance.

15 15. On or about December 11, 2007, Grievant rode up on the elevator with other co-workers and Mrs. Jones. Grievant followed Mrs. Jones back to her office. Mrs. Jones took a

telephone call which lasted more than five minutes. (See footnote 2) After she got off the phone, Mrs. Jones started working. After a few minutes Mrs. Jones told Grievant she had work to do and he got up to leave. He came over and said that he was going to give Mrs. Jones a hug. Mrs. Jones informed Grievant that “I am fine, I don't need one.” Grievant still put his arms around Mrs. Jones as she was sitting in her chair. Mrs. Jones told him “That is enough.” He walked toward the door and said he was sorry, but he just couldn't help himself.

16 16. Heather Kennedy, a co-worker of Mrs. Jones whose work area is in visual and audio proximity, witnessed this advance and independently substantiated Mrs. Jones' account of events.

17 17. Ms. Kennedy specifically overheard Mrs. Jones respond negatively to Grievant's advances. Ms. Kennedy overheard and witnessed Mrs. Jones put forth resistence to Grievant's advances on or about December 11th in Mrs. Jones' office.

18 18. Mrs. Jones became more concerned about Grievant's behavior. Mrs. Jones met with her supervisor, Jan Mudrinich; Grievant's supervisor, Gail Stricklen; and Tom Raynes, and expressed concern about Grievant's actions. After this meeting, a formal investigation was initiated by Deputy Tax Commissioner Craig Griffith. He assigned theTax Department's Equal Employment Opportunity (EEO) Counselors to investigate the matter.

19 19. On December 12, 2007, Mrs. Jones was in the Commissioner's office and noticed Grievant was hanging around the elevators outside the Commissioner's office. He was standing by the card access at the double doors in front of the elevators. He opened the door for Mrs. Jones. She walked past the elevators, and went into the stairwell toward the basement. She went to the ladies room, staying there for approximately five (5) minutes (Mrs. Jones testified she did this to avoid Grievant). Upon her exit, she walked over to the freight elevator again to avoid the Grievant. When she noticed the sign that said “Authorized persons only,” she decided not to take the freight elevator but instead turned to walk out of the corridor back to the main elevators. Mrs. Jones saw Grievant standing behind the freight elevator corridor watching her from behind a door through a crack between the door and wall. She walked by Grievant and he asked Mrs. Jones if she was going to go up. She indicated that she was taking the stairs and went to the staircase on the other side of the vendeteria, and went back up to the office. Mrs. Jones felt terrified that she was being followed by Grievant.

20 20. On December 14, 2007, Warne Dawkins and Linda Coleman, EEO Counselors, met

separately with Mrs. Jones and Grievant.

21 21. Mrs. Jones and Grievant, independently, provided information and details of events and conversations that transpired between the two of them to the EEO Investigators.

22 22. EEO Counselors Dawkins and Coleman submitted a written memorandum to Respondent outlining the results of their investigation. The memorandum was written on the same day that the counselors communicated with the parties. 23 23. The December 14, 2007, EEO Memorandum states that Grievant admitted "[H]e has given [Mrs. Jones] hugs." The memo further reports that Grievant was asked whether Mrs. Jones had informed him that she was not comfortable, or that she didn't want any contact with him.

24 24. After reviewing Grievant's employment history, the EEO memorandum, and consulting with a number of West Virginia State officials, including the Attorney General's Office, the Division of Personnel, and various Division of Revenue personnel, Respondent decided to discharge Grievant.

25 25. Grievant was orally discharged from employment on December 18, 2007. A written discharge letter dated December 20, 2007, was signed by Craig Griffith, Deputy Tax Commissioner, and delivered to Grievant.

26 26. The three-page discharge letter specified Grievant's "continued displays of behaviors which are prohibited by the WV Division of Personnel's Policy regarding workplace harassment." The discharge letter supplied details and rationale for Grievant's dismissal.

27 27. Among other relevant information, the discharge letter of December 20, 2007, states:

- On December 13, 2007 it was brought to my attention that another informal complaint had been filed with your supervisor, Gail Stricklen.

- Upon learning of this, I assigned the Tax Department's Equal Employment Opportunity counselors to investigate the matter.

- Their investigation report substantiated the claims made by the female employee to your supervisor.

These current claims again involve a female Tax Department employee who complains that you made inappropriate and unwelcome advances of a sexual nature, including hugging this employee after shespecifically requested that you not do so.

This conduct occurred after the female employee advised you by an email dated November 15, 2007 that she was married and was not interested in you or your unwelcome gestures. After your inappropriate and unwelcome physical contact with this female employee you continued to position yourself throughout the workplace to ensure further contact with her.

When questioned by Warne Dawkins, EEO Counselor and Linda Coleman, EEO Counselor during their investigation of the allegations, you admitted hugging the complainant in addition to attempting to give her unsolicited gifts and unannounced visits to her office. You offered no explanation for these behaviors other than to state you thought you were the complainant's friend.

Considering that individuals have complained that your behavior is unsolicited, unwelcome, and intimidating, and that these complaints have been substantiated, I believe your behavior has violated the West Virginia Division of Personnel's policy regarding workplace harassment. Since you have failed to respond to direct requests from the complainant that you cease your attempts to come in contact with her, and in light of previous discipline imposed for similar conduct, you left me no choice but to dismiss you.

## Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Davis v. W.Va. Dep't. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992); *Ramey v. W.Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). “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 does not necessarily mean the greater number of witnesses, but the opportunity forknowledge, information possessed, and manner of testifying; [this] determines the weight of the testimony.” *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).

State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also DOP Administrative Rule, 143 CSR 1, Sections 12.2 and 12.3 (July 1, 2007). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982). It is noted Grievant is a long-term state employee as he had been employed for more than twenty years with the Tax Department of the State of West Virginia. It is also noted that Grievant had been admonished for unwelcome behavior toward female employees in the past. This grievance requires a determination whether Respondent proved the facts upon which the dismissal was based. Grievant is accused of sexual harassment. "State employees may be disciplined for sexual harassment where their conduct creates an intimidating, hostile or offensive work environment for one or more employees." *Lough v. Dep't of Health and Human Resources*, Docket No. 99-HHR-323 (Aug. 29, 2000); *Lanham v. Dep't of Transp.*, Docket No. 98-DOH-369 (Dec. 30, 1998). *See Worden v. Dep't of Health and Human Resources*, Docket No. 98-HHR-130 (Jan 29, 1999); *Hall v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997); *Turner v. W. Va. Div. of Highways*, Docket No. 94-DOH-594 (Feb. 27, 1995); *Stonestreet v. W. Va. Dep't of Admin.*, Docket No. 93-ADMN-182 (Nov. 30, 1993). *See also Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

**I. Credibility**

In order to decide whether Respondent has met its burden of proof, it is first necessary to resolve the issue of witness credibility, as testimony of Respondent's witnesses contradicted Grievant's testimony on pertinent issues. Therefore, credibility determinations are required in this case. 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. *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 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*.

Respondent's witnesses did not demonstrate any bias, and the information presented was plausible. Their testimony was internally consistent, consistent with the EEO report, and consistent from witness to witness. Grievant failed to prove any credible motive for these witnesses to lie. While he denied each and every sworn allegation, he did not provide a plausible alternative explanation. In response to the statements made by witnesses Jones and Kennedy regarding the events of December 11, 2007, Grievant's explanation as to why they would fabricate information is that “[T]hey are women and women lie.” Grievant testified contrary to what was stated in the December 14, 2007, EEO report. Investigator Dawkins testified that Grievant admitted to hugging Jones multiple times (more than once,“hugs”). Grievant denies having made this admission and offers no credible explanation as to why the EEO investigators documented this version.

Grievant exhibited a complete lack of credibility when he testified that the reprimand that he received in 2002 was “forgiven” by his Supervisor, Gail Stricklen, peeking her head into his cubicle to tell him. Such pains were taken to memorialize the 2002 reprimand, it only makes sense that equal efforts would be taken to negate those efforts. Further, Grievant adamantly claims that he filed a grievance in 2002 regarding the female co-worker Heather Haynes. No evidence of such grievance could be produced by the Grievant or found to exist in the appropriate files. It is more likely that Grievant has confused events of 2002 with the events in 2004 between himself and another female co-worker, Melanie Whittington. (See footnote 3)

While Grievant has a college education, he is described by his father, who testified at the level

three hearing, as somewhat naive with regard to interpersonal relations. This is not an acceptable explanation for Grievant's behavior. Grievant had been admonished for unwelcome behavior toward female employees in the past. Grievant was or should have been aware that creating an intimidating or offensive work environment for his fellow employees was inappropriate.

Grievant denies hugging Mrs. Jones in the elevator but concedes he may have patted her on the back or shoulder area. Further, Grievant's statement regarding his actions in Mrs. Jones' office is that he patted her on the shoulder. This testimony is in direct contradiction to the sworn testimony of complainant Jones, witness Kennedy, EEOCounselor Dawkins, and the December 14, 2007, EEO Memorandum. Grievant's testimony regarding this issue is inconsistent. Notwithstanding Grievant's ever-changing perception of what constitutes a hug, Grievant physically touched Mrs. Jones more than once (placing his hands and arms on Mrs. Jones' body in a manner which traditionally constitutes a hug). This contact was unwelcome and intimidating. It is never advisable to physically put your hands upon a co-worker without permission or undisputable justifiable cause.

The undersigned Administrative Law Judge finds Grievant's testimony to be implausible, illogical and without credibility. Grievant's recollection of events tends to be askew and at times disturbing. Grievant's demeanor is not consistent. Grievant's recollection of facts and events differs from all other witnesses' perceptions and testimony with regard to crucial matters. Further, Grievant tends to fixate on non-essential matters, while failing to adequately assess his own behavior. Grievant's perception of his relationship with Mrs. Jones is not substantiated by any reliable evidence of record. Grievant's statements regarding his own actions contradict known and undisputable facts. While Grievant may profess his trustworthiness, Grievant's perception of events and his testimony are not credible.

Conversely, the undersigned Administrative Law Judge finds the testimony of Mrs. Jones to be consistent and plausible. There was nothing in her demeanor which indicated she was lying or being untruthful about events that transpired. Mrs. Jones' testimony was credible. Further, the undersigned, who had an opportunity to observe the demeanor of the witnesses and to assess their words and actions during their testimony, determines the testimony of Heather Kennedy, Gail Stricklen, Warne Dawkins and Deputy TaxCommissioner Craig Griffith to be reliable. The statements of these witnesses were consistent with each other, consistent with prior statements, and internally consistent. There was no indication that the witnesses were being untruthful. The demeanor of these witnesses was straightforward, and their testimony was plausible.

## II. Division of Personnel's Prohibited Workplace Harassment Policy

The West Virginia Division of Personnel ("DOP"), which promulgates rules and regulations applicable to all state employees, has in place an Interpretive Bulletin regarding workplace harassment entitled "Prohibited Workplace Harassment." Prior to December 1, 2006 this language was called DOP-P6 Policy and was titled *Sexual Harassment Prohibited*. Historically, (See footnote 4) the stated purpose of the policy has been:

> to provide a work environment free from sexual harassment whereby no employee is subjected to unsolicited and unwelcome 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. (Emphasis Added.)

DOP-P6 *Sexual Harassment Prohibited* Policy (2006)

Of relevance to this case, DOP's Interpretive Bulletin, *Prohibited Workplace Harassment* defines "Sexual Harassment" as:

> A type of illegal harassment which involves any unsolicited and unwelcome sexual advances, requests for sexual favors, or other verbal, written, or physical conduct of a sexual nature when:
>
> 1. Submission to such conduct is made either explicitly or implicitly as a term or condition of an individual's employment,
>
> 2. Submission to or rejection of such conduct is used as the basis for personnel actions affecting an employee, or
>
> 3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. (Emphasis Added.)

Further DOP's definition of "Hostile Environment" provides that harassment “is created where an employee is subject to unwelcome verbal or physical sexual behavior and/or illegal mistreatment that is either severe or pervasive and unreasonably interferes with an individual's work performance.”

The Interpretive Bulletin states that:

> Illegal harassment includes words, conduct, or action, usually repeated or persistent, directed at a specific person which annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose and is prohibited by State and federal anti-discrimination laws.

“Hostile Work Environment Sexual Harassment” encompasses verbal and/or physical conduct which includes, “undesired, intentional touching such as embracing, patting, or pinching.” W. Va. DOP Interpretive Bulletin, *Prohibited Workplace Harassment*; See also *Proklevich v. W. Va. Dep't of Motor Vehicles*, Docket No. 02-DMV-143, (Oct. 11, 2002). While examples of sexually-harassing behavior can be verbal and/or physical conduct, "[o]ther actionable forms of conduct have also been found to evolve from other types of situations which appear normal or harmless but may in fact, constitute sexual harassment." See *Proklevich*, supra., citing DOP-P6 “*Sexual Harassment Prohibited Policy*.”

Once an investigation report has been received by the appointing authority, DOP instructs the agency to review the written report of the findings and take appropriate action within 15 calendar days. The severity of any disciplinary action will be determined by the seriousness of the offense and may include, but is not limited to, the following:

a. a verbal warning documented in writing and placed in an administrative file;

b. a written reprimand that is placed in the employee's file;

c. an employee transfer when warranted;

d. suspension, demotion, and/or termination.

All state employees are expected to comply with all relevant federal, state and local laws; comply with all Division of Personnel and Department policies; follow directives of their superiors; and conduct themselves professionally in the presence of fellow employees and the public. *See Worden*

*v. Dep't of Health and Human Resources*, Docket No. 98- HHR-130 (Jan 29, 1999). Respondent specifically advises its employees that sexual harassment in the workplace represents a serious matter which will not be tolerated.

Grievant contends that his conduct was not sexual harassment because it was not egregious, excessive, and he did not touch the breast or genital area. Grievant's professed, self serving definition of sexual harassment is not persuasive. The actions of Grievant toward Mrs. Jones were unsolicited, unwelcome and intimidating. Grievant inappropriately hugged Mrs. Jones. He repeatedly positioned himself throughout the workplace and surrounding areas to ensure contact with her. Grievant's action in the basement of the Revenue Center, standing behind a freight elevator corridor watching Mrs Jones through a crack was understandably disturbing to Mrs. Jones. Employers have the right to expect employees not to engage in sexual harassment and to follow policies that do not impinge on their health and safety. *Hatfield v. Dep't of Corrections*, Docket 98-CORR-020 (Apr. 30, 1998); *See Scarberry v. Bureau of Employment Programs,* Docket No. 94-BEP-625 (Jan. 31, 1995); *Smith v. Dep't of Corrections*, Docket No. 93-CORR-538 (May 17, 1994).

"State employees may be disciplined for sexual harassment where their conduct creates an intimidating, hostile or offensive work environment for one or more employees." *Proklevich*, supra.*; Lough, supra.; Lanham, supra.; Worden, supra.; Hall, supra.; Turner supra.; Stonestreet, supra.* Grievant was aware that there existed workplace harassment policy, evident by prior disciplinary actions, Grievant's attendance at sexual harassment training class, (e.g.,*"Preventing Workplace Harassment: It's Not Just about Sex Anymore*") and further Grievant was on notice with regard to inappropriate contact with female co- workers. During more than one meeting with superiors and in two of his written disciplinary actions, Grievant was specifically advised that additional verifiable complaints regarding inappropriate conduct of the same or similar nature, would trigger further disciplinary action, up to and including suspension or dismissal.

By a preponderance of the evidence, including reliable witness testimony, exhibits and various applicable rules and regulations, Respondent has demonstrated that Grievant engaged in a pattern of conduct with regard to Mrs. Jones which constituted sexual harassment, in violation of applicable workplace harassment principles. Grievant's actions created an intimidating and/or offensive work environment for his fellow employees. Respondent has proven the charges against Grievant and demonstrated Grievant wasdismissed for "good cause," and that his misconduct was of a substantial

nature, not trivial or inconsequential. *See Oakes, supra*.

**III. Mitigation/Severity of Penalty**

The argument that Grievant's termination is excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.,* Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.,* Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corrections*, Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his judgement for that of the employer. *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).

Although another form of punishment could have been selected, in assessing the above-cited

factors, the undersigned Administrative Law Judge is unable to conclude Respondent abused its substantial discretion in designating the penalty in question. Grievant had received verbal and written reprimands admonishing him for the same or similar type of conduct.

Craig Griffith, Deputy Tax Commissioner, testified the pages of handwritten material his office received from Grievant around the time of Grievant's termination served, in his mind, to verify that Respondent was justified in their determination to discharge Grievant. Commissioner Griffith, along with other adjectives, depicted the six to eight page document as “creepy.” The document provides an unnatural recollection of interaction with Mrs. Jones, including what Mrs. Jones was wearing in detail on dates certain. He noted that thedocument tended to indicate that Grievant had essentially been stalking Mrs. Jones in and around the Tax Revenue Center.

The various incidents of misconduct in this case are of significance and disturbing in nature. Respondent could have chosen to suspend Grievant and place him on an Improvement plan. This they elected not to do. The undersigned Administrative Law Judge does not find the discipline imposed was clearly excessive. Respondent did not abuse its discretion by dismissing Grievant. Employers have the right to expect employees not to engage in sexual harassment and to follow policies that do not impinge on their health and safety. *Hatfield*, *supra*.; *Scarberry, supra*.; *Smith, supra.* The fact that Respondent did not decide to try any longer to correct Grievant's behavior cannot be seen as arbitrary and capricious.

The following conclusions of law are appropriate in this matter.

## Conclusions of Law

28 1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007)*; Davis v. W.Va. Dep't. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992); *Ramey v. W.Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

29 2. “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 bedetermined by the number of the

witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997).

30 3. "State employees may be disciplined for sexual harassment where their conduct creates an intimidating, hostile or offensive work environment for one or more employees." *Lanham v. Dep't of Transp.*, Docket No. 98-DOH-369 (Dec. 30, 1998). *See Worden v. Dep't of Health and Human Resources*, Docket No. 98-HHR-130 (Jan 29, 1999); *Hall v. W. Va. Dep't of Transp.,* Docket No. 96-DOH-433 (Sept. 12, 1997); *Turner v. W. Va. Div. of Highways*, Docket No. 94-DOH-594 (Feb. 27, 1995); *Stonestreet v. W. Va. Dep't of Admin.*, Docket No. 93-ADMN-182 (Nov. 30, 1993). See also *Proklevich v. W. Va. Dep't of Motor Vehicles*, Docket No. 02-DMV-143, (Oct. 11, 2002).

31 4. Respondent established by a preponderance of the evidence that Grievant engaged in sexual harassment in violation of applicable policy regarding *Prohibited Workplace Harassment*. Grievant's conduct created an intimidating and/or offensive work environment for one or more of his fellow employees.

32 5. The argument that discipline is excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). In assessing whether the disciplinaryaction was excessive or disproportionate the undersigned must look at the totality of the circumstances.

33 6. The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

34 7. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances," all

of which must be determined on a case by case basis. *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). Grievant failed to meet his burden of demonstrating the penalty was clearly excessive or reflects an inherent disproportion between the offense and the disciplinary action.

35 8. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his judgment for that of the employer. *Overbee, supra.*

Accordingly, this grievance is **DENIED**.

This Decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of KanawhaCounty within thirty days of receipt of the Decision. This Decision is not automatically stayed pending the outcome of the appeal. W. Va. Code § 6C-2-5 (2007). Neither the West Virginia Public 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 the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board at . 6.20 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County.

**Date:** July 25, 2008

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**Landon R. Brown**

**Administrative Law Judge**

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*Footnote: 1*

*Accompanying the grievance form filed were a number of handwritten pages, but not all of these pages were Grievant's grievance statement. With regard to the pages which were attached, the first two pages came to be identified as part of the grievance form, while the remaining six to eight pages were copies of a correspondence/timeline Grievant provided to Respondent around the time of his termination.*

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*Footnote: 2*

*Mrs. Jones represented to the EEO Investigators and at the level three hearing that she thought Grievant would leave*

*since she was busy, but he didn't.*

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*Footnote: 3*

*In 2004, there had been an e-mail from a different female co-worker, Melanie Whittington regarding alleged conduct of Grievant. This matter did not reach the magnitude of a formal complaint. There was an informal conference with Grievant. In 2004, Grievant filed a grievance associated with the Melanie Whittington situation, but this was not the fact pattern Grievant testified of, insisting he filed a complaint in 2002 with regard to co-worker Heather Haynes.*

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*Footnote: 4*

*West Virginia Division of Personnel Interpretive Bulletin, Prohibited Workplace Harassment, replaced DOP-P6(Sexual Harassment Prohibited) policy effective December 1, 2006.*