WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JIMMY VANCE,
Grievant,

v. **Docket No. 2011-1705-MAPS**

WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/ SOUTHWESTERN REGIONAL JAIL,
Respondent.

DECISION

Jimmy Vance ("Grievant") was employed by the Regional Jail and Correctional Facility Authority ("RJCFA") as the Chief Correctional Officer at the Southwestern Regional Jail in Logan County, West Virginia. Mr. Vance filed a level three grievance form[1] dated May 20, 2011, stating the following:

> I was wrongfully terminated apparently based on unfounded allegations of wrongdoing in violation of West Virginia Code Section 6C-2-2(i)(1)(ii) & (v).

As relief Grievant seeks, "Reinstatement with full back pay and benefits."

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on September 14 and 15, 2011. Grievant appeared at the hearing and was represented by Katherine L. Dooley, Esquire. Respondent was represented by Stephen R. Compton, Esquire, Senior Assistant Attorney General. Following the hearing the parties submitted Proposed Findings of Fact and Conclusions of Law which were received at the Grievance Board on October 24, 2011. The grievance became mature for decision on that date.

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[1] W. VA. CODE § 6C-2-4(a)(4) authorizes a grievance contesting dismissal from employment to be filed directly at level three.

Synopsis

Respondent suspended Grievant while conducting an investigation into charges against him and then terminated Grievant's employment. Grievant was dismissed for allegedly failing to timely report a sexual harassment claim, making a false report to concerning EEO[2] issues, engaging in improper relationships with subordinates that led to sexual harassment and showing favoritism toward one of these subordinates. This conduct is alleged to violate a number of RJCFA policies rules and regulations.[3]

Grievant admits to having romantic relationships with two subordinates and participating in the evaluation and a promotion interview involving one of the women with whom he was involved. However, Grievant argues that the relationships did not lead to sexual harassment and he showed no favoritism to the subordinate he was involved with. Grievant acknowledges that he was guilty of bad judgement in some of his actions but believes dismissal is too severe a penalty given his long successful career and the nature of his offenses.

Respondent proved that Grievant violated agency policy but failed to demonstrate that Grievant was guilty of sexual harassment. Given the totality of the circumstances, termination of Grievant's employment was disproportionate to the offenses he was proven to commit and mitigation of the discipline is appropriate . Consequently, the grievance is granted in part and denied in part.

The following facts are found to be proven by a preponderance of the evidence

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[2] Equal Employment Opportunity.

[3] Respondent's Exhibit 6, dismissal letter dated May 3, 2011.

based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Jimmy Vance, was originally employed as a Correctional Officer ("CO") by the RJCFA in 1995. He has been regularly assigned to the Southwestern Regional Jail ("Jail") throughout his career.[4]

2. Grievant received regular promotions during his career and was ultimately promoted from the rank of Sergeant in the CO 4 classification to the rank of Lieutenant in the CO 5 classification. As Lieutenant, Grievant Vance was the Chief Correctional Officer at the Jail. Grievant also served as the interim Regional Jail Administrator[5] for a period of time.

3. While serving at the Jail, Grievant has been involved in a romantic relationship with Ashley Hayton who is also employed at the Jail as an Office Assistant ("OA"). The two co-workers have lived together and have a child together.

4. Grievant and Ms. Hayton did not hide their relationship and neither of them were reprimanded in any way for being romantically involved with a co-worker.

5. It was not uncommon at the Jail for co-workers to be involved in romantic relationships. There were at least three other couples so involved during the same time period as Grievant and Ms. Hayton. There was no indication that this behavior was

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[4] Grievant Vance has held brief temporary assignments at other Regional Jails to help with the start-up of those facilities.

[5] The Regional Jail Administrator is responsible for the management and operation of the Jail and is the highest management authority at the Jail level. All Jail employees are under the authority of the Regional Jail Administrator.

discouraged unless one of the workers was a direct supervisor of the other.

6. In Mid-February 2010, Grievant was taking a test for a promotion to Lieutenant at a site away from the Jail. At that time Grievant was a Sergeant. Another Correctional Officer, Tammy Gleason, was attending a training away from the Jail at the same time and place. Ms. Gleason was a CO 2 at the time. They were both staying at a hotel in Flatwoods, West Virginia.

7. While at Flatwoods, Grievant and CO 2 Gleason struck up a romantic relationship.[6] Grievant and CO 2 Gleason did not attempt to hide their relationship and the Chief of Operations of the Regional Jail Authority, John King,[7] had seen them together at a bar and going to dinner during this period of time. Chief of Operations King asked Grievant if he and CO 2 Gleason were in a relationship and Grievant responded that they were.

8. The intermittent relationship between Grievant and CO 2 Gleason lasted for approximately one year.

9. In March 2010, Grievant was promoted to Lieutenant and the Chief Correctional Officer at the Jail. Grievant's Classification was CO 5. All Correctional Officers at the Jail, including CO 2 Gleason, were under his authority. However, CO 2 Gleason's direct supervisor was Sergeant Hager.

10. While Grievant was serving as the Chief Corrections Officer, vacancies became available in the transport section of the Jail. Transportation Officers are charged

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[6] For purposes of clarity, the term romantic relationship used herein included the parties thereto being sexually involved with each other.

[7] John King has since left the employment of the Regional Jail Authority.

with taking inmates to Court hearings, other correctional facilities and other locations. Most of these duties occur during the regular work day which makes these assignments desirable for most Correctional Officers.

11. CO 2 Gleason received one of the assignments to the transport section and another correctional officer filed a complaint with the Jail Administrator alleging that she received the assignment due to her relationship with Grievant.

12. Henry Robinson was the Interim Regional Jail Administrator at that time and he investigated the complaint. He found nothing improper in the assignment of CO 2 Gleason to the transport section.

13. Because the transport section assignments are desirable, the Correctional Officers are rotated into that section on an annual basis. Transportation Officers are required to meet certification requirements in the use of a firearm. Of the Correctional Officers who were firearm certified at the jail only one officer was ahead of CO 2 Gleason in the rotation and that officer declined assignment to the transport section. CO 2 Gleason was appropriately assigned to the Jail transport section.

14. Interim Administrator Robinson interviewed Grievant as part of his investigation. He asked Grievant if he was in a relationship with CO 2 Gleason. Grievant responded that they had been in a relationship but that they were not at that time. Administrator Robinson told Grievant that it was not a good idea to be dating a subordinate.

15. Some time after the investigation, the romantic relationship between Grievant and CO 2 Gleason resumed.

16. The evaluations for the Jail Correctional Officers are prepared by the

Sergeant to whom they are assigned. The Lieutenant then reviews the evaluation and adds his ratings. The ratings of the two supervisors are averaged to reach the final score.

17. While Grievant and CO 2 Gleason were in their relationship Grievant remained an endorser on CO 2 Gleason's evaluation. Grievant gave CO 2 Gleason a higher rating on "attitude" than her Sergeant had.

18. There were copies of evaluations for eighteen employees in which Grievant Vance participated as the endorser included in the investigation report produced in the matter. Respondent's Exhibit 1. Grievant Vance gave four of the employees higher scores than the evaluator and five employees lower scores than the evaluator. On the remaining evaluations, the scores given were the same. There was no evidence that Grievant abused his discretion in giving any of these scores.

19. There were a series of temporary Jail Administrators from 2009 through the time Grievant was dismissed. Vickie Green served as Administrator in 2009, Leslie Oxley and Harry Robinson were both interim Administrators in 2010. Grievant was serving as interim Jail Administrator when he was dismissed in 2011.

20. CO 2 Gleason and several other Correctional Officers applied for promotion to the rank of Corporal in the CO 3 classification. A selection committee was assigned to assess the candidates. Grievant served on the committee even though he was in a romantic relationship with CO 2 Gleason. Chief of Operations, John King, also served on the committee. Chief King apparently knew about Grievant's relationship with CO 2 Gleason but did not suggest that Grievant not serve on the committee.

21. Due to her test scores, CO 2 Gleason was not selected by the committee for promotion to Corporal.

22. While Grievant's participation in CO 2 Gleason's evaluations and sitting on the promotion committee created the potential for favoritism, there was no proof that Grievant showed favoritism to CO 2 Gleason as an employee. In fact, CO 2 Gleason complained that she was assigned overtime on most Friday nights which made it difficult for her to attend her son's high school football games.[8]

23. The RJCFA had a policy that prohibited Jail employees from having relationships with inmates but there was no policy prohibiting employees from amorous relations with other employees.

24. While Grievant and CO 2 Gleason were involved, they would regularly communicate with each other by sending text messages. This activity took place during and after work hours. At times, Grievant used inappropriate language in his texts. CO 2 Gleason sent explicit pictures of herself to Grievant by phone. Grievant did not use the cell phone he was provided by the RJCFA to send or receive these texts. CO 2 Gleason saved Grievant's texts to her and provided some of them to investigators who were looking into Grievant's conduct. However, she deleted the texts she had sent to Grievant. Consequently, those messages were not available for the investigators.

25. CO 2 John Harper was Officer Gleason's partner when she was assigned to the transportation section. The two officers would travel together while transporting inmates to court in Mingo, Logan, Wayne and Boone Counties. CO 2 Gleason would often

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[8] A number of Correctional Officers employed at the jail testified in the level three hearing. They were nearly unanimous in stating that they believed Grievant treated all employees fairly and that they did not believe that CO 2 Gleason received any favorable treatment as an employee as a result of her relationship with Grievant. They also opined that Grievant should not have been involved in a subordinate's evaluation and potential promotion while they were romantically involved.

complain to Officer Harper when she received texts from Grievant Vance if he and Officer Gleason were not getting along. This made CO 2 Harper uncomfortable because he felt it put him in the middle between his boss and his partner.

26. In January 2011, Grievant resumed cohabitation with OA Hayton but was still involved with CO 2 Gleason. By March 2011, Grievant and CO 2 Gleason were no longer dating and CO 2 Gleason was romantically involved with a man who was not employed at the Jail.

27. On the evening of Thursday, March 17, 2011, CO 2 Gleason received a telephone call on her cell phone from a number she did not recognize. The caller told her to stay away from Grievant Vance. The caller also told CO 2 Gleason that the caller had pictures of Gleason that she had sent to Vance and if she did not stay away from Grievant Vance, the caller would send the pictures to Gleason's new paramour.

28. CO 2 Gleason did not report these telephone calls to anyone at the Jail until Thursday, March 24, 2011, when she confronted Grievant with the calls and said they were instigated by OA Hayton. Grievant called the telephone number and found that the telephone belonged to Michelle Preece. Ms. Preece is a friend of OA Hayton but is not an employee of the Jail.

29. Grievant later called OA Hayton to his office and asked her if she was involved in the telephone calls to CO 2 Gleason and she said she was not.

30. On March 28, 2011, CO 2 Gleason met with Grievant and requested that her personnel file be moved from the Jail to the RJCFA central office in Charleston so that OA Hayton would not have access to her personnel information.

31. On Monday, March 28, 2011, Grievant Vance called Chief of Operations King

and reported the conversation he had with CO 2 Gleason and Gleason's insistence that her file be moved to Charleston. Chief King told Grievant to advise CO 2 Gleason to write an incident report and put her request in writing.

32. CO 2 Gleason gave a written request to have her file moved to Charleston. Respondent's Exhibit 5. The letter is dated March 28, 2011 and initialed by Jimmy Vance as received "3-31-11". Grievant Vance did not forward the letter to Chief King until CO 2 Gleason insisted he do so.

33. CO 2 Gleason prepared a written incident report regarding the threatening telephone call on March 30, 2011, and gave it to Grievant on that day.

34. Grievant Vance prepared an incident report on March 31, 2011 and forwarded both incident reports to the central office on that day. In Grievant's incident report he stated that CO 2 Gleason had reported the incident to him on March 28, but she first brought the incident to his attention on March 24.

35. Grievant Vance was issued a letter of suspension dated April 7, 2011. He was suspended without pay pending an investigation of the following allegations:

> It is alleged that while on duty as the Acting Administrator of the Southwestern Regional Jail, you were aware of hostile threatening phone calls between two employees. Further you failed to promptly report the incident. Additionally, it is alleged that you may have engaged in inappropriate behavior with staff and may have acted in a retalitory nature toward one of them.

Respondent's Exhibit 3.

36. RJCFA Chief Investigator Crook and CO Donna Slack were assigned to conduct an investigation into the allegations against Grievant Vance. They interviewed several Jail staff members and issued a "Report of Investigation" dated May 2, 2011.

Respondent's Exhibit 1.

37. A predetermination conference was held for Grievant on April 26, 2011. In addition to Grievant, the conference was attended by Sergeant Scotty Hager, Deputy Chief of Operations, Henry Robinson, Investigator Stephen Crook and Chad Cardinal, Esquire.[9]

38. Grievant Vance was dismissed from employment in a letter from Acting Chief of Operations, John V. Lopez[10] dated May 3, 2011. The specific reasons for the dismissal were the following:

> During the course of the investigation, it was found that you failed to report a sexual harassment claim in a timely manner, you provided a false report concerning staff EEO issues, you engaged in romantic and sexual relationships with subordinates that subsequently led to a hostile work environment, you showed favoritism to one of the females you were involved with by increasing her evaluation scores. And failed to take corrective action when she violated Policy and Procedure. These actions compromised your ability to lead as a Lieutenant and Acting Administrator.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.* Docket

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[9] A transcript of the conference was introduced into the level three record as Respondent's Exhibit 2.

[10] Chief of Operations John King had left the agency at this time and John Lopez had replaced him in an acting capacity.

No. 96-20-380 (Mar. 18, 1997). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

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). Grievant Vance is such an employee.

The charges against Grievant were set out in the dismissal letter and are set out in Finding of Fact 38, *supra.* The first charge is that Grievant failed to make a timely report of a sexual harassment complaint. The complaint which Respondent characterizes as sexual harassment is when CO 2 Gleason reported to Grievant on March 24, 2011, that she had received a threatening telephone call to stay away from Grievant on March 17. CO 2 Gleason had four work days during which she could have reported the incident to the Sergeant who was her immediate supervisor or the Jail EEO[11] officer. Testimony demonstrated that was the proper procedure for making a sexual harassment complaint. Yet CO 2 Gleason waited to talk to Grievant about what she thought was a call from his girl

[11] Equal Employment Opportunity.

friend. Grievant confirmed that the call came from a cell phone that belonged to a person who is not a Jail employee. He believed that CO 2 Gleason's visit with him was a personal matter, not a report of sexual harassment, and the evidence indicates that he was correct.

RJCFA Policy and Procedure Statement # 3041 (Policy # 3041 defined "sexual harassment" as follows:

> **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.[12] Conduct of this nature will result in appropriate disciplinary action which may include dismissal.

The complaint made by CO 2 Gleason on March 17, did not involve a threat by a Jail employee nor did it involve unwelcome sexual overtures of any kind. CO 2 Gleason's complaint to Grievant on March 24 did not involve any conduct that fit the foregoing definition of "sexual harassment." The first time the complaint could have reasonably been considered work related was when CO 2 Gleason came to Grievant on March 28, 2011, and asked that her personnel files be moved to the RJCFA central office so OA Hayton would not have access to her personal information. At that point, Grievant immediately called Chief King and reported the incident. Grievant then followed Chief King's instruction and told CO 2 Gleason to file an incident report. He filed a written report as well.

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[12] 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 workplace rewards for compliance with sexual demands or threatens punishment for noncompliance. This type of harassment is not alleged in this case.

Respondent did not prove that Grievant failed to report a sexual harassment claim in a timely manner.

The second charge against Grievant was that he "provided a false report concerning staff EEO issues." Respondent's Exhibit 6. The basis for this charge is that Grievant wrote in his incident report and made statements that CO 2 Gleason made her complaint on March 28 instead of March 24. As pointed out herein, the first time CO 2 Gleason related the telephone threat incident to the jail was on her second visit made on March 28. Grievant's statements were therefore accurate and Respondent did not prove their second charge. In fact, CO 2 Gleason made no complaint regarding sexual harassment or a hostile workplace for the entire year she was romantically involved with Grievant. The first time that issue was raised was during the investigation which was commenced in April 2011.

The third charge against Grievant is that he "engaged in romantic and sexual relationships with subordinates that subsequently led to a hostile work environment." Respondent's Exhibit 6. The Grievance Board generally follows the analysis of the federal and state courts in determining what constitutes a hostile work environment.[13] *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).

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[13] 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.

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); *Rogers v. Reg. Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (April 23, 2009).

Respondent argues that Grievant created a hostile work environment for CO 2 Gleason by sending her numerous text messages on her cell phone while she was on duty. When the relationship between her and Grievant was not harmonious these texts tended to make her upset. However, CO 2 Gleason willingly exchanged an untold number of texts with Grievant during the course of their intimate relationship including explicit photos sent to Grievant from CO 2 Gleason. This activity was not unwelcome by either party but rather described in the testimony of both participants as their routine method of communication. CO 2 Gleason willingly participated in this conduct and did not make any complaint regarding sexual harassment until the term was brought up during the investigation into the

alleged telephone threats. Respondent did not prove that Grievant was guilty of creating a hostile work environment for CO 2 Gleason.

Respondent also argues that Grievant created a hostile work environment for other Jail employees by participating in romantic relationships with co-workers. No Jail employees made reports or complaints against Grievant for sexual harassment or creating a hostile work environment. In fact, all of the Jail employees who testified stated that they were aware of Grievant's amorous encounters and did not feel it affected their work performance. The one Jail employee who felt harassed by the relationship between Grievant and CO 2 Gleason was Ms. Gleason's partner in the transportation section, CO 2 John Harper. Officer Harper confirmed that Grievant and Officer Gleason often exchanged telephone texts while he and CO 2 Gleason were involved in transports. When Officer Gleason and Grievant were spatting through text messages, Officer Gleason would become upset and share the content of the texts with CO 2 Harper. One example was a text from Grievant to CO 2 Gleason which stated "since you can't answer me fuck it." Respondent's Exhibit 4. CO 2 Harper testified that he became very nervous about these texts because he felt that he was in the middle between his partner and his boss. He sought medical treatment and was prescribed medication to help him deal with his agitation.

Grievant did not send texts to CO 2 Harper nor discuss his romantic relationships with him. The only information Officer Harper received regarding the exchanges between Grievant and CO 2 Gleason was from his partner, Officer Gleason. If CO 2 Harper was subjected to a hostile work environment as a result of being exposed to the texting spats between his partner and his boss, Officer Gleason was responsible for the situation by

exposing him to her personal quarrels. There was nothing stopping her from turning off her cell phone or keeping the texts to herself. Instead, Officer Gleason shared some of the texts she received from Grievant in an apparent effort to enlist her partner in her fight with her boyfriend. It is uncontested that Grievant engaged in romantic and sexual relationships with subordinates. However, Respondent did not prove that Grievant created a hostile work environment for any of the Jail employees by participating in these relationships.

The fourth charge against Grievant was that he "showed favoritism to one of the females you were involved with by increasing her evaluation scores." Respondent's Exhibit 6. Grievant admits that he increased the score on CO 2 Gleason's evaluation by four points in the area of "attitude" over the score given to her by her Sergeant. He points out that as endorser he often gives a different score in some areas of an Officer's evaluation. The evaluation process is set up so that the final score is reached by adding together the scores given by the Sergeant and the Captain and dividing by two. There were copies of evaluations for eighteen employees in which Grievant Vance participated as the endorser included in the investigation report produced in the matter. Respondent's Exhibit 1. Grievant Vance gave four of the employees higher scores than the evaluator and five employees lower scores than the evaluator. On the remaining evaluations, the scores given were the same. The scoring of CO 2 Gleason's evaluation followed an established pattern for evaluations and no evidence was provided that Grievant gave Officer Gleason special treatment in that process. Respondent did not prove by a preponderance of the evidence that CO 2 Gleason's evaluation score was affected by favoritism by Grievant.

What Respondent was able to prove was that Grievant participated in the evaluation process of an employee with whom he was sexually involved. He further participated in

an interview process for a promotion to Corporal in which the same employee was involved. While there was no specific evidence that CO 2 Gleason benefitted from Grievant's participation in these matters, there is no doubt that it raised the appearance of impropriety. Some Officers were preparing to file grievances if CO 2 Gleason received the promotion to Corporal. Grievant's participation in that process was unfair to all the Officers involved including Officer Gleason. Had she been a successful candidate a cloud of suspicion would exist as to whether she received the promotion based upon her professional skills. The dismissal letter given to Grievant quotes RJCFA Policy # 3010 related to employee conduct which states in part:

> "All employees shall conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority, or public service.

Grievant's conduct with subordinates did not encourage the public trust or bring credit to the Authority. Rather, it fostered an atmosphere of iniquity regarding important employment transactions. Grievant was the highest ranking Correctional Officer in the Jail and the Acting Administrator. As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under his supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors. *Wiley v. Dept. of Natural Res.*, Docket No. 96-DNR-515 (March 26, 1988); *Lilly v. Dep't of Transp.*, Docket No. 07-DOH-387 (June 30, 2008); *Henry v. Div. of Highways*, Docket No. 2011-0944-DOT (Aug. 31, 21011). As noted in the dismissal letter, by participating in the evaluations and on the promotion committee for a subordinate with whom Grievant was sexually involved, Grievant compromised his

ability to lead as a Lieutenant and Acting Administrator. Disciplinary action was appropriate for this conduct.

Grievant argues that the punishment given to him was disproportionate to alleged misconduct 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).

A previous case involving the same Respondent provides some insight into the mitigation issue. In the case of *Rogers v. Reg. Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (April 23, 2009) the grievant was the Lieutenant and Chief Correctional Officer at a regional jail. Like Grievant Vance, he had worked his way up through the ranks and had a long history of successful service. The grievant in *Rogers* was accused of creating a hostile work environment through sexual harassment of female correctional officers at the facility. In that case, the Respondent took the grievant's successful years of service

into consideration and instead of terminating his employment the grievant was suspended for thirty days, demoted to a CO 2 and transferred to another jail. The charges of sexual harassment were proven in that case and the penalty was upheld. In this case, Grievant Vance held the same rank and similar service as the *Rogers* grievant. Yet he was terminated. Additionally, Respondent failed to prove that Grievant created a hostile work environment in contrast to the *Rogers* case. Given Grievant's long and successful service, the failure of Respondent to prove sexual harassment and the disciplinary history of Respondent in a similar case, Grievant proved that the penalty of termination of employment was disproportionate to the misconduct proven to have occurred. Consequently, mitigation is appropriate.

Respondent proved that Grievant did not behave in a manner conducive to the public trust by actively participating in the evaluation process and on a promotion committee for a subordinate with whom he was sexually involved. A thirty day suspension is appropriate given Grievant's position of trust and responsibility at the Jail. Accordingly, the Grievance is GRANTED in part and DENIED in part.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't*

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

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. RJCFA Policy and Procedure Statement # 3041 (Policy # 3041 defined "sexual harassment" as follows:

> **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. Conduct of this nature will result in appropriate disciplinary action which may include dismissal.

Respondent did not prove that Grievant failed to make a timely report of a sexual harassment complaint or that Grievant made a false report regarding an EEO issue.

4. The third charge against Grievant is that he "engaged in romantic and sexual relationships with subordinates that subsequently led to a hostile work environment." Respondent's Exhibit 6. The Grievance Board generally follows the analysis of the federal and state courts in determining what constitutes a hostile work environment. *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); *Rogers v. Reg. Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (April 23, 2009).

5. Respondent did not prove by a preponderance of the evidence that Grievant created a hostile work environment for any employees at the jail.

6. RJCFA Policy # 3010 related to employee conduct which states in part:

> "All employees shall conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority, or public service.

Respondent proved that Grievant violated the letter and spirit of this policy by actively participating in the evaluation process and on a promotion committee for a subordinate with whom he was sexually involved.

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) (citations omitted).

8. Grievant proved that, given Grievant's work history, the Respondent's discipline history in a similar matter and the totality of the circumstances that the penalty was disproportionate to the misconduct proven and mitigation of the penalty is proper.

Accordingly, the Grievance is GRANTED in part and DENIED in part. It is Ordered that Grievant be suspended for thirty working days without pay from the date of his initial suspension. It is further Ordered that Grievant be reinstated to employment at the Southwestern Regional Jail as of the date that the thirty-day suspension with full back pay and benefits.

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: FEBRUARY 22, 2012.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE