

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**SHAWN MICHAEL NUTTER,
Grievant,**

v.

Docket No. 2019-1651-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF PRISONS AND JAILS/MOUNT OLIVE
CORRECTIONAL COMPLEX AND JAIL,
Respondent.**

DECISION

Shawn Michael Nutter, Grievant, filed this grievance against his employer, Division of Corrections and Rehabilitation ("DOC"), Respondent, protesting his dismissal from employment. The grievance was filed on May 28, 2019, as an expedited grievance,¹ and the grievance statement provides:

Grievant was dismissed by Respondent on 13 May 2019. Respondent dismissed grievant one week after signing settlement agreement for back pay owed to the grievant that was upheld by the Grievance Board. Respondent also failed to adhere to policies governing EEO investigation by exceeding time limits.

As relief Grievant requests:

Dismissal removed from personnel file. Reinstatement as a Correctional Officer V. Back pay as maintained in previous grievance. Protection from retaliation by respondent.

A level three hearing was held before the undersigned Administrative Law Judge on December 10, 2019, at the Grievance Board's Charleston office. Grievant appeared *pro se*.² Respondent was represented by Briana Marino, Assistant Attorney General.

¹ 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.

² "*Pro se*" is translated from Latin as "for oneself" and in this context means one who

General. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on February 24, 2020, on receipt of the last of these proposals.

Synopsis

Grievant was employed as a Correctional Officer with Respondent in a supervisory position. Grievant had undergone regular and enhanced training on Equal Employment Opportunity ("EEO") issues and the mandatory reporting of those issues. After reported allegation of inappropriate language and deed(s) by Grievant, an investigation into Grievant's conduct was conducted. The investigation substantiated the allegations against Grievant, and the substantiated allegations resulted in Respondent's disciplinary action of dismissing Grievant from employment. Grievant's irresponsible conduct, of engaging in inappropriate and unwanted physical and verbal contact with a female officer under his direct supervision, is found to be justifiable grounds for discharge. Respondent established good cause for its disciplinary action. Grievant failed to demonstrate that termination was too severe a punishment, or that mitigation was warranted under the circumstances. This grievance is denied.

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

represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

Findings of Fact

1. Grievant, Shawn Michael Nutter, was employed by Respondent in the classification of Correctional Officer V at the time of the events giving rise to this grievance. He was employed at the Mount Olive Correctional Complex and Jail ("MOCCJ") when his employment was terminated by Respondent.

2. Grievant was first permanently employed by the West Virginia Division of Corrections ("DOC" or "DCR")³ in or around February 2008.

3. In or around November and December 2018, Grievant was performing the services of a correctional officer supervisor in the MOCCJ Central Control supervising both the female employee and another subordinate male employee.

4. On December 11, 2018, a female subordinate employee approached Captain Richard Toney, Grievant's direct supervisor, with complaints of Grievant's alleged verbal and physical misconduct.

5. The female subordinate employee informed Captain Toney that Grievant had grabbed her by the buttocks and squeezed and made a statement that she reminded Grievant of his wife. The victim informed Captain Toney that Grievant had been making her feel uncomfortable for several weeks prior, and he had also put his hands into her front pants pocket causing her to slap his hands away.

6. Although the female subordinate employee indicated a hesitation to report the incidences, she advised Captain Toney that she wanted the conduct to stop.⁴

³ As of July 1, 2018, the West Virginia Division of Corrections was eliminated pursuant to an act of the Legislature. The successor entity to the former division is the Division of Corrections and Rehabilitation.

⁴ This female employee had previously made similar allegations to another male employee in Central Control with the similar plea that he not officially report her complaint, and

7. Subsequent to his notification of a potential EEO violation, Captain Toney undertook his mandatory duty to report this information through his chain of command which resulted in a formal EEO investigation.

8. On January 3, 2019, Terri Arthur, Respondent's Director of EEO Services, assigned EEO Investigators Wesley Stewart and Debbie Miller to investigate the complaint, with Investigator Stewart as the lead.

9. Investigator Stewart, a Correctional Program Specialist currently assigned to the Saint Mary's Correctional Center and Jail, has undergone specific training with both Respondent and the West Virginia Equal Employment Opportunity Office in proper investigatory techniques. He has performed the function of an EEO investigator for approximately two (2) years, during which time he has undertaken numerous EEO investigations.

10. During the course of the instant investigation,⁵ a total of seven (7) persons were interviewed, with Grievant being interviewed twice. The March 21, 2019 investigation report (R Ex 1) was admitted and made a part of the record without objection. A written affirmation statement was obtained from employees interviewed. *Id.*

11. Prior to each interview of Grievant, Grievant was advised of his right to counsel.

12. During the interview of the principle female subordinate employee, she provided that Grievant frequently refers to her and another female officer as "whores and

the male employee had acceded to her request.

⁵ As the deadline was approaching for completion of the investigation, Investigator Stewart properly requested, and was granted, an extension of time for submission of the report pursuant to Respondent's EEO policy.

bitches.” She further explained that Grievant has touched her buttocks and placed his hands inside of her pockets. See R Ex 1. On December 9, 2018, the employee reported that she was alone with Grievant in Central Control. Grievant came up behind her and forced his hands in her front pants pocket and rubbed her legs. He also touched her stomach and arms. *Id.*

13. The female subordinate employee (victim) claimed that incidents had occurred as many as twenty (20) different times and started around August or September 2018. Grievant had not specifically requested sexual intercourse. but made the comment that they would “be in a lot of trouble” if they weren’t both married, while repeatedly telling her she reminded Grievant of his wife and is why he engaged in the conduct.

14. The female subordinate employee reported that Grievant’s misconduct was affecting her work and she would feel like calling off work if she was required to work under Grievant’s supervision. See R Ex 1.

15. The female subordinate employee (victim) was moved to a different shift during the pendency of the investigation.

16. During his first interview on February 7, 2019, Grievant described himself as a tactile person and admitted that sometimes his actions could be seen as inappropriate.

17. Grievant admitted to calling female staff members “bitches” but denied using the word “whore.”

18. Grievant deflected some of the blame from his actions by claiming he has no concept of personal space.

19. On February 28, 2019, the second interview of Grievant commenced. Grievant continued to deny any inappropriate touching of female employees. However, upon further questioning, Grievant when asked “Did you touch her?” to which he replied “shoulder, back, side, and maybe the knee.” Grievant also admitted putting money in the victim’s pocket with his hand, claiming that he owed her such money. When asked to whom he was referring, Grievant indicated the victim.

20. Grievant advised that he knows the position into which he put the facility and Respondent by his actions. Grievant continued to deny a sexual connotation to his actions and continued to deny intentionally groping the victim’s breast or buttock areas. Grievant stated he had no justification for touching the victim and described his acts as “retarded.”

21. Following the conclusion of the investigation, MOCCJ Superintendent Donnie Ames became aware of the finding of the investigation. Superintendent Ames is charged with reviewing such matters, along with the prior disciplinary history of the employee, and making recommendations as to the level of discipline to Lance Yardley, Respondent’s Chief of Institutional Operations for a final decision.

22. Superintendent Ames is of the opinion, that misconduct of this nature cannot be tolerated as it can have a detrimental effect on the entire chain of command with the facility. Superintendent Ames noted that unwanted touching of the type admitted by Grievant is never warranted, but it is especially problematic for internal rank structures when it is perpetrated by a superior on a subordinate.

23. Superintendent Ames further noted that Grievant’s status as a supervisory employee was particularly troubling, in that such employees are required to enforce the

rules violated by Grievant and set the standards for other officers through their own conduct. In a review of Grievant's disciplinary history, Superintendent Ames noted that Grievant had previously been suspended for making inappropriate remarks to a different female employee and using excessive force against an inmate. R Ex 4

24. It was with this backdrop that Superintendent Ames concluded that such actions by a supervisor, who had substantial training in EEO identification and prevention and a prior history indicating an understanding of the consequences of misconduct against a subordinate employee, all while stationed at a critical post, could not be tolerated and warranted dismissal.

25. On May 13, 2019, Superintendent Ames issued a notice of predetermination conference to Grievant indicating the reasons for the contemplated dismissal, to be held later that day. R Ex 2

26. Respondent's progressive discipline policy authorizes the dismissal of an employee without regard to progressive discipline when an employee commits a singular offense of such severity that dismissal is warranted. R Ex 5

27. On May 13, 2019, Superintendent Ames, having received approval for his recommended discipline, issued a letter of dismissal to Grievant stating that Grievant's conduct, as admitted in his first and second investigatory interviews, created a discriminatory hostile work environment and his behaviors constituted hostile work environment sexual harassment. R Ex 3

28. In the dismissal letter, Superintendent Ames concluded that Grievant's misconduct violated DOP Prohibited Workplace Harassment Policy and Respondent's Progressive Discipline Policy Directive 129.00.

29. In the dismissal letter, Superintendent Ames specifically highlighted Respondent's Progressive Discipline Policy Directive 129.00, concluding that Grievant's misconduct violated:

- 129.00, Paragraph V, Sub-paragraph A, section 1a:
 - Conduct themselves in such a manner that their activities both on and off duty will not discredit either themselves, other employees, or the Division
- 129.00, Paragraph V, Sub-paragraph A, section 1b:
 - Conduct themselves in a manner that creates and maintains respect for the Division of Corrections and the State of West Virginia
- 129.00, Paragraph J, Section 1:
 - Failure to comply with Policy Directives, Operational Procedures, or Post Orders
- 129.00, Paragraph J, Section 4:
 - Instances of disrespectful conduct or the use of insulting, abusive, or obscene language to or about others
- 129.00, Paragraph J, Section 5:
 - Instances of inadequate or unsatisfactory job performance
- 129.00, Paragraph J, Section 6:
 - Disruptive Behavior
- 129.00, Paragraph J, Section 28:
 - Unprofessional treatment of persons contrary to Division Policy, Operational Procedure, court order or philosophy

30. Grievant testified in his own defense at the level three hearing. Grievant failed to call any additional witnesses. Grievant admitted that he was advised prior to each interview of his right to counsel and that he never requested counsel be present.

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. In disciplinary matters, the employer bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

. . . 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). 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, the party bearing the burden has not met its burden. *Id.*

Permanent state employees who are in the classified service can only be dismissed for “good cause,” meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or

mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also W. Va. Code St. R. § 143-1-12.02 and 12.03 (2016).

Respondent contends Grievant created a discriminatory hostile work environment and engaged in hostile work environment sexual harassment. This is not an inconsequential matter. Grievant was a permanent State employee in the classified service. Respondent dismissed Grievant for sexual harassment of a female subordinate correctional officer and creating a hostile work environment, in violation of Respondent’s Progressive Discipline Policy 129.00, as well as applicable provisions of DOP’s Prohibited Workplace Harassment Policy. 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. *Id.*

Captain Toney was Grievant’s direct supervisor, and verified that Grievant, as a supervisor CO, had been provided EEO training throughout his tenure. Captain Toney indicated that such training is provided to all officers initially and yearly as in-service training. In addition, supervisory employees are required to undergo additional EEO training related to the mandatory reporting of EEO violations. Grievant had undergone training and was and/or should have been, aware of appropriate workplace conduct. DOP Prohibited Workplace Harassment Policy, provides in pertinent parts:

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:

1. Sexually explicit or implicit propositions;
4. Undesired, intentional touching such as embracing, patting, or pinching;
5. Remarks directed against one's sex as a class or group;
7. Repeated sexually explicit or implicit comments or obscene and suggestive remarks that are unwelcome or discomfiting to the employee

In accordance with evidence which was admitted without objection and stated to be accurate by Grievant, Respondent proved the allegations by a preponderance of the evidence that Grievant: (1) admitted to calling female staff members "bitches" in their presence; (2) admitted touching a subordinate female correctional officer without justification on her shoulder, back, side, and maybe knee; and (3) Grievant, self-described his actions as retarded conduct. Respondent proved the allegations by a preponderance of the evidence that the verbal comments and physical touching were repeated, unwelcome, and unwanted by the subordinate female correctional officer. R Ex 1

Grievant acknowledged that the findings of the EEO investigation were accurate but countered that his discipline was the result of disparate treatment and that he was unaware that he had a right to discuss the matter with counsel.⁶ Grievant suggested that

⁶ The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); See *Buskirk, supra*; *Edwards v. Berkeley County Bd. Of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989). The contention that Grievant was denied due process in the circumstances of this matter has no merit.

the EEO investigation was untimely, rendering its findings inappropriate or less credible. The undersigned is not persuaded. In the circumstance of this matter the existence or nonexistence of certain material facts did not hinge on the credibility of conflicted witness testimony. It is established that Grievant repeatedly made unwelcome physical contact with a subordinate female employee/correctional officer and repeatedly made unwelcome inappropriate comments to her and remarks about her sex as a group in her presence. Examples are of record but not set forth in this decision.⁷

Other than an oral presentation of an unsubstantiated list of persons and their alleged offenses and punishment, whom Grievant claimed received different and/or lesser discipline for similar misconduct, Grievant failed to present any evidence of any kind necessary to prevail on a claim of disparate treatment. Grievant did not establish the fundamental elements of a disparate treatment defense.⁸ Further, Grievant did not prove that he was improperly denied the right to representation. Grievant did not establish that the internal EEO investigation was untimely or unreliable.

Respondent established that Grievant violated established and readily known policies by repeatedly making unwelcome physical contact with a subordinate female

⁷ Demonstrative example: A male employee of Respondent's was working in Control with Grievant and the female subordinate employee (victim). He heard victim tell Grievant to stop touching her, he turned around, and saw Grievant touching victim's breast and buttocks. He further saw her slap Grievant's hand away and repeat her request for Grievant to stop. R. Ex 3

⁸ For an employee, to prevail on a claim of disparate treatment in discipline, he must establish that there is no rational basis for distinguishing specific penalties for the same or substantially similar misconduct. The misconduct brought into question must be similar or more serious than that with which the grievant is charged. The grievant must also show that the other employee's disciplinary record is similar to his own. Finally, the grievant must establish that his position is similar to that of the other employee to whom he is compared with respect to the trust and responsibility expected of his position. *Wikle v. Monroe County Board of Educ.*, Docket No. 2012-0720-MnrED (December 4, 2012); *McVicker v. Kanawha County Bd. of Educ.*, Docket No. 95-20-339 (Feb. 9, 1996).

employee/correctional officer and repeatedly making unwelcome inappropriate comments. Respondent established Grievant created a discriminatory hostile work environment and engaged in hostile work environment sexual harassment. Respondent established by a preponderance of the evidence that it had good cause to dismiss Grievant from employment. Grievant has failed to demonstrate that Respondent's actions of terminating his services were clearly excessive or an abuse of discretion.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified. See W. VA. CODE R §156-1-3. *Burden of Proof* Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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, a party has not met its burden of proof. *Id.*

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). See *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006).

4. In the circumstance of this matter the existence or nonexistence of certain material facts did not hinge on the credibility of conflicted witness testimony, therefore credibility determinations were not required.

5. Respondent proved by a preponderance of the evidence that Grievant repeatedly engaged in misconduct which created a hostile work environment and constituted hostile work environment sexual harassment. Respondent demonstrated by a preponderance of the evidence that Grievant's employment was terminated for good cause.

6. Grievant did not prove the essential elements for a claim of disparate treatment.

7. Grievant failed to demonstrate that the disciplinary measure of dismissal was disproportionate to the offense, arbitrary and capricious, or an abuse of discretion by Respondent.

8. Respondent established by a preponderance of the evidence that Grievant's conduct was in violation of applicable Prohibited Workplace Harassment Policy.

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 (2018).

Date: March 26, 2020

Landon R. Brown
Administrative Law Judge