BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF GARY E. ONKEN, Grievant v. DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, Agency	**DOCKET NO. 96-01-71** **FINDING OF FACT** **CONCLUSION OF LAW** **OPINION AND ORDER**

BEFORE Katy K. Woo, Chairperson, Robert Burns, Vice Chairperson, Gary Fullman and Dallas Green, Members of the Merit Employee Relations Board, constituting a lawful quorum of the Merit Employee Relations Board ("Board") pursuant to 29 Del. C., § 5908(a).

APPEARANCES:

For the Grievant: Roy S. Shiels, Esquire
Brown, Shiels & Chasanov
108 East Water Street
PO Drawer F
Dover, Delaware 19903

For the Department: Merrilyn Ramsey, Personnel Administrator
Department of Natural Resources and
Environmental Control

AND NOW, to-wit, this 26th day of June, 1996, the above-referenced matter having been before the Board for an evidentiary hearing on June 6, 1996, for the reasons set forth hereinafter, the Board makes the following findings and conclusions and enters the following Order:

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NATURE OF THE PROCEEDINGS

This matter came before the Board for evidentiary hearing as the result of direct appeal pursuant to Merit Rule Nos. 20.037 and 21.0100 of a two-day suspension imposed on Gary E. Onken by Gerard L. Esposito, Director of the Division of Water Resources of the Department of Natural Resources and Environmental Control ("DNREC"). The two-day suspension was effective on December 28 and 29, 1995 and was imposed for the alleged misconduct of repeatedly and knowingly lying during the conduct of an investigation and intentionally misleading the investigator.

SUMMARY OF THE EVIDENCE

Captain William P. McDaniel, II, a Regional Environmental Protection Officer, who has 22 years with DNREC and is a graduate of the Delaware State Police Academy with specific training in internal affairs investigations, provided sworn testimony concerning the investigation he conducted resulting from a sexual harassment complaint filed on September 20, 1995 by Wanda Wright regarding a "screen saver" program depicting a partially-nude female clothed only in an Indian headdress and loin cloth which had been placed on a computer she shared with the Grievant. Capt. McDaniel was the only witness offered by the agency, and he identified two exhibits: the first, marked as Joint Exhibit 1, was a chronology of the investigation from September 14, 1995 through October 11, 1995; the second, marked as State's Exhibit No. 2, was the report of the investigation by McDaniel to Chief William W. Hill dated October 10, 1995.

As a result of the investigation, three individuals received disciplinary action. One for bringing the screen saver program into the workplace, one for placing it on the computer jointly used by Gary Onken and Wanda Wright, and the Grievant, Gary Onken, for his conduct during interviews conducted as a part of the investigation.

Captain McDaniel interviewed Gary Onken on two occasions as a part of the investigation. The first interview was on October 5, 1995, and the second was on November 2, 1995, after the submission of the investigation report by Capt. McDaniel. The second interview of Mr. Onken was, according to McDaniel, conducted at the direction of Director Esposito

after McDaniel had completed his investigatory report on October 10, 1995. McDaniel testified that the charges against Onken developed as a result of the November 2nd interview.

At the beginning of the second interview, Mr. Onken wanted to review any notes McDaniel had from his October interview. This made McDaniel suspicious. McDaniel testified that Onken's "body language" caused him to think that Onken was being evasive and so he looked for inconsistencies between what Onken had said at the October interview and what was stated at the November interrogation. At the first interview, Onken had been more "laid back" or at ease and had, according to McDaniel, indicated that he felt the screen saver incident was intended as a joke played on him by some unidentified individual, perhaps in the computer support group. In contrast, during the November interrogation, Onken professed to have been shocked and offended by the incident. Also, Capt. McDaniel believed that Mr. Onken knew more than he was telling about who had placed the image in the computer. McDaniel testified that at the end of the November 2, 1995 interview of Onken, in the presence of other department officials, including Director Esposito, he gave his view that Onken was being evasive; had been inconsistent in his statements; and had hindered the investigation by not giving more specific information in the first interview. The discipline against Mr. Onken arose exclusively from the results of the November interview as Capt. McDaniel thought the matter was closed on October 11, 1995 when he turned in his investigative report which did not recommend any disciplinary action against Gary Onken.

Wanda Wright, who had filed the complaint about the screen saver incident, was sworn. Ms. Wright recounted that on Monday, September 18, 1995 when she turned on the computer which she shared with Gary Onken, she was offended to see an image of a partially clothed female in native American headdress and loin cloth. Onken was not working that day, and she confronted him the next morning about the image on the screen. He told her that he had found the image on the screen the previous Friday and had contacted Richard Gardner in the computer support section and told him to remove the image so that Onken could log out of the computer. Ms. Wright testified that Gary Onken seemed annoyed that Richard Gardner had not removed the image. Neither she nor Gary Onken knew how to get the image off the screen. Richard Gardner was the quality assurance manager and was in charge of providing computer support. She and Gary Onken confronted Gardner about the fact that the image was still on the computer after Gary Onken had asked that it be removed and Gardner just shrugged his shoulders and sloughed the matter off. She thereafter reported it to Human Resources. She testified that it is

now known that Richard Gardner was responsible for putting the image on the computer and that she was dissatisfied with the way in which her administrator, Dr. Harry Otto, had handled the matter.

Gary E. Onken, the Grievant in this proceeding, was sworn and testified that at 4:35 P.M. on Friday, September 15, 1995, after a lengthy personnel meeting, he returned to his office where he shared a computer with Wanda Wright. He found an image of a partially-clothed female on the computer screen and could not get the image off the screen to log out. He had an appointment and was in a hurry to leave. He called Richard Gardner into the cubicle where the computer was located and told him to get the image off the screen so that he (Onken) could log out and turn the machine off. Gardner sat down at the keyboard, and Onken turned his back. When he turned around, the screen was clear, and Gardner told him it was okay to log out. Onken testified that he "parked" the computer and left at about 4:45 P.M. thinking the matter had been taken care of. He did not work on Monday, and on Tuesday, when he came into the office, Wanda Wright confronted him about the image on the screen. Onken recounted to her the events of the preceding Friday with Richard Gardner and that he was surprised that the image was still there and had not been removed. Both Onken and Wright then went into Gardner's office, but he would not say anything about the incident and just shrugged it off. Onken testified that he did not know until later that Gardner had been responsible for putting the image on the computer.

Onken testified that around October 5, 1995, Capt. McDaniel asked him to come up to McDaniel's office. The Chief of the Environmental Protection officers, William Hill, was present in the office while McDaniel conducted the interview which lasted from forty-five minutes to an hour. Onken stated that he was asked what he knew about the incident and who he felt placed the screen saver on the computer. He testified that he did not then know and did not know until after the second interview with McDaniel on November 2, 1995 that Richard Gardner was the person responsible for placing the image into the computer. During the first interview, Onken told McDaniel that he felt it was probably someone in the computer support group as they had the knowledge needed to put something like that into the computer. Onken testified that he told McDaniel that Gardner was attempting to suggest that it was done as a joke on Onken.

Onken testified that the second interview, which occurred in November, 1995, was attended by the Division Director, Gerard Esposito, Lisa Falkner from the Human Resources

Office, Carol Murphy, administrative assistant to the Division Director, Chief William Hill, and Capt. McDaniel. McDaniel asked Onken to relate again what he had said at the October 5th interview. At the beginning of the interrogation, Onken asked Chief Hill if the notes in front of him were notes from the October interview. Hill replied that they were, and Onken asked if he could review them for accuracy and content. Hill said no, and McDaniel said to just tell us the truth, just tell us what you told us on October 5th.[1]

Onken testified that he was apprehensive during the second interview and was concerned that they thought he was involved with putting the image on the computer. He stated that he did not then know who had actually placed the screen saver on the computer.

After the conclusion of the November 2nd interview, according to the testimony of Mr. Onken, Richard Gardner admitted that he had put the image on the screen. Onken asked him why he did not take it off on Friday as he had been asked to do so and was told by Gardner that the joke had not run its course.

Onken testified that he had originally been told that he would receive a five-day suspension but that it was reduced to a two-day suspension after a pre-discipline decision meeting. He was told that he was being suspended for "lying during the formal investigation." Onken testified he believed that his statements at the first meeting are consistent with what he said at the November 2nd interrogation and that he has never been told what constituted the alleged lying or inconsistent statements. The only thing he could learn from the agency was that they thought there were differences in the two statements.

THE LAW

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, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this

[1] A subpoena was issued compelling the production of any such notes. The representative for DNREC has represented to the Board that no such notes exist of the first interview with Gary Onken.

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.

Chapter 15, Employee Accountability

Merit Rule No. 15.1 Employees shall be held accountable for their conduct. Measures up to and including dismissal shall be taken only for just cause. "Just cause" means that management had sufficient reasons for imposing accountability. Just cause requires:

- showing that the employee has committed the charged offense;
- offering specified due process rights specified in this chapter; and,
- imposing a penalty appropriate to the circumstances.

DISCUSSION AND FINDINGS OF FACT

As counsel for the Grievant observed, one thing on which all parties agree is that placing offensive images on individuals' computer equipment should be actively discouraged by the Department. The evidence presented establishes that Mr. Onken did not participate in and was, in fact, a victim of the actions of others in bringing this objectionable material into the workplace and placing it on the computer jointly used by Wanda Wright and Gary Onken.

Mr. Onken is ostensibly being disciplined for lying to the investigator during two interviews during the investigation of this incident. The only direct evidence presented by the agency concerning this charge was the testimony of Capt. McDaniel who recounted that Mr. Onken's "body language" and his request to review notes of the prior interview caused McDaniel to search for inconsistency between the two interviews, and there was limited testimony relating to whether or not Mr. Onken had been offended or had felt the matter was a joke. Capt. McDaniel also appeared to have a suspicion or sense that Mr. Onken knew more about the identity of the perpetrator than he related during his initial interview.

The Board has heard the evidence, observed the credibility and demeanor of the witnesses and finds that the evidence presented does not support the allegation that Mr. Onken lied during the investigation of this matter or that he misled or misdirected the investigator or

that any just cause exists to discipline him on that basis. Rather, the evidence presented supports the finding that Mr. Onken, albeit nervous and apprehensive at his second interrogation by Capt. McDaniel, was not misleading or untruthful.

CONCLUSION OF LAW

The Board concludes that the appeal of Gary E. Onken should be granted as the evidence presented fails to establish just cause for his two-day suspension in that it failed to show that the employee has committed the offense charged as required by Merit Rule No. 15.1. The Board further concludes that Mr. Onken should, pursuant to 29 Del. C. Section 5949, be made whole, and the relief requested should be granted.

ORDER

Based upon the foregoing findings and conclusions, it is **ORDERED**:

1. That the appeal is sustained.
2. That the Department shall reverse the two-day suspension which has not been justified. This reversal shall include more than merely two days pay by including all fringe benefits such as accrual of vacation, sick leave and all other employee entitlements necessary to place Mr. Onken in precisely the same position he would have been from the standpoint of the employment records of the State of Delaware had the two-day suspension never been imposed.
3. That the Department shall cause all material in Mr. Onken's personnel records relating to this incident to be forthwith expunged.

IT IS SO ORDERED

Katy K. Woo, Chairperson

Robert Burns, Vice Chairperson

Dallas Green, Member

Gary Fullman, Member

APPEAL RIGHTS

29 Del. C. §5949 provides that the appointing agency 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 appointing agency. 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: 6/28/96

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