

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

CRISTINA COLOMA BRAGA,
Grievant,

v.

DOCKET NO. 2017-1685-BRCTC

**BLUE RIDGE COMMUNITY
AND TECHNICAL COLLEGE,**
Respondent.

DECISION

Grievant, Cristina Coloma Braga, filed this grievance against her employer, Blue Ridge Community and Technical College, directly at level three of the grievance procedure, on February 13, 2017, after she was notified that her employment was being terminated. As relief Grievant seeks to be reinstated with back pay.

A level three hearing was held before the undersigned Administrative Law Judge on April 7, 2017, in the Grievance Board's Westover office. Grievant was assisted by her husband, Wael Balaa, and Respondent was represented by Candace Kraus, Deputy General Counsel, Higher Education Policy Commission. This matter became mature for decision on receipt of Respondent's Proposed Findings of Fact and Conclusions of Law, on May 8, 2017. Mr. Balaa made a verbal closing statement on behalf of Grievant at the level three hearing, in lieu of written argument.

Synopsis

Grievant's employment was terminated by Respondent for sexual harassment, that is, touching a person who was on campus, but who was not a student or employee at the time, "on her vagina external to her jeans without solicitation or consent." The termination

letter also states that Grievant provided a false statement during a formal investigation, and that she had sent a retaliatory text message to the complainant. Respondent failed to prove the charges against Grievant.

The following Findings of Fact are made based on the evidence presented at level three.

Findings of Fact

1. Grievant was employed by Respondent, Blue Ridge Community and Technical College ("Blue Ridge"), for over three years. She was a Housekeeper, and was a classified employee.

2. By letter dated January 27, 2017, Grievant was notified by Rodney Wilfong, Facilities Supervisor, that Respondent intended to terminate her employment "due to a violation of the sexual harassment policy based on creating a hostile work environment." The letter further stated that in mid-November 2016, Grievant "explicitly touched Ms. [Alexis] Byers on her vagina external to her jeans without solicitation or consent. All parties described the touching as brief, though the location of the touching differed amongst the three accounts. The witness statement however corroborated the complaint that you touched Ms. Byers' vagina." The letter does not explain how the conclusion was reached that the witness had corroborated that Grievant had touched the vagina when the location of the touching differed "amongst the three accounts." The letter also stated that Grievant had "provided a false statement as part of a formal investigation by stating that you had touched Ms. Byers' buttocks and not her vagina. The complainant's statement and witness statement conflicted with your recollection of the matter." The letter stated that Grievant

had also, on January 25, 2017, “sent a retaliatory text message to Ms. Byers contrary to HR instruction of a zero tolerance policy against retaliation.”

3. By an undated letter, Grievant was notified by Mr. Wilfong that her employment was being terminated effective February 2, 2017, for the reasons set forth in the “Notice of Intent to Terminate letter.”

4. On January 19, 2017, Justin Ruble, Vice-President of Human Resources, and Duane Roberson, who is responsible for Housekeeping and Facilities at Respondent’s satellite campus, among other things, met with Alexis Byers, a Housekeeper at BRCTC, regarding an investigation into an incident involving Ms. Byers. Mr. Ruble advised Ms. Byers that she would receive a written warning for the incident. Mr. Ruble made notes during the meeting. His notes state that Ms. Byers advised that she had been “molested as a child and then touched inappropriately again by someone at Blue Ridge CTC. When prompted as to when this occurred, and after confusing the timeline, Alexis mentioned that it was early to mid-November.” The notes reflect that Ms. Byers at first said she was a student at the time, and then said she was not a student at that time, nor was she working at BRCTC, but that the incident occurred on campus. Ms. Byers alleged that Grievant “took two fingers and rubbed them on her vagina outside her pants for approximately 4 seconds.” Ms. Byers indicated another employee, Imelda Goffin, a Housekeeper, was present at the time, and that Ms. Byers had told another employee about the incident on his last day of employment, which was January 6, 2017, and she had told Treva Hills-Graham, a Tech Center Housekeeper, in December 2016, and “a few friends,” but she had not previously reported the incident to anyone in human resources or management because she “did not want to cause any trouble and just wanted to forget about it.”

5. It was Mr. Roberson's perception that Ms. Byers made the accusation against Grievant when Ms. Byers realized she could be getting in trouble. Mr. Roberson found the accusation hard to believe because he had never heard of any issue with Grievant. Mr. Roberson recalled that Ms. Byers said Grievant had touched her private area, and then when asked to repeat the accusation had said Grievant grabbed her vagina. He did not recall that Ms. Byers indicated how long the touching or grabbing had continued.

6. Ms. Byers did not provide a signed, written statement at any time regarding the accusation against Grievant, nor was she called to testify at the level three hearing in this matter.

7. Mr. Roberson encountered "drama" with Ms. Byers during her employment. As an example he stated that Ms. Byers was involved in an incident where voices were raised in a hallway at the college, and she was making gestures toward a man, winking and showing her teeth. After several of these types of incidents over a period of about three months, he decided to terminate her employment before something more serious happened. Ms. Byers' employment was terminated by Respondent prior to the level three hearing in this matter.

8. Mr. Ruble interviewed Treva Hills-Graham, asking her if Ms. Byers had told her "that someone had touched [Ms. Byers] inappropriately in a private area." Mr. Ruble made notes during the interview, but Ms. Hills-Graham did not provide a written statement, nor was she called as a witness at the level three hearing. Mr. Ruble's notes reflect that Ms. Hills-Graham "recalled the story exactly as told by Alexis to Justin and Duane the previous hour. . . .She said the touching also occurred based on how Alexis dresses. She also stated that [Grievant] frequently jokes around and will tap one on the back or butt

without meaning. . . . and that Alexis says many things and that she does not believe most of them. She said Alexis has problems and does not trust her and that she looks for trouble.”

9. Mr. Ruble interviewed Ms. Goffin on January 25, 2017, after he spoke with Grievant. Teresa Noll, BRCTC Human Resources Representative, was also present. Ms. Goffin did not provide a written statement. Mr. Ruble’s notes reflect that Ms. Goffin told him she, Grievant and Ms. Byers were “joking around and talking inappropriately. Justin asked if there was any physical contact. Imelda gestured with her hand a swift movement in the front of her body near her vagina. . . . Justin asked by touching of the front if she meant the vagina. Imelda confirmed Christina did touch the outside of Alexis’ pants on the vagina. She said Christina nor she reacted to it, but Alexis slightly curled up when touched.” Mr. Ruble’s notes indicate that Ms. Byers had contacted Ms. Goffin the previous Friday regarding the incident via text messages which Ms. Goffin showed him, although his notes do not reveal the context of these text messages. At some point after the alleged incident, Ms. Byers asked Ms. Goffin if Grievant was gay.

10. Ms. Goffin is a native of the Phillippines, and while she learned to speak conversational English in school in the Phillippines, it is her second language, and she did not use English regularly in conversation until she moved to the United States 10 years ago. Ms. Goffin testified at the level three hearing, speaking in somewhat broken English, and at times was searching for the correct word, asking once “what’s the word,” and she

stated that it is difficult for her to verbalize sometimes in English.¹ Ms. Goffin is friends with Grievant, and became emotional during her testimony.

11. Ms. Goffin testified that she was nervous when she met with Mr. Ruble, and that he made her uncomfortable. She testified that she did not realize the “v” was underneath,” and she did not realize Mr. Ruble meant “between the legs.” She testified that she, Ms. Byers, and Grievant were happy to see each other on the date of the alleged incident, and were jumping around, and Grievant accidentally touched Ms. Byers in the front, not underneath, but she did not really see it. Ms. Goffin stated that she never said the touching “was underneath,” however, she agreed that Mr. Ruble’s notes reflected what she had told him. She testified that she did not understand what vagina meant when she was being interviewed by Mr. Ruble, and Grievant did not touch Ms. Byers “underneath.” She further stated that no intentional touching of a sexual nature occurred.

12. Ms. Goffin submitted a written, notarized statement to Mr. Ruble on February 1, 2017, which was dated January 30, 2017, withdrawing “my comments that were verbally given in a statement that was grossly taken out of context. Please withdraw these comments at once.” Ms. Goffin also met with Mr. Ruble on February 1, 2017. Mr. Ruble’s notes reflect that Ms. Goffin told him she, Ms. Byers and Grievant “were hugging and excited in the room because Ms. Goffin knew Ms. Byers from beauty school and because Ms. Byers was going to start as a housekeeper the following week with the College. She said the touch was a brush during the course of that interaction. Ms. Goffin said she

¹ Respondent’s take on Ms. Goffin’s speech was that she spoke clearly and articulately, and that it was not difficult to understand her speech or terminology. The undersigned’s observations were quite different from this characterization.

thought the vagina area was anywhere on the front of the body based on her cultural understanding.” Mr. Ruble’s notes also reflect that he went over Ms. Goffin’s prior statements with her, and Ms. Goffin verified that she had said Grievant had touched Ms. Byers on the “‘front,’ and then Mr. Ruble asking if it was the vagina, and Ms. Goffin responding ‘yes.’ . . . Mr. Ruble asked if she was changing the statement or indicating that the information presented was false. She said ‘no’ but it didn’t mean anything and Christina should not be in trouble.”

13. Grievant is a native of the Phillippines, and like Ms. Goffin, learned to speak conversational English as a second language in school, but did not use English on a regular basis until she moved to the United States five years ago. She stated that she can understand simple English, and her testimony revealed that she does not speak English as well as Ms. Goffin, and relies on her husband, who is of a different nationality and also uses English as a second language, to assist her with communicating at times.

14. Mr. Ruble spoke to Grievant on January 25, 2017. His notes reflect that he asked her “what had occurred in mid-November in a second floor HQ classroom with Sandy ‘Alexis’ Byers and Imelda Goffin.” Mr. Ruble’s notes reflect that Grievant told him they were joking around, with the joking being “sexual-related jokes about men.” Grievant told Mr. Ruble she touched Ms. Byers “‘on the butt, very quickly,’” as part of this joking, and indicated she would apologize if Ms. Byers found this offensive, and she wondered why Ms. Byers had waited two months to report this if she found it to be a problem and why she had not told Grievant she was offended. Grievant told Mr. Ruble she thought Ms. Byers was upset with her because she had stopped responding to her text messages, and that she and Ms. Byers had gone shopping together and she thought they were friends. She

then showed Mr. Ruble text messages she had received from Ms. Byers which Mr. Ruble characterized in his notes as containing “vulgar sexual comments.”

15. Mr. Ruble’s notes reflect that at the pre-determination meeting on February 1, 2017, Grievant stated that when the three women were hugging, “she might have accidentally touched the front of Ms. Byers.”

16. Grievant did not touch or grab Ms. Byers’ vagina, nor did Grievant rub two fingers on Ms. Byers’ vagina outside her pants for approximately 4 seconds. Ms. Byers provided a false statement to Mr. Ruble and Mr. Roberson. Grievant did briefly touch Ms. Byers’ pants with her hand during the course of a conversation of a sexual nature among Grievant, Ms. Goffin, and Ms. Byers, and she may have accidentally touched Ms. Byers on the pants during the excited greeting. Grievant did not realize that Ms. Byers was or would be offended by this, nor did she intend to offend Ms. Byers’ sensibilities. Grievant and Ms. Byers were friends at the time this occurred, and Ms. Byers was not a student or an employee of BRCTC at the time.

17. On November 26, 2016, Grievant received a text message on her cell phone from Ms. Byers’ cell phone which reads, “[d]on’t forget to give him some HEAD tonight. (LOL). . . .” On December 1, 2016, Grievant received a text message from Ms. Byers’ cell phone which reads, “I can tell you don’t like to do it (Girl you better get it while it’s nice and fucking Hard. (it’s not going to stay hard forever ..(Hheeee) LOMFL.” After these text messages, Grievant quit responding to the text messages sent from Ms. Byers’ cell phone. On January 7, 2017, Grievant received a text message from Ms. Byers’ cell phone which reads, “What’s Wrong Girl. I am trying to figure out why you just stop texting me.. (You said you wanted to be friends. (You know Girl shopping..Lunch, hanging out.) I guess you

change[d] your mind. (Only you Know...(OK...I will not text you anymore. Since you choose NOT to text me BACK. BYE BYE GIRL.!" Grievant saved these text messages and shared them with Mr. Ruble.

18. In late November 2016, Ms. Byers went shopping with Grievant and Grievant's husband.

19. BRCTC Rule 15.1, Section 3.1 states that BRCTC "prohibits discrimination, harassment, sexual misconduct, domestic misconduct, stalking, and retaliation . . . by or against any member of the College community that occurs on College premises or in connection with a College-sponsored activity; . . .As a result, any individual found to have committed these acts against another is subject to appropriate discipline."

20. BRCTC Rule 15.1, Section 3.3.1 defines harassment, and states it "is conduct that creates a hostile environment, as defined below, **and** is based upon an individual's race, color, national origin, ancestry, age, physical or mental disability, marital or family status, pregnancy, veteran status, service in the uniformed services . . ., religion, creed, sex, sexual orientation, genetic information, gender identity, or gender expression." This Rule states that harassment may include "conduct that may be physically threatening, harmful, or humiliating," and intent to harm is not required, nor are repeated incidents necessary to constitute harassment. (Emphasis added.)

21. BRCTC Rule 15.1, Section 3.3.2 defines a hostile environment as "a situation where an individual is subjected to any conduct based on the reasons set forth in Section 3.3.1 and that conduct is sufficiently severe or pervasive and objectively offensive so as to unreasonably interfere with an individual's educational experience, work or academic performance or deny or limit the individual's ability to participate in or benefit from the

College's programs, services, opportunities, or activities. . . . Mere offensiveness is not enough to create a hostile environment. . . . a serious incident, even if isolated, can be sufficient to create a hostile environment." The record does not reflect that the alleged action by Grievant disrupted Ms. Byers' educational or work experience. To the contrary, Ms. Byers began working for Respondent after the alleged incident, and continued to initiate contact with Grievant.

22. BRCTC Rule 15.1, Section 3.3.3 defines sexual harassment as "harassment that creates a hostile environment based on sex, as defined above, and also unwelcome sexual advances, . . . or other verbal or physical conduct of a sexual nature on or off campus that is sufficiently severe or pervasive" when submission is a condition of employment or participation in college activities or used as a basis for employment or academic decisions. No such quid pro quo was alleged by Respondent or Ms. Byers.

23. BRCTC Rule 15.1, Section 3.4 defines sexual misconduct to include sexual contact by "intentional touching, either directly or through clothing, of the breast, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person's body by the actor's sex organs."

24. Mr. Ruble told Grievant during the meeting on January 25, 2017, that he could not tell her what to do, but she should not speak with anyone about the allegations, and there could be no retaliation against Ms. Byers or anyone else. He did not put this in writing.

25. BRCTC Rule 15.1, Section 5.1 states that "[n]o individual may retaliate against any complainant" Section 5.2 states that retaliation "means to take an adverse action against an individual or subject an individual to conduct that has the purpose or

effect of unreasonably interfering with that individual's educational experience, work or academic performance, or creates an educational experience or academic or work environment that a reasonable person would find intimidating or hostile because of something that individual did to further this Rule . . .” Grievant had been provided with a written version of this Rule.

26. BRCTC Rule 15.1, Section 3.7 states that “[v]iolators of this Rule are subject to appropriate disciplinary action that **may include** sanctions as severe as discharge of an employee . . .” (Emphasis added.)

27. On January 25, 2017, Grievant's husband, Wael Balaa, sent a text message to Ms. Byers which reads, “I can't believe how low you are reporting fake accusations about me to HR. I regret helping you taking the job here. Shame on you. I showed all your nasty text messages to HR. And that's the reason why I decided long time ago to stop talking to you. Shame on you. Very disappointed. No more talking to you anymore.”

28. BRCTC Administrative Procedure Series 1, Number AP1501, states that Respondent “promotes a zero-tolerance policy that expressly prohibits any form of harassment, discrimination or retaliation.” It also states that Respondent has the responsibility to “take immediate and appropriate corrective action when discrimination, harassment or retaliation is reported or becomes known.” This Procedure notes at 3.2.1 that prompt reporting of complaints is encouraged as “early reporting and intervention have proven to be the most effective method of resolving actual or perceived incidents of harassment or discrimination.” This Administrative Procedure does not state that a zero-tolerance policy means that any harassment or retaliation will result in termination of employment, rather it says a 3.2.9 that it “will be dealt with appropriately. Responsive

action may include, for example, training, referral to counseling and/or disciplinary action such as warning, reprimand, withholding of a promotion or pay increase, reassignment, temporary suspension without pay or termination.”

29. On July 11, 2014, Grievant was notified that she had left her employment location to take care of personal business without clocking out, and that she was to clock out in the future before leaving the workplace. Grievant was also notified, in writing, on December 16, 2014, that a verbal altercation she had with a co-worker on December 4, 2014, was unacceptable behavior. The co-worker had reported that Grievant cursed and shook her fist at the co-worker. Grievant was directed to be professional and courteous to her co-workers. Grievant had received no other discipline during her employment with Respondent.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

The woman who made the accusations against Grievant was not called as a witness, nor did Respondent produce a written statement signed by her. The allegations

she made to Respondent's witnesses, as related by those witnesses, is hearsay. 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.² *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 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 accuser's statement was not reduced to writing, nor was it given under oath. Respondent apparently did not call the accuser as a witness because Respondent had terminated her employment for misconduct. The accusation itself was made more than two months after the alleged incident, no explanation was offered as to what prompted Grievant to touch Ms. Byers in this fashion, or how she was able to do so, and the accusation was made when the accuser was participating in a meeting regarding her own misconduct, which could result in discipline for her. The accuser's supervisor stated that

² The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See *Borninkhof v. Department of Justice*, 5 MSBP 150 (1981).

he had had “drama” with the accuser before, and another employee who was interviewed during the course of the investigation questioned the accuser’s credibility generally.

Hearsay evidence is admissible in the grievance procedures for state and education employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. See, *Seddon v. W.Va. Dept. of Health*, Docket No. 90-H-115 (Dec. 14, 1997).

Cook v. W. Va. Division of Corrections, Docket No. 96-CORR-037 (Oct. 31, 1997), Conclusion of Law No. 2. The verbal statement given by the accuser is unreliable hearsay, which cannot be considered by the undersigned in this proceeding. See, *Warner v. Dep’t of Health and Human Res.*, Docket No. 07-HHR-409 (Nov. 18, 2008).

The only eyewitness presented by Respondent at the level three hearing was Ms. Goffin. Ms. Goffin did not provide a written statement during the course of the investigation, nor was her interview recorded or given under oath, she at one point withdrew her statement, in writing, and the testimony she gave conflicted with Mr. Ruble’s notes of her interview. Ms. Goffin’s credibility is at issue. 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); *Pine v. W. Va. Dep’t of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep’t of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge 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. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

Ms. Goffin did not report the incident. She was first asked about it more than two months after the alleged incident. When she was asked about Grievant touching Ms. Byers, she did not at first provide a verbal response, but swiped her hand down her front below her waist area. She did not say Grievant touched Ms. Byers' vagina, rather it was Mr. Ruble who asked if she meant Grievant had touched Ms. Byers' vagina. At the level three hearing, however, Ms. Goffin testified, under oath, that she did not understand what area of the body Mr. Ruble meant when he asked this. It is apparent that her testimony at the level three hearing was somewhat different from what she told Mr. Ruble. It is also apparent that Ms. Goffin is from a different culture, and does not have a strong command of English, which may well manifest itself during stressful situations. The English she learned was conversational, and may not have included instruction in various parts of the human body, which terms would not be used in conversational situations in her native country. The undersigned finds it entirely credible that Ms. Goffin did not understand at first where the vagina is. She seemed very uncomfortable during her testimony, using "v" initially in her testimony rather than saying the word "vagina." Ms. Goffin's testimony

otherwise was confusing as she agreed with the notes taken by Mr. Ruble, yet was steadfast in her statement that any touching was unintentional, and that Grievant definitely did not touch Ms. Byers on the vagina, but also said she did not really see it. Indeed, while it would have been easy enough for Grievant to have touched Ms. Byers on the front of her pants near her crotch, accidentally or intentionally, the undersigned finds it difficult to envision how Grievant could have touched Ms. Byers on the vagina. Respondent failed to prove this charge against Grievant, and it should have been clear to Respondent that the allegation was falsely made.

Grievant denied from the beginning that she had touched Ms. Byers' vagina, and Respondent asserted that Grievant's denials and her assertion she had touched Ms. Byers on the butt area amounted to a false statement. Respondent supported its allegation by pointing to Grievant's statement at the pre-determination meeting that she might have accidentally touched the front of Ms. Byers' pants when the women were hugging, and asserting that this statement contradicted her original statements. This conclusion is frankly absurd and demonstrates Respondent's inability to view this entire situation in a reasonable, unbiased fashion. Assuming Mr. Ruble accurately noted Grievant's comments when he was taking his notes, what a reasonable person would take from this is not that it contradicts the statements Grievant made on January 25, 2017, but that Grievant is acknowledging that, although she does not recall touching Ms. Byers in this fashion, it is indeed possible that she could have accidentally done so. Although, all we have in this case are Mr. Ruble's notes since that is what was used to terminate Grievant's employment, not any recordings or signed, written statements.

Further, Respondent should have taken into account that the alleged incident did not occur immediately before Grievant was confronted with the allegation. It occurred nearly two months before Grievant was confronted with the allegation, and even by most of Ms. Byers' accounts, but not all of them, was a brief touching, while the women were having a conversation of a sexual nature. It is certainly believable that Grievant would not recall touching Ms. Byers at all, and that she could have touched her on the butt or side while the women were engaged in jumping around. More importantly, however, Grievant did not, in fact, touch Ms. Byers' vagina. Respondent did not demonstrate that Grievant provided a false statement during the course of the investigation.

Finally, Respondent asserted that Grievant retaliated against Ms. Byers after being told not to do so, and that Respondent has a zero-tolerance policy against retaliation. First, the applicable policy states quite clearly that termination of employment is not the only possible discipline to be imposed for retaliation. Second, Ms. Noll testified that Mr. Ruble told Grievant on January 25, 2017, that he could not tell her what to do, but she should not speak with anyone about the allegations, and there could be no retaliation against Ms. Byers or anyone else. While Mr. Ruble thought he was clear, this instruction was not reduced to writing, and could be unclear to anyone after this interview was sprung on them without warning and without any representation, particularly given Grievant's command of the English language. Certainly, Grievant had been provided with a copy of the written retaliation policy, however, one would not expect a Housekeeper to have committed this policy to memory, or to go review this policy after speaking with Mr. Ruble.

More importantly, however, whether the text message sent by Grievant's husband, not Grievant, to Ms. Byers was retaliatory is questionable. Grievant had already quit texting

Ms. Byers by this time, and apparently had not been friendly with her in some time. The text message sent to Ms. Byers does indicate that Grievant is upset by the allegations, that she reported the text messages sent by Ms. Byers, and confirms that she will not have contact with Ms. Byers in the future, which she had already ceased. Retaliation is defined by Respondent as “to take an adverse action against an individual or subject an individual to conduct that has the purpose or effect of unreasonably interfering with that individual’s educational experience, work or academic performance, or creates an educational experience or academic or work environment that a reasonable person would find intimidating or hostile because of something that individual did to further this Rule.” Grievant’s husband sent a text message to Ms. Byers, which, in and of itself is not an adverse action, and no adverse action was forecast in the text, other than cutting off communication with Ms. Byers, which had already occurred. There is nothing in the message which should have caused any interference with Ms. Byers work or work environment. Respondent did not prove the charges against Grievant.

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. *Ramey v. W. Va. Dep’t of Health*, Docket No. H-88-005 (Dec. 6, 1988). “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. W. Va. Dep’t of Health and Human Res.*, Docket No. 92-HHR-486 (May 17,

1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. 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.³ *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 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).

Hearsay evidence is admissible in the grievance procedures for state and education employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. See, *Seddon v. W. Va. Dept. of Health*, Docket No. 90-H-115 (Dec. 14, 1997).

³ The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See *Borninkhof v. Department of Justice*, 5 MSBP 150 (1981).

Cook v. W. Va. Division of Corrections, Docket No. 96-CORR-037 (Oct. 31, 1997),
Conclusion of Law No. 2.

3. The allegations by the complainant are unreliable hearsay, which cannot be considered by the undersigned in this proceeding. See, *Warner v. Dep't of Health and Human Res.*, Docket No. 07-HHR-409 (Nov. 18, 2008).

4. Respondent did not prove any of the charges against Grievant.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her position as a Housekeeper, to pay her all backpay to which she is entitled from the date her employment was terminated until the date she is reinstated, plus interest, restore all benefits, as though she had not been dismissed from her employment, and remove all references to the dismissal, from all personnel records maintained by Respondent.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Deputy Chief Administrative Law Judge

Date: June 13, 2017