BRIAN EDMOND,

Grievant,

v. Docket No. 04-CORR-313

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

DECISION

Brian Edmond ("Grievant") filed this grievance directly at level four on August 12, 2004, challenging the termination of his employment at the Huttonsville Correctional Center ("HCC"). He seeks reinstatement, with back pay and benefits, plus interest. A level four hearing was held in Elkins, West Virginia, on November 8, 2004, and January 12, 13, and 14, 2005. Grievant was represented by counsel, David Sims, and Respondent was represented by Charles Houdyschell, Senior Assistant Attorney General. After a transcript of the level four hearing was prepared at the parties' request, the parties submitted fact/law proposals, the last of which were received by the undersigned on May 9, 2005.

The following pertinent facts have been proven by a preponderance of the credible evidence presented at the level four hearing.

Findings of Fact

1. Prior to his termination, Grievant had been employed at HCC for approximately 13 years. He began his employment as a correctional officer, but was laterpromoted to counselor, and ultimately became a case manager. Grievant was a case manager at the time of the events at issue in this grievance.

2. Beginning in January of 2003, Grievant entered into a romantic relationship with a coworker, Kirissa Siler, who was employed at HCC first as a correctional officer, and then as a counselor. She

began employment at HCC on May 1, 2001.

3. Through the course of their relationship, Grievant and Ms. Siler broke up and reunited on several occasions, but they were only apart for a day or two at a time.

4. In late February of 2004, Grievant and Ms. Siler's romantic relationship formally "ended." (See footnote 1) However, they continued to frequently spend time together and talk on the phone.

5. After their February breakup, coworkers told Grievant that Ms. Siler was saying negative things about him. As a result, Grievant phoned Ms. Siler at work on March 10, 2004, telling her that he heard she had been saying bad things about him and that she needed to stop. Grievant wrote a letter to Ms. Siler, which he handed to her at work on March 11, 2004. Grievant made statements in the letter to the effect that he did not appreciate her telling lies about him, that he had loved her, but he had decided he "deserved better." He ended the letter by stating:

> I absolutely never wanted to be enemies but that is evidently the path that you have chosen for us. It is a shame but I am absolutely pissed, so keep running your mouth & let the war begin. I seem to remember that I have a lot more firepower.

6. Ms. Siler took the March 11 letter to her supervisor, Robin Miller. A meeting was called that day, and Grievant, Ms. Siler, Ms. Miller, Deputy Warden Teresa Waid, and Warden William Haines were in attendance. During that meeting, Grievant was advised that his statements to Ms. Siler in the letter and phone call could be construed as threatening behavior, which would not be tolerated in the workplace. Grievant and Ms. Siler were told not to have any contact with each other while at HCC and to keep personal matters away from the facility. After the meeting, Grievant and Ms. Siler smoked a cigarette together and had a friendly conversation.

7. Ms. Siler took Grievant's "fire power" statement in the March 11 letter to mean that he would try to get her into trouble at work. (See footnote 2) When he made the statement, Grievant meant that he could say many more negative things about her than she could say about him.

8. On March 23, 2004, Ms. Siler left HCC at approximately 1:20 p.m. to purchase supplies for her unit at the local Wal-Mart store.

9. Grievant "clocked out" of work at 1:56 p.m. on March 23, 2004, to pick up his daughter from school. After speaking to his ex-wife on the phone, he learned that he would not be picking up his daughter, so he went to Wal-Mart to purchase golf balls.

10. When Grievant entered Wal-Mart at approximately 2:30 p.m., Ms. Siler was already shopping. Grievant walked around the store with Ms. Siler, assisted her with her shopping, and went

to the checkout line with her. The receipt from Wal-Mart indicates that Ms. Siler checked out at 2:56 p.m. 11. Grievant helped Ms. Siler load her purchases into her vehicle in the Wal-Mart parking lot, and during their conversation, she told Grievant that she had to go to K-Mart to purchase basketballs. Grievant accompanied Ms. Siler to K-Mart, but an argument ensued between them, so Grievant left.

12. Ms. Siler did not complain to anyone about Grievant speaking with her at Wal-Mart and K-Mart at the time these events occurred.

13. On March 24, 2004, Grievant received a written reprimand from Warden Haines for his conduct toward Ms. Siler on March 11, 2004. He advised Grievant that his conduct violated DOC Policy Directives prohibiting disrespectful conduct and threatening behavior. Grievant was also reminded in this reprimand that personal matters should be kept out of the workplace.

14. Throughout the month of April, 2004, Grievant and Ms. Siler saw each other socially outside of work and talked on the phone virtually every day. Coworkers Matthew Currence and Roger Channel, along with Grievant's brother and sister (who both work at HCC), saw Grievant and Ms. Siler together at Beander's, a restaurant and bar in Elkins which they frequented, in mid-April. On these occasions, they were touching or hugging each other, appearing to be together as a couple.

15. On April 23, 2004, Grievant phoned Ms. Siler at her home sometime between 10:00 and 11:00 a.m. Grievant was at HCC on his lunch break at the time. Grievant asked Ms. Siler to attend his daughter's birthday party that evening, an argument ensued, and she hung up on Grievant. He called back and left a message on her answering machine, stating “I don't know why you hang up on me for no reason, but you'reacting like a complete asshole and you are making me fucking hate you. You're making me hate you and you may have hung up on me one too many times.”

16. Ms. Siler approached Grievant at work later in the day on April 23, 2004, and apologized for the way she spoke to him and for hanging up on him. She advised Grievant that she had sent flowers and balloons to his daughter's school.

17. During the evening of April 23, 2004, Grievant and Ms. Siler agreed to meet at Beander's. They spent some time playing poker machines together, then left together in Ms. Siler's car to get money from a bank ATM machine. They then returned to the bar and spent more time together before going home for the evening (separately).

18. Sometime in April of 2004, Grievant and Ms. Siler discussed whether either of them had

dated anyone else since they had been “broken up.” Ms. Siler admitted to having gone out once with a state trooper, Charlie Traynor.

19. On the evening of April 28, 2004, Grievant was at a local gas station, and Ms. Siler followed him into the parking lot. A conversation ensued, and Grievant got into Ms. Siler's parked vehicle to talk. Grievant accidently sat on Ms. Siler's cell phone, picked it up, and saw that the state trooper had just recently called her. An argument ensued, because Grievant felt that Ms. Siler had been dishonest about her relationship with the trooper. At the end of the conversation, Grievant told Ms. Siler he never wanted to see her again, and Ms. Siler told Grievant she was going to “get [his] ass in trouble at work.”

20. Later in the evening on April 28, 2004, Grievant left a note in Ms. Siler's car while she was having dinner with her father. The note made statements to the effect that Grievant was hurt by her dishonesty, that he was confused by it, and that he felt “stupid”for believing her. He also made statements wishing her luck with her new boyfriend (calling him “Jethro”) and said “thanks for shitting on me . . . you're a real class act.”

21. Also on the evening of April 28, 2004, after Ms. Siler had threatened Grievant, Rocky Maxson, an HCC coworker (who eventually became Ms. Siler's current boyfriend), saw Ms. Siler drive by and called her on her cell phone to tell her that Grievant was four cars behind her. Ms. Siler then proceeded to drive to the Elkins police station to report Grievant for following her and to take out a domestic violence petition on him. Grievant followed her into the parking lot at the police station and begged her not to try to get him into trouble. While she was in the police station, Grievant called her on her cell phone four times.

22. On the morning of April 29, 2004, Grievant went to the workplace of Ms. Siler's mother and handed her a sealed envelope, asking Mrs. Siler to give the envelope to Kirissa, because “he would not be seeing her anymore.” Inside the envelope were nude pictures that Grievant had taken of Ms. Siler, and he wanted her to have them, so she would not be concerned about him showing them to anyone. Grievant taped the envelope and wrote Ms. Siler's name across the seal, so she would know if anyone else opened it.

23. Also on April 29, 2004, Ms. Siler reported to her immediate supervisor, Carolyn Meade, that Grievant had left a “threatening” phone message on her machine on April 23, 2004. Ms. Siler then had Robin Miller come to her house to listen to the message, and a copy of the message was

given to Ms. Miller.

24. Ms. Siler went to the local magistrate on April 29, 2004, and filed a domestic violence petition, even though she was advised by the magistrate and the state police that the charges would not be upheld, since there had not been any actual violence in therelationship. However, once such a petition is filed, the accused is not allowed to have contact with the victim until a hearing is held, giving Ms. Siler a “reprieve” from Grievant's alleged harassment.

25. At a hearing regarding the domestic violence petition, the magistrate dismissed the charges, commenting on Ms. Siler's recent voluntary contact with Grievant, along with the absence of actual domestic violence.

26. On April 30, 2004, after being informed by Ms. Siler of the domestic violence petition, Diana Miller issued a written memorandum to Grievant, advising him not to have any contact with Ms. Siler on HCC grounds in person, by telephone, or through third parties. He was also cautioned not to enter the north side of the institution where Ms. Siler was stationed. (See footnote 3)

27. During the first week of May, 2004, Ms. Siler filed a petition in magistrate court, alleging Grievant had committed the crime of stalking. Pursuant to this petition, Grievant was arrested on the stalking charge on May 6, 2004. Grievant posted bond and was released, returning to work at HCC. The conditions of Grievant's bond were no direct or indirect contact of any kind with Ms. Siler.

28. On May 20, 2004, Ms. Siler filed an affidavit in magistrate court, stating that Grievant had called her cell phone three times on May 16, 2004, at 3:00 a.m., in violation of the conditions of his bond.

29. Grievant was arrested while at work on approximately May 21, 2004, for allegedly violating his bond by contacting Ms. Siler. 30. Grievant was immediately suspended from work by Warden Haines because of the arrest, but the warden advised him that he could return to work if he “took care of the stalking charge.”

31. Grievant obtained an attorney to represent him regarding the stalking charge. Because it would take approximately two months to receive a trial date on the charge, and because he could not continue to do without his pay, Grievant pled guilty to the misdemeanor charge of harassing phone calls. He paid a fine and received two years of probation.

32. On May 5, 2004, Ms. Siler filed an EEO complaint, alleging Grievant sexually harassed her at work throughout March and April of 2004.

33. During an investigation of the EEO complaint, interviews were conducted by Wayne Armstrong, Human Resources Director for Corrections, and Vickie Elkins, an investigator from the Bureau of Employment Programs. In her statement, Ms. Siler told the investigators that Grievant had left numerous notes on her car at work, including the following:

> A note from late 2003, while the two were still a couple, where Grievant told Ms. Siler how much he appreciated her and thanking her for her support during problems he was having. Ms. Siler told investigators he had given the note to her in late February of 2004 after the breakup.
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> A note from late January, 2004, while the two were still a couple, where Grievant discussed how upset he was, because Ms. Siler was considering moving away and taking a job in Norfolk, Virginia. Ms. Siler told investigators that the note was given to her at work in early March of 2004, after the breakup.
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> A note from December of 2003, when Ms. Siler and Grievant had temporarily broken up, which discussed selling some property, and also in which Grievant told Ms. Siler how much he missed her and asking her to comeback to him. Ms. Siler told investigators Grievant gave her the note at work in late March of 2004.
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> A note from July of 2003, when the couple had temporarily broken up, in which Grievant expressed his feelings for Ms. Siler and told her how much he wanted to get back together. He also stated he did not want to go to the beach without her, a trip which they ended up taking later that month. Ms. Siler told investigators this note was given to her at work in early March of 2004, after the breakup.
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> The note left on her car while she was having dinner with her father on April 28, 2004.
>
> A letter Grievant gave to Ms. Siler just after their breakup in February of 2004, expressing his love for her and his sadness about their breakup.
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> A note Grievant wrote to Ms. Siler's mother dated April 7, 2004, in which he apologized for the trouble he had caused her, telling her how much he appreciated how nice she had been to him, and stating that he wanted her to know that he had really loved Kirissa.

34. Ms. Siler admitted under cross examination at the level four hearing that, after the March 11, 2004, meeting in which Grievant was told not to have contact with her at work, he did not give her any notes at work or leave them on her car at work, contrary to what she told the investigators.

35. During the EEO investigation, Ms. Siler did not tell investigators that, after the phone message Grievant left on her answering machine on April 23, while he was at work, she apologized to him and spent the evening with him.

36. The EEO investigators only interviewed witnesses whose names were given to them by Ms. Siler, and they did not interview individuals whom Grievant told them could corroborate his side of the story.

37. After the EEO investigation was concluded, Grievant was dismissed from his employment at HCC on July 15, 2004. The termination later issued by Commissioner JimRubenstein stated that Grievant was being dismissed for harassing Ms. Siler in the workplace. Further, the letter mentioned that Grievant's arrest for terminating the conditions of his bond on the stalking charge indicated he had violated portions of Policy Directive 129.00 regarding conduct not discrediting a Corrections employee, conducting oneself in a respectful manner, and avoiding action adversely affecting the public confidence in Corrections. Grievant was also terminated for engaging in sexual harassment in the workplace, violating the Division of Personnel's Workplace Security Policy, disrespectful conduct, disruptive behavior, insubordination, and unprofessional conduct.

38. Grievant's termination was effective on July 30, 2004.

39. Grievant and Ms. Siler reconciled their romantic relationship for a brief period of time in mid- to late August of 2004, but once again terminated the relationship.

40. Throughout his employment, Grievant has received good evaluations, and the only discipline on his record were a few counseling sessions, the majority of which occurred in early 2004, regarding Grievant's leave usage.

41. After Grievant and Ms. Siler's breakup in February of 2004, both were observed in the other's work area on several occasions.

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 ismore 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.

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 & 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).

___The emphasis of Respondent's case is that Grievant harassed Ms. Siler *in the workplace* and exhibited threatening behavior toward her, in violation of policies of Corrections, the Division of Personnel, and other laws. In addition, Respondent contends that Grievant's being charged with stalking and his arrest for bond violations at work have reflected discredit upon him and upon HCC. However, while Respondent's points are well taken, and are quite valid on their face, they ignore the many, many mitigating and surrounding circumstances involved in this case.

The first and most important consideration upon which to focus in this case is that the EEO complaint and ensuing investigation were the direct cause of Grievant's termination. The conclusion of that investigation was that Grievant harassed Ms. Siler *at work* throughout March and April of 2004. A review of the evidence reveals this to be completely untrue. Under cross examination, Ms. Siler herself admitted that, after the meeting in March of 2004, during which Grievant was advised of the unacceptable nature of his conduct toward Ms. Siler in the workplace, he did not leave any notes on her car atwork, nor did he have contact with her at HCC. Absent the single phone call made by Grievant while he was working on April 23, 2004, leaving a less-than-pleasant message on Ms. Siler's answering machine, Grievant complied with his superior's directives.

Respondent has specifically alleged that Grievant has violated the West Virginia Division of Personnel's ("DOP") 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.

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. As set forth in the findings of fact, above, while there were numerous encounters between Grievant and Ms. Siler after their February, 2004, breakup, none of them occurred at HCC, with the arguable exception of the April 23 phone call. As discussed in Bowe v. Worker's Compensation Comm'n, Docket No. 04-WCC-268 (Oct. 27, 2004), “Respondent is not authorized to discipline Grievant under a State sexual harassment policy for conduct which . . . did not occur in the workplace nor while Grievant was performing his job duties.” While the incidents which occurred in late April and early May between Grievant and Ms. Siler were quite unfortunate, they did not occur at HCC.

Moreover, there is overwhelming evidence that Ms. Siler voluntarily spoke to Grievant and spent time with him during the period in question, making her claim of “sexual harassment” not credible. 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.) As defined in the DOP policy, sexual advances must be "unsolicited and unwelcome" in order to constitute harassment. 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. 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. In the instant case, Ms. Siler testified at the level four hearing that Grievant constantly “whined” about their breakup and how he wanted to get back together. A review of the notes given to Ms. Siler by Grievant, regarding which she was dishonest as to when and where they were given to her, reveals only that Grievant loved her and experienced loss, hurt, and anger over their breakup. There is nothing intimidating or hostile in these notes, and the evidence establishes that they were likely not even offensive to Ms. Siler, as shown by her voluntarily contact with Grievant afterwards, even resulting in reconciliation after he was fired from his job.

As to the Wal-Mart incident, Grievant's version of the events of that day are more believable than Ms. Siler's. While she claimed that he followed her around the store, then proceeded to follow her to K-Mart afterwards, after being told she did not want him around her, Grievant credibly testified that Ms. Siler made no such statements to him. Grievant's testimony that Ms. Siler was friendly to him and did not appear to feel his presence to be unwelcome is quite credible, in view of the many encounters between them in which they both voluntarily participated. 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); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing thecredibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95- 23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess 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 footnote 4) See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Unfortunately, Ms. Siler did not establish herself as a credible witness. First, as already discussed, she portrayed the several notes which Grievant wrote as being given to her at work and written after the mid-March meeting in which Grievant was warned not to have contact with her at work. At the level four hearing, Grievant explained the time frame for each note, based upon its contents, and Ms. Siler herself admitted that none of them were given to her at work after March 11, 2004, directly contrary to her previous assertions. Additionally, when questioned by the EEO investigators, while complaining about Grievant's April 23 phone message on her answering machine, she failed to mention her “date” with Grievant later that evening. She continued to deny spending the eveningwith Grievant on April 23 after investigators informed her of Grievant's version of the events of that evening. Then, to make matters worse, Ms. Siler stated that she “just forgot” to tell the investigators about that evening, when questioned about it at the level four hearing. She failed to explain how she could “just forget,” after being told “Grievant says you spent that evening together.” On the other hand, Grievant was an extremely solid, credible witness. Under cross examination, while Respondent's counsel repeatedly questioned Grievant's veracity, Grievant remained calm, composed, and did not waiver from his version of all of the events in question. Conversely, Ms. Siler has seemingly said whatever has been necessary to bolster her case against Grievant.

As to the April 23, 2004, phone call to Ms. Siler that Grievant made from HCC, it did violate Warden Haines' directive to Grievant not to have any contact with Ms. Siler while working. Therefore, the question would be whether or not that violation was sufficient to result in the punishment rendered, which will be discussed later in this Decision. However, as to whether or not that phone call constituted harassment, the uncontroverted evidence is that Ms. Siler spent the evening with Grievant afterwards and admitted that they had “a really good time,” so it is impossible to conclude that this was harassment.

Grievant has also been charged with violating DOP's Workplace Security Policy, which prohibits threatening, hostile or abusive behavior, whether physical or verbal. As discussed in Burkhammer v. Department 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. The only incidents which actually occurred in the workplace were the March 11 phone call and note, along with the April 23 phone message, when Grievant called Ms.Siler from HCC. DOP's policy defines “threatening behavior” as conduct which a reasonable person perceives as “so outrageous and extreme as to cause severe emotional distress or cause, or is likely to result in, bodily harm.” Once again, Ms. Siler's admitted repeated, voluntary contact with Grievant after these alleged “threats” were made, tends to indicate that she was not afraid of Grievant, and she stated more than once in this proceeding that she did not feel physically threatened by Grievant or afraid of him at any time. As to severe emotional distress, there is no evidence whatsoever that Ms. Siler was suffering from this during the events in question. (See footnote 5) Finally, it is important to keep in mind that Ms. Siler did not complain about Grievant's behavior at Wal-Mart or during the April 23 phone call, until *after* their “final” argument on April 28, 2004.

Another major factor in Grievant's termination appears to be the fact that he was arrested at work in early May of 2004 for allegedly violating the conditions of his bond on the stalking charge. Respondent alleges that Grievant's conduct in this regard has violated various portions of Correction's policy regarding appropriate conduct and integrity. Again, Respondent's point is well taken on its face, but ignores important mitigating factors. Clearly, Ms. Siler filed both domestic violence and stalking charges against Grievant after their argument on April 28, 2004, during which she threatened to get Grievant into trouble at work. The same behavior of which she complained when she filed the charges was notoffensive to her at the time it occurred, but became offensive after the April 28 argument. Also, it is important to keep in mind that Grievant's bond revocation was based upon the claims of Ms. Siler and Rocky Maxson that Grievant called her cell phone at 3:00 a.m. on May 16, 2004. As established above, Ms. Siler has displayed credibility problems, and Mr. Maxson, who is Ms. Siler's present boyfriend, certainly has ample motivation to keep Grievant from returning to HCC. Therefore, in view of Grievant's credible testimony that he did not call Ms. Siler on May 16, the undersigned must find that Respondent has failed to prove by a preponderance of the evidence that this occurred.

While it certainly reflects poorly on an employee when he is arrested at work, it is also improper to punish him for events beyond his control. Grievant did not ask Ms. Siler to file a false claim which would result in his bond revocation, and the evidence does not prove that the bond revocation was

justified. Grievant's guilty plea to harassing phone calls was understandable under the circumstances, since he wanted to return to work quickly, and because he did call Ms. Siler's cell phone while she was at the police station attempting to file charges against him on the night of April 28.

Respondent's termination letter to Grievant stated that the “Division of Corrections has no recourse but to dismiss you from employment as your continued presence in the workplace jeopardizes our obligation to provide a safe and secure workplace, free of harassment and/or discrimination, for all our employees.” Considering all of the events which preceded Grievant's dismissal from employment, it is almost absurd to characterize his behavior toward Ms. Siler as discriminatory, harassing, or potentially threatening. Not only did Ms. Siler voluntarily spend time with Grievant throughout March and April of 2004, she willingly reconciled with him in August of 2004 *after he was terminated for harassingand threatening her!* This is hardly the behavior of an employee in jeopardy who needs the protection of her employer.

Nevertheless, Grievant did violate a direct order from Warden Haines not to have contact of any kind with Ms. Siler at work. While Grievant's characterization of the Wal- Mart incident as not being “at work” (although Ms. Siler was on work time) is quite understandable, he did make the phone call to her from work on April 23, 2004, in direct violation of that directive, and he did so in a quite unpleasant manner. This conduct would constitute insubordination. "[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 (2002).

Finally, the undersigned must determine whether Grievant's misconduct warranted termination, which it undeniably did not. As discussed above, Respondent's case against Grievant was based largely upon misinformation provided by Ms. Siler, and most of the events in question did not occur in the workplace and some were beyond Grievant's control. "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 the punishment imposed by anemployer 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).

There can be no question that Grievant violated his employer's directive to have no contact with Ms. Siler while on the premises of HCC, and his conduct during the April 23 phone call was certainly unprofessional and offensive. However, Grievant's arrest for bond violations was beyond his control and, while it may have appeared badly to anyone at HCC who witnessed it, it cannot be characterized as conduct on Grievant's part which brought discredit to the institution. Pursuant to Corrections' Policy Directive 129.00 on progressive discipline, the next step after a written reprimand is a suspension. However, that policy provides that “an employee may [also] be suspended without pay while the agency conducts an investigation because of threat of continuing danger.” Accordingly, in view of Ms. Siler's (unsubstantiated) allegations of a physical threat from Grievant, it was appropriate for Respondent to suspend him during the EEO investigation. Therefore, in light of all of the evidence of record, the undersigned finds that Grievant should have been suspended for 10 days without pay at the conclusion of the investigation.

In accordance with this Decision, the following conclusions of law are appropriate.

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).

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 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 & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. "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).

4. State employees are prohibited from engaging in threatening, hostile or abusive behavior, whether physical or verbal, in the workplace. In such cases, the employer must evaluate whether the threat seems real, and the nature, likelihood and imminence of the potential harm. Burkhammer v. Dep't of Health & Human Resources, Docket No. 03-HHR-276 (Nov. 12, 2003). 5. Respondent has failed to prove by a preponderance of the evidence that Grievant sexually harassed or threatened Kirissa Siler while at work, in violation of any state policy.

6. "[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 (2002).

7. Respondent has proven by a preponderance of the evidence that Grievant was insubordinate when he called Ms. Siler on April 23, 2004, after being told not to have any contact with her while on HCC premises.

8. "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).

9. A ten-day suspension without pay is an appropriate penalty for Grievant's insubordination, given the facts and circumstances of this case, pursuant to Corrections' Policy Directive 129.00.

Accordingly, this grievance is **GRANTED IN PART**, and Respondent is **ORDERED** to reinstate Grievant to his position, with all applicable back pay and benefits, with interestat the statutory rate.

However, a ten-day suspension period should be deducted from Grievant's back pay, along with the period during which the EEO investigation took place. Record of the 10-day suspension should be placed in Grievant's personnel file. (See footnote 6)

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: May 18, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

As the saga of this relationship unfolds in this Decision, it will become apparent to the reader why the word "ended" must be used only loosely when referring to the parties in question.

Footnote: 2

As will be discussed later, Ms. Siler was concerned that Grievant would inform HCC officials that he had taken nude photos of her, or that he would distribute those photos.

Footnote: 3

Grievant's work station was on the opposite side of the institution.

Footnote: 4

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as 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).

Footnote: 5

It should be mentioned at this juncture that Respondent attempted to introduce into evidence court documents from 1992 in a case where Grievant allegedly kidnaped and committed domestic violence against a former girlfriend. Grievant pleaded guilty to misdemeanor battery in that case. The undersigned rejected the evidence, due to the fact that the events in question occurred over 12 years before the events which gave rise to this grievance. See Hixon v. Wood County Bd. of Educ., Docket No. 01-54-115 (Aug. 10, 1991).

Footnote: 6

Of course, if Respondent feels it necessary to do so, explicit prohibitions regarding contact between Grievant and Ms. Siler at the facility may be implemented upon his return to work.