

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DERECK PALMER,
Grievant,**

v.

Docket No. 2023-0816-DHHR

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

DECISION

This action was filed by Grievant, Dereck Palmer, on April 28, 2023, challenging a written reprimand that he received for making comments to two female employees. This case was filed directly to level three of the grievance procedure. A level three evidentiary hearing was conducted before the undersigned on March 11, 2024, by Zoom conferencing. Grievant appeared *pro se*. Respondent appeared by Ginny Fitzwater, Human Resources Director for the Office of Health Facilities, and by its attorney, James “Jake” Wegman, Assistant Attorney General. This matter became mature for consideration and a decision upon receipt of the last of the parties’ Findings of Fact and Conclusions of Law on April 10, 2024.

Synopsis

Grievant is employed by the William R. Sharpe, Jr. Hospital as a housekeeper. Grievant was issued a written reprimand for inappropriate comments to fellow employees. Respondent established the allegations of clear policy violations by a preponderance of the evidence. Grievant acknowledged that he had been cautioned and coached by Sharpe staff to be vigilant to act with civility and proper decorum when interacting with

fellow employees. It was proper to issue a written reprimand to Grievant when his misconduct continued.

The following Findings of Fact are based on the record of this case.

Findings of Fact

1. Grievant is employed by the William R. Sharpe, Jr. Hospital as a housekeeper.

2. By Notice of Written Reprimand dated April 28, 2023, the Grievant received a written reprimand due to a “substantiation of a harassment complaint.” Respondent Exh. 1.

3. Grievant was disciplined because he allegedly told a fellow employee that he “could pleasure her in ways her boyfriend could not.” The victim also alleged that Grievant made multiple requests for her home address and telephone number.

4. The written reprimand also alleged that Grievant told another employee that “if she did her hair and makeup that she would make a good stripper.”

5. The written reprimand also noted that Respondent had made repeated attempts to correct the Grievant’s behavior through counseling and verbal reprimands.

6. It is undisputed that Grievant commented to another employee that she was chubby and that he liked chubby people because there was more “cushion for the pushing.” Grievant also make an inappropriate comment that he could pleasure her ways that her partner could not.

7. This employee was justifiably offended and did not interpret Grievant’s comments as some type of joke. This employee related that she once had to ask her supervisor to instruct Grievant to remove himself from her work area. Grievant would also

wait at the front desk for her to leave Sharpe Hospital so he could initiate conversations with her.

8. It is also undisputed that Greivant stated to another fellow employee that if she did her hair and makeup, that she “would be a good stripper.” The employee did not view this as a joke and felt embarrassed by the behavior.

9. Cherrity Weekley performs investigations for the Department’s Office of Human Resources Management. Ms. Weekley was assigned to investigate and spoke to the above employees about the allegations. The employees confirmed that Grievant had made inappropriate comments. Ms. Weekley substantiated the allegations of inappropriate conduct by the Grievant.

10. Pat Ryan, Chief Executive Officer, opined that a written reprimand was appropriate for Grievant’s comments because they were prohibited under the agency’s workplace harassment policy.

11. Sharpe Hospital had previously attempted counseling to correct Grievant’s behavior. There are numerous policies that prohibit inappropriate and sexual comments towards fellow employees. Respondent Exh. 3-6.

12. Grievant acknowledged that he had been cautioned and coached by Sharpe Hospital management to not make inappropriate statements to coworkers. Grievant is of the opinion that his coworkers took his comment the wrong way.

Discussion

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 Rule of the W. Va. Public Employees

Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp.*, Docket No. 2009-0005-DOT (Aug. 4, 2009) citing *Jackson v. State Farm Mut. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). See *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter, supra*.

Grievant was issued a written reprimand for conduct that violated the Department of Health and Human Resources' Policy Memorandum 2123, Violent/Hostile Work Environment; and Policy Memorandum 2108, Employee Conduct Code. Policy Memorandum 2123 provides, in pertinent part:

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.

Employees are prohibited from intimidation, aggression, staring, glaring or other nonverbal demonstrations of hostility, exclusion or social isolation, verbal abuse or insults, menacing behavior, humiliation, withholding work-related information, sabotaging a co-worker's work product or undermining an employee's work performance, treating others less favorably, repeatedly manipulating a person's job content.

The Grievance Board has long stated that "[t]o 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). Whether a working environment is hostile or abusive can be determined only by looking at all of the

circumstances. Certainly, any act might be construed by someone as harassing, hostile, disruptive, or offensive. In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. *Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Graley v. W. Va. Parkways Economic Div. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000).

In the instant case, Grievant was issued a written reprimand for making inappropriate comments to two female staff members. Both women testified at level three that Grievant made inappropriate comments towards both. The comments were offensive. The allegations were substantiated as a policy violation after an investigation by Department's Office of Human Resources Management. Grievant acknowledged the comments but argued that his comments were taken in the wrong way. The comments were clearly inappropriate under Respondent's various policies that prohibit harassment. State employees are expected to conduct themselves in a professional manner. Employees are expected to behave in a professional manner in the presence of the fellow employees.

Sexual harassment is prohibited in the West Virginia Division of Personnel's Prohibited Workplace Harassment Policy. The policy requires the Respondent to enforce this policy and take action to address violations. The offensive comments made by Grievant violate these policies. Grievant acknowledged that he had been cautioned and coached by Sharpe staff to be vigilant to act with civility and proper decorum when

interacting with fellow employees. It was proper to issue a written reprimand to Grievant when his misconduct continued.

The following Conclusions of Law support the decision reached.

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 Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp.*, Docket No. 2009-0005-DOT (Aug. 4, 2009) citing *Jackson v. State Farm Mut. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). See *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter, supra*.

2. The Grievance Board has long stated that "[t]o 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). Whether a working environment is hostile or abusive can be determined only by looking at all of the circumstances. Certainly, any act might be construed by someone as harassing, hostile, disruptive, or offensive. In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances.

Lanehart v. Logan County Bd. of Educ., Docket No. 97-23-088 (June 13, 1997). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Graley v. W. Va. Parkways Economic Div. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000).

3. Respondent proved by a preponderance of the evidence that Grievant's behavior created an environment that was hostile to the employees who were subjected to it. Respondent also proved by a preponderance of the evidence that the behavior of Grievant was sufficiently inappropriate to warrant a written reprimand under the totality of the circumstances of this case.

Accordingly, this grievance is **DENIED**.

"The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed." W. VA. CODE § 6C-2-5(a) (2024). "An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with § 51-11-4(b)(4) of this code and the Rules of Appellate Procedure." W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: May 21, 2024

Ronald L. Reece
Administrative Law Judge