THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WILLIAM M. MULLINS,

Grievant,

v. **Docket No. 2013-1660-MAPS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/SOUTHWESTERN REGIONAL JAIL,

Respondent.

DECISION

Grievant, William M. Mullins, filed this expedited level three grievance dated April 11, 2013, against his employer, West Virginia Regional Jail and Correctional Facility Authority/Southwestern Regional Jail, stating as follows: "[g]rievant was wrongfully terminated for being involved in a consensual relationship with another employee. Grievant was treated differently than other employees involved in relationships." As relief sought, Grievant seeks reinstatement and back pay.

A level three hearing was held on September 10, 2013, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, and by counsel, Paul M. Stroebel, Esq., Stroebel & Johnson, PLLC. Respondent appeared by counsel, Shane P. McCullough, General Counsel. This matter became mature for decision on October 29, 2013, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was accused of sexually harassing a subordinate employee. After an investigation, Grievant was terminated from his position at the regional jail for sexually harassing a subordinate employee. Grievant denied that he sexually harassed the

subordinate employee, and asserted that he and the subordinate were instead involved in a consensual romantic relationship. Respondent failed to meet its burden of proving the charges alleged against Grievant. Accordingly, this grievance is GRANTED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At all times relevant herein, Grievant, William M. Mullins, was employed as a correctional officer, having the rank of Corporal, by Respondent at the Southwestern Regional Jail ("SRJ").

2. Respondent terminated Grievant, upon recommendation of the facility's disciplinary review committee, after an investigation into allegations that Grievant sexually harassed one of his subordinates, Correctional Officer II Amber Mitchell.[1]

3. By an incident report dated March 15, 2013, CO II Mitchell reported to Lieutenant Hansford Slater that on March 9, 2013, Grievant had made inappropriate comments to her, including saying in front of co-workers that she should have his baby, and that he had prevented her from doing her work by harassing her. Further, in this report, CO II Mitchell implied that Grievant had subjected her to inappropriate, unwelcome romantic advances.

[1] Neither Respondent nor Grievant introduced the letter of termination into evidence at the level three hearing. For unknown reasons, a copy of such was contained in the file, but its origin is unknown. It is possible that the letter had been attached to the statement of grievance or the initial statement filed by Grievant, but such is unknown. Accordingly, the letter will not be considered as evidence in this matter. The exclusion of this letter should have little, to no, effect on the outcome of this grievance because the parties agree Grievant was terminated after it was alleged he sexually harassed a subordinate employee.

4. At or around the time CO II Mitchell filed her incident report, she and Grievant were involved in some type of romantic relationship. In addition to working together, the two were "friends" on Facebook and used the website to communicate.

5. On or about March 5, 2013, Grievant's wife logged on to Facebook using Grievant's account and reviewed the following message from CO II Mitchell: "[l]ove you too Mo. You can let me know Wednesday night what the fuck was going on. You had me so fucking stressed out…. I'm just glad you are okay." Grievant's wife sent CO II Mitchell the following message from Grievant's account in response: "Amber, this is Mo's wife. I was just going to let you know, I know everything that as (sic) been going on. I see he must have told you he loved you because you said you loved him TOO (sic)." Grievant's wife and daughter had been taking steps to prevent Grievant from accessing his Facebook account so that they could intercept communications from CO II Mitchell. *See,* testimony of Dawn Mullins; Grievant's Exhibit 1.

6. CO II Mitchell filed her incident report nearly one week after Grievant made the alleged comments about having his child, and just days after Grievant's wife confronted her on Facebook about her relationship with Grievant.

7. CO II Mitchell's incident report was forwarded to RJA's Chief of Internal Affairs, Austin Burke. Upon his receipt of the same, Mr. Burke initiated an investigation. CO II Mitchell's incident report makes no mention of her recent communications with Grievant and his wife on Facebook.

8. During his investigation, Mr. Burke interviewed CO II Mitchell, Grievant, and other RJA employees. Mr. Burke summarized these interviews in written reports,

some of which were later submitted to the disciplinary review committee.[2] These reports do not indicate whether the interviews were recorded in any fashion, and contain no transcripts of all that was said during the interviews. Moreover, these reports do not indicate whether any of the statements contained therein are direct quotes, and they do not contain all statements made during the interviews.

9. During her interview with Investigator Burke, CO II Mitchell did not tell him about her relationship with Grievant. CO II Mitchell also made other claims of sexual harassment against Grievant that were not contained in her incident report. However, CO II Mitchell informed Investigator Burke that she had told Grievant that she loved him. CO II Mitchell did not inform Investigator Burke of her communications with Grievant and his wife on Facebook.

10. Investigator Burke interviewed Grievant as part of his investigation. During this interview, Grievant informed Investigator Burke that he and CO II Mitchell had been involved in a romantic relationship. Grievant informed Investigator Burke that he had communicated with CO II Mitchell on Facebook. However, those communications were not made available to Investigator Burke during his investigation.

11. In his reports, Investigator Burke concludes that Grievant sexually harassed CO II Mitchell. Investigator Burke did not include in his report that CO II Mitchell had reported to him that she had told Grievant that she loved him.

12. Investigator Burke testified before the RJA disciplinary review committee concerning his investigation into CO II Mitchell's incident report and the allegations she made during her interview, and presented the committee his investigation reports.

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[2] It is unclear from the evidence presented which documents were provided to the disciplinary review committee.

13. The disciplinary review committee made its decision to terminate Grievant based solely upon Investigator Burke's testimony and reports. The disciplinary review committee was not made aware of the Facebook communications exchanged by Grievant, CO II Mitchell, and Grievant's wife. The disciplinary review committee was also never made aware that CO II Mitchell had admitted to Investigator Burke that she told Grievant that she loved him.

14. The Facebook communications of Grievant, CO II Mitchell, and Grievant's wife would have been mitigating factors to be considered when determining whether Grievant sexually harassed CO II Mitchell, and what, if any, discipline to impose on Grievant.

15. Despite being subpoenaed to testify at the level three hearing in this matter, CO II Mitchell did not appear. CO II Mitchell did not assert she was unavailable to testify and she did not request to be released from her subpoena. CO II Mitchell ignored the subpoena she was served. Further, there are no sworn statements from CO II Mitchell in the record of this proceeding.

16. CO II Mitchell resigned her position with the RJA in April 2013, soon after Grievant was terminated.

17. No witnesses to the comments alleged to have occurred on March 9, 2013, were called as witnesses at the level three hearing. Further, no witnesses to any of CO II Mitchell's other allegations were called as witnesses.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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 & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent asserts that it properly terminated Grievant's employment because he sexually harassed a subordinate, CO II Mitchell, in violation of a number of RJA policies. Grievant denies Respondent's claims, asserting that he and CO II Mitchell were involved in a consensual relationship. Grievant, therefore, asserts that he could not have committed any of the policy violations alleged. Grievant further argues that having romantic relationships with co-workers or subordinates is common at RJA and is not grounds for discipline.

Grievant is a permanent state employee. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt, 1, *Oakes v. W. Va. Dep't of Finance and Admin.,* 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

Although Respondent failed to introduce into evidence Grievant's termination letter, which should have listed the charges alleged against him, Respondent primarily

asserted at the level three hearing that Grievant sexually harassed CO II Mitchell in violation of RJA policies, and that such constitutes good cause for terminating Grievant's employment. Grievant denies the allegations that he sexually harassed CO II Mitchell. Accordingly, the first issue to be addressed is whether Grievant's conduct toward CO II Mitchell constitutes sexual harassment.

RJA Policy 3041 defines sexually harassing behavior as follows:

> . . . any **unsolicited and unwelcome** verbal or physical conduct which includes, but is not necessarily limited to the following:
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> 1. Sexually explicit or implicit propositions;
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> 2. Improper questions about an employee's private life;
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> 3. Sexually discriminatory ridicule, insults, jokes or drawings;
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> 4. Undesired, intentional touching such as embracing, patting, or pinching;
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> 5. Remarks directed against one's sex as a class or group;
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> 6. Threat of rape, attempted or actual sexual assault;
>
> 7. Repeated sexually explicit or implicit comments or obscene and suggestive remarks that are objectionable or disconcerting to the employee; and
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> 8. Offers of employment benefits in exchange for sexual favors or threats or reprisals for negative responses to sexual advances.

(Emphasis added).

In its case in chief, Respondent presented no witnesses with first-hand knowledge to support its claim that Grievant sexually harassed CO II Mitchell. Instead, Respondent relied primarily on the testimony of Investigator Burke and Chief of

Operations Crook.[3] Therefore, much of the evidence Respondent presented was hearsay. Under the statues and procedural rules regarding the grievance process, the formal rules of evidence are not applicable in grievance proceedings, except as to the rules of privilege recognized by law. *See,* W. VA. CODE § 6C-2-4(a)(3). The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Accordingly, an administrative law judge must determine what weight, if any, that is to be accorded hearsay evidence in a disciplinary proceeding. *See, Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV June 9, 2011); *Warner v. Dep't of Health and Human Resources,* Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't Health and Human Resources,* Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and

[3] This grievance is limited to Grievant's alleged conduct toward CO II Mitchell. Respondent attempted to argue that after it terminated Grievant, other employees made allegations of sexual harassment against Grievant. However, as those other allegations were not a factor in the decision to terminate Grievant's employment, and as no other complaints were made against Grievant before he was terminated, Respondent was not allowed to present any such evidence at the level three hearing.

whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *See, Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011)*; Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997); *Sinsel v. Harrison County Bd. of Educ.,* Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't,* Docket No. 90-8-115 (June 8, 1990).

In applying these factors, the undersigned determines that much of the evidence presented by Respondent is entitled to no weight. All of Investigator Burke's testimony regarding the allegations CO II Mitchell made during his interview with her is hearsay. CO II Mitchell failed to appear at the level three hearing even though she had been subpoenaed to testify. CO II Mitchell did not ask for the subpoena to be quashed, and did not assert that she was unavailable to appear on the date of the hearing. She simply ignored the subpoena. There are no sworn statements from CO II Mitchell. Further, the interviews Investigator Burke conducted were not recorded; therefore, there are no transcripts of what was said during them. From the evidence presented, it appears that Investigator Burke did not attempt to record the interviews.

In addition to Investigator Burke's reports being hearsay, they are incomplete. His reports are essentially summaries of the interviews. They do not contain all statements made during the interviews. Further, it is impossible to discern which, if any,

of the statements contained in the reports are direct quotes because the reports contain no quotation marks. Investigator Burke admitted during his level three testimony that CO II Mitchell had stated during her interview that she had told Grievant that she loved him. However, that statement is not contained in his report, and the disciplinary review committee was not advised of that statement. Investigator Burke also admitted during his testimony that he found no evidence to corroborate CO II Mitchell's allegations before he presented his report and conclusions to the disciplinary review committee.

The RJA discipline review committee's decision to terminate Grievant was based entirely on the testimony and reports of Investigator Burke. Grievant and CO II Mitchell were not called to testify before the committee. Chief of Operations Crook, who was a member of the disciplinary review committee in this case, testified that information such as CO II Mitchell telling Grievant that she loved him would have been a mitigating factor to be considered by the disciplinary review committee. Also, the disciplinary review committee did not know about the communications among Grievant, CO II Mitchell, and Grievant's wife on Facebook which clearly indicate that Grievant and CO II Mitchell were involved in a romantic relationship. Mr. Crook testified that those communications would have also been mitigating factors to be considered because they suggest a romantic relationship existed between Grievant and CO II Mitchell.

Grievant has maintained that he was involved in a consensual relationship with CO II Mitchell, and that his conduct does not meet the definition of sexual harassment because it was not unwanted or unsolicited. According to the evidence presented, romantic relationships among employees at RJA are common and do not violate any

policies. Respondent has failed to produce any reliable evidence to suggest that the relationship between Grievant and CO II Mitchell was anything other than consensual.

For the foregoing reasons, the undersigned concludes that Respondent has failed to prove by a preponderance of the evidence that Grievant violated RJA policies regarding sexual harassment.

The following Conclusions of Law support the decision reached:

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988).

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt, 1, *Oakes v. W. Va. Dep't of Finance and Admin.,* 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. An administrative law judge must determine what weight, if any, that is to be accorded hearsay evidence in a disciplinary proceeding. *See, Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV June 9, 2011); *Warner v. Dep't of*

Health and Human Resources, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't Health and Human Resources,* Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

4. The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *See, Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011)*; Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997); *Sinsel v. Harrison County Bd. of Educ.,* Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't,* Docket No. 90-8-115 (June 8, 1990).

5. Respondent has failed to prove by a preponderance of the evidence that Grievant violated RJA policies regarding sexual harassment.

Accordingly, this Grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to the position of Corporal at the Southwestern Regional Jail with full back pay and benefits, plus interest.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: December 20, 2013.

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Carrie H. LeFevre
Administrative Law Judge