MICHAEL BOWE,

Grievant,

v. **Docket No. 04-WCC-268**

WORKERS' COMPENSATION COMMISSION,

Respondent.

DECISION

Michael Bowe ("Grievant") initiated this proceeding at level three on January 8, 2004, challenging a 30-day unpaid suspension. After a level three hearing conducted on March 2 and 3, 2004, the grievance was denied in a decision dated July 1, 2004. Grievant appealed to level four on July 9, 2004. After a level four hearing was scheduled, the parties elected to submit this matter for a decision based upon the lower level record, supplemented by fact/law proposals, the last of which were submitted on September 27, 2004. (See footnote 1) In order to expedite the level four decision, this matter was reassigned to the undersigned administrative law judge on October 7, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant began employment with the Bureau of Employment Programs (See footnote 2) in September of 2000 as a Tax Examiner. His job responsibilities involved conducting auditsof the accounting and financial records of businesses to determine their reporting and payment of unemployment compensation and workers' compensation taxes.

2. On January 5, 2004, Grievant was suspended for thirty days, based upon the results of an investigation finding that he had "engaged in a pattern and practice of sexually harassing conduct," insubordination, threatening comments toward a supervisor, and performance issues.

3. An investigation into Grievant's conduct was launched in late 2003 after complaints were filed against Grievant by two employees of Ryan's Steakhouse in Parkersburg, West Virginia, where

Grievant was a frequent customer. Grievant had made comments to one employee regarding a meat thermometer, asking where she would place it if she took his (Grievant's) temperature. The other employee claimed Grievant hugged her. Neither of these individuals knew Grievant was an employee of the Workers' Compensation Commission ("WC") at the time the statements were made.

4. Grievant was on his lunch hour and was not acting in any official capacity as an employee of WC at the time he made statements to Ryan's employees. The employees discovered he was a WC employee at a later time, after one of them saw him while visiting the local WC office for services.

5. Grievant was suspended in November of 2001 for three days after he approached an Unemployment Compensation claimant and asked for her for a date. At that time, he was also accused of sexually harassing the owner of a business that he was auditing.

6. In December of 2001, Grievant was conducting an audit of Ciara Log Homes, a private business, and had difficulty obtaining information from its employees. In Februaryof 2002, a private accountant involved with WC audits informed Grievant's supervisor that Grievant had sexually harassed a female employee of Ciara Log Homes. No complaint was filed, and the nature of the alleged harassment was not specified.

7. During a training session in December of 2002, Grievant and Eurita Rose, a WC employee, engaged in a lengthy conversation, some of which was personal. They each discussed their marital status, and at one point, Ms. Rose stated that she would feel better about herself if she could lose weight. Grievant responded that he thought she looked "great" and he would describe her as "voluptuous." This comment made Ms. Rose uncomfortable, but she did not tell Grievant. Other employees who were present in the office at the time perceived that Grievant and Ms. Rose were laughing, talking, and seemed to be enjoying themselves.

8. After the "voluptuous" comment, Ms. Rose declined to have further dealings with Grievant and avoided his phone calls. She informed a supervisor that she did not want to talk to Grievant, and the supervisor intercepted one of Grievant's calls on Ms. Rose's behalf. After that, Grievant made no further attempts to contact Ms. Rose. (See footnote 3)

9. Linda Reaser is an employee of the same division as Grievant, and she was required to talk with Grievant on a daily basis regarding time sheets and supplies. After a retirement dinner on an unspecified date, Grievant commented to Ms. Reaser that the dress she was wearing at the dinner was so short that he could "see up it." She told Grievant to "grow up," and the conversation ended.

This made Ms. Reaser “a little uncomfortable,” but she did not register a complaint with any superior, and Grievant wasnot inappropriate with her on any other occasion. Ms. Reaser did not perceive Grievant's comment to be sexual in nature, and she never saw or heard him being inappropriate with anyone else.

10. Suzann Stoehr, also a WC employee, was in daily contact with Grievant during his initial training period. On one occasion, he commented to her that his muscles had been tense and he had gone to see a licensed massage therapist, who happened to be an attractive female. On a different occasion, Grievant stated that he wanted to have lunch at a particular restaurant and he hoped a particular waitress waited on him. Ms. Stoehr did not believe these statements to be sexual in nature, and they did not make her uncomfortable.

11. In July of 2003, Judith Vance was a new employee, working as an office assistant in Grievant's division at WC. She and Grievant had frequent phone contact in the course of their respective job duties. Early on, Grievant told Ms. Vance that he had looked up her statistics with the Division of Motor Vehicles, and that if she were “younger, better looking, and didn't weigh so much, he would have a go at [her].” Tr. at 116. Ms. Vance told Grievant she did not appreciate the comment and that it was not appropriate.

12. In July of 2003, Ms. Vance complained to her supervisor, John Stikes, that Grievant made inappropriate statements which made her uncomfortable, such as dirty jokes. After being informed she could file a sexual harassment complaint, Ms. Vance elected to deal with the matter herself, telling Grievant that certain things should not be discussed in a business setting, and she felt he “got the message.” Resp. Ex. 10.

13. Grievant commented to Ms. Vance that he found certain women attractive, such as “blonde women” with “big boobs.” Although Ms. Vance claims Grievant'scomments made her uncomfortable, an email dated October 9, 2003, from Ms. Vance to Grievant, indicates that the two of them discussed personal matters in a friendly fashion. That email stated, in part: “Listen, some day in the not too distant future, you will be finding someone who will rock your world. Don't get down on yourself because you are a fantastic person.” Gr. Ex. 7.

14. Nichelle Perkins (WC Human Resources Director), Nicole Price (Assistant Director of Human Resources), and Gere Flick (manager of Grievant's unit) met with Grievant on November 6, 2003, to inform him that allegations had been made by two employees from Ryan's Restaurant.

Grievant denied the allegations, and he was informed that an investigation into the charges would be conducted. Grievant was instructed not to discuss the allegations with anyone while the investigation was ongoing.

15. On November 7, 2003, Grievant discussed the Ryan's allegations with Ms. Vance, complaining that they were not true, and that the accusers were “out to get him.” Grievant also mentioned the allegations to Ms. Vance in subsequent conversations in November of 2003, generally complaining that he was being accused of something he did not do. He also contacted Mr. Carothers regarding representing him in this matter, and informed him what the allegations were.

16. In conversations with Ms. Vance in November and December of 2003, Grievant stated that Mr. Flick (manager of the unit) “had better have his ducks in a row, because shit will hit the fan,” threatened to file a lawsuit against Mr. Flick, called him “an ass,” and stated Mr. Flick could “eat shit and die.” Resp. Ex. 4.

17. For the period of October 1, 2001, through September 30, 2002, Grievant received a “meets expectations” performance evaluation. Comments on that evaluationwere that Grievant was “learning to be a productive tax examiner,” had the ability to perform quality audits, was organized and dedicated to his job. It was further stated that Grievant could improve “by concentrating on his audit assignments and reducing conflict situations” and that he needed to spend more time in the field conducting audits, rather than being in the local office. It was noted that Grievant had experienced some problems with “outside influences” interfering with his job duties, but it was not specified what those influences were. Gr. Ex. 8.

18. On March 25, 2003, Grievant's direct supervisor, John Stike, met with him to discuss Grievant's failure to produce as many audits as expected. Grievant was having difficulty getting appointments with employers to conduct audits, and Mr. Stike offered to assist him in this regard. Grievant expressed his dissatisfaction with his job at that time, and Mr. Stike advised him that his production level would have to increase, or he would be reassigned to a lesser position in the office.

19. After his discussion with Mr. Stike in March, Grievant increased his productivity to an acceptable level, which declined again in September and November of 2003.

20. In the January 5, 2004, suspension letter, the conclusions of the investigation into the allegations against Grievant were listed as follows:

> You violated WC [Sexual Harassment Policy] when you harassed the employees at Ryan's and your co-workers.

> You engaged in a pattern and practice of sexual harassment constituting hostile work environment for co-workers, clients, and WV residents in violation of the agency, the state, and federal sexual harassment policies.
>
> You violated WC and DOP's insubordination policy by recklessly disregarding a directive from your supervisors and the [human resourcesdivision], which compromised the investigation and infringed on witnesses [sic] right to confidentiality.
>
> You threatened your supervisor violating the Violence in the Workplace policy.
>
> Your job performance is below an acceptable standard for Employment Programs Tax Examiner.

21. The discipline imposed upon Grievant on January 5, 2004, included the thirty- day suspension, reassignment from Parkersburg to South Charleston, Grievant was to communicate with Judy Vance only by email, a corrective action plan was imposed, and Grievant was required to attend individualized sexual harassment classes.

22. By letter dated August 19, 2004, Grievant's employment was terminated.

23. Grievant resigned from his employment with WC in a letter dated August 17, 2004; the letter was postmarked August 30, 2004, and was received by WC on August 31, 2004.

24. Grievant has not challenged his termination.

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. **Motion to Dismiss**

As a preliminary issue, on September 20, 2004, Respondent filed a motion to dismiss this grievance, alleging that Grievant's termination has rendered the issues moot. However, if the suspension was unjustified, Grievant would be entitled to back pay for a suspension imposed prior to his termination or resignation. See Moore v. Dep't of Health and Human Res., Docket Nos. 99-HHR-

382/451 (Nov. 2, 2000). Accordingly, it is appropriate to address the propriety of the suspension. The various allegations against Grievant will be addressed separately.

Ryan's Employees' Allegations

Respondent contends that Grievant's statements to waitresses at Ryan's Restaurant were “lewd comments of a sexual nature” and constituted sexual harassment. Grievant denies making the statements as alleged. "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). The West Virginia Division of Personnel ("DOP"), which promulgates rules and regulations applicable to all state employees, has in place a policy on sexual harassment (See footnote 4) . 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.

Further, the 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 . . .” submission to such conduct is made a term or condition of employment, is the basis of personnel action against the employee, or the “conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.” Once an investigation is completed and charges substantiated, discipline may include a reprimand, suspension, or dismissal, depending on the severity of the conduct and situation.

Presuming that Respondent is able to prove that Grievant made statements that were sexual in nature to the Ryan's employees, such conduct simply does not constitutesexual harassment as defined by the DOP policy. The policy prohibits sexual harassment only in the workplace, and its purpose is specifically to protect the rights of *employees* to be free from sexual harassment on the job. Although it is undisputed that Grievant was not working while he was visiting Ryan's, and the alleged harassment clearly did not take place at his workplace, Respondent contends that a “nexus” has been established between Grievant's conduct and his employment, because the Ryan's employees identified him as an employee of WC. Further, Respondent argues that discipline was necessary for this conduct, because Grievant works with the public, and in that capacity, his actions reflect upon the State. Nevertheless, Respondent is not authorized to discipline Grievant under a State sexual harassment policy for conduct which did not involve State employees and did not occur in the workplace nor while Grievant was performing his job duties. Accordingly, this portion of the findings against Grievant are not justified.

Pattern and Practice of Sexual Harassment

Respondent further alleges that Grievant has engaged in a pattern and practice of sexual harassment of coworkers dating back to 2001. These allegations arise from the incidents involving Ms. Rose, Ms. Reaser, Ms. Stoehr, and Ms. Vance, along with the employee of Ciara Log Homes who claimed Grievant sexually harassed her. In addition, Respondent alleges that the incident leading to Grievant's 2001 suspension for sexual harassment marks the beginning of this alleged pattern of behavior. Each of the alleged "victims" of Grievant's harassment will be discussed in turn.

Ms. Rose testified that, while she and Grievant were having an admittedly personal conversation, discussing their marital status and relationships specifically, Grievant made the comment that she was "voluptuous." She felt uncomfortable because of this comment,even though it was made in response to her comment about her own personal appearance. As to Grievant's attempts to contact Ms. Rose after this conversation, Grievant admitted that he believed she may have been interested in a personal relationship with him based upon their interactions, and he ceased trying to contact her when he discovered that this was not the case.

As was discussed in the Grievance Board's decision in Stemple v. Div. of Corrections, Docket No. 03-CORR-116 (Sept. 5, 2003), in order to constitute sexual harassment, an employee's conduct must contain the key element of being offensive, intimidating or hostile to the victim involved. As

further discussed in that decision, the United States Supreme Court has recognized that even if the conduct constitutes harassment, it is not prohibited sexual harassment, unless a member of a specific gender is "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not opposed." (Citation omitted.) Under the circumstances presented, the undersigned does not believe that Ms. Rose was subjected to sexual harassment. As defined in the DOP policy, sexual advances must be "unsolicited and unwelcome" in order to constitute harassment. In this case, the alleged sexual harassment occurred between two people who were having a personal conversation, and Grievant's comment, while probably inappropriate, was not an illogical response to Ms. Rose's statement about her appearance. Moreover, other employees in the vicinity testified that Ms. Rose and Grievant were laughing and enjoying themselves during the training session. When combined with Grievant's perception that Ms. Rose was personally interested in him, Grievant's statement was not necessarily unsolicited or unwelcome. As Grievant admitted, he ceased contact with Ms. Rose when he realized that he had misread her interest in him. As discussed in Stephenson v. Div. of Juvenile Serv., Docket No. 02-DJS-190 (Nov. 5, 2003), even asking a coworker for a social date does not always constitute sexual harassment, unless it is clearly unwanted or is combined with more offensive behavior.

Grievant's interactions with Ms. Reaser and Ms. Stoehr are more glaring examples of conduct which does not constitute sexual harassment, because the alleged "victims" were simply not offended by the comments. Both women testified that they did not take Grievant's comments seriously, did not feel they were sexual in nature, and only Ms. Reaser felt "a little uncomfortable." As was the case in Stemple, supra, an employee's conduct cannot be labeled as sexual harassment if the victim of the harassment does not feel that an intimidating, hostile, or offensive working environment has resulted. Mild discomfort or "aggravation," as the alleged victim in Stemple described it, is not sexual harassment.

As to the employee of Ciara Log Homes whom Grievant allegedly harassed, Respondent has simply failed to substantiate this charge with any meaningful evidence. The only documentation of this allegation was a note jotted down by Grievant's supervisor several months after the alleged harassment occurred, and that information came from a third party. The employee herself never complained to WC about Grievant, and the nature of the harassment was never specified or discussed. Accordingly, the undersigned simply has no evidence to support the conclusion that

Grievant sexually harassed this individual.

The allegations made by Ms. Vance against Grievant are the most recent presented in this case and, if true, would definitely be the most offensive. Certainly, commenting to a female coworker that you would "have a go at her" if she was more attractive, telling dirty jokes, and comments regarding female anatomy would be offensive to most people. However, Ms. Vance also testified that, when Grievant made these comments, she told him they were not appreciated, and she believed he "got the message." Then, when WC officials begin investigating whether or not Grievant has engaged in sexual harassment, Ms. Vance's allegations are used to establish a pattern of conduct. Nevertheless, the evidence clearly shows that Grievant and Ms. Vance were quite friendly, as recently as the month prior to the investigation into his conduct, and she felt that Grievant had ceased his offensive conduct when she asked him to stop. Accordingly, the evidence of record does not establish by a preponderance of the evidence that Ms. Vance experienced a hostile, intimidating or offensive working environment as a result of Grievant's conduct.

Respondent has made a valiant attempt to establish that Grievant has engaged in a consistent pattern of sexual harassment against various women. However, when examined individually and in detail, it is clear that Respondent has chosen to make inferences from these events which are not supported by the facts. A pattern and practice of sexual harassment on Grievant's part has not been established. However, it is clear that Grievant has a history of making comments which would not be considered appropriate in the workplace, and his behavior was unprofessional at the very least. In Stemple, supra, it was found that some discipline is proper to punish and deter this type of conduct.

Insubordination

Respondent contends that Grievant was insubordinate in his repeated discussions of the allegations against him with coworkers, when he had been directed not to do so.
"[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." Butts v. Higher Educ.Governing Bd./Shepherd College, 212 W. Va. 209, 569 S.E.2d 456 (W. Va. 2002). Although it is somewhat unclear what constitutes "willfulness," the cases seem to suggest that for a refusal to obey to be "willful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order. See Annotation,

Dismissal of Teacher - "Insubordination", 73 A.L.R.3d § 3 (1977). Butts, supra.

Respondent has established that Grievant was insubordinate. After being directed not to discuss the allegations against him while they were being investigated, Grievant admittedly discussed them with Ms. Vance on multiple occasions, and also with Mr. Carothers, both of whom were potential witnesses in the case. Although Mr. Carothers ended up representing Grievant, this does not excuse Grievant's clear defiance of the instructions of his superiors, which could have tainted an ongoing investigation. Grievant's remarks regarding his superiors and the allegations clearly show that he was angry about the investigation, supporting the finding that his insubordination was willful.

Threatening Behavior

Grievant was also suspended for statements he made about his manager, Mr. Flick, which Respondent contends constituted threatening behavior. Specifically, Grievant's comments that Mr. Flick "better have his ducks in a row," "shit would hit the fan," that Mr. Flick was going to "get a lawsuit against him," and that he could "eat shit and die"prompted Respondent's finding that he had violated DOP's Workplace Security Policy, which prohibits threatening or assaultive behavior.

As discussed in Burkhammer v. Dep't of Health & Human Resources, Docket No. 03-HHR-276 (Nov. 12, 2003), several factors must be evaluated in such cases, including whether the threat seems real, and the nature, likelihood and imminence of the potential harm. In the instant case, it is more likely than not that Grievant was venting his anger over the investigation, rather than having any intention of carrying out violence against Mr. Flick. Nevertheless, these statements were at the very least unprofessional and inappropriate comments for the workplace, especially when made about a superior, and they could also be characterized as insubordinate.

Performance

Respondent contends that Grievant has had performance issues dating back to his first year as a tax examiner. It has pointed to some specific events which occurred in 2000, 2001 and 2002, involving disputes with his supervisor and allegedly unprofessional conduct in his dealings with audit clients, which it believes support Grievant's suspension. However, these incidents are far too remote from the 2004 suspension to serve as justification for it. When each incident occurred, Respondent made the choice at that time whether or not to discipline Grievant for it, and it chose not to in each instance. Accordingly, events which occurred two, three and four years ago, which have not been

alleged to constitute any particular "pattern and practice" of behavior, cannot serve as the basis for a suspension imposed in 2004. See Lanham v. W. Va. Dep't of Transp., Docket No. 98-DOH-369 (Dec. 30, 1998). Moreover, these incidents appear to be more examplesof Grievant's inappropriate behavior, and do not necessarily constitute poor performance issues.

More recently, Respondent has pointed to the counseling he received in early 2003 from his supervisor, when Grievant was not producing the number of audits expected of him. As discussed above, Grievant apparently expressed unhappiness with his position during that meeting, and even indicated that he was seeking employment elsewhere. Thereafter, his production did improve, but had declined again toward the end of 2003. A review of the evidence in this case indicates that Grievant had an ongoing problem with his productivity, as it was noted in his September 2002 evaluation that he needed to spend more time in the field conducting audits. It is appropriate for an employer to discipline an employee who has not improved a specific area of his performance after being counseled to do so. See Rainey v. Dep't of Admn., Docket No. 04-ADMN-174 (Sept. 3, 2004).

Mitigation

"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). "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 forrehabilitation." Overbee v. Dep't of Health & Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Although Grievant has not specifically requested mitigation in this case, it is clearly appropriate, and may granted in accordance with the undersigned's authority to grant “fair and equitable relief,” pursuant to W. Va. Code § 29-6A-5(b). Respondent has failed to prove many of the charges against Grievant by a preponderance of the evidence, specifically that he was guilty of sexual harassment and that he engaged in a pattern and practice of that type of behavior at work. However,

Respondent's evidence does establish that Grievant has been unprofessional on many occasions, that his reactions to the investigation into his conduct were insubordinate, and that his performance had deteriorated somewhat at the end of 2003. Accordingly, the undersigned finds that Grievant's 30-day suspension should be reduced to 10 days, and Grievant is to be reimbursed for lost pay during the suspension period. Any further relief must be denied, due to Grievant's termination/resignation from employment with Respondent.

This decision is supported by the following conclusions of law.

Conclusions of Law

1. 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).

2. "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). SeeWorden 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).

3. Respondent has failed to establish by a preponderance of the evidence that Grievant has engaged in sexual harassment in the course of his employment.

4. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." Butts v. Higher Educ. Governing Bd./Shepherd College, 212 W. Va. 209, 569 S.E.2d 456 (W. Va. 2002).

5. Respondent has established by a preponderance of the evidence that Grievant was insubordinate.

6. Employees may be disciplined for failure to improve a specific area of performance after being counseled to do so. See Rainey v. Dep't of Admn., Docket No. 04-ADMN-174 (Sept. 3, 2004).

7. Respondent has established by a preponderance of the evidence that Grievant's

performance was below expected standards in early 2003 and had deteriorated again by the end of that year.

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 & Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

9. Because Respondent did not prove all of the charges against Grievant, mitigation of the discipline imposed is appropriate relief in this case.

Accordingly, this grievance is **GRANTED IN PART**, and Respondent is **ORDERED** to reimburse Grievant for twenty days of the thirty-day suspension. All further relief 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.

Date: October 27, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented by Charles Carothers, a coworker, and Respondent was represented by counsel, David M. Fryson.

Footnote: 2

Workers' Compensation is now separate from the Bureau of Employment Programs.

Footnote: 3

Grievant admitted that he believed that Ms. Rose had some personal interest in him, based upon their interactions during the training session.

Footnote: 4

Although Grievant was actually disciplined for violating WC's sexual harassment policy, only DOP's policy was introduced by Respondent as evidence in this grievance.