

# WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DENNIS DALE BENNETT,**  
**Grievant,**

**v.**

**Docket No. 2017-2115-DOT**

**DIVISION OF HIGHWAYS,**  
**Respondent.**

## **DECISION**

Dennis Dale Bennett, s, protesting the termination of his employment. The original grievance statement provides, *“I was falsely accused of repeatedly flipping a female employee’s breasts by forcefully flipping the employee’s breast upward, resulting in the termination of my employment with the Department of Transportation, Division of Highways, as a Transportation Worker’s Equipment Operator.”* The relief requested, *“I am seeking the reinstatement of my employment with the Department of Transportation, Division of Highways, as a Transportation Worker 3 Equipment Operator.”* Grievant has further communicated a desire to be compensated for lost wages.

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process.<sup>1</sup> A level three hearing was held before the undersigned Administrative Law Judge on October 3, 2017, at the Grievance Board’s Beckley facilities. Grievant appeared in person and with counsel Derrick W. Lefler, attorney-at-law. Respondent was represented by Lora Witt, Employee Relations Coordinator and through its legal counsel Keith A. Cox, Esquire, DOH Legal Division. In

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<sup>1</sup> W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

addition to the level three hearing proceedings, both parties submitted written Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about November 6, 2017, on receipt of the last of these fact/law proposals.

### **Synopsis**

Grievant was terminated from his employment. Grievant filed a grievance stating that he had been falsely accused and requested to be reinstated with the DOH as a Transportation Worker III Equipment Operator. Grievant alleges pretext and retaliation for voicing opposition to other actions he believed to be unlawful conduct. Respondent maintains Grievant participated in multiple instances of inappropriate conduct of a sexually harassing nature perpetrated in the workplace. The alleged behavior included, but was not limited to 'flipping' a female employee's breast by forcefully flipping the employee's breast upward. Evidence throughout this matter is both direct and hearsay in nature.

It is acknowledged there was inappropriate behavior in the workplace happening in District 9, Summers County, interestingly, a good number contend varying degrees of others' complicity while readily expressing individual innocence. Respondent has a responsibility to remedy unlawful workplace behavior. Respondent established with a reasonable degree of certainty that Grievant participated in behavior toward a female co-worker rationally viewed as inappropriate conduct of a sexually harassing nature. Employees have a duty to refrain from work place harassment. Sexual harassment can be perpetrated with or without physical touching in the workplace. Respondent established a violation of applicable *Prohibited Workplace Harassment* Policy by a

preponderance of the evidence. Grievant did not persuasively establish that termination of his employment was too severe of discipline. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

### **Findings of Fact**

1. Dennis Dale Bennett, Grievant, was employed as a Transportation Worker III Equipment Operator (TW3) with the DOH, working in District 9, in Summers County, WV. Grievant had been employed by Respondent for almost nine years.

2. Grievant's employment with the DOH was terminated on April 17, 2017. The stated reason for such termination was "Multiple instances of inappropriate conduct of a sexually harassing nature perpetrated by you in the workplace. This behavior includes, but is not limited to 'flipping' a female employee's breast by forcefully flipping the employee's breast upward." R Ex 5

3. The allegations upon which Grievant was terminated arose subsequent to an investigation conducted at the request of the District Engineer for District 9, Steven Cole, which was the district in which Grievant was employed. The investigation itself was initially ordered in response to complaints made by Danny Willey, co-worker, and to some limited degree Grievant, following being disciplined on February 3, 2017.

4. On February 3, 2017, Grievant and co-worker Danny Willey were disciplined for inappropriately questioning a supervisor and threatening to leave post. Both took exception to this disciplinary action and believed it was motivated by another agenda. After the imposition of discipline, both Willey and Grievant went to District

Engineer, Steve Cole, and made complaints about the discipline, as well as the manner in which the Summers County garage was operated and issues with equipment. Assertions of misconduct on the part of managerial officials at the county garage were levied, including but not limited to allegations of misuse of state property.

5. There have been numerous investigations pertaining to a variety of alleged actions transpiring at or within the West Virginia Department of Transportation, Division of Highways ("DOH") over the years.

6. On February 8, 2017, Danny Willey, Transportation Worker 3 Equipment Operator from Summers County wrote an email to the Governor's Office alleging harassment, discrimination retaliation and unsafe equipment. The Human Resources Division (HR) received this complaint and responded on February 15, 2017. A joint investigation by HR and Equal Employment Opportunity (EEO) was initiated. R Ex 16

7. James G. Hardy, Highway Administrator, the Summers County Supervisor testified at the level three hearing. On or about the evening of February 24, 2017, Mr. Hardy became aware of alleged conduct that had been ongoing within District 9. County Supervisor Hardy was informed by Chuck Rollyson that Danny Willey and Grievant had been less than ideal DOH employees, and had on multiple occasions been witnessed (flipping the breast of a female employee, [REDACTED]). Unofficial Transcription L-3 pg. 113-118, pg.128-131 and R Ex 11

8. Allegations of sexual misconduct were brought to the district engineer Steve Cole's attention by James G. Hardy, Summers County Supervisor.

9. The alleged offending conduct was described in testimony as "flipping" whereby one would lift a female breast in upward motion with fingertips. It is disputed

from testimony and statements taken that these activities were done in a manner of horseplay.

10. Also described was an activity referred to as “pocketing” where an employee would approach an employee from behind and reach around and stick their hands in the employee’s pants pocket, apparently so as to startle the other employee. From the descriptions, it does not appear that this "pocketing" activity involved touching breasts or genitals. This “pocketing” activity does appear to occur as horseplay, and by several accounts is engaged in by both male and female employees. Pocketing is also described as to poke on side of pelvis tender area.

11. [REDACTED] was a female employed by Respondent as a Transportation Worker. Ms. [REDACTED] worked with a unit in District 9, Summers County. She resigned from employment with Respondent in or about September 2017. This former employee has filed notice to the State of West Virginia of pending law suit. R Ex 10

12. After the conversation with Chuck Rollyson, Supervisor Hardy spoke to two crew leaders, Randy Bridges and Charlie Cox.

13. Charlie Cox provided that he had seen inappropriate behavior from Grievant perpetrated against [REDACTED]. Charlie Cox also stated that [REDACTED] asked him not to say anything because she did not want to cause trouble. Hardy L-3 testimony, Trans. pg. 130-131 and R Ex 11

14. After speaking to the two crew leaders, County Supervisor Hardy called [REDACTED], female transportation worker, into his office. Mr. Hardy asked Ms. [REDACTED] about the breast flipping. Ms. [REDACTED] indicated she did not want to bring attention to the practice/event(s).

15. Ms. [REDACTED] provided that the breast flipping had happened numerous times. Ms. [REDACTED] was not pleased with the conduct (the fact that it had been happening). Supervisor Hardy asked Ms. [REDACTED] why she had not come forward about this issue and Ms. [REDACTED] indicated that she did not want to cause any trouble for anyone. Trans pg. 124-125, pg. 131-134 and R Ex 11

16. Reportedly, Supervisor Hardy informed Ms. [REDACTED] that he had a responsibility to report this behavior.

17. Supervisor Hardy went to Steve Cole's office in Lewisburg, WV. Steve Cole is and was the District Manager for District 9. Summers County is one of the five counties that lie in District 9.

18. County Supervisor Hardy informed District Manager Cole that there was an issue in Summers County concerning the sexual harassment of a female employee, identifying Danny Willey and Grievant. District Manager Cole elected to call Lora Witt, Employee Relations Coordinator to listen as Mr. Hardy explained what he had discovered regarding the inappropriate behaviors. During the phone call, or soon thereafter, a determination was made that DOH Human Resources should investigate the matters presented. Hardy L-3 testimony, Trans. pg. 125-134

19. Between March 6, 2017, and March 20, 2017, Lora Witt, Employee Relations Coordinator from HR and Debbie Amos met with and spoke to thirty-three of the thirty-seven employees assigned to the unit which [REDACTED], Danny Willey and Grievant were all members. Debbie Amos is the Internal EEO Officer for the DOH. From their investigative work, Debbie Amos completed a report and Lora Witt completed a summary. R Ex 16 and 2

20. Initially the joint investigation by HR and EEO was not focused, intended, or for that matter aware of any elements of sexual harassment. The investigation was generated because allegations were made regarding misconduct of managerial individuals and agency dealings.<sup>2</sup>

21. The March 2017 (investigation) report among other information states, "The purpose of the interviews was to ascertain if the employee are being made to operate unsafe equipment and if there are any indications of harassment, discrimination, or retaliation." R Ex 16

22. Ms. [REDACTED] met with and communicated with agency personnel investigating work place conduct of several DOH employees of District 9, Summers County.

23. On or around March 6, 2017, [REDACTED] signed a statement stating that Danny Willey and Dennis Bennett had been touching her inappropriately. Ms. [REDACTED] provided that they had been flipping her breast, pinching her breast, and that they had grabbed her butt. Ms. [REDACTED] reported that the first occurrence was more than a year ago but the most recent occurrence had been about a month ago. R Ex 15

24. Ms. [REDACTED] did not testify at the October 3, 2017, level three hearing. Subsequent to the investigation into these matters, [REDACTED] resigned and has given Respondent an intent to sue letter alleging "intentional torts of sexual battery and intentional infliction of emotional distress." R Ex 10

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<sup>2</sup> One of the individuals against whom such accusations were leveled was County Administrator, James G. Hardy, the same individual who brought the sexual misconduct allegations to the district engineer.

25. Danny Willey did not testify at the level three hearing. Danny Willey was interviewed for the joint investigation by HR and EEO on March 7, 2017.

26. On or about March 7, 2017, Danny Willey admitted to investigators that he had flipped the breast of [REDACTED] and stated that several other employees had flipped [REDACTED] breast also. Mr. Willey mentioned other inappropriate touching/conduct by several employees and noted that he felt he and Grievant were being singled out for conduct that appeared to be rampant. Amos L-3 testimony, Trans. pg. 175-177 and R Ex 14 Mr. Willey resigned soon after his interview and while the investigation of these matters was ongoing.

27. Grievant provided a hand-written document to investigating DOH personnel, Debbie Amos and Lora Witt, dated March 20, 2017. R Ex 12

28. Grievant denies touching Ms. [REDACTED] inappropriately. He acknowledges he has seen others do such but "I have never touched her breast." Grievant identified several co-workers he had allegedly seen flip Ms. [REDACTED] breast. . . further, Grievant provided the activity had "been going on as long as I've been here. Probably 2-3 times to once a day." R Ex 12

29. Grievant has indicated that he "looked at [REDACTED] as a boy not a female." This is NOT viewed by Respondent as acceptable justification for repeated disrespect of a female co-worker.

30. In late March of 2017, Lora Witt and Debbie Amos reported their findings to District Manager Cole and Kathleen Dempsey. Kathleen Dempsey was the Human Resources Director for Respondent at that time.



31. On or about April 4, 2017, District Manager Cole filled out an RL-544<sup>3</sup> recommending to Director Dempsey the termination of Grievant stating that Grievant had violated the West Virginia Division of Personnel (DOP) Workplace Harassment Policy and the DOH Standards of Work Performance and Conduct. Cole L-3 testimony, trans. pgs. 88-90 and R Ex 1

32. 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.

DOP *Prohibited Workplace Harassment Policy*, R Ex 7

33. Grievant was given an opportunity to meet and met with District Manager Cole regarding the discharge recommendation on April 13, 2017. Grievant denied inappropriate behavior and stated that he was being targeted for being a whistleblower concerning safety issues and other agency activity. R Ex 1

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<sup>3</sup> RL-544; WV Department of Transportation Notice form-Employee Disciplinary Action document.

34. After the meeting and resulting RL-546 (employee response form), HR Director Dempsey spoke to several persons involved, reviewed the facts presented, reviewed DOH Disciplinary policy, and DOP Prohibited Workplace Harassment Policy. After her review of all the available information and policy, Ms. Dempsey determined that it was appropriate to dismiss Grievant from employment with the DOH. On April 17, 2017, Ms. Dempsey sent Grievant a letter stating that he was being terminated and stating the reason for his termination. Dempsey L-3 testimony, Trans. pg. 31-38 and R. Ex 5

35. The April 17, 2017, dismissal letter provides "... The reason for your termination is your violation of the West Virginia Division of Highways Standards of Work Performance and Conduct and the West Virginia Division of Personnel Prohibited Workplace Harassment Policy. More specifically, but not limited to: Multiple instances of inappropriate conduct of a sexually harassing nature perpetrated by you in the workplace. This behavior includes, but is not limited to: "Flipping" a female employee's breasts by forcefully flipping the employee's breast upwards." R Ex 5

36. Several co-workers were called to testify at the level three hearing. The number of co-workers who actually testified about what they had witnessed was less than the number Respondent investigators indicated had witnessed Grievant and/or Willey touch, grab, or flip [REDACTED] breast.

a. Randy Fox stated the following under oath:

Q: What did you tell them (the investigators) about the conduct?

A: I said that they had went a little too far.

Q: In what way? What kind of conduct did you witness?

A: I've seen both of them touching her in inappropriate ways.

Q: Who is both?

A: Dennis and Danny.

Q: Touching who?

A: [REDACTED]

Q: And you're saying inappropriate ways. What do you mean by inappropriate ways?

A: Pulling on the back of her bra, putting their hands-coming up behind and putting their hands down in her pockets. Putting in her pockets.

....

Q: Did you ever see Mr. Bennett touching her ([REDACTED]) breast?

A: I've seen Dennis walk up in behind her and reach around.

Q: Reach around her and touch her breast?

A: Grab around her – grab her whole body.

Q: In those times how did you see Ms. [REDACTED] react to these kinds of touching?

A: I've heard her tell them to stop, get off of her.

Level three Hearing Trans pg. 214-216

b. Steve Seamster stated the following under oath:

Q: what did you tell investigators that you had witnessed as far as hands-on stuff?

A: I witnessed Danny and Dennis playing around with [REDACTED].

Q: Be specific with us today. What do you mean by "playing around with [REDACTED]"?

A: Well, different ways. They're shoving their hands in her pockets, flipping her on the breast and stuff.

Q: Did you ever see Mr. Bennett flipping his hands on Ms. [REDACTED] breast?

A: One time.

Q: You said you've seen Mr. Bennett do it one time. Had you ever seen Mr. Willey do it?

A: Yeah, Mr. Willey was back behind her at this time I seen. He had his hands around her and that's when Dennis come up, you know, and flipped her.

Level three Hearing trans. pg. 237-238

37. Several co-workers testified about a practice called "pocketing" and other horseplay in the work environment. <sup>4</sup>

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<sup>4</sup> Debbie Amos, EEO Officer for Division of Transportation understanding and description of "pocketing" differs from what some employees identified and described to be pocketing. See fof 10, infra.

38. Danny Willey resigned before an imminent dismissal. Dempsey L-3 testimony, Trans. pg. 63 Several other employees have been disciplined for their respective roles. *Id.*

39. Conduct which has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment is prohibited by applicable state policy. See DOP *Prohibited Workplace Harassment Policy*, R Ex 7

### **Discussion**

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant 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). "A preponderance of the evidence is evidence

of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant was a permanent state employee in the classified service. Grievant, as a permanent state employee, had a property interest in his employment. Cites omitted. "A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1997). Permanent state employees who are in the classified service can 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*).

Respondent dismissed Grievant for behavior depicted as participating in multiple instances of inappropriate conduct of a sexually harassing nature perpetrated in the workplace. The alleged behavior included, but was not limited to 'flipping' a female

employee's breast by forcefully flipping the employee's breast upward. Grievant alleges pretext and retaliation for voicing opposition to other actions he believed to be unlawful conduct. Grievant in his testimony at the level three hearing, as well as his statements to investigators, has unequivocally denied engaging in inappropriate contact with the female employee or any behavior that would qualify as sexual harassment.

### **Credibility**

In reaching a decision in one or more of the issues associated with the parties, herein, certain facts in dispute must be addressed, including a determination of conduct and reasonable effect of misconduct, if established, in the circumstances of this case. Certain facts or rationale surrounding events of this matter were the subject of conflicting testimony. 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 Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't. of Health & Human Resources*, 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 & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994). In the circumstances of this case, it is deemed prudent to address the reliability and due weight that is most readily applicable to several witnesses, who testified and provided information within the course of this matter.<sup>5</sup>

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<sup>5</sup> The specific testimony of Grievant and the testimony of other witnesses or co-workers

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 the following: 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*. The undersigned had an opportunity to observe the demeanor of the witnesses and to assess their words and actions during their testimony and the duration of the level three hearing. Utilizing the noted factors, credibility assessments were made, herein, from direct observations as well as review of the record. Accordingly, the undersigned must make credibility determinations.

James "Gordy" Hardy, Highway Administrator, the Summer County Supervisor testified at the level three hearing. The demeanor of this witness was a little bit of everything. His ability to communicate is not in question, his ability to comprehend the issue(s) in discussion is not in doubt. While the information provided by this witness is not overwhelming, it served to establish a plausible explanation as to why the investigation by Respondent's agents turn toward the sexual harassment issue. Administrator Hardy's behavior was consistent. His statement did not appear to be rehearsed or insincere. His demeanor was direct and seemingly attempted to be straightforward in responding to questions and relevant issue(s). Nevertheless, it was

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will be discussed in context with the issues in litigation.

readily obvious that Administrator Hardy was aware of more than he relayed. His credibility suffers when he professed semi-awareness that employee Willey had levied allegations regarding administrative agency personnel performance of duties (more likely than not this included Hardy, himself). This witness testified as to information he passed up the administrative ladder. The timeline of some data is hazy, but overall the information is supported by collateral information and not decisively discredited. Hardy's testimony did not establish a high degree of confidence in mid-management awareness of day-to-day operations, but the explanation as to how Respondent became aware of alleged employee misconduct is plausible.

Summers County is one of the five counties that lies in District 9. Steven Cole is the District Engineer (Manager) for District 9. This witness demonstrated traditional decorum of a witness testifying at a Grievance Board proceeding. Manager Cole's office is in Greenbrier County and was contacted by Administrator Hardy regarding alleged crew conduct in Summers County. District Manager Cole contacted investigative personnel and the allegations of employee misconduct of a sexual nature was folded into the investigation that had begun. This information is consistently recounted and readily agreed upon by all of Respondent's witnesses. The Agency's action is perceived as reasonable and deemed credible.

Human Resources Director Kathleen Dempsey testified during the litigation of the instant grievance. Director Dempsey testified in a manner demonstrating due deference to the issues in contention and this Grievance Board. The witness's demeanor was direct and informative. She demonstrated the mannerisms of an individual attempting to be accurate regarding the facts and issues. With due acknowledgment to her role in



this matter, this witness responded to queries posed and attempted to explain the agency's analysis of this situation. Her testimony was fundamentally sound, but the testimony also gave the undersigned reason to pause. Ms. Dempsey identified standard State policy regarding employee conduct and what she identified as relevant state agency policy, DOP Work Place Harassment policy and DOT Disciplinary Policy. R Ex 6 & 7 Ms. Dempsey testified with conviction and steadfast confidence. She vocalized the proper words and provided the basis for her belief that disciplinary action was warranted. Director Dempsey testified as to the relevant sequence of events, the facts she was provided and how she processed the information. The facts as presented were consistent. The proper and efficient execution of business activity is a legitimate concern of every responsible employer. Further, it was provided that Grievant was not the only employee sanctioned for actions relevant to these events. This witness provided her opinion, but the basis of her opinion is not necessarily established on all points to which she testified. Ms. Dempsey's testimony is deemed reliable and trustworthy with regard to the information she was provided and the factors she weighed in making the agency's ultimate determination regarding disciplinary action. However, her opinion on the motivation or intent in the mind of the identified female employee, [REDACTED] is beyond Director Dempsey's knowledge.

Debbie Amos, EEO Officer for Division of Transportation, conducted an investigation related and unrelated to the instant allegations of behavioral misconduct of a sexual nature, (touch, grab, or flipping of a female employee's breast). No less than

thirty-three employees were individually interviewed, including [REDACTED].<sup>6</sup> Ms. [REDACTED] gave this EEO officer verbal and written statements pertaining to alleged conduct. R Ex 15 Ms. Amos drafted a confidential report comprised of the information, data and her conclusions regarding issues in discussion. R Ex 16 Respondent relied upon information provided by this witness. Ms. Amos testified at the level three hearing. With due acknowledgment to her role in this matter, EEO Officer Amos was aware the credibility of her report and testimony, was subject to scrutiny. The witness demonstrated appropriate decorum of a witness testifying at a Grievance Board proceeding. The—witness's demeanor was informative and direct. Some of the interviewed employees' statements were signed, some hand-written, others typed accountings of interview information. Not all employee statements were entered into evidence. The undersigned finds the testimony of Ms. Amos to be credible as to what was reported and the manner in which the information was collected. It is not found that this witness improperly targeted or sought to entrap Grievant.

There is some disparity between the reports of the investigator(s) and the sworn testimony presented by Respondent's witnesses at the hearing. The difference however does NOT reach the level of uncertainty desired by Grievant. This ALJ saw and measured the mannerisms of Grievant's former co-workers. It seems none truly wished Grievant ill will, but then again, each had information he would rather not speak about. As one witness testified, he informed the investigators he would honestly answer yes or no to their questions but would not volunteer any information. The credibility of

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<sup>6</sup> Lora Witt, Employee Relation Coordinator from HR and Debbie Amos met with and spoke to thirty-three of the thirty-seven employees assigned to the unit where [REDACTED], Danny Willey and Grievant worked. R Ex 16

the investigator's testimony and her conclusions was not truly impeached by co-workers' hesitation to readily testify. The undersigned had an opportunity to observe the demeanor of all of the witnesses and to assess their words and actions during their testimony. Credibility assessments were made from direct observations, as well as review of the record. The undersigned, in assessing the credibility of co-workers, is sympathetic to the difficult position but is also mindful of duty.

The disparity between the reports of the investigator and the sworn testimony presented by Respondent's witnesses at the hearing gives this ALJ pause. Overall, the credibility of the information is persuasive. Given the nature of the issue and working relationships of the unit, it is understandable that crew members were hesitant to formally testify. It was also evident that none used the term "sexual harassment" on the job site. The terms "horseplay" "teasing" or ribbing were more likely expressions used by unit workers. Legal terminology is not generally terms acquainted with day-to-day work-site communications. Grievant's co-workers, who testified at the L-3 hearing are honorable men, nevertheless, each in one way or another exhibited the demeanor of an individual with subject matter knowledge but not necessarily happy about sharing the information.<sup>7</sup> There was, without a doubt, worksite horseplay and workplace shenanigans present in Summers County.<sup>8</sup> The question is whether the conduct rose to

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<sup>7</sup> Testifying co-workers included Scott Bernnet, Robert Cottie, Randy Fox and Steve Seamster. Level three hearing. Randy Fox stated that he had seen inappropriate touching by Grievant on Ms. [REDACTED]. Scott Burdette stated that he saw Grievant make motions toward the breast of [REDACTED] and wasn't sure if contact was made or not. Steve Seamster testified that he had seen Grievant flip the breast of [REDACTED]. *Id* See also R Exs 16,

<sup>8</sup> An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Weik v. Div. of Natural Resources*, Docket No. 2011-1270-DOC (Dec 2011); *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources*, Docket

the level of unlawful harassment.

## **MERIT**

Respondent maintains Grievant is culpable of inappropriate conduct of a sexually harassing nature perpetrated in the workplace. Grievant acknowledges some of the problematic workplace facts that existed in Summers County but denies direct participation. R Ex 12 In assessing the trustworthiness of the information provided by Grievant and various administrative personnel, the undersigned was mindful of the potential for bias, and the possibility of agency interest, while considering the consistency of statements and the plausibility of the witness's information. Grievant denies engaging in inappropriate contact with a female employee, or any behavior that would qualify as sexual harassment. It is possible that the behavior was not perceived by Grievant as sexual, it is also possible that Grievant did not consider the conduct as harassment. Regrettably, such an explanation is more plausible than Grievant's direct denial. Respondent's investigator testified that numerous (ten) individuals had witnessed Grievant engaging in "flipping" activity against the female employee. See also

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No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). 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. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (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).

R Ex 16 However, the employer called only four of those individuals to testify. Presumably those would be the best of the ten. Testifying co-workers witnessed horseplay as a general practice, which included the “pocketing” and “flipping” of a protesting female employee by Grievant. The witnesses presented were not necessarily smoking gun evidence, but sufficient information was presented to warrant agency intervention. Notably absent from employer’s witness roster was the female employee, [REDACTED].

Subsequent to February 3, 2017, Grievant and a co-worker, Danny Willey, went to District Engineer, Steve Cole, and made complaints.<sup>9</sup> The complaints were reportedly with regard to disciplinary sanctions received by the two employees, as well as the manner in which the Summers County garage was operated and issues with equipment. Danny Willey, wrote to the Governor’s Office alleging harassment, discrimination, retaliation and unsafe equipment. An investigation was initiated. Interestingly, after the commencement of the investigation, allegations of employee(s) misconduct were raised, abruptly Grievant and Willey were facing termination. Grievant alleges retaliation for voicing opposition to actions he believed to be unlawful conduct.

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.”

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<sup>9</sup> On February 3, 2017, Grievant and co-worker Danny Willey were disciplined for inappropriately questioning a supervisor and threatening to leave post. Both took exception this disciplinary action and believe it was motivated by a strong animus against Willey and to Grievant because of his close association with, and support for, the co-worker.

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

- (1) that he engaged in protected activity (i.e., filing a grievance);
- (2) that he 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).

While Grievant did not demonstrate through any measurable means that the actions of Respondent were tainted by nefarious motive, the timing of the allegations against Grievant and his co-worker raise questions. It is proffered that the allegations were brought forward as soon as knowledge of the situation was acquired. (Hardy testimony) However, the coincidence of the allegations with the complaints and pending investigation relating to supervisor(s) is simply too great to not arouse suspicion. It is not lost on this ALJ that the allegations put before the investigation against Grievant and Danny Willey served to significantly draw focus and attention from

the investigation generated by the initial complaint(s).<sup>10</sup>

Grievant maintains he supported and/or participated with Willey's proclaimed whistle blowing actions. It is arguable that Grievant has a *prima facie* case for retaliation, in that an investigation was started pertaining to District 9, due in large part to allegations made by employees regarding management then suddenly the focus shifts and, relevant to the instant matter, Grievant finds his employment terminated.<sup>11</sup> The Supreme Court has held: An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the adverse action. *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). A causal connection 'might' be inferred that Grievant has met all four elements of retaliation and made a *prima facie* case.

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 Dep't. 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).

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<sup>10</sup> Danny Willey, an identified co-worker of Grievant, made allegations regarding agency corruption and mismanagement. These allegations were made and designed to provoke action (communication sent to Governor's Office).

<sup>11</sup> It is not perceived that Respondent and Grievant were without their differences. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998); See *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995). "[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).

“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.” *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). See *Sloan v. Dep’t. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

It is within the recognized purview of an employer to maintain a reasonable standard of workplace behavior. “In order to maintain an efficient and effective work environment, employers are often required to address inappropriate employee behavior and/or performance through corrective and/or disciplinary action.” DOP Supervisor’s Guide to Progressive Corrective and Disciplinary Action (W. Va. Code 29-6-1 *et seq.*) Workplace and/or Sexual harassment is not horseplay, nor is it a trivial matter. Respondent has legitimate rational justification for intervening and establishing a safe and hostile free work place environment for all its employees.

Respondent dismissed Grievant for (sexual) harassment and creating a hostile work environment, in violation of the DOP *Prohibited Workplace Harassment* Policy, R Ex 7, as well as DOH Standards of Work Performance and 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:

- 3. Sexually discriminatory ridicule, insults, jokes, or drawings;
- 4. Undesired, intentional touching such as embracing, patting or pinching.

- 7. Repeated sexually explicit or implicit comments or obscene and suggestive remarks that are unwelcome or discomfiting to the employee;

G. Nondiscriminatory Hostile Workplace Harassment consists of unreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the repeated unwelcome mistreatment of one or more employees often involving a combination of intimidation, humiliation, and sabotage of performance which may include, but is not limited to:

- 1. Unwarranted constant and destructive criticism;
- 2. Singling out and isolating, ignoring, ostracizing, etc.;
- 3. Persistently demeaning, patronizing, belittling, and ridiculing; and/or,
- 4. Threatening, shouting at, and humiliating particularly in front of others.

#### *DOP Prohibited Workplace Harassment Policy, R Ex 7*

The DOH Administrative Operating Procedures related to employee conduct states:

The Division of Highways expects its employees to meet certain standards of work performance and conduct regardless of the type of work or unit to which they are assigned. These standards include but are not limited to the following:

- Refusal to engage in insulting, abusive, threatening, offensive, defamatory, harassing or discriminatory conduct or language and prompt reporting of the same to the appropriate authority

DOH Administrative Operating Procedures, Disciplinary Action, § 2, Ch. 6, II.A.10. R Ex 6

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).

Workplace harassment is prohibited and should not be tolerated. The degree of Grievant's participation in the disputed workplace conduct is at issue. It is readily apparent that there is/was a level of mischief throughout the Summers County garage facility in which Grievant has participated. It also appears that other employees, including the female employee herself have engaged in some shenanigans to one degree or another.<sup>12</sup> The action(s) alleged, do appear to be in the vein of inappropriate workplace conduct, some activities more objectionable than others. Conduct which has the purpose or effect of unreasonably interfering with an individual's work performance

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<sup>12</sup> The instant Grievant was not the sole employee sanctioned, several other employees have been disciplined for their respective roles. HR Director Dempsey L-3 Testimony

by creating an intimidating, hostile, or offensive working environment is prohibited. Respondent established that there was a legitimate, non-retaliatory reason for the disciplinary action and Grievant did not prove that the reason was pretextual.

Grievant testified on his own behalf regarding alleged facts, alternative interpretations, his opinion and Respondent's actions (motivation) with regard to disciplinary actions. Grievant's demeanor demonstrated that he was aware of the issues(s) being presented and analyzed. Grievant's testimony was less candid than the undersigned would have preferred. Grievant acknowledges that the identified activity, (touch, grab, or flipping of a female employee's breast) existed in Summers County but denies direct participation.<sup>13</sup> Ms. ■■■ identified Grievant as an individual who had touched her inappropriately. See R Ex 15 Grievant is or should be aware of reasonable workplace standards. Grievant received a copy of applicable workplace harassment policy. R Ex 8 The undersigned finds Grievant's subjective denial unpersuasive. The "flipping" of a female's breast in the work place by male co-workers is not considered appropriate behavior for state employees. It is perceived by the majority to be of a sexual nature. Whether it is *per se*, sexual, or not, will not be debated by the undersigned. The activity was reportedly objected to and by the female employee. Witnesses and evidence of record established the event(s) and her objection.<sup>14</sup> On at least one incident, certain, but more likely than not, on multiple occasions Grievant

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<sup>13</sup> Grievant denies touching Ms. ■■■ inappropriately (in a sexual manner). He acknowledges he has seen others do such but "I have never touched her breast." Grievant identified several co-workers he had allegedly seen flip Ms. ■■■ breast. . . further, Grievant provided the activity had "been going on as long as I've been here. Probably 2-3 times to once a day." R Ex 12

<sup>14</sup> See Respondent's Exhibits 2, 11, 12, 14, 15 and 16.

harassed a female co-worker with inappropriate behavior. The misconduct behavior is perceived to be of a sexual nature but is without question harassment behavior which was unwelcomed or discomfiting to the employee. Respondent established a violation of applicable *Prohibited Workplace Harassment Policy* by a preponderance of the evidence.

Grievant by counsel suggested for consideration that if the "flipping" is considered inappropriate, the level of such behavior established by the weight of credible evidence does not merit the discharge of a long-serving employee, such as Grievant." See Grievant's PFOF. Grievant suggests the penalty is too severe and mitigation is implied.<sup>15</sup>

"Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Mitigation of a penalty is considered on a case by case basis.<sup>16</sup>

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<sup>15</sup> "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency[s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. [State] Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

<sup>16</sup> "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No.

*Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corrections*, Docket No. 95-CORR-252 (July 23, 1996).

While it is more than inferred that former co-worker Willey is more culpable than Grievant, this information does not relieve Grievant of responsibility for his own actions.<sup>17</sup> Considering the totality of the circumstances, termination of Grievant's employment was and is within the discretion of Respondent. The undersigned is not comfortable with second guessing Respondent's determination to terminate Grievant's employment. The undersigned is not persuaded that mitigation of the disciplinary action taken is appropriate. Events clearly constitute a violation of the DOP *Prohibited Workplace Harassment* Policy. 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**

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93-45-105 (Mar. 31, 1994). See *Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 22, 1997).

<sup>17</sup> Former employee Danny Willey provided "yes I flipped [REDACTED] breast," he also provided, "everyone says things about her breast." "Why is it just me and Dennis everyone is complaining about." "I haven't done anything to her since last October." R Ex 14

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). “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 & 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. 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. An administrative law judge must determine what weight, if any, that is to be accorded hearsay evidence in a disciplinary proceeding. See *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010), *aff'd*, Cir. Ct. of Kanawha County, Civil Action No. 10-AA-73 (June 9, 2011); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

5. Certainly, an employer is entitled to expect its employees to confirm 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. *Hubble v. Dep't of Justice*, 6 MSPR 659, 6 MSPR 553 (1981). See *Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000); *Keaton v. West Virginia Dep't. of Transportation/Division of Highways*, Docket No. 2011-0188-DOT (May 9, 2011).

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

7. 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).

8. 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. DOP *Prohibited Workplace Harassment Policy*

9. Conduct which has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment is prohibited by applicable state policy. DOP *Prohibited Workplace Harassment Policy*



10. Respondent established a violation of applicable *Prohibited Workplace Harassment* Policy by a preponderance of the evidence.

11. “The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was ‘clearly excessive or reflects an abuse of the agency[’s] discretion or an inherent disproportion between the offense and the personnel action.’ *Martin v. W. Va. [State] Fire Comm’n*, Docket No. 89-SFC-145 (Aug. 8, 1989).” *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

12. In assessing the penalty imposed, “[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis.” *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The Grievance Board has held that “mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee’s offense that it indicates an abuse of discretion. Considerable deference is afforded the employer’s assessment of the seriousness of the employee’s conduct and the prospects for rehabilitation.” *Overbee v. Dep’t of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). “Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No.

97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).” *Meadows, supra*

13. Considering the totality of the circumstances of this case, termination of Grievant’s employment was not excessive and mitigation of the disciplinary action taken is not required.

Accordingly, this 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:** January 18, 2018

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**Landon R. Brown**  
**Administrative Law Judge**