

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**KEVIN R. MCHENRY,  
Grievant,**

**v.**

**Docket No. 2020-0577-CONS**

**DIVISION OF HIGHWAYS,  
Respondent.**

**DECISION**

Grievant, Kevin R. McHenry, was employed by Respondent, Division of Highways.

On October 4, 2019, Grievant filed a grievance, assigned docket number 2020-0472-DOT, against Respondent stating,

I'm filling [sic] this grievance because of the RL544 that I received stating recommended dismissal, without ever receiving any prior disciplinary action for the alleged offense. In addition, my current grievance (Docket No.2019-0546-DOT) has not been resolved, no issue or report regarding the Level 2 mediation has been received by me. The Level 2 mediation was held on July 23,2019, and to date, no report has been received which is in clear violation of the 15-day requirement in the State Code. With no Level 2 decision, I have not been given the opportunity to advance this to Level 3 and be able to prove these allegations false with additional testimony.

I feel this retaliation and workplace harassment, is in result of a meeting I had with Mr. Ray on August 29th, 2018. The meeting contained discussion about a summer worker who attended a fuel master meeting in Charleston, with Mr. Ray, and indicated to me she felt harassed during the trip.

This current recommendation of dismissal has kept me from advancing to other positions I have been recommended for in District Four maintenance, where I am currently temporarily assigned and have been since March 2019.

For relief, Grievant sought [t]o remain employed [sic] and advance to the most recent position I have been selected for, and have these false allegations removed. I will also be

requesting any and all attorney fees and related expenses be reimbursed to me, and to be made whole in any other way.” On October 31, 2019, Grievant filed a second grievance, assigned docket number 2020-0537-DOT, stating, “I am grieving the termination of my employment based on violations of due process, including but not limited to, subjecting me to termination based on false and unsubstantiated claims, failure to follow the agency's policy for disciplinary action, retaliation, and discrimination and for reporting sexual harassment allegations against his direct supervisor.” As relief Grievant requested as follows:

I am requesting that I be reinstated to my employment with the Division of Highways and made completely whole as a result of the bogus action that has been taken against me. During the pendency of the investigation against me, I interviewed for two positions both of which constituted promotions in grade and salary. Upon information and belief, due to the wrongful actions taken against me, I was not selected for either position despite the fact that I was most qualified and the choice of the selection committee for each position. I am requesting backpay and benefits based on the promotions that I was denied and the salary that I have been denied as a result of the wrongful action taken against me.

By order entered November 18, 2019, the grievances were consolidated into the above-styled grievance.

A level three hearing was held on March 29, 2021 and March 30, 2021, before Administrative Law Judge Ronald L. Reece at the Grievance Board's Elkins, West Virginia office. Grievant appeared in person and was represented by counsel, Katherine L. Dooley, Dooley Law Firm. Respondent appeared by H. Julian Woods, Executive Director Human Resources Division, and was represented by counsel, Jesseca R. Church. At the beginning of the hearing, the parties discussed a previously filed grievance alleging hostile work environment, docket number 2019-0546-DOT, and agreed that the transcript

of the level one hearing in that grievance should be admitted into evidence. The parties did not request that the grievances be consolidated nor did Judge Reece state that the grievances would be consolidated. Unbeknownst to counsel, neither of whom had participated in the hostile work environment grievance, Judge Reece had mediated the grievance nearly two years before, nor did Judge Reece recall serving as mediator.

Following the hearing, by order entered April 8, 2021, Judge Reece consolidated the hostile work environment grievance into the above-styled action. On April 22, 2021, Respondent, by counsel, filed *Respondent's Motion for New Level Three Hearing* "to avoid any potential bias and allow all parties involved the opportunity to fully participate in a level three hearing" alleging that Judge Reece was disqualified because he had mediated docket number 2019-0546-DOT and that the Intervenor in that action had not been given notice and an opportunity to be heard. On April 28, 2021, Grievant, by counsel, filed *Grievant's Opposition to Respondent's Motion for a New Level Three Hearing* asserting Respondent had waived any conflict and that rehearing would be an extraordinary remedy. Upon learning that he had mediated docket number 2019-0546-DOT, Judge Reece recused himself from further participation in the consolidated grievance.

Following a telephone conference on May 11, 2021, the undersigned denied Respondent's motion for rehearing, finding that, as there was no evidence that Judge Reece's presiding over the hearing had any impact on the fairness of the proceeding, another administrative law judge could render a decision based on a review of the hearing recording, the documentary evidence, and the proposed findings of fact and conclusions of law from the parties. The parties submitted the proposed findings of fact and

conclusions of law on June 11, 2021, and June 15, 2021. On June 14, 2021, Respondent, by counsel, filed a *Verified Complaint for Writ of Prohibition* in the Circuit Court of Kanawha County. The Honorable Jennifer F. Bailey denied the complaint by *Order* entered September 23, 2021. On September 30, 2021, Respondent filed a *Motion to Stay Pending Appeal*. No ruling was issued on the motion. On October 25, 2021, Respondent appealed the order denying the complaint to the West Virginia Supreme Court of Appeals. On December 3, 2021, the undersigned was notified that a scheduling order had been entered, which did not order a stay of the grievance proceeding. Therefore, it appears this matter is now mature for decision.

### **Synopsis**

Grievant was employed by Respondent as a Highway Equipment Supervisor 2. Grievant's employment was terminated for 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. Respondent proved charges sufficient to establish good cause to terminate Grievant's employment. Grievant failed to prove that the termination of his employment was discriminatory or retaliatory. Grievant failed to demonstrate that mitigation of the penalty was warranted. Accordingly, the 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 was employed by Respondent as a Highway Equipment Supervisor 2 at the Equipment Division in Buckhannon and had been so employed since

February 2012. Grievant had previously been employed by another State agency. In total, Grievant had been employed with the State of West Virginia for almost thirty-two years.

2. Grievant's immediate supervisor was Jeff Pifer, Assistant Director of the Equipment Division. Grievant's second-level supervisor was Travis Ray, Highway Engineer Senior, who served as the Director of the Equipment Division. Grievant's co-supervisor was Kevin Linger, who was also a Highway Equipment Supervisor 2. Bruce Rohrbough, Highway Equipment Supervisor 1, was also part of the management team of the Division.

3. Grievant and Mr. Linger supervised approximately sixty employees between them and had split the duties such that Grievant mainly supervised the employees in the building and Mr. Linger mainly supervised the employees in the yard.

4. During the summer of 2018 Grievant, at times, supervised two summer interns, Makayla Loudin and Reba Cutright, who began work on May 14, 2018.

5. Ms. Loudin had just graduated high school and was eighteen years of age. Ms. Cutright had recently graduated college and was twenty-three years of age.

6. Ms. Loudin was originally assigned to work in the yard washing vehicles. Due to a medical condition, Ms. Loudin was having difficulty performing her duties and her immediate supervisor, J.D. Haller, was not addressing her problem.

7. Ms. Loudin's father, Dusty Loudin, is also employed by Respondent and worked in the yard. Because Mr. Loudin was friends with Mr. Haller, Mr. Loudin did not want to confront Mr. Haller about Ms. Loudin's complaint. Instead, Mr. Loudin approached Grievant about Ms. Loudin's difficulty performing the work due to her medical

condition and asked Grievant to take care of it. Grievant agreed that he would and, upon return to work the next day, May 18, 2018, moved Ms. Loudin under his direct supervision to work in the shop office.

8. Ms. Cutright was assigned to work in the shop office under Grievant's supervision from the beginning of her employment.

9. Grievant and Ms. Cutright quickly became friendly and began spending lunches and breaks together. They were also frequently seen talking for long periods of time around the shop and Ms. Cutright was frequently in Grievant's office during the workday. Ms. Cutright's duties did not require her to be in Grievant's office for that amount of time.

10. When Ms. Cutright was in Grievant's office, the door was shut and the blinds were closed. It was not unusual for management's doors to be shut because of the noise of the shop but it was unusual for blinds to be closed. Also, on several occasions while Ms. Cutright was in Grievant's office the door was locked.

11. Early on, Grievant offered to take Ms. Loudin and Ms. Cutright to lunch one day but when they got in the vehicle Grievant stated that they were not actually going to lunch and, after an uncomfortable pause said, "We're going to the beach, have some drinks – just have some fun. You'd like that wouldn't you?" Although Grievant then did actually take them to lunch as he had originally offered, this incident frightened Ms. Loudin.

12. Following this incident, Ms. Loudin tried to avoid Grievant as much as possible but Grievant seemed to follow her, frequently stared at her, and would wink at her.

13. During an employee cookout, when Ms. Loudin shifted her stance in a way that moved her hips Grievant said, "Let me see you shake that thing again."

14. In another instance, Grievant walked up behind Ms. Loudin and rubbed her neck and ears asking, "Is it ok that I touch you like this?" and continued to do so for a few seconds after she said, "No."

15. Summer interns can apply to be hired for temporary employment following their internship. Both Ms. Loudin and Ms. Cutright wanted to apply and went together to Grievant's office to ask that their employment be extended as temporary employees. Grievant stated that he would recommend them for temporary employment but that they would have to "pay up." When Ms. Loudin asked what Grievant meant, Grievant said, "Well, if you want the extension, then you owe me some videos." Grievant laughed and smiled and stared at Ms. Loudin but didn't say anything further. Ms. Loudin felt that Grievant meant videos of a sexual nature and was very uncomfortable.

16. On July 23, 2018, the Division had an ice cream social. Following the social, as Ms. Cutright, Ms. Loudin, and Samantha Ball returned to work in the shop office, Grievant went to the shop office with a can of spray whipped cream left over from the social. He approached Ms. Cutright with the can and asked if she wanted any. She giggled and he squirted the whipped cream into her mouth and he said, "You like that don't you?" This made Ms. Loudin and Ms. Ball very uncomfortable. Grievant next approached Ms. Loudin and offered the whipped cream. Ms. Loudin told him to leave her alone and go away and he went back over to Ms. Cutright. Ms. Loudin was upset and began crying and left the room.

17. Grievant took the can of whipped cream to his office and put it in his personal refrigerator. Later that day, he summoned Ms. Loudin and Ms. Cutright to his office, telling them that the whipped cream was there for special occasions and if they ever needed time away they could come up there and spend time together.

18. Shortly after the day of the ice cream social, Grievant approached Ms. Loudin while she was alone in the kitchen. Although Ms. Loudin tried not to engage with him and refused, Grievant made a coke float for her and then attempted to feed her a spoonful, touching her face with it. Ms. Loudin felt cornered by Grievant's body positioning and that he had approached her even when she had refused.

19. After this incident, Ms. Loudin no longer felt she could continue working at the Division and, although she had previously wanted to extend her employment, she terminated her employment with Respondent on August 9, 2018, at the conclusion of her internship.

20. Shortly before Ms. Loudin's last day, Grievant said that he knew where to find her and that he would be making "appearances." He said he knew where she lived and that he had been watching her at Walmart. When she asked how and when he had seen her he stated, "Don't worry about it, just know that I have my ways."

21. Ms. Loudin did not report Grievant's behavior to anyone because she did not know what to do, she was embarrassed and afraid, and she did not want to cause trouble for her father at work.

22. On August 2, 2018, Director Ray and Ms. Cutright rode together to Charleston to attend a training. Ms. Cutright later alleged Director Ray sexually harassed her during the trip.



23. In late August, because the shop office had become fully staffed after Ms. Ball was hired and fully trained, Director Ray determined that Ms. Cutright should be transferred to the warehouse office under the supervision of Dee Brown to assist lead worker Tammy Cleavenger.

24. The Equipment Division has a long-standing issue with gossip. Gossip had circulated regarding Grievant's relationship with Ms. Cutright for most of the summer, which escalated in late August.

25. On August 29, 2018, having heard of the gossip about Grievant and Ms. Cutright and seeing them leaving work together at quitting time, Director Ray intercepted them and met with them in his office. Grievant and Ms. Cutright denied any wrongdoing. Grievant was angry that Director Ray had questioned him about his relationship with Ms. Cutright.

26. Once Ms. Cutright was moved to the warehouse office, the only duty she retained relating to the shop was clerical work involving the Fuelmaster program.

27. The Fuelmaster program is a computerized fuel management system. As part of the Fuelmaster program, vehicles are issued physical Prokeys, which require digital encoding through a USB device. Making a Prokey takes only a few minutes per key and occurs only when there is a new vehicle, which happens, at most, a few times a week.

28. When Ms. Cutright began working with the program, the Prokey device was located on a computer in the shop office. Once Ms. Cutright was moved to her new office at the warehouse, the device was to be moved to her new computer. However, there was some technical issue with Ms. Cutright's computer and the device did not work.

29. Although Grievant was no longer Ms. Cutright's supervisor and the Prokey device had previously been located in the shop office, when the device failed to work on Ms. Cutright's new computer, Grievant had the Prokey device moved to his computer for Ms. Cutright to use sometime around September 25, 2018.

30. After Ms. Cutright was moved to the warehouse office, in late August or early September, she was frequently absent from her workstation and could not be located for sometimes hours at a time. Grievant was also frequently seen with Ms. Cutright in the warehouse office, although there was no reason for him to be in the warehouse office regularly.

31. Throughout September, Ms. Cutright's supervisor, Ms. Brown, lead worker, Ms. Cleavenger, and Assistant Director Pifer counseled Ms. Cutright about her performance, the need for her to remain at her workstation, and to report to Ms. Cleavenger or Ms. Brown if she was leaving the warehouse office. Ms. Cutright continued to disappear despite this counseling. At a meeting on September 26, 2018, just after the Prokey device was moved to Grievant's office, when Ms. Cutright was again questioned about her frequent disappearances, she was defiant and confrontational.

32. In late September, early October, Ms. Cutright stated to Sheryl Krause, a human resources employee, that people didn't know what Director Ray did and said when he was alone with her but Ms. Cutright would not give any details when Ms. Krause asked for explanation. Ms. Krause told Ms. Cutright that she should come to her when she was ready to talk.

33. On September 28, 2018, Grievant conducted two meetings with staff. Prior to the meeting, Grievant and Mr. Linger had agreed on the issues that would be

addressed at the meeting, which included routine performance concerns and information. Of the management team, Mr. Linger, Mr. Rohrbough, and Assistant Director Pifer were present but Grievant led the meetings. During the meetings, Grievant veered from the agreed agenda. Grievant stated there were rumors going around about him sleeping with the college girls and that the rumors needed to stop. Grievant stated that Ms. Cutright might file sexual harassment claims and that he could fire or bring charges against five or six employees for sexual harassment. Grievant stated that if anyone didn't like it they could meet him at Sheetz. Grievant did not make these statements in a joking manner.

34. The phrase "meet me at Sheetz" refers to meeting off State property for the purpose of settling a dispute through a confrontation, whether physical or verbal. It is a phrase that had been widely used in the Equipment Division both seriously and as a joke.

35. Ms. Loudin's father, Dusty Loudin, was walking into the meeting while Grievant was talking and thought that Grievant had affirmatively stated that he had "fucked" all the college girls and "especially" Mr. Loudin's daughter, Makayla Loudin.

36. Many employees were upset by the meeting and there was wide discussion about what Grievant had said and about what Mr. Loudin thought Grievant had said, especially as the summer interns tended to be relatives of regular employees. Several employees, as well as the mother of a former intern, complained to either Assistant Director Pifer or Director Ray.

37. On October 9, 2018, Grievant came into the yard and motioned Mr. Loudin into Grievant's vehicle. This was not a usual occurrence. Grievant asked if he had done anything to make Makayla Loudin uncomfortable. Mr. Loudin stated that Grievant's comments in the meeting were uncalled for and made him angry but, at that time, Ms.

Loudin had not yet told her father about Grievant's inappropriate behavior during her employment.

38. That evening, Mr. Loudin questioned Ms. Loudin about Grievant, telling her that Grievant had said he had "fucked" all the college girls. Ms. Loudin was angry and embarrassed. She broke down and told Mr. Loudin about Grievant's previous inappropriate behavior as outlined above.

39. On October 11, 2018, Mr. Loudin reported to Director Ray Ms. Loudin's complaint of sexual harassment against Grievant.

40. In response to Mr. Loudin's complaint, Director Ray contacted Debbie K. Amos, EEO Officer, to report the complaint as well as the complaints of the other employees and the mother of the former intern.

41. Ms. Amos began an investigation. Ms. Amos initially included Director Ray in the investigation, stating he had a "right" to participate as he was the director.

42. Ms. Amos and Director Ray first interviewed Ms. Loudin on October 19, 2018. In addition to the interview, Ms. Loudin had also prepared a written statement, which she provided to Ms. Amos the same day.

43. Ms. Amos and Director Ray then conducted interviews with employees at the Equipment Division on October 25, 2018.

44. Ms. Amos and Director Ray interviewed Ms. Cutright and Grievant last on that day. While Ms. Cutright was waiting to be interviewed, she came into Ms. Krause's office crying and saying that things were "out of hand." She stated to Ms. Krause that Director Ray had called her "Hot Reba" and had put his hands in her hair during their trip to Charleston.

45. During Ms. Cutright's interview, while Director Ray was out of the room, Ms. Cutright said that Director Ray had sexually harassed her. Ms. Amos told Ms. Cutright to write down her allegations on a piece of paper but stated that the interview wasn't about Director Ray and would go forward with Director Ray present.

46. During Grievant's interview he was told how inappropriate it looked to have the interns in his office with the door shut and the blinds closed, and he assured Ms. Amos and Director Ray that he understood the appearance and would open his blinds.

47. The next day, at approximately 7:00 a.m. on October 26, 2018, while Grievant was away from his office, Director Ray entered Grievant's office. Finding the blinds still down and tied in such a way that they could not be raised, Mr. Ray tore the blinds down off the window and threw them down the stairs. In tearing the blinds down, Director Ray knocked a printer over, damaging it, and knocked papers and files off Grievant's desk. Upon leaving, Director Ray then kicked the door off its hinges.

48. Grievant observed Director Ray tearing down the blinds from the shop floor below and went immediately to Ms. Krause's office to report it. Grievant was not offered and did not otherwise file a formal EEO complaint.

49. Later that day, due to the pending investigation into the allegations against him, Grievant was transferred to another work location.

50. Also on October 26, 2018, Ms. Krause called Ms. Cutright to her office and asked her if she wanted to file a formal complaint against Director Ray, which she did.

51. On October 29, 2018, Ms. Amos met with Mike Vasarhelyi, Chief Investigator of the Office of Investigations Unit of the Department of Transportation for assistance with the investigation, which had expanded to include Ms. Cutright's complaint

against Director Ray for sexual harassment. Mr. Vasarhelyi assigned M. Dirk Stemple, Investigator II, to assist in the investigation. Mr. Stemple and Ms. Amos conducted additional interviews on October 30<sup>th</sup> and 31<sup>st</sup>.

52. Following his interview with Mr. Stemple and Ms. Amos on October 31, 2018, Grievant filed a grievance alleging Director Ray had created a hostile work environment and that the investigation against himself was in retaliation for him reporting Director Ray for sexual harassment.

53. On November 30, 2018, Ms. Loudin provided a revised written statement to add additional detail relating to questions she had been asked during her previous interviews.

54. On December 3, 2018, and December 20, 2018, a level one hearing was conducted in Grievant's hostile work environment grievance, the transcripts of which were entered into evidence in this grievance.

55. On January 14, 2019, Mr. Stemple issued a report of the investigation, substantiating the complaints against Grievant but not substantiating Ms. Cutright's claim of sexual harassment against Director Ray. Although Grievant had complained to Ms. Amos and Ms. Krause and had provided pictures regarding Director Ray damaging his office, the investigation report did not address the incident.

56. On August 27, 2019, Deputy State Highway Engineer Gregory Bailey issued Form RL-544, *Notice to Employee*, to Grievant to notify him that his dismissal from employment was being recommended for 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* naming five specific incidents of

misconduct towards “a female summer employee” and for an alleged threatening statement in a meeting towards employees.

57. On September 11, 2019, Deputy Engineer Bailey met with Grievant. Grievant denied the allegations and asserted that the allegations against him were in retaliation for Grievant’s complaint against Director Ray for harassing Ms. Cutright. On the same date, Grievant also provided a written statement denying all allegations.

58. By letter dated October 22, 2019, H. Julian Woods, Executive Director Human Resources Division, terminated Grievant’s employment for 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*. Director Woods listed the following specific instances in support of the termination:

- On numerous occasions during the summer of 2018, outside of a legitimate business purpose, you had young female summer interns in your office during work hours for longer than normal lunch and break periods. During these visits the office door was closed/locked, and the blinds were closed.
- During the summer of 2018, the Equipment Division had an ice cream social. Later the same day you were witnessed spraying Redi-whip whipped cream, left over from the party in the mouth of a summer intern and told her to “open up” and “lie back on the table” and “beg for more” saying “you like this, don’t you.” You tried to spray the whipped crema in the mouth of another summer intern, and she started crying and told you to get away from her. You told them you would keep the whipped cream in your office for them any time they wanted to take a break, during the investigation the whipped cream was located in a refrigerator in your office.
- On one occasion during the summer of 2018 you came up behind a female summer employee and began rubbing her neck. You asked, “Is it ok if I touch you like this?” she stated “no”, you did not stop right away.

- On one occasion during the summer of 2018 you stated to a female summer employee “Let me see you shake that thing”, referring to her buttocks.
- During the summer of 2018 one of the summer workers approached you about extending her hours to work past the normal ending date for summer workers. You indicated it could be arranged if she were to pay up” with “some videos”, insinuating videos of a sexual nature.
- You had the computer program for making pro keys for the fuel master program moved from the existing location to a computer in your office, requiring the female summer worker to come to your office to make the keys.
- On or around September 28, 2018 when talk of your behavior with the summer interns circulated around the workplace, you called a meeting with your subordinates. During the meeting you announced that apparently “I have f...’d all the summer girls”, you told employees that the rumors had to stop and if they didn’t like it you would meet them at Sheetz, indicating there would be a physical altercation.

59. Respondent’s *Administrative Operating Procedures* contain standards of work performance and conduct which include “maintenance of a high standard of personal conduct and courtesy in dealing with the public, fellow employees, subordinates, supervisors, and officials...[a]voidance of detrimental behavior or outside activity or employment or interests that may interfere with work performance or conduct or that may create a conflict of interest...[and r]efusal to engage in insulting, abusive, threatening, offensive, defamatory, harassing, or discriminatory conduct or language and prompt reporting of the same to the appropriate authority....”

60. Respondent’s *Administrative Operating Procedures* provide for progressive discipline but clearly state that “[a] single performance issue or instance of misconduct may warrant immediate drastic action, including dismissal.”

61. The Division of Personnel’s Prohibited Workplace Harassment Policy prohibits sexual harassment including “[s]exually explicit or implicit



propositions...[u]ndesired, intentional touching...and [o]ffers of tangible employment benefits in exchange for sexual favors, or threats or reprisals for negative responses to sexual advances....”

62. Prior to the termination of his employment, Grievant had no disciplinary issues and had met expectations in his performance evaluations.

### **Discussion**

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (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, the employer has not met its burden. *Id.*

Respondent asserts it was justified in dismissing Grievant for his inappropriate conduct towards Ms. Loudin and Ms. Cutright and his misconduct during the meetings with his subordinates, which violated both Respondent's and the Division of Personnel's policies. Grievant denies all misconduct of which he is accused. Grievant asserts that the investigation and his termination were retaliation for his complaint against Director Ray for sexual harassment and to get rid of him in order to promote Mr. Loudin. Grievant argues that his termination was discriminatory as Director Ray was not disciplined for his misconduct towards Grievant. Alternatively, Grievant argues that mitigation of the punishment is warranted.

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. § 143-1-12.2a (2016). Supervisors "may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of [their] supervisors." *Wiley v. Div. of Natural Res.*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Linger v. Dep't of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5. 2012).

Most of the relevant facts of the grievance are disputed. Grievant asserts that the investigation report is not credible because the investigation itself was improper and that the testimony of some witnesses was not credible. 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 Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING

THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant asserts that the investigation report is not credible and asserts that the investigation was biased and tainted. The investigation report and its attachments are hearsay<sup>1</sup>. "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility."<sup>2</sup> *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). See *Stewart v. W. Va. Bd. of Exam'rs for Registered Prof'l Nurses*, 197 W. Va. 386, 475 S.E.2d 478 (1996). "Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them." *Comfort v. Regional Jail & Corr. Facility Auth.*, Docket No. 2013-1459-CONS (Apr. 18, 2013) (citing

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<sup>1</sup> "Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6<sup>th</sup> ed. 1990).

<sup>2</sup> Although *W. Va. Code*, 6C-2-4(a)(3) [2008], states that "formal rules of evidence and procedure do not apply" to Level One grievance hearings, neither that statute nor the *West Virginia Code of State Rules* § 156-1-1 [2008], et seq., address whether formal rules of evidence apply to Level Three hearings. However, two predecessor statutes, *W. Va. Code*, 29-6A-6(e) [1998], concerning State employees, and *W. Va. Code*, 18-29-6 [1992], concerning education employees, indicate that formal rules of evidence do not apply to grievance hearings. See syl. pt. 3, in part, *University of West Virginia Board of Trustees v. Fox*, 197 W. Va. 91, 475 S.E.2d 91 (1996) (Formal rules of evidence do not apply to grievance procedures under *W. Va. Code*, 18-29-6.)" *W. Va. DOT v. Litten*, 231 W. Va. 217, 222, 744 S.E.2d 327, 332 n.6 (June 5, 2013).

*Simpson v. W. Va. Univ.*, Docket No. 2011-1326-WVU (May 3, 2012); *Cook v. W. Va. Div. of Corrections*, Docket No. 96-CORR-037 (Oct. 31, 1997)).

The Grievance Board has applied the following factors in assessing hearsay: 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. *Id.*; *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-H-115 (June 8, 1990).

Mr. Stemple's written investigative report itself is merely his summary and opinion and is entitled to no weight and was not considered. The evidence considered from the investigation report is confined to the attachments to the investigative report that consisted of witness statements, photographs, telephone records, and transcripts of the witness interviews that were assigned weight as discussed below.

Written witness statements that were not signed and affirmed are entitled to no weight and were not considered. As for the transcripts, Respondent provided a copy of the audio recordings along with the transcripts of the interviews and Grievant did not allege any inaccuracies in the transcripts. With the exception of Tammy Cleavinger, Andy

Casto, and Todd McIntyre, all of the witnesses with interview transcripts also testified at level one, level three, or both. Respondent provided no explanation why those three witnesses were not called to testify at level three and provided no affidavit from them. Therefore, the transcripts of those three witnesses were not considered. For the remainder of the witnesses for whom transcripts or written statements were included, the same were considered and were assigned weight pursuant to the credibility determinations, in conjunction with any testimony given at level one or level three.

Regarding the allegation that the investigation was biased and tainted, the relevant consideration is whether any alleged improprieties in the way the investigation was conducted impacted the reliability of the witness' statements. Regarding the witnesses, Grievant particularly points to the conduct of the investigators relating to their questioning of Ms. Cutright and of J.D. Haller, who was questioned regarding Grievant's statements in the staff meeting. It was unquestionably improper for Ms. Amos to allow Director Ray to continue to participate in the interview once Ms. Cutright stated that she had a complaint against Director Ray. However, there is no evidence Ms. Amos was aware of any allegation against Director Ray prior to that time so it is not clear that allowing Director Ray to participate before that time was improper as neither party introduced Respondent's EEO investigation procedures. Further, it is unclear how Director Ray's participation in the interviews would have tainted any statements regarding Mr. McHenry or impacted Mr. McHenry's ability to defend himself from the charges against himself.

During the interviews, Ms. Amos and Mr. Stemple did share what were supposed to be confidential statements of witnesses with other witnesses and did, at times, mischaracterize witness statements, which could have tainted the statements of

witnesses. The questioning of Mr. Haller, in particular, appeared more to be an attempt to steer the witness to provide the statements they wanted to support their preferred conclusion rather than an unbiased attempt to ascertain the facts. This was particularly troubling when Mr. Haller had expressed his fear of Grievant's retaliation if Grievant returned to work, which might influence Mr. Haller to lie to ensure Grievant did not return to work. Therefore, the transcript of Mr. Haller's interview was given no weight and has not been considered.

While uncomfortable, the questioning of Reba Cutright using mischaracterized statements did not appear to have tainted her statement. When confronted with mischaracterized statements, Ms. Cutright mostly stuck with her current story and simply asserted the other statements were not true. As for the remaining witnesses, Grievant had the opportunity to cross examine those witnesses and it does not appear that the questioning did influence their statements and their testimony remained consistent with their statements. Therefore, with the exception of Ms. Cleavinger, Mr. Casto, Mr. McIntyre, and Mr. Haller, whose statements were excluded as explained above, the transcripts were considered and the statements were given weight based on credibility.

Between level one and level three numerous witnesses testified. All witness testimony was reviewed in conjunction with the witness' prior statements and interviews, except for those excluded above. However, the credibility determinations below were made only for those witnesses necessary to determine key issues.

Makayla Loudin's demeanor was appropriate. She was quiet and calm and admitted when she could not remember details. She demonstrated an appropriate level of memory for events that had occurred years prior to her testimony and supplied an

appropriate level of detail in her testimony. She was very steady during cross examination, remaining calm but firm in her testimony when questioned. During the few times she became distressed during her testimony, her distress appeared genuine. Ms. Loudin's level three testimony was consistent with her testimony at level one in the related grievance, and with her interview statements during the investigation. The only major inconsistency was in Ms. Loudin's initial written statement in which she omitted Ms. Cutright's presence during several incidents. Ms. Loudin's explanation that she left Ms. Cutright out of her original statement because she did not want to involve Ms. Cutright is plausible and does not impact the credibility of her statement.

Grievant asserts Ms. Loudin is not credible because of alleged inconsistencies in her statements, because there is no corroboration or substantiation to her claims, and because she had motive to lie. Grievant alleges it was impossible for Grievant to have watched Ms. Loudin wash cars because he was out of town. This is incorrect. Ms. Loudin clarified in her level three testimony that Grievant watched her on the same day that he returned from his trip and moved her to work in the office. That clarification was not inconsistent with her previous statements or with Grievant's testimony that he did move her when he returned to the office.

In his PFFCL Grievant mischaracterizes Ms. Loudin's testimony in several important respects. Grievant quotes from Ms. Loudin's testimony regarding a text message she sent to her father in support of Director Ray, asserting that the testimony was in answer to the question of "what prompted her to write a statement wherein she alleged sexual harassment against Mr. McHenry." Grievant asserts this was an admission by Ms. Loudin that she raised the allegations against Grievant because of the

allegations Ms. Cutright raised against Director Ray. This was not the question Ms. Loudin was asked. Ms. Loudin was asked, “What prompted you to write that [text message]?” To which Ms. Loudin answered that she was upset about what Grievant had said about her, that she did not believe that Director Ray had harassed Ms. Cutright, and was willing “to be there” for Director Ray. Ms. Loudin consistently testified she raised her allegations after her father told her that Grievant had said in the meeting he had “fucked all the college girls.” Ms. Loudin’s level one testimony regarding the text message, which text message was sent a week after Ms. Loudin had already been interviewed about her claim of harassment against Grievant, in no way disproves Ms. Loudin’s stated reason for deciding to come forward: that Grievant’s statement was the last straw because it angered and embarrassed her and she did not want it to happen to anyone else. Grievant also mischaracterizes Ms. Loudin’s testimony that Director Ray and Ms. Amos instructed her to amend her statement. Ms. Loudin testified that she amended her statement to add additional information after consultation with her parents and based on the questions she had been asked in her initial interview.

Grievant also asserted Ms. Ball and Mr. Canfield did not substantiate Ms. Loudin’s claims regarding the whipped cream incident as stated in the termination letter. The termination letter incorrectly stated that Grievant told Ms. Cutright to lay back on a table. Ms. Loudin consistently stated that Grievant told Ms. Canfield to “lay back” but never stated on a table. In her testimony, she explained that Ms. Cutright was in a chair that would lay back so it was referring to laying back in the chair. Ms. Loudin’s statements regarding Grievant spraying whipped cream into Ms. Cutright’s mouth were substantially corroborated by Ms. Ball, who also said Grievant spray the whipped cream saying, “You



like that, don't you," and other unspecified comments about the whipped cream, said Ms. Cutright was giggling, and that she and Ms. Loudin were uncomfortable. Mr. Canfield's testimony did not contradict that an incident happened. Mr. Canfield testified that Grievant offered Ms. Cutright whipped cream, she giggled, and that it made Ms. Loudin uncomfortable. This is consistent with Ms. Loudin and Ms. Ball. Mr. Canfield's testimony differed in that he stated that Grievant only pointed the can of whipped cream at Ms. Cutright. Mr. Canfield offered no testimony on any specific comments Grievant made to Ms. Cutright, so his testimony does not contradict the statements Ms. Loudin and Ms. Ball stated they heard. The differences in testimony are explainable by Ms. Loudin paying more attention because she was already uncomfortable with Grievant and by Ms. Ball and Mr. Canfield's admission both stating that they were doing other things while the incident was occurring.

Ms. Loudin's statement about Grievant keeping the whipped cream in the refrigerator for the interns was partially corroborated. Grievant denied that he had the whipped cream in his refrigerator, but whipped cream was found in his refrigerator when no other foodstuffs from the ice cream social were present in his refrigerator. Further, Ms. Ball stated she saw Grievant take the whipped cream to his office. As will be discussed below, although Ms. Cutright denied Grievant made the statement about whipped cream in his office, Ms. Cutright is not credible. Ms. Loudin's accusation that Grievant said, "Let me see you shake that thing" was not corroborated by witnesses but it was also not disputed by witnesses. Although Ms. Loudin named several witnesses who were present when the statement was made, none of these witnesses appear to have been asked whether they heard it.

Grievant asserts Ms. Loudin had motive to lie because she was angry over what her father stated Grievant said during the meeting and because she wanted to protect Director Ray. Ms. Loudin was understandably angry when her father told her what he believed Grievant said in the meeting and that anger could be a motivation to lie. However, Ms. Loudin's explanation that it was simply her last straw is plausible and credible. Ms. Loudin's explanation that she had not previously reported because she did not know what to do and did not want to cause trouble for her father at work is also plausible and credible. As discussed above, Ms. Loudin did say that she wanted to protect Director Ray from what she believed to be false allegations by Ms. Cutright in her text message on October 26, 2019, but that was after Ms. Loudin had already made her written statement and been interviewed regarding her allegations against Grievant on October 19, 2019. Makayla Loudin was credible.

Samantha Ball's demeanor was appropriate. Ms. Ball was calm and forthright and admitted when she did not remember specific details. Ms. Ball's inability to remember specific wording at level three is understandable as the events had occurred almost three years prior to her level three testimony. Ms. Ball does not appear to have a motivation to lie. Although Ms. Ball was in a relationship with Investigator Stemple at the time of the level three hearing, they were not involved when Investigator Stemple interviewed Ms. Ball in 2018. Ms. Ball had only been employed with Respondent for a few weeks at the time of the events and a few months at the time of her first interview regarding the events. Ms. Ball's statements regarding Grievant spraying whipped cream into Ms. Cutright's mouth remained consistent through the interviews, her level one testimony, and her level three testimony, although she did provide greater detail in some statements over others.

She corroborates Ms. Loudin's assertion that it happened and that it was uncomfortable. She refutes Grievant and Ms. Cutright's denial that it happened. Ms. Ball not hearing all the same statements Ms. Loudin asserts were said does not refute Ms. Loudin's testimony because Ms. Ball stated that she was helping another employee at the time so may not have heard everything. Samantha Ball was credible

Although it appeared Dustin Loudin may have been nervous during his level three testimony, as he had to be asked not to swivel in his chair, he had an otherwise appropriately serious attitude towards the proceeding. He appeared to have a good memory of events and had no hesitation in answering questions. During his level one testimony, he became understandably upset when talking about what his daughter said Grievant had done to her. Grievant asserts Mr. Loudin has motive to lie because Mr. Loudin wanted to be promoted. There is no evidence this was the case. Mr. Loudin's statements that he was motivated to ask his daughter about Grievant's behavior because of the staff meetings and private meeting with Grievant is plausible and fits the timeline. Mr. Loudin's concern for his daughter and upset appeared genuine. Dustin Loudin was credible.

The entire management team of Mr. Pifer, Mr. Linger, and Mr. Rohrbough consistently stated that Grievant did use the meeting to address the rumors about him sleeping with the college girls, that the rumors had to stop, that he said he would meet employees off State properly if they had an issue with it, and that he was upset and not joking during the meeting. Mr. Pifer and Mr. Rohrbough also stated that Grievant said he could fire or file charges employees for sexual harassment and Mr. Linger testified that Grievant said if the rumors didn't stop it would be "dealt with." The differences in

testimony are explained in that Mr. Linger and Mr. Pifer were talking to each other during the meeting. All stated that they were surprised by Grievant's behavior in the meeting, and they did not believe his behavior was appropriate. Their statements about what occurred in the meeting were supported by almost every person who made a statement about the meeting, although some people stated that they believed Grievant was only joking about meeting employees at Sheetz. Even Grievant's own witness, Mr. Wiseman, stated that Grievant said "I'll meet you at Sheetz," although he stated Grievant was joking.

Mr. Pifer, Mr. Linger, and Mr. Rohrbough all appear to be credible. None of them appeared to have any bias against Grievant or motivation to lie. Mr. Linger, in particular, had a good relationship with Grievant and was the person who originally asked Grievant to apply for the job. Although Mr. Linger stated in his level three testimony that he had some difficulty remembering events because it had been three years, Mr. Linger's testimony remained consistent between his investigation interview, level one testimony, and level three testimony. Mr. Rohrbough's statements remained consistent throughout. Mr. Rohrbough and Mr. Pifer's statements were detailed, and both appeared to have a good memory of events.

Lee Canfield was somewhat credible. Mr. Canfield only testified at level one and, although he was interviewed, no interview statement or transcript was entered into evidence at level three. Mr. Canfield's testimony was conversational, and he answered questions readily. He admitted in his testimony that he was a "shit-stirrer" and that he had started untrue gossip in the past but asserted it was never anything to hurt anyone. While this admission of untruthfulness calls into question the credibility of his testimony, it could also be said that this admission shows honesty during his actual testimony, which

was serious and not like the gossiping he had admitted was untrue. It does appear that several times during his testimony, including regarding the whipped cream incident, Mr. Canfield was attempting to downplay the events. Mr. Canfield tended to talk at length about certain things, but regarding the whipped cream incident his testimony was non-specific, stating “she starts giggling and this and that, but nothing happened” and was quick to say that Grievant did not squirt the whipped cream on Ms. Cutright, even though he admitted that Ms. Loudin was uncomfortable

Sandy Walter’s demeanor was sincere and forthright. There was no evidence of bias against Grievant and, in fact, Ms. Walter had stated she was so disappointed in his behavior because she had liked and trusted Grievant. Although Ms. Walter was unable to provide dates, this would not be unusual, and she was able to provide appropriate levels of detail about what she had observed. Ms. Walter’s explanation that she knew the door was locked was particularly detailed and compelling. She explained that she knew the door would stick and that she knew it was locked instead of sticking because Grievant had shown her how to open it if it was sticking and this time the handle would not turn at all. Sandy Walters was credible

Misty “Dee” Brown’s demeanor was professional and calm and she readily answered questions. Although Ms. Brown admitted to thinking Grievant was a bully and intimidating and admitted that Grievant had resented her for receiving the comptroller position over him, there is no evidence that Ms. Brown was motivated to lie in her testimony. Ms. Brown’s statements remained consistent between her level one and level three testimony and were supported by the credible testimony of Mr. Pifer. Her testimony supports that Ms. Cutright would disappear, was with Grievant for unusual amounts of

time that cannot be explained by a legitimate business purpose, and that it continued despite counseling Ms. Cutright over it. Misty Brown was credible

Reba Cutright is not credible. Ms. Cutright testified only at level one and not at level three. Comparing her interview transcripts and level one testimony reveals inconsistent and implausible statements and multiple instances where her statements are contradicted by the credible statements of others. Ms. Cutright denies that the whipped cream incident with Grievant occurred but asserts that, before she and Grievant went shopping for the ice cream social, Director Ray stated he wanted to lay her on a table and put whipped cream on her. Ms. Cutright stated that she and Grievant forgot the whipped cream and when they returned from shopping Director Ray told Grievant that they had forgotten the one thing Director Ray had asked for. However, whipped cream was present at the ice cream social, Ms. Loudin and Ms. Ball both asserted Grievant had sprayed the whipped cream in Ms. Cutright's mouth, and the whipped cream was later located in Grievant's personal minifridge. Further, in her initial interview, when asked what Grievant said in response to Director Ray saying he wanted to put whipped cream on her, Ms. Cutright said that Grievant only told her that she needed to say something back and not take it. Her story changed in her level one testimony when she said that Grievant had apologized for what Director Ray had said but nothing about Grievant telling her not to take it and say something back.

During her second interview and level one testimony, Ms. Cutright denied spending long periods of time in Grievant's office, denied that Grievant had come to her office other than five minutes two or three times, and stated that Grievant was "very rarely" in the warehouse offices. These statements are refuted by the testimony of almost all the

witnesses in this matter that stated Ms. Cutright was frequently in Grievant's office for long periods of time and that Grievant frequently visited Ms. Cutright in the warehouse offices once she was moved. Regarding one particular instance where she had gone missing for a long period of time, Ms. Cutright denied having been in Grievant's office and denied even having gone upstairs at all. However, regarding this incident Grievant stated in his interview that Ms. Cutright had been in his office and Ms. Ball stated that she saw Ms. Cutright coming down the stairs from the direction of Grievant's office.

Ms. Cutright denied that Mr. Pifer and Ms. Brown had met with her about her performance and frequent disappearances from her assigned workstation although Mr. Pifer and Ms. Brown both testified that these meetings took place. Ms. Cutright testified that she did not know that investigation interviews were being conducted and testified as if her allegation of harassment against Director Ray to Ms. Krause was unrelated. However, in her prior statement, she stated that she had been called down to the interview with her uncle and had spoken about the conflicts she was having with her uncle over his concern with the rumors and her relationship with Grievant. Further, Ms. Krause testified that while Ms. Cutright was waiting to be interviewed she came to her office crying and saying things were "out of hand" and only then did she mention her allegations against Director Ray. Reba Cutright was not credible.

Although Grievant's demeanor during the level three hearing was appropriate, a comparison of Grievant's previous statements clearly show Grievant's attempts to manipulate the narrative. Grievant's statements regarding key issues changed as time went on and were contradicted by the credible testimony of others. These statements show a clear agenda to cast suspicion on Director Ray to deflect attention from himself.

According to Grievant, he is innocent of all wrongdoing, and everything was fabricated specifically to retaliate against him for reporting Director Ray for sexual harassment and to give Mr. Loudin a job. The timeline of events does not support this narrative and it is simply not plausible that numerous people would consistently lie about multiple different issues in order to assist Director Ray in retaliating against Grievant or to put Mr. Loudin in a job. The investigation was clearly precipitated by Ms. Loudin's report of sexual harassment, which her father relayed to Director Ray on October 11, 2018, and that report was because of Grievant's behavior during the staff meeting and in pulling Mr. Loudin into his vehicle.

In fact, Grievant never made any actual report of Director Ray's alleged sexual harassment of Ms. Cutright to anyone. The first time Grievant brought up Director Ray's alleged sexual harassment was when Grievant was being interviewed regarding the allegations of harassment against himself. According to Grievant, he confronted Director Ray with allegations of sexual harassment in the August 29, 2018 meeting and Director Ray retaliated against him by initiating the investigation and against Ms. Cutright by moving her to the warehouse section. However, Grievant's statements regarding what happened in the August 28<sup>th</sup> meeting were inconsistent and were contradicted by Ms. Cutright's statements.

In his interview on October 31, 2018, Grievant did not state that he had accused Director Ray of harassment during that meeting. Grievant stated that Director Ray had called Ms. Cutright into his office "to find out what she was telling me, which really wasn't anything" and that when Director Ray called him into the meeting Grievant named no names but said Ms. Cutright had something on her mind and he would "deal with it" if



“somebody’s doing something they are not supposed to be doing.” Grievant conveniently left out that Director Ray saw Grievant and Ms. Cutright leaving together at quitting time and called them into his office to ask what was going on between them because of all the rumors. By level three, Grievant had admitted that they had been called into the office together and his story had morphed into relaying specific and detailed accusations about Director Ray’s behavior towards Ms. Cutright and that he was giving Director Ray a “heads up” because people were talking. No one was talking. At that time, Ms. Cutright had stated that the only person she had talked to about Director Ray was Grievant. No witness ever said that they had heard rumors about Director Ray and Ms. Cutright; they had only rumors about Grievant and Ms. Cutright. Also, Ms. Cutright was clearly not moved because of the meeting because she stated in her interview that, when Director Ray asked them what was going on between them, she told them that she was just talking to Grievant about problems with Ms. Cleavenger and the move.

It appears Grievant changed his story based on whatever he thought was going to get him out of trouble at the time. In the interview, he stated he did not know anything about Fuelmaster and had nothing to do with the Prokey device being moved to his computer, that it would be Director Ray’s responsibility to have the tech department correct the problem, and that it was the technicians who put the Prokey device on Grievant’s computer because they just happened to be installing a new computer for Grievant when they were there trying to fix Ms. Cutright’s computer. At level three, he stated that the tech people had asked to put it on his computer because he was in charge of the Fuelmaster program. Grievant also submitted emails into evidence showing that it was he who contacted tech support saying that the Prokey device would not work on Ms.

Cutright's computer, that he had tried it on his computer, and his computer would not recognize the device either. Ms. Cutright's statements also contradict Grievant's story in that she said the Prokey device was moved because she asked Grievant for help when it would not work on her computer.

In the interview, Grievant denied that he and Ms. Cutright spent much time together at all outside of lunch and breaks, and that lunch and break together was only two or three times a week and never more than for a half hour. This was contradicted by almost every other witness statement. At level three he changed his story and stated that he would sit her at his conference table to do multiple jobs. In the September meeting with employees and at level three, he stated he had spent a lot of time with her counseling her about her problems, including her complaints of sexual harassment. Yet, in the interview, Grievant said that, directly after the August 29<sup>th</sup> meeting with Director Ray, he told Ms. Cutright that she would need to talk to human resources about Director Ray's harassment and leave him out of it. Also, in statements after the interview, both Grievant and Ms. Cutright then began to excuse her presence in his office by the need to make Prokeys, although the credible testimony of multiple witnesses was that Prokeys would only need to be made at most, one or two times a week and that each key would take no more than five minutes.

In addition to the statements above that Ms. Cutright contradicted, multiple other statements were contradicted by the statements of others, which are not necessary to examine in detail. The most egregious example was Grievant's initial denials that he was even present in the second staff meeting, that he led the meetings, and that he discussed rumors about himself. All of which was contradicted by almost every other witness that made statements about the meeting, including witnesses that Grievant called himself or

whom he identified as friendly towards him like Mr. Linger, and some of which Grievant later contradicted himself. For the many reasons above, Grievant was not credible.

Respondent proved that it was more likely than not some of the time Ms. Cutright spent in Grievant's office was not for a legitimate business purpose and created an appearance of impropriety and favoritism. Almost every person interviewed or who testified stated that Ms. Cutright and Grievant spent an unusual amount of time together. Credibility determinations for all the witnesses were ultimately not necessary because Grievant and Ms. Cutright's inconsistent stories and changing statements clearly show their attempts to conceal the amount of time they spent together. Even when Grievant supervised Ms. Cutright there was no need for her presence in his office that frequently. After Ms. Cutright was transferred, the only time Ms. Cutright should have been in Grievant's office, other than for a normal break or lunch period, would be to make keys. The evidence shows that was not a daily duty and should have taken no more than approximately five minutes per key and would not account for the excessive time Ms. Cutright was present in Grievant's office. If Grievant was also "counseling" Ms. Cutright regarding her alleged problems with Director Ray, as he later changed his story to state, that also would not have been a legitimate business purpose. While Ms. Cutright certainly could have discussed those things with Grievant as a friend on her own time, as Grievant was not her supervisor, he had no official role to play and should have referred her to human resources or to her supervisor, which he also at one point contradicted himself to say that he had after the meeting with Director Ray. Also, locking the door while a young, female intern was in the room is also certainly highly suspicious and inappropriate.

Respondent did not prove the allegations in full as recited in the termination letter regarding the whipped cream incident with Ms. Cutright but did substantially prove misconduct. Respondent proved Grievant sprayed whipped cream in Ms. Cutright's mouth in a flirtatious manner in the presence of Ms. Ball and Ms. Loudin, which made them uncomfortable. Respondent proved Grievant also approached Ms. Loudin to offer whipped cream. In light of the flirtatious manner in which he had sprayed the whipped cream with Ms. Cutright, this made Ms. Loudin understandably very uncomfortable. The termination letter appears to get confused the second instance in which Grievant cornered Ms. Loudin in the kitchen and tried to feed her an ice cream float, getting it on her face, which is related misconduct Respondent proved. Respondent proved through the credible testimony of Ms. Loudin that Grievant told the interns that he was keeping the whipped cream for them.

Respondent proved it is more likely than not that Grievant had the Prokey device moved to his office for an improper purpose. In the interview, Grievant denied responsibility for the move entirely. Grievant's later story that the techs asked to move the program is contradicted by Ms. Cutright's statement and the emails Grievant submitted into evidence. Further, moving the device to Grievant's computer made no business sense. If there was a problem getting the device to work on Ms. Cutright's new computer, that is an issue that should have been addressed by Ms. Cutright's supervisor, Ms. Brown, and not Grievant. Also, as the device had previously been located in the shop office, if it could not be made to work on Ms. Cutright's new computer then the logical solution would have been to make the keys on the shop office computer where Ms. Cutright had previously been making the keys. It is also telling that this move was

accomplished weeks after Ms. Cutright's office was moved and only after Mr. Pifer had met with Ms. Cutright regarding the need to remain at her workstation.

Respondent failed to prove that Grievant cursed during the staff meeting but did prove Grievant's behavior during the meeting was misconduct. Grievant did refer to the rumors that he was having sexual relations with the interns but only one witness said that he used a curse word in doing so. Further, it is clear Grievant was referring to the rumors and not affirmatively stating that he had actually had sex with all of the interns. Respondent did prove that Grievant said he would meet employees at Sheetz and that statement was not a joke and did refer to inviting an altercation off State property, which was clearly meant to intimidate employees. Respondent proved that Grievant threatened that he could fire or file charges against five or six employees for sexual harassment, which was also threatening. Such is obviously troubling behavior in a supervisor but is even more concerning in that Grievant chose to have this meeting directly in response to Director Ray confronting Grievant about the rumors about Grievant and Ms. Cutright.

Respondent proved it was more likely than not Grievant sexually harassed Ms. Loudin. Ms. Loudin's credible testimony that Grievant touched her inappropriately, made the "let me see you shake that thing" comment, told her she would have to "pay up" with "some videos" to be recommended for employment, and engaging in the sexually-charged whipped cream incident with Ms. Cutright establishes serious misconduct of Grievant as a supervisor particularly. Grievant and Ms. Cutright's contrary statements do not refute Ms. Loudin's statements as Grievant and Ms. Cutright are not credible.

Although Respondent did not prove all the charges levied against Grievant, Respondent proved significant and concerning misconduct that is particularly egregious

in a supervisor as it reflects an abuse of power. Grievant sexually harassed a particularly vulnerable employee, spent excessive amounts of time with another young female employee, and then attempted to intimidate his subordinates for talking about his suspicious behavior. This misconduct clearly violated the *Division of Personnel's Prohibited Workplace Harassment Policy* and the standards of work performance and conduct contained in Respondent's *Administrative Operating Procedures*. Respondent proved it was justified in terminating Grievant's employment for this serious misconduct.

Grievant asserts that his termination was in retaliation for making the allegation of sexual harassment against Director Ray. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined 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." W.VA. CODE § 6C-2-2(o).

"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)).

There is no direct evidence of a retaliatory motivation, only that Grievant's termination occurred after he disclosed in his interview his allegations that Director Ray had sexually harassed Ms. Cutright. Clearly, if Grievant had made a formal complaint of sexual harassment against Director Ray, such would be a protected activity. However, at no time did Grievant proactively make a report of sexual harassment against Director Ray. Although according to Grievant's changed statement he had been "counseling" Ms. Cutright about Director Ray's alleged sexual harassment for months, Grievant made no report of sexual harassment to anyone. Grievant only asserted that he discussed the allegations with Director Ray during the meeting in which Director Ray confronted Grievant and Ms. Cutright regarding the rumors about them and Director Ray denies Grievant made these allegations at all. Even after the meeting, Grievant did not disclose this alleged harassment to anyone. Grievant made no allegations of Director Ray's alleged harassment until Grievant was himself accused of harassment during the initial interview with Ms. Amos. It was only to deflect from his own behavior that he accused Director Ray of harassment during his interview. Therefore, it is unclear that Grievant actually engaged in a protected activity.

Even if Grievant engaged in a protected activity, “[a]n 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). Respondent clearly rebutted any presumption that may have arisen. Grievant was already under investigation for sexual harassment when he disclosed to Ms. Amos his allegations of sexual harassment against Director Ray and Respondent provided substantial evidence of Grievant’s own serious misconduct for which it had a legitimate reason to terminate Grievant’s employment to protect its employees. Grievant failed to prove that Respondent’s reason for terminating his employment were a mere pretext.

Grievant asserts he was the victim of discrimination or favoritism because he was terminated for the same type of conduct that Director Ray was guilty of and for which Director Ray was not disciplined. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). “‘Favoritism’ means unfair treatment of an employee as demonstrated



by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h). Grievant and Director Ray were not similarly situated. Grievant and Director Ray were both accused of sexual harassment but they were treated differently on that issue because Respondent substantiated the claim against Grievant and did not substantiate the claim against Director Ray. Grievant and Director Ray also both engaged in behavior that can broadly be characterized as threatening or intimidating but the behaviors were different. Grievant’s threatening behavior appeared to be calculated, was done by use of his authority as a supervisor in a meeting, was made directly to multiple employees, and was coupled with a threat to his employee’s employment. Director Ray damaging Grievant’s office appeared to be a spur-of-the moment action motivated by, in Respondent’s view,<sup>3</sup> righteous anger and was not done directly in Grievant’s presence. Further, Grievant was found to have committed multiple acts of misconduct over a period of months while Director Ray was found to have committed only the single act of misconduct of damaging Grievant’s office. While the undersigned disagrees with Respondent’s decision not to discipline Director Ray for his own serious misconduct, it cannot be said to invalidate the termination of Grievant’s employment.

Alternatively, Grievant argues that the punishment should be mitigated. “[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

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<sup>3</sup> During this proceeding, Respondent did not offer an explanation for its failure to discipline Director Ray. This view was presented by Respondent’s counsel during the level one hearing in the hostile work environment grievance.

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).

The only factors in favor of mitigation were that Grievant had a substantial work history of good evaluations and no prior discipline. Termination of employment for Grievant's serious misconduct as a supervisor was not clearly disproportionate. As stated previously, Grievant was not similarly situated to Director Ray. The allegations of sexual harassment were not substantiated against Director Ray and, although Director Ray's conduct in damaging Grievant's office was disturbing, it was not similar to Grievant's calculated actions towards his employees in the meeting and was a single act rather than the pattern of continuing misconduct Grievant was found to have committed. Grievant failed to prove mitigation of the punishment is warranted.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (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, the employer has not met its burden. *Id.*

2. Supervisors "may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of [their] supervisors." *Wiley v. Div. of Natural Res.*, Docket No. 96-DNR-515 (Mar. 26,

1988); *Linger v. Dep't of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5, 2012).

3. Respondent proved it had good cause to terminate Grievant's employment for his serious misconduct as a supervisor.

4. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

5. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

6. Grievant failed to prove the termination of his employment was discriminatory or favoritism.

7. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined 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." W.VA. CODE § 6C-2-2(o).

8. "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,

9. [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)).

10. "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).

11. Grievant failed to prove the termination of his employment was retaliatory.

12. “[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).

13. “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).

14. Grievant failed to prove mitigation of the punishment is 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: January 20, 2021**



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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**