WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BOBBIE JO STEELE
Grievant,

v. **Docket No. 2013-0037-MAPS**

REGIONAL JAIL and CORRECTIONAL FACILITY AUTHORITY/SOUTH CENTRAL REGIONAL JAIL,
Respondent.

D E C I S I O N

Bobbie Jo Steele, Grievant, filed this grievance against Regional Jail and Correctional Facility Authority/South Central Regional Jail, Respondent, on July 13, 2012, contending she was discharged without cause and wrongfully terminated. Grievant's requested relief is to be reinstated with back-pay.

A conference/hearing was held at level one on July 26, 2012, and the grievance was denied at that level on July 27, 2012. Grievant appealed to level two on August 6, 2012, and a mediation session was held on November 19, 2012. Grievant appealed to level three on November 28, 2012. A level three hearing was held before the undersigned Administrative Law Judge on February 25, 2013, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by counsel, Paul M. Stroebel, Esquire, Stroebel & Johnson, P.L.L.C. Respondent was represented by its then counsel Travis E. Ellison, III, Esquire. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about March 27, 2013, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Respondent terminated Grievant's employment as a correctional officer at South Central Regional Jail. Grievant was classified as a Corporal, a supervisory position. Grievant contends the termination is improper and offers several arguments in support of her contention. Respondent maintains its disciplinary action is lawful.

Grievant was discharged for violating applicable Non-Discriminatory Workplace Harassment Policy. Although Grievant denies the allegations, and provides some counterbalance to aspects of the allegations, Respondent established the charges by the weight of credible evidence. Grievant engaged in conduct which created a hostile work environment for an identified correctional officer. Grievant failed to demonstrate that termination was too severe a punishment, or that mitigation was warranted under the circumstances. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed as a Correctional Officer at South Central Regional Jail in Kanawha County, West Virginia. Grievant had been employed by Respondent for four years and was classified as a Corporal at the time of termination.

2. Grievant is married to Corporal Jeff Steele. Grievant is also the mother of Correctional Officer Matthew Queen. During the time period relevant to facts of the instant matter, all three individuals were employed by West Virginia Regional Jail & Correctional Facility Authority ("WVRJA"), Respondent, at South Central Regional Jail.

3. On May 17, 2012, Correctional Officer II, Tonya Swayne, completed an Equal Employment Opportunity Complaint form alleging that Grievant was discriminating and/or harassing her. Resp. Ex. 1.

4. Correctional Officer Swayne also filed Incident Reports. Resp. Ex. 2a, 2b, 2c. referencing events that she believed demonstrated dubious behavior of Grievant and/or other correctional officers creating a hostile work environment.[1]

5. An investigation was conducted by the West Virginia Equal Employment Office ("WVEEO" or "EEO") regarding the complaint(s) filed by Officer Swayne and an internal investigation was conducted by Respondent.

6. Correctional Officer Swayne is an African-American female. The allegations toward Grievant levied by CO Swayne were initially perceived as racial discrimination.

7. A variety of correctional officers were interviewed and requested to provide information regarding various events and/or interactions with Grievant and CO Swayne. Individuals interviewed include: Correctional Officers Tonya Swayne, Jediah Walls, Marvin Hively, Frank Wright II, Austin Jordan, Dustin Williams, Matthew Queen and Nathan Roop; Sergeants Norman Atkins and Richard Savilla; Corporals Anthony Leonard, Jeff Steele and Grievant; Lieutenant Ronald Craig Adkins; Administrator Steven Tucker, and James Rollins with the WV EEO. *See* Resp. Ex. 7 and 9.

8. EEO Investigator, James Rollins, conducted an investigation into the merits of a race-based hostile work environment. Mr. Rollin's investigation concluded that based

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[1] The instant Grievant is not the only correctional officer identified with regard to assisting to create a hostile work environment for CO Swayne. This decision will strive to address issues as relevant to the conduct of Corporal Bobbie Jo Steele, Grievant.

upon the statements obtained, CO Swayne's allegations could not prove a *prima facie* case of racial discrimination, but concluded that some form of discrimination against CO Swayne had taken place and should be referred back to the WVRJA as an administrative matter. Resp. Ex. 7.

9. Respondent's internal investigation of Correctional Officer Swayne's allegations of discrimination and/or hostile work environment was done by Crystal Wieble, then Investigator II for the WVRJA.[2] The internal investigation report is a part of the record. Resp. Ex. 9.

10. Respondent's interpretation of the allegations levied by Correctional Officer Swayne matured over the course of time. The perception that the allegations were the premise of a racial discrimination matter shifted; Respondent's attention began to focus toward that of a hostile work environment investigation.

11. Some time during May 2012, then Administrator Steve Tucker and Lt. Craig Adkins counseled Correctional Officer Tonya Swayne regarding her conduct and interaction with inmates, one particular inmate was identified to be of particular concern. The "counseling" included informing CO Swayne of how her actions could be placing her in danger and identifying alternative methods of conduct. CO Swayne acknowledged the information and indicated her intent to correct any behavior perceived to be ill-advised. CO Swayne was not issued any formal reprimand. CO Swayne was of the opinion that the

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[2] At the time of the level three hearing, Ms. Wieble was no longer employed with WVRJA. The internal investigation report dated June 26, 2012, and associated support documentation, Resp. Ex. 9, was relied upon by Respondent to make its decision to terminate Grievant's employment.

matter was concluded. There was no further investigation authorized or ordered regarding CO Swayne by Respondent.[3]

12. Grievant was a supervisor and was responsible for overseeing correctional officers such as CO Swayne. Grievant formed an opinion regarding a female correctional officer not directly under her supervision.[4] Corporal Steele was not Officer Swayne's direct supervisor. Grievant was of the opinion that CO Swayne was "dirty" and readily shared this belief with others.

13. Grievant asked correctional officers under her supervision to write incident reports on CO Swayne. Grievant also requested that individuals write some reports without getting an "Incident Report Number" so the reports would not be logged into the Incident Report Log.

14. Grievant made comments to staff under her supervision and other correctional officers pertaining to Officer Swayne. Grievant exercised her authority and positional status to undermine the reputation of CO Swayne.

15. Comments made by Grievant include but are not necessarily limited to; calling CO Swayne a dirty officer, referencing that Swayne is participating in an inappropriate relationship with an inmate, alleging that she could possibly bring a gun in to her "boyfriend."

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[3] Administrator Tucker indicated he accepted CO Swayne's explanation regarding the issues in discussion. He indicated to the EEO Investigator that there have not been any additional problems with Officer Swayne since they spoke to her regarding the matter. *See* Resp. Ex 7.

[4] Grievant notes that as a Shift Commander, she is responsible for all employee working the shift. It is recognized that there may have been isolated incidents when Officer Swayne worked and Grievant was Shift Commander. A distinction is recognized between this and being Officer Swayne's direct supervisor.

16. Grievant did not hold co-worker CO Swayne in high regard and readily made her low opinion of Swayne known to others. Grievant further elicited the assistance of others to gather negative information about CO Swayne. It is more likely than not that the actions of Grievant demonstrated the actions of an individual conducting an investigation into the work habits of a correctional officer.

17. Respondent was made aware of actions and comments fostered by Grievant regarding CO Swayne which generated concern(s). Events and/or situations identified included:

a. Allegations that Officer Swayne was a dirty officer
b. Allegations that Officer Swayne had been in close contact with a male inmate
c. Allegations that Officer Swayne made an unauthorized visit with an inmate when she walked him to the visitor's area.
d. Allegations that Officer Swayne put her head into the food tray hole opening in an inmate's cell.
e. Allegations that Officer Swayne stops and talks to inmate(s) while walking the perimeter of the complex.
f. Allegations that Officer Swayne stayed in the chapel too long when the inmates were having church service.
g. Spreading of rumors that Officer Swayne maybe inclined to bring in a weapon for use by an inmate.

18. Grievant exercised her authority and positional status to undermine the reputation of CO Swayne, and to foster an atmosphere designed to facilitate mistrust of Officer Swayne's ability to perform as a correctional officer at South Central Regional Jail.

19. CO Jediah Walls was asked by Grievant to write report(s) regarding anything unusual he may have seen in regard to CO Swayne, and encouraged him to not get an Incident Report Number from the control room but to give the report directly to Grievant or her husband, Cpl. Jeff Steele. This was not normal procedure.

20. Grievant told Officer Walls that Officer Swayne was a “dirty officer” and that “they needed to get some female officers who are not sleeping with inmates and other officers.” Walls L-3 testimony

21. Further CO Queen, Grievant’s son, told CO Walls that he could talk to CO’s Wright or Williamson because they were “in on it.” *Id*.

22. CO Walls generated two Incident Reports regarding CO Swayne. Resp. Exs. 3a and 3b.

23. CO Queen wrote a confidential report alleging that he had witnessed CO Swayne pass something to an inmate.

24. Grievant had occasion to correct CO Swayne. Reportedly Grievant determined CO Swayne was incorrectly doing an “admin check” where the cell doors are checked to make sure they were secure and that Swayne failed to properly pat down an inmate. Grievant did not file an Incident Report but communicated these situations with Swayne’s immediate supervisor. Further, Grievant had occasion to report Officer Swayne for conduct she perceived and/or determined as odd behavior for a correctional officer. Grievant reported that Swayne had thrown keys and spoken to her disrespectfully. *See* EEO Investigation Report, Interview of Grievant, Resp. Ex. 7.

25. CO Swayne spoke to Corporal Anthony Leonard complaining that Grievant was picking on her all the time. Cpl. Leonard is normally Officer Swayne’s immediate supervisor. Cpl. Leonard has worked for WVRJA for nineteen years. Cpl. Leonard was aware that “[Grievant] and Officer Swayne did not mix well together.” Resp. Ex. 7. Cpl. Leonard, an African-American male, did not think the problem between the two was racial.

26. West Virginia Division of Personnel's Policy on Non-Discriminatory Workplace Harassment is described as: "[A] form of harassment commonly referred to as "bullying" that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bounds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing his or her work." *West Virginia Division of Personnel Prohibited Workplace Harassment Policy.* Resp. Ex. 11.

27. In accordance with the DOP's *Prohibited Workplace Harassment Policy,* "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." *Id*.

28. Grievant was provided with additional written information regarding Workplace Harassment in the form of a document entitled "Prohibited Workplace Harassment 2011 Refresher." Grievant signed said document on November 1, 2011, acknowledging that she had read, understood and intended to comply with the information provided. Resp. Ex. 15.

29. The Prohibited Workplace Harassment 2011 Refresher document among other information restated that; "[i]llegal and non-Discriminatory hostile workplace harassment will not be tolerated within the workplace and will result in appropriate disciplinary action, up to and including dismissal," citing DOP's *Prohibited Workplace Harassment Policy*.

30. Respondent provided Grievant with a dismissal letter dated July 11, 2012, after a pre-determination conference where Grievant, with the assistance of legal counsel, was advised of the allegations and evidence in this matter. Grievant has been provided opportunity to address the allegation against her. Resp. Ex. 13.

31. The three page July 11, 2012 dismissal letter, signed by Director of Human Resources, Wayne Armstrong, in relevant part, provides:

> Specifically, during the course of an Investigation, it was determined that you were conducting an authorized Investigation on a female Correctional Officer that you though was "dirty" and that you asked Correctional Officers under your supervision to write reports on the female Correctional Officer. You encouraged the Correctional Officers under your supervision to write those reports without getting an Incident Report so their reports would not be logged into the Incident Report Log. You also made comments to staff under your supervision that this female Correctional Officer could possibly bring a gun in to her "boyfriend."
>
> It is our determination that your actions were in violation of the West Virginia Division of Personnel's Policy on Non-Discriminatory Workplace Harassment

Resp. Ex. 13.

32. Further, the July 11, 2012 dismissal letter, stated:

> This is unacceptable conduct for a supervisory employee of the West Virginia Regional Jail and Correctional Facility Authority. Your actions, as they relate to this matter, indicates . . . that you cannot continue in your position as a Supervisory Correctional Officer. Your actions in this matter also compromised the safety of the female Correctional Officer as well as the safety and security of the entire facility. This type [of] conduct cannot, and will not, be tolerated.

Resp. Ex. 13.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public

Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Permanent state employees in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interests 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's employment with Respondent was terminated for actions determined to be in violation of West Virginia Division of Personnel's Policy on Non-Discriminatory Workplace Harassment. In addition to the more formal descriptions of the forbidden conduct, non-discriminatory workplace harassment has been recognized to involve the repeated unwelcome mistreatment of one or more employees often involving a combination of intimidation, humiliation and sabotage of performance. *See* III G. of Policy, Resp. Ex. 11.

Grievant contests her dismissal. Grievant makes a number of arguments as to why she contends termination is improper in this matter. Grievant maintains that the evidence does not support the finding that she unlawfully harassed Officer Swayne as alleged.[5] Grievant contends that Respondent failed to institute progressive discipline procedures and further alleges her due process rights were violated. Grievant also notes she had previously filed a claim of harassment against Respondent and this matter is retaliation. Finally, Grievant provides that another employee with a similar charge was demoted as a result of his/her actions rather than discharged.

An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Weik v. Div. of Natural Resources*, Docket No. 2011-1270-DOC (Dec. 7, 2011); *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008)*; Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the

[5] Among other assertions, Grievant relies heavily on the contention that each employee of WVRJA has an affirmative duty to report unusual incidents and/or allegations of inappropriate or illegal conduct of inmates or staff. Grievant infers that her conduct and the actions of others were reasonably in compliance with such responsibility.

statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

The internal "Report of Investigation" dated June 26, 2012, and associated support documentation, Resp. Ex. 9, was relied upon by Respondent to make its decision to terminate Grievant's employment. Further, it is factually accurate that the EEO investigation was influential, to some degree, with regard to Respondent's course of action in this matter. Thus, in the circumstances of this case, it is prudent to discuss the two investigations (EEO and internal), the respective reports of each with select review of support documents and interviews which influenced and/or substantiated the conclusions of the investigation reports.

There were several Correctional Officers who were interviewed, providing statements and collateral documentation throughout the course of the two investigations. No less than fourteen officers were interviewed. *See* Finding of Fact (FOF) 7. It can not be said with certainty that the internal investigation officially began at the conclusion of the EEO investigation. Respondent's internal investigation of allegations of discrimination and/or hostile work environment was done by Crystal Wieble, then Investigator II for the WVRJA. She actively participated with the EEO Investigation. EEO Investigator James Rollins and Ms. Wieble conducted investigations into the circumstances and merits of the

complaints initiated by CO Swayne. It is more likely than not that the internal investigation and the EEO investigation overlapped. Mr. Rollins' investigation concluded that, based upon the statements obtained, CO Swayne's allegations could not prove a *prima facie* case of racial discrimination, but concluded that some form of discrimination against CO Swayne had taken place and should be referred back to the WVRJA as an administrative matter. Resp Ex. 7. The internal investigation of Respondent expanded its focus to encompass the prospect of employee misconduct not of a racial basis. This is found to be reasonable.

Numerous interviews were conducted over a rational span of time, statements were collected, and witnesses were questioned about incidents that transpired contemporaneous to allegations. Affirmation statements were provided by Correctional Officers interviewed. Not all of the COs whose interviews were encapsulated by the two investigative reports, testified at the level three hearing. The support documentation attached to the two investigative reports are consistent with the findings stated in the individual reports. The interviews were recorded and it is believed that the encapsulations of CO statements are credible. There are questions regarding the appropriate weight that should be given to some incident reports.

There was consistent testimony by all witnesses that incident reports were a common and daily occurrence at the Regional Jail. It is undisputed that there were incident reports prepared by a limited number of identifiable correctional officers about the conduct of CO Swayne. Nevertheless, of the incident reports known to have been filed by others COs regarding Officer Swayne, the catalyst is Grievant and her efforts to verify her suspicions regarding the character of Officer Swayne. *See* testimony of Walls, Roop and Adkins; also *see* EEO Report, Resp. Ex. 7. CO Roop was of the opinion that the "Steeles"

would retaliate against anyone that goes against them. It is evident that certain reports were orchestrated at the behest of Grievant and/or Matthew Queen, Grievant's son, working in concert with Grievant.[6] While the conduct reported in the incident reports factually was the type of conduct that might legitimately be noted, incident reports were used as weapons to undermine Officer Swayne. This is persuasive information not necessarily conclusive, but persuasive nonetheless.

It is recognized by the June 26, 2012 Internal Investigation Report that Officer Swayne's personality is respectful and friendly. It was acknowledged that CO II Swayne's natural personality may cause the appearance of an impropriety even when none exists. This was dealt with at the facility level. *See* FOF 11. Administrative personnel empowered to counsel Officer Swayne were satisfied with her explanation regarding her past interactions with inmates and her indicated course of corrective action. In the circumstance of this matter, it is of record that Grievant formed a negative opinion with regard to Officer Swayne and readily shared that belief with others. The Internal investigation sought to determine what actions, if any, Grievant may have taken toward Officer Swayne. The internal investigation was commenced after a complaint alleging harassment was filed. Further, it is factually accurate that the EEO Investigation was influential with regard to Respondent's course of action. The agency acted responsibly. Respondent did not *sua sponte* commence this action against Grievant. Respondent rationally exercised its authority to determine, with some specificity, the conditions of Officer Swayne's employment.

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[6] Probationary Correctional Officer Matthew Queen, Grievant's son, filed and requested others file incident reports regarding Officer Swayne.

The internal investigation report dated June 26, 2012, and associated support documentation, Resp. Ex. 9, was relied upon by Respondent to make its decision to terminate Grievant's employment. This is found to be reasonable. Further, the methods established in the investigation are credible. The information as documented by recorded interviews, typed findings and rational conclusions is deemed reliable.

Non-discriminatory Hostile Workplace Harassment is defined in the Division of Personnel's Prohibited Workplace Harassment Policy as:

> A form of harassment commonly referred to as "bullying" that involves verbal, non-verbal or physical conduct not discriminatory in nature that is so atrocious, intolerable, and so extreme and outrageous as to exceed bounds of decency and which creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing her or his work.

This Board has generally followed 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 plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75 (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 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (Apr. 23, 2009). "'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, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006).

Grievant contends, in light of the totality of the circumstance, her conduct was subjectively reasonable. This contention has been considered. The undersigned is aware that each employee of WVRJA has a an affirmative duty to report unusual incidents and/or allegations of inappropriate or illegal conduct of inmates or staff. *See* WV Regional Jail and Correctional Facility Authority Policy and Procedure, Resp. Ex. 12 and 14. Arguably, 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*.

Nevertheless, Grievant actively undermined Officer Swayne's credibility as a correctional officer. Grievant's demeaning, ridiculing and slandering of CO Swayne on a methodical basis, culminated to create a non-discriminatory hostile work environment. Grievant did more than report information or incidents of concern. Grievant exercised her authority and positional status to undermine the reputation and security of CO Swayne. Grievant spread rumors and gossip that was detrimental to not only the target of Grievant's

venom, but it was also damaging to the interest and legitimate concerns of WVRJA. Grievant's conduct was sufficiently severe and pervasive to alter the terms and conditions of CO Swayne's employment.

"As a supervisor, Grievant may be held to a higher standard of conduct, because [s]he is properly expected to set an example for those employees under [her] supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of [her] supervisors. *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988)." *Lilly v. Dep't of Transp.*, Docket No. 07-DOH-387 (June 30, 2008).

Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior. *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)." *Corley, et al., supra.*

Grievant contests whether the behavior alleged is truly unprofessional conduct. Further, Grievant challenges whether directives specific to the instant situation were given as to how to improve/correct the conduct. Respondent clearly and frequently explained its policies concerning proper employee conduct. It is disingenuous to argue Grievant was

not aware her conduct was extreme, and unaware of how to curtail her conduct. Grievant's conduct was willful and deliberate. It is a violation of DOP's *Prohibited Workplace Harassment Policy* 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." Serving in a supervisor position heightened Grievant's accountability and the Agency's responsibility to act. The West Virginia Regional Jail & Correctional Facility Authority has promulgated a Code of Conduct Policy 3010 which among other things, requires:

> *<u>Procedure 16</u> - All employees shall remain alert, observant, and occupied with facility business during their tour of duty. All employees shall conduct themselves in a manner which will reflect positively upon the Authority and its employees;*
>
> . . .
>
> *<u>Procedure 19</u> - 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."*

Resp. Ex. 12.

Grievant infers that previously filed claims of harassment against the Regional Jail, including claims of retaliation were instrumental in her being disciplined by Respondent in the instant case. 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 (i.e., filing a grievance);
> (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 her 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 or her 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).

Grievant placed little to no evidence in the record regarding her participation in other grievances. Grievant notes the existence of a legal dispute with Respondent. Such is also referenced in general terms, in both investigative reports; however, Grievant did not identify any particulars other than to note the contended allegations. Nor was Grievant's employment history provided. There was no specific evidence placed into the record substantiating the filing of a civil suit was a factor in the instant decision to discipline Grievant. Grievant did not demonstrate through any measurable means that the actions of Respondent were tainted by nefarious motive. As discussed earlier, the internal

investigation was commenced after a complaint alleging harassment was filed. Respondent rationally exercised its authority to determine the conditions of Officer Swayne employment.

Grievant further contends that Respondent did not follow progressive discipline policy when it discharged Grievant. Generally, “Progressive Disciplinary Action” describes when verbal reprimands, written reprimands, suspensions, possible demotions and dismissals are appropriate. Policy does not require that each of the "disciplinary tools" described therein must be applied in a sequential order. Therefore, the fact that Grievant was terminated, rather than suspended, does not violate policy, *per se.* Rather, the supervisor’s guide to discipline cited by Grievant, indicated that an employee’s singular offense may be of such severity to warrant dismissal.

Progressive discipline does not bar an employer from sanctioning an employee at a severe level of discipline. An agency’s use of a progressive discipline does not require the agency to blindly, commence at a preset level of discipline. Thus, this ALJ is not persuaded that Grievant was not given the opportunity of a progressive discipline policy.

Grievant alludes that she is and/or was deprived of due process. Due process is the substantive and procedural safeguard to a person’s liberty and property interest, provided by both the United State and West Virginia Constitutions. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required

to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. Of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The question is whether the due process protections afforded Grievant were sufficient.

It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that Respondent is required to provide. *Id*. at Syl. Pt. 3.

Grievant has had the assistance of legal counsel commencing with her interview during the EEO investigation.[7] Grievant was aware of the various allegations being investigated, she was informed verbally, provided written notice of the charges against her, and Respondent identified the conduct for which Grievant was to be terminated. Grievant was provided an opportunity to be heard on the charges, and to address the allegations of misconduct. Grievant, with the assistance of legal counsel, has addressed the issues in contention, including the opportunity to challenge the validity of the information provided by the two investigative reports. Grievant has been provided copies of the written evidence consulted in review of the pending charges. Accordingly, Grievant's contention that she was denied due process is without merit.

Respondent had options in the fact pattern of this matter. Nevertheless, Respondent chose to terminate Grievant's employment. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

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." *Dickens v. West Virginia Regional Jail & Correctional Auth'ty*, Docket No. 2009-0534-CONS, (March 23, 2009). Mitigation of a penalty is

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[7] On May 25, 2012 Grievant declined to speak with investigators, even after being informed it was an internal investigation. Arrangements were made for an interview with Grievant and her attorney on June 11, 2012.

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). "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 (W. Va. Educ. St. Empl. Griev. Bd., Aug. 8, 1989). Respondent established that Grievant engaged in conduct that was in violation of applicable *Workplace Harassment Policy* and that the misconduct substantially and significantly affects the public interest. A preponderance of the evidence establishes that Grievant actively participated in creating significant non-discriminatory harassment in the workplace. This is sufficient ground to reasonably justify the termination of an employee entrusted with supervisory responsibilities. Grievant has failed to demonstrate that Respondent's actions of terminating her services was clearly excessive or an abuse of discretion. Grievant has not proven that Respondent neglected to follow progressive discipline policy. Lastly, Grievant also failed to establish that under the circumstances of this matter that her due process rights were violated.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

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

preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

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. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008)*; Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

4. The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of

contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

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, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006).

6. Respondent has proven by a preponderance of the evidence that Grievant's employment was terminated for good cause.

7. "Due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)).

8. Applicable progressive discipline policy was not violated in this matter.

9. Grievant bears the burden of showing that the penalty of dismissal was too severe or was an abuse of discretion. An allegation that a disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent

disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995); *see also, Martin v. West Virginia State Fire Commission,* Docket No. 89-SFC-145 (Aug. 8, 1989).

10. Grievant failed to demonstrate that the disciplinary measure of dismissal was disproportionate to the offense, arbitrary and capricious, or an abuse of discretion by Respondent.

11. "Whether to mitigate punishment imposed by the employer depends upon 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). In assessing the penalty to be imposed, "whether to mitigate punishment imposed by the employer depends upon 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).

12. Non-Discriminatory Workplace Harassment is described as: "[A] form of harassment commonly referred to as "bullying" that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bounds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing his

or her work." *West Virginia Division of Personnel Prohibited Workplace Harassment Policy.* In accordance with DOP's *Prohibited Workplace Harassment Policy,* "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.

13. Respondent established by a preponderance of the evidence that Grievant's conduct was in violation of applicable Prohibited Workplace Harassment Policy.

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 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: June 5, 2013

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Landon R. Brown
Administrative Law Judge