BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF CHRISTOPHER YOUNG, **Grievant,**	)	**DOCKET NO. 97-05-122**
v.	)	
DEPARTMENT OF HEALTH AND SOCIAL SERVICES, **Agency.**	)	**DECISION AND ORDER**

BEFORE Katy K. Woo, Chairperson, Robert Burns, Vice-Chairperson, and Dallas Green, Member, constituting a quorum of the Merit Employee Relations Board ("Board") as required by 29 *Del. C.* § 5908(a).

APPEARANCES

For the Grievant: Christopher Young, *Pro se*

For the Agency: Loretta G. LeBar, Deputy Attorney General
Elizabeth D. Maron, Deputy Attorney General
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

NATURE OF THE PROCEEDINGS

This matter came before the Board as an appeal after a fourth step grievance decision adverse to the Appellant. The appeal was timely filed on May 7, 1997 and was the subject of a hearing before

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the Board on September 18, 1997 on the Agency motion to quash the subpoena *duces tecum* issued by the Board at the request of Mr. Young. The detail of that proceeding and the Board decision thereon are the subject of a prior Board Order in this docket mailed to the parties on October 30, 1997.

By letter erroneously dated December 4, 1997, which was received at the Board on December 3, 1997, Christopher Young requested, among other things, that

> ". . . [T]he matter before the board of Chris Young versus the department of health and social services be given due consideration for sanctions to be executed against the department for failure to comply with the said order of the court on September 18, 1997, for the release of discovery documentation for the Grievant to effectuate the cross examination of witnesses or evidence presented against his during the hearing for an determination of whether conditions of employment during the grievant employment with the department caused a disparate impact against the grievant therefore causing discrimination against Mr. Young the Grievant."

The Department responded by letter dated December 8, 1997 and opposed the granting of sanctions against the State with regards to the release of discovery documentation on the basis that all available discovery, which the Board required to be produced, had been provided to Mr. Young.

This Docket next came before the Board on December 11, 1997 for a public evidentiary hearing before Chairperson Katy Woo, Vice-Chairperson Robert Burns, and Board Member Dallas Green. At the December 11, 1997 hearing, Mr. Young did not pursue his request for sanctions concerning the production of discovery and advised the Board that he was prepared to go forward with the hearing. Mr. Young was advised of his right to appear with legal counsel, and the hearing procedure provided by the Merit Rules was read to and provided in writing to Mr. Young who advised the Board that he would proceed *pro se* with assistance from his wife. The hearing was conducted as an open public hearing, and Mr. Young, pursuant to Merit Rule No. 21.0230, was designated as the moving party. At the request of Mr. Young, the witnesses were sequestered and

advised not to discuss their testimony in the case with others. The parties were unable to conclude the evidentiary presentation on December 11, 1997, and the hearing was continued to and concluded on February 19, 1998.

SUMMARY OF THE EVIDENCE

John James Dowling was sworn and testified that he was hired at the Treatment Access Center ("TASC") in January of 1996. He worked there approximately eight months as a case manager. He received job training including the responsibility of urine sample monitoring. Mr. Dowling testified that it is necessary to go into the bathroom with the client to be sure the sample was from the client and to do the appropriate paperwork to identify and secure the sample. He stated that the frequency of sample monitoring varied up to 50 times a day and that he was often interrupted from his other work to do urine sample monitoring. It took anywhere from 2 to 45 minutes to observe the production of the sample depending on the individual. The average was about 5 minutes. Mr. Dowling testified that urine monitoring was a task which he and Christopher Young split. Mr. Dowling also testified that the female case managers did not have the same frequency of monitoring responsibilities because the majority of the clients were male.

Mr. Dowling told the Board that the monitoring impacted his job in that it made it more difficult particularly when he was writing. He related that for the first two weeks he did almost exclusively intake work before he took on more cases and was phased out of intake responsibilities.

On cross-examination, Mr. Dowling testified that he and Christopher Young had the same job in that both were case managers. Dowling testified that although he was frequently interrupted to do urine sample monitoring, he managed to get his other work done and that he did not have misspellings in the letters he sent to the court. Mr. Dowling testified that there were complaints about

Christopher Young's performance by his co-workers. The complaints related to his lateness and to the fact that Mr. Young was not where he was supposed to be on occasions. Also, there were complaints that Mr. Young did not have full and complete reports for presentation to the court and there was trouble with his getting the court schedules. Mr. Dowling also related that it was imperative that males were matched with males for the urine sampling monitoring.

John Dowling testified that the practice was for him to write a report for the court and to give it to his supervisor for review before it was sent. The supervisor would make corrections and suggestions about the content of the report and return it. Dowling also testified that his supervisor did not have to make grammar and punctuation changes in his work and occasionally made suggestions about the content of the report. He also related that during the time when he worked at TASC there was no flexible schedule for employees.

Ms. Karen Eason, in sworn testimony, told the Board that she started at TASC in June of 1994 initially under contract and became a state employee late in 1995 when a case manager position opened, and she successfully applied for it. She stated that for approximately one and one-half years she did all intake work and then she was hired as a state employee and a case manager. As a case manager, she still did intake and eventually did training of others in how to do intake. The training was 4 to 5 hours a day or about a day for a couple of weeks. She would go to the prison with the trainee and instruct them in how to do the intake process.

Ms. Eason testified that she was assigned to assist Christopher Young in improving his organization skills and developing his ability to prioritize his work responsibilities and develop his filing system, among other things. She told the Board that there were meetings about Mr. Young's situation and about urine monitoring being a burden on his ability to get his intake work done. She

stated that from about 9:30 A.M. to 11:00 A.M. was the time when a case manager was in the courtroom attending court hearings.

Karen Eason stated that she met with Christopher Young on four different occasions before the September report to management about Mr. Young's deficiencies. She testified that Mr. Young did things his own way and that he was in conflict. He needed to do things in a timely manner and was not getting things done. According to Ms. Eason, she was detailed by the supervisor, Ms. King, to help Christopher Young learn to prioritize his work. Ms. Eason testified that it was a very frustrating experience for her trying to assist Mr. Young. She related that he was not getting his assessments done nor the court calendars prepared on time. She related one incident when Mr. Young had signed out to go to the Gander Hill Facility, and she personally saw him across town at the courthouse.

Ms. Eason testified that if she had to do 50 urine monitoring sessions in a day that it would cut down on the time she had to do other work, but she testified that it would not affect the quality of the work she did, and it would not cause her to be late to work or to misspell words in reports to the court.

In response to Board questions, Ms. Eason testified that she worked with Christopher Young to improve his performance on four different occasions about a month to a month and one-half apart. She stated that she saw his work product and proof read a lot of his work. There was no improvement shown as a result of the sessions.

Roger Rio Pleus was sworn and testified that he is a former TASC employee who now works for the Department of Labor. He left TASC because a career opportunity opened for him in labor law enforcement and because of the unrealistic workload at TASC in relation to the time available. He stated that his other duties, including urine monitoring, made it difficult to perform his case

manager duties. For a period, he was the only male to observe males giving urine samples. He testified that the urine monitoring program did affect his reports and case notes. He was interrupted approximately 15 times a day to observe or monitor urine samples. Mr. Pleus testified that he did not have a good relationship with has case manager supervisor. There was a power struggle going on, and she tried to discipline him in relation to his attendance at an approved defensive driving course.

On cross-examination, Mr. Pleus testified that he received a satisfactory job evaluation and that he was doing his job well. Even with the interruptions, he got the job done, and the interruptions did not cause him to use bad grammar or to misspell words in his reports. He testified that he did not work with Christopher Young and did not have the opportunity to observe Mr. Young's work. He stated that he did not do intake and functioned as a case manager and viewed intake and case management as being different.

Ms. Bonnie Beyer, in sworn testimony, told the Board that she is presently a TASC case manager and came to the unit in February, 1996 shortly after Christopher Young was hired. She received intake training and initially did intake work and is skilled at it. She took over Roger Pleus' position after he left. She stated that she did not have much contact with Christopher Young and had no personal knowledge of his job performance. She testified that she had a caseload of 60 to 70 clients and is required to write letters to the court and to communicate clearly and accurately with State officials.

Ms. Caroline King was sworn and testified that she is the TASC case manager supervisor, and she wrote the October 10, 1996 memorandum to Paul Barker at Department of Health and Social Services Personnel Office seeking advice on whether and when she could terminate the employment of Christopher Young. (Grievant's Exhibit No. 1).

Ms. King testified that Christopher Young got all of the required training and a lot of additional training to help him perform the requirements of his job. Ms. King testified that she tried informally to help Mr. Young and paired him with Karen Eason for additional assistance. Ms. King testified that different case managers had different duties at different times. Some were doing only case management while others were doing only intake, and some were doing both case management and intake. She stated that Christopher Young had 18 cases in May and 19 cases in June of 1996. In July, after he had been in the position for six months, he was raised to a full case load with 56 cases.

Ms. King testified that as the supervisor in the agency she knew that urine monitoring affected the job, and that fact was taken into consideration. It was a part of the job. The agency is gender specific on urine test monitoring. The number of males exceeded the number of females in the program. For example, in October, 1996, there were 67 urine samples collected and 56 were male.

Ms. King testified that male case managers were only required to monitor urine tests on one day a week. She stated that the agency was understaffed from August 1st to September 18th, and this understaffing affected everyone working there. She stated that she relieved Christopher Young of his responsibility to do any urine sample monitoring to help him, since he was complaining about not having enough time to do his work due to the urine sample interruptions. Ms. King testified that such accommodation was done to give Mr. Young every opportunity to learn to do his job. She stated that no two employees have the same job duties at the same time but that every employee has the same duties at different times. According to Ms. King, the work is never evenly distributed; it varies. For example, Bonnie Beyer went into case management directly without much intake work. Ms. Beyer received formal intake training and did some intakes but was more experienced and moved to case management.

Ms. King testified that she had reviewed Mr. Young's letters to the court, and the quality was very poor all of the time. He used inappropriate words, and the content was incorrect. She testified that she spent the largest part of her supervisory time in correcting his work product so that it actually reflected what was in the case file. She also detailed staff to him in order to help him with the development of these skills. His assessments were not done in a timely manner, and the intakes were not being completed in a timely manner. Ms. King testified that Mr. Young began on January 16, 1996, and his last day at work was December 16, 1996. She stated that they did everything they could do to help him, but that she and others were getting very frustrated with him. She asked him to take classes in grammar and punctuation. Ms. King testified that in June and July she investigated Christopher Young's whereabouts in response to complaints from other staff that Mr. Young was not where he was supposed to be. She personally checked on 4 or 5 occasions, and Mr. Young was not where he should have been. In October, 1996, she had someone check out the log books in the various institutions and locations where Mr. Young was signed out to be. There was a lot of unaccounted for time, and he did not sign in and out properly, although he knew that he was a probationary employee. Ms. King identified State's Exhibit No. 1 as the service audit she had prepared on the hours worked for the month of October, 1996 for Christopher Young. She also identified State's Exhibit No. 2, a two-page chart showing case referrals to TASC by month and case manager and the assessments completed by month by case manager. Ms. King testified that in 1994 only Karen Eason was doing intakes, and she got the job done. According to Ms. King, Christopher Young's assessments were not completed in a timely manner, and his letters were not done properly. Words were spelled wrong, and there was improper or no punctuation.

Ms. King told the Board that staffing is now up to ten case managers. Three are male and seven are female with four being minority individuals.

Patricia Ann Brooks, on affirmation, testified to the Board that she was working at the TASC during the same period Christopher Young worked there. She remembered him telling her that he had been relieved of the duty of urine sample monitoring. She stated this caused some confusion, because he was the only male case manager there, and the male clients needed to have observed urine samples. She stated that she was never told by anyone else that Christopher Young did not have to do urine monitoring. She did not see Christopher Young's work until after his supervisor had reviewed it, and she could not evaluate his performance. She stated that there was a file service audit done on all case managers' files, and numerous discrepancies in certain files were found, and there were suggestions and recommendations for improvement made. However, no one was fired for this. There were high caseloads, and it was hard to get all of the work done. Occasionally, misspellings get out in the letters to the courts. Ms. Brooks testified that occasionally the supervisor would return her work for correction of typographical errors or because she did not like the way something was stated.

Christopher Young, after being sworn, produced a handdrawn chart marked as Grievant's Exhibit No. 1 which he stated represented the division of his work week showing 6 hours court time and 12.5 hours doing urine monitoring with these two activities taking one-half of the 37.5 hour work week, leaving the remaining one-half for the performance of all of his assigned duties, including intakes. He stated that there were two specified days for the urine testing, leaving three days of the week to do his other job. He testified that he was the only male present doing urine test monitoring and doing all of the intakes. He testified that he is not a perfect person and that he did not do a perfect job. He stated that he thought he was hired as a case manager and that intake is a support function. He asked how someone could be fired who was not properly supported. He stated that he felt that he was the best judge of the impact of urine monitoring responsibilities on his job

performance and that other males had different job responsibilities during the time they were doing urine monitoring. He stated that he believed that he was washed out the door because he was a black male after the State no longer needed a black male to meet Equal Employment Opportunity Commission requirements. He stated that he was the only person fired for deficiencies and that he was a black male.

Mr. Young continued his sworn testimony on February 19, 1998 recounting to the Board that he had no way to contest the accuracy of log sheets from sixteen months ago and that the TASC movement sheets he produced (Grievant's Exhibit No. 3) showed that on several occasions he signed out late proving that he had put in extra hours getting his work done. Mr. Young described his job responsibilities and noted that he was required to be in court for 2.5 hours every day and that after May 26, 1996 he was given the sole responsibility for doing intake. He described the process of dong intake assessments for both "fast track" and sentenced clients and described the difficulties he often encountered in attempting to find the clients to do the required assessments. Also, at this time, he was the only male available to do urine monitoring, and on one or two days a week, his time was taken up doing sometimes as many as 50 or more urine test observations. He also described the process of putting together and posting a court schedule. He recounted to the Board that it was difficult in getting the other work done when he lost 5 or 6 hours in a week doing urine test monitoring.

Mr. Young denied that he got two weeks of training from Karen Eason and stated that he received the same two weeks training everyone got and that he had one session only in training in intake.

Mr. Young introduced into evidence a copy of his employment application and told the Board that he was a veteran; had a disability; and occasionally had to take a muscle relaxant which causes

him to be more "laid back." On cross-examination, he stated that he did not request any special accommodation and that there was no accommodation needed for his disability.

The Board received into evidence, over the objection of Mr. Young, copies of his performance reviews for August 23, 1996 and for September 27, 1996. (State's Exhibit No. 3). Mr. Young objected on the basis that the attachment of selected examples of his work product was prejudicial in that the Agency had not allowed him to cull through the case files for examples of his work product which he could produce as examples of good work. Mr. Young concluded his testimony and rested his direct presentation without calling additional witnesses.

MOTION TO DISMISS

At the conclusion of the presentation by Mr. Young, the Agency moved to dismiss the grievance for failure of the Grievant to present evidence of improper discrimination against him on the basis of his race or gender.

As discussed below, the Board, by unanimous vote, finds and concludes that the motion to dismiss should be granted for failure to establish a discriminatory basis for this termination during the probationary period.

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 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.

MERIT RULE NO. 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.

MERIT RULE NO. 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.

MERIT RULE NO. 11.0100

All appointments shall be for an established probationary period during which the individual's fitness for appointment shall be evaluated. Appointing officers are responsible for insuring the effectiveness of this working test period and for insuring that probationary employees are given help in meeting the job requirements.

MERIT RULE NO. 11.0400

At any time during the initial probationary period, the appointing authority may dismiss the employee for reasons of unsatisfactory service or conduct. The appointing authority shall notify the employee in writing with reasons for the action. (*See also* 14.0610).

MERIT RULE NO. 11.0500

Except in some cases of discrimination on the basis of non-merit factors, probationary employees do not have the right under the merit system law to appeal decisions of appointing authorities.not to retain their services.

DISCUSSION AND CONCLUSION

Mr. Young claims discrimination on the basis of non-merit factors in his termination from the position as a Senior Social Worker/Case Manager with the Treatment Access Center ("TASC"). He contends that his termination was impermissibly based upon his sex and his race, and he seeks reinstatement in the position from which he was terminated. Under the Merit Rules, he would have

no basis for a grievance concerning this termination but for his allegations of impermissible discrimination.

Under the Administrative Procedures Act (29 *Del. C.* § 10125(c)) and decisions of the Delaware Supreme Court (*see Hopson v. McGinnes*, Del. Supr., 391 A.2d 187 (1978)), Mr. Young, as the Grievant in this matter, has the burden of convincing the Board by a preponderance of the evidence that it should sustain his claim and rule in his favor. He has not carried that burden.

Discrimination in state employment practices is prohibited by both statute and merit rule (29 *Del. C.* § 5953 and Merit Rule No. 19.100). Such discrimination may occur where there is disparate treatment of a person for an impermissible reason. It occurs when a person is treated more or less favorably than others because of such person's status as a member of a protected group or class. Another form of discrimination involves disparate impact. Disparate impact occurs when there is the use of practices or policies which are facially neutral in their treatment of different groups, but which unjustifiably disadvantage one or more groups. In disparate impact cases, proof of a discriminatory motive is not required and proof of such cases is usually based on statistics, and requires proof of effect on a group, not merely on an individual. *See Saville v. Quaker Hill Place*, Del. Supr., 531 A.2d 201 (1985).

In the present case, the Board finds that Mr. Young was terminated, because after repeated attempts to mentor him and to improve his work product, his performance remained unsatisfactory.

Ms. Karen Eason testified convincingly concerning the burdens imposed by the task of urine test monitoring that even if she had to perform a large number of urine monitoring in a day, it would not significantly affect the quality of work she accomplished and would not cause her to be late for work or to misspell words in correspondence. Ms. Eason reviewed the work product of Mr. Young, and even after repeated attempts to assist him, his work did not improve. His complaints about the

difficulty in getting his work accomplished because of interruptions for urine monitoring resulted in that task being taken from him, and according to his supervisor, Ms. King, his performance was not acceptable. She recounted that his correspondence with the court, a necessary and important part of his job, was very poor. Not only were his assessments not done in a timely manner, but his communications with the court used inappropriate words, the content was incorrect, and a large amount of Ms. King's supervisory time was consumed in attempts to correct his work product.

Mr. Roger Pleus, a minority male, testified that while he was working at TASC the workload was heavy and indeed unrealistic in comparison to the time available, and he found employment elsewhere. However, his job performance while he was at TASC was rated as satisfactory.

The Board finds and concludes that Mr. Young's status as a black male was not the basis for his termination. In fact, a review of the motions and correspondence which Mr. Young has filed in this matter with this Board (an excerpt of which is set out above on page 2), even without resort to the examples appended to his performance evaluations, supports the conclusion that Mr. Young's ability to write correctly and communicate clearly leaves much to be desired. The position he occupied on a probationary basis was clearly a difficult one which required organization, efficiency, and good communication skills, both oral as well as written. Mr. Pleus testified as to the difficulty of balancing the many responsibilities of the position with the urine test monitoring responsibility. However, even without the time constraints imposed by the required observations of urine tests, it appears that Mr. Young's work product was not meeting his supervisor's expectations, and he was consuming a large part of her supervisory responsibility.

Mr. Young may have much to offer an employer, but in this instance, he and the requirements of the position were not compatible for reasons unrelated to race or gender. He has offered no persuasive evidence that his termination from the position was improperly racially motivated nor did

it impermissibly result from a policy which had a disparate impact. Gender specific urine test monitoring is clearly not an unreasonable requirement, and is one which is legitimate and non-discriminatory. *See* Merit Rule No. 19.0200. Such test monitoring may have given Mr. Young less time for his other duties, but even after he was relieved of that responsibility, his job performance was not sufficient to justify permanent employee status.

Mr. Young, in his testimony to the Board, described his feeling that he was terminated by virtue of his being a black male, but he candidly acknowledged that it was difficult for him to prove his suspicion. To prevail on his appeal, he must convince the Board that his termination was improperly discriminatory, and he has not done so.

ORDER

For the foregoing reasons, the motion of the Agency to dismiss the appeal for failure to establish a discriminatory basis for the termination is granted. The appeal of Mr. Christopher Young is denied by unanimous vote of the undersigned members of the Merit Employee Relations Board, and the action of the Secretary in terminating his employment during the probationary period is upheld.

IT IS SO ORDERED this 25th day of March, 1998.

Katy K. Woo, Chairperson

Robert Burns, Vice-Chairperson

Dallas Green, Member

APPEAL RIGHTS

Pursuant to 29 *Del. C.* § 5949, the Appellant may appeal to the Superior Court. The burden of proof in any such appeal to the Superior Court is on the appellant. All appeals to the Superior Court are to be filed within thirty (30) days of the notification of the final action of the Board.

Mailing Date: March 26, 1998

Distribution:
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Merit Employee Relations Board
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