WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KENNY THOMPSON,

Grievant,

v. **Docket No. 2023-0032-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ WILLIAM R. SHARPE, JR. HOSPITAL,

Respondent.

DECISION

Grievant, Kenny Thompson, was employed by Respondent, the Department of Health and Human Resources, at Sharpe Hospital. On July 13, 2022, Grievant filed a grievance against Respondent, stating, "Unjustified termination." As relief, Grievant requests, "To be made whole in every way including restoration of job, any and all backpay with interest[.] Restoration of any leave occur[r]ed including any holiday and restoration of benefits."

Grievant filed directly to level three of the grievance process.[1] A level three hearing was held by videoconference before the undersigned on July 12, 2023. Grievant appeared in person and was represented by Gordon Simmons. Respondent appeared by Ginny Fitzwater and was represented by James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on August 18, 2023. Each party submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant was dismissed for sexually harassing coworker L.H. by regularly calling her "Ms. Crites" (after a male coworker) and saying she had sex with her father and

[1]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.

brothers. Grievant had previously been counseled and suspended for sexual harassment. Respondent proved good cause for dismissal. Grievant failed to prove denial of due process or that his dismissal was excessive. Accordingly, the grievance is **DENIED**.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Kenny Thompson, was employed at Sharpe Hospital (Sharpe) by Respondent, the Department of Health and Human Resources (DHHR), as a Health Service Worker (HSW), starting in 2011.

2. Sharpe is a State-owned psychiatric hospital operated by DHHR. Sharpe houses patients suffering from mental illness.

3. On September 29, 2013, Grievant was issued Employee Performance Appraisals (EPA) setting forth expectations. The EPAs noted that Grievant "will work at maintaining appropriate workplace conversation so as not to offend coworkers and patients" and "will be mindful of appropriate language with staff and patients so as not to offend." (Respondent's Exhibit 9, Grievant's Exhibit 3).

4. On July 15, 2016, Samantha Perry, a housekeeper employed at Sharpe, filed a State of West Virginia Equal Employment Opportunity (EEO) Discrimination Complaint Form asserting Grievant had sexually harassed her from March through July 2016. Ms. Perry complained that Grievant made inappropriate sexual comments towards her every time she cleaned on his unit, even after she repeatedly requested that he stop.

5. The EEO investigation concluded that Grievant had in 2016, during a three-month period, harassed and made inappropriate sexual comments to Ms. Perry. These

included Grievant telling Ms. Perry that he would stick a duster in places "she would like," that he would hold her hand, that he would like to see her wear black jeans again in lieu of scrubs, and making statements such as "I like to watch you walk," "I'd like to see you wear them again," "I like to look at your butt," and "you should wear more tight clothes." The investigation found that Grievant ignored repeated requests by Ms. Perry to stop. (Respondent's Exhibit 9).

6. In a letter dated November 3, 2016, Respondent suspended Grievant for five days for making "sexually inappropriate comments to a female co-worker." The letter noted that the discipline followed corrective actions, including counseling and coaching "for comments [Grievant] made in the presence of female coworkers" and documented in Grievant's EPAs. (Respondent's Exhibit's 8 & 9).

7. The Grievance Board upheld Grievant's suspension in *Thompson v. DHHR/Sharpe*, Docket No. 2017-1164-CONS (Feb. 12, 2018), stating in relevant part:

> The record demonstrates that Respondent worked with Grievant by moving him from his assigned work area after the sexual harassment allegation was made and moving him after additional interaction was had with Ms. Perry after the EEO Complaint was substantiated. The record also demonstrates that Respondent worked with Grievant through EPAs and prior counseling and Grievant was suspended only after other avenues of non-disciplinary actions failed.
>
> The prior EPAs were considered in making the decision to suspend Grievant after the EEO Complaint against him was substantiated. The EPAs demonstrated Respondent's attempts to correct Grievant's inappropriate comments when around female employees and emphasized the need to be cognizant of language and comments made around female co-workers. Despite these efforts to coach and counsel Grievant, his language and comments did not improve …. After the EEO Complaint was filed against him, it was necessary for Respondent to limit, and if possible, alleviate, his interaction with Ms. Perry. Respondent moved Grievant's

> assigned work locations to reduce his interaction with Ms. Perry. After the EEO Complaint was substantiated, there was subsequent interaction between Grievant and Ms. Perry, which she described in written statements. Respondent again moved Grievant's assigned work locations and attempted to limit any interaction Grievant would have with Ms. Perry. …
>
> Respondent has met its burden of proof and demonstrated Grievant engaged in gross misconduct when Grievant made inappropriate comments to a female co-worker and failed to abide by Respondent's directive to limit his contact with this coworker.

8. At times relevant to this grievance, Grievant was a member of Sharpe's transport team, which transports patients to their appointments.

9. L.H.[2] was also employed by Sharpe as an HSW and was a member of Sharpe's transport team at times relevant to this grievance. L.H. is no longer with Sharpe.

10. Roger Crites was employed at Sharpe prior to the times relevant to this grievance and worked alongside Grievant and L.H.

11. From June 2020, after Mr. Crites left Sharpe, until L.H. filed a complaint in January 2022, Grievant regularly referred to L.H. as "Ms. Crites," implying that L.H. and Mr. Crites had a sexual relationship. Grievant called L.H. "Ms. Crites" thousands of times over this period.

12. L.H. found these comments offensive, as she was married and never engaged in a romantic or sexual relationship with Mr. Crites.

13. L.H. voiced her displeasure to Grievant at times by telling him to stop and, in case there was any doubt as to her wishes, went as far as telling him to shut up, hitting him, and throwing stuff at him. Grievant hit L.H. numerous times in response to being called "Ms. Crites." (Transportation team member Dawn Syrews' testimony).

[2]Initials are used to protect the victim's privacy due to the sensitive details covered.

14. At some point during or prior to this period, L.H. was accused of having sex with a patient. L.H. was exonerated of these allegations after Adult Protective Services investigated the matter. Grievant knew of these allegations. L.H. also told Grievant that she was molested as a child by her father but had Grievant promise not to tell anyone. Nevertheless, Grievant told coworkers that L.H. had been molested as a child and made jokes about L.H. having sex with patients. (L.H.'s testimony).

15. Grievant would make sexual comments to L.H. about her and Mr. Crites, such as asking L.H. how Mr. Crites could reach her with his fat belly and her fat ass; if Mr. Crites had to lift his belly so L.H. could suck his dick, and if L.H. removed her false teeth when she performed oral sex on Mr. Crites or a Sharpe patient. (Respondent's Exhibits 3 & 4, L.H.'s testimony).

16. Members of the transport team, including Grievant and L.H., were part of a Facebook chat group, created by Ms. Bleigh, called "Business Only." Employees used the chat group to exchange messages that could be considered physical threats. One mentioned a "cow" (which apparently was L.H.) and talked of cutting up a body and bringing it to a pig farm in response to L.H.'s complaints against Grievant. Participants were friends with Grievant and already disliked L.H. Some employees, including Grievant's witnesses, Kelsie Allman and Dawn Syrews, were suspended for their role. Many group members became even more embittered against L.H.

17. In February 2021, L.H.'s twin brother died. L.H. has eight brothers in all. L.H. was put on medication to deal with the trauma. The meds caused L.H. to fall asleep during patient transports. Employees are not permitted to sleep during transports.

Grievant and other coworkers took pictures of L.H. sleeping during transports after supervisor Carol Lynn Bleigh advised them to do so.

18. Almost a year later, on January 12, 2022, an incident occurred with Grievant, L.H., and William Tenney (a guard at Sharpe). L.H. told Grievant and Guard Tenney that she never dated in high school. Grievant responded that this was because L.H. was too busy having sex with her father and brothers. L.H. was very upset and ran out of the office. Grievant also left. L.H. returned in tears and told Mr. Tenney that she was molested as a child and that Grievant's comment offended her. Mr. Tenney encouraged Grievant to file a complaint. Security guard Kelly Lantz entered and observed that L.H. was very upset. (Guards Tenney & Lantz's testimony).

19. Days later, L.H. filed an EEO Complaint Form with the Office of Human Resources Management (OHRM) and DHHR's Employee Management Unit, alleging workplace harassment by Grievant, Carol Lynn Bleigh, and Kelsie Allman.

20. DHHR Civil Rights Specialist Jason Barnette and DHHR EEO Officer Wesley Henderson investigated L.H.'s allegations. They interviewed 14 individuals, including Grievant. They informed Grievant of the allegations against him. Grievant admitted to calling L.H. "Ms. Crites" but denied the other allegations. Though L.H. refused to be interviewed, the EEO investigation substantiated that Grievant had sexually harassed and made the alleged incest remarks to L.H. based on interviews with William Tenney, Kelly Lantz, and others. The investigation found insufficient evidence to substantiate the allegations against Ms. Bleigh and Ms. Allman. (Respondent's Exhibit 5, Mr. Barnette's testimony).

21. On July 6, 2022, Respondent sent Grievant a notice of predetermination conference, stating in relevant part:

> This meeting has become necessary based on the following allegations and/ or policy violations.
>
> Allegation & Corresponding Policy:
>
> Allegations were received that you made a comment to a co-worker [L.H.] that was sexual in nature and comment also referenced 'incest'.
>
> The investigation has concluded that substantiated the claims.
>
> The behavior violates the following policies:
>
> **DHHR Policy 2108 – Employee Conduct**
>
> **A. Expectations**
>
> Employees are expected to:
>
> 7. Conduct themselves professionally in the presence of Residents, patients, clients, fellow employees, and the public;
>
> 12. Be ethical, alert, polite, sober, and attentive to the responsibilities associated with their jobs.
>
> **B. Prohibitions**
>
> Employees are prohibited from:
>
> 6. Harassing, intimidating, or physically abusing residents, patients, clients, or fellow employees.
>
> **DOP P6 – Prohibited Workplace Harassment Policy;**
>
> E. There are two legally recognized types of sexual harassment claims: (1) Quid Pro Quo Sexual Harassment, and (2) Hostile Work Environment. Such harassment involves Verbal and/or physical conduct which may include, but is not limited to:
>
> 3. Sexually discriminatory ridicule, insults, jokes, or drawings;

(Respondent's Exhibit 6).

22. On July 6, 2022, Grievant participated in a predetermination conference.

23. On July 12, 2022, Respondent sent Grievant a letter of dismissal, stating in relevant part:

> Allegations were received that you made a comment to a female co-worker that was sexual in nature and comments also referenced incest. Some of these comments include "fucking your brothers", making comments about women's breasts, making comments about eating pussy. One employee stated you make sexual comments on an almost daily basis. The investigation substantiated that you made a comment to your coworker referring to her past sexual abuse by family members and that it was more likely than not that the other sexual remarks attributed to you occurred as well. The investigation has concluded that substantiated the claims.
>
> This is in violation of DHHR Policy 2108: Employee Conduct, which provides: *Employees are expected to; Comply with all applicable state and federal rules and regulations governing their field; Comply with all Division Personnel, Department, and Agency policies; Conduct themselves professionally in the presence of residents, patients, clients, fellow employees, and the public; Be ethical, alert, polite, sober, and attentive to the responsibilities associated with their jobs. Employees are prohibited from; Harassing, intimidating, or physically abusing residents, patients, clients, or fellow employees; Making unwanted or inappropriate verbal or physical contacts.*
>
> This is in violation of DOP P6: Prohibited Workplace Harassment, which provides: *There are two legally recognized types of sexual harassment claims: (1) Quid Pro Quo Sexual Harassment, and (2) Hostile Work Environment Sexual Harassment. Such harassment involves Verbal and/or physical conduct which may include, but is not limited to: Sexually discriminatory ridicule, insults, jokes, or drawings; Repeated sexually explicit or implicit comments or obscene and suggestive remarks that are unwelcome or discomfiting to the employee….*
>
> A review of your personnel file indicated that you were previously suspended for 5-days for a similar incident on November 3, 2016. This claim was investigated by the Department EEO Coordinator, and the Department EEO

> Counselor. The investigation concluded and was substantiated. This was in relation to you making sexually inappropriate comments to a female co-worker.
>
> After considering your conduct, any previous disciplinary action, and your response, it is decided that your dismissal is warranted. Your actions in this matter demonstrate a serious lapse of judgment. With your training and experience, you should have been well aware that your actions would have significant ramifications, including endangering the lives of the very citizens this agency is charged to protect. This action complies with the Department of Health and Human Resources (DHHR) Policy Memorandum 2104, *Progressive Correction and Disciplinary Action* and Section 12.2 of the West Virginia Division of Personnel, *Administrative Rule* W. Va. Code R. § 143-1-1 *et seq*.

(Respondent's Exhibit 7 & 11).

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Grievant was dismissed for sexually harassing L.H. after being suspended and receiving counseling through EPAs for prior incidents of sexual harassment. Permanent state employees who are in the classified service can only be dismissed "for good cause,

which means 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); *Sloan v. Dep't of Health & Human Res*., 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

Respondent alleges that Grievant sexually harassed coworker L.H. in regularly calling her "Ms. Crites," implying she had a sexual relationship with former coworker Mr. Crites, and in saying to L.H. and Guard Tenney that L.H. had sex with her father and brothers. Grievant admitted to calling L.H. "Ms. Crites" thousands of times over a two-year period but denied saying L.H. had sex with her father and brothers. Grievant argues L.H. is not credible, that Respondent denied him due process by only citing the incest comment in its predetermination letter, and that dismissal is excessive. Respondent counters that Guard Tenney credibly testified to the incest comment and that Guard Lantz credibly testified to seeing Grievant legitimately upset in the aftermath of Grievant's incest remarks. Respondent contends that, because Grievant previously received counseling and a suspension for sexual harassment, Grievant's actions towards L.H. constitute good cause for dismissal.

As Grievant contests that he said L.H. had sex with her father and brothers or that he meant anything sexual in calling L.H. "Ms. Crites," a credibility assessment is necessary.

In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id*., *Burchell v. Bd. of Trustees, Marshall Univ*., Docket No. 97-BOT-011 (Aug. 29, 1997).

Not every factor is relevant in assessing credibility. For Grievant, the relevant factors are motive and plausibility. Grievant's obvious motive is to return to his job. Grievant testified that he did not know that it bothered L.H. that he called her "Ms. Crites." This defies credulity. Grievant's witnesses, in an ironic attempt to help Grievant's case in trying to show that L.H. was crazy and unhinged, testified that L.H. responded to Grievant's calling her "Ms. Crites" at times by telling Grievant to stop and even hit and threw stuff at him. Grievant's witnesses were alarmed that L.H. got away with her violent responses towards Grievant. Grievant admitted that L.H. told him to stop but testified that he thought she was joking because she would smack his arm, implying it was not violent and out of control like

his witnesses made it out to be. Grievant did not testify about the violent responses mentioned by his witnesses. Grievant explained that he called L.H. “Ms. Crites” because she and Mr. Crites bantered like husband and wife and that he never meant anything sexual by the moniker.

For L.H., the relevant factors are plausibility, non-existence of fact, reputation, and motive. Grievant’s witnesses testified that L.H. had motive to lie because Grievant and other transport team members took pictures of L.H. sleeping during a transport. However, that incident took place a year before L.H. filed her EEO complaint, which was filed two days after Grievant made the incest remark and was far removed from the alleged motivating event. Witnesses testified that L.H. had a reputation for dishonesty. These were the same individuals (Bleigh & Allman) that L.H. included as defendants in her EEO Complaint. Grievant harps on the fact that in L.H.’s version, both Guard Tenney and Guard Lantz were present when Grievant made the incest remark, but that in Tenney and Lantz’ versions only Tenney and L.H. were present, with Lantz arriving to see L.H. upset in the aftermath. This does not affect L.H.’s credibility, as L.H. had nothing to gain in having Lantz present during the incest remark because Tenney was present for the remark. It is more likely than not that L.H. either did not remember the precise time Lantz entered or meant that Lantz was generally present for the incident since Lantz encountered L.H. just after the remark while she was still upset. As for plausibility, while Grievant denied he meant anything sexual in calling L.H. “Ms. Crites,” L.H. provided precise examples of remarks Grievant made about sexual interactions between L.H. and Mr. Crites that lent credibility to her testimony regarding the sexual nature of the “Ms. Crites” moniker. L.H. credibly testified that Grievant would make sexual comments to her about Mr. Crites, such as asking how Mr. Crites could

reach her with his fat belly and her fat ass, if Mr. Crites had to lift his belly so L.H. could suck his dick, and if L.H. removed her false teeth when she performed oral sex on Mr. Crites.

As for Guards Tenney and Lantz, the relevant factors are demeanor, attitude towards the action, bias, and consistency. Neither had any bias towards Grievant. Grievant testified that he got along with them but that he did not trust Tenney. Yet Grievant could not quantify this mistrust. Tenney and Lantz' demeanor and attitude towards the action were appropriate; neither acted as if they had a stake in the outcome or acted emotionally bonded with L.H. or against Grievant in the way Grievant's witness acted for Grievant and against L.H. Grievant attacked the consistency of Guard Tenney's testimony that Grievant said "fucking" in the context of the incest remark because, during the EEO investigation a year and a half prior, Tenney told investigators he could not say for sure whether Grievant precisely said "fucking" or something equivalent to it. Grievant implied that Tenney just had a memory problem rather than being intentionally deceptive. Yet Tenney was consistent throughout regarding the fact Grievant's comment entailed L.H. having sex with her father and brothers. Any memory failure regarding the exact words used by Grievant to denote "sex" does not discredit Tenney's testimony as to Grievant's incest remark. Witnesses generally paraphrase and are rarely expected to remember the exact phrase used. Uncertainty regarding synonymous terms such as "fucking" verses "having sex" does not discredit a witness in this context. Tenney was clearly credible despite his failure to remember the exact "sex" term used by Grievant. Lantz was not similarly attacked and was also credible.

Guard Tenney testified that L.H. told him and Grievant that she did not date in high school and that Grievant responded by saying this was because L.H. was too busy having sex with her father and brothers. Guard Tenney testified that L.H. was very upset and left and that L.H. came back still upset after Grievant left, whereupon she told Tenney she had been molested as a child. Tenney testified that L.H. seemed truly upset and was not just putting on an act to get Grievant in trouble as Grievant implied in his testimony. Tenney testified that he told L.H. she should file a complaint. Both Tenney and Lantz testified that Lantz walked in thereafter. Lantz testified that L.H. was still crying and truly upset. Lantz was not close to L.H. and was credible in his testimony. Respondent proved by a preponderance of the evidence that Grievant was making a sexual connotation in calling L.H. "Ms. Crites" and that he said to L.H. and Tenney, on January 12, 2022, that L.H. did not date in high school because she was too busy having sex with her father and brothers.

Respondent proved that Grievant sexually harassed L.H. due to his repeated unwelcome sexual comments to her. West Virginia Division of Personnel's Prohibited Workplace Harassment policy (DOP P-6), outlines sexual harassment in relevant part as:

> …. Such harassment involves verbal and/or physical conduct which may include, but is not limited to: … Sexually discriminatory ridicule, insults, jokes, or drawings; Repeated sexually explicit or implicit comments or obscene and suggestive remarks that are unwelcome or discomfiting to the employee….

Respondent proved that because Grievant previously received counseling, EPAs, and a suspension for sexual harassment, Grievant's actions towards L.H. constitute good cause for dismissal. In *Thompson v. DHHR/Sharpe*, Docket No. 2017-1164-CONS (Feb. 12, 2018), the Grievance Board found that Grievant had been counseled against sexually harassing conduct and that Respondent was justified in suspending Grievant for the same

ongoing behavior. Grievant was given every opportunity to change his behavior but demonstrated he was either unable or unwilling to do so.

Grievant contends he was denied due process when Respondent only cited the incest remark in the predetermination letter. Civil service employees have "a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 156, 241 S.E.2d 164, 166 (1977). That property interest "warrant[s] the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our constitution." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 283, 332 S.E.2d 579, 583 (1985) (*per curiam*) (*citing Waite*).

"[O]utside of the area of criminal law, 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. *Clarke v. West Virginia Board of Regents*, [166 W. Va. 702, 710], 279 S.E.2d 169, 175 (1981); *Bone v. West Virginia Department of Corrections*, 163 W. Va. 253, 255 S.E.2d 919 (1979); *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Buskirk*, 175 W. Va. at 283, 332 S.E.2d at 583. "The extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Waite* at Syl. Pt. 5.

Under this test, the WVSCA "'has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections,' including, generally, predischarge notice and a hearing. *Major v. DeFrench*, [169 W. Va. 241, 255], 286 S.E.2d 688, 697 (1982)." *Buskirk*, 175 W. Va. At 283, 332 S.E.2d at 583. In determining the due process that is required for public employees, the WVSCA has determined "[t]he constitutional guarantee of procedural due process requires '"some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987).

"'Due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise.' Syl. pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Clarke* at Syl. Pt. 5. "The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (*citing Loudermill* at 546). In this case, Grievant received due process prior to the predetermination letter when investigators allowed him to respond to each of L.H.'s allegations. This resulted in Grievant admitting he called L.H. "Ms. Crites" and denying the remaining allegations. Thus, Grievant failed to prove he was denied due process.

Regardless, even if Grievant had been denied due process, the remedy does not entail reversal of discipline unless Grievant can show that the outcome would have been

different had he received due process. The remedy for a due process violation is not reinstatement unless "dismissal would have been prevented by a pretermination hearing." *See Nickerson v. City of Anacortes*, 45 Wash. App. 432, 441, 725 P.2d 1027, 1032 (1986)." *Fraley*, 177 W. Va. at 733, 356 S.E.2d at 487. As previously discussed, Respondent had good cause to terminate Grievant and a predetermination letter that more completely outlined the allegations would not have prevented the termination given the evidence.

Grievant contends that, even if the allegations are true, dismissal is excessive. "[A]n allegation that a particular 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 agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), aff'd, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), appeal refused, W.Va. Sup. Ct. App. (Nov. 19, 1996).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W.*

Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), aff'd Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). Respondent provided a rational basis for its decision to dismiss Grievant. Grievant did not show that Respondent acted in an arbitrary and capricious manner.

"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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), appeal refused, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ*., Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ*., Docket No. 2014-0028-RalED (Apr. 30, 2014), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015). Grievant could not show that he had a stellar record, that dismissal was disproportionate to his actions given his prior counseling and suspension, that another

employee received a lesser penalty for a similar history and similar conduct, or that he was ignorant of the impropriety of his conduct. Grievant failed to prove that his dismissal was excessive, and that mitigation is warranted. Thus, this grievance is DENIED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). 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, which means 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); *Sloan v. Dep't of Health & Human Res*., 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

3. Respondent proved by a preponderance of the evidence Grievant sexually harassed L.H. and that this, along with his prior counseling and suspension for sexual harassment, constituted good cause for dismissal.

4. "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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), appeal refused, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

5. Grievant did not prove by a preponderance of the evidence that his dismissal was excessive or that mitigation of his punishment is warranted.

6. The West Virginia Supreme Court of Appeals "'has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections,' including, generally, predischarge notice and a hearing. *Major v. DeFrench*, [169 W. Va. 241, 255], 286 S.E.2d 688, 697 (1982)." *Buskirk*, 175 W. Va. At 283, 332 S.E.2d at 583.

7. "The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to

present his side of the story' prior to termination." *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (citing Loudermill at 546).

8. "Reinstatement would be appropriate only if the appellant's dismissal would have been prevented by a pretermination hearing. *See Nickerson v. City of Anacortes*, 45 Wash. App. 432, 441, 725 P.2d 1027, 1032 (1986)." *Fraley*, 177 W. Va. at 733, 356 S.E.2d at 487.

9. 'When official policy results in a person being deprived of property or liberty without procedural due process, and such deprivation would have taken place even if a proper hearing had been held, then the person is not entitled to compensatory damages for the deprivation itself. *Carey v. Piphus*, 435 U.S. 247, 260, 98 S. Ct. 1042, 1050, 55 L. Ed. 2d 252 (1978). The person is entitled only to nominal damages for the denial of due process, unless the person demonstrates actual injury attributable to the denial of due process rather than to the deprivation.' 201 W.Va. at 533, 498 S.E.2d at 726, (*quoting DeSimone v. Board of Educ*., 612 F. Supp. 1568, 1571 (E.D.N.Y.1985))." *White v. Barill*, 210 W. Va. 320, 324, 557 S.E.2d 374, 378 (2001) (*per curiam*).

10. Grievant did not prove by a preponderance of the evidence that he was denied due process or that the outcome of his discipline would have been different if his procedural due process expectations had played out the way he wanted.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.[3] Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

[3] On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant

§ 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: October 5, 2023

Joshua S. Fraenkel
Administrative Law Judge

to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.