THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEVEN C. HENRY,

Grievant,

v. **Docket No. 2019-0378-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Steven Henry, is employed by Respondent, Division of Highways. On September 18, 2018, Grievant filed this grievance against Respondent stating, "Suspension without good cause/ hostile work environment/ retaliation/ discrimination in over time".[1] For relief, Grievant seeks "[t]o be made whole in every way including back pay with interest and benefits restored".

Grievant filed directly to level three of the grievance process.[2] A level three hearing was held on May 23, 2019, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared in person and by Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent appeared through its party representative, Mandy Crow, and by, Keith Cox, Esq. Each party submitted Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision on July 8, 2019.

[1]Grievant did not present any testimony regarding his claim of discrimination in overtime and did not address the issue in his PFFCL. This claim is therefore deemed abandoned and will not be addressed herein.

[2]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.

Synopsis

Grievant has been employed as a lone night shift telecommunications worker in Wheeling Tunnel for the Division of Highways, Respondent. Grievant had previously been suspended by Respondent three times for sleeping on the job. After Grievant's current supervisor, Paul Hicks, returned to that role, he began making surprise visits and twice caught Grievant on camera sleeping. Mr. Hicks warned Grievant against sleeping on the job through a performance appraisal, but stated no action was being taken. When Grievant insisted on making a written contest of the facts, Mr. Hicks handed him a notice of recommendation for 20-day suspension. Grievant claims his eventual suspension was in retaliation for exercising his right to challenge his appraisal and an attempt to get back at his dad, a prior subordinate of Mr. Hicks. He further claims hostile work environment and implies that his suspension should be mitigated. While Grievant made a *prima facie* case of retaliation, Respondent rebutted the presumption and Grievant did not prove that the reasons were pretext for retaliation. Grievant did not prove harassment or mitigation. Accordingly, this grievance is Denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant has been employed for 10 years as a Telecommunicator at the Wheeling Tunnel for Respondent, West Virginia Division of Highways (DOH), in Respondent's District Six.

2. Grievant's Telecommunicator position can be very slow at times, but serves as the single point of contact for six county 911 and law enforcement agencies to notify

DOH of incidents impacting the highway systems for District Six. The Telecommunicator has a pivotal role during emergency situations.

3. Grievant has regularly been assigned to night shift as a lone employee in the office.

4. Grievant had previously been suspended by Respondent three times for sleeping on the job, the last incident occurring March 17, 2015. (Grievant's testimony and Respondent's Exhibit 15)

5. Paul Hicks is a traffic engineer and served as Grievant's supervisor from 2012 through January 2015, before continuing in that role from April 2018 through the present time. (Mr. Hicks' testimony)

6. During his first stint as a traffic engineer, Mr. Hicks supervised Grievant's father until the latter became assistant to the District's maintenance engineer. (Mr. Hicks' testimony)

7. After Mr. Hicks was promoted to maintenance engineer, he again supervised Grievant's father. (Mr. Hicks' testimony)

8. As maintenance engineer, Mr. Hicks attempted to discipline Grievant's father for insubordination but was told by agency attorneys to leave Grievant's father alone. (Grievant's testimony)

9. In April 2018, Mr. Hicks was demoted to traffic engineer and reassigned to supervise Wheeling Tunnel and Grievant, after he failed to properly document his actions with subordinates. (Mr. Hicks' testimony)

10. Shortly after Mr. Hicks resumed his position as traffic engineer in April 2018, and three years after Grievant was last caught sleeping on the job, Mr. Hicks showed up

at the tunnel one morning when Grievant was on duty. His view of Grievant was initially obstructed so he could not see if he had been sleeping. Mr. Hicks proceeded to tell Grievant that he knew he had a history of sleeping on the job and he did not want him to do anything that might make it look like he was sleeping.

11. In the following months, Mr. Hicks would check on Grievant sporadically and would randomly appear at the door and start recording Grievant. (Grievant's testimony)

12. On June 13, 2018, Mr. Hicks found Grievant asleep at his desk and took a picture of Grievant with his head titled back, eyes closed, mouth open, and a relaxed facial expression. (Mr. Hicks' testimony & Respondent's Exhibit 1)

13. Later that day, Mr. Hicks sent Grievant an email stating, "as discussed, if you are feeling the least bit drowsy, you need to get up and move around, next time will result in further discipline." (Respondent's Exhibit 14)

14. On August 7, 2018, Mr. Hicks looked through the door window of Grievant's office and found Grievant asleep in his chair with his eyes closed, the lights off, and a metal chair barricading the door. While standing at the window, Mr. Hicks videoed Grievant sleeping for about a minute and a half before Grievant awoke to an incoming phone call. Grievant then moved the metal chair to let Mr. Hicks in. (Mr. Hicks' testimony and Respondent's Exhibit 2)

15. Respondent did not initially discipline Grievant for these two incidents.

16. Soon after the August 7, 2018, incident, Mr. Hicks discovered motion sensing equipment that would alert a telecommunicator in the office that someone was approaching the office. The motion sensing equipment was confiscated and an email sent to all telecommunicators stating that if the equipment is theirs they should pick it up.

Grievant was off at the time the equipment was found and Respondent never determined who had set up the equipment. (Mr. Hicks' testimony)

17. In an August 20, 2018 employee performance appraisal (EPA2), Mr. Hicks wrote under "performance development needs", "[t]here were two incidents so far during this rating period that could result in disciplinary actions if they are repeated. One incident of being a sleep (sic), which was a continuation of previous transgressions, but, since it has been a while since the last write-up, I provided a warning." (Respondent's Exhibit 13)

18. Under "general comments", Mr. Hicks wrote, "Steve is a good worker, and with positive reinforcement, continues to be a dependable team member. His communication has improved, and his willingness to help out other team members make him a true part of the team, and helps build the trust and cohesion of the team that works the tunnel." (Respondent's Exhibit 13)

19. At the August 20, 2018 meeting on the EPA2, Grievant informed Mr. Hicks that he wanted to write a statement contesting the EPA2. Mr. Hicks attempted to persuade Grievant to not make a written reply, telling Grievant it was no big deal. (Grievant's testimony)

20. Nevertheless, Grievant prepared a written response that day, stating, "I would like to dispute the claim that I was asleep. At the time I had not missed any calls in the phone or any radio transmissions and all my work was current and completed. I did have my eyes closed for a few second (sic) because I had broken a tooth in half two days before and it gave me some relief from the pain to relax my jaw and put pressure on it with my tongue. I thought it was obvious I was awake and alert as I immediately engaged Paul in conversation when he opened the door and I was not groggy or 'just

waking up' at all and I thought I did not need to give an explanation other than I was not sleeping when Paul asked me if I was and said not to let it happen again and gave me the impression that it was not going to be made into an issue. He was here for 20 minutes and only said something about it on his way out the door. Also, the way this appraisal is worded I think it would be easy to misread it as a claim that I was sleeping on two separate occasions. I do agree with the part about providing a warning and planning and ensuring communication for missing shifts is also important. But anyone reading this might believe I was sleeping on two separate occasions when in reality I was only trying to fight through the pain of a horrible tooth ache." (Respondent's Exhibit 13)

21. After the August 20, 2018, meeting, Mr. Hicks left and returned with an RL-544 disciplinary 'notice to employee' that recommended a 20-day suspension. (Grievant's testimony)

22. The RL-544 was officially dated and signed August 15, 2018, but noted that it was provided to Grievant on August 20, 2018. (Respondent's Exhibit 10 & 13)

23. On August 30, 2018, Grievant provided an RL-546 written response to the allegation made in the August 15, 2018, RL-544 and stated that the discipline was the result of a vendetta "because of bad relationship between Paul Hicks and my dad." It went on to state that "I am being targeted. Paul took the video and you cant's see my eyes, which I was watching TV and he stops the video when I answered the phone on the first ring, because his only concern was capturing evidence that he could present as me sleeping, and he did not want to show me as alert, doing my job properly. Employee denies sleeping." (Respondent's Exhibit 11)

24. On November 15, 2018, three months after the last incident, Respondent issued Grievant a 20-day suspension letter that stated, "On June 13, 2018 you were found sleeping while at work. You have a history of being disciplined for this type offense and were warned by your supervisor to stay awake and that any further incident would result in discipline. On August 7, 2018, you were found sleeping at work, with a chair lodged against the doorway. Your last suspension for this offense was a fifteen (15) day in July 2015." (Respondent's Exhibit 9)

25. Respondent's policy states that sleeping on the job is an offense which can be grounds for discipline. (Respondent's Exhibit 16)

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Respondent contends that Grievant's three prior suspensions for sleeping on the job justify the 20-day suspension issued him for twice sleeping on the job in 2018. Grievant counters that Respondent did not have good cause to suspend him since it failed

to prove that he was asleep on each occasion in 2018, that sleeping on the job is not good cause for suspension in that it is not misconduct of a substantial nature directly affecting the rights and interests of the public, and that Respondent should have factored in his good work record when suspending him, thereby implying that his punishment should be mitigated. Grievant contends that his suspension is retaliation for exercising his right to challenge his performance appraisal and is retribution by his supervisor for a feud with Grievant's father. Grievant further asserts that his supervisor's conduct is harassment. While Respondent has the burden of proving that the suspension was justified, Grievant must prove its allegations against Respondent.

Respondent asserts that Grievant was sleeping at the controls on June 13, 2018, and August 7, 2018. Respondent submitted electronic images and a recording of the incidents. Grievant contends that he was not asleep on either occasion: that, on the first occasion, he had his eyes closed as he managed throbbing pain from a chipped tooth by pushing against his tooth with his tongue and, on the second, he had his eyes open while watching television. Grievant did not present any corroborating evidence of his chipped tooth or the accompanying pain. Grievant could have taken pictures or had friends or family testify about his pain, even if he could not build a record that he sought medical assistance. Respondent submitted a picture of the June 13, 2018, incident which clearly showed Grievant asleep, reclining in a high back office chair, his head tilted back and mouth slightly open, with a relaxed expression of sleep on his face rather than an agonized look of pain. The video of the August 7, 2018, incident shows Grievant completely still for over a minute, his head tilted back and to the side, with a baseball cap covering his eyes. Grievant only moves when the phone rings. While it seems apparent

in the video that Grievant's eyes are closed, the video does not actually show Grievant's eyes. While Grievant testified that his eyes were open, Mr. Hicks testified that Grievant was asleep with his eyes closed, the lights off, and a metal chair barricading the door. Grievant testified that he moved the metal chair blocking the door in order to let Mr. Hicks in, but that he did not place the chair in front of the door. It is apparent from the video that the lights were off and that Grievant was sleeping before he awoke to the ringing phone. Grievant does not dispute that these images were taken while he was on the job, but disputes that they show him sleeping. While there are varying accounts regarding whether Grievant was asleep during the June 13, 2018, and August 7, 2018, incidents, the video evidence clearly shows Grievant asleep. Therefore, no credibility assessment is needed.

Respondent implies that it had good cause to suspend Grievant due to his multiple prior suspensions for sleeping on the job and the public safety aspect of his job that necessitates he be alert. The West Virginia Supreme Court has found that good cause "means misconduct of a substantial nature directly affecting the rights and interest of the public …". 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); *Sloan v. Dep't of Health & Human Res*., 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. Parkways Econ. Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake*

v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res*., Docket No. 2011-0890-DHHR (Jan. 24, 2012). Respondent had an expectation that Grievant would be awake and alert throughout his shift, even when things were slow, due to the sporadic and unpredictable nature of emergency calls. A crucial part of Grievant's job entails being alert for the duration of his shift so he does not miss a single call. Due to the public safety aspect of the job, Grievant's sleeping on the job is misconduct of a substantial nature which gives rise to good cause for discipline.

Grievant contends that Respondent retaliated against him by choosing to suspend him only when he chose to exercise his right to contest Mr. Hicks' version of events in his employee appraisal. Grievant further asserts that Mr. Hicks retaliated against him due to his vendetta against Grievant's father, which was temporarily stymied when Respondent's attorneys forced Mr. Hicks to stop harassing Grievant's father directly. The West Virginia Supreme Court has set forth a three-phased assessment for determining whether an employee has been retaliated against for engaging in a protected activity. "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ*., 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was

> subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (*citing* Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

Under the first phase, the undersigned must determine whether Grievant made a *prima facie* case for retaliation. This includes four elements. First, Grievant must establish by a preponderance of the evidence that he engaged in a protected activity. While Grievant did not show that his father's engagement in a protected activity would qualify as Grievant's protected activity, Grievant proved that he engaged in a protected activity when he contested Mr. Hicks' version of events in his performance appraisal. This Board has held that a "grievance proceeding" is not limited to grievance actions before this Board or other tribunals. *See Riddle v. DHHR/BCF*, Docket No. 2018-2029-DHHR (Oct. 24, 2018), ***aff'd*** on other grounds, Civil Action No. 18-AA-256 (Kanawha County Circuit Court Nov. 20. 2018). In the context of retaliation, this Board has interpreted "grievance proceeding" to mean a range of "protected activities" beyond a "grievance proceeding". *See Williamson v. Division of Highways*, Docket No. 2016-0608-CONS (September 22, 2016). Grievant also proved the remaining elements required to make a *prima facie* case of retaliation. Grievant showed that Respondent was aware of his protected activity when, in acting on behalf of Respondent, Mr. Hicks attempted to convince Grievant not to attach his version of events to the appraisal. Grievant established a causal connection between his suspension and challenging Mr. Hicks version of events. Grievant showed that

immediately after he gave Mr. Hicks his written contest of the events set out in the appraisal, Mr. Hicks left and came back with Form RL-544 recommending Grievant's 20-day suspension.

Consequently, the second and third phases of assessing retaliatory action come into play. Under these phases, the undersigned must determine whether Respondent rebutted Grievant's *prima facie* case of retaliatory action and, if so, whether Grievant proved that the reasons given by Respondent were pretext for unlawful discrimination or retaliatory action. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc*., 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ*., 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

Under the second phase of retaliatory discharge, the undersigned must assess the validity of Respondent's non-discriminatory and non-retaliatory reasons for suspending Grievant. The reasons Respondent gave include Grievant's three prior suspensions for sleeping on the job and his subsequently sleeping on the job twice in three months. This provides a strong non-retaliatory reason for issuing Grievant a 20-day suspension. Even if Grievant had shown that his father's protected activity was transferrable to him, Mr.

Hicks' conduct is inconsistent with Grievant's allegation that Mr. Hicks was using Grievant to get back at his father. If Mr. Hicks wanted to implement a vendetta, he would have had cover in utilizing Grievant's infractions to discipline him immediately rather than inform Grievant through his performance appraisal that he was simply providing a warning.

A more likely motivation for pursuing discipline was Mr. Hicks' apparent frustration that even though he was going easy on Grievant by not pursuing discipline, Grievant insisted on disputing Mr. Hicks' account of events and did not take responsibility for his conduct. Respondent was therefore justified in disciplining Grievant for failing to reform his conduct after all the opportunities given him to continue with his employment in spite of numerous suspensions for sleeping on the job. The fact that Mr. Hicks only recommended suspension rather than termination speaks to his mindset of reforming Grievant's conduct. With Grievant's history of progressive discipline, Mr. Hicks had sufficient evidence to recommend termination, yet chose suspension. Grievant failed to prove that the reasons provided by Respondent were pretext for unlawful discrimination or retaliatory action.

Grievant asserts that his 20-day suspension was unreasonable, in-light-of his record as a good employee. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No

95-AA-66 (May 1, 1996), appeal refused, W.Va. Sup. Ct. App. (Nov. 19, 1996). "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); Olsen v. Kanawha County Bd. of Educ., Docket No. 02-20-380 (May 30, 2003), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "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. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ*., Docket No. 2014-0028-RalED (Apr. 30, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health*

and Human Res., Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). Even though Mr. Hicks testified that Grievant was otherwise a good employee, it was well documented that Grievant had a recurring problem of sleeping on the job. While Mr. Hicks acknowledged that he could not recall ever seeing a 20-day suspension, Grievant's record of sleeping on the job could have reasonably warranted termination. Given that Grievant had been suspended on three prior occasions for sleeping on the job and that Respondent could have reasonably terminated Grievant after further incident, Respondent acted reasonably in suspending Grievant for 20-days after finding Grievant asleep twice within three months.

Grievant contends that Mr. Hicks' repeated surprise recordings cause him great distress and constitute harassment. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "What constitutes harassment varies based upon the factual situation in each individual grievance." *Sellers v. Wetzel County Bd. of Educ*., Docket No. 97-52-183 (Sept. 30, 1997). Harassment equates to a hostile work environment. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg'l Jail & Corr. Facility*

Auth., Docket No. 2011-1705-MAPS (Feb. 22, 2012), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5, 2012); *Rogers v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010). 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, 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) (citing Harris, 510 U.S. at 23). 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 "no single factor is required." *Harris*, 510 U.S. at 23. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (per curiam). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Kimzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997)." *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9 (1999).

The undersigned is sympathetic to the predicament of both Grievant and Mr. Hicks. While the undersigned can empathize with the stress Grievant experiences in not knowing when Mr. Hicks will show up to record him, there is nothing unreasonable in Mr. Hicks making surprise appearances. The undersigned cannot say how many, if any, surprise

appearances in a day, a week, a month, or a year is unreasonable or harassing. It seems that Grievant's primary issue has to do with Mr. Hicks' making surprise appearances using a camera rather than his just showing up in person. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety." *Ball v. Dep't of Transp*., Docket No. 96-DOH-141 (July 31, 1997); *Mickles v. Dep't of Envtl. Prot*., Docket No. 06-DEP-320 (Mar. 30, 2007), ***aff'd***, Fayette Cnty. Cir. Ct. Docket No. 07-AA-1 (Feb. 13. 2008). "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail & Corr. Facility Auth*., Docket No. 06-RJA-147 (Sept. 29, 2006); *Miller v. Kanawha County Bd. of Educ*., Docket No. 05-20-252 (Sept. 28, 2005). Mr. Hicks' responsibilities include ensuring that his subordinates perform their duties. Grievant's primary duty in a shift devoid of activity is to remain alert so that he can respond to the one emergency call that might come through during his shift. Therefore, it is not unreasonable for Mr. Hicks to ensure that Grievant is awake during his shift, especially given Grievant's history of sleeping on the job. Mr. Hicks testified that he had been demoted a few years prior because he did not properly document his actions. Grievant's level of stress should be the same regardless of whether Mr. Hicks makes a surprise appearance with or without a camera. However, from Mr. Hicks' perspective, having a camera is crucial to corroborating his version of events and his subsequent disciplinary actions, particularly since he was previously demoted for not properly documenting his actions. Grievant did not show that Mr. Hicks' surprise appearances

with or without a camera violated any law, rule, or policy. Therefore, Grievant has failed to prove hostile work environment.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. The West Virginia Supreme Court has found that good cause "means misconduct of a substantial nature directly affecting the rights and interest of the public …". 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); *Sloan v. Dep't of Health & Human Res*., 215 W. Va. 657, 600 S.E.2d 554 (2004) (per curiam). "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk*

v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res*., Docket No. 2011-0890-DHHR (Jan. 24, 2012).

3. "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a prima facie case." *Freeman v. Fayette Cty. Bd. of Educ*., 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (*citing* Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)). "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc*., 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983).

Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ*., 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

4. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "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); *Olsen v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "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. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ*., Docket No. 2014-0028-RalED (Apr. 30, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

5. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

6. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "What constitutes harassment varies based upon the factual situation in each individual grievance." *Sellers v. Wetzel County Bd. of Educ*., Docket No. 97-52-183 (Sept. 30, 1997). This Board has generally followed the analysis

of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2011-1705-MAPS (Feb. 22, 2012), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5, 2012); *Rogers v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010). 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, 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) (*citing Harris*, 510 U.S. at 23). 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 "no single factor is required." *Harris*, 510 U.S. at 23. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (per curiam). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Kimzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997)." *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9 (1999).

7. Respondent proved by a preponderance of evidence that it had good cause to suspend Grievant for 20 days.

8. Grievant did not prove by a preponderance of evidence retaliation, harassment, or that mitigation of his punishment was warranted.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: August 15, 2019

_____

Joshua S. Fraenkel
Administrative Law Judge