WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

D. H.,[1]
Grievant,

v. **Docket No. 2011-0792-DEA**

DIVISION OF REHABILITATION SERVICES,
Respondent.

DECISION

Grievant, D.H., was employed by Respondent, Division of Rehabilitation Services, ("DRS") as a Rehabilitation Program Specialists for approximately one year. D.H.[2] filed a level one grievance form dated November 11, 2010, contesting the suspension and termination of his employment and seeking, "Reinstatement and back pay from the date of suspension to the date of reinstatement."[3] A level one conference was held on December 3, 2010, and a decision denying the grievance was issued on December 8, 2010.

Grievant appealed to level two on December 23, 2010, and a level two mediation was conducted on March 11, 2011. Grievant appealed to level three on March 26, 2011.[4] The first day of the hearing was conducted by Administrative Law Judge Carrie LeFevre in the Charleston office of the West Virginia Public Employees Grievance Board on July 26, 2012. Grievant appeared *pro se* and Respondent DRS was represented by Katherine A. Campbell, Assistant Attorney General. During the hearing

[1] Grievant will be referred to by his initials because of the sensitive nature of the issues in this decision.
[2] D. H. holds a Doctorate in Psychology.
[3] A three-page statement of grievance was attached to the grievance form, and is incorporated herein by reference.
[4] During the first two levels of the grievance procedure, Grievant was represented by John A. W. Lohmann, Esquire. Sometime after the matter was appealed to level three, attorney Lohmann took employment out of state and withdrew as counsel for Grievant. This matter was continued to give Grievant opportunity to engage a replacement, but ultimately Grievant proceeded without assistance of counsel.

ALJ LeFevre discovered she had a possible conflict of interest related to one of the witnesses and voluntarily recused herself from further participation in the matter. The grievance was reassigned to the undersigned ALJ and the final level three hearing was held at the same location on December 12, 2012.[5] The parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was received on January 29, 2013. This matter became mature for decision on that date.

Synopsis

Respondent dismissed Grievant for unprofessional conduct after discovering that he had engaged in oral sex with a co-worker in his office during regular work hours. Grievant asserts that he was on break when the event took place, and that it did not constitute unprofessional conduct. Grievant also argues that he was subjected to discrimination because the co-worker was not disciplined. Respondent proved that the conduct was unprofessional and that Grievant was not similarly situated to the co-worker involved in the incident.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact[6]

1. Grievant, D.H., was employed by Respondent DRS as a Rehabilitation Program Specialist on July 16, 2009.

[5] Once again, Grievant appeared *pro se* and Respondent was represented by Katherine A. Campbell, Assistant Attorney General.

[6] These findings contain descriptions of sexual activity. The material is necessary to understand the nature of the allegations of misconduct involved in this matter.

2. Grievant had a satisfactory performance record before the incident which gave rise to this action. His general demeanor at work demonstrated competence and professionalism.[7]

3. Grievant previously had a sexual relationship with C.S.[8] who is a co-worker in Grievant's workplace. The sexual relationship began around the time Grievant began working at DRS and had ended before July 2010. The two remained friends thereafter.

4. Occasionally, C.S. would spend time in Grievant's office with him during breaks. Sometimes she would bring a food to share and they might play cards for fifteen minutes.[9] It was not unusual for the office door to be closed at these times.

5. At approximately 3:00 p.m., on July 12, 2010, C.S. took some cheese into the office of D.H. to share during a break. Upon entering the office, C.S. shut and locked the door from the inside. C.S. complained to D.H. that she had shoulder pain. She sat on the floor in front of D.H. who was seated in his office chair, and D.H. massaged C.S.'s shoulders. C.S. had her back to D.H. and was seated between his knees. Grievant's Exhibit 1.

6. Eventually, D.H. moved his hands down to C.S.'s breasts. C.S. gave his hand a friendly bite and threw them away from her breasts. D.H. continued to massage C.S.'s shoulders and again moved his hands down on to her breasts. C.S. bit his hand

[7] Level three testimony of three co-workers.
[8] The co-worker will be identified by her initials to preserve her privacy.
[9] Grievant's Exhibit 1, the Investigation Report compiled by the Director of the West Virginia Equal Employment Opportunity ("EEO") Office and an Addendum to the Investigation Report Complied by Ann Kautz, Respondent's Senior Manager for Human Resources. The information in this finding comes from the statement given by C.S. to the EEO investigators.

again but not hard enough to leave a mark and moved them away.[10] Grievant's Exhibit 1.

7. The second time C.S. moved D.H.'s hands away; she turned toward him and saw that he had his penis out. D.H. pulled her head toward him and placed his penis in her mouth. C.S. pushed away and D.H. ejaculated. C.S. stated that she "disassociated" after the incident. After a short period, C.S. left D.H.'s office.[11] Grievant's Exhibit 1.

8. On July 26, 2010, C.S. met with her supervisor Angela Farha. Ms. Farha is Respondent's Manager of Staff Development and EEO Counselor. She has been the direct supervisor for C.S. since 2002.

9. C.S. wanted her supervisor to know that she had taken sick leave for three days because she had been sexually assaulted by a friend. C.S. did not tell Ms. Farha that the incident happened at work. Ms. Farha noted that Grievant was often "dramatic" and that C.S. has a history of telling others at work that she had been the victim of unwanted sexual advances in the past. Ms. Farha did not believe C.S., but told her that if she had been sexually assaulted she should contact the police.[12]

10. On August 6, 2010, Ms. Farha was approached by Carol Johnson-Cyrus about a conversation Ms. Johnson-Cyrus had with C.S. Ms. Johnson-Cyrus is the Librarian for the DRS and Ms. Farha is her immediate supervisor. Ms. Johnson-Cyrus related that she had been approached by C.S. and C.S. told her that she had been sexually assaulted by D.H. in his office. C.S. described the incident that took place on

[10] C.S. stated to the investigators that D.H. told her to, "Go with the moment" and that he wanted to have intercourse with her.
[11] D.H. testified that C.S. gave no indication that she was upset or angry about the encounter.
[12] Grievant's Exhibit 1. The information in this finding comes from the statement Ms. Farha gave the EEO investigators and her level three testimony.

July 12, 2010, and indicated that D.H. physically forced her to participate. Ms. Johnson-Cyrus reminded C.S. that she had been seen going into D.H.'s office on several occasions, and that she had performed child-sitting services for D.H., all of which occurred after the incident. Thereafter, C.S. told her that D.H. didn't physically force her but rather "the assault could have happened psychologically."[13] Ms. Johnson-Cyrus did not believe that C.S. had been sexually assaulted.

11. Upon getting more detail from Ms. Johnson-Cyrus, Ms. Farha concluded that the incident that C.S. had spoken to her about was the same one she had related to Ms. Johnson-Cyrus. Supervisor Farha then realized for the first time that the incident took place in a DRS office.

12. After it became clear that the incident happened in the workplace, Ms. Farha reported this incident to Ann Kautz, DRS Human Resources ("HR") Manager.[14]

13. On August 25, 2010, Ms. Kautz reported the allegations to her supervisor, Deborah Lovely, Director of DRS. Because of the sensitive nature of the allegations, Director Lovely felt it would be best to have any investigation conducted by an outside agency. She instructed HR Manager Kautz to contact the State Equal Employment Opportunity ("EEO") Office and ask that that office conduct an investigation.

14. HR Manager Kautz called Jann Hoke, Director of the West Virginia EEO Office, the same day. EEO Director Hoke agreed to come to the DRS office to discuss an investigation in to an allegation of sexual harassment. EEO Director Hoke met with

[13] Grievant's Exhibit 1. The information in this finding comes from the statement Ms. Johnson-Cyrus gave the EEO investigators and her level three testimony. The portion in quotation marks was in quotation marks in the EEO statement.
[14] The specific day this report took place is unclear. It occurred between August 6 and August 25, 2010.

HR Manager Kautz that afternoon and agreed to conduct an investigation into a "potential EEO violation without a named complainant."[15]

15. EEO Director Hoke enlisted Franklin Hairston, Director of Staff Development and EEO Counselor for Sharp Hospital to conduct the investigation with her. EEO director Hoke selected Mr. Hairston because he had conducted more EEO investigations than she had and because she had heard in passing that the victim might be mentally unstable. Director Hoke had no training in mental health issues, but Mr. Franklin did have such training.[16]

16. EEO Director Hoke and Mr. Franklin were appointed to conduct the investigation on August 26, 2010, by DRS Director Lovely. They reviewed the material they were provided by the DRS management and began interviewing DRS staff the next day (August 27, 2010). The investigators took recorded statements form Angela Farha, Carol Johnson-Cyrus, Frank "Tony" Guyton,[17] and C.S.[18] In addition to her description of the incident, C.S. stated that she "cared for the man" and did not want to see his career affected. Grievant's Exhibit 1.

17. The next business day after her interview with Director Hoke, (August 30, 2010) C.S. "sent an unsolicited two-page single-spaced e-mail to Jann Hoke, giving her personal mental health history and ending with a recommendation of 'therapy/counseling' as 'discipline' for [D.H.]."[19]

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[15] Grievant's Exhibit 1, introduction to the report by EEO Director Hoke. The quotation marks were in the original. The complaint was listed in this way because no individual had actually made an EEO complaint and the investigation was instigated by the agency (DRS).
[16] Sharp Hospital is a State psychiatric hospital.
[17] Mr. Guyton is a painter in the DRS Maintenance Unit. He had a "working relationship-type friendship with C.S. She told him about the incident with D.H.
[18] The statement of C.S. is set out in previous finding of fact herein.
[19] Grievant's Exhibit 1, Director Hoke's report on the interview with C.S.

18. At this point, the investigators temporarily stopped the investigation to determine if it was an EEO policy or a Division of Personnel policy related to reporting allegations of criminal conduct unearthed in the course of an EEO investigation. Director Hoke ascertained that no policy was in place and decided to suspend the investigation without interviewing D.H. She was unsure if the investigators would need to give D.H. a "Miranda" warning or follow other procedures required in an investigation of alleged conduct. Director Hoke decided to stop the investigation.

19. EEO Director Hoke provided DRS with a report of the investigations with the following determination:

> As a result of the above, the EEO subject matter being investigated is determined to be UNSUBSTANTIATED at the time.[20]
>
> This determination is made subject to the outcome of an appropriate criminal investigation, particularly given the alternative investigative outcomes that may result.
>
> Should it be determined that no criminal conduct has occurred, then the issues of sexual harassment and workplace harassment may need to be readdressed within the EEO context.[21]

EEO Director Hoke suggested that the DRS refer the matter to the West Virginia State Police.

[20] Director Hoke testified that the complaint was listed as unsubstantiated because it was not complete. No finding could be made without an interview with the accused.
[21] Grievant's Exhibit 1.

20. Because of the sensitive nature of the allegations and the incident occurred on State property; DRS Director Lovely referred the matter to the West Virginia Division of Protective Services[22] rather than the State Police.

21. The Division of Protective Services received the allegations from DRS Director Lovely on September 7, 2010.[23] Lt. Mark Neal and Lt. Mike Mace were assigned to conduct the investigation. They interviewed C.S. in a conference room at the DRS. C.S. described the encounter with the shoulder rub and D.H. rubbing her elsewhere as she had described it to the EEO investigators. C.S. also told the officers that she and D.H. had been together after the incident, but not sexually. Grievant's Exhibit 2, page 5 of 6. C.S. signed her statement on September 15, 2010. The signed statement was not included in Grievant's Exhibit 2.

22. Lt. Neal and Lt. Mace met with Grievant at the DRS offices on September 13, 2010, and talked with him about the allegation of sexual misconduct. D.H. was surprised by that allegation and decided he needed to talk with a lawyer before providing a statement. By e-mail dated September 16, 2010, Grievant advised the officers that he had set a date to talk with an attorney. Grievant's Exhibit 2, page 5 of 6.

23. On September 15, 2010, Lt. Mace and Lt. Neal met with an Assistant Prosecuting Attorney and advised him "that based on [C.S.'s] own statement we did not believe a crime had occurred that was prosecutable."

24. The officers reported their conclusions to DRS Director Lovely prior to meeting with the Assistant Prosecutor. Director Lovely assigned James Quarles, DRS

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[22] This division is commonly referred to as the Capitol Police. Director Lovely referred the investigation to the Capitol Police rather than the State Police because she felt the latter would be a public record and she did not believe that would be fair to Grievant if the charge was not substantiated.

[23] Grievant's Exhibit 2, Investigative Reported completed by the Division of Protective Services. *See* page 1 of 6.

Assistant Director, and H.R. Manager Kautz to complete the internal investigation started by the EEO office. Director Lovely also suspended Grievant for thirty days without pay while the investigation was being conducted. Respondent's Exhibit 1, suspension letter.

25. H.R. Manager Kautz has been employed by DRS for thirty-one years, six of which have been in her present position. Assistant Director Quarles had been employed by Respondent for forty-three years. He served as Personnel Director for twenty-three years. He is now retired. Together, these managers have conducted many disciplinary-related interviews with employees.

26. Assistant Director Quarles and H.R. Manager Kautz interviewed Grievant before he left the office on September 13, 2010, and Grievant confirmed that oral sex had occurred in his office while he and C.S. were taking a break. He insisted that the oral sex was consensual. The investigator interviewed C.S. prior to interviewing Grievant. She stated that she did not consent.

27. H.R. Manager Kautz prepared a report titled Addendum to Investigation Report which she provided to Director Lovely. This addendum was dated October 1, 2010, and was attached to the EEO report. The addendum described the investigation conducted by H.R. Manager Kautz and Assistant Director Quarles and contained the following determination:

> It is not possible to determine whether or not the act of oral sex was consensual between the two parties. However, oral sex between the two parties on State property during working hours in Mr. [H.'s] office has been admitted. Whether or not a criminal act was committed will be determined by the Prosecuting Attorney's Office and the Police.

The report concluded that the addendum was being turned over to Director Lovely for review and action. Grievant's Exhibit 1.

28. After receiving the addendum, Director Lovely decided that if the sex was consensual she was going to dismiss both parties. She instructed Ms. Kautz and Mr. Quarles to interview C.S. one more time to determine if they felt she was telling the truth. C.S. continued to insist that the oral sex was not consensual and that was reported to Director Lovely by the investigators.

29. By letter dated October 13, 2010, Director Lovely informed Grievant that the investigation suspension was being extended for another 30 days. She also informed Grievant that he was to meet with H.R. Manager Kautz and Mr. Pisnu Bua-lam, Grievant's direct supervisor, on October 15, 2010, to discuss the outcome of the investigation and for a predetermination conference. The meeting took place as scheduled and Grievant was informed that termination of his employment was being considered. Respondent's Exhibit 2.

30. By letter dated November 1, 2010, DRS Director Lovely informed Grievant that his employment with DRS was terminated effective that day. Grievant was dismissed for engaging in oral sex in his office with another employee, which Director Lovely described as inappropriate and unacceptable workplace behavior.

31. C.S. received no discipline for the sexual incident because Mr. Quarles and Ms. Kautz reported to Director Lovely that they believed her statement that the oral sex was not consensual.

32. C.S. did not appear as a witness at the first day of the level three hearing. She was subpoenaed for the second day of hearing, but asked to be released because

of a conflict with her daughter's wedding. In a telephone hearing regarding the subpoena, Grievant released C.S. from the subpoena he had requested.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ*. Docket No.96-20-380 (Mar. 18, 1997); *Leichliter v. W. Va. Dep't of Health and 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.*

Grievant was a permanent State employee in the classified service. 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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that

a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

Respondent dismissed Grievant from employment for engaging in oral sex in the work place during regular business hours which Respondent characterized as "inappropriate and unacceptable work place behavior."[24] Grievant does not dispute that he engaged in sexual activity in his office during normal office hours.[25] He argues that his door was closed and he and his co-worker were on break, therefore, there was nothing wrong with the conduct. Additionally, Grievant argues that he has been subjected to discrimination because the other person who participated in the activity received no discipline.

Respondent noted that when Grievant was employed he received a policy requiring him to conduct himself professionally while working for Respondent. Grievant signed an acknowledgement form stating that he had received and understood the policy. Respondent argues that it is extremely unprofessional for employees to have sex in the workplace during regular office hours. At least one of the managers testified that their clients and tax payers in general deserved better behavior from Respondent's employees. She noted that in addition to being unsanitary, sex in the office was outside

[24] Respondent's Exhibit 3.
[25] Approximately 3:00 p.m. *See* Finding of Fact 5, *supra.*

of social norms, wasted time and resources, and exposed the employer to potential claims of sexual harassment. Grievant countered that social morays have evolved to the point where sex in the office is far from uncommon,[26] and is therefore, not an offense which, standing alone, would justify dismissal from employment.

Neither party presented legal authority that specifically addressed the issue of sexual acts at the workplace during work hours. The West Virginia Public Employees Grievance Board has upheld disciplinary actions against employees who were viewing sexually explicit material at work. *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011) (Holding that viewing sexually explicit material on a computer in the workplace constituted "gross misconduct."); *Kennard v. Tucker County Bd. of Educ.*, Docket No. 01-47-591/628 (Mar.12, 2002) (Holding that viewing pornographic material on a school computer constituted "immorality" pursuant to W. VA. CODE § 18A-2-8.); and *Beck v. Div. of Corr./Huttonsville Corr. Ctr.*, Docket No. 2009-1567-MAPS (Feb. 2, 2010) (Upholding the suspension of an employee for viewing sexually explicit magazines while at work.). Obviously, if viewing sexually explicit material on the job is grounds for termination, committing sexual acts in one's office during working hours is as well. Additionally, such activity puts the employer at significant risk of sexual harassment claims from employees who may hear the activity, or accidently walk in on the participants. Even more likely is the scenario that a party to the activity may claim that it was coerced or unwelcome if the relationship ends poorly.

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[26] A scientific survey conducted by a news organization in 2004 found that 12 percent of those surveyed admitted to having sex at the office. *ABC NEWS PRIMETIME LIVE POLL: THE AMERICAN SEX SURVEY*; ANALYSIS by GARY LANGER, with CHERYL ARNEDT and DALIA SUSSMAN Oct. 21, 2014.
http://abcnews.go.com/Primetime/PollVault/story?id=156921&page=1#.Ubdtk9ipzSg

Respondents met their burden of proving by a preponderance of the evidence that Grievant had oral sex in his office during regular work hours and that the activity constituted significantly unprofessional conduct. While Grievant had a work record of professional competence otherwise, he had only worked for Respondent for one year. The unprofessional conduct was sufficiently egregious to justify his dismissal from employment given all the circumstances.

Grievant's next argument is that Respondent discriminated against him because they terminated his employment but gave no discipline to the other party who participated in the incident. For purposes of the grievance procedure, "discrimination" is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA.CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). Grievant argues that he and a co-worker were similarly-situated because they engaged in a sex act in his office during working hours, yet he was dismissed and the co-worker was not disciplined at all. The difference in treatment does not appear to be related to their job responsibilities and it was not agreed to in writing.

Respondent counters that the two were not similarly-situated because C.S. did not consent to the sex. Respondent argues that the parties were treated differently because C.S. did not participate voluntarily and therefore was not culpable. Therefore, whether the sex act was indeed consensual is essential to the determination of discrimination.

Unfortunately, neither C.S. nor D.H. testified at level three. The only evidence that is available is the statements given to investigators by the participants. D.S. steadfastly insisted that the sex was consensual, C.S. participated willingly, and he did not force her to do anything. C.S. consistently states that the sex was not consensual. She told witnesses and investigators that Grievant physically and psychologically forced her to participate after she repeatedly told Grievant "no."

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* information. *See Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1588-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999).

Since neither C.S. nor Grievant testified, the undersigned was unable to observe their demeanor under oath. Grievant seemed calm and earnest while presenting his case, but that is not the same. There are instances where C.S.'s actions do not seem consistent with her statement. She voluntarily came into Grievant's office, shut and locked the door. She sat on the floor between his legs and asked him to rub her shoulders. When D.H.'s hands strayed to her breasts she moved them away and bit him in a friendly way, but she did not move away. Additionally, the first two people she spoke with about the incident had known her for some time and did not believe her. She did not make an EEO complaint nor go to the police. Her employer did both of those things for her.

On the other hand, C.S. was interviewed by six professionals[27] and consistently stated that she did not consent to the sex act. She was personally interviewed by two managers of Respondent, who have a combined 29 years of experience as HR managers, and they were convinced that she was telling the truth. The undersigned did not get the opportunity to see this person give a sworn statement and will not overturn the credibility determination of those who did. Consequently, it is established that C.S. and Grievant were not similarly-situated, and Grievant failed to establish the affirmative defense of discrimination by a preponderance of the evidence.[28] Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the

[27] Two EEO investigators, two police officers, and two of Respondent's managers.
[28] Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence. 156 C.S.R.1 § 3

evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989).

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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam).

3. Respondents met the burden of proving by a preponderance of the evidence that Grievant had oral sex in his office during regular work hours and that the activity constituted unprofessional conduct egregious enough to support dismissal from employment. *See generally, Crites v. Dep't of Health & Human Ser*., Docket No. 2011-0216-DHHR (Nov. 16, 2011); *Kennard v. Tucker County Bd. of Educ.*, Docket No. 01-47-591/628 (Mar.12, 2002); and *Beck v. Div. of Corr./Huttonsville Corr. Ctr*., Docket No. 2009-1567-MAPS (Feb. 2, 2010).

4. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) That the different treatment is not related to the actual job responsibilities of the employees; and,

> (c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. Grievant did not prove by a preponderance of the evidence that Respondent discriminated against him by not disciplining C.S. and dismissing him.

Accordingly, the grievance is DENIED.

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 (2008).

DATE: JUNE 17, 2013

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WILLIAM B.MCGINLEY
ADMINISTRATIVE LAW JUDGE