BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

GRIEVANT,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 12-04-541**
v.	)	
	)	**DECISION AND ORDER**
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	)	(*redacted*)
	)	
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on October 18, 2012 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Dr. Jacqueline Jenkins, Acting Chair, John F. Schmutz, and Paul R. Houck, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Employee/Grievant *pro se*

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of
Natural Resources and Environmental
Control

BRIEF SUMMARY OF THE EVIDENCE

The Department of Natural Resources and Environmental Control (DNREC) offered and the Board admitted into evidence five documents pre-marked for identification as Exhibits 1-5.

DNREC called four witnesses: Lieutenant Michael J. Costello; Patricia E. Murray; Arturo Sanchez; and Kathleen M. Stiller, Director of the Division of Water. [1]

The employee/grievant (the Grievant), testified on her own behalf but did not call any other witnesses. The Grievant did not offer any documents into evidence.

FINDINGS OF FACT

Prior to her termination on April 11, 2012, the Grievant had worked in the Division of Water for fourteen years.

In January 2005, DNREC adopted the State of Delaware Workplace Violence Policy. As set forth in the Policy Statement: "The State of Delaware is committed to providing a workplace that is safe, secure and free of harassment, threats, intimidation and violence for all employees." The policy lists as examples of prohibited workplace violence:

* aggressive or hostile behavior that creates an objective reasonable fear of injury to another person or subjects another individual to emotional distress;

* hitting or shoving an individual with any part of one's body and/or object.

The policy notes that "Violence can include more than inflicting physical harm to others or self. Violent behavior also consists of threats and acts of aggression. Some examples of threats

[1] Lieutenant Costello was out of state so the Board allowed him to testify by telephone.

are remarks of revenge and abusive and obscene statements. Acts of aggression are abusive behavior, such as stalking, pounding of fists, stomping, swiping of objects, tearing paper and tampering with property, in an attempt to intimidate, inflict harm, or destroy property."

The policy provides that "Threats, threatening conduct, or any other acts of aggression or violence in the workplace will not be tolerated. The violation of this policy may be grounds for discipline up to and including dismissal based on the just cause standard set forth by Merit Rule 12.1, ..."

In July 2007, the Grievant received Violence in the Workplace training.

On January 12, 2012, at around 4:30 p.m., Patty Murray, an Environmental Scientist III, was walking to the rear of the Richardson Robinson Building carrying a handful of water drilling permits. Normally, Murray would give the permits to the Grievant to send out by mail but the Grievant's work day ended at 4:30 p.m. (Murray worked until 5:00 p.m.). As Murray passed the Grievant in the hall, the Grievant said "I hope those aren't for me." Murray replied, "Oh yeah, b****, these are for you."

According to the Grievant, she and Murray had been friends for many years and Murray had used the "B" word before in jest but it had never bothered the Grievant. [2]

For reasons the Grievant did not explain to the Board, Murray's use of the "B" word on January 12 set the Grievant off. Murray's and the Grievant's accounts of what happened next diverged sharply. According to the Grievant, she squeezed Murray's neck with one hand but it was only "horseplay." According to Murray, the Grievant grabbed her by the throat with both hands and pushed her up against a copying machine for 20-25 seconds.

[2] DNREC reprimanded Murray for using the "B" word with the Grievant.

According to Murray, she "was completely shocked," her "air was cut off," and she "couldn't breathe." According to Murray, the Grievant said while holding her throat, "Don't call me that!" For some time afterwards, Murray felt stressed out and couldn't sleep or eat because of her apprehension about running into the Grievant at the office.

The day after the January 12 incident, the Grievant went to Murray's office. Murray was talking with another co-worker, Bill Cocke. The Grievant told him to get out of the office. After Cocke left, the Grievant demanded to know if Murray had reported the incident to Human Resources. Murray assured the Grievant she had not.

Murray was traumatized by the incident. Even nine months later when she testified before the Board she struggled to maintain her composure. Murray testified that she did not immediately report the incident as required by the Workplace Violence Policy because she was afraid of retribution by the Grievant. In Murray's own words, "I didn't know that it won't happen again"; "I was nervous, I wasn't sure what was going to happen next."

Eventually, Murray came forward (the Board does not know exactly when or to whom). Kathleen Stiller testified that she became aware of the incident on February 6, 2012. The next day she asked Lieutenant Michael Costello, a police officer in the Environmental Crimes Unit, to investigate. Meanwhile, Stiller ordered the Grievant not to have any contact with Murray.

Lieutenant Costello interviewed both Murray and the Grievant, the only eyewitnesses to the incident. [3] After reviewing Costello's investigative report, Stiller notified the Grievant she was recommending her termination for workplace violence. Stiller testified that she based her

[3] Arturo Sanchez was in his office at the time of the incident. He testified that he heard shouting in the hall but did not leave his office and did not see anything that happened between the Grievant and Murray.

recommendation on the adverse impact of the Grievant's misconduct on Murray and the other staff. According to Stiller, DNREC has a "zero tolerance" workplace violence policy because it will run the risk of placing employees in potential jeopardy.

DNREC held a pre-termination meeting on March 19, 2012. By memorandum dated April 11, 2012, the Deputy Director of DNREC (David Small) terminated the Grievant for violating the Workplace Violence Policy.

The Board finds as a matter of fact that DNREC has a zero-tolerance Workplace Violence Policy.

The Board finds as a matter of fact that the Grievant received training about Workplace Violence in July 2007.

The Board finds as a matter of fact that on January 12, 2012 the Grievant violated the Workplace Violence Policy by putting her hands on Murray's neck in an aggressive and threatening manner. The Board finds as a matter of fact that Murray's account of the incident was the more credible. In her testimony before the Board, Murray spoke from the heart and she was obviously still uncomfortable in the Grievant's presence.

The Grievant was less than credible. She acknowledged that she grabbed Murray by the neck and held her for upwards of thirty seconds, though she denied pushing Murray up against a copy machine. But when Lieutenant Costello first interviewed the Grievant, she said she had only pinched the skin of Murray's neck with her thumb and forefinger, a prior inconsistent statement.

The Board does not find credible the Grievant's testimony that she did not intend to hurt Murray and that it was merely "horseplay." Murray's shock at having her neck – a very

vulnerable area – grabbed by a co-worker and squeezed to the point where she could not breathe would have been obvious to anyone. The Board was particularly disturbed by the Grievant's comment during her testimony that "If I wanted to hurt her [Murray], I could have."

The Board finds as a matter of fact that DNREC had legitimate concerns about the workplace safety of other employees if the Grievant remained on the job. As Kathleen Stiller testified, there was no way of knowing whether the Grievant might fly off the handle again, this time with even more serious consequences.

CONCLUSIONS OF LAW

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.**

The Board concludes as a matter of law that DNREC had just cause to terminate the Grievant for violence in the workplace.

"'Just cause for removal from civil service employment under a state civil service act has been said to exist only if the factors supporting removal are job-related and in some manner rationally and logically touch upon the employee's competency and ability to perform [her] duties.'" *Vann v. Town of Cheswold*, 945 A.2d 1118, 1122 (Del. 2008) (en banc) (quoting 15A Am.Jur.2d Civil Service §64).

An employer "is obligated to maintain a safe working environment for its employees;

consequently, when a violent threat is made to [another employee], termination is reasonable." *Holmes v. Cleveland Civil Service Commission*, 2010 WL 126000, at p.5 (Ohio App., Jan. 14, 2010). This is true even if no criminal charges are filed. "[W]hether to prosecute someone and whether to terminate someone are completely different standards. The [employer was] in the best position to determine the impact the threat had on the other employees and the workplace." *Id.*[4]

In *Ford v. Louisiana State University Health Sciences Center*, 2011 WL 856418 (La. App., Feb. 11, 2011), two hospital employees got into an argument and one of them called the other a "b****". Instead of walking away, the other employee started to pick up a nearby chair and a scuffle ensued. The other employee violated the hospital's workplace violence policy. Rather than walking away and reporting the insult, the other employee "escalated a verbal confrontation into a dangerous physical confrontation." 2011 WL 856418, at p.7. "The Civil Service Commission has found that violence in the workplace is cause for dismissal." *Id.* at p.8 (citing *Lewis v. Louisiana Health Care Authority*, CSC No. S-11881 (Feb. 26, 1997)).

"It is well settled under Delaware law that even a single act of misconduct may constitute 'just cause' for terminating an employee. An employer is not obligated to withstand multiple acts of serious misconduct before termination is appropriate." *Green-Hayes v. Department of Labor*, C.A. No. N12A-02-011-PLA, 2012 WL 351822, at p.3 (Del. Super., Aug. 8, 2012). [5]

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[4] In *Holmes*, an employee sent an e-mail to her supervisors threatening them with bodily harm if they did not pay her for two days she did not work.

[5] *Toribio v. Peninsula United Methodist Homes*, C.A. No. 08A-02-001-PLA, 2009 WL 153871 (Del. Super., Jan. 23, 2009), illustrates the risk of using progressive discipline to curb workplace violence. In *Toribio*, the claimant received a written warning and then a two-day suspension for pushing a co-worker's hands away from a time-clock as they were clocking out for the day. Two years later, the claimant hit a co-worker before he could clock out ahead of her, causing him to stumble to the ground further injuring his already bandaged hand.

The Delaware courts have held that a single act of workplace violence may be just cause for termination. *See Mackey Green Valley Terrace*, C.A. No. 02A-05-002-ESB, 2002 WL 32067545, at p.3 (Del. Super., Nov. 26, 2002) (single act of throwing a knife at a co-worker in a cafeteria dispute) (citing *Hudson v. English Hill Apartments*, C.A. No. 95A-05-004-RRC (Del. Super., Nov. 30, 1996) (single act of waiving a toy revolver in a co-worker's presence)).

In *Mackey*, the employer had a zero tolerance policy toward violence in the workplace and made new employees aware of the policy during orientation. DNREC provided the Grievant with workplace violence training in July 2007 so she was aware of the agency's zero tolerance policy and the potential consequences of violating the policy.

In *Mackey* and *Hudson*, the courts affirmed the denial of unemployment benefits because the employees' misconduct was willful or wanton. The Board is well aware that the "just cause" standard for denying unemployment benefits is different than the just cause standard for discipline under Merit Rule 12.1. *See Vann v. Town of Cheswold*, 945 A.2d at 1121 (because unemployment compensation is a property-like right, "we require an especially good reason and demand heightened scrutiny of the proffered reason [for termination]").

However, if a single act of workplace violence may be just cause for denying unemployment benefits, *a fortiori* a single act of workplace violence may be just cause for termination under Merit Rule 12.1. Termination from the classified service only requires that "the factors supporting removal are job-related and in some manner rationally and logically touch upon the employee's competency and ability to perform his duties." *Vann*, 945 A.2d at 1121 (footnote omitted).

The Workplace Violence Policy provides that a "violation of this policy may be grounds

for discipline up to and including dismissal." Dismissal is not mandatory in every case. The agency may take into account mitigating circumstances in deciding on a lesser penalty than dismissal. The Grievant did not offer the Board any mitigating circumstances for her physical attack on Murray. Even if the Grievant felt insulted by Murray's use of the "B" word, the Grievant had other options. She could have just walked away, or told Murray that her feelings were hurt, or reported the exchange to a supervisor. Instead, she "escalated a verbal confrontation into a dangerous physical confrontation." *Ford*, 2011 WL 856418, at p.7.

The Grievant did not present the Board with evidence that DNREC did not dismiss another employee for the same or substantially similar workplace violence. Absent such evidence, the Board will not second-guess the agency's decision that the Grievant was too great a risk to remain in the workplace. The agency is "in the best position to determine the impact the threat had on the other employees and the workplace." *Holmes*, 2001 WL 126000, at p.5.

ORDER

It is this **31st** day of **October, 2012**, by a unanimous vote of 3-0, the Decision and Order of the Board to deny the Grievant's appeal.

JACQUELINE D. JENKINS, EDD, MERB Member

JOHN F. SCHMUTZ, MERB Member

PAUL R. HOUCK, MERB 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 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.
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> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
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> (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.
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> (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: **October 31**, 2012

Distribution:
Original: File
Copies: Grievant
Agency's Representative
Board Counsel