BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

GRIEVANT,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 12-10-568**
v.	)	
	)	
DEPARTMENT OF HEALTH AND SOCIAL SERVICES/OFFICE OF THE CHIEF MEDICAL EXAMINER,	)	**INTERIM DECISION AND ORDER**
	)	**(Public Order)** *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 September 25, 2013 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, Victoria D. Cairns, Dr. Jacqueline Jenkins, 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

Jeffrey K. Martin, Esquire
on behalf of the Grievant

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of Health and Social Services/Office of the Chief Medical Examiner

BRIEF SUMMARY OF THE EVIDENCE

The Office of the Chief Medical Examiner (OCME) offered and the Board admitted into evidence sixteen documents marked for identification as Exhibits A-D and F-P. [1]

OCME called four witnesses: Johna Esposito, Forensic Toxicology Supervisor; Jessica A. Smith, Chief Forensic Toxicologist; Hal G. Brown, Deputy Director, Office of Chief Medical Examiner (OCME); and Mark Cutrona, former Deputy Attorney General.

The employee/grievant (Grievant) offered and the Board admitted into evidence documents marked for identification by page numbers as MERB 001 – MERB 0190.

The Grievant testified on his own behalf but did not call any other witnesses.

PRELIMINARY PROCEDURAL MATTERS

The Board came to the hearing prepared to hear evidence and argument on two issues as framed in the Pre-Hearing Order: (1) whether the agency had just cause to terminate the Grievant for unsatisfactory job performance (Merit Rule 12.1); and (2) whether the agency intentionally discriminated against the Grievant on the basis of his national origin (Merit Rule 2.1).

At the start of the hearing, however, the Grievant's counsel advised the Board that they were also alleging violations of Merit Rules 13.2, 13.3, 12.4, 12.5, 12.6, 18.1, and 18.4. The agency's counsel objected to this trial by ambush. All of the agency's witnesses had prepared for

[1] During cross-examination of the Grievant, the agency's counsel showed him a document to try to impeach his testimony about the agency's denying him access to records he later asked the Board to subpoena. The Board admitted that document (e-mails dated September 17 and 18, 2012 between the Grievant and Jessica Smith) marked for identification as Exhibit S. The Board notes that the e-mails concerned the Grievant's access to a DUI file after he received a subpoena to testify in a criminal trial, not the documents the Grievant asked the Board to subpoena on June 27, 2013.

hearing on July 24, 2013, only to have the hearing continued at the last minute at the Grievant's request because of his health. All of the agency's witnesses were present and ready to testify about the two issues framed in the Pre-Hearing Order, but not on the new issues raised by the Grievant.

On such short notice, it was difficult for the Board to decide whether it even had jurisdiction over the newly alleged Merit Rule violations. The Board decided to go forward and hear the evidence on the just cause and discrimination issues. The Grievant's legal counsel acknowledged that he was prepared to do that, even though he preferred to have all of the issues heard at the same time.

After the Board decided the Merit Rule 2.1 and Merit Rule 12.1 claims, the Board instructed the parties to file supplemental briefs on three issues: (1) Does the Board have jurisdiction over the grievant's claims for a violation of Merit Rules 12.4, 12.5, 12.6, 18.1, and 18.4?; (2) If so, did the agency violate any of those Merit Rules?; and (3) If so, were any procedural defects remedied by the grievant's opportunity to be heard at the Step 3 level and before the Board?

The Board directed the Grievant to file his supplemental brief by October 25, 2013 and for the agency to file its supplemental brief by November 25, 2013. The Board will not accept reply briefs. After reviewing the supplemental briefs, the Board will schedule another meeting to decide if it needs to hear evidence regarding the procedural issues, or if the Board can decide the issues as a matter of law. The Board will retain jurisdiction over this appeal until then.

FINDINGS OF FACT

OCME hired the Grievant as an Analytical Chemist II on February 1, 2010 subject to a one-year probationary period. The Grievant is a national of Sierra Leone. He has a B.S. degree in chemistry.

The Grievant worked in the Forensic Toxicology Lab. The lab chemists are responsible for testing blood, urine, and other samples to determine, for example, whether a driver was under the influence of alcohol or drugs. Johna Ober (now Johna Esposito), is the supervisor of the Forensic Toxicology Lab and was the Grievant's immediate supervisor.

Johna Esposito conducted the Grievant's performance review for the period March 17-October 11, 2011. The Grievant's overall rating was "Needs Improvement." Esposito noted that the Grievant had received four Corrective Action Reports (CARs). OCME may issue a CAR after it discovers that a chemist made an error in analyzing a sample. The most serious kind of error is a "sample switch." As explained by Johna Esposito, the consequences of a sample switch can be severe once it goes "out the door." For example, a driver arrested for DUI may be acquitted because the sample tested contained no alcohol but was not the blood drawn from that driver. Conversely, an innocent driver could be convicted and lose his liberty based on another person's blood alcohol content.

On October 12, 2010, OCME placed the Grievant on a Performance Improvement Plan (PIP). Among other things, the PIP required the Grievant to "Avoid all switching errors."

The Grievant's one-year probationary period was to expire on February 1, 2011. Despite his job performance issues, OCME asked the Director of the Office of Management and Budget (OMB) to approve an extension of his probationary period for another six months. The OMB

Director approved the extension until August 1, 2011. According to Johna Esposito, this was the only time OCME had ever asked to extend a new employee's probationary period in the 5 ½ years she had worked there.

On April 27, 2011, Esposito conducted a performance review of the Grievant for the period October 11, 2010 to April 27, 2011. The Grievant's overall rating was "Meets Expectations." Esposito noted in the review:

> Typically, we would expect a person to be fully trained in about a year. [The Grievant] has been working in the toxicology laboratory since 2/01/10, for over 15 months, and has not even started training on THC. This is due, in part, to several setbacks early on involving sample switch errors. [The Grievant] has made much improvement since then, and it is hoped that he will be fully trained within the next three to six months.

Esposito also noted that the Grievant "has failed two mock trials. This is especially disconcerting because much time and effort went in to preparing him for his second mock trial and specific suggestions were given, which were not followed . . . [The Grievant] did make marked improvements and it is hoped that, with practice, he will be able to pass within the next several months." [2]

In spite of the Grievant's job performance issues, OCME did not terminate him before his probationary period expired (August 1, 2011).

On December 21, 2011, Johna Esposito conducted a performance review of the Grievant for the period April 4 to December 19, 2011. The Grievant's overall rating was "Needs

[2] OCME partners with prosecutors from the Department of Justice to hold mock trials to acquaint chemists with courtroom procedure for when they may have to testify as an expert witness at trial. The Grievant finally passed his mock trial in November 2011.

Improvement." Esposito noted that the Grievant received two Corrective Action Reports for sample switches (his fifth and sixth CARs).

> [I]t should be reiterated that sample switch errors are one of the most potentially devastating errors that can be made in a lab. It has gotten to the point where, if any more occur, [the Grievant] will not be trusted to do *any* type of casework. He will immediately be taken off casework until a meeting can be scheduled between [the Grievant], his supervisors, the director and deputy director of the lab, and possibly Human Resources. It is worth noting that casework is the primary job of a chemist in the toxicology laboratory.

On December 21, 2011, OCME placed the Grievant on another Performance Improvement Plan. Like the previous PIP, the plan warned the Grievant to "Avoid all sample switching errors." OCME limited the Grievant to conducting only alkaline/acid neutral drug screens. "This is due to his many sample switches. Sample switches are more easily detectable with these assays because they are typically confirming EIA [enzyme immunoassay] results and/or confirmed by alkaline quant runs."

Esposito conducted a performance review of the Grievant for the period December 19, 2011 to April 30, 2012. The Grievant's overall rating was "Meets Expectations."

On August 15, 2012, Esposito conducted a performance review of the Greivant for the period May 1 to August 14, 2012. The Grievant's overall rating was "Unsatisfactory." The principal basis for the rating was the Grievant's seventh sample switch error.

> [T]he office has received case file discovery requests for both cases involved in your seventh sample switch. This means that the attorney general's office(s) and the defense attorneys in each case will see the CAR and all of the notations discussing the error and your prior six sample switches. While the cases have not gone to trial, this is very likely to be an issue and could potentially have a significant impact on the outcome of

> the trials. Furthermore, this could lead to other attorneys questioning the reliability of the work coming from this laboratory. This is one of the many reasons why, in a forensic toxicology laboratory, critical errors are unacceptable.

On August 21, 2011, Deputy Attorney General Mark Cutrona called Jessica Smith, the Chief Forensic Toxicologist, to express his concern that the Grievant's most recent sample switch could jeopardize a felony DUI case Cutrona was prosecuting. Cutrona testified that in the wake of a recent report by the National Academy of Sciences the reliability of forensic labs around the country was being questioned jeopardizing the prosecution of and convictions in countless criminal cases.

By letter dated September 13, 2012, the Deputy Director (Hal G. Brown) informed the Grievant: " I am proposing your dismissal from your position as an Analytical Chemist II in the Office of the Chief Medical Examiner (OCME). The reason for this action is your continued unsatisfactory performance and inability to perform the essential functions of your job." The letter advised the Grievant: "Prior to a final decision in this matter, you are entitled to a pre-decision meeting to respond to the proposed action, and offer any reasons why the proposed penalty may not be justified or is too severe, provided you submit a written request for such meeting to me within fifteen calendar days of the date of this letter."

On September 26, 2012, the Grievant filed a grievance alleging discrimination based on national origin and citing Merit Rule 2.1. [3]

By letter dated October 1, 2012, the Secretary of DHSS (Rita M. Landgraf), informed the

[3] The Grievant alleged in his grievance that "Management is aware of my national origin and is systematically applying obstacles to suppress my success at OCME." The Grievant mentioned "the dismissal letter" but at the time he had only received a notice of intent to dismiss (on September 13, 2012). OCME did not dismiss the Grievant until October 1, 2012.

Grievant: "You are dismissed for the reasons outlined in Mr. Brown's letter of September 13, 2012, and as detailed again below." According to the Secretary, the Grievant waived his right to a pre-decision meeting "by filing a grievance on September 26, 2012."

The Board finds as a matter of fact that over 2½ years the Grievant made seven sample switch errors.

The Board finds as a matter of fact that the Grievant's sample switch errors may have compromised criminal prosecutions and called into question the reliability of the Forensic Toxicology Lab.

The Board finds as a matter of fact that during the 2½ years the Grievant worked at OCME he had by far and away the most sample switch errors of any chemist. The Grievant had seven errors; one chemist had two errors; two chemists had one error; and three chemists had zero sample switch errors.

CONCLUSIONS OF LAW

A. Just Cause For Termination

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.

Just cause is "'a legally sufficient reason supported by job-related factors that rationally

and logically touch upon the employee's competency and ability to perform his duties.'" [4]

The Board concludes as a matter of law that OCME had just cause to terminate the Grievant because he committed the charged offense: unsatisfactory job performance based on seven sample switch errors. The Board concludes as a matter of law that the penalty of termination was appropriate to the circumstances. After supplemental briefing by the parties, the Board will decide whether the Grievant received specified due process rights and, if he did not, whether that should have any bearing on his termination.

The Grievant offered little in the way of a defense to the charged offenses. He went through each of the seven sample switch errors but only repeated what was already in the Corrective Action Report. He did not dispute that he was at fault for the first six CARs.

1. The Grievant's Seventh Sample Switch

The Grievant did not dispute that he analyzed the sample or his supervisor's finding of a switch during her review of the batch. The Grievant suggested the possibility that the cause of the sample switch was that the numbering on the conical vials he used for the final drydown were smudged. According to the CAR, however, Jessica Smith removed the vials from the biohazard waste and determined that vials 5 and 6 (the two that were switched) were clearly labeled. She also checked the autosampler vials which were still in place in the instrument and vials 5 and 6 were clearly labeled.

According to the Grievant, OCME denied him access to his files which might help him show that he was not at fault for the sample switch. At the Greivant's request, the Board issued

[4] *Stanford v. DHSS*, 44 A.3d 923 (TABLE), 2012 WL 1549811, at p.3 (Del., May 1, 2012) (quoting *Vann v. Town of Cheswold*, 945 A.2d 1118, 1122 (Del. 2008)).

a subpoena to OCME on June 27, 2013 for: "All documents pertaining to the sample switch on June 20, 2012 including the Corrective Action Monitoring Form (CAM form) associated with the CAR for this error." According to OCME, there was no CAM form because it had relieved the Grievant of his casework and so there was no casework to monitor.

During the hearing, the Grievant specified for the first time what else he was looking for: the chain of custody worksheet and the instrument sequence/batch packet of all the raw data. Jessica Smith testified that when OCME received the subpoena they did not realize that was what the Grievant was looking for. According to Smith, those records still exist. Smith testified that she reviewed those records when she investigated the sample switch error and all of the chain-of-custody sequences matched up.

The Grievant did not make any proffer to the Board as to how his own review of those same records might exonerate him of responsibility for the sample switch error. The Board does not believe that providing copies of those records to the Grievant at this time would change the Board's decision.

2. Unequal Treatment

The Grievant claims that OCME issued Corrective Action Requests for his errors, but treated other chemists more favorably by not writing them up. This claim does not absolve the Grievant of his errors, but rather goes to whether the penalty of termination was too harsh in light of comparative treatment.

The Board concludes as a matter of law that the Grievant failed to prove unequal treatment because none of the other five employees he identified was similarly situated.

To determine whether employees are similarly situated, the courts evaluate "whether the

employees are involved in or accused of the same or similar conduct and are disciplined in different ways." *Manniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999). The "quantity and quality of the comparator's misconduct must be nearly identical to prevent courts from second guessing employers' reasonable decisions and confusing apples with oranges." *Id.*

In *Washington v. MacNeal Hospital*, 2000 WL 1273452 (N.D. Ill., Sept. 6, 2000), Robert Washington worked in the hospital's Blood Bank. His first performance review identified several deficiencies, including inaccurately performing tests and improperly recording test results. A second performance review identified the same deficiencies and the hospital placed him on a 90-day performance improvement plan. During that period, Washington committed a cross match error which caused a patient to suffer a delayed transfusion reaction.

The hospital gave Washington a final warning and a 60-day extended evaluation period. Six days later, Washington incorrectly recorded a patient's blood type. The hospital terminated Washington.

Washington claimed that other employees had similar performance issues but were not disciplined or terminated. The court disagreed.

> The performance histories of full time Blood Bank medical technologists do not establish that [the hospital] treated these employees more favorably than it treated Washington. While these technologists may have had certain performance problems, they did not have as many negative evaluations, the same type of problems (such as the "serious" cross match error), or the same degree of difficulties as Washington.
> 2000 WL 1273452, at p.7

The Board reviewed the five chemists identified by the Grievant and none of them stack up as valid comparators. For one thing, OCME witnesses testified that not all errors are written

up as a CAR. Whether to write up a CAR depends on the Quality Assurance Manager's assessment of the incident. Typically, a first error – even a sample switch – may not result in a CAR. It also depends on the nature of the error. Sample switches are considered much more serious than a documentation error.

By e-mail dated January 11, 2011, Johna Esposito notified the other lab chemists that "I accidentally added the citalopram quant standard to many of my calibrators, rather than the venlafaxine standard." But according to Jessica Smith, this was a "misspike" not a sample switch error.

The Grievant's second comparator was written up in an Incident Report. Because it was her "first issue with a possible sample switch, no CAR is needed." Similarly, the Grievant did not receive a CAR for his first sample switch.

The Grievant's third comparator was written up in an Incident Report for a sample switch. The Board does not know if that was her first sample switch error or why the Quality Assurance Manager exercised discretion not to write up a CAR. The Board does not believe that this one example supports a pattern and practice of unequal treatment.

On August 16, 2011, OCME wrote up a CAR on the Grievant for a sample switch/contamination error. In the discussion of the root cause of the problem, the CAR noted: "The problem may have started with the fact that a sample, TX11-302 Urine, was added into the logbook for FENT testing by mistake by another analyst (who was notified of the mistake and will be more careful in the future)." The other analyst did not make a sample switch error. In contrast, the Grievant "went ahead with the extraction with a blank on his chain of custody" which caused "the samples in spots 16 and 17 being switched."

On August 3, 2012, OCME wrote a Laboratory Incident Report on the Grievant for his use of a multi-vortexer to mix test tubes when one of the center test tubes splashed over his lab coat and head and the surrounding floor area. As the root cause of the incident, the report stated that the "multi-vortexer had recently been reset after cleaning and the lack of mixing may have been caused by the top bracket being positioned too low." Even if another chemist may have re-set the machine improperly, that was not a sample switch error.

3. Mitigating Circumstances

The Grievant claimed his error rate was higher than the other chemists in the Forensic Toxicology Lab because he did more tests than they did. According to the Grievant, the more tests the more chances for error. The Grievant did not present the Board with any comparative data to support that claim.

The Grievant self-reported five of his seven errors. The Board does not find that a mitigating circumstance. Johna Esposito testified that all of the chemists in the Forensic Toxicology Lab try to self-report their errors because it is in their own interest to do so. And no one can be sure how many errors the Grievant made which went undetected by anyone.

The Grievant suggests that his seventh sample switch was not serious because OCME did not issue a Corrective Action Monitoring Form along with the CAR. Johna Esposito testified there was no reason for a CAM because OCME had already relieved the Grievant of all of his casework.

The Grievant claimed that he is only human and no one is perfect. According to Johna Esposito, "we recognize that people make mistakes." OCME may strive for a zero percent error rate but that may be unattainable. According to Esposito, OCME might be able to tolerate an

error rate of .1% (one in a thousand tests). But the Grievant's error rate was intolerably high. Between 2008 and 2011, the Grievant's error rate was .377%, significantly higher than the other chemists (76-100% higher).

OCME did everything it could to give the Grievant the opportunity to improve, but he continued to fail with adverse consequences for the criminal justice system and the reputation and reliability of the entire Forensic Toxicology Lab. Under those circumstances, the Board concludes as a matter of law that the penalty of termination was appropriate to the circumstances.

The Board concludes as a matter of law that there are no mitigating circumstances to warrant a penalty lesser than termination for the Grievant's seven sample switches.

B. Merit Rules 13.2 and 13.3

Merit Rule 13.2 provides:

> Changes in Performance. Recognition of effort, accomplishment, improvement or the need for further skill development shall be addressed as needed by verbal discussions, written communication, and/or formal documentation.

The Board concludes as a matter of law that the Grievant cannot prove a violation of Merit Rule 13.2. The record shows that his supervisors addressed his need for job performance improvement through verbal discussions, written communication, and formal documentation, including four job performance reviews and two performance improvement plans.

Merit Rule 13.3 provides:

> Unsatisfactory Performance. When an employee's work performance is considered unsatisfactory, the performance must be documented in writing, and the specific weaknesses

> must be made known to the employee. The employee shall be given documented assistance to improve by the designated supervisor. An opportunity for re-evaluation will be provided within a period of 3 to 6 months.

The Grievant signed his unsatisfactory performance review on August 15, 2012. The review detailed the areas of specific performance deficiencies or unsatisfactory work. The Grievant claims that OCME violated Merit Rule 13.3 because it did not give him an opportunity for re-evaluation within three to six months but rather terminated him on October 1, 2012.

The Greivant's Merit rule 13.3 grievance is time barred. Merit Rule 18.6 requires a grievant to file a Step 1 grievance "within 14 calendar days of the date of the grievance matter." The Grievant did not file a grievance until September 26, 2012 (which, by the way, did not mention the unsatisfactory performance review). Merit Rule 18.4 provides that "Failure of the grievant to comply with time limits shall void the grievance."

C. National Origin Discrimination

Merit Rule 2.1 provides:

> Discrimination in any human resource action covered by these rules or the Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors is prohibited.

The Board concludes as a matter of law that the Grievant did not meet his burden to prove that OCME intentionally discriminated against him on the basis of his national origin.

"To establish a prima facie case of national origin discrimination, [the Grievant] must show that (1) he was a member of a protected class; (2) he was qualified for the job; and (3) he was discharged while other employees not in his protected class were retained." *Jalil v. Avdel*

Corp., 873 F.2d 701, 708 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990).

The Grievant is a member of a protected class (he is a national of Sierra Leone). The Board concludes as a matter of law that the Grievant did not establish the other two elements for a prima facie case of national origin discrimination.

First, the Grievant was not qualified for the job of Analytical Chemist II. As the Board has already decided, his job performance was unsatisfactory.

Second, the Grievant did not produce "evidence that could establish that similarly-situated employees of other . . . national origins were treated more favorably than he was." *Subh v. Wal-Mart Stores East LP*, 386 Fed.Appx. 29, 2010 WL 2690321, at p.1 (3rd Cir., July 8, 2010) (per curiam), *cert. denied*, 131 S.Ct. 1005 (2011). It was the Grievant's burden "to identify comparable employees" and "to demonstrate that similarly situated employees were not treated equally." 2010 WL 2690321, at p.1.

The Grievant claims that five other chemists committed errors but did not receive a Corrective Action Request. The Board does not believe they are valid comparators. The Grievant would have to identify another chemist who had as many sample switch error rates as he did but was not terminated. During the Grievant's 2 ½ years at OCME, he had seven sample switch errors. During that same time, one chemist had two sample switch errors, two had one sample switch error, and three chemists had no sample switch errors.

Even if the Grievant established a prima facie case of national origin discrimination, OCME articulated a "legitimate, nondiscriminatory reason for [his discharge]." *Jalil*, 873 F.2d at 706. The Grievant did not present any evidence to convince the Board that "the alleged reasons proffered by [OCME] were pretextual." Indeed, OCME bent over backwards to try to

help the Grievant to succeed. OCME asked OMB to extend his probationary period by another six months, even though the agency could have terminated him for unsatisfactory job performance. OCME gave the Grievant three opportunities to pass a mock trial. The Deputy Director tried to work with the Grievant and the Department of Labor to see if there was another chemist position (like testing soil specimens for the Department of Natural Resources and Environmental Control, or testing drinking water for the Division of Public Health) where a mistake would not have the same devastating consequences as a mistake by the Forensic Toxicology Lab. And the chemist OCME hired to replace the Grievant was another foreign national (an African-American woman from the British Virgin Islands).

There is not a scintilla of evidence in the record of any national origin animus, bias, or discrimination against the Grievant.

INTERIM DECISION AND ORDER

It is this **8th** day of October, 2013, by a unanimous vote of 4-0, the Interim Decision and Order of the Board to provisionally deny the Grievant's appeal but to retain jurisdiction over the appeal pending supplemental briefing by the parties.

Martha K. Austin
MARTHA K. AUSTIN, MERB Chairwoman

Paul R. Houck
PAUL R. HOUCK, MERB Member

Victoria D. Cairns
VICTORIA D. CAIRNS, MERB Member

Jacqueline D. Jenkins
JACQUELINE D. JENKINS, EDD, MERB Member