BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

IN THE MATTER OF ELAINE FANNING, Grievant, v. STATE OF DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES Agency	DOCKET NO. 95-03-11 OPINION AND ORDER

BEFORE Woo, Chairperson, Burns, Vice-Chairperson, Bowers, Fullman and Green, members, constituting a lawful quorum of the Board pursuant to 29 Del Code, Section 5908(a).

And now, this 14th day of March, 1996, it appearing to the Board that:

This matter came before the Board for an initial hearing on May 17, 1995, and an interim order was issued on July 8, 1995 dismissing grievant's claim under Merit Rule 21.0111, but permitting grievant to amend her notice of appeal by June 17, 1995 to reflect a claim of discrimination under Merit Rules 19.0000 and 21.0112.

The grievant timely filed her amended notice of appeal dated June 6, 1995, and this matter came back before the Board on September 27, 1995.

SUMMARY OF EVIDENCE

1. Elaine H. Fanning was sworn and testified that she was hired as a probationary employee on December 1, 1993 as a Residential Manager at the Stokely Center, Georgetown, Delaware. Ms. Fanning testified that she worked on November 7, 1994 and left town on November 8, 1994 on scheduled and approved compensatory leave. Ms. Fanning testified that she returned to Baltimore on November 29, 1995 and since she was not feeling well, she contacted her supervisor to take two days of sick leave on November 30 and December 1, 1994, which was approved.

2. Ms. Fanning testified that on December 1, 1994 she stopped by the reception desk between 8:00 and 9:00 PM, and the receptionist advised her that she did not have a paycheck for her,. Ms. Fanning testified further that Mrs. Penny Orndorff entered the administration building during this time and claimed not to know where her check was, but that she would look into it.

3. Ms. Fanning testified that on December 2, 1994 she received a certified letter from Carmen R. Nazario, Secretary of the Department of Health and Social Services, dated November 10, 1994, notifying her that she was being terminated immediately. Ms. Fanning testified that the envelope was postmarked November 21, 1994.

4. Ms. Fanning testified that she spoke to Kim Nowacki, Personnel Assistant, on December 5, 1994 who told her that she had her paycheck but wanted Ms. Fanning's authorization to change the compensatory time to annual leave. Ms. Fanning testified that she denied Ms,. Nowacki's request and was transferred to Mr. John M. Brion, Personnel Officer, who said he would look into it.

5. Ms. Fanning testified that she received an undated letter from Mr. Brion on January 24, 1995 along with her November 30, 1994 paycheck. Ms. Fanning testified that she received another paycheck in February, 1995.

6. Ms. Fanning testified that she was 52 years of age at the time she was terminated and was replaced by a Ms. Phyllis Neal, who she believes is 38 years of age and who was hired in March 1995. Ms. Fanning testified that she filled out the top part of the Employee Performance Planning and Appraisal (EPPA) on December 27, 1993, and that the job requirements were stated, however, she was never reviewed using the form.

7. Ms. Fanning testified that she received a reprimand in May, 1994 for not timely completing individual client reports. Ms. Fanning testified that the incidents cited were typical of the IPP that were completed during April 1994, as the facility was undergoing its second licensing survey since her hiring. Ms. Fanning testified that this first incident established a pattern of differential treatment, that included harsh treatment by supervisors, including the

tone of voice used when speaking to her and remarks made at team meetings with all staff which were condescending in nature.

8. Ms. Fanning testified that she was directed to move outdoor lawn furniture due to an anticipated nor'easter that caused her to suffer a job-related injury. Ms. Fanning testified she was denied pay for the compensatory time earned and that Ms. Neal, who she believed was under the age of forty, was moved into her position when she was terminated.

9. Upon the close of the Plaintiff's case, the Department moved to dismiss plaintiff's grievance for failure to establish a prima facia case of age discrimination.

THE LAW

Age Discrimination in Employment Act, (ADEA) 29. U.S.C. § 633(a), text omitted.

29. Del. C. § 5931. Grievances.

> "The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The Director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, please employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of the chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days. (29 Del. C. 1953, § 5931; 55 Del. Laws, c. 443, § 6, 69 Del. Laws, c. 436, § 7.)" Effect of amendments --- 69 Del. Laws, c. 436, effective July 14, 1994, rewrote this section.

19. Del. C. § 711. Unlawful employment practices; employer practices.

(a) It shall be an unlawful employment practice for an employer to:

> (1) Fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, marital status, color, age, religion, sex or national origin; or

(2) Limit, segregate or classify employee in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the individual's status as an employee because of such individual's race, marital status, color, age, religion, sex or national origin.

Merit Rule 19.0000 Non-Discrimination Policy

19.0100

Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline or any other aspect of personnel administration because of political or religious opinions or affiliations or because of race, national origin, age, sex, physical or mental disability, or other non-merit factors will be prohibited.

19.0200

Specific age, sex, physical or mental requirements which constitute a bona fide occupational qualification necessary to proper and efficient administration may be required. (See also 21,0113.)

19.0300

Grievances and appeals arising from such factors shall be made in accordance with Chapters 20.0000 and 21.0000.

Merit Rule 21.0112 Appeal from Discrimination

Any applicant or employee who has reason to believe that he/she has been discriminated against because of an interpretation or application of the Merit Rules by the Director or any procedures or regulations established by the Director or any procedures or regulations established by the Director for the purpose of implementing the Merit Rules may appeal directly to the Merit Employee Relations Board within ten (10) working days of the date of the action being appealed. Such appeal must be based on discrimination due to religious or political opinions or affiliations, national origin, race, or other non-merit factors. Any employee who has reason to believe he/she has been discriminated against by action within an agency should initiate a grievance in accordance with the grievance procedure. (See also 20.0300.)

FINDINGS OF FACT

1. Ms. Elaine Fanning was employed by the Department of Health and Social Services at the Stokley Center, Georgetown, Delaware from December 1, 1993 until November 18, 1994.

2. Ms. Fanning was terminated by letter mailed November 22, 1994.

3. Ms. Fanning was 53 years old at the time of termination.

4. Ms. Fanning had received a written reprimand and counseling prior to termination.

5. Ms. Fanning's termination was not based on age but upon job performance.

CONCLUSION OF LAW

The Board finds by a preponderance of the evidence that Ms. Elaine Fanning was terminated during her probationary period in accordance with the Merit Rules and the federal Age Discrimination in Employment Act, (ADEA) 29. U.S.C. § 633(a), a grievant must show that:

(1) She is a member of the protected group, and

(2) that she suffered unfavorable employment action taken by the employer, and

(3) that age was a determining factor in employee's decision to take adverse action.

The grievant failed to establish by a preponderance of the evidence that age was a determining factor in employer's decision to take adverse action, as Ms. Fanning testified to the written reprimand and counseling undertaken by the agency prior to termination. See Proud v. Stone, (4th cir.) 945 F.2d 796 (1991).

ORDER

The grievance is dismissed.

IT IS SO ORDERED

Katy K. Woo, Chairperson

Robert Burns, Vice-Chairperson

Walter Bowers, Member

Gary Fullman, Member

Dallas Green, Member

APPEAL RIGHTS

29 Del. C. § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

Mailing Date: March 15, 1996

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