THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RICHARD E. ROGERS,

Grievant,

v. **Docket No. 2009-0685-MAPS**

WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY,

Respondents.

DECISION

Grievant Richard E. Rogers was employed as the Chief Correctional Officer, by the Regional Jail and Correctional Facility Authority ("RJCFA"), and assigned to the South Central Regional Jail ("Jail") in Charleston, West Virginia. As the Jail's Chief Correctional Officer, Grievant was classified as a Correctional Officer 5 ("CO 5") and held the rank of Lieutenant. On October 2, 2008, Grievant was suspended from his duties as Lieutenant at the Jail pending an investigation into allegations of sexual harassment. On October 29, 2008, Grievant was demoted to Correctional Officer 3 and the rank of Corporal. He was also transferred to the Western Regional Jail, effective November 14, 2008. These actions were taken due to a finding by Respondent that the allegations of sexual harassment were substantiated. On November 11, 2008, Mr. Rogers filed this grievance, directly to level three,[1] contesting his demotion and transfer, and requesting to "[r]eturn to CO [5] and placement back at South Central Regional Jail, and all backpay and benefits due [him],

[1] W. VA. CODE § 6C-2-4(a)(4) provides that a grievance may be initiated at level three for certain specified issues including demotion of the grievant. In such instances levels one and two are waived.

with interest." A hearing was held on February 9 and 10, 2009, in the Charleston office of the West Virginia Public Employees Grievance Board. Grievant Rogers attended the hearing and was represented by Mary Jo Swartz, Esq. and Mark Swartz, Esq., Swartz Law Offices, PLLC. RJCFA was represented by their General Counsel, Chad M. Cardinal. The parties were given until April 15, 2009, to prepare and mail Proposed Findings of Fact and Conclusions of Law, but the parties subsequently agreed to submit their Proposals by March 20, 2009. This grievance became mature for decision on that date.

Synopsis

Grievant was demoted and transferred from his position of Chief Correctional Officer at the South Central Regional Jail. Respondent alleges that Grievant made inappropriate comments to female subordinates that violated agency policy and created a hostile work environment. Grievant denies making most of the comments, avers that the allegations were unsubstantiated and argues that any comments that were made were innocent and misconstrued. He further implies that the main complainant exhibited ribald behavior indicating that she would not be offended by suggestive comments if Grievant did make them.

Respondent proved that Grievant made inappropriate comments to female subordinates that violated agency policy and contributed to a hostile workplace. While the penalty was severe, it was not disproportionate with the offense given Grievant's supervisory position, and the grievance is denied.

The following findings of fact are based upon a thorough review of the record created at the level three hearing.

Findings of Fact

1. Grievant Rogers has been employed as a Correctional Officer ("CO") by the RJCFA since July 8, 1993. The entire time he has served as a CO, Grievant has been assigned to the South Central Regional Jail.

2. Since 2003, Grievant has been the Chief Correctional Officer of the Jail with the rank of Lieutenant and the classification of CO 5.

3. Throughout his career as a CO, Grievant has received excellent performance evaluations and he has risen through the ranks to the position of the highest security officer at the Jail. His only supervisor at the Jail level was John McKay, who is the Administrator of the South Central Regional Jail.

4. On September 18, 2008, Dianna C. Seymour, a CO 2 at the Jail, filed an EEO[2] complaint against Grievant alleging that he had made "[m]any obscene coments [sic] about/toward [her] dress, or circumstances [she] could not prevent." The complaint was made to First Sergeant, Mark Jarrett, who was the EEO officer at the Jail at that time.

5. Enigmatically, news that there were complaints of inappropriate comments being made by Grievant came to the attention of the Executive Director of the RJCFA, Terry L. Miller. Mr. Miller asked Donald Raynes to investigate these allegations. Donald Raynes has been the acting director of the West Virginia Governor's Office of Equal

[2] EEO stands for Equal Employment Opportunity. In this instance, it refers to an agency complaint procedure for reporting allegations of workplace discrimination by state employers.

Employment Opportunity since March 2008.[3]

6. During the week of September 22 through 26, 2008, Mr. Raynes and a second investigator,[4] Heather Kennedy, interviewed a number of employees at the Jail as part of an investigation regarding the allegations against Grievant.

7. On September 29, 2008, Mr. Raynes gave a written report to the RJCFA Executive Director Miller and the RJCFA Deputy Director, Cedric Greene.[5] Mr. Raynes concluded, among other things, that Grievant had "made inappropriate comments to female employees" of the Jail. He also concluded that Grievant knew of inappropriate conduct by other officers and did not act on that conduct.[6]

8. In his report,[7] Mr. Raynes made the following recommendations:

- Take immediate action to correct and prevent further inappropriate behavior;
- Train all RJCFA employees on EEO procedures; and
- Any other disciplinary actions the RJCFA deems appropriate.

9. On October 2, 2008, Deputy Director Greene provided Grievant with a letter suspending him without pay pursuant to West Virginia Department of Personnel

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[3] This office was created to establish an equal employment opportunity program for all state agencies and state employees. Mr. Raynes has been investigating similar complaints for state agencies for the past thirteen years.

[4] In cases involving allegations of sexual harassment the State EEO Office makes it a practice to have two investigators, one male and one female, participate in the interviews.

[5] Cedric Greene took an active management role in this matter. He has since left the RJCFA and is employed as the West Virginia Deputy Secretary of State.

[6] Mr. Raynes would not make a finding that sexual harassment had taken place. He felt that was a legal conclusion and his responsibility was limited to investigating and reporting facts.

[7] Respondent's Exhibit 1.

Administrative Rule 143 C.S.R. 1 § 12.3 (2007), while the RJCFA conducted an investigation into "the allegations of possible inappropriate behaviors resulting in a hostile work environment, while conducting business at the South Central Regional Jail."

10. Subsequent to Grievant's suspension, Paul O'Dell, Investigator for the RJCFA, conducted an investigation into the allegations made against Grievant.[8]

11. After Investigator O'Dell finished his investigation, Respondent engaged the services of James Wells to consult with them regarding appropriate personnel actions to be taken as a result of the investigation. James Wells is a private consultant for human relations issues. He has previously worked in state government for thirty-three years, the last seventeen of which he was in management positions in the Division of Personnel.

12. Mr. Wells reviewed the reports of Raynes and O'Dell, including the transcripts of all the interviews, Grievant's personnel file and held discussions with the RJCFA authorities and Mr. Raynes. He concluded that Grievant had made inappropriate comments to three female officers under his supervision. Wells referred to the West Virginia Division of Personnel Interpretive Bulletin titled *Prohibited Workplace Harassment* ("DOP's Harassment Bulletin") and concluded that Grievant's behavior did not rise to the level of "Illegal Harassment" but did constitute a "Hostile Environment."

13. On October 28, 2008, Grievant met with Deputy Director Greene and Paul O'Dell for a predetermination conference. At the conference the allegations of

[8] Investigator O'Dell issued a report regarding his investigation which was referred to occasionally by some of the witnesses. However, O'Dell did not appear as a witness and his report was not introduced as evidence. It became apparent at the hearing that the O'Dell report was not supplied to counsel for Grievant prior to the hearing as part of discovery. The undersigned offered to order production of the report and leave the record open for evidence related to it. All of the parties declined this offer.

inappropriate comments were discussed with Grievant and he was given an opportunity to respond to the allegations. Respondent's Exhibit 3.

14. On October 29, 2008, Deputy Director Greene provided Grievant with a letter in which Grievant was demoted from his position as CO 5 at pay grade thirteen to the position of CO 3 at pay grade eleven.[9] This constituted a reduction in monthly salary of $520.00. Grievant was also transferred from the South Central Regional Jail, near Charleston, West Virginia, to the Western Regional Jail, near Barboursville, West Virginia.[10]

15. The reasons cited for the demotion and transfer were violations of two specified RJCFA Policies:

- *Procedure Statement Document #3041 (Sexual Harassment)*: By conduct that "has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
- *Procedure Statement Document # 3010 (16):* By on duty conduct that does not reflect positively upon the Authority and its employees.
- *Procedure Statement Document # 3010 (19):* By on duty conduct which would not earn the public trust and confidence inherent in his position and which brings discredit to his position as well as the Authority.
- *Procedure Statement Document # 3010 (33):* By violating a prime factor in maintaining order, control and good discipline in the facility by failing to maintain a professional demeanor with employees.

16. Upon being demoted and transferred, Grievant was reimbursed for all wages he lost as a result of being suspended without pay while the investigation was being conducted by O'Dell.

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[9] Grievant's rank was reduced from a Lieutenant to a Corporal.

[10] The two jails are forty-nine miles apart.

17. Hillary Kinder is employed at the Jail and had been working there for approximately four months when she was interviewed by Raynes and Kennedy. During her employment at the Jail, prior to the interview, Grievant had made a couple of unnecessary sexual comments to her. Specifically, when Kinder stated that she had worked her butt[11] off, Grievant made a point of looking at her behind and saying "I don't think you have."

18. CO 2 Seymour regularly works the night shift at the Jail and Grievant worked the day shift. Usually, Seymour encountered Grievant as she was leaving the Jail after her shift. Seymour dropped the mail off near Grievant's office and occasionally stopped in his office and asked him if he liked her hair or how she looked. Witnesses indicated that Seymour regularly sought Grievant out before she left the Jail and described this behavior as flirtatious.

19. On one occasion Seymour stopped by Grievant's office as she was leaving the Jail. She was wearing a halter top. Grievant told her that by wearing a shirt like the one she had on, she could get anything she wanted at the Jail.

20. On or about September 8, 2008, CO 2 Seymour was working the night shift at the Jail. She was instructed to give a prospective employee a partial tour of the facility so he could see what it was like at the Jail before he applied. Seymour had the civilian with her in her post in the tower for what was supposed to be a half hour. Seymour's replacement was late so she and the civilian had to remain in the tower for over an hour.

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[11]The undersigned recognizes that this, and other terms used herein, may be offensive to some readers. However, the use of these words is necessary since euphemisms will not accurately reflect the testimony.

Seymour took the prospective employee to Grievant's office before she left. Grievant asked the civilian if he learned anything or was it a "don't ask, don't tell type of thing, behind closed doors?"[12] Seymour stated that this comment humiliated her because she felt Grievant was implying that she had sex in the tower with a stranger.

21. On the same morning, after CO 2 Seymour had changed out of her uniform and was preparing to leave, she again stopped by Grievant's office to show him the motorcycle tee-shirt she was wearing. It was a Harley Davidson tee-shirt from Alaska and she knew Grievant was interested in motorcycles. Seymour turned her back and moved her hair so Grievant could read the written message about where the shirt was from. When Seymour turned around and Grievant asked "Where'd it come from?" Seymour responded "You just looked at it." Grievant replied "Well, I didn't read it."[13] Seymour was offended by this exchange because she believed that Grievant was looking at her butt and not her shirt.

22. Seymour came to Grievant's office because she was upset about an evaluation she received from her Sergeant that she felt was inaccurate and unfair. While talking to Grievant she became agitated and began to cry. Grievant told Seymour to quit crying and said "I wish I could hug you and make it go away, but we're going to have to speak to your Sergeant." Seymour stated that this made her feel uncomfortable. Grievant's Exhibit 3.

23. On a day, when all the officers were present in the lunchroom after a shake

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[12] The exact words spoken by Grievant were not always consistently reported but they always included the elements "don't ask, don't tell' and "behind closed doors".

[13] Grievant's Exhibit 3, statement of Grievant taken by Raynes and Kennedy.

down, Grievant saw Seymour standing near the pop machine. A male officer was seated in front of her and was leaning his head against her chest. Later that day, when Seymour was in his office, Grievant counseled Seymour that such displays of affection should not take place in the Jail. He mentioned the incident to the First Sergeant for him to record in his critique book.[14] Grievant did not speak to the male officer about this incident.

24. A male officer brought a cell phone into the Jail which had a picture of Seymour taken at a party outside work where other COs employed at the Jail were present. In the picture, Seymour had raised up her shirt to prove that her nipples were pierced and a couple of males took that opportunity to fondle her breasts. The officer showed the picture to other male employees in the Jail. Grievant became aware of this incident but did not take action because he feared it would be viewed as taking retaliatory action against Seymour for filing the EEO complaint against him. Grievant's Exhibit 3.

25. Officer Leonard is a CO at the Jail. On one occasion he was in the control room with Seymour and another officer. He accidently bumped into Seymour and his face turned red. The other officers laughed and CO 2 Seymour backed her butt up against Leonard. He told Seymour to stop and she moved away from him.

26. Bobbie Queen is a CO 2 at the Jail and has been a CO there for about eighteen months. At one point Grievant told Queen that she looked tired. When she responded that she was tired Grievant suggested that she could crawl under his desk to rest but he didn't know how much sleep she would get. This remark made Queen angry

[14] A critique book is where the supervisor keeps notes on daily performance to utilize in preparing performance evaluations for subordinates. Grievant stressed to the investigators that he did not write Seymour up over this incident or recommend disciplinary action be taken.

because she felt that Grievant was insinuating that she should perform oral sex with him.

27. On another occasion Grievant looked at CO 2 Queen and said "I'd like to spank that ass."

28. On several occasions, Grievant asked CO 2 Queen to come to his house for beer when Grievant's wife was not home. Queen felt that these invitations were for much more than a friendly beer and was frustrated when they continued after she kept declining them.

29. Queen testified that Grievant regularly made comments that insinuated sex to her when no one else could hear them. The comments were not overtly sexual but were charged with innuendo. Grievant's behavior made CO 2 Queen very tense. She told Grievant that she did not appreciate his comments but he did not stop making them until Queen started dating CO Steele who is a friend of Grievants.

30. Approximately a month before CO 2 Seymour filed her EEO complaint against Grievant, Sergeant Binion heard rumors that Grievant had made inappropriate comments to Officer Queen. Binion asked Queen about the rumors and she told him that Grievant had asked her out and had "said something about her butt."[15] Binion did not report the incidents because Queen insisted that she did not want him to.

31. Officer Timothy Thompson was Officer Queens training officer when she started as a CO at the Jail. CO 2 Queen talked to him about Grievant's actions and comments being "a little too friendly" which made her uncomfortable. Officer Thompson took no action regarding Queen's comments to him.

[15] Testimony of Sargent Binion at the level three hearing.

32. Officer Thompson stated that Grievant always had the ability to say things that made him laugh. At or before roll call, or in the lunch room, Grievant made comments that could be taken more than one way. Thompson noted that if you had a dirty mind you could take the comment one way, but you could take it another way too. Thompson stated that Grievant was "real witty in what he had to say."[16]

33. John McKay has been the Administrator of the Jail since 2003. Prior to that time, he was the Jail's Chief Correctional Officer for nine years. McKay has been Grievant's immediate supervisor during that time and has worked with Grievant for twenty years. McKay has never heard Grievant make a comment that he felt was sexually harassing. McKay has however, coached Grievant over the years about making comments that were inappropriate given Grievant's management position. He stated that Grievant needed to be more "politically correct and conservative" in his comments.[17]

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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."

[16] Testimony of Officer Thompson at the level three hearing.

[17] Testimony of Administrator McKay at the level three hearing. McKay would not be more specific about any comments he had coached Grievant about making.

Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Hostile Environment

Respondent determined that Grievant's behavior violated two RJCFA policies. The first was Policy and Procedure Statement # 3041 ("Policy # 3041") related to Sexual Harassment. As quoted in the discipline letter sent to Grievant that policy states in part:

> **Sexual harassment:** is a form of discrimination under Title VII of the Civil Rights Act of 1964 and is in violation of federal and State EEO policies. It is therefore, in the interest of the Authority to provide a work environment free from sexual harassment whereby no employee is unreasonably subjected to unsolicited and unwelcome sexual overtures or conduct, either verbal or physical. Sexual harassment will not be tolerated in the work place and is prohibited by law where: . . . (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.[18] Conduct of this nature will result in appropriate disciplinary action which may include dismissal.

Policy #3041 lists several examples of behavior that constitute sexual harassment including:

- Unsolicited sexually explicit or **implicit** proposals.
- Repeated sexually explicit or **implicit** comments or obscene and suggestive remarks that are objectionable or discomforting to an employee.

(Emphasis added) Policy # 3041.

[18] Areas (1) and (2) left out of this quoted section of the Policy deal with what is commonly referred to as *quid pro quo* sexual harassment. In those situations the supervisor promises work place rewards for compliance with sexual demands or threatens punishment for noncompliance. This type of harassment is not alleged in this case. In the discipline letter provided to Grievant, area (3) was highlighted in bold indicating that Grievant was accused of creating a hostile environment.

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment.[19] *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13,1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81,118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris,* supra); These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris,* supra at p.23. "The hostility *vel non* of a workplace does not depend on any particular kind of conduct; indeed, '[a] worker need not be propositioned, touched offensively, or harassed by sexual innuendo in order to have been sexually harassed.' *Quick v. Donaldson Co.,* 90 F.3d. 1372, 1379 (8th Cir. 1996)." *Billings v. Town of Grafton*, 515 F. 3d 39 (1st Cir. 2008).

In the recent *Billings* case the First Circuit Court of Appeals examined a set of facts where a supervisor was accused of staring at a subordinates breasts while talking to her. This conduct made the employee uncomfortable. She would hold a paper in front of her chest when talking to her boss and on at least one occasion went home and changed out

[19] The courts are generally interpreting the Federal Civil Rights Act or the West Virginia Human Rights Act in their decisions. In this case, we are interpreting a hostile environment under the RJCFA's Policy # 3041. However, the policy makes reference to the Civil Rights Act so the federal and state court cases provide significant guidance for this issue.

of a sweater into something more loose. On one occasion, when a co-worker was looking for the subordinate, the supervisor said that she was under his desk. All involved felt that the supervisor was making an implication regarding oral sex. The *Billings* Court found that this conduct alone was sufficient to require sending a claim for hostile work environment to the jury.

In this grievance, the behavior of Grievant meets the objective standard for a hostile work environment. It is true that Grievant made very few explicit sexual remarks. The one that leaves little to the imagination was when he told Officer Queen that he would like to spank her ass. However, there was ample evidence that sexually implicit propositions, comments and suggestive remarks were made by Grievant. He repeatedly asked CO Queen to come to his house for beer even after she refused his invitations. Much like in *Billings*, Grievant's comment to Queen about crawling under his desk is a sexual innuendo with the thinnest of veils. Queen was uncomfortable with Grievant's comments and talked to her training officer Timothy Thompson to no avail. More than a month prior to when the complaint was made by Officer Seymour, Sergeant Binion sought Queen out because he had heard rumors that she was upset by Grievant's behavior. Queen told Binion that Grievant was behaving inappropriately toward her and it bothered her but she didn't want to file a formal complaint.

Grievant's statement toward Hillary Kinder about her not "working her butt off" may not be considered a sexual comment in isolation. However, she told the investigators that this was only one example of similar comments he had made to her and that "most of the female employees have had some problems with him." Respondent's Exhibit 9, Statement of Hillary Kinder.

The testimony of Officer Timothy Thompson was revealing. He stated that Grievant often made "funny" remarks before and during roll call and in the lunchroom. He noted that these comments could be taken as "dirty" if you had a "dirty mind" but they could be taken another way too. Of course this type of behavior is the very reason that sexual harassment policies prohibit implicit sexual comments. It prevents supervisors from masking offensive behavior in double entendres. Administrator McKay also testified that he had coached Grievant about making comments that were not appropriate for his position. McKay would not elaborate about these comments, except to say that he did not believe them to be sexually harassing.

In his own words, Grievant told investigator Raynes that he might have told Officer Seymour that he wished he could hug her and make her evaluation problems go away. His "don't ask, don't tell" comment about Seymour and the civilian "behind closed doors" was an implicitly suggestive remark. So too was the comment regarding her being able to get anything she wanted at the Jail if she wore her halter top at the Jail. It is also problematic that he counseled Seymour about the incident in the lunchroom with a male co-worker but did not speak to the male officer involved. Additionally, some of the male officers in the Jail were sharing a picture of Officer Seymour in which she was naked from the waist up and no action was taken about this until after she filed her complaint.

A great deal of Grievant's case was to demonstrate that Officer Seymour was not likely offended by sexual innuendo coming from Grievant because she was flirtatious with Grievant and other male officers to the point of baring her breasts at a party where male COs from the Jail were in attendance. In particular, on the day that she was supposedly infuriated with Grievant for implying that she had sex with a visitor that she did not know,

she stopped by his office minutes later to show him a tee-shirt.

Courts have recognized that a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. *Faragher v. City of Boca Raton,* 524 U.S. 775, 787, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). There is some question as to whether, given the full scope of her conduct, Officer Seymour was truly offended by Grievant's behavior or his unwillingness to help her with her evaluation. If her complaints were isolated, there might be some question as to whether Respondent was able to prove that Grievant's behavior was "subjectively" offensive to her. However, that is not the case. His inappropriate comments were extended to other female officers in the Jail who clearly found them offensive and embarrassing. What is more important, his actions toward Officer Queen made her job very stressful and had a negative impact on her job performance. Clearly, she and Ms. Kinder found his comments to be subjectively offensive and a reasonable person would find his inappropriate comments made to all the women offensive as well.

Grievant also notes that the investigation was limited to women who actually complained about Grievant's behavior, which was apparently three out of twelve to fifteen. In fact, three women who are employed at the Jail and have worked with Grievant, testified that he had never made sexually harassing comments to them. Grievant asserts that to determine if the work place was truly hostile, the investigators should have interviewed all the female employees. However, it is not required that several women in the facility be harassed to create a hostile environment. The West Virginia Supreme Court has stated that the fact that no other women in the workplace had complained would not preclude an

individual employee's sexual harassment claim. "Women may become sexual harassment targets for a variety of factors--e.g., their age, personality, vulnerability, demeanor, physical appearance, or the proclivities of their harassers." *Conrad v. ARA Szabo*,198 W.Va. 362, 480 S.E.2d 801 at 811 (W.Va. 1996). While it may have been more thorough for the investigator's to question all of the female employees at the Jail, there were sufficient complaints to find a hostile environment among the women questioned. The fact that not all the women employed at the Jail found the work place hostile does not diminish the complaints of those who did. *Id.*

Credibility

When Grievant was interviewed by Raynes and Kennedy, he denied making many of the inappropriate comments that were alleged by the female employees. The women admit that most of the comments were made when no one could hear them but Grievant and the employee. Grievant avers that since the comments were not substantiated by others, Respondent has failed to meet the burden of proof. The Grievance Board has held that "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998). However, that does not mean that every allegation must be confirmed by corroborating testimony. If that were the case, supervisors would be able to threaten and coerce subordinates at will as long as they were able to do so out of the presence of others.

There is sufficient evidence to substantiate Respondent's allegation that a hostile work environment was present at the Jail. The testimony of the female employees differed

on specific incidents, but was consistent with regard to the nature of Grievant's comments. Grievant made sexually charged innuendos to each of them on separate occasions. Additionally, Officers Binion and Thomas both confirmed that Officer Queen complained about the comments of Grievant at least a month prior to the first formal complaint of Seymour. Even McKay, an obvious supporter of Grievant, admitted that he had to counsel Grievant regarding his "politically incorrect" comments.

When witnesses differ in their versions of the facts, a credibility determination is appropriate. 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*.

No inferences can be drawn from the fact that Grievant chose not to testify at the level three hearing[20] and it has no bearing on the credibility of his prior statements. With regard to his prior statements, avoidance of discipline is certainly a motive for denying the allegations of the female employees. Additionally, it seems implausible that the women and some male employees would report that Grievant made inappropriate statements in separate interviews if no statements were made.

[20] W. VA. CODE § 6C-2-3(g)(2) provides that a grievant may not be compelled to testify against himself in a disciplinary hearing.

Officer Seymour was evasive in her answer to questions from Grievant's counsel. She frequently made long explanations before providing a direct answer to questions. She too had a motive for embellishing her accusations against Grievant. She had previous discipline problems at the Jail and it appeared that Grievant was not going to intervene with her evaluation concerns.

On the other hand, Officer Queen was straight forward and direct in her testimony. She seemed somewhat angry about the entire process but that is understandable, if not natural, under the circumstances. She was reluctant to come forward with the allegations and did not have any motive for falsely accusing Grievant of making inappropriate comments and suggestive remarks to her. Being a relatively new employee, she did not want to cross the Lieutenant in charge of the Jail. Her testimony at the hearing was consistent with her prior statements and while not identical to the allegations made by Seymour and Kinder, hers were consistent in character to the allegations made by the other women. The testimony of Officer Queen was credible and added credibility to the allegations of Officer Seymour.

Given the totality of the evidence, Respondent proved by a preponderance of the evidence that Grievant created a hostile work environment at the Jail for a number of female correctional officers in violation of RJCFA's Policy #3041.

Policy # 3010

Policy # 3010 consists of more general requirements of expected behavior than Policy # 3040 which relates to sexual harassment. Having found that Grievant's inappropriate conduct created a hostile environment, it is obvious that Respondent also proved that Grievant's conduct did "not reflect positively on the Authority" or "earn public

trust and confidence." Clearly, Grievant failed to maintain a professional demeanor with employees at the Jail. Even Officer Thompson commented on Grievant's regular use of double entendres and Administrator McKay found it necessary to coach Grievant regarding his statements that were not appropriate for someone in his position. Respondent proved that Grievant also violated the general provisions of Policy #3010 and that discipline was appropriate.

Mitigation

Finally, Grievant propounds that the penalty for the alleged misconduct was disproportionate to his actions given his many successful years of service as a Correctional Officer. "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) (citations omitted). 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).

Grievant was transferred to a different correctional facility and demoted from a CO 5 to a CO 3. This is certainly a stiff penalty for someone who has successfully risen

through the ranks to the position of the Chief Correctional Officer at the Jail through years of service. Respondent argues that Grievant's successful service was taken into consideration when he was demoted and not dismissed. James Wells testified that he has been involved in many cases where a state employee was accused of creating a hostile environment and the penalty in this case is in line with his experience.[21] Additionally, leaving Grievant in the position of supervisor over the employees he allegedly harassed would open the RJCFA to the possibility of significant civil liability.[22] Transferring Grievant to a different facility was a responsible action. Similarly, demoting Grievant so he would not be in charge of other female COs in a different facility was also a responsible action. That is not to say that Grievant should never be in a supervisory position again. Both Wells and Deputy Director Greene testified that Grievant was demoted, but not dismissed, to give him a chance to rehabilitate his career. Given the serious nature of the charges, the penalty is not so disproportionate with the conduct as to warrant mitigation.

For the reasons set out herein the Grievance is denied.

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. Procedural Rules of the W. Va. Public Employees

[21] Based upon his experience, Wells originally recommended that Grievant's employment be terminated.

[22] The following cases discuss the necessity for an employer to take prompt and effective action to end harassment when faced with such allegations in the workplace: *Fairmont Specialty Services v. West Virginia Human Rights Comm'n*, 206 W.Va. 86, 522 S.E.2d 180 (1999); *Snell v. Suffolk County*, 782 F.2d 1094, 1104 (2nd Cir.1986); *DeGrace v. Rumsfeld*, 614 F.2d 796 (1st Cir.1980).

Grievance Board, 156 C.S.R. 1 § 3 (2008); *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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81,118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris,* supra); These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, supra* at p.23.

3. A sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. *Faragher v. City of Boca Raton,* 524 U.S. 775, 787, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

4. Respondent proved by a preponderance of the evidence that Grievant's behavior created an environment that was hostile subjectively to female employees who were subject to it. Respondent also proved by a preponderance of the evidence that the

behavior of the Grievance was sufficiently inappropriate to be considered abusive by a reasonable person in the position of the complaining employees. Thereby, Respondent proved by a preponderance of the evidence that Grievant violated RJCFA Policy # 3041 related to Sexual Harassment.

5. Respondent proved by a preponderance of the evidence that Grievant violated RJCFA Policy # 3010 regarding inappropriate conduct of an employee of the Jail.

6. "[M]itigation 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).

7. The punishment imposed by Respondent was not so disproportionate to Grievant's conduct as to indicate an abuse of discretion. Mitigation of the punishment is not appropriate in this grievance.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: April 23, 2009.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE