THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRETT ANTHONY HORTON,

Grievant,

v. **DOCKET NO. 2009-1381-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Brett Anthony Horton ("Grievant") challenges the decision of Respondent Department of Transportation/Division of Highways ("DOH"), to dismiss him from his employment. The March 30, 2009, "Statement of Grievance" provides as follows: "[t]erminated for misconduct." As relief, the Grievant seeks to be reinstated with back pay.[1]

As this grievance is disciplinary in nature, Grievant filed directly to Level Three. W.VA. CODE § 6C-2-4(a)(4). A Level Three hearing was held on May 27, 2009, in Charleston, West Virginia, before the undersigned Administrative Law Judge ("ALJ"). Grievant appeared pro se. Respondent appeared by and through its counsel Timbera C. Wilcox. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 15, 2009.

Synopsis

Grievant was employed by DOH as a permanent Accountant Auditor 2. After working for DOH for approximately one month, Grievant was dismissed. Grievant asked

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[1] The "Relief Sought" portion of the grievance form was left blank. At the Level Three hearing, Grievant made clear the specific relief he sought.

several other employees for a controlled substance, Lortab. Further, Grievant created a hostile work environment for female employees. He made statements inferring that he would get an erection if he continued to look at pictures of Dolly Parton in the workplace. He grabbed a female coworker from behind and made her very uncomfortable. He told this same coworker that when he left his wife he would look her up, and "older women have needs."

Grievant argues that DOH has not proven the charges against him and that progressive discipline was not followed. DOH maintains that Grievant violated policies related to drugs in the workplace and workplace harassment, and the infractions were serious in nature.

Respondent has met its burden of proving the Grievant attempted to obtain a controlled substance from various employees and created a hostile work environment. DOH did not violate its progressive discipline policy. Mitigation is inappropriate in light of the totality of the circumstances. Accordingly, this grievance is **DENIED**.

The following findings of fact are based upon a thorough review of the record produced in this matter:

Findings of Fact

1. Grievant was interviewed for the position of Accountant Auditor 2 with DOH. He was offered the position and began working for the DOH as a full time, permanent employee on or about February 2, 2009.[2]

2. Grievant's job duties included being in charge of the entire invoicing process for

[2] Grievant had previously been employed by the State of West Virginia for eight years. However, his employment was not with the Respondent.

the Accounts Receivable Section as well as acting as the Assistant Supervisor of the Accounts Receivable Section. In the event that the Supervisor of the Accounts Receivable Section was off work for any reason, Grievant would have been tasked with operating in her capacity in her absence, i.e. Grievant would be the Acting Supervisor. Level Three, Testimony of Martha Gibson.

3. Grievant reviewed and signed the *Drug- and Alcohol-Free Workplace Policy* Acknowledgment. Level Three, Respondent's Exhibit 2; Testimony of Jeff Black.

4. During March of 2009, Grievant had a prescription for Lortab. Lortab is classified as a Schedule III controlled substance under West Virginia's Controlled Substance Act. *See* W.VA. CODE § 60A-2-208(b)(6).

Lortab incidents

5. On or about March 4, 2009, Grievant followed Bruce Miller, a DOH employee, into the hall and asked him if he would come back to Grievant's cubicle. Mr. Miller, who was just back to work after knee surgery said "no," that he had to go back to work as he had been out for two weeks. Grievant asked Mr. Miller if he could go back to his office with him and Mr. Miller said "yes." Grievant proceeded to get on the elevator with Mr. Miller. Upon exiting the elevator on the fifth floor, Grievant inquired of Mr. Miller as to whether he had an office or a cubicle. Mr. Miller stated that he had a cubicle and that everything said within the cubicle could be overheard by other employees. Grievant and Mr. Miller then stood in the hall outside of the Traffic Engineering Division. Thereafter, Grievant asked Mr. Miller if he could "borrow" some of his Lortabs. Mr. Miller said "no" and stated that he only had about five left and he intended to save them in case he needed them. Level Three, Testimony of Bruce Miller.

6. On the same day, March 4, 2009, Michael Bradley, an employee of the DOH's Finance Division, was approached by Grievant and asked if he had anything for a bad headache. Mr. Bradley replied that all he had was ibuprofen. Thereafter, Grievant asked Mr. Bradley if he could bring some Lortabs from home after which Mr. Bradley replied "no" that he did not have any at home.

7. Later that afternoon, Jerry Hubbard overheard Grievant on the telephone talking to someone and trying to obtain Lortab. Grievant told the individual on the telephone that he would meet him outside of the building if need be and money was not an object as he had $3,000 cash. Level Three, Testimony of Jerry Hubbard.[3]

8. During the first week of March, 2009, Mr. Hubbard returned from having a stent placed in his heart. Grievant asked Mr. Hubbard for some of his pain medication from when they "popped [him] open." Mr. Hubbard replied that "they didn't pop [him] open and that he didn't have any pain medication." *Id*.

Hostile work environment incidents

9. On Grievant's second day of work, February 3, 2009, Martha Gibson, Grievant's supervisor, was talking to Grievant and another employee of the Finance Division, Jim Hash, when Grievant noticed that Mr. Hash had pictures of Dolly Parton. Mr. Horton told Mr. Hash that he too was a fan, and the two began to discuss their mutual admiration for Dolly Parton. Thereafter, Grievant said that "his pants were getting too tight" because they

[3] Mr. Hubbard specifically heard Grievant say that he wanted "45 white pills and 20 blue ones."

were discussing Dolly Parton and that they had better stop.[4] Ms. Gibson was "flabbergasted" by this comment.

10. During February and March of 2009, Grievant had occasion to interact with Samuel Curia, a temporary employee of the Payroll Division. Mr. Curia was talking with a coworker, Butch Pauley, in the Finance Division when they were approached by Grievant. Grievant joined the conversation and asked Mr. Curia how old he was. Mr. Curia replied that he was 23, and Grievant then said that "his [Mr. Curia's] balls probably haven't dropped yet." This comment was upsetting to Mr. Curia and he was very embarrassed by it. On another occasion, Mr. Curia was talking to Mr. Bradley in the Finance Division when he was approached by Grievant who called Mr. Curia a "pervert" and then said to Mr. Curia that he "saw the mirror [he] had on [his] shoe looking up women's skirts." Mr. Curia was very uncomfortable and embarrassed by these comments and testified that they created an offensive work environment. Level Three, Testimony of Samuel Curia.

11. On February 27, 2009, Grievant had occasion to interact with Sallie Barnett, the Audit Supervisor with the Auditing Division. On that day, Ms. Barnett had come to Ms. Gibson's office to eat lunch as Ms. Gibson and Ms. Barnett are friends. Grievant came into the office where they were eating and began flexing his chest muscles after which he stated that he "was moving his titties." Ms. Barnett was embarrassed and made uncomfortable by this comment.

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[4] Grievant testified that he has low testosterone levels and erectile dysfunction, and therefore he would not have made this statement. Level Three, Testimony of Brett Anthony Horton; Grievant's Exhibit 1. The issue is not whether the statement is true, but whether the statement was made. There is no causal relationship between erectile dysfunction and the ability to talk about achieving an erection.

12. On March 5, 2009, Ms. Barnett again came to Ms. Gibson's office for lunch. Ms. Gibson was finishing up a meeting so Ms. Barnett stood outside her office waiting for the meeting to conclude when she was approached by Grievant and engaged in conversation. During the conversation, Grievant told Ms. Barnett how strong he was and asked her to "feel his biceps." Ms. Barnett told Grievant that it "wasn't necessary." Grievant continued to ask Ms. Barnett to feel his biceps until she felt she had no choice but to do so. Ms. Barnett was made very uncomfortable by this encounter with Grievant and felt "trapped" by him. Level Three, Testimony of Sallie Barnett.

13. On yet another occasion, Ms. Barnett, who has an elderly father, failed to reach her father on the telephone after repeated attempts to do so, which was unusual. Consequently, she went to Ms. Gibson's office to ask Ms. Gibson to accompany her to her father's home to check on him as she was very worried about him. At that time, Ms. Barnett was approached by Grievant, who repeatedly attempted to hug her. Ms. Barnett attempted to prevent Grievant from hugging her. Grievant would not leave her alone until she hugged him. Ms. Barnett felt uncomfortable and "trapped" into hugging Grievant in order to get out of the situation. Level Three, Testimonies of Sallie Barnett and Martha Gibson.

14. Another of Grievant's coworkers, Kathy Bowe, was always addressed by Grievant as "sweetie," "honey," "baby doll," "beautiful," or "gorgeous" and never by her name. Ms. Bowe often had to encounter Grievant at the copier in the Finance Division where again, she was always addressed by Grievant using an endearment and never by her name. After one such encounter, Ms. Bowe told Grievant, "my name is Kathy." Ms. Bowe was made very uncomfortable by these encounters and was so intimidated by

Grievant's demeanor toward her that she changed her work habits in order to avoid encountering him. Ms. Bowe stated that Grievant's presence in the Finance Division and his demeanor impeded her ability to do her job. Level Three, Testimony of Kathy Bowe. She changed the time she left her cubicle and took different routes in the building to avoid Grievant.

15. After Grievant had been working for the DOH for a few weeks, he had occasion to interact with Maria Catalano, Payroll Supervisor. Ms. Catalano had come to Mr. Hubbard's cubicle to make herself a sandwich for lunch when Grievant entered the cubicle and made the comment to her that they had met before at a bar where they were drunk and kissing each other. Ms. Catalano responded that they had never met before and definitely not while drunk in a bar and kissing. Ms. Catalano was offended by these comments. Level Three, Testimony of Maria Catalano.

16. Grievant also had occasion to encounter another employee, Susan Creager, a Financial Reporting Specialist, at the copier in the Finance Division. Grievant came up behind her without warning and "grabbed" her by the shoulders. This encounter scared Ms. Creager and made her uncomfortable. Level Three, Testimony of Susan Creager.

17. On another day, Ms. Creager was talking with another employee in her cubicle within the Finance Division when Grievant came into the cubicle and joined the conversation. Grievant then proceeded to relate to Ms. Creager and the other employee a humorous story about his wife. At the end of the story, Grievant said to Ms. Creager that "when he got rid of her, [his wife], he was going to come and see [Ms. Creager]." Grievant's statement made Ms. Creager uncomfortable so she said, just to put him off, that she was "old enough to be his mother." Grievant replied that "older women have needs

too." Ms. Creager was made very uncomfortable by these comments and she was embarrassed. Ms. Creager eventually got to the point where she did not want to leave her cubicle because she was afraid she would encounter Grievant. *Id*.

18. On or about February 27, 2009, Grievant's supervisor, Ms. Gibson, attempted to schedule a one-month meeting with Grievant to discuss his work performance and complaints of sexual harassment she had received. Because of sick days and annual leave, this meeting was put off. Level Three, Testimony of Martha Gibson.

19. On March 9, 2009, Grievant was provided notice that it was being recommended by his supervisor that he be dismissed from employment for violation of the drug-free workplace policy and the DOP's *Prohibited Workplace Harassment Bulletin*.[5] He was afforded the opportunity to respond both orally and in writing.

20. On or about March 10, 2009, Grievant met with Fred Thomas concerning the notice. In his meeting with Mr. Thomas, Grievant denied all allegations and stated that all he is guilty of is trying to make friends. Level Three, Respondent's Exhibit 2.[6]

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[5] Specifically, the notice stated:

> On Wednesday, March 4, 2009 you approached several employees in attempts to obtain controlled substances. You had just signed the Drug-and-Alcohol-Free Workplace Policy Receipt upon your employment with the agency on 2/1/09, agreeing to abide by its terms as a condition of employment. Further, on numerous occasions you have used inappropriate words, terms & actions which has created an intimidating, hostile & offensive work environment for coworkers. The inappropriate use of these words, terms & actions have been addressed with you by your immediate supervisor and other supervisors. Your actions are considered to be in violations of the state Drug and Alcohol Free Workplace Policy and the Prohibited Workplace Harassment Bulletin, as well as agency standards of conduct[.]

[6] At Level Three, Grievant testified that he was not trying to make friends and kept to himself. Level Three, Testimony of Brett Anthony Horton.

21. By letter dated March 13, 2009, Grievant was dismissed from his employment with DOH. The dismissal letter provided the following:

> [T]he reason for your dismissal is violation of the State Drug and Alcohol Free Workplace Policy, as well as inappropriate workplace behavior. More specifically: On Wednesday, March 4, 2009 you approached several employees attempting to obtain Lortab, a controlled substance. In two of those instances, you were aware the employees had a recent medical procedures for which you seemed to believe Lortab would have been prescribed. You have also acted inappropriately toward female employees in the workplace. You have approached female employees from behind and gotten inappropriately close to them while making inappropriate greetings, and you have made inappropriate comments about your clothing being too tight and the needs of older women.

22. The West Virginia Division of Personnel's ("DOP") *Drug- and Alcohol-Free Workplace Policy*, Section III, provides as follows:

> a. It is the policy of West Virginia State government to ensure that its workplaces are free of alcohol, illegal drugs and controlled substances by prohibiting the use, possession, purchase, distribution, sale, or having such substances in the body system. Although the sale and use of alcohol by an adult may be legal, the possession, use, distribution, or dispensation of alcohol in the workplace is strictly prohibited.
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> d. The unlawful possession, use, manufacture, distribution, or dispensation of a controlled substance or illegal drug; the reporting to work under the influence of a controlled substance or illegal drug; having an illegal drug in the body system; or possession of drug paraphernalia are all prohibited in the workplace.

Level Three, Joint Exhibit 3. Pursuant to the policy, an employee may be subject to disciplinary action, up to and including dismissal, for violation of the policy.

23. In accordance with the DOP's *Prohibited Workplace Harassment Interpretative Bulletin*, "employees have the right to be free from illegal harassment on the job, and the State has the moral and legal obligation to ensure that such harassment does not occur."

Level Three, Joint Exhibit 3. It is a violation of DOP's *Prohibited Workplace Harassment Interpretative Bulletin* for an employee to exhibit conduct that has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment." *Id*.

24. DOH's progressive discipline policy provides that:

> [a] single performance issue or instance of misconduct may warrant immediate drastic action, including dismissal. Less serious performance issues or instances of misconduct may be handled on the basis of "progressive discipline," which does not merely punish the employee, but is intended to allow the employee an opportunity to meet the expected standards of work performance or conduct. Discipline is progressive when an employee is not subject to immediate dismissal for an initial offense but is given a lesser penalty. The initial penalty could be an oral reprimand, a written reprimand, a demotion, *or a suspension*.

(Emphasis added).

Discussion

The burden of proof for disciplinary claims rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Permanent 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 Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982)(per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W.Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777(1988)(per curiam).

"Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, *Clarke v. W. Va. Bd. of Regents*, 166 W.Va. 702, 279 S.E.2d 169 (1981); Syl. Pts. 4 and 5 of *Snyder v. Civil Serv. Comm'n*, 160 W.Va. 762, 238 S.E.2d 842 (1977); *Bryant v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 06-DMV-225 (May 22, 2009). In this matter, Grievant has been placed on notice that on March 4, 2009, he attempted to obtain Lortab within the workplace. Further, he has been placed on notice that during his short tenure he "approached female

employees from behind and gotten inappropriately close to them while making inappropriate greetings," and "made inappropriate comments about your [Grievant's] clothing being too tight" and "the needs of older women."[7] *See* Level Three, Joint Exhibit 1; Grievant's Exhibit 2.

The Respondent has met its burden of proving Grievant attempted to obtain and possess Lortab within the workplace. Respondent has proven, by a preponderance of the evidence, that Grievant created a hostile work environment. "Good cause" exists for the dismissal and mitigation is inappropriate. Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151.

I. Credibility

As an initial matter, a credibility determination need be made. The Grievant testified that he only asked coworkers for aspirin. Further, he claims that none of the incidents of hostile work environment occurred. This testimony is in direct contrast with many of Grievant's former coworkers who testified at Level Three. 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

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[7] Insofar as the Grievant was not put on notice of some of the charges and incidents put in the record at Level Three, this ALJ does not consider these incidents as substantive evidence. However, such incidents do serve as rebuttal evidence to Grievant's request for mitigation. These incidents are also probative of the Grievant's workplace disposition. The only incidents this ALJ considers for the purpose of determining whether Respondent has proven the charges against Grievant are: (1) all Lortab requests on March 4, 2009; (2) the February 2, 2009, Dolly Parton statement; (3) the incidents involving Ms. Creager; and (4) the incidents with Ms. Barnett.

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 & 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*.

Grievant testified that he committed no act that could be construed as harassing or hostile towards other employees.[8] Essentially, he argues that every witness against him is lying. Avoidance of discipline is a motive for Grievant to deny the allegations of the employees who reported Grievant made inappropriate comments and inappropriately touched them. It is both implausible and improbable that several female coworkers would report that Grievant acted inappropriately if he did not do so. Indeed, when considering the incidents described by the witness, each portrayed the incidents with great detail.[9]

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[8] However, Grievant testified at Level Three, that if he had been given a verbal or written reprimand for the February 2, 2009, Dolly Parton incident, the other acts would not have happened. Level Three, Testimony of Brett Anthony Horton. This alternative argument/testimony is in direct contrast to the Grievant's testimony that none of the events occurred.

[9] It is noted that the Grievant's motivation for having contact with other employees is conflicting. At one point, Grievant avers that he was "simply trying to make new friends."

It is also implausible and improbable that several coworkers would all report the Grievant specifically asked them for Lortab on the same day. Like the hostile work environment witness, these witnesses testified with detail as to where the conversations took place and the precise nature of the conversations. Grievant's own testimony is unclear. At Level Three, he testified that he did not ask Mr. Miller or Mr. Hubbard for Lortab. He testified that he was "curious" what they were taking for pain. Prior to being dismissed, Grievant stated that he asked his coworkers for aspirin.

The Grievant's testimony and version of events is not credible. Taken as a whole, the evidence presented by the DOH demonstrated a pattern of behavior by Grievant consisting of attempting to obtain or possess a controlled substance and creating a hostile work environment.

II. Controlled substance

Respondent has proven, by a preponderance of the evidence, that Grievant violated the *Drug- and Alcohol-Free Workplace Policy* because Grievant attempted to obtain and possess Lortab, a controlled substance, from coworkers. The *Drug- and Alcohol-Free Workplace Policy*, Section III, provides as follows:

> a. It is the policy of West Virginia State government to ensure that its workplaces are free of alcohol, illegal drugs and controlled substances by prohibiting the use, possession, purchase, distribution, sale, or having such substances in the body system. Although the sale and use of alcohol by an adult may be legal, the possession, use, distribution, or dispensation of alcohol in the workplace is strictly prohibited.

Level Three, Respondent's Exhibit 2. However, in contrast, Grievant testified that he was not in the workplace to make friends and kept to himself. Level Three, Testimony of Brett Anthony Horton.

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> d. The unlawful possession, use, manufacture, distribution, or dispensation of a controlled substance or illegal drug; the reporting to work under the influence of a controlled substance or illegal drug; having an illegal drug in the body system; or possession of drug paraphernalia are all prohibited in the workplace.

The DOP policy does not specifically state that the attempt to obtain or possess a controlled substance is a violation of policy. Hence, the issue is whether the DOH's interpretation of this policy to encompass the attempt to obtain or possess a controlled substance is arbitrary and capricious.

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health & Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf & the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

The drug policy prohibits the "use, possession, purchase, distribution" or "sale" of a controlled substance. Respondent did not err by finding the Grievant violated the *Drug-*

and Alcohol-Free Workplace Policy where Grievant, on several occasions, attempted to obtain and possess a controlled substance in the workplace. West Virginia criminal law and the intent contained within the *Drug- and Alcohol-Free Workplace Policy* guides this finding.

Under West Virginia law, possession of Lortab without a lawful prescription is a crime. W.VA. CODE § 60A-2-208(b)(6); W.VA. CODE § 60A-4-401(c). It is a crime to "manufacture, deliver,[10] or possess with the intent to manufacture or deliver" Lortab. *See* W.VA. CODE § 60A-2-208(b)(6). It is a crime *to attempt* to commit a criminal offense. W.VA. CODE § 61-11-8. The purpose behind the DOP policy "is to establish clear and uniform guidelines in accordance with federal and State regulations regarding alcohol, drugs, or controlled substances, including the provisions of the Drug-Free Workplace Act of 1998." Hence, when considering whether conduct violates the DOP policy, the terms "use, possession, purchase, distribution" are construed in a manner consistent with West Virginia's Controlled Substance Act and the policy's intent of keeping controlled substances out of the workplace.

The DOH's construction of the terms "use, possession, purchase, distribution" in a manner to include the attempt to do such an act was reasonable in light of the circumstances. On March 4, 2009, the Grievant was seemingly in great need of the Schedule III controlled substance Lortab. Though he had a prescription, he had apparently exhausted his supply. He sought to obtain the drug beyond the scope of the prescription.

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[10] It is noted that under West Virginia's Controlled Substance Act, the definition of the term "deliver" includes and encompasses the "attempted transfer" of a controlled substance. *See* W.VA. CODE § 60A-1-101(g).

Instead of calling his physician, he systematically began approaching those within the workplace. One after another he asked three different coworkers whether they had, or could bring him the controlled substance Lortab. All refused. He attempted to obtain the drug via telephone and stated that money was no object.

Grievant attempted to illegally possess or purchase Lortab. This ALJ finds that the Respondent has established, by a preponderance of the evidence, that Grievant violated the *Drug- and Alcohol-Free Workplace Policy* on March 4, 2009. Next, the DOH's claim of hostile work environment is considered.

III. Hostile work environment

It is a violation of DOP and state policy for an employee to create a hostile work environment. *See* Level Three, Joint Exhibit 3. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment." *Napier v. Stratton*, 204 W. Va. 415, 418, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995); *Bryant v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 06-DMV-225 (May 22, 2009). Whether a working environment is hostile or abusive can be determined only by looking at the totality of the circumstances. *See Spencer v. Bureau of Employment Programs*, Docket No. 98-HHR-130 (Jan. 29, 1999). Certainly, any act might be construed by someone as harassing, hostile, disruptive or offensive. In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. *Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997); *Bryant*,

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 v. Forklift Systems, Inc.,* 510 U.S. 17, 23, 114 S.Ct. 367, 371 (1993); *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (Apr. 23, 2009). 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, 22, 114 S.Ct. 367, 371.

When considering the evidence, Grievant's conduct was sufficiently severe and pervasive to alter the terms and conditions of his coworker's employment. On his second day on the job, he made reference to getting an erection when viewing pictures of Dolly Parton in front of, and to, his female supervisor. One day, he told a female coworker that when he left his wife, he would go look her up. He then made the statement "older women have needs." Several coworkers testified that they felt uncomfortable around Grievant and altered their work behavior to avoid him. On two occasions Grievant coerced a female to touch his body either by demanding she feel his bicep or demanding a hug. He grabbed another female from behind and made her uncomfortable.

In light of the totality of the circumstance, Grievant's conduct was both subjectively and objectively unreasonable. He continually acted out in a hostile manner towards females in the work environment. This conduct was both verbal and physical. The Respondent has established, by a preponderance of the evidence, that the Grievant created a hostile work environment.

Next, it must be determined whether the Respondent violated its progressive

discipline policy.

IV. Progressive discipline

DOH did not violate its progressive discipline policy as a single serious instance of misconduct may warrant dismissal. DOH policy provides that:

> A single performance issue or instance of misconduct may warrant immediate drastic action, including dismissal. Less serious performance issues or instances of misconduct may be handled on the basis of "progressive discipline," which does not merely punish the employee, but is intended to allow the employee an opportunity to meet the expected standards of work performance or conduct. Discipline is progressive when an employee is not subject to immediate dismissal for an initial offense but is given a lesser penalty. The initial penalty could be an oral reprimand, a written reprimand, a demotion, *or a suspension*.

(Emphasis added). The DOH's interpretation of its progressive discipline policy was not erroneous because, based upon the language of the policy, an employee may be dismissed for a single, serious instance of misconduct. *See also Townsend v. W.Va. Div. Juvenile Servs.*, Docket No. 2008-1501-MAPS (Mar. 19, 2009); *Stiles v. Dep't of Health & Human Res.*, Docket No. 07-HHR-162 (March 31, 2008). In this grievance, the Grievant was dismissed for a series of serious infractions that occurred over a very short period of time. He asked several employees for Lortabs. He made frequent inappropriate comments to those within the workplace. Further, he coerced others to touch him, and on at least one occasion, grabbed a female employee from behind.

As indicated by the plain language of the progressive discipline policy, a single instance of misconduct may result in dismissal. In light of the evidence presented, the Respondent's interpretation and application of its progressive discipline policy was not arbitrary and capricious. Grievant committed several serious infractions.

V. Mitigation

Nevertheless, even where progressive discipline is not violated, a lesser discipline may be imposed where the offense is disproportionate to the punishment. 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). "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 Corr.*, 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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Given the considerable deference afforded to employers in disciplinary situations, the undersigned is not persuaded that the discipline imposed was disproportionate to the offenses committed. Grievant had only been working with DOH for a little over one month and was slated to be an acting supervisor when his supervisor was out of the office. During the short time he worked for DOH, his actual work performance was sub-par. *See* Level Three, Testimony of Martha Gibson. He asked several coworkers for a controlled substance and exhibited unreasonable conduct towards females. He made crude, sexual comments in the workplace. On two occasions, Grievant coerced a female to touch him. One time, he required her to feel his bicep. The other time, he demanded a hug. This was not a mere technical violation of policy or an unintentional act or mistake. Mitigation is not appropriate and dismissal is not disproportionate to the offenses in light of the totality of the circumstances.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The burden of proof for disciplinary claims rests with the employer, and the employer must meet that burden by proving the charges against an employee by a

preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 9 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Permanent 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).

3. Division of Personnel's *Drug- and Alcohol-Free Workplace Policy*, Section III, provides that:

> It is the policy of West Virginia State government to ensure that its workplaces are free of alcohol, illegal drugs and controlled substances by prohibiting the use, possession, purchase, distribution, sale, or having such substances in the body system. Although the sale and use of alcohol by an adult may be legal, the possession, use, distribution, or dispensation of alcohol in the workplace is strictly prohibited.
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> The unlawful possession, use, manufacture, distribution, or dispensation of a controlled substance or illegal drug; the reporting to work under the influence of a controlled substance or illegal drug; having an illegal drug in the body system; or possession of drug paraphernalia are all prohibited in the workplace.

4. Respondent has established, by a preponderance of the evidence, that the Grievant violated the *Drug- and Alcohol-Free Workplace Policy* when he attempted to obtain or possess a controlled substance from several coworkers within the workplace.

5. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment." *Napier v. Stratton*, 204 W. Va. 415, 418, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995); *Bryant v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 06-DMV-225 (May 22, 2009). Whether a working environment is hostile or abusive can be determined only by looking at the totality of the circumstances. *See Spencer v. Bureau of Employment Programs*, Docket No. 98-HHR-130 (Jan. 29, 1999). Determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. *Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997); *Bryant*, *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 v. Forklift Systems, Inc.,* 510 U.S. 17, 23, 114 S.Ct. 367, 371 (1993); *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (Apr. 23, 2009).

6. Respondent has established, by a preponderance of the evidence, that the Grievant created a hostile work environment.

7. Under DOH policy, an employee may be dismissed for a single act of serious misconduct.

8. The DOH did not violate its progressive discipline policy when it dismissed Grievant from his employment where he attempted to obtain a controlled substance from several coworkers and created a hostile work environment. Good cause existed for Grievant's dismissal.

9. 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). 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). 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 Corr.*, Docket No. 95-CORR-252 (July 23, 1996).

10. Grievant has not met his burden of proving, by a preponderance of the evidence, that his dismissal was excessive in light of the totality of the circumstances.

Accordingly, this 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 WEST VIRGINIA 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: September 16, 2009

Mark Barney
Administrative Law Judge