THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BEVERLY CREWS,
Grievant,

v. **Docket No. 2017-0344-DVA**

DEPARTMENT OF VETERANS ASSISTANCE,
Respondent.

DECISION

Grievant, Beverly Crews, is employed by the Department of Veteran Assistance ("DVA") as the Director of Nursing at the West Virginia Veterans Home in Barboursville, West Virginia. Director Crews filed an expedited grievance dated September 13, 2016, challenging a suspension without pay.[1] She alleges the suspension was without good cause, retaliatory, and without a predetermination meeting. Grievant seeks a reversal of the suspension with back pay, interest, and all benefits restored.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on November 16, 2016. Grievant personally appeared and was represent by Gordon Simmons, UE Local 170 and Respondent DVA was represented by Mark S. Weiler, Assistant Attorney General. This matter became mature for decision on December 21, 2016, with receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

[1] *See* W. VA. CODE § 6C-2-4(a)(4) which sets out circumstances when an employee may file a grievance directly to level three.

Synopsis

Respondent issued Grievant a two-day unpaid suspension for violating the DOP *Prohibited Workplace Harassment Policy,* by repeatedly and unnecessarily touching her subordinates in a way that made them uncomfortable. Respondent also alleged that Grievant was guilty of insubordination for continuing to unnecessarily touch her subordinates after being directed to stop.

Grievant argues that the suspension was in retaliation for her filing a separate grievance, violated the rule related to predetermination meetings and that she did not violate the DOP policy.

Respondent proved that it had a legitimate, non-retaliatory reason for the discipline which was not a pretext for nefarious conduct, and that it was in compliance with the DOP rule related to predetermination meetings. Respondent also proved by a preponderance of the evidence that Grievant's unwanted touching was sufficiently pervasive to create a hostile work environment and the Grievant was insubordinate.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. The West Virginia Veterans Home ("Veterans Home") in Barboursville, West Virginia, is an independent living facility for qualifying veterans. Social work programs and nursing services, such as health maintenance and wellness care plans, are provided to the resident veterans at the facility.

2. The nursing services are provided by a staff of licensed practical nurses ("LPN") who perform wellness assessments and administer medication to the residents.

The LPNs coordinate with the Veterans Administration Hospital concerning the residents' medical care and carry out doctors' orders as appropriate. The LPNs are directly supervised by the Director of Nursing ("DON") who is charged with insuring that Veterans Home policies and procedures are followed by the nursing staff.

3. Grievant, Beverly Crews is employed by the Department of Veteran Assistance ("DVA") as the Director of Nursing at the Veterans Home. She has been employed as the Veterans Home Director of Nursing since the spring 2015. Grievant has been a registered nurse for approximately fifteen years. As Director of Nursing, Grievant is the direct supervisor for all the LPNs at the Veterans Home.

4. Thomas McBride is the Administrator for the Veterans Home and has held that position for more than three years. Prior to coming to the Veterans Home, Mr. McBride served twenty-nine years in state and federal law enforcement[2] and six years as Warden of the Mt. Olive Correctional Facility.[3] As the Hospital Administrator ("Admin."), Mr. McBride is Grievant's immediate supervisor.

5. Shortly after she stated working as the DON, five of the LPN's sent Grievant a joint memorandum asking that all future discussions with them take place with at least one other LPN present. The stated reason was to foster accurate communication with the staff regarding their behavior and daily duties. These LPNs felt that Grievant would tell each of them one thing while alone and then another when in a group. (Respondent Exhibit 1, memorandum dated October 28, 2015).

[2] Twenty-two years in the West Virginia State Police and seven years in the United States Marshall Service.
[3] West Virginia's only maximum security state prison.

6. After the staff memorandum was sent, some of the LPNs discussed their concerns about Grievant with Admin. McBride. They complained that Grievant spoke to them disrespectfully, talked down to them, and treated them like they did not know their jobs.

7. Admin. McBride met with Grievant to discuss these issues. He told Grievant that she had to be more respectful when dealing with the LPNs, and try for a less harsh tone. Grievant indicated that she didn't realize that she was being harsh. She explained that she was a "northerner" and people there just talk like that. She said that she would try to be less abrasive.

8. Mary Stroud had been an LPN at the Veterans Home for over twelve years. In January 2016, LPN Stroud submitted a resignation letter in which she alleged that Grievant was inappropriately touching the LPN staff. Admin. McBride investigated this allegation by speaking with other staff members. LPN Andrea Ball stated that Grievant came up behind her and massaged her shoulders and would often invade her personal space. Others indicated the Grievant would often rub their arms. LPN Stroud said Grievant would say her hands were cold and then rub them on Ms. Stroud's arms.

9. Admin. McBride met with DON Crews about these complaints as well. Mr. McBride told Grievant not to put her hands on people. Grievant indicated that she suffers from Raynaud's disease which sometimes causes her hands to be unusually cold and even have markedly different temperatures from each other. Because she finds this to be a curious phenomenon, she would touch an LPN on the arm so they could see what was happening. She told Mr. McBride that she did not know this was bothering the staff

and she would stop. She also said she did not realize she was touching the staff in other ways but would avoid doing so.

10. From mid-July through mid-August 2016, Admin. McBride was out of the Hospital for vacation and to attend a conference in Utah. He returned on August 15, 2016. Upon return he found an incident report made by LPN Kelly Hite, regarding an incident involving Grievant.[4]

11. The incident report was made by LPN Kelly Hite and stated:

> 7/12/16 – 1:08 p.m. As I was standing beside the nurse's station desk talking on the phone with a VA nurse, Beverly Crews walked by me and smacked me across the buttocks with her hand.

(Respondent Exhibit 9).

12. Admin. McBride investigated the incident. He started by interviewing LPN Hite and taking her statement on August 16, 2016. (Respondent Exhibit 10). Ms. Hite repeated the basic allegation and answered follow-up questions. When asked if she acknowledged being touched, LPN Hite responded, "I felt the touch. I was on the phone and I did respond."

13. When asked if there had been prior incidents of Grievant inappropriately touching her, LPN Hite stated that several weeks earlier in the cafeteria Grievant touched her arm and told her "you feel good." LPN Hite told Grievant to "get [her] big fat sausage fingers off of me", to which Grievant laughed. (Respondent Exhibit 9, Statement of Kelly Hite). Ms. Hite indicated that she sent the incident report through the administrator rather than through her supervisor, DON Crews, because she feared retaliation.

[4] Mr. McBride had been notified of the incident while he was away and told the staff person to put the report in a folder for him to address upon his return.

14. While meeting with Admin. McBride on August 16, 2016, LPN Hite described another incident which was not in her statement. Mr. McBride requested that she put it in writing. LPN Hite filed a second incident report dated August 25, 2016, stating:

> On 7/12/16, Beverly Crews came into the medication room and danced up against me with the front of her body touching the back of mine. I said "Get off of me!" She laughed and stopped.

(Respondent Exhibit 11). July 12, 2016, is the same date of the touching alleged in the first report. The medication room is very small and crowded. It is difficult for two staff members to be in the room without making some physical contact.

15. A video camera located at the nurses' station recorded the incident which was the subject of the original report wherein LPN Hite alleged that DON Crews "smacked her across her buttocks". The video is date stamped for July, 12, 2016, at approximately 1:10 p.m. LPN Hite was bent at the waist, leaning on the side of the desk. She was resting on her arms with her back roughly parallel to the desk top while she talked on the telephone. Initially, DON Crews was seated at the desk. DON Crews rose from the desk to walk across the room, which required her to walk between LPN Hite and the filing cabinets in a space approximately three feet wide. As DON Crews passed LPN Hite she raised her left hand and with her finger tips, tapped Ms. Hite on her lower back, near the top of her hips. LPN Hite had no visible reaction to the touch and DON Crews continued across the room.

16. Between August 16 and August 18, 2016, Admin. McBride Met with DON Crews and advised her that he had received a complaint and he was investigating the matter.

17. Ms. Crews filed a different grievance on August 25, 2016, alleging that improper directives were given regarding medical care of the residents. (Respondent Exhibit 14).

18. Following the investigation, Admin. McBride decided that disciplinary action was likely warranted and considered suspension appropriate since he had previously warned Grievant about unnecessary touching and as a supervisor he felt Grievant should be held to a high standard of conduct. He testified that he made the decision regarding discipline prior to becoming aware of the grievance file by DON Crews.[5]

19. Admin. McBride originally scheduled a predetermination meeting for September 2, 2016, and prepared a suspension letter on that date. (Respondent Exhibit 13). Grievant's representative was unavailable on that date and the meeting was rescheduled for September 13, 2016.

20. After the predetermination conference, Admin. McBride gave Grievant the suspension letter suspending her for two days without pay. The reasons given for the suspension were inappropriate touching of staff in violation of the "DOP[6] Prohibited Workplace Harassment Policy and WVVH's policies," as well as speaking to staff members in a disparaging manner about a social worker employed at the Veterans Home and her general management style in dealing with her staff. Grievant was also instructed to "put together a supervisor training program for [herself] . . . to improve [her] supervisory performance and communication skills." (Respondent Exhibit 13). The letter was signed by Admin. McBride, Grievant and Conda Collins on September 13, 2016.

[5] There is no evidence regarding when Admin. McBride decided upon his course of action beyond his own testimony.
[6] Division of Personnel.

Discussion

This grievance involves a disciplinary matter. Therefore, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent gave Grievant a two-day suspension for allegedly violating the Division of Personnel ("DOP") Prohibited Workplace Harassment Policy by inappropriately touching her subordinates after being counseled against such behavior. Additionally, Respondent alleges that Grievant needs to improve her management skills by instructing, assigning, and correcting her employees without appearing to belittle them. Respondent also alleges that Grievant's failure to stop unnecessarily touching staff after being counseled on the issue constitutes insubordination. Grievant alleges the

suspension was without good cause, retaliatory, and without a required predetermination meeting.

There is no dispute that a predetermination meeting took place. Grievant was present and her representative participated by telephone. Grievant's representative argues that the meeting was meaningless because Admin. McBride had already made up his mind regarding the discipline; indeed, he had already drafted a letter. Mr. McBride does not dispute that he drafted the suspension letter in anticipation of the September 2, 2016, meeting that was postponed. Rather he noted that he prepared the letter based upon the results of his investigation but was open to changing the discipline contemplated if Grievant provided reason for doing so at the predetermination meeting.

The DOP Administrative Rule in the section related to disciplinary suspensions states the following:

> Prior to the effective date of the suspension, the appointing authority or his or her designee shall:
> 12.3.a.1. meet with the employee in a predetermination conference and advise the employee of the contemplated suspension, . . .

W. VA. CODE ST. R. § 146-1-12.3(a). The rule requires that Respondent advise the employee that suspension is being contemplated. Admin. McBride did that at the meeting in this case.

The purpose of the legislative rule requiring a predetermination conference is to protect Grievant's due process rights, to be given notice of the charges against him and the right to respond to those charges before disciplinary action is taken. *See, Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, (1981).

In this case, Grievant was advised that suspension was being contemplated, given the reasons for the contemplated action, and an opportunity to respond. At this stage in the process that is all that is required. The preparation of a suspension letter in advance of the meeting does not violate the legislative rule or due process. *See, Catalina v. Dep't of Health & Human Res*., Docket No. 2011-0885-DHHR (Aug. 11, 2011).

Grievant avers that Admin. McBride suspended her as a reprisal for her filing a grievance on August 25, 2016, rather than for the reasons he set out in the suspension letter. WEST VIRGINIA CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That she engaged in protected activity;
>
> (2) That she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural* Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical

question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Grievant filed a grievance contesting directives given by Admin McBride on August 25, 2016. Mr. McBride had commenced an investigation into allegations that Grievant had inappropriately touched staff members on August 16, 2016. The investigation continued through August 25, 2016, when a second incident report was filed. Admin. McBride testified that he decided that suspension was appropriate discipline around that time and before he learned about the grievance. If that is the case, the third element necessary to prove reprisal does not exist. However, if Admin. McBride did know about

the grievance, Grievant established a *prima facia* case of reprisal in as much as she filed a grievance which is a protected activity, she suffered the adverse consequence of an unpaid suspension, we assume the administration had at least constructive notice of the filing of the grievance and the adverse action occurred in close enough time proximity to infer a causal connection.

Even assuming a *prima facia* case was established, Admin. McBride proved the existence of legitimate, non-retaliatory reasons for the suspension and Grievant did not offer any evidence to prove that those reasons were pretextual. Accordingly, Grievant did not prove reprisal as contemplated by the public employees grievance statutes.

Finally, Grievant denies that she made inappropriate contact with the staff members in a way that creates a hostile work environment on violation of the DOP policy. Grievant admits that from time to time she would place her hands on the arms of an LPN. Grievant testified that she suffers from Raynaud's disease which sometimes causes her hands to be unusually cold and even have markedly different temperatures from each other. Because she finds this to be a curious medical phenomenon, she would touch an LPN on the arm so they could see what was happening. She believed the LPNs would also be interested in this phenomenon since they too were in the medical field. Grievant testified that she did not remember meeting with Mr. McBride about this issue. However, remembered telling him that no one had complained to her about the touching but she would try to stop doing it. Given the totality of the testimony it is more likely that not that

Admin. McBride met with Grievant in early 2016, discussed complaints he was receiving from staff regarding her touching them and counseled her to stop. *See* FOFs 8 & 9 *supra.*[7]

Grievant does not contest that she touched LPN Kelly Hite while Ms. Hite was at the nurses' desk on July 17, 2016, but denies that there was anything inappropriate about the incident. Clearly, LPN Hite grossly exaggerated the incident when she reported that Grievant smacked her across the buttocks. The video showed that Grievant tapped Ms. Hite on her lower back near the top of her hips as she went by.

Grievant alleges that she did this because the space was tight and she was just letting Ms. Hite know that she was coming by. This explanation is also inconsistent with the video in as much as Grievant had sufficient space to pass Ms. Hite without touching her and was nearly past her when the touch took place.

Regardless of the reason, Grievant did touch LPN Hite in a moderately intimate place without any necessary or appropriate reason for doing so. While LPN Hite registered no visual reaction at the time, it is not unreasonable that this touching, in conjunction with prior incident, would make her uncomfortable. There is no doubt that Grievant knew that LPN Hite was not receptive to being touched since she had previously told Grievant to "get your big fat sausage fingers off of me." *See* FOF 13.[8]

[7] While DON Crews testified that she did not remember this meeting she did not deny that it took place.

[8] Grievant alleges that the LPNs were actually angry because they had worked at the Veterans Home for a long time and Grievant was making changes that she felt were in the residents' best interests.The wording of this reaction, as well as Ms. Hite's exaggeration of the incident at the nurses' desk, lends some credence to that theory. However, that does not change the fact that Grievant was continually making unwanted physical contact with her staff.

Grievant denies that she danced up against LPN Hite in the medical room. However, she stated that the room is so small that if they were in the room at the same time it is likely that their bodies did make contact. Ultimately, Grievant admits to touching her staff from time to time when talking to them, and in demonstrating symptoms of her medical condition. She also intentionally tapped LPN Hite near her rear for no apparent reason. However, she denies that these incidents had any sexual motivation and did not create a hostile work environment.

The DOP *Prohibited Workplace Harassment Policy,* defines "Hostile Work Environment Harassment" in at least two ways:

> F. Hostile Work Environment Sexual Harassment: A type of illegal sexual harassment based on gender that is sufficiently severe and pervasive as to alter the conditions of the employee's employment and create a hostile and abusive working environment.
>
> H. Nondiscriminatory Hostile Workplace Harassment: A form of harassment commonly referred to as "bullying " that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bounds of decency and 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.

The policy further states in Section III:

> E. 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:
> . . .
>
> 4. Undesired, intentional touching such as embracing, patting, or pinching;

Respondent Exhibit 3).

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, supra* at p. 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009).

"'To 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)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule, 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., [v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kinzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006).

Grievant has regularly touched her subordinates on the arms and occasionally on other places. These incidents have occurred regularly enough for several of the employees to bring the issue to Grievant's supervisor. Admin. McBride counseled Grievant against touching the LPNs but the conduct continued. It is apparent from the evidence that some of Grievant's touching behavior is so ingrained that she does not always realize she is doing it. However, it is clear the behavior is pervasive and causes at least some of the LPNs discomfort. At least one of them, LPN Hite, has made her discomfort known in graphic terms. Whether Grievant intends to cause her co-workers discomfort or not, a reasonable person might reasonably find such regular unwelcome touching to be disturbing and since it is coming from a supervisor, intimidating. Respondent has proved that Grievant's behavior created a hostile environment in violation of the DOP *Prohibited Workplace Harassment Policy.* Respondent seemed to take the fact that Grievant might not have realized the extent of her touching by issuing a short suspension rather than more significant discipline.

Even had the behavior not reached the level of violating the DOP policy, Respondent proved that Grievant was insubordinate in not complying with Admin. McBride's counseling and directive to stop touching the LPNs.

Insubordination "includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). *See also Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ*., Docket No. 26-89-004 (May 1, 1989). The Grievance Board has

previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ*., 266 S.E.2d 42 (N.C. 1980)). "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are "expected to treat each other with a modicum of courtesy in their daily contacts." *See Fonville v. DHHS*, 30 MSPR 351 (1986) (*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *See Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See also Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000); *Corley, et al., v. Workforce W. Va.*, Docket No. 06-BEP-079 (Nov. 30, 2006).

Admin. McBride counseled Grievant that her touching of the staff members as well as her generally harsh management style was disrespectful and directed her to stop. Notwithstanding this directive Grievant tapped LPN Hite in an inappropriately familiar way. Respondent proved by a preponderance of the evidence Grievant was insubordinate. *See, Kearney v. Div. of Envtl. Prot.,* Docket No. 2016-0353-DEP (Jun. 13, 2016).

Accordingly, the grievance is DENIED.

Conclusions of Law

1. This grievance involves a disciplinary matter. Therefore, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. The DOP Administrative Rule in the section related to disciplinary suspensions states the following:

> Prior to the effective date of the suspension, the appointing authority or his or her designee shall:
> 12.3.a.1. meet with the employee in a predetermination conference and advise the employee of the contemplated suspension, . . .

W. VA. CODE ST. R. § 146-1-12.3(a). The rule requires that Respondent advise the employee that suspension is being contemplated. Admin. McBride did that at the meeting in this case.

3. The purpose of the legislative rule requiring a predetermination conference is to protect Grievant's due process rights to be given notice of the charges against him and the right to respond to those charges before disciplinary action is taken. *See, Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Board of Education of the*

County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, (1981).

4. The preparation of a suspension letter in advance of the meeting does not violate the W. VA. CODE ST. R. § 146-1-12.3(a). *See, Catalina v. Dep't of Health & Human Res*., Docket No. 2011-0885-DHHR (Aug. 11, 2011).

5. WEST VIRGINIA CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

6. To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That she engaged in protected activity;
>
> (2) That she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural* Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

7. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory

reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

8. Respondent proved that there was a legitimate, non-retaliatory reason for the disciplinary action and Grievant did not prove that the reason was pretextual.

9. The Grievance Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means

limited to them, and "no single factor is required." *Harris, supra* at p. 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009).

10. "'To 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)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule, 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., [v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kinzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006).

11. Respondent has proved that Grievant's behavior created a hostile environment in violation of the DOP *Prohibited Workplace Harassment Policy.*

12. The Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ*., 266 S.E.2d 42 (N.C. 1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *See Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See also Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket

No. 99-PEDTA-406 (Oct. 31, 2000); *Corley, et al., v. Workforce W. Va.*, Docket No. 06-BEP-079 (Nov. 30, 2006).

13. Respondent proved by a preponderance of the evidence Grievant was insubordinate. *See, Kearney v. Div. of Envtl. Prot.,* Docket No. 2016-0353-DEP (Jun. 13, 2016).

Accordingly, the grievance is DENIED.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: MARCH 14, 2016.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE