WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS A. POWERS

Grievant,

v. **Docket No. 2024-0527-DOT**

**DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,**

Respondent.

DECISION

Grievant, Thomas Powers, was employed by Respondent, Department of Transportation with the Division of Highways. On February 7, 2024, Grievant filed a grievance against Respondent, alleging:

> Terminated due to inaccurate statements made against me on 3.26 section 4.5B section 4.5C and Section 4.5G and included 3.32 and 4.2 parts C and J this would have been filed sooner but I didn't get to talk to Natasha White until 2-2-2024.

As relief, Grievant requests, "A hearing to let me speak my side of the actions taken against me and possible reinstatement of employment."

Grievant filed directly to level three of the grievance process as permitted for termination by West Virginia Code § 6C-2-4(a)(4). A level three hearing was held by videoconference before the undersigned on May 13, 2024, and July 2, 2024. Grievant appeared and was self-represented. Respondent appeared by Kathryn Hill and was represented by Jack Clark, Esq. This matter matured for decision on August 9, 2024. Only Respondent submitted proposed findings of fact and conclusion of law.

Synopsis

Respondent terminated Grievant for making sexual remarks and gestures. Respondent did so based on its investigative interviews with the apparent victim and

multiple eyewitnesses. However, at the hearing in this matter, Respondent simply relied on the hearsay testimony of its investigator. Respondent claims to possess written statements from eyewitnesses and audio recordings from their investigative interviews. Yet, Respondent failed to submit any of these into evidence. Under the hearsay weight test, Respondent's evidence garners little weight. Respondent failed to prove that Grievant engaged in misconduct through sexual remarks and gestures. Accordingly, the grievance is **GRANTED**.

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, Thomas Powers, was employed by Respondent, Department of Transportation (DOT), with the Division of Highways (DOH), supervising work crews as a Transportation Construction Superintendent.

2. On October 19, 2023, Deanna Giles texted Jeremy Casto, Assistant Director of Operations, as follows:

> Hey [,] I [k]now it is late tonight but I would really like to talk to you. I need to be on a new crew or something[.] I'm tired of [their] dirty joke[.] [T]hey are not the least little bit respectful to a woman and I'm over it or I will file a complaint.

(Grievant's Exhibit 2).

3. Investigator Joshua Thomas began an investigation in early November 2023, and concluded that Wayne Strope, Thad Smith, and Grievant "did make comments that were disparaging towards women." (Respondent's Exhibit 8).

4. Investigator Thomas reported that he interviewed witnesses who told him they either observed or were told that Wayne Strope, Thad Smith, and Grievant made

inappropriate sexual remarks and/or gestures on multiple occasions in September and October of 2023. Investigator Thomas reported that, of these witnesses, Deanna Giles, David Hinkle, William Linville III, Andy Simpson, and Thad Smith told him that they directly observed Grievant engage in sexual/vulgar comments and/or gestures. Investigator Thomas also wrote in his report that Andy Simpson said of Grievant's sexual remarks, "which I wasn't here for." (Respondent's Exhibit 8, Mr. Thomas' testimony).

5. Investigator Thomas recorded these interviews. Ms. Giles apparently provided a signed written statement to Investigator Thomas regarding her allegations. Ms. Giles was not employed by Respondent at the time of this hearing. (Mr. Thomas' testimony).

6. Respondent did not submit any witness recording or signed statement into evidence and did not call or subpoena any firsthand witness to testify.

7. Of the purported firsthand witnesses, Grievant did call Wayne Strope, David Hinkle, and Andy Simpson (his direct supervisor) to testify. Mr. Hinkle testified that he made a complaint against Grievant regarding Ms. Giles and that he observed what he included in his complaint, but that he could not remember any details of what he observed and could not even remember if Grievant made sexual remarks. Respondent did not cross examine Mr. Hinkle or attempt to refresh his memory even though it apparently had his written complaint and an audio recording of his interview. Mr. Simpson did not make any direct observations under oath but simply testified that he had conversations with "the crew" about not making inappropriate comments to Ms. Giles. Even after repeated direct questioning by Grievant, Mr. Simpson refused to affirm his purported written allegation that he had the conversation with Grievant. Jamie Persinger and Wayne Strope testified

that Grievant was not present on the day the inappropriate sexual remarks were made but did not provide an exact date.

8. On January 5, 2024, Respondent issued Form RL-544 recommending dismissal as follows:

> The investigation was substantiated that you were making inappropriate sexual remarks and telling inappropriate jokes made inappropriate sexual remarks and body gestures and told inappropriate jokes to female subordinate employee. …
>
> [Grievant] … violated the following sections of WVDOT Policy 3.26, Prohibited Workplace Harassment:
> 1. Section 4.5, B. Improper questions about an employee's private life.
> 2. Section 4.5, C. Sexually discriminatory ridicule, insults, jokes, or drawing[.]
> 3. Section 4.5, G. Repeated sexually explicit or implicit comments of obscene and suggestive remarks that are unwelcome or discomforting to the employee.
>
> This also violates the following subsections of WVDOT Policy 3.32, Disciplinary Action, Section 4.2, Standards of Work Performance and Conduct:
> 1. C. Maintenance of high standards of personal conduct and courtesy in dealing with the public, fellow employees, subordinates, supervisors, and officials.
> 2. J. Refusal to engage in insulting, abusive, threatening, offensive, defamatory, harassing, or discriminatory conduct or language and prompt reporting of the same to the appropriate authority.
>
> The outcome of an investigative in March of 2022, [Grievant] was found to be the aggressor in an incident that occurred on January 20, 2022. He violated WVDOT Policy 3.26, Prohibited Workplace Harassment, Section 4.7, Nondiscriminatory Hostile Workplace Harassment. [Grievant] grabbed a subordinate employee around the neck/collar areas and threatened him. He also used foul, abusive, threatening, and insulting language to this employee. ..
>
> There have also been performance issues … such as wandering off and disappearing for hours on the job site,

> refusing to do certain jobs, or not work[ing] at all stating he was waiting on equipment to arrive….

(Respondent's Exhibit 2).

9. On January 10, 2024, Grievant participated in a predetermination meeting and was given an opportunity to respond. Grievant signed a verification of disciplinary action and wrote:

> My plea is I know I have violated policy[.] I understand it and I would like to see if days off and put to work in Tennerton for my couple of months to March and do the repair work there. And retire if at all possible.

(Respondent's Exhibit 2).

10. Grievant was simply attempting to be agreeable for settlement purposes to at least be allowed to retire and did not admit to any factual allegation.

11. On January 12, 2024, Grievant was issued a letter of dismissal, stating in part:

> Your termination is a result of gross misconduct … The reason for your termination is your violation of the WVDOT Standards of Work Performance. More specifically, but not limited to:
>
> A recent investigation revealed, with evidence, that you have been making inappropriate sexual remarks and telling inappropriate jokes made inappropriate sexual remarks [sic] and body gestures and told inappropriate jokes [sic] to female subordinate employee. We have zero tolerance for this type of behavior that undermines our policies, values, and safety at the WVDOT.

(Respondent's Exhibit 2).

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 burden has not been met. *Id*.

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. (2022). "'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*).

Grievant was dismissed for sexually harassing a subordinate, Ms. Giles, through sexual remarks and gestures. Respondent's policy prohibits employees from engaging in verbal and physical conduct of a sexual nature. Respondent argues that eyewitnesses corroborated under oath the hearsay testimony of Investigator Thomas. Respondent

specifically mentions the testimony of Mr. Hinkle as prime evidence against Grievant. Respondent argues that in response to being asked whether Ms. Giles told him of the allegations included in Mr. Hinkle's complaint against Grievant, Mr. Hinkle said that he had seen it with his own eyes. Yet, Mr. Hinkle did not testify as to what he saw but instead testified he did not remember if Grievant made any sexual comments. In fact, no eyewitness stated under oath at level three that Grievant made sexual gestures or comments. Crucially, Respondent did not submit into evidence any of the eyewitness complaints or recordings of their investigative interviews and simply relied on hearsay testimony from Investigator Thomas.

While the rules of evidence limit hearsay, the WVSCA has generally allowed for the liberal application of procedural rules in grievance proceedings because many grievants are self-represented. Consequently, Grievance Board caselaw has long permitted hearsay testimony, with any limitation through a weight attribution test. As such, "[h]earsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ*., Docket No. 97-23-055 (Dec. 9, 1997).

Under the historically liberal application of this precedent, even when hearsay testimony is presented by a party with attorney representation, such as Respondent, this hearsay must be considered if justified under the weight test. 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. *Id*.; *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-H-115 (June 8, 1990).

Respondent claims that it no longer employs the apparent victim, Ms. Giles. However, Respondent asserts there were four other eyewitnesses it relied on who it apparently still employs. Respondent did not call any of these witnesses to testify. Grievant did call three of them: Wayne Strope, David Hinkle, and Andy Simpson. However, these three did not affirm the allegations against Grievant. Respondent claims to have recordings of its investigative interviews with eyewitnesses, as well as written complaints provided by eyewitnesses and a signed statement from Ms. Giles. Yet, it did not submit any of these into evidence. Nor did it attempt to challenge the memory of Mr. Strope, Mr. Hinkle, and Mr. Simpson through their interview recordings or written complaints. These witnesses did not testify that Grievant made sexual remarks or gestures in September or October of 2023.

Some of the apparent eyewitnesses were not disinterested observers. Grievant alleged that Ms. Giles was mad at him because he had previously refused her request for assistance. Mr. Strope was investigated by Respondent for the same allegations and Mr. Simpson was apparently upset because Grievant had called him out. There was also an

alleged conflict between Grievant and William Linville III, another apparent crucial eyewitness. The eyewitnesses that did testify contradicted or wholly failed to remember the apparent damning interviews and complaints made to Investigator Thomas.

Grievant also presented the firsthand testimony of Mr. Strope and Jamie Persinger in support of the contention that Grievant was not at work the day sexual remarks were made to Ms. Giles. While this evidence is problematic in that the date of Grievant's absence was not provided, and Grievant was accused of engaging in prohibited behavior numerous times over the course of two months, this evidence must be measured against the lack of firsthand evidence against Grievant. The burden of proof is on Respondent. Respondent failed to meet this burden. Further, there are abounding questions about the credibility of the eyewitnesses Respondent relied on to affirm the allegations against Grievant. Apart from Ms. Giles, Respondent did not offer a reason for failing to call any eyewitness or at least present their recorded interviews or written statements. After considering all the hearsay weight factors, the undersigned determines that no weight can be placed on the hearsay testimony provided by Investigator Thomas.

Respondent contends that Grievant admitted wrongdoing when he signed a verification of the disciplinary action against him and wrote:

> My plea is I know I have violated policy[.] I understand it and I would like to see if days off and put to work in Tennerton for my couple of months to March and do the repair work there. And retire if at all possible.

Grievant counters that he has been with Respondent for over 20 years, is nearing retirement age, and simply wanted to be able to retire and retain his retirement benefits, some of which he thought could be forfeited through his termination. Grievant contends that it was with this mindset he was trying to be as conciliatory as possible. Grievant's strategy

was an understandable attempt to retain retirement benefits. Regardless, this statement is not an admission of a specific act. Grievant also testified that he does scratch a lot, but that this is due to a disability resulting from chemical exposure in Dessert Storm and he is being treated by the VA. This, in and of itself, is not an admission of making a sexual gesture.

Respondent also points to Grievant's prior discipline. The conduct underlying the prior discipline cannot be used to prove the current allegations but simply as justification for the allotted punishment once Respondent proves the underlying factual allegations. Respondent failed to prove that Grievant engaged in misconduct through sexual remarks and gestures. As such, this grievance is GRANTED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. 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. "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 burden has not been met. *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).

3. "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ*., Docket No. 97-23-055 (Dec. 9, 1997). 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. *Id*.; *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-H-115 (June 8, 1990).

4. The hearsay testimony presented by Respondent is attributed little weight.

5. Respondent did not prove by a preponderance of the evidence that Grievant made sexual remarks and gestures and thus failed to prove good cause for dismissal.

Accordingly, this grievance is GRANTED. Respondent is ORDERED to reinstate Grievant and to provide him backpay from the date of his dismissal to the date he is reinstated, minus all wages he earned in the interim, plus interest at the statutory rate; to restore all benefits, including seniority; and to remove all references to the dismissal from Grievant's personnel records maintained by Respondent.

"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) (2024).

Date: September 16, 2024

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Joshua S. Fraenkel
Administrative Law Judge