ALISA PROKLEVICH,

Grievant,

v.

DOCKET NO. 02-DMV-143

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF MOTOR VEHICLES,

Respondent.

D E C I S I O N

Grievant, Alisa Proklevich, filed the following Statement of Grievance on May 20, 2002, with the Division of Motor Vehicles ("DMV") asserting "Wrongful termination" and requesting as relief "Reinstatement to former position with back pay and benefits."

As the grievance involved a termination, it was filed directly to Level IV, and a Level IV hearing was held on July 18, 2002. (See footnote 1) This case became mature for decision on September 24, 2002, after receipt of the last of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Respondent maintains Grievant's termination for sexual harassment and inappropriate behavior was proper. Grievant asserted the sexual harassment was not proven, and even if it were, the penalty of termination was too harsh. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed less than two years by DMV, from June 16, 2000, to May 10, 2002,

as a Driver License Examiner, a position in the classified service. She was stationed in the Winfield office.

2. In October 2000, Grievant attended sexual harassment training. Resp. Ex. No. 4, at Level IV.

3. On July 3, 2001, Grievant was verbally reprimanded for making negative remarks about a Japanese customer in front of other customers. (See footnote 3)

4. In December 2001, Grievant looked up another employee's file on the computer at work. She received a three-day suspension for this act, from March 26 - 28, 2002. (See footnote 4) She did not grieve this suspension.

5. In December 2001, Grievant grabbed, with both hands, the buttocks of a contract worker, Richard Lamp and squeezed. Chris Bell, Grievant's co-worker observed this behavior. Mr. Lamp was a custodian who worked for Goodwill, and only worked a couple of hours a day at the Winfield office.

6. Mr. Lamp is not a state employee, and was not aware of the State's Sexual Harassment Policy. He did not know what, if any, options he had to report this behavior.

7. In January 2002, Grievant asked Mr. Lamp to wear ladies' underwear to work while he cleaned at the Winfield office. Grievant indicated she wanted to see these articles of clothing.

8. Grievant frequently cursed in the office. She did not curse at customers, but did frequently curse in front of them. One of the words used was "f..k."

9. On February 4, 2002, Grievant said the words "prick" and "ass" in front of a customer, who reported these inappropriate remarks to Grievant's supervisor, Michael May. Grievant received a verbal reprimand for this incident.

10. In February 2002, a customer filed a complaint against Grievant for her rude behavior. Test. Wilson, Level IV Hearing.

11. On February 15, 2002, Mr. Lamp finally talked to Mr. Bell, a Driver License Examiner, about Grievant's behavior, explaining that it bothered him, but he did not know what to do about it.

12. Mr. Bell directed Mr. Lamp to the only supervisor present that Friday, Phyllis D'Allessio. Ms. D'Allessio listened briefly to Mr. Lamp, and suggested he address the problem with the EEO counselor, Carolyn Parsons, the next week. Mr. Lamp agreed to wait. Ms. D'Allessio played no further part in anything involving Mr. Lamp's complaint about Grievant. 13. Grievant and Ms. D'Allessio do not get along well, and Ms. D'Allessio had previously stated, in December 2001, that

she wanted Grievant to be terminated. Ms. D'Allessio was verbally counseled for this remark.

14. The following Tuesday, February 19, 2002, Mr. Lamp talked to a variety of people and told them about Grievant's treatment of him. (See footnote 5) He signed an EEO complaint.

15. On February 20, 2002, while in the work area, Grievant commented about sexual intercourse with older men, and explained how they liked to have their "balls caressed." Mr. Bell reported this incident to Mr. May, as he found it disturbing.

16. On February 22, 2002, Grievant lit her lighter behind Mr. Lamp's buttocks, and she received a verbal reprimand for this behavior. Test. Lamp and May, Level IV Hearing.

17. In late February or early March, Grievant discussed the size of Mr. Bell's penis with Mr. Lamp in the work area. Test. Lamp, Level IV Hearing.

18. Because Grievant's treatment of him was upsetting, Mr. Lamp also discussed the situation with his wife and pastor. Mr. Lamp was transferred from the Winfield office in April 2002.

19. At times, Grievant cursed co-workers when they did not do what she wanted. The term Grievant used was "God damn" and the co-workers felt verbally abused by this remark. On such remark was made in front of a teenage customer. Test. Bell, Level IV Hearing. 20. Grievant poked and tickled Mr. Bell. Mr. Bell was asked by Mr. May, if this behavior bothered him, and Mr. Bell said no. Grievant also lit her lighter behind Mr. Bell. Resp. Ex. No. 2, at Level IV. Grievant's behavior did bother Mr. Bell when she behaved this way in front of customers. Test. Bell, Level IV Hearing.

21. Mr. Bell did report other behavior of Grievant that he found upsetting, such as cursing in front of customers, and explicit sexual discussions and remarks.

22. Mr. Bell transferred in April 2002. At the Level IV hearing and during the EEO investigation, Mr. Bell said the reason he transferred from the Winfield office was because of Grievant's behavior. He described Grievant as a "Jekyll and Hyde" personality, one day your best friend, and the next mean and stirring up trouble.

23. Rebecca Wilson, a coworker, observed Grievant's treatment of Mr. Bell, and felt bad for the way Grievant treated Mr. Bell, especially since Mr. Bell would ask Grievant to stop and she would not. Test. Wilson, Level IV Hearing.

24. Grievant received repeated verbal warnings from her supervisor to stop these behaviors. Grievant would tone down for a while, but eventually her behavior would warrant another verbal reprimand, and Mr. May would again counsel Grievant about her inappropriate behavior. Test. May,

Level IV Hearing.

25. Because Mr. Lamp's complaint was made by a non-employee, Ms. Parsons, called her supervisor, Drema Smith, to ask for guidance. After discussions, Ms. Smith informed Ms. Parsons that the required investigation would be performed at the state level, and Ms. Smith would be a member of the EEO investigating committee. 26. The EEO investigation was performed at the state level because Mr. Lamp was not a state employee, and DMV did not want to have any possible allegations of favoritism.

27. This committee investigated the allegations and found, in spite of Grievant's denial, that she had:

> made inappropriate comments to and in front of Richard Lamp and that Ms. Proklevich has touched Mr. Lamp in ways that can be construed as being sexual in nature. Additionally, it is the consensus on the investigators that Mr. Chris Bell transferred because of Ms. Proklevich's inappropriate behavior. Mr. Bell indicated the [sic] Ms. Proklevich was the reason he transferred. Ms. Proklevich admitted to joking around with Mr. Bell and tickling him on his back.

28. After receiving the EEO committee's report dated May 1, 2002, Stephen Edens, Director of Support Services, wrote Grievant's termination letter dated May 10, 2002. (See footnote 6)

29. This letter informed Grievant she was being dismissed immediately. The letter noted Mr. Lamp's complaint had been received on February 19, 2002, and an EEO investigation had followed. The letter continued stating:

> On Thursday, May 2, 2002, I received a report from the investigators including signed statements taken from you, Mr. Lamp and other witnesses. Mr. Lamp stated that you grabbed his buttocks and made demeaning and inappropriate jokes about his appearance. He also stated that you asked him if he would wear pink panties and bra to work so you could see them. The report states that your supervisor, Mike May, witnessed you lighting a cigarette under Mr. Lamp's back pant's pocket. When asked if this had everhappened before, you responded that you had lit a cigarette lighter under Chris Bell's shirt. The report also states that you "taunted and aggravated" Mr. Bell while at work. Other employees reported that you made disrespectful comments and swore at customers. These employees stated that they often had to apologize to customers as a result of your behavior. The also stated they felt uncomfortable around you and felt you would take some type of retaliatory action if they reported you.
>
> The investigators stated in this report that you made inappropriate comments to and in front of Richard Lamp, and that you touched him in ways that can be construed as being sexual in nature. It was also the consensus of the investigators that Chris Bell transferred from his position at the Winfield Office because of your inappropriate behavior towards him.

30. The letter further noted Grievant had sexual harassment training, had acknowledged she knew the difference between appropriate and inappropriate behavior in the work place, but Grievant did not follow "the appropriate behavioral guidelines while at work."

31. The termination letter was based on Grievant's total performance, not just the sexual harassment allegations. Behavior to and in front of customers was considered to be very serious, as DMV is concerned about the image it presents to the people it serves.

32. During the time of the investigation, Grievant told co-workers she was going to get them all in trouble. Test. Wilson, Level IV Hearing.

33. J.L., a supervisor in another office, was given a written reprimand several years ago for calling breasts "puppies" in front of co-workers. (See footnote 7) The complaint was made after Mr. L. got the promotion another co-worker wanted. The "puppies" comment was made before the promotion.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

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 Section 12.2 and .3, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate

disciplinary measure in cases of misconduct." Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985). See Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (1983); Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (1982). It is noted Grievant is not a long-term state employees as she had been employed for less that two years.

This grievance requires a determination of whether Respondent proved the facts upon which the dismissal was based. Grievant is accused of sexual harassment as well as a variety of inappropriate behavior, such as cursing, taunting, inappropriate remarks, and creating a hostile work environment. "State employees may be disciplined for sexual harassment where their conduct creates an intimidating, hostile or offensive work environment for one or more employees." Lanham v. Dep't of Transp., Docket No. 98-DOH-369 (Dec. 30, 1998). See Worden v. Dep't of Health and Human Resources, Docket No. 98-HHR-130 (Jan 29, 1999); Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Turner v. W. Va. Div. of Highways, Docket No. 94-DOH-594 (Feb. 27, 1995); Stonestreet v. W. Va. Dep't of Admin., Docket No. 93-ADMN-182 (Nov. 30, 1993). See also Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

I. Credibility

An issue that must be addressed is credibility. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't ofHealth and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). The Grievance Board has applied these factors in many cases, and considers the following in assessing a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence

of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Perdue, supra.

Respondent's witnesses did not demonstrate any bias, and the information presented was plausible. Their testimony was internally consistent, consistent with the EEO report, and consistent between witnesses. The acts Grievant was accused of were witnessed by many employees. Grievant chose not to testify as her right pursuant W. Va. Code § 29-6A-6(e). Accordingly, the testimony presented by Respondent was unrebutted. **II. Division of Personnel's Sexual Harassment Policy**

The West Virginia Division of Personnel ("DOP") has in place a policy on sexual harassment. The purpose of this policy is:

> to provide a work environment free from sexual harassment whereby no employee is subjected to unsolicited and unwelcomed sexual overtures or conduct, either verbal or physical. Employees have the right to be free from sexual harassment on the job. Such conduct or harassment will not be tolerated within the workplace and is prohibited by State and federal anti- discrimination laws where: (1) submission to such conduct is made a term or condition of employment, either explicitly or implicitly, (2) submission to or rejection of such conduct by an individual is used as the basis for personnel actions affecting such individual, or (3) such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Conduct of this nature will result in appropriate disciplinary action which may include dismissal.

(Emphasis Added.)

This policy defines "Sexual Harassment" as:

> Any unsolicited and unwelcomed sexual advances, requests for sexual favors, or other verbal, written, or physical conduct of a sexual nature when:
>
> 1. Submission to such conduct is made either explicitly or implicitly as a term or condition of an individual's employment,
>
> 2. Submission to or rejection of such conduct is used as the basis for personnel actions affecting an employee, or

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

This Policy further defines a "Hostile Environment" as "[c]onduct which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating or offensive working environment."

The Policy lists the following examples of sexually-harassing behavior which can be verbal and/or physical conduct:

1. Sexually-explicit or implicit propositions;

2. Improper questions about an employee's private life;
3. Sexually discriminatory ridicule, insults, jokes, or drawings;

4. Undesired, intentional touching such as embracing, patting, or pinching;

5. Remarks directed against one's sex as a class or group;

6. Threats of rape, or attempted or actual sexual assault;

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

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

This Policy also notes, "[o]ther actionable forms of conduct have also been found to evolve from other types of situations which appear normal or harmless but may in fact, constitute sexual harassment."

Once an investigation report has been received by the appointing authority, the Policy requires the agency to review the written report of the findings and take appropriate action within 15 calendar days. The severity of any disciplinary action will be determined by the seriousness of the offense and may include, but is not limited to, the following:

a. a verbal warning documented in writing and placed in an administrative file;

b. a written reprimand that is placed in the employee's file;

c. an employee transfer when warranted;

d. suspension, demotion, and/or termination.

It is clear all state employees are expected to comply with all relevant Federal, State and local laws; comply with all Division of Personnel and Department policies; followdirectives of their superiors; and conduct themselves professionally in the presence of fellow employees and the public. See Worden, supra.

DMV advised its employees that sexual harassment in the workplace represented a serious matter which would not be tolerated. All employees are required to attend sexual harassment training where the seriousness of these acts is impressed upon them. Test. Parsons, Level IV Hearing. Employers have the right to expect employees to not engage in sexual harassment and to follow policies that are do not impinge on their health and safety. Hatfield v. Dep't of Corrections, Docket 98-CORR-020 (Apr. 30, 1998); See Scarberry v. Bureau of Employment Programs, Docket No. 94-BEP-625 (Jan. 31, 1995); Smith v. Dep't of Corrections, Docket No. 93-CORR-538 (May 17, 1994).

III. Merits

Respondent has met its burden of proof and demonstrated Grievant engaged in sexual harassment and inappropriate behavior in violation of the Sexual Harassment Policy. Grievant grabbed Mr. Lamp's buttocks and made demeaning and inappropriate remarks to Mr. Lamp. These charges are proven as the testimony was unrebutted that Grievant grabbed Mr. Lamp's buttocks, lit a lighter behind his buttocks, and asked him to wear a bra and panties at work and let her see them. All these events were witnessed by others, and the complaints of Mr. Lamp were corroborated.

While the termination letter states Grievant cursed **at** customers, the testimony demonstrates Grievant frequently cursed **in front of** customers. Grievant attempts to prove this is a vital and substantial difference. Although it would have been worse for Grievant to curse at customers, it is still very inappropriate to curse in the presence ofcustomers. A citizen of this state should be able to get his or her license renewed without hearing the words "f..k" and "prick." Additionally, Grievant made other inappropriate remarks in the work area and harassed co-workers. She ignited lighters behind

co- workers, and contrary to Grievant's assertions, no co-workers saw this as horseplay they all engaged in.

IV. Unequal treatment

Grievant's apparent argument that another employee received a lesser punishment in that he was given a written reprimand, and this is unequal treatment, is not applicable here. Grievant's situation is different from Mr. L.'s. Mr. L. made one remark, one time and received a written reprimand. He had no other disciplinary actions taken against. Grievant had repeated verbal reprimands and a three day suspension. She did more than make one remark one time. She made repeated remarks of a demeaning character, and actually grabbed Mr. Lamp's buttocks. Additionally, Grievant engaged in other inappropriate behavior, such as cursing and taunting other employees. There is truly no comparison between the two employees.

V. Mr. Lamp took too long to lodge his complaint

Grievant asserts Mr. Lamp could not have been too upset, and the behavior must not have been unwelcomed because Mr. Lamp did not complain until two months later, and he was able to continue to perform his work duties. This argument ignores the fact Mr. Lamp was not a state employee, was not privy to the Sexual Harassment Policy, and did not know to whom or how to complain. He did not even know if he could complain. It was only after he shared his anxiety and distress over Grievant's behavior with Mr. Bell, that helearned there was a process whereby he could protect himself from Grievant's physical and verbal assaults. Further, the fact Mr. Lamp did not know what to call Grievant's actions, and if they were really sexual harassment, is also of no moment. The acts Grievant engaged in are clearly identified in the Sexual Harassment Policy. Grabbing an individual's buttocks while he is bending over to perform a work task is wrong. Asking a male custodian to wear a bra and panties while he performs cleaning tasks is demeaning. Just because Mr. Lamp did not know what to call the behavior does not make it any less inappropriate or prevent it from being labeled correctly as sexual harassment.

VI. Mitigation/Severity of Penalty

The argument that Grievant's termination is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8,

1989).

"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). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept.29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

In assessing the above-cited factors, I find the employer has substantial discretion to determine a penalty, and the undersigned Administrative Law Judge cannot substitute her judgement for that of Respondent. See, e.g. Hammer v. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995). Although another form of punishment could have been selected, the undersigned Administrative Law Judge is unable to conclude DMV abused its substantial discretion in designating the penalty in question. Grievant receivednumerous verbal reprimands for the same type of conduct. She surely must have understood these actions were inappropriate and should cease. The incidents of

misconduct in this situation are sufficiently egregious to conclude DMV did not abuse its discretion by dismissing Grievant. Respondent could have chosen to suspend Grievant and place her on an Improvement plan. This they elected not to do. The undersigned Administrative Law Judge does not find the discipline imposed was clearly excessive. Sexually harassing a non-state worker on state property, cursing in front of customers, discussing intimate sexual acts in the work area, and igniting lighters under other workers is "misconduct of a substantial nature directly affecting the rights and interest of the public." Oakes, supra. The fact DMV did not decide to try any longer to correct Grievant's behavior cannot be seen as arbitrary and capricious.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

2. 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 andinterest 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 Section 12.2 and .3, Administrative Rules, W. Va. Div. of Personnel (July 1, 2000).

3. Grievant was not a long-term employee.

4. "State employees may be disciplined for sexual harassment where their conduct creates an intimidating, hostile or offensive work environment for one or more employees." Lanham v. Dep't of Transp., Docket No. 98-DOH-369 (Dec. 30, 1998). See Worden v. Dep't of Health and Human Resources, Docket No. 98-HHR-130 (Jan 29, 1999); Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Turner v. W. Va. Div. of Highways, Docket No. 94-DOH-594 (Feb. 27, 1995); Stonestreet v. W. Va. Dep't of Admin., Docket No. 93-ADMN-182 (Nov. 30, 1993). See also

Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

5. Respondent established by a preponderance of the evidence that Grievant engaged in sexual harassment in violation of DOP's policy, created an intimidating and/or offensive work environment, and made numerous inappropriate remarks.

6. An 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 the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

7. "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). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

8. "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).

9. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97- 06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

10. Grievant failed to demonstrate that termination for the acts of sexual harassment of Mr. Lamp and co-workers, creating a hostile work environment, andrepeated inappropriate remarks was clearly excessive or unduly harsh, given she had received multiple prior verbal reprimands. See Worden, supra; Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v.

Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 11, 2002

Footnote: 1

At the end of Respondent's presentation of its case, Grievant made a Motion to Dismiss for failure to state the charges with specificity. This Motion was denied.

Footnote: 2

Grievant was represented by Attorneys Thomas Kirk and David Moye, and Respondent was represented by Assistant Attorney General Janet James.

Footnote: 3

Grievant's supervisor also indicated Grievant received a verbal reprimand on July 16, 2001, for inappropriate remarks and cursing. It was somewhat unclear if this verbal reprimand was in addition to the one issued on July 3, 2001.

Footnote: 4

No explanation was given about why there was a delay between the act and the discipline. Grievant did not note this as a problem.

Footnote: 5

Monday, February 18, 2002, was a state holiday.

Footnote: 6

Mr. Edens testified that one of the things that went into his decision was Grievant's involvement in a "CDL" incident.

(CDL stands for Commercial Driver's License.) Grievant had not been found guilty of any wrongdoing in one CDL incident, but there had been more than one complaint about Grievant's work in this area.

Footnote: 7

Initials were used to identify this employee per a request from Division of Motor Vehicles.