

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD  
OF THE STATE OF DELAWARE**

**IN THE MATTER OF  
JAMES TILLMAN,**

**Appellant,**

v.

**DEPARTMENT OF HEALTH AND  
SOCIAL SERVICES,**

**Employer/Agency.**

**DOCKET NO. 98-04-148  
DECISION AND ORDER**

**COPY**

Before Susan L. Parker, Esquire, Chairperson; Robert Burns, Vice-Chairperson; Dallas Green, John F. Schmutz, Esquire; and John W. Pitts; members constituting the entire membership and a quorum of the Merit Employee Relations Board ("the Board") as required by 29 *Del. C.* §5908(a).

**APPEARANCES:**

For the Department:            Marc Niedzielski  
   Deputy Attorney General  
   Department of Justice  
   820 N. French Street  
   Wilmington, DE 19801

For the Appellant:            James Tillman, Pro se

**NATURE OF THE PROCEEDINGS**

This matter came before the Merit Employees Relations Board as a direct appeal under Merit Rule No. 21.0111. The grievance which was the subject of the appeal concerned the imposition of a ten (10) day suspension imposed upon the Appellant for misbehavior in the workplace. On October 15, 1998, a hearing concerning the appeal was heard by the full membership of the Merit Employee Relations Board. At the hearing Mr. Tillman was advised of his right to appear with legal counsel and the hearing procedure provided by the Merit Rules was explained to him. Mr. Tillman advised

the Board that he would proceed *pro se*. Mr. Tillman was further advised that the hearing could be public or private at his election. With Mr. Tillman's concurrence, the hearing was conducted as an open public hearing. The Department of Health and Social Services, pursuant to Merit Rule No. 21.0230, was designated as the moving party. This is the Board's Decision and Order based upon the evidence presented at the hearing.

#### SUMMARY OF THE EVIDENCE

Anita Faye Harris was sworn and testified that she was employed as a Certified Nursing Assistant at the Stockley Center during September of 1997. She works in the Medical Center (MC-3) where she takes care of the profoundly retarded patients. The Appellant, James Tillman, works in the same location. Ms. Harris identified Department Exhibit No. 1, which was received into evidence without objection, a copy of her hand written statement dated October 2, 1997 in which she recounted that on September 15, 1997 she went to the Stockley Center to pick up her paycheck on her day off. As she was walking down the hall past the Nursing Office, James Tillman came up behind her and started blowing down her top. She began walking faster to get away. The hallway was busy, she got into a crowd of people and went into Darlene Hockman's office to pick up her paycheck and then went home.

On September 17, 1997 she went outside to the picnic table to have a cigarette. James Tillman was sitting at the table doing paperwork. According to Ms. Harris' written statement, James Tillman turned to her and said "I know one thing for certain and one thing for positive." She thought he was referring to work and she said, "What's that?" According to her hand written statement and her sworn testimony, Ms. Tillman replied, "For certain I want to suck your nipples and for positive

I want to put my tongue on your pussy." Ms. Harris got up, swung her arm back and walked inside, according to her statement.

On September 18, 1997, according to Department's Exhibit No. 1, Ms. Harris was working on MC-3 cleaning up the area where the sink is located when James Tillman came into the area and was standing in her way. When she moved, he would move. According to Ms. Harris, Gloria Andrews came in the dining room and saw James Tillman standing in her way. She got around him and went into the dining room. James went past her and out the other door. According to Ms. Harris' statement, at that time Ms. Andrews asked her if she was taking out the trash and she replied to her that she was going to take the bag and hit someone in the head. This was said loud enough that maybe James heard it. Then Ms. Andrews asked her if James was begging and she replied yes and told her what he was doing.

Ms. Harris testified that the language in her written statement was the language used by Mr. Tillman to her. She stated that at a meeting after the incidents with Mr. Tillman, he had said that he did not remember what he had said to her at the picnic table. She testified that James Tillman had asked her to date him and that she had told him that she was married.

On cross-examination by Mr. Tillman, Ms. Harris did not recall when he had asked her to date him and did not know what prompted his statement at the picnic table. Ms. Harris stated that she is well endowed and she had come to work in a tank top. Some of the women called her "twin peaks" or "Dolly Parton". She and another woman had been laughing about this on one occasion when James Tillman was in the area and asked them what they were laughing about. Ms. Harris, according to her testimony, at the urging of the other woman, told Mr. Tillman that they were talking about her twin peaks or twin volcanos.

On redirect examination Ms. Harris testified that she never told Mr. Tillman that it was okay for him to talk to her in that way.

John Brion, being duly sworn, testified that he was the personnel officer at Stockley Center. Shortly after the incident on September 17, 1997, Ms. Harris and Willa Jordon, her supervisor, came to his office to discuss the incidents with Mr. Tillman. He asked Ms. Harris what she wanted done about the situation and she stated that she wanted it stopped. Mr. Brion stated that Ms. Harris felt that she may not have made it clear to Mr. Tillman that his remarks were not welcome. A meeting was to be scheduled between Ms. Harris and Mr. Tillman to clear the air. Mr. Brion stated that he asked Ms. Harris for a written statement and thereafter requested a written statement from Mr. Tillman also. A hand written statement by James Tillman was identified by Mr. Brion and received into evidence without objection. In the statement, Mr. Tillman recounted that he was informed that he was to attend a meeting on Monday, September 22, 1997 with Mary Brennen and Faye Harris to discuss a complaint by Ms. Harris that he had been sexually harassing her. In the statement Mr. Harris recounted that at the meeting Faye Harris informed him that she was upset with the remarks Mr. Harris had made to her the prior week on two (2) separate occasions. According to the hand written statement, Mr. Tillman informed her that the day she came over to the picnic table he did not remember saying anything that she would have found upsetting. Faye Harris repeated his statement to her and Tillman, according to his handwritten statement, informed her that he did not remember saying that and apologized to her if he had said anything to her which offended or upset her and that it would never happen again. In the written statement Mr. Tillman recounts that during the meeting Faye Harris told him that he had made the same remarks again outside the door of the pantry of the medical center and again he apologized for any remarks that she found upsetting or offensive, but that

he did not remember saying that to her. The statement continued stating that Faye Harris had informed Mr. Tillman at the meeting that he walked by and blew on her neck. It had upset her. According to his statement (Department Exhibit No. 2) Tillman stated, "I informed Faye that I was only playing with her but it would never happen again." Mary Brennen asked Faye Harris if she accepted the apology and Faye replied that she did and that they could work together without any further problems. She informed him that she was just upset and as long as he made sure that nothing like that happened again things between them would be just fine.

According to Mr. Tillman's hand written statement, (Department Exhibit No. 2) after that meeting he went to Mr. Brion's office to review the events of the meeting and told Mr. Brion about an incident where Faye Harris had made a statement about her breasts being twin peaks or twin volcanos as she stood in front of him shaking them. In his written statement Mr. Tillman stated that John Brion informed him that the meeting with Faye Harris was to clear the air and for both parties to communicate exactly what was and was not okay, and that if further events should take place then further action would be taken.

On cross-examination by Mr. Tillman, Mr. Brion explained that his statement that "This should wrap it up" referred to the receipt of Mr. Tillman's written statement, not that the matter was concluded. He did say to Mr. Tillman that "Stockley is not the only place to work." The statement, according to Mr. Brion should be taken in the context of Mr. Tillman's comments that the situation at Stockley had deteriorated to the point where he felt that he could not talk to a woman.

In response to questions by Board members, Mr. Brion testified that he could not state specifically why it had taken four (4) or five (5) months to take action against Mr. Tillman. He stated that the matter had to go to the Department level and there was a good deal of discussion about what

should be done and these things are taken seriously. He stated that it was not an unusual time frame and that it takes a while to resolve such issues. Mr. Brion stated that he did recommend formal disciplinary action and there had been other incidents with James Tillman in the past. While he did not make a recommendation as to discipline, he did not believe the ten (10) day suspension was an unusually severe penalty. He stated that it was consistent with other disciplines given in the Department.

Mr. Brion recounted that there had been an incident with Mr. Tillman prior to the 1995 incident where Mr. Tillman was reprimanded for statements of a sexual nature and he did not know the outcome of the pre-1995 incident but it was a part of what the Department considered.

The Department marked and introduced without objection the following documents:

1. Department Exhibit No. 3 -- January 28, 1998 letter to James Tillman from Wesley E. Perkins, Executive Director of the Stockley Center advising of the proposed ten (10) day suspension for inappropriate sexual conduct.
2. Department Exhibit No. 4 -- February 10, 1998 letter to John Brion from James Tillman requesting a pre-decision meeting on the proposed ten (10) day suspension.
3. Department Exhibit No. 5 -- February 19, 1998 letter to Mr. Tillman scheduling the pre-decision meeting.
4. Department Exhibit No. 6 -- February 24, 1998 letter to Mr. Tillman rescheduling the pre-decision meeting.
5. Department Exhibit No. 7 -- Letter to Mr. Tillman scheduling the pre-decision meeting for March 5, 1998.
6. Department Exhibit No. 8 -- Letter to Mr. Tillman imposing ten (10) day suspension and noting that a review of the record shows that Mr. Tillman was verbally reprimanded in August, 1995 for inappropriate sexual remarks made on two (2) occasions to his supervisor and noting that Mr. Tillman was advised at that time that the remarks were offensive and was further advised that future incidents of offensive or inappropriate sexual behavior would result in further disciplinary action.

7. Department Exhibit No. 9 -- Memorandum dated August 16, 1995 from Lynn M. Banks, LCSW, Director of Social Services to James Tillman's Psychiatric Social Worker II confirming verbal reprimand given on Tuesday, August 8, 1995 for comments of an intimate nature deemed inappropriate in a professional relationship and/or setting.

James Tillman, being sworn, identified and offered two (2) written exhibits. Appellant's Exhibit No. 1, received without objection consisted of a three (3) page typed statement submitted by Mr. Tillman to the Merit Employee Relations Board with his appeal. Appellant's Exhibit No. 2 consisted of a one (1) page recitation of Merit Rules Mr. Tillman contended were violated by the agency in imposing a ten (10) day suspension. Specifically, Merit Rule 15.1; 15.2 and 15.8.

Mr. Tillman admitted blowing on the neck of Faye Harris. He stated that he was having a good day; it was just horseplay; she has a lot of problems and is always down. He denied that he had ever asked her out and denied that he had made the statements she attributed to him. He stated that he did not accuse her of lying at the time of the meeting with Mary Brennen because they had to work together in the future. He thought at the time that the incident would be closed and so it was not necessary for him to challenge her and deny the statements. He contended that the imposition of a ten (10) day suspension was excessive and was caused by the improper use of a prior disciplinary action which was over two (2) years old in violation of the Merit Rules. Mr. Tillman also denied making the statements for which he received the reprimand in 1995.

### 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. 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 the management has 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.

#### **MERIT RULE NO. 15.2**

"Employees shall receive a written reprimand where appropriate based on specified misconduct, or where a verbal reprimand has not produced the desired improvement."

#### **MERIT RULE NO. 15.8**

"Adverse documentation shall not be cited by agencies in any action involving a similar subsequent offense after two (2) years, except if employees raise their past work record as a defense or mitigating factor."

## DISCUSSION, FINDINGS AND CONCLUSIONS

The burden of proof in a proceeding such as this is upon the Appellant and the action of the appointing authority, in this case, the Department of Health and Social Services, is prima facie correct. See *Hopson v. McGuinnes*, Del. Supr., 391 A.2d 187 (1978). The Board finds that Ms. Faye Harris is a credible witness and that the Department has made an adequate showing that the employee committed the conduct for which he was disciplined. There is a dispute as to whether certain offensive language was uttered by Mr. Tillman. On balance, considering the circumstances including the testimony, the credibility, and the interests of the parties, the Board is convinced by a preponderance of the evidence that it is more probable than not that the statements were made. Mr. Tillman has not convinced the Board to the contrary and has not met his burden in this regard.

The Board also finds that the due process requirements including a pre-determination meeting were met and that the penalty imposed was appropriate to the circumstances. Mr. Tillman expressed concern over the length of time between the commission of the offenses and the imposition of the discipline. While prompt imposition of discipline has much to recommend it, so too does seasoned and careful consideration of what is appropriate. The time involved here was not excessive under the circumstances.

Somewhat more troubling, however, is the situation created by the consideration of the reprimand given to Mr. Tillman in 1995 and the relationship of the consideration to the appropriateness of the discipline imposed in light of Merit Rule No. 15.8 which places a period of repose of two (2) years on the use of adverse documentation by an agency except where the employee raises his or her past work record as a defense of mitigating factor. In this case,

Department Exhibit No. 8, the letter imposing the ten (10) day suspension, expressly references the prior incident in 1995 slightly over two (2) years preceding the present incidents which occurred in September of 1997.

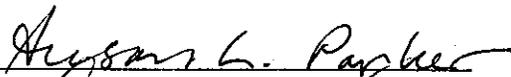
The presumption of the appropriateness of the penalty imposed may be argued to be overcome by the express consideration of the prior reprimand. The discipline imposed is severe and Mr. Tillman contends under the circumstances is excessive. The Board, however, is without authority to fix the penalties on appeal from disciplinary actions and to substitute other or lesser sanctions for the penalties imposed by the appointing authority. *State v. Berenguer*, Del. Super., 321 A.2d 507 (1974).

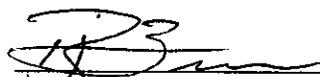
The Board has ignored the prior discipline and concludes that, even in the absence thereof, the penalty imposed under the circumstances, while severe, is not inappropriate.

**ORDER**

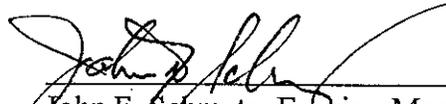
For the foregoing reasons, the action of the appointing authority is upheld and the appeal is dismissed.

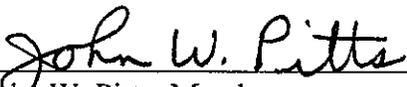
IT IS SO ORDERED this 19<sup>th</sup> day of November, 1998

  
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Susan L. Parker, Esquire, Chairperson

  
\_\_\_\_\_  
Robert Burns, Vice-Chairperson

  
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Dallas Green, Member

  
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John F. Schmutz, Esquire, Member

  
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John W. Pitts, 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:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within thirty (30) days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial *de novo*. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: November 19, 1998

Distribution:

Original: File

Copies: Grievant

Agency's Representative