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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
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CHARLES E. CHRISTIAN

v.

Docket No. EBA-88-010

EDUCATIONAL BROADCASTING AUTHORITY

DECISION

Charles E. Christian, employed by Respondent Educational Broadcasting Authority as a shipper and printer at its station WSWP-TV in Beckley until his dismissal, initiated grievance proceedings at Level IV on August 31, 1988. A hearing was held October 7, 1988, but recessed by agreement of the parties until July 10, 1989, when the hearing resumed.¹ With receipt of proposed findings of fact and conclusions of law from Respondent on August 7, 1989,² this matter may be decided.

¹A status conference was also held May 1, 1989.

²No proposals have been received from Grievant, although at hearing the parties were notified that such proposals should be mailed no later than August 4th. Accordingly, Grievant has apparently waived his right to make such submissions.

Don Rogosin, General Manager of the station, dismissed Grievant by letter of August 4, 1988, wherein he stated,

Pursuant to Section 704[d]^[3] of the Personnel Policy Manual of the WVEBA, I am hereby dismissing you of your employment with the Authority. This dismissal is effective August 20, 1988. The reason for your dismissal is a second offense of sexual har[assment] which occur[ed] on August 3, 1988. I have investigated that incident and sought the assessment of a group of staff acting as the sexual har[assment] committee. They concur unanimously in the decision. The charges resulting in your dismissal and the reasons in support thereof include a previous incident of October 1987 in which you were suspended and a pattern of inappropriate behavior that resulted in an oral reprimand from one of your supervisors and a talking to by another.

The alleged August 3rd incident referred to in the letter involved a sixteen-year-old girl, Jane Doe,⁴ who, along with another girl, Mary Smith,⁵ was temporarily hired by Respondent to stuff envelopes in the station's print

³Section 7.04(d) provides,

In the event of a dismissal, the supervisor must provide the employee with a written notice of the action and the reason(s) for it no less than fifteen (15) calendar days prior to the effective date of the dismissal. The fifteen-day notice is not required when dismissal is for gross misconduct or when, in the judgment of the division manager, the public interest is best served by immediate termination without prior notice.

The policy does not include a definitional section; "gross misconduct" accordingly is not defined.

⁴Because of the nature of this case and the girl's minority, a fictitious name is provided rather than her actual name.

⁵Since no purpose is served by providing the girl's name, a fictitious one is used here.

room, where Grievant also spent part of his workday. At the October 1988 portion of the hearing Ms. Doe testified as follows regarding that incident: She went to the bathroom at about three o'clock in the afternoon, and when she walked out Mr. Christian was there, who said he wanted to show her something in the tape room. She went into the tape room with him, where he asked her if she would hug him. Not seeing anything wrong with his suggestion, she hugged him, then turned to leave. However, Mr. Christian pulled her back to him by her arm and started kissing her on the neck and cheek. She tried to get away from him and asked him to quit, but he held onto her. She did not cry out or scream because she was scared.⁶ After a few minutes he let go of her; she went back into the print room and told Ms. Smith what had happened. Although Ms. Smith urged her to tell Mr. Rogosin, she refused; she simply wanted to leave the station.

Ms. Smith telephoned Ms. Doe's counselor, Helena Ellis,⁷ and told Ms. Ellis what Ms. Doe had told her. Ms. Ellis asked to speak to Delores Kidd, Ms. Doe's supervisor at the station, who, after talking to Ms. Ellis, asked the

⁶The witness testified that her fear arose because Mr. Christian's actions brought back bad memories. The evidence established that Ms. Doe is a ward of the state, housed at the Beckley Child Care Center, due to her charging that her father had repeatedly molested her.

⁷Ms. Ellis is an employee at the Beckley Child Care Center.

girls what had happened. Since Ms. Doe was "too shook up" to say much, Ms. Smith did most of the talking, but Ms. Doe listened to Ms. Smith's telling of her story and agreed with it. Ms. Doe also talked to another woman, but could not remember her name, although she stated the woman was outside the hearing room.⁸

At the July portion of the hearing, nine months later, Ms. Doe testified again about the incident. Although she placed it at one o'clock rather than three, as she had previously testified, she stated that her memory was not as sharp as it had been in October. Under leading questioning, she stated that Mr. Christian put his hands on her breasts and touched her genital areas. Otherwise, her July testimony was consistent with her October testimony.

Ms. Kidd also testified, corroborating Ms. Doe's testimony of Ms. Smith's telling her of the incident. She further stated that, after talking to Ms. Doe and Ms. Smith, she talked to Rita Ray, who, as Director of Programming, was the head of the department in which Grievant was employed. She further testified that she, along with Ms. Ray and another management employee, Matt Stanley, was appointed by Mr. Rogosin to a committee to look into the matter. She stated that on August 4th she talked to Mr. Christian, who denied that the incident occurred. She stated that she

⁸It became clear during the hearing that Ms. Doe was referring to Rita Ray.

believed Ms. Doe's story rather than Mr. Christian's, because he had also put his hands on her and made sexual innuendoes to her. Finally, she testified that, like the other two committee members, she recommended to Mr. Rogosin that Mr. Christian be dismissed.

Ms. Ray's testimony, like Ms. Kidd's, corroborated Ms. Doe's on what they were told on the day of the alleged incident. She stated that, while Ms. Smith was talking to her, Ms. Doe was unable to talk and that her demeanor was "as though in shock, huddled down as though upset and afraid." Ms. Ray testified that other station employees had complained of verbal and physical advances of a sexual nature made by Mr. Christian and that he had done the same with her.⁹ She also stated that she believed Ms. Doe that the incident with Mr. Christian occurred.

Mr. Rogosin corroborated the testimony of Ms. Kidd and Ms. Ray regarding the actions of the committee. He stated that all three members of the committee thought the incident occurred and that none believed Mr. Christian. He also testified that in October 1987 Mr. Christian had been suspended for harassing the station's receptionist,

⁹As an example, she stated that Mr. Christian would squeeze her arm in a way that made her uncomfortable but that she had not complained because his actions were subtle. She also testified that Mr. Christian had once driven by her home, where she and her husband were working in the yard, and the next day at work he commented that he would not have shown up if he had known her husband would be there.

specifically for touching the woman on the shoulder, very close to her breast. He stated that Mr. Christian had admitted at the time that he had touched the receptionist, although he had disputed the closeness to her breast. On cross-examination Mr. Rogosin testified that in appointing the committee members he wanted a male and a black person¹⁰ and also wanted to minimize the number of people who would know the story. Regarding the suspension, he testified that at that time he had warned Mr. Christian that the next time he sexually harassed someone he would be fired.

Respondent's final witness, Kathleen Spearen, also an employee at the station, testified of three incidents of Mr. Christian's harassing her, the details of which need not be provided here. In short, she told of Mr. Christian's backing her into a corner at a Christmas party in 1986 and making a crude sexual statement to her; of Mr. Christian's trailing after her in a department store; and of Mr. Christian's dancing too closely with her at a party and the next day coming by her house and asking her to become involved with him sexually and, upon refusal, offering her money to do so.

Mr. Christian testified at both portions of the hearing and his testimony, which follows, was consistent. On August 3rd, at a little before three o'clock, Ms. Doe came out of

¹⁰Mr. Christian and Ms. Kidd are black.

the restroom at the time he came out of the tape room and she asked what was in the room. He offered to show her the room, explaining that it was where the tapes were kept. He held the door open for her and she stepped inside about two feet for only about ten seconds to look around. They then went out.

Grievant denied he fondled Ms. Doe at all or that he kissed her. When asked in detail about the other incidents, he denied each one. At the October portion of the hearing he denied telling Mr. Rogosin he had touched the receptionist in 1967 and he denied that incident also.¹¹

Grievant does not contend that Respondent failed to follow any required procedures in its disciplinary action, and no such failure is found on this record. Grievant also does not contend that, if the incident occurred, it did not warrant dismissal, and clearly such sexual misconduct would constitute gross misconduct warranting dismissal. Grievant's defense is simply that the incident did not occur, and therefore the sole issue is one of credibility, i.e., whether Grievant should be believed.

The simple fact is that Grievant in essence declared every witness who testified to sexual incidents with him a liar, for he denied that any of the encounters testified to occurred. He also denied Mr. Rogosin's statement that he

¹¹He testified that the receptionist owed him money and when he pressed for the debt she brought the charges.

had admitted to touching the receptionist. Accordingly, in order to accept Grievant's testimony one must accept that Ms. Doe, Ms. Kidd, Ms. Ray, Ms. Spearen and Mr. Rogosin all failed to tell the truth and only Grievant did so--that all the witnesses, who had no reason to falsely testify, did so while Grievant, who, in order to save his job, had cause to do so, did not. Furthermore, Ms. Doe's testimony that Grievant kissed her on the neck and cheek has not been discredited. While at the second hearing she did give testimony to additional touching, which is not accepted because it was in response to leading questions¹² and Ms. Doe declared that her memory was poorer at that hearing than the first, her statements of being kissed were consistent at both hearings. Moreover, her history with her father and any psychological problems that may have resulted from that do not serve to lessen her credibility in this case. While a girl who has been molested may be subject to interpreting a look or an innocent remark as sexual where a girl without such a history would not, the act of kissing is not subject to such an interpretation. Accordingly, Respondent's

¹²The most notable was that she was asked if he had touched her "genital" area, and she replied, "Yes," but appeared a bit uncertain. While she was not further questioned, it may be that she did not understand what the "genital" area was and may have believed her breasts were "genital." She did say he touched her breasts; she was not asked whether he touched her there with his hands or by pressing against her in a hug.

witnesses, including Ms. Doe, are found more credible than Grievant.

In addition to the preceding discussion, the following findings of fact and conclusions of law are appropriate:

Findings of Fact

1. On August 3, 1988, Grievant asked a sixteen-year-old girl to come into the tape room of Station WSWP-TV, where he kissed her on the neck and cheek and held onto her, even though she asked him to quit and let her go.

2. Grievant had been suspended in October 1987 for touching the station's receptionist near her breast and had been warned that he would be fired the next time he sexually harassed an employee.

Conclusions of Law

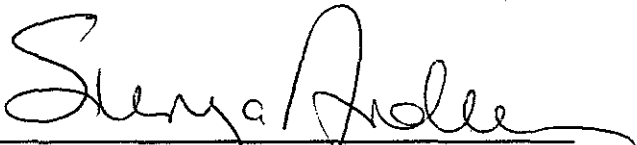
1. Pursuant to the provisions of W.Va. Code §29-6A-6, the burden of proof in disciplinary matters rests with the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. West Virginia Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. In that Respondent established that Grievant engaged in sexual misconduct or sexual harassment of a sixteen-year-old girl, see Finding of Fact 1, Respondent established gross misconduct justifying dismissal of

Grievant. See Schmidt v. West Virginia Dept. of Highways,
Docket No. DOH-88-063 (Mar. 31, 1989).

Accordingly, the grievance is **DENIED**.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.



SUNYA ANDERSON
HEARING EXAMINER

DATED: August 24, 1989