

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**MICHAEL WAYNE RANSON,
Grievant,**

v.

Docket No. 2017-1187-MAPS

**REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY/SOUTHWESTERN
REGIONAL JAIL,
Respondent.**

DECISION

Grievant, Michael Ranson, was employed by Respondent, Regional Jail and Correctional Facility Authority (“RJCF”) in the classification of Correctional Officer 4 (“CO4”) at the Southwestern Regional Jail when his employment was terminated. Officer Ranson filed an expedited grievance to level three¹ alleging:

I feel I was dismissed of my duties due to no just cause and retaliation over filing grievance on matters in regard to an EEO claim.

As relief, Grievant seeks “[t]o be reinstated to my position as a CO IV.”

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on February 16, 2017. Grievant personally appeared, *pro se*.² Respondent was represented by Brooks H. Crislip, Assistant Attorney General. This matter became mature for decision upon receipt of the parties’ Proposed Findings of Fact and Conclusions of Law on March 20, 2017.

¹ See W. VA. CODE § 6C-2-4(a)(4).

² “*Pro se*” is translated from Latin as “for oneself” and in this context, means one who represents oneself in a hearing without a lawyer or other representative. *Black’s Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

Synopsis

Respondent dismissed Grievant from employment for allegedly sexually harassing a subordinate Correctional Officer on several occasions. Grievant argues that the subordinate's allegations are not credible, and she fabricated the charges to avoid working on night shift. He also alleges Respondent dismissed him in retaliation for filing an earlier grievance. Respondent conducted a full investigation of the incidents and made a finding that the charges were true. Respondent proved the allegations by a preponderance of the evidence.

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. Grievant, Michael Ranson, was employed by Respondent in the CO4 classification at the time of the events giving rise to this grievance. The CO4 classification is equivalent to the rank of Sergeant in the RJCFA ranking system. He was employed at the Southwestern Regional Jail ("Jail") when his employment was terminated by Respondent.

2. Grievant was first permanently employed by the RJCFA on November 1, 2007. He was promoted to CO3 (Corporal) in 2012, and became a CO4 (Sergeant) two years later. Grievant was first stationed at the South Central Regional Jail, and was transferred to the Southwestern Regional in October 2014.

3. By letter dated January 31, 2012, Grievant was suspended without pay for ten working days. Grievant was working at the South Central Regional Jail. The specific reason given for the suspension was:

In the fall of 2010 you cultivated a relationship with then Inmate [S. H.]³ while you were conducting your duties as a correctional officer. Within days of her release from the SCRJ you traveled to Ms. [H]'s home, where she was serving a sentence of home confinement, and engaged in sexual intercourse with her.⁴

(Respondent Exhibit 8). Grievant did not deny nor contest these charges.⁵

4. As a Sergeant, Grievant's duties included overall supervision of Jail personnel during his shift, assigning posts to officers for daily duties, conducting post checks and walk-throughs of the facility, and ensuring the general safety and security of the facility. Grievant had two Corporals to whom he could delegate duties.

5. During a shift, there needs to be at least one officer in each of the following positions at all times; Central Control, Booking and the Towers. Other officers relieve the assigned officers in these positions so that they may take breaks or for any other reason which may come up. The officers assigned to these positions may not leave the posted position until relieved. The Towers are locked and the officer assigned to a Tower must unlock the door for anyone else to gain entrance.

6. Each Tower has a Rover to take care of duties in the pod and provide Tower relief as needed. Core Rovers float throughout the facility performing checks and escorts. On visiting days, one of the Rovers is stationed in the front of the facility to go over

³ The inmate's name is not used to protect her privacy and it is not an essential fact in resolving this grievance. The inmate's full name appears in the exhibit.

⁴ RJCFA Policy and Procedure statement #3010 states that "Employees shall develop only those relationships with inmates that are necessary for the professional conduct of business."

⁵ At the level three hearing, Grievant testified that he didn't know that S.H. was still on home confinement when he visited her. This does not change the fact that he started the relationship while she was in jail, nor does it seem credible that he would not know her release status.

paperwork prior to the visits and facilitate the visits. Afterward that Rover makes copies of the visitor lists.

7. R.N.⁶ has been employed as a Correctional Officer at the Southwestern Regional Jail for roughly two years. Nearly all that time she was working under the supervision of Sergeant Ranson, Grievant. She started as a Correctional Officer 1 and was promoted to a Correctional Officer 2 (“CO2”) after attending the training academy and serving her probationary period.⁷

8. By all accounts, CO2 R.N. is a competent Correctional Officer and got along well with her coworkers.

9. Grievant completed the duty rosters which assigned Correctional Officers on his shift to their duty posts. CO2 R.N. was assigned to be the Rover more times than usual and was almost exclusively the officer assigned to be the Rover for visitations.⁸

10. On or about July 1, 2016, CO2 R.N. made a complaint to Katrina Kessel, RJCFA Assistant Director of Human Resources (“HR”), alleging that she was being sexually harassed and subjected to a hostile work environment by her supervisor, Sergeant Michael Ranson, Grievant. April Darnell, RJCFA Director of Human Resources, followed up on the complaint with a telephone call to CO2 R.N. to get details regarding her specific allegations. An investigation into the allegations was initiated on July 11, 2016. Steve Berthiaume, Investigator III, with the Division of Corrections and Brenda Hoylman, Division of Juvenile Services, were assigned to conduct the investigation.

⁶ This Officer’s initials will be used herein rather than her name to protect her privacy since she is not the grievant and was the subject of alleged sexual harassment.

⁷ Typically, one year.

⁸ Respondent Exhibit 1, Findings made by Steve Berthiaume, Investigator III, in the report on an investigation into a sexual harassment complaint filed by CO2 R.N..

11. The investigation was temporarily rescinded on July 13, 2016, when the West Virginia State Police started a criminal investigation. Sergeant Frye conducted the investigation for the State Police. He took two statements from Officer R.N. and one from Grievant. The Prosecuting Attorney's office declined to prosecute the case because there was no evidence of physical force present in the allegations. (Respondent Exhibit 1)⁹

12. After learning of the disposition of the criminal investigation, HR Director Darnell met with the investigators to discuss moving forward with the internal investigation.

13. The allegations to be investigated were that on numerous occasions Grievant had forced Officer R.N. to perform oral sex on him while at work in the Jail, and that Grievant had refused to provide relief for Officer R.N. when she began menstruation while assigned to E Tower and need to go to her car to get materials to deal with her situation.

14. The investigators met with State Police Sergeant Frye to discuss the criminal investigation and were supplied with two statements taken from CO2 R.N., a statement taken from Sergeant Ranson and the investigative report.

15. Two taped interviews were conducted of Officer R.N. Grievant gave a statement, as did CO2 Ashley Ranson (Grievant's wife), Sergeant Elba Frye (brother to State Police Sgt. Frye), CO1 George Hignite, and CO2 Wesley Fields. The investigators also went through the Jail duty logs and schedules to determine the assignments of Officer R.N. as well as when she and Grievant were working at the same time.

⁹ Investigator Berthiaume testified concerning the contents of this report, his actions in taking statements and gathering evidence and reasons for reaching the conclusions therein.

16. Officer R.N. originally was assigned to the night shift but was having some difficulty with the supervisor who she said was picking on her. Grievant transferred her to the day shift under his supervision. They knew each other and got along well at first.

17. Within a month or two of Ms. R.N. working under Grievant's supervision, he began saying things when they would pass that others could not hear. The main thing that he said was "suck my dick."¹⁰ Ms. R.N. either ignored him or told him it was silly, hoping that he was joking and he would stop.

18. In late summer or early fall of 2015, Officer R.N. was working E Tower. Grievant and two corporals¹¹ came by the Tower to perform a post check. Grievant let them in for the check. All three left but shortly thereafter, Grievant asked to be let back in to use the restroom which is on the first floor near the exit door. Officer R.N. let him in, locked the door, and went back up into the tower. After a short time, Grievant called her to come and let him out. When Grievant got to the bottom of the steps Grievant was standing in the corner between the exit door and the restroom door. He had his pants unzipped and his erect penis exposed and told Grievant to perform oral sex on him. She told him no but he would not leave. He told her that he was her Sergeant and he would fire her.¹² After some discussion and threats Officer R.N. complied for fear that she would lose her job otherwise. After it was over Grievant threatened her that she "better not say

¹⁰ An attempt has been made to use less graphic language where possible. However, the specific words used in some situations must be set out in the decision for the true nature of the conduct and relationships to be understood.

¹¹ Chauncey Maynard and John Cook.

¹² Officer R.N. felt she could not leave the Tower without being fired for abandoning her post.

any fucking thing about it.” Ms. R.N. said this was “nasty” and made her feel very low about herself. (Respondent Exhibit 1 and level three testimony).

19. That was the last incident in the Tower. Thereafter, Grievant would assign CO2 R.N. to be the visitation Rover. When she went to the copy room he would follow her in, lock the door and demand oral sex. Other times when she was assigned as a Rover he would send her into Room 210 which was the office of a supervisor on another shift to get restraints or some other supply. He would follow her in and the same thing would occur. Each time he would threaten her by making statements like “You better not say anything or something bad will happen, you know it will because I don’t give a fuck.”¹³ Grievant would force Ms. R.N. to swallow the ejaculate telling her “not to get that shit on the floor or anywhere.” When Grievant finished, he would walk out of the room. Ms. R.N. tried to avoid Grievant but it was not always possible.

20. When Investigator Berthiaume pressed Ms. R.N. for details to help him judge the credibility of her rendition of events she stated that Grievant had reddish blonde pubic hair, his erect penis was about the length of an ink pen and that it was “white as a ghost.” (Respondent Exhibit 1, pg. 19). Officer R.N. could not remember the exact number of sexual incidents but estimated that it was between ten of fifteen times.

21. CO2 R.N. stated that she was afraid to report the activity because she did not know who to trust and that it seemed that a lot of the officers were related. She did not tell family or friends because she wanted to forget it, but could not.

¹³ This was a specific statement Ms. R.N. remembered. She testified that he said similar things on each occasion and at others times. She was afraid because she didn’t know what he might do.

22. Occasionally, CO2 R.N. would be left in the Tower and as a punishment no relief would be provided for her. On one such occasion, CO2 R.N. started asking for a break around 3:00 pm. She was told she would have to wait because the officers had to see to diabetics at 4:00. Grievant had started menstruation and was needing to go to her car to get necessary hygiene products. Thereafter, no one would answer the radio and when she called the sergeant's office someone would pick up the receiver and immediately hang up. She became frustrated and said over the radio that she had started her period and it was a mess. An officer responded that there was toilet paper in the Tower and no relief was sent until 6:20 pm which gave her ten minutes to deal with her issues before the lock down at 6:30 pm. After this event, Grievant came to her and said "see, you start doing what I tell you to do." CO2 R.N. felt this was a response to her efforts to avoid Grievant and giving excuses why she could not do oral sex.

23. When asked about this incident in his interview, Grievant told Investigator Berthiaume that he could not recall that situation but said, "it could very well had happened." Sergeant Ranson stated that it "absolutely happens" that officers are left in the towers without relief as payback or punishment for taking excessively long breaks or things of that sort. Grievant stated that technically it is not supposed to happen but it does and "they serve justice on themselves." (Respondent Exhibit 1, pg. 30).

24. Grievant was promoted to Acting Lieutenant in March 2016 with general hours of 4:00 a.m. to 12:00 p.m. Around that time there was a general shake up in assignments and Officer R.N. was being moved to the night shift.

25. CO2 R.N. was glad when Grievant became a Lieutenant because he would no longer be her shift supervisor. However, Grievant began asking her to come in early

and clock in a 4:00 a.m., so she could “to take care of him.” (Respondent Exhibit 1, pg. 19). She realized that things were not going to change. At that point, Officer R.N. made a formal complaint with Assistant HR Director Kessel.

26. Grievant denied all the allegations of sexual conduct with Officer R.N. During his interview, he told the investigators he believed that Officer R.N. was upset that she was transferred to night shift and made this complaint about a week after she received that notice to try to get out of it. At the level three hearing, Grievant stated that he had heard that Ms. R.N. had filed the complaint to get money to help her brother get out of a criminal charge. No evidence was presented to validate that rumor.

27. Grievant opined at the hearing that the sexual acts could not have happened because there are video cameras all over the Jail and it would have been seen. When asked if there were any spots in the Jail or towers where the cameras did not cover Grievant specifically noted the supervisors’ office such as room 210, the copy room. In the towers the only spot was the corner between the exit door and the bathroom door.¹⁴

28. A predetermination meeting was held on October 5, 2016, and Grievant was given notice that disciplinary action, including dismissal was being considered. Grievant attended the meeting, as well as a plethora of RJCFA employees including Director of Human Resources April M. Darnell.¹⁵

¹⁴ Grievant showed no sign of realization that this explained how the sexual acts described could have taken place without appearing on camera.

¹⁵ At the hearing, Grievant complained that two of the officials participated in the predetermination conference by telephone and he was not informed of their participation until he received the dismissal letter. While this is not the best procedure, there was no evidence that Grievant was prejudiced by their participation or that these individuals participated in the ultimate disciplinary decision.

29. By letter dated October 21, 2016, Grievant's employment with the Respondent was terminated. The letter was signed by HR Director Darnell and cited the following conclusions set out in the investigation:

Based upon information garnered during the investigation, the allegations that **the Respondent** did commit acts of Sexual Harassment toward **the Complainant** are **SUBSTANTIATED** by a preponderance of the evidence.

Based upon information garnered during the investigation, the allegations that **the Respondent** did allow a Hostile Work Environment by allowing for staff members to intentionally delay needed post relief of **the Complainant** are **SUBSTANTIATED** by a preponderance of the evidence. (Emphasis in Original)

Respondent found that Grievant's actions violated the West Virginia Division of Personnel ("DOP") *Prohibited Workplace Harassment Policy*, as well as the *West Virginia Regional Jail Policy and Procedure #3010 – Code of Conduct*. (Grievant Exhibit 1, termination of employment letter).

Discussion

As this grievance involves a disciplinary matter, 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).

Grievant was a permanent state employee in the classified service. Permanent state employees who are in the classified service can only be dismissed for “good cause,” meaning “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). See also *Sloan v. Dep’t of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam). “*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent.” *Serreno v. West Va. Civil Serv. Comm’n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (per curiam). “‘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).

Respondent dismissed Grievant for sexual harassment of a subordinate and creating a hostile work environment, all in violation of the DOP *Prohibited Workplace*

Harassment Policy, as well as the West Virginia Regional Jail Policy and Procedure

#3010 – Code of Conduct. The DOP policy states in pertinent part:

Employees have the right to be free from harassment while in a State government workplace, and the State has the legal obligation to ensure that such harassment does not occur and that effective means of redress are available.

A. Illegal harassment is prohibited by the West Virginia Human Rights Act and Title VII of the Civil Rights Act of 1964 where such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

B. (3.) Any employee found to be in violation of this policy will be subject to disciplinary action up to and including dismissal.

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:

8. Offers of tangible employment benefits in exchange for sexual favors, or threats or reprisals for negative responses to sexual advances.

DOP Prohibited Workplace Harassment Policy.

The Regional Jail Policy #3010 related to employee conduct states:

19. All employees shall conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority, or public service. *Id.*

Respondent argues that Grievant violated both of these policies by repeatedly forcing a subordinate officer to participate in sexual conduct by threat of retaliation if she failed to do so and by harassing her by refusing to provide her with needed relief while she was occupying a post which required continuous monitoring.

Grievant counters that he did not commit any of the acts with which he is charged and the allegations were made up by the complaining employee to serve her own ends. In cases involving allegations of sexual assault there is often only the alleged perpetrator and the alleged victim who can attest to whether the acts took place. The very nature of such offenses lead to them being conducted covertly. This is the situation in this matter. Ultimately, the case must be determined based upon the credibility of the testimony of Grievant and that of Officer R.N.. Where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, 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, 1994).

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' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28,

2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

CO2 R.N. was upset when she testified and had trouble keeping from crying. However, she did not falter in telling what happened in the Jail. She maintained eye contact and within reason demonstrated an appropriate demeanor. She had been interviewed by the State Police and twice during the investigation before testifying at the level three hearing. The basic components of her recital of events remained constant throughout of the statements. However, they did not sound as if she were repeating the events by rote as if she had made them up. She did not hesitate in her replies and answered questions directly. While Officer R.N. could not provide exact dates and times she did provide detail of where and how the incidents occurred. She remembered that she was forced to sit on a small stool in the copy room. She was forced to swallow the ejaculate and Grievant became very angry when she got choked and spilled some on one occasion. Importantly, she provided specific physical details of Grievant which could be proven false if not accurate. Officer R.N. had no apparent grudge against Grievant and had nothing to gain from making the complaint except relief from a terrible situation. Her testimony was credible.

Sergeant Ranson was confident in giving his testimony. He also made appropriate eye contact and did not hesitate in his answers. He was angry regarding the allegations but did not have any inappropriate outburst.

However, there were problems with Grievant's version of the events. He insisted that the sexual acts could not occur without being caught on camera because of the prevalence of video recorders in the Jail. Yet when he was asked to identify and places

in the Jail he knew were not recorded by the cameras his response included the various areas which Ms. R.N. had described as where the incidents happened, including the corner between the restroom and the exit in the tower. Grievant did not hesitate in his response to this question. During his investigation interview, Grievant indicated that he had heard rumors that Officer R.N. made up the allegations to avoid being placed back on night shift. When asked by the investigator if it seemed a bit extreme to file an EEO complaint to avoid a shift change, Grievant admitted that it sounded crazy. At the hearing, he indicated that he heard additional rumors that Grievant filed the complaint to get money to help her brother defend against a criminal charge. Yet Grievant did not provide any evidence to corroborate these rumors, which also seem far-fetched. Additionally, Grievant made no effort to dispute the specific physical characteristics attributed to him by Ms. R.N. Admittedly, it would have been challenging to come up with a specific way to test her assertions. However, Grievant did not even address them even though he had been provided the statements long before the hearing.

Additionally, when questioned about the incident of refusing to provide relief to Grievant when she was assigned to the tower, Grievant could not remember the specific incident, but believed it could have happened because he and other supervisors definitely use that strategy to ensure obedience from their subordinates even though he knows it to be “technically” improper.

Finally, the fact that Grievant previously had participated in an inappropriate sexual relationship with an inmate which he initiated while she was under his custody and control, indicates Grievant's willingness to violate Regional Jail procedures in pursuit of sexual gratification. Grievant clearly had a bias in this matter because his job was at stake, but

he could not offer any plausible explanation for CO2 R.N. to have lied. By his own account, he was friendly with her prior to the incidents and he believed she was a good officer.

When all the factors are taken into consideration it is more likely than not that the incidents occurred as Officer R.N. described them. These events clearly constitute a violation of the DOP *Prohibited Workplace Harassment* Policy, in as much as they constituted clear threats of reprisal if Officer R.N. responded negatively to her supervisor's demand for sexual favors. *Id.*, § III, E. ¶ 8.

Respondent proved the allegations which led to the termination of Grievant's employment by a preponderance of the evidence. Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, 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. Where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, 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, 1994).

3. 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' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

4. Given the totality of the evidence and the comparative credibility of the testimony of Grievant and Officer R.N., Respondent proved the bases for terminating Grievant's employment by a preponderance of the evidence.

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: APRIL 26, 2017.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE