ROBERT L. MILLER,

Grievant,

v. **DOCKET NO. 03-HEPC-340**

HIGHER EDUCATION POLICY COMMISSION/

MARSHALL UNIVERSITY,

Respondent.

DECISION

Grievant filed this grievance on September 12, 2003, after he was dismissed from his position as a Campus Service Worker at Marshall University. He seeks reinstatement to his position and applicable back pay. His Statement of Grievance alleges a violation of the Americans with Disabilities Act of 1990 and of Respondent's progressive discipline policy. He claims Respondent did not take into account his medical condition, and that the disciplinary action was not initiated by his immediate supervisor. A level four grievance hearing was held in the Grievance Board's Charleston office on December 8, 2003. Grievant was represented by coworker Joseph Brumfield, and Respondent was represented by counsel, Jendonnae Houdyschell, Senior Assistant Attorney General. This matter became mature for decision on January 9, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant was employed by Respondent as a Campus Service Worker, with approximately ten years of service to the University.

2. On or about August 12, 2003, Grievant reported to work and was in a stock room changing

into his uniform when Charlie Harless, Assistant Supervisor of Campus Services walked by the doorway. Grievant was tucking his shirt in and called out to Mr. Harless, then stuck his thumb through the fly of his trousers and said “Look at this white owl.” Grievant intended to give the impression that he was exposing his penis.

3. Mr. Harless was offended. He went back to his office and called Brenda Fleming, Grievant's immediate supervisor, and told her about the incident. They agreed he should call their supervisor, Charles Newsome, Physical Plant Manager, and Mr. Harless did so.

4. Mr. Newsome advised Mr. Harless to fill out a "Performance Counseling Statement" form about the incident to serve as a written warning to Grievant. Mr. Harless did so and signed it in the space marked, "Supervisor's signature." Ms. Fleming signed as a witness.

5. John Workman witnessed the incident and concurred that Grievant did not expose his penis, but stated he did not realize it was Grievant's thumb until "after a second take." Grievant's Exhibit No. 2 at level three.

6. Mr. Newsome informed Grievant by letter dated August 28, 2003, that he was terminated from employment. This letter stated in part:

> The act of exposing yourself to an Assistant Supervisor or anyone else for that matter while on duty is inexcusable and will not be tolerated. This violates the University work rule prohibiting immoral or indecent conduct on University property. The University administration has approved our recommendation that you be terminated from employment at MarshallUniversity effective at the end of shift on Thursday, August 28, 2003. You are to remain on administrative leave with pay until the conclusion of your employment.

Respondent's Exhibit No. 1 at level three.

7. Grievant suffers from a bi-polar/manic depressive disorder, for which he must take medication to control, and has been treated for alcohol and substance abuse. He was not taking his medication at the time of the incident. He had not advised his employer about his condition, however, he had on two occasions presented papers showing he had been treated at a local psychiatric hospital following absences. He did not inform anyone why he was treated at this hospital.

8. Respondent's Classified Staff Handbook, in the section relating to disciplinary procedures, describes a system of escalating punishments for workplace offenses, but explicitly provides that "some infractions may warrant immediate suspension or dismissal." Grievant's Exhibit No. 1 at level four. Examples of such conduct are listed, including "sexual harassment, assault or rape," and

"immoral or indecent conduct on University property."

9. The Handbook further provides that an employee may be dismissed for "Infractions involving violations without the benefit of oral or written counseling."

10. On October 31, 2002, Mr. Newsome gave Grievant a warning memorandum after Grievant was seen with two bottles of beer on campus. This memo also provided Grievant with information on free alcohol treatment programs available to Grievant if he needed help with a problem.

11. Grievant was orally counseled by Mr. Newsome after Grievant accosted a female coworker and asked her questions of a sexual nature, and after he had climbed in through the window of a locked building in which another female employee was working,and asked her about the sexual preferences of another female employee. Both female employees gave Mr. Newsome written complaints about the incidents. Respondent's Exhibits Nos. 2 and 3 at level four. Grievant was told this behavior was not tolerable. Grievant did not mention his behavior was caused by his bipolar disorder or alcoholism.

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). Respondent's position is that Grievant's conduct, whether he actually revealed his penis or simulated it with his thumb, was gross misconduct for which he should be terminated. Grievant, who admits to simulating his penis with his thumb, contends it was just a joke in poor taste, and that his medical conditions excuse his conduct because Respondent knew about his conditions and did nothing to help him.

Grievant's position is one in which he refuses to accept personal responsibility for his own actions, but instead seeks to place the blame on his employer. However, even if it were his employer's duty to provide Grievant with treatment, there is no way it could force him to comply. In fact, Grievant admits he should have been taking medication that would help him control his impulses, but that he was not doing so at the time of the incident. Respondent had no power to make Grievant comply with the treatment he already had availed himself of.

Respondent terminated Grievant for exposing himself to a coworker. The evidence supports

Grievant's contention that he did not actually expose himself. However, Grievant clearly intended that Mr. Harless believe he was exposing himself and referred to histhumb using a slang term for a penis. The effect was the same, and it is the effect of sexual harassment that should be the concern of the employer. There is no excuse for Grievant's behavior.

Grievant argues in his brief that Grievant's act does not amount to indecent exposure under the criminal statutes of the state, and he is correct. Nevertheless, the conduct was immoral and indecent, and amounted to sexual harassment, all as expressly prohibited by Marshall's Code of Conduct. Grievant has not been accused of any crime, so the criminal definition is inapposite. However, given that the charge for which Grievant was terminated, exposing himself, was not proven, the next question is whether Grievant's actual conduct still supports his discharge.

As discussed above, Grievant's act still falls within the immoral and indecent conduct prohibition, and Respondent still considers the conduct reprehensible enough to warrant dismissal. 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 cannot substitute his judgement for that of the employer. Jordan v. Mason County Bd. of Educ., Docket No. 99- 26-8 (July 6, 1999); 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).

Grievant contends that termination is too severe a penalty for what was, to him, just a joke. 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, orreflects 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). "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).

Grievant has a very long work history with Respondent, with no evidence of performance problems. He has, however, recently been counseled on other, similar behavior. On October 31, 2002, he was warned against possessing alcohol on campus when he was seen with two bottles of beer. Obviously, this incident was not of the same type as the one for which Grievant was terminated, but it flows from the same medical conditions. However, Grievant has also exhibited at work other behavior that shows he does not respect the sexual boundaries of his coworkers. Despite oral counseling on these behaviors, he still escalated to the behavior for which he was terminated. Such inability to maintain proper workplace demeanor after having been warned does not foster confidence in Grievant's prospects for rehabilitation. Grievant blames his conduct on his condition, but he admits he has been treated for his condition and refuses to maintain his medication that would help him control his behavior. He offers no assurance that he will, in the future be able to comply with the terms of his treatment. Respondent's personnelpolicies clearly evidence its intent to keep immoral and indecent conduct off its campus, and Grievant has not shown this decision was arbitrary and capricious in any way.

To support his contention that Respondent improperly failed to follow its progressive disciplinary policy, Grievant cites a prior Grievance Board decision finding Respondent had improperly terminated an employee when it failed to provide a warning letter and improvement plan. However, that case is not comparable to Grievant's situation. In Howard v. Marshall University, Docket No. BOR-88-094 (Oct. 18, 1988), the employee was dismissed for unsatisfactory work performance, not for a specific, terminable act. In this case, Grievant's conduct falls squarely in the categories of infractions for which Respondent's policy expressly states an employee may be dismissed without progressive discipline.

Grievant also claims his rights have been violated under the Americans with Disabilities Act (ADA). This Grievance Board has determined that it does not have authority to determine liability for claims that arise under the ADA, (42 U.S.C. §§ 12111, et seq.). Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997); Rodak v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-536 (June 23, 1997). Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination," as that term is defined in W. Va. Code § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the ADA. In other words, the

Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims. Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). *See* Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Bowman, *supra*. Even if it did, Grievant cited no possible accommodation that would allow his behavior. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d). A grievant, seeking to establish a *prima facie* case of discrimination under W. Va. Code § 29-6A-2(d) must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Grievant presented no evidence that would establish proof of even the first of these three factors. He did not identify any other employee with whom he considered himself similarly situated, in a pertinent way. Grievant did attempt to compare his incident to the situation of another employee, David Jackson, who filed a grievance when he was suspended for unsatisfactory performance. Mr. Jackson apparently revealed that his performance problems stemmed from a drug problem, and he was permitted to seek treatment. However, Grievant was not disciplined for unsatisfactory performance, but instead for an overt act of immoral and indecent behavior. The two situations are not similar in a pertinent way.

The following conclusions of law support the outcome of this decision:

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 apreponderance 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.

2. This Grievance Board has determined that it does not have authority to determine liability for claims that arise under the ADA, (42 U.S.C. §§ 12111, et seq.). Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997); Rodak v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-536 (June 23, 1997). Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination,", as that term is defined in W. Va. Code § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the ADA. In other words, the Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims. Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). *See* Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Bowman, *supra*.

3. Respondent's policies expressly permit discharge of an employee for immoral or indecent conduct without progressive discipline.

4. Grievants conduct amounted to immoral and indecent sexual harassment.

5. 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 cannot substitute hisjudgement for that of the employer. Jordan v. Mason County Bd. of Educ., Docket No. 99- 26-8 (July 6, 1999); 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).

6. "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).

7. Grievant has not shown the penalty for his conduct should be mitigated.

8. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d).

9. A grievant, seeking to establish a prima facie case of discrimination and/or favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

10. Grievant did not establish a *prima facie* discrimination claim.

For the foregoing reasons, this grievance is hereby **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, and 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: January 21, 2004 _____

M. Paul Marteney

Administrative Law Judge