WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAY REED CARPER,
Grievant,

v. **Docket No. 2012-0235-ClaCH**

CLAY COUNTY HEALTH DEPARTMENT,
Respondent.

DECISION

Grievant, Jay Carper, was employed by the Respondent, Clay County Health Department ("Health Department"), as a Nursing Director and Sanitarian. Mr. Carper filed a level one grievance form dated August 29, 2011, contesting the termination of his employment with the Health Department and seeking, among other things, reinstatement with back pay and benefits or for a severance package that he agreed to.[1] A level one conference was held on September 13, 2011, and a level one decision was issued on September 22, 2011, denying the grievance. Grievant's level two appeal was dated September 27, 2011, and a mediation was conducted on December 12, 2011. Grievant filed a level three appeal dated December 15, 2011.

A Level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on three separate days: April 25, 2012, August 8, 2012, and December 21, 2012. At the first day of hearing, Grievant Carper appeared *pro se.* On the second and third day, Grievant was present and represented by Hiram C. Lewis IV, Esq. Respondent was represented on all three days by Christopher D.

[1] Mr. Carper's statement of grievance was over five and a half pages, single spaced, and his request for relief was an additional two and a half pages. Much of the relief was a request for specific findings of fact and conclusions of law. The nature of the grievance was summarized herein but the entire document is incorporated by reference.

Negley, Esq., Shuman, McCuskey and Slicer, PLLC. Both parties presented Proposed Findings of Fact and Conclusions of Law, the last of which was received on January 31 2013. This matter became mature for decision on that date.

Synopsis

Respondent dismissed Grievant from employment for accessing and attempting to access pornographic material on his work computer during the work day. Grievant denies these allegations and argues, among other things, that his dismissal was an act of reprisal for his filing a previously successful grievance and whistle-blowing activity. Respondent proved the allegations by a preponderance of the evidence and that it had valid, non-retaliatory reasons for terminating Grievant's employment. The Grievance is DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Jay Carper, has been employed by Respondent, Clay County Health Department, since 2002; first as a Sanitarian and later as a Sanitarian and Nursing Director 1. As the Nursing Director for Respondent, Grievant was responsible for overseeing Respondent's program of family planning, obtaining medical histories, patient education regarding birth control, breast self-examinations, patient interviewing and assessing client needs. The majority of Respondent's clients are women.

2. Respondent provides local health services to citizens of Clay County and surrounding counties. These services include, but are not limited to, family planning,

breast and cervical cancer awareness and physical examination. (Respondent's Exhibit 2.)

3. The Department of Health and Human Resources ("DHHR") provides and maintains a computerized network connecting Respondent to the DHHR, and its Bureau of Public Health for use in public health issues.

4. The West Virginia Legislature created the West Virginia Office of Technology ("WVOT") to maintain and monitor the States network of computers. The WVOT monitors the network for viruses and other technical intrusions and has developed policies for proper use of the internet on the State's network to help guard against such intrusions.

5. Pursuant to an agreement executed between DHHR and WVOT, the WVOT is now charged with monitoring computer usage by DHHR and by health departments receiving DHHR computer services such as Respondent.[2]

6. Employees of the Respondent receive access to the "Clay County Health Department Employee Handbook" upon their employment. The handbook is on the DHHR intranet that Respondent's employees are given access to so they may perform specific functions of their job.

7. The Clay County Health Department Employee Handbook[3] is virtually identical to the DHHR Employee Handbook[4] given to the employees of the Department of Health and Human Resources with the only differences being specifically noted on

[2] Level three testimony of Christopher Lee Avis, WVOT employee.
[3] Respondent's Exhibit 30.
[4] Respondent's Exhibit 31.

the Employee Acknowledgement[5] form given to each group of employees, and in Respondent's Handbook which excludes County employees from certain state employee requirements.

8. The Clay County Board of Health approved the Respondent's Handbook several years prior to Grievant's employment.[6]

9. Grievant signed an Employee Acknowledgment form on June 17, 2005, stating that he received access to the handbook and acknowledging that he understood that he was "responsible for becoming familiar with its contents."[7] The form instructed grievant to sign the form and return it to the Administrator of the Clay County Health Department, which he did.

10. Respondent's Handbook states that:

> The transmission of obscene, profane, harassing, or intimidating material or messages is specifically prohibited, as is the use of the DHHR's communication systems in violation of any policy, rule or law. Misuse of e-mail and/or internet access can result in disciplinary action up to and including dismissal.[8]

Additionally the Employee handbook requires every employee:

> . . . to read and be familiar with all Information Technology Policies. The policies related to this section are IT Policy 501 – Use of IT Resources and IT Policy 510 – Electronic Message (e-mail) Guidelines and Requirements.[9]

[5] Respondent's Exhibit 4, A form signed by all new employees acknowledging that they have received access to the DHHR Employee Handbook on the DHHR intranet.
[6] Level three testimony of Linda Klotzbach, Respondent's former Administrator, now retired.
[7] Respondent's Exhibit 4.
[8] Respondent's Exhibit 30.
[9] *Id.*

11. IT Policy 501 set out that employee are responsible for activity that comes from the computer assigned to them. Employees are required to take certain actions to ensure the security of their computers including the following:

- Always use strong passwords;
- NEVER share passwords with any individual for any reason;
- Logging off or locking the computer when away from workstation.[10]

(Emphasis in original)

12. Grievant had a specific computer assigned to him, by Respondent with a password that he selected. Grievant often left his password written and available on his desk.[11] Additionally, Grievant left his workplace on occasion to take breaks, without locking or turning off his computer.

13. Grievant's computer was located in his office which he did not always lock. While Grievant's computer was available for other employees to use when he was not there, no other employees were seen using his computer.

14. In order to prohibit the searching of inappropriate and/or obscene websites the WVOT utilizes a computerized program that attempts to identify each web search against a known list of obscene and/or inappropriate websites. For newly created websites, the WVOT program attempts to categorize them as either allowable or blocked.[12]

15. However, because of the multitude of web sites that are created every year,[13] the program cannot accurately categorize each web site. Thus, on occasion,

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[10] IT Policy 501 Appendix A – *Employee Responsibilities.*
[11] Grievant's Exhibit 5 is a list of Grievant's various passwords that he said he kept on his desk where anyone could see it.
[12] Level three testimony of, Christopher Lee Avis, WVOT.
[13] There are over 200 million unique URLs on the internet.

obscene and/or pornographic websites can be accessed by computers on the DHHR network, including the Respondent's computers.

16. Should an employee attempt to access a website that has been identified as obscene and/or inappropriate, the system will "block" entry into the website and display an Executive Information Security Message informing the user that the website has been blocked because of possible prohibited content.[14]

17. Each computer provided to an employee of Respondent is assigned an individual Internet Protocol ("IP") address which is a numerical label. Additionally, each computer user is assigned a unique identifying number[15] to access the computer network. By using these numbers, WVOT personnel can track the specific usage of each individual computer.[16]

18. Each agency may choose words that will automatically result in a block if used in a search. Because the Health Department is involved in researching and treating women's health issues and breast feeding of infants, they may not block words like "breasts" which would be blocked by other agencies.

19. Websites which display pornography or hate materials are generally not as closely monitored by their creators and administrators as mainstream sites and are much more likely to contain viruses and malware which could be harmful to the State's computer network. Accordingly, the WVOT is particularly sensitive to employees accessing these banned sites.

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[14] Respondent's Exhibit16, is an exemplar of an "Executive Information Security Message."
[15] The last octet of the IP address.
[16] Level three testimony of Christopher Lee Avis, Information Security Officer with the Office of Technology. Mr. Avis has been employed by the State in the field of information technology for more than ten years.

20. When a WVOT information security officer receives an alert from the monitoring software that a state computer is attempting to access prohibited websites, the officer will check to see what type of websites are being targeted. If it appears that the websites are in violation of State policy, the officer may review the internet usage for the computer and create a Network Violation Report ("NVR") detailing improper usage of the computer.

21 In August of 2010, an NVR was developed regarding Grievant's computer. Respondent's Exhibit 14. The report noted that the number of the computer was the specific computer assigned to Jay Carper, Grievant. On August 24, 2010, between 10:00 a.m. and 12:00 p.m., the computer operator made forty-seven requests for search engines known to contain pornographic material, which were denied. *Id.* A review of the computer usage for that day indicated that some websites containing obscene or pornographic material[17] were allowed to be viewed on the computer. These sites

[17] The examples of the web-site content introduced as evidence were mostly made up of pictures of nude women, occasionally engaged in coitus and bondage. In determining the constitutionality of an anti-pornography ordinance, the West Virginia Supreme Court noted:

> The controlling test was set forth by the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). HN2Material which meets this standard is considered obscene, thus it is not afforded the First Amendment freedoms of speech or press protections: (a) Whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, [408 U.S. 229] at 230 [92 S. Ct. 2245, 2246, 33 L. Ed. 2d 312, 315 (1972)], quoting *Roth v. United States*, [354 U.S. 476] at 489 [77 S. Ct. 1304, 1311, 1 L. Ed. 2d 1498, 1509 (1957)]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of *Memoirs v. Massachusetts,* 383 U.S. [413] at 419 [86 S. Ct. 975, 978, 16 L. Ed. 2d 1, 6 (1966)], 413 U.S. at 24, 93 S. Ct. at 2615, 37 L. Ed. 2d at 431. n2.

Butler v. Tucker, 416 S.E.2d 262, 264-265, 187 W. Va. 145, 147-148 (W. Va. 1992). Since neither party questioned whether the material viewed was pornographic or obscene the term "pornography" will be used herein but the undersigned makes no determination as to whether the material met the legal standard for that term.

included pictures of naked women, some of whom were engaged in sexual acts. The report noted that one website redirected the user to a different website "which is PornTube in a 'teen' search by user." *Id.*

23. Grievant was at work during the times listed in the NVR for when the prohibited material was accessed.[18]

24. The first page of each NVR contains the a section in which words; "Enrolled," "Strike 1," "Strike 2," and "Strike 3" are set out. Each time an NVR is developed concerning a particular computer, a box beside each of these words is marked indicating whether prior reports have been made. The "Enrolled" box was marked related to the August 2010 NVR. Respondent's Exhibit 14.

25. After the NVR is completed, the information security officer sends it to the agency. Sometimes the officer requests a response to see if the employee has been counseled, but not always. The first NVR related to Grievant's computer was sent electronically to Linda Klotzbach, the Respondent's Administrator at the time. For some reason, Ms. Klotzbach did not see this report and therefore did not bring it to Grievant's attention.

26. On January 7, 2011, a second NVR was generated citing attempts to visit several known pornographic websites by Grievant's computer. As with the first NVR, the computer was identified as being the computer assigned to Grievant by the specific IP address and unique log-on identifier. (Respondent's Exhibit 1.) The report included a copy of the first NVR with the boxes "Enrolled" and "Strike 1" marked. The second report was marked "Strike 2."

[18] Respondent's Exhibits 17 & 18, time sheets showing when Grievant was at work and when he checked out of the office for lunch or breaks.

27. The second NVR noted that between that between 7:00 a.m. and 9:00 a.m., Grievant's computer was used to attempt to access ninety-five websites known to contain pornographic and offensive material. Additionally, the computer was able to access sites which contained such material. Examples of the websites accessed contained nude women engaged in sex acts with men and other women.[19] There were numerous websites visited during the report period which were not pornographic in nature including material related to sport fishing and medical research items. These sites were interspersed with the pornographic material.[20] Grievant is an avid fisherman and used medical sites in his work for Respondent.

28. Grievant was at work during the times listed in the second NVR for when the prohibited material was accessed.[21]

29. The second NVR related to Grievant's computer was sent electronically to Linda Klotzbach's e-mail address. Ms. Klotzbach had retired and Nancy Cottrell was serving as Respondent's interim co-administrator.

30. Jeffery E. Smith was hired as the Administrator for Respondent on May 2, 2011,and Ms. Cottrell was returned to her Clerk position. Ms. Cottrell did not see the second NVR until she opened the e-mail attachment in August 2011. Within three weeks of his employment, the Health Officer, Dr. Leela Patel,[22] and at least one Board member of Respondent were very concerned about Mr. Smith's ability to perform his new job. Grievant was one of the few employees in the office with whom Mr. Smith has

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[19] Samples of the websites accessed included, www.pornhub.com, www.karenloveskate.com, and www.hustlerlive.com.

[20] Testimony of Christopher Avis, WVOT Security Officer.

[21] Respondent's Exhibits 19 & 20, time sheets showing when Grievant was at work and when he checked out of the office for lunch or breaks.

[22] During the hearing, Dr. Patel was also referred to as Respondent's Medical Director. Regardless of which title was correct, Dr. Patel is in charge of all medical aspects of the Respondent's activities.

a good working relationship. *See Smith v. Clay County Health Department*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012).

31. Ms. Cottrell found the electronic version of the NVR's in Respondent's e-mail files in August 2011. Upon finding the NVR's, Ms. Cottrell called Respondent's Health Officer, Dr. Leela Patel, to tell her about the material. She provided Dr. Patel with a copy of the reports at Dr. Patel's office in South Charleston.

32. Upon viewing the material in the NVR and noting that it referred to "teen" sites, Dr. Patel reported the material to the Clay County Prosecuting Attorney in case any of the material related to minors.[23] The Prosecuting Attorney had the materials investigated by a State Police Officer and an agent of the FBI and determined that there was no evidence that a crime had been committed.[24]

33. On August 8, 2011, approximately two days after receiving the NVRs, Dr. Patel and Joyce McLaughlin, Clay County Board of Health President, met with Grievant regarding the reports. At the end of that meeting Grievant was advised that he was suspended from his position for not more than thirty days while an investigation was conducted. (Respondent's Exhibit 6, a letter confirming the verbal suspension.)

34. A predetermination conference was held on August 19, 2011, with Grievant, Board President, Joyce McLaughlin, Dr. Patel, and Administrator Smith in attendance. Grievant was advised again about the network violations and he stated

[23] Dr. Patel believed she was required, as a mandatory reporter of suspected abuse or neglect of minors under W.VA. CODE §49-6A-2, to report the issue to the prosecuting attorney's office. However, there is no indication that the matter was reported to the Department of Health and Human Resources as required by the statute.

[24] There was hearsay testimony offered that a Board member, Joyce McLaughlin, and Ms. Cottrell insisted that the prosecutor have the material submitted to the FBI. It is not relevant who made this suggestion since the action was taken and no evidence of criminal activity was found. Chris Avis testified that if the WVOT security officers find any evidence that a computer is being used to view pornography involving minors, the matter is immediately turned over to the FBI. That was not done in this matter.

that he was unaware of any network policy approved by Respondent and did not make any network violations.[25] Dr. Patel also provided Grievant with a letter, dated the same day, extending the investigation suspension for a period of five days and advising Grievant that a decision would be made by August 24, 2011. (Respondent's Exhibit 8.)

35. By letter dated August 24, 2011, Grievant's employment with Respondent was terminated. The specific reasons cited were:

> . . . Specifically, you have used your State-owned computer to access adult pornography and attempt to access teen sites. You were also inappropriately searching for information on a coworker.[26]

36. At the level one conference held in this matter, Grievant alleged, among other things, that he had looked up multiple websites including hunting, fishing, and Ebay, in an effort to get the attention of network violations so Respondent would be investigated for the injustice that happened there on a daily basis. Respondent's Exhibit 10, (notes from the level one conference taken by Dr. Patel the next day.)

37. Grievant had a contentious relationship with past-administrator Linda Klotzbach. He accused her of improperly distributing H1N1 vaccinations and not allowing him to properly direct employees. Thereafter, Ms. Klotzbach gave Grievant a reprimand which he was able to reverse in a successful grievance decision. Grievant was also supportive of Administrator Smith which made him unpopular with other employees.

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[25] Respondent's Exhibit 7, notes from the Predetermination conference signed by Dr. Patel and Administrator Smith.

[26] Respondent's Exhibit 9, Grievant did not deny looking for information regarding a co-worker and Respondent did not provide any proof that this was a specific violation of policy.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See Watkins supra, 229 W.Va. at _, 729 S.E.2d at 833* (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

Litten v. W. Va. Dep't of Trans., Div. of Highways, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision).

Grievant was dismissed for multiple violations of WVOT Policy 510, as well as DHHR and Respondent policies, prohibiting the use of State-owned computer equipment to access obscene or pornographic material at the workplace. Grievant was also accused of violating WVOT Policy 501, by making his passwords available for others to use and by failing to turn-off or lock his computer when he was away from it. Respondent proved that Grievant's computer was used on several days, while Grievant was at work, to access and attempt to access a large number of websites known to contain pornographic and obscene material.

Grievant contends that he was never made aware of the policies or the early violations. He agrees that he used his computer to access hunting and fishing websites as well as other personnel matters, but never used it to access pornographic material. He notes that he was never advised of the NVR issued in 2010 and if he had been he would have stopped using the computer for personal use and taken steps to protect it from improper use by others. Grievant does not deny that he made his password accessible on his desk and that he did not lock his computer when he left his office to take smoke breaks or run errands. In fact, Grievant opines that others may have used his computer when he was away to access such material in an effort to discredit him. Grievant alleges that his dismissal was in retaliation for his successful grievance challenging an improper disciplinary action, his accusations of improper conduct by Ms. Klotzbach and others and his support of Administrator Smith. Finally, he argues that the penalty of dismissal was too harsh given his conduct and that it should be reduced.

Respondent produced acknowledgement forms demonstrating that Grievant had been made aware of the DHHR and Board of Health Employee Handbooks which contain references to WVOT policies related to proper use of the computer. Grievant also demonstrated knowledge of the policies when he alleged that he was accessing hunting and fishing websites to provoke an investigation of Respondent by the WVOT. *See* FOF 33, *supra*. Grievant's allegation that he was not made aware of the policies regarding proper computer usage is disingenuous.

Respondent proved that Grievant's specific computer, located in Grievant's office was used to access pornographic and obscene material. Grievant's time sheets demonstrate that he was at work during the periods this activity took place. Additionally,

interspersed with the pornographic web searches were web searches for sport fishing and medical research material. These are searches which Grievant admitted to making. There was no evidence that any other employees were observed going into Grievant's office during these time periods. Respondent met its burden of proof that it is more likely than not that Grievant was the employee who used the computer to access the pornographic material, in violation of Respondent's and State policy. *Litten, supra.*

Grievant argues that his termination was in retaliation and reprisal for his prior grievance, his accusations of misconduct by Ms. Klotzbach and his support of Administrator Smith. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity;
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical question is whether the grievant has established by a

preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004). "As discussed in the case of *Franks Shoe Store, supra,* this process has also been used to determine if an employer is guilty of improper retaliation against an employee for engaging in protected activity other than the Public Employees Grievance Procedure." *Hypes v. Div. of Highways*, Docket No. 2010-0389-DOT (Aug. 1, 2011).

In this case, Grievant participated in the protected activities of filing a grievance[27]and whistle-blowing.[28] Respondent had actual knowledge that Grievant

[27] *See* W. VA. CODE § 6C-2-3(h) *Reprisal.* -- No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination.

participated in these activities and he was subsequently dismissed from employment. However, Grievant was not able to prove by a preponderance of the evidence "that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner, supra.* Most of Grievant's protected activity was aimed at Linda Klotzbach, who was no longer Respondent's Administrator when he was dismissed. Ms. Klotzbach did come back to work for Respondent on a temporary basis but there is no indication that she had a role in the termination of Grievant's employment. More importantly, Respondent proved there was a "legitimate, non-retaliatory reason for its action." Therefore, Grievant would not have prevailed even if he had made a *prima facia* case of reprisal. *Id.*

Finally, Grievant argues that the penalty of dismissal from employment was too severe for his conduct, especially since he had not been warned about the conduct when it first occurred in 2010.[29] In assessing the penalty imposed, "[w]hether 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); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011). Respondent proved that Grievant had used his computer to access pornographic material while he

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[28] *See* W. VA. CODE § 6C-1-3 (a) No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

[29] Grievant's main argument for mitigation is that his only improper misconduct was failing to keep his computer and password secure. However, Respondent proved all of the misconduct related to misuse of the computer.

was at work. The West Virginia Public Employees Grievance Board has upheld disciplinary actions against employees who were viewing sexually explicit material at work on one or more occasions. *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011) (Holding that viewing sexually explicit material on a computer in the workplace constituted "gross misconduct."); *Kennard v. Tucker County Bd. of Educ.*, Docket No. 01-47-591/628 (Mar.12, 2002) (Holding that viewing pornographic material on a school computer constituted "immorality" pursuant to W. VA. CODE § 18A-2-8); and *Beck v. Div. of Corr./Huttonsville Corr. Ctr.*, Docket No. 2009-1567-MAPS (Feb. 2, 2010) (Upholding the suspension of an employee for viewing sexually explicit magazines while at work). Grievant accessed and attempted to access, more than a hundred sexually prohibited websites on his work computer over the course of two years. Additionally, most of his clients were women who needed to sufficiently trust Grievant to talk with them about personal and sensitive matters. Given the totality of the circumstances, dismissal was not too severe a penalty. Accordingly, the grievance is DENIED.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Litten v. W. Va. Dep't of Trans., Div. of Highways*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision).

2. Respondent met its burden of proof that it is more likely than not that Grievant was the employee who used the computer to access pornographic material, in violation of Respondent's and State policy.

3. W. VA. CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity;
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

4. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989).

5. “Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive.” *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004). “As discussed in the case of *Franks Shoe Store, supra,* this process has also been used to determine if an employer is guilty of improper retaliation against an employee for engaging in protected activity other than the Public Employees Grievance Procedure.” *Hypes v. Div. of Highways,* Docket No. 2010-0389-DOT (Aug. 1, 2011).

6. Grievant was not able to prove by a preponderance of the evidence “that his protected activity was a ‘significant,’ ‘substantial’ or ‘motivating’ factor in the adverse personnel action.” *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

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); *Crites v. Dep’t of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

8. Given the totality of the circumstances, the penalty of dismissal was not clearly excessive and mitigation of the penalty is not appropriate.

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: JULY 15, 2013

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE