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BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

J. J. CHRISTMAN, M.D.,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 04-06-307**
v.	)	
	)	
DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES,	)	**DECISION AND ORDER**
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board ("the Board") at 10:00 a.m. on December 12, 2007 at the Margaret M. O'Neill Building, 410 Federal Street, Suite 213, Dover, DE 19901

BEFORE John F. Schmutz, Chair, Joseph D. Dillon, and Paul R. Hauck, Members, constituting a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

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CIVIL DIVISION
DEPARTMENT OF JUSTICE
DOVER, DELAWARE

Laura A. Gerard, Esquire
Legal Counsel to the Board

Jean Lee Turner
Administrative Assistant to the Board

Roy S. Shiels, Esquire
on behalf of J.J. Christman, M.D.

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Division of Health and Social Services

SUMMARY OF THE EVIDENCE

The grievant, Dr. Christman, offered and the Board admitted into evidence without objection nine exhibits: Dr. Maureen Dempsey memo dated February 3, 2004 (A-1-1); Dr. Christman's Performance Review for the period December 2002 to February 3, 2004 (A-1-2); e-mail dated August 27, 2003 from Barbara Jarrell to Dr. Dempsey (A-1-4); e-mail dated January 13, 2004 from Barbara Jarrell to Joan Powell (A-1-5); e-mail dated August 14, 2003 from Kae Johnson to Barbara Jarrell (A-1-6); composite e-mails and other documents from subordinates (A-1-7); State of Delaware Performance Review User Guide (A-1-9); Dr. Christman position posting (A-1-12); and handwritten notes dated June 13, 2003 (A-1-13).

The Board admitted into evidence subject to authentication a time-line diagram (A-1-3). The Board admitted into evidence a Division Organizational Chart (A-1-10) and a Community Health Care Access Organizational Chart (A-1-11) subject to authentication of hand-written notations on those documents. The Board reserved decision on the admission of the first two pages of exhibit A-1-8 until the document could be authenticated.

Dr. Christman testified on her own behalf and called one witness, Kathleen Sullivan (a hearing officer for the Driver Improvement Medical Unit of the Division of Motor Vehicles).

FINDINGS OF FACT

Dr. Christman started to work at the Division of Public Health in 2000 as the Chief of the Community Health Care Access Section. In that position, she had management responsibility for various programs, including Northern Health Services, Southern Health Services, and the Women Infants and Children (WIC) program.

In 2003, Dr. Maureen Dempsey became the new Director of the Division of Public Health. A number of organizational changes then took place. As a result, Dr. Christman was no longer responsible for Northern Health Services, Southern Health Services, WIC, and other programs. According to Dr. Dempsey, these changes significantly diminished her job responsibilities in the number of personnel she oversaw, her access to federal and state grant monies, and her direct reporting to the Division Director.

On April 5, 2004, Dr. Christman received an unsatisfactory performance review from the Division Director. Dr. Christman grieved, and the Division rescinded the performance evaluation and restored her pay.

CONCLUSIONS OF LAW

In her appeal to the Board, Dr. Christman claims: "(1) the Agency has abused the evaluation process, using it for punitive purposes rather than sincere evaluation, and (2) the agency has during the same time period focused on and systematically reduced the functions, personnel and budget of Grievant's position, without State Personnel approval or coordination, claiming realignment was general and minor in nature."

After Dr. Christman presented her evidence and rested her case, DHSS moved to dismiss the appeal because she had not met her burden of proving a violation of the Merit statutes or Merit Rules and regulations. The Board's Rules of Practice and Procedure provide for dispositive motions "prior to the start of the hearing" but do not specifically provide for dismissal after the close of the grievant's case. The Board, however, believes that it is appropriate to consider such a motion without requiring the employer to present its case.

In *Koo v. Kentucky Department for Adult & Technical Education*, 919 S.W.2d 531 (Ky. App. 1996), the Court of Appeals of Kentucky held that an administrative hearing officer had the authority to enter a directed verdict in favor of an employer after the employee presented his case. "Hearing officers are afforded great deference when considering and weighing evidence. To require that the party not having the burden of proof to go forward, when the hearing officer is unpersuaded by the case presented by the party bearing such burden, would be a futile exercise." 919 S.W.2d at 533. *See also Smith v. Parham*, 72 F. Supp.2d 570, 574 (D.Md. 1999) ("It would certainly be inconsistent for the Maryland General Assembly to grant such broad authority to ALJs, but then deny them the right to dismiss a case based on insufficient evidence.").

The Administrative Procedures Act gives the Board broad authority to conduct its hearings. *See* 29 *Del. C.* §10125. The Board believes that includes the authority to dismiss an appeal after a grievant presents his or her case for failure to prove by a preponderance of the evidence a violation of the Merit statutes or the Merit Rules or regulations.

Technically, "directed verdict" is not the proper procedural device in an administrative case because it only applies in jury trials. "In the case of a defendant's motion for a directed verdict, the trial judge assesses whether plaintiff has discharged the burden of proving a prima

facie case by reviewing the evidence in the light most favorable to the plaintiff." *Gary Realty Co. v. Dudek*, Civ.A. No. 79A-MY-13, 1980 WL 318318, at p.2 (Del. Super., June 10, 1980). "If under any reasonable view of the evidence the jury could justifiably find in favor of the plaintiff, then the factual issues must be submitted to the jury." *Id.*

In contrast, in a non-jury case a court can dismiss the case "based on insufficiency of plaintiff's proof." *Id.* (citing Superior Court Civil Rule 41(b)). [1] The court is "empowered to weigh the evidence and decide where the preponderance lies." *Gary Realty*, 1980 WL 31318, at p.2.

When an employer moves to dismiss after the grievant presents his or her case and rests, the Board believes it can and should follow the court rules of civil procedure and "evaluate the evidence without making special inferences in the [grievant's] favor." *Emerson Electric Co. v. Farmer*, 427 F.2d 1082, 1086 (5th Cir. 1970). The Board "should go ahead and resolve the case on the basis of the preponderance of the evidence." *Id.* [2]

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[1] Superior Court Civil Rule 41(b) provides: "After the plaintiff in an action tried by the Court without a jury, has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

[2] By letter dated January 15, 2008, the Board's Legal Counsel was of the opinion that "the legal standard on which [the Board] based its verbal vote for the Motion to Dismiss raised at the end of Appellant's case was incorrect." Based on further legal research, the Board's Legal Counsel is now of the opinion that the Board applied the correct legal standard. After Christman presented and rested her case, the Board concluded as a matter of law that Christman had not proved by a preponderance of the evidence any violation of the Merit statutes or Merit Rules or regulations. Accordingly, the Board does not have to re-hear the case.

Accordingly, the Board will address Dr. Christman's two claims based on the evidence she presented at the hearing.

A. Performance Evaluation

Merit Rule 12.1 provides: "Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. 'Just cause' means that 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."

Dr. Christman contends that Merit Rule 12.1 "makes everything an adverse action for disciplinary purposes from an oral reprimand on up." The Board, however, has previously determined that oral or verbal reprimands are not disciplinary measures for purposes of Merit Rule 12.1. *See Trader v. DHSS*, MERB (May 15, 2008). The Board also concludes that an unsatisfactory performance review is not a disciplinary measure for purposes of Merit Rule 12.1.

In *Turrurici v. City of Redwood City*, 190 Cal.App.3d 1447 (1987), state law provided for a right to appeal any "punitive action," defined to include dismissal, demotion, suspension, reduction in salary, [or] written reprimand." The California Court of Appeal held that a negative personnel evaluation was not punitive action. "[T]he nature of a an employee evaluation is such that negative comments may be expected. Certainly, the legislature did not contemplate an administrative appeal every time an employee receives an adverse evaluation." 190 Cal.App.3d at 1449-50. ""[T]he performance appraisal was a regularly scheduled employee evaluation, the purpose of which was to point out areas in which the employee needs improvement. . . . The object was not to impose punishment but to assist the employee in *avoiding* it." *Id.* at 1450-51.

The Board believes that Merit Rule 12.1 applies only to disciplinary measures that are punitive in nature. The Board does not believe that an unsatisfactory performance evaluation is punitive in nature. The evaluation is intended to bring the employee's attention to areas needing improvement, not to punish the employee for misconduct.

The Board concludes as a matter of law that Dr. Christman's April 2004 unsatisfactory performance evaluation was not a disciplinary measure and therefore is not grievable under Merit Rule 12.1. [3]

B. Job Responsibilities

Dr. Christman contends that significant changes in her job responsibilities were disciplinary action "to punish the employee who had gotten on the wrong side of the Director."

The Board does not believe that a change in job duties or responsibilities is a disciplinary measure for purposes of Merit Rule 12.1 unless it amounts to a demotion. Merit Rule 19.0 defines a "demotion" as "the movement of an employee from a position in a class of a higher paygrade to a position in a class of lower paygrade through a process other than reclassification." Whatever changes the Division made in Dr. Christman's job responsibilities, they did not entail her moving to a class of lower paygrade. Those changes were within the Division's management prerogatives under Merit Rule 1.4 "to manage its operations and direct employees except as specifically modified by these Rules."

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[3] The Board notes that Dr. Christman also cited to Merit Rule 13.3 which requires the employer to follow certain procedures for an unsatisfactory performance evaluation. The Board believes that any claim Dr. Christman may have had under Merit Rule 13.3 was resolved in her favor at the Step 3 level in another grievance she filed.

Dr. Christman did not use the term, but she suggested that the substantial changes in her job responsibilities amounted to a "constructive" or "de facto" demotion. The Board does not believe it has statutory authority to redress an alleged de facto demotion. "'The State Personnel Commission [now the Board] is a creature of statute. 29 *Del. C.* Ch. 59. Its power and authority are derived exclusively from the statute, and its power therefore extends only to those cases which are properly before it in compliance with the statutory law.'" *Cunningham v. Department of Health & Social Services*, Civ.A.No. 95A-10-003, 1996 WL 190757, at p.2 (Del. Super., Mar. 27, 1996) (Ridgely, Pres. J.) (quoting *Maxwell v. Vetter*, 311 A.2d 864, 865 (Del. 1973).

The Merit statute authorizes an appeal to the Board for "dismissal, demotion or suspension." 29 *Del. C.* §5949(a). Merit Rule 19 defines a "demotion" as "the movement of an employee from a position in a class of higher paygrade to a position in a class of a lower paygrade through a process other than reclassification." The Board does not believe it has jurisdiction to hear a grievance alleging a constructive or de facto demotion through the loss of significant job responsibilities which does not involve the employee's moving to a lower paygrade.

In *Berumen v. County of Los Angeles Department of Health Services*, 152 Cal.App.4th (2007), a hospital administrator claimed a de facto demotion when the medical center reorganized its operations and she lost significant job responsibilities. The California Court of Appeal held that the county civil service commission did not have jurisdiction over the hospital administrator's claim. "A civil service commission created by charter has only the special and limited jurisdiction expressly authorized by the charter." 152 Cal.App.4th at 376. The county civil service rules defined a "demotion" as "a lowering in rank or grade." The hospital administrator "was not reduced in either rank or grade, and therefore was not demoted within the meaning of the Civil

Service Rules . . . The Civil Service Rules do not recognize a direct civil service appeal for a 'de facto' demotion, which by itself does not constitute a 'demotion' under the Civil Service Rules." *Id.*

The Board concludes as a matter of law that the loss of job responsibilities without reduction in pay is not a demotion or other disciplinary measure over which the Board has jurisdiction. Dr. Christman failed to prove that DHSS took any disciplinary measure against for which Merit Rule 12.1 required just cause.

ORDER

It is this 28th day of May, 2008, by a majority vote of 2-0, the Decision and Order of the Board that the Grievant's appeal is denied.

John F. Schmutz
Chair

Joseph D. Dillon
Member

I dissent because I believe the Board had an obligation to hear the case in its entirety.

Paul R. Houck

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 on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must 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 30 days of the day the notice of the decision was mailed.
>
> © 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: June 11, 2008

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