

file

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

COPY

IN THE MATTER OF
BENJAMIN J. MATWEY,

Grievant,

v.

DEPARTMENT OF ADMINISTRATIVE
SERVICES,

Agency.

DOCKET NO. 99-05-180

FINDINGS, CONCLUSION
AND ORDER

BEFORE Robert Burns, Vice Chair, Dallas Green, John F. Schmutz, Esquire, and John W. Pitts, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. §5908(a).

APPEARANCES

For the Appellant: Roy S. Shields, Esquire
Brown Shields Chasanov & Beauregard
108 East Water Street
P. O. Drawer F
Dover, DE 19903

For the Agency: Ilona Kirshon, Deputy Attorney General
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, DE 19801

NATURE AND STAGE OF THE PROCEEDINGS

The Grievant, Benjamin Matwey, appeals from an adverse decision at Step 4 of the Grievance process. (See Merit Rule No. 21.0120.)

Mr. Matwey's grievance complained of an alleged violation of Merit Rule No. 20.0420 by his supervisor Robert McWilliams at a meeting held on December 4, 1998 through harassment and intimidation because of prior grievances filed by Mr. Matwey. The relief sought by Mr. Matwey was the removal of any negative adverse action from his personnel file including a later sanction and restoration of any pay or benefits lost. Mr. Matwey's appeal is denied and his grievance is dismissed for reasons set forth hereinafter.

SUMMARY OF THE EVIDENCE

This summary of the evidence is provided in compliance with the provisions of the Delaware Administrative Procedures Act specifically 29 *Del. C.* §10128.

Robert P. McWilliams, being sworn, testified that he presently is employed with his own consulting company in Wilmington, Delaware. He was previously employed as the Division Director for the Division of Purchasing in the Department of Administrative Services where he supervised approximately 30 employees.

The witness stated that on December 4, 1998, a meeting was scheduled by Constance (Connie) Biddle at the request of Ben Matwey for the purpose of discussing Matwey's job performance plan in a new position which he had held for approximately four months. According to Mr. McWilliams, Mr. Matwey had previously presented a version of events which had supposedly transpired at various meetings which differed from the version recalled by the management

representative at that meeting and therefore Director McWilliams determined that in any meeting with Ben Matwey there would always be two members of management present.

Connie Biddle told Robert McWilliams of the meeting she had scheduled at Mr. Matwey's request and McWilliams decided that he would be the other management member attending the meeting. Ms. Biddle was Mr. Matwey's immediate supervisor and McWilliams was the reviewer of the performance plan because of a vacancy in the position of Deputy Director who normally would have been the reviewer.

Mr. McWilliams recalled that the meeting was to be held in the Division of Purchasing Conference Room and was to begin at 10:00 a.m. He and Ms. Biddle were seated in the conference room at the conference table opposite to the door into the room when Mr. Matwey arrived for the meeting. Mr. Matwey came a short distance into the room and, when he saw Mr. McWilliams, did not proceed further and would not sit at the table. Mr. McWilliams recounted that Mr. Matwey stated to Connie Biddle that he would not have a meeting with McWilliams present and, according to Mr. McWilliams, Matwey berated Connie Biddle for setting up the meeting with McWilliams present. McWilliams further testified that Matwey remained standing near the doorway and, despite repeated invitations, would not come into the conference room and be seated. According to McWilliams, Matwey refused to speak to him and continued to address his comments, which McWilliams described as "berating" toward Ms. Biddle. Witness McWilliams admitted that he was upset with Mr. Matwey's behavior and that he raised his voice but denied yelling at or pointing his finger at Matwey. McWilliams determined that the meeting was not going to be productive and concluded it.

Mr. McWilliams testified that at no time did he come into physical contact with Mr. Matwey and that Mr. Matwey continued his berating monologue directed at his supervisor Ms. Biddle. McWilliams testified that Mr. Matwey was being insubordinate and was berating Ms. Biddle, so McWilliams announced that the meeting was unproductive and was over. McWilliams then got up from his chair and moved to the door telling Matwey that he was going to write him up for insubordination. According to McWilliams, he then left the room and was followed by Ms. Biddle. He thereafter gave Matwey a "verbal" reprimand which was noted in Mr. Matwey's personnel file. (State's Exhibit No. 1) There was never any discussion of Mr. Matwey's performance plan. Mr. Matwey indicated he no longer wanted the meeting with Ms. Biddle if Mr. McWilliams was to be present.

On cross examination, Mr. McWilliams testified that in June of 1997 when Mr. Matwey came to work for the Division he was filling an information support position which they had been trying to get for 18 months. At that time, the Deputy Director position was vacant with the departure of Diana Zoeckler.

Mr. McWilliams acknowledged that he was having problems in his personal life in November but he denied that he ever asked Ben Matwey to allow him move into Matwey's apartment in Wilmington. McWilliams testified that he did make inquiries of Matwey and others about apartments in the city. He denied asking Mr. Matwey if he could move in with him and therefore denied becoming angry about Matwey's refusal to let him move in. McWilliams also denied telling Matwey in December of 1997 that none of the employees in the Division liked him. McWilliams testified that Matwey had been abrupt with some employees. McWilliams also did not recall repeating in January that everyone was having problems with Matwey but he admitted that he and Matwey had

conversation about Mr. Matway's offer to resign if 75% of the employees were having difficulty with him. Mr. McWilliams testified that he had told Matway that the state employment system was not run as a democracy and did not operate by popularity poll.

Mr. McWilliams testified that Ben Matway had filed a number of grievances but he did not recall the dates of the grievances. Mr. McWilliams reiterated that, based on his prior experiences with Mr. Matway, he felt it was important for two management people to be present at meetings with Mr. Matway just to keep recollections accurate. Witness McWilliams related that he viewed Mr. Matway's conduct during the December 4th meeting as insubordinate not because Matway refused to have the meeting but because of Matway's berating of his supervisor.

Witness McWilliams testified that he was the only other manager available to be present for the meeting between Matway and Biddle and, since he was the reviewer of Mr. Matway's performance plan, it was appropriate for him to be present at a meeting called to discuss the performance plan.

The state introduced as State's Exhibit No. 1, a one page detailed statement of the "verbal" reprimand dated December 4, 1998. This memorandum, prepared by Bob McWilliams and addressed to Ben Matway, was placed in Mr. Matway's personnel file and recounted in detail McWilliams's version of the December 4, 1998 meeting.

Constance Biddle, a 13 year employee of the Division of Purchasing, was sworn and testified that she had been employed at the Division in a supervisory capacity for approximately 10 years. In December of 1998, she was the immediate supervisor of Benjamin Matway and continues in that position today. Mr. Matway's original performance plan was prepared by Connie Biddle and by Diane Zoekler. However, by December, Deputy Director Zoekler was no longer working for the Division

of Purchasing and Ben Matwey requested a meeting with Ms. Biddle in December of 1998 to discuss his employee performance plan. Ms. Biddle testified that Robert McWilliams was the reviewer for Mr. Matwey's performance plan and had established a procedure where there were two management persons present at any meeting with Mr. Matwey. Ms. Biddle asked Mr. McWilliams to attend the meeting with Mr. Matwey and at 10:00 a.m. on December 4, 1998 she and Bob McWilliams were sitting in the conference room when Mr. Matwey arrived for the meeting. According to Ms. Biddle, Matwey came into the room and saw Bob McWilliams. Mr. Matwey stopped and said "He shouldn't be here" and proceeded to tell her that she was using incorrect performance procedures for the meeting by having McWilliams present. Matwey indicated to her that, based on information he had received at a State Personnel Office ("SPO") training session, she was not following SPO guidelines by having another person at the meeting. Ms. Biddle recalled that Matwey came about two steps into the room and Bob McWilliams asked him to sit down. According to Ms. Biddle, Matwey ignored McWilliams and continued to berate her about having McWilliams present for the meeting. She told him that Mr. McWilliams was present at her request. According to Ms. Biddle, Mr. Matwey was very angry and was disrespectful to her. She testified that she did not observe any physical confrontation between McWilliams and Matwey. Bob McWilliams did raise his voice but he was not yelling at Mr. Matwey. Ms. Biddle stated that Bob McWilliams was frustrated with Mr. Matwey who would not speak to him but who continued to berate Ms. Biddle. She testified that she did not view it as a threatening exchange between Matwey and McWilliams. She did not see McWilliams point his finger at Matwey but did see him point with his pen when he said, referring to Matwey's behavior, that he was going to write this down as insubordination. She stated that Mr. McWilliams told Mr. Matwey that he was not listening to him and that since he refused to meet, the meeting was

over. Mr. McWilliams got up from the chair and moved to the door where he was within approximately three feet of Mr. Matwey. Ms. Biddle testified that she discussed with Mr. McWilliams the verbal reprimand given to Mr. Matwey concerning this incident and that Mr. Matwey had not grieved that verbal reprimand the notation of which was placed in his personnel file.

On cross examination, Ms. Biddle noted that on several occasions Mr. Matwey had verbally and by e-mail asked for meetings concerning his performance plan. She stated that Bob McWilliams had told her that he had previously explained to Mr. Matwey in October 1997 that there would always be another management person present at meetings with Mr. Matwey. According to Ms. Biddle, Mr. McWilliams repeated this at the December 4th meeting by telling Ben Matwey that he had previously explained to him that there would always be two supervisors present at meetings with him. She stated that there were no other supervisors available and Bob McWilliams was the performance plan reviewer so she had asked him to be present for the meeting. She testified she felt that Mr. McWilliams was the appropriate person to be present at the meeting. Ms. Biddle testified that she had reviewed the document which Mr. McWilliams had placed in Mr. Matwey's personnel file (State's Ex. 1) and that she felt it was an accurate reflection of what had happened at the December 4th meeting. She related that at the December 4th meeting Matwey came into the room and was standing between the first and second chairs at the conference table. Matwey stated he did not want the meeting with McWilliams present and that he would go back to his office and send his comments to her by e-mail. According to Ms. Biddle, she was aware that there had been tension between Mr. Matwey and Mr. McWilliams but that it was contained by both men and they were not snarling at each other in the hallways. Ms. Biddle repeated that Mr. McWilliams did raise his voice with Mr. Matwey and that it was not uncommon for Mr. McWilliams to raise his voice; it was, according to

Ms. Biddle, a part of his management style. According to Ms. Biddle, on recommendation from the Human Relations section they still have two people present for meetings with Mr. Matwey although there is a new Director and a new Deputy Director. The new Director is Blaine Herrick, who took over after Mr. McWilliams left in February or March of 1999. Ms. Biddle testified that the new Director has had several meetings with Mr. Matwey where another management individual was present and Mr. Matwey has not objected to the other individual being present. She felt his objection was to Robert McWilliams. Ms. Biddle continues as Mr. Matwey's immediate supervisor and testified that she presently has a professional relationship with him.

Blaine Herrick, the present Director of the Division of Purchasing in sworn testimony recounted that Robert McWilliams, who had preceded him as Director, offered him the vacant Deputy Director position. Mr. Herrick recount that McWilliams told him that he had offered the Deputy Director position to Ben Matwey and Herrick responded that he was not interested in the position if it had already been offered to Mr. Matwey. According to Mr. Herrick, he suspected that Mr. McWilliams and the former Deputy Director, Diane Zoekler, had a personal relationship and that both of them were eventually divorced from their respective spouses. Mr. Herrick recounted an occasion where he had observed McWilliams and Zoekler laughing. He asked what was funny and Bob responded that he had asked Ben Matwey about moving in with him in his apartment in Wilmington.

Director Herrick testified that there came a time in November or December of 1998 when Ben Matwey's status in the Division changed. At one point Matwey was considered a part of the management team and thereafter he was not invited to management meetings and was not considered management material. According to Mr. Herrick, Robert McWilliams had taken the position that Mr.

Matway could not be trusted and that Matway would turn around whatever was said to him. Mr. Herrick also stated that Robert McWilliams was upset about the grievances Matway had filed. Mr. Herrick testified that he had observed McWilliams raising his voice with an employee other than Ben Matway. Mr. Herrick stated that presently Mr. Matway is not viewed as a part of management as his job has changed. Previously, he was viewed as management in his former position and, although that position did not change at that time, in approximately December of 1998 Mr. Matway was no longer welcome to management meetings.

Mr. Herrick stated that both he and the new Deputy Director had met with Mr. Matway and Connie Biddle but that he did not have a policy that there had to be two management persons in meetings with Mr. Matway.

Benjamin J. Matway, being sworn, testified that he started to work at the Division on June 2, 1997. He was hired as an Information Support Specialist and a part of the management team. He recounted that he was offered the Deputy Director position by Mr. McWilliams after he had been at work for a couple of weeks. According to Mr. Matway, he accepted Mr. McWilliams's offer and they had a good relationship until November or December when things changed.

Mr. Matway recounted that Deputy Director Diane Zoeckler was divorcing her spouse and Bob McWilliams was being divorced from his wife. According to Mr. Matway, Diane Zoeckler and Bob McWilliams were discussing Wilmington townhouses. Ms. Zoeckler had rented one and they were looking for one for Bob McWilliams. According to Mr. Matway, McWilliams asked if he could move in with him. Mr. Matway testified that he said no to Mr. McWilliams' request and that thereafter their relationship soured with McWilliams going from very friendly to very stern. Later in the month of December Matway was called into a meeting and given a performance review by

McWilliams and Zoekler. Mr. Matwey testified that McWilliams told him that all of the employees complained to him about Matwey. Mr. Matwey related that he had filed a grievance about the performance review (Appellant's Exhibit No. 1). Among other things, he felt that he was being cut off from management access.

Concerning the December 4th meeting with Connie Biddle, Mr. Matwey produced ten color photographs of the conference room (Appellant's Exhibit No. 2) where the meeting took place. He testified that he had asked for the meeting with Connie Biddle, his immediate supervisor after he had attended an SPO class where employees were encouraged to meet with their supervisors and give feedback on their performance plans. He testified that he came to the conference room for the meeting he believed was scheduled with only his supervisor. He entered into the conference room and was standing behind the second and end chairs at the table. He saw Robert McWilliams seated at the table and concluded that he did not wish to participate in a meeting to discuss his performance plan with Ms. Biddle if Mr. McWilliams was to be present. Mr. Matwey recounted that he had a stressful relationship with Mr. McWilliams based on prior grievances and his refusal to allow Mr. McWilliams to move into his apartment. Mr. Matwey testified that he was afraid of a physical confrontation with Mr. McWilliams whom he described as "volatile". Mr. Matwey recounted that he told Connie Biddle that he did not know that Bob McWilliams was to be at the meeting and she replied that Bob McWilliams was the reviewer and had a right to be there. According to Mr. Matwey, he told Ms. Biddle that, under the circumstances, he did not want the meeting and that he wanted to go back to his office where he would e-mail her his comments. Mr. McWilliams, according to Mr. Matwey, pointed at him, told him to shut the door and to sit down. Mr. Matwey testified that McWilliams told him that if he left he would be insubordinate. Matwey stated that he moved to his

right further into the room to stay away from the door and told Connie Biddle that he wanted to withdraw the meeting request. Mr. Matway told the Board that he was attempting to avoid a confrontation with Bob McWilliams and felt that McWilliams was harassing him. According to Matway, McWilliams got up suddenly and moved toward him and the door. Mr. Matway testified that he asked McWilliams to step back and that he was pleading with Connie Biddle when McWilliams stated: "We're leaving," and both he and Ms. Biddle left the room.

Mr. Matway identified Appellant's Exhibit No. 3 as the e-mail he sent to Connie Biddle after the meeting on December 4, 1998 detailing his version of the events that transpired.

MERIT RULES

MERIT RULE NO. 20.420

No action will be taken that will threaten, intimidate or retaliate against an employee for initiating or processing a grievance.

FINDINGS AND CONCLUSIONS

The Board finds that the behavior of both Robert McWilliams and Benjamin Matway at the December 4th meeting left room for improvement. Each man has a self-serving and subtly different vision of the events of December 4, 1998. From Mr. Matway's vantage point it was harassment by Robert McWilliams. From Mr. McWilliams perspective it was a supervisor and a reviewer granting a meeting about a performance plan to an employee; being met with frustration and insubordination by Mr. Matway's refusal of specific and repeated directions from Mr. McWilliams to come into the room and sit down to discuss the situation; and, by Mr. Matway's berating his supervisor.

It is obvious that at some prior point Director McWilliams had lost confidence in Mr. Matway. Their relationship soured to the point where Mr. McWilliams announced his determination that two management representatives would be present in all future meetings with Mr. Matway. This determination apparently stemmed from prior incidents where Mr. Matway's recollection of the events departed from the recollection of the individual with whom he was meeting.

Both McWilliams and Matway testified as to a strained relationship although their versions parted as to some details and as to the interpretation to be placed upon certain events. This mutual lack of trust was evident when Mr. Matway entered the conference room on the morning of December 4th expecting a meeting with his supervisor Connie Biddle and found that the Division Director Robert McWilliams was present. Both Ms. Biddle and Mr. McWilliams credibly testified that Mr. Matway began and continued berating his supervisor Ms. Biddle for having asked Robert McWilliams to attend the meeting. This clearly was unnecessary and under the circumstances when viewed with Mr. Matway's other actions, amounted to insubordinate behavior for which the oral reprimand he received was not at all inappropriate.¹

The Board had an opportunity to observe the bearing and demeanor of both Mr. Matway and Mr. McWilliams and finds reason to believe that Mr. McWilliams was very likely agitated and indeed frustrated by Mr. Matway's behavior at the meeting. Mr. McWilliams, as the reviewer of Mr. Matway's performance plan believed that he had a right to be present at a meeting requested by Mr.

¹While a verbal reprimand for insubordination was given, the one page notation containing Mr. McWilliams version of the events of the meeting of December 4, 1998 (State's Exhibit No. 1) is more in the nature of a written reprimand rather than a simple notation of a verbal reprimand having been given. It should be removed from Mr. Matway's personnel file and the State's electronic grievance tracking system should be accordingly modified to reflect the Board's disposition of this grievance.

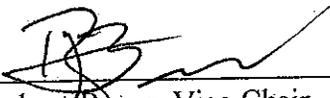
Matwey to discuss the performance plan. Mr. Matwey similarly felt that he had the right to discuss his performance plan with his immediate supervisor without having the Director Mr. McWilliams present. Mr. Matwey, because of his prior disagreements with Mr. McWilliams saw Mr. McWilliams' presence as harassment. It is difficult to determine if Mr. Matwey actually felt threatened by Mr. McWilliams' expressions of exasperation and frustration with Mr. Matwey's refusal to come in and sit down at the conference table. He has testified that he did. The evidence does support a finding that Mr. McWilliams did indeed raise his voice but did not yell nor shout nor did he physically threaten Mr. Matwey although he did point at him with his pen. The evidence also supports the conclusion that Mr. McWilliams' frustration was provoked by Mr. Matwey and his treatment of his supervisor Ms. Biddle. Under the circumstances Mr. Matwey has not met his burden to establish harassment, threats or intimidation against an employee for initiating or processing a grievance in violation of Merit Rule 20.0420 by a preponderance of the evidence. In this instance, Mr McWilliams' behavior, while provoked, ideally could have been more restrained. However, it was not objectively threatening, intimidating or harassing and has not been shown to be in violation of Merit Rule 20.0420.

ORDER

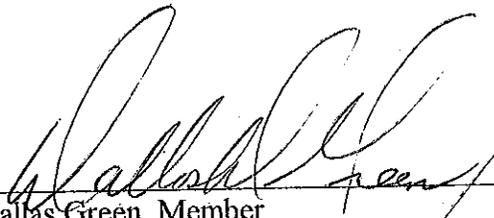
Based on the findings of fact and conclusions of law stated above, and for the reasons stated in the Step 4 hearing officer's report, by the unanimous vote of the undersigned members of the Merit Employee Relations Board, the grievance of Benjamin Matwey against the Department of Administrative Services alleging a violation of Merit Rule No. 20. 0420 is denied and the grievance in docket No. 99-05-180 is hereby **DISMISSED**. As noted above, the Department shall take prompt

steps to remove State's Exhibit No. 1 from Mr. Matway's personnel file and to correct any electronic record of Mr. Matway's harassment grievance to reflect and refer to this decision of the Board.

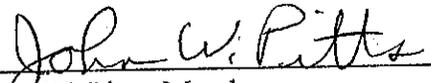
IT IS SO ORDERED:



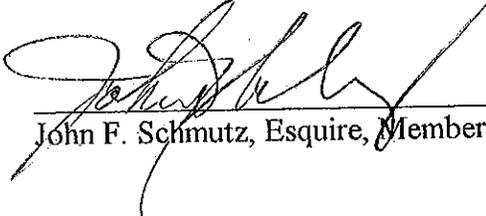
Robert Burns, Vice Chair



Dallas Green, Member



John W. Pitts, Member



John F. Schmutz, Esquire, 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.

29 Del. C. § 10142 provides that any party against whom a case decision has been decided may appeal such decision to the Court.

Mailing Date: July 20, 2000

Distribution:

Original: File

Copies: Grievant's Representative

Agency's Representative

Merit Employee Relations Board