

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

KATHLEEN DAVIES,)	
)	
Employee/Grievant,)	
)	DOCKET No. 17-12-680
v.)	
)	
OFFICE OF THE AUDITOR OF ACCOUNTS,)	Order of Document Production
)	
)	
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 June 21, 2018 at the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Suite 100 Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Paul R. Houck, Victoria Cairns and Sheldon Sandler, Esq., a quorum of the Board pursuant to 29 *Del. C.* §5908(a).

APPEARANCES

Rae Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L Murray-Sheppard
Board Administrator
MERB

Michele Allen, Esq.
On behalf of Kathleen Davies

Kevin Slattery
Deputy Attorney General
on behalf of the Office of the Auditor
of Accounts

PROCEDURAL BACKGROUND

On or about June 5, 2018, the employee/grievant, Kathleen Davies (“Davies”) filed a request for Production of Documents on her former employer, the Office of the Auditor of Accounts (“OAOA”) to provide the following documents:

1. Produce all copies of allegation(s) submitted to the Office of Management and Budget (“OMB”) in the fall of 2015, as referenced in the July 2016 News Journal Article and confirmed by Bert Scoglietti of OMB.
2. Produce the Memorandum dated March 21, 2016, from Ann Vassali to R. Thomas Wagner referenced in R. Thomas Wagner’s May 17, 2016, letter to the AOA Chief Administrative Auditor (“CAA”) on administrative leave.
3. Produce results of the OMB review from fall 2015 to May 17, 2016.
4. Produce the OMB’s Human Resource results of review performed subsequent to May 17, 2016.
5. Produce all supporting documents, recordings, videos, written and verbal representations including interview notes to be used in the State Auditor’s case for terminating the CAA.
6. DPERS
 - a. Produce an electronic copy of the Wade Sailing MERB Hearing transcript obtained by the Office of the Auditor of Accounts (“AOA”) prior to May 17, 2016 (under the open investigation) from the MERB.
 - b. Produce a readable electronic copy of DPERS Investigative TeamMate workpapers as last revised at or prior to May 17, 2016.
 - c. Produce the May 17, 2016 version of the engagement planning document for DPERS inspection.
 - d. Produce the AOA’s documentation on decision/disposition on closing the DPERS inspection without a public report.
7. Produce a readable electronic copy of the School Revenue Attestation Examination TeamMate project file of May 17, 2016, including the School District schedules of revenues and Local Tax collections.
8. Produce the School District Revenue, Local Tax Collection, and Debt Service Attestations, including:

- a. The May 17, 2016 version of engagement planning document for the School Revenue Attestation Examination engagement; and
 - b. The AOA's documentation on decision/disposition on closing this project.
9. Produce copies of the binders as of May 17, 2016, regarding research for two Charter School inspections given to Stephenie Tatman by the CAA in the Spring of 2016.
 10. Produce a copy of AOA's documentation on the decision not to continue with the two Charter School inspections related to the research.
 11. Produce AOA's Organization Charts for January 1, 2010 through date of the request.
 12. Produce all versions of AOA professional staff qualifications and experience document from January 1, 2010 through date of this request.
 13. Produce Overtime, Under Fill Pay, Compensatory Time, Promotions/Change of working conditions from May 17, 2016, to present.
 14. Produce a copy of John Fluharty's resume and transcripts obtained during his hiring process.
 15. Produce any and all DTI record of changes made to the intranet, the related links, copy of files, documents, and pdfs posted from January 1, 2010 to December 21, 2017.
 16. Produce copies of Division of Accounting Memos from January 1, 2010 through December 21, 2017.
 17. Produce the policy, procedure, and internal control documents specific to AOA's termination of the CAA, that were not already provided as part of the intranet documents request above.
 18. Produce any and all email announcements to all AOA staff on changes to documents and/or posts to intranet web-site.
 19. Produce any and all communications between the State Auditor to the CAA.
 20. Produce any and all emails and voicemails from the office landline and/or mobile devices forwarded from the State Auditor to the CAA, including attachments for her action/response on behalf of the State Auditor.
 21. Produce any and all other communications regarding or related to the CAA from September 1, 2015, to December 21, 2017.
 22. Produce Kathleen A. Davies' complete outlook email and calendar file from DTI in a .pst format from January 2010 to May 17, 2016.

23. Produce all DTI records on public web-post updates, including deletions and or changes with copies of deleted items from the web-site fiscal year end June 30, 2012 through fiscal year end June 30, 2017.
24. Produce all DTI reports on deleted AOA electronic files and records from September 1, 2015 through date of request.
25. Produce the State Auditor's email and calendar requests for meetings with AOA staff from January 1, 2010, through December 21, 2017.
26. Produce the State Auditor's travel log for the State issued vehicle from January 1, 2010, through May 17, 2016.
27. Produce the complete copies of all original recordings and/or videos from January 1, 2010, through December 21, 2017 consisting of:
 - a. the CAA
 - b. R. Thomas Wagner
 - c. AOA staff
 - d. external parties to AOA including vendors.
28. Produce a readable copy of the eSchoolPLUS and Unit Count Performance Audit issued May 4, 2016, as well as any electronic engagement workpapers. (TeamMate)
29. Produce a readable copy of the eSchoolPlus and Unit Count Inspection issued September 6, 2016, and any electronic engagement workpapers. (TeamMate.)
30. Produce a copy of the hardcopy tie-out binder for the eSchoolPLUS and Unit Count Performance Audit.
31. Produce a copy of the Andrew Patchan's contract.
32. Produce any and all emails between the CAA and Andrew Patchan, including attachments.
33. Copy of audit documentation (TeamMate file and tie-out binder) for Millville Volunteer Fire Company inspection issued May 10, 2016.
34. Copy of audit documentation (TeamMate file and tie-out binder) for the June 20, 2016, reissued Millville Volunteer Fire Company inspection.
35. Produce any and all emails, including copies of attached documents, from or to all AOA staff members, relating to the eSchoolPLUS and Unit Count Performance Audit engagement.

36. Produce the Santora Contract quality control reviews, invoices, and Stacey Wayne's review results, including emails from Stacey Wayne to the CAA on the 2015 Dual Employment CY 2012-2013, as well as the following:
 - a. Engagement hours for 1st TeamMate project associated with this engagement and
 - b. Engagement hours for the 2nd TeamMate project associated with this engagement.
37. Produce all Performance Plans for Senior Manager and Managers from Spring 2016.
38. Produce any and all emails from 2015 and 2016, from CAA to Tammy Smith requesting she complete engagement performance evaluations.
39. Produce a list of all TeamMate projects, team members, and assigned reporting structures from January 1, 2010 to May 17, 2016, that are either: concluded, closed, never completed or re-done.
40. Produce all versions of the TeamMate user manuals from 2010 to 2016.
41. Produce a copy of the DVD that was held in CAA's in-bin of Petty Cash Inspection TeamMate project.
42. Produce all Engagement Planning and Engagement Wrap-up documents for the State-wide Unit Count AUPs issued in 2017.
43. Any and all communication (including email notification and/or distribution of results) regarding AOA progress on completing Maximum Student-Instructor Ratio procedures for the State-wide Unit Count AUPs issued in 2017.
44. Produce all results of the Internal and External Investigation referenced in AOA's response to Division of Unemployment Kathleen A. Davies Division of Unemployment Claim Denial.
45. Produce a readable electronic copy of the Charter School Petty Cash TeamMate project file from May 17, 2016.
46. Produce a readable electronic copy of the final Charter School Petty Cash TeamMate project file.
47. Produce any and all communications regarding Charter School Petty Cash TeamMate project and final letters.
48. Produce any and all copies of all reporting distribution for the final work product of the Charter School Petty Cash project.

49. Produce all AOA appropriation balance reports for each fiscal year from June 30, 2009, through June 30, 2016.
50. Produce any detailed report on revenues and expenditures for the non-appropriated special fund from June 30, 2009, through June 30, 2016 and supporting documentation for all expenditures.
51. Produce all of the OMB and Joint Finance Committee transcripts from the AOA budget hearings from January 2010, through May 17, 2017.
52. Produce the State Auditor's computer log-in and log-out records dating from January 2010, to May 2016.
53. Produce DTI's record of the State Auditor's internet access log from January 2010, to May 2016.
54. Produce the State Auditor's Key-pad and key-card access records from January 2010 to May 2016.
55. Produce the documentation identifying when the security system camera access was first installed on R. Thomas Wagner's desktop and the related log-in history from date of installation until December 21, 2017
56. Produce Pictures of the following:
 - a. the security panel clearly visible on the wall located on the upper side of the CAA's desk,
 - a. the security panel clearly visible on the wall located on the upper side of the CAA's desk,
 - b. the hardwired panic button at the third-floor reception area, and
 - c. the portable panic buttons.
57. Produce the IT Steering Committee Meeting Minutes from the start of the committee until May 17, 2017.
58. Produce any and all documentation regarding revoking the CAA's authority.
59. Produce all contracting (including contract extensions) for January 19, 2010 through May 17, 2016, specifying the following:
 - a. contract number,
 - b. vendor,
 - c. description of services and scope of work,
 - d. contract or extension period, and
 - e. who signed for AOA.

60. Produce any and all documented responses from the Z&A to the State Auditor regarding concerns about their work on AOA's Peer Review.
61. Produce any and all documentation including communication from the Z&A regarding the conclusion that Z&A's work on peer review was inadequate.
62. Produce any and all documentation making notification to parties outside AOA to stop relying on the peer review.
63. Produce copies of the RFP, all RFP submissions, technical evaluations forms, cost scoring, Contracted Engagements Manual in effect at the time of the scoring for the Z&A Treasury AUP original contract award.
64. Produce any and all documentation related to the renewal of the Z&A Treasury AUP contract.
65. Produce a readable copy of the Annual TeamMate contracted engagement TeamMate project from 2010 through 2016.
66. Produce the Z&A contract awards and renewals between May 17, 2016, and December 21, 2017.
67. Produce DTI's history on all edits to the CAA's posted job description and specification made in 2016.
68. Produce the OMB record on version and edits for the CAA job description in 2016 and 2017.
69. Produce the OMB record of AOA's Human Resource Representatives from 2009 to 2016.
70. Produce all AOA employee CPE/non-CPE/conference documentation including, but not limited to, out-of-state travel forms, all trip related expenses (inclusive of budget appropriation used to pay the expense), and detailed conference agenda for such training January 2010 through May 17, 2017.
71. Produce AOA's details on educational support and tuition reimbursement for all AOA employees from January 2010 through May 17, 2017.
72. Produce the Management Retreat contract with David Minionis, hotel contract, and flip chart notes located in the CAA Office for future reference and retreats, as well as the email sent by Kim Judy documenting the session.
73. Produce all approved record destruction form for AOA from fall of 2015 through date of this request.

74. Produce a copy of CAA's completed Human Resource Certification Program application submitted to OMB.
75. Produce a copy of CAA's Personnel Records.
76. Produce R. Thomas Wagner's letter to the OMB regarding making recommendations to the CAA for a non-scheduled pay increase.
77. Produce R. Thomas Wagner's letter nominating the CAA for the David Walker Award in 2016.
78. Produce R. Thomas Wagner's recommendation to Utica College for admissions into the Master of Financial Crime and Compliance Management.
79. Produce Grant Thornton's final executed contract including but not limited to any appendices or related documents.
80. Produce any and all emails pertaining to the drafting of the Grant Thornton contract.
81. Produce any and all documents relating to the Procurement Practice for selecting Grant Thornton.
82. Produce a copy of Grant Thornton's report obtained directly from Grant Thornton with a page by page certification by Grant Thornton.
83. Produce all draft reports submitted from Grant Thornton to the State of Delaware (AOA or others) and any remarks or edits made or requested by the State.
84. Produce Grant Thornton's supporting documentation, notes, recordings, documents.
85. Produce a copy of Grant Thornton's final executed contract including any addendums, scope of work guidance, professional standards requirements, and procurement documents.
86. Produce Grant Thornton's investigatory files, notes, and interviews, and documents.
87. Produce Grant Thornton invoices submitted to AOA, AOA approvals, and payments for the AOA engagement.
88. Produce all Grant Thornton document requests from all parties within and outside the State of Delaware (provided or declined.)

On June 5, 2018, the Board issued a Subpoena Duces Tecum to OAOA commanding the above-mentioned documents be produced on or before June 11, 2018 for the Grievant's review

and inspection. On June 6, 2018, counsel for OAOA filed a Motion to Quash objecting to numbers 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 33, 34, 36, 37, 39, 42, 43, 46, 47, 48, 50, 51, 56, 65, 68, 69, 70, 71, 73, 80, 81, 82, 83, 86 and 88.. The Board received the Grievant's response to the Motion to Quash on June 13, 2018 where some of the requests were withdrawn. The Board held a hearing to consider the Motion to Quash on the remaining requests on June 21, 2018.

BRIEF SUMMARY OF THE MOTION

The Board did not hear any witness testimony but heard legal argument by the parties on the OAOA's motion to quash the enumerated categories within the subpoena.

OAOA raises one or all of the following objections to each of the requests: the material is irrelevant and immaterial to the issue before the Board; the request goes beyond the May 17, 2016 placement of the Grievant on administrative leave; the request is vague and lacks sufficient specificity to respond; the request is overbroad and seeks information that extends beyond the relevant time period in question; the materials constitute part of staff personnel files (including payroll records) which are confidential; and the request requires OAOA to either create a new document or respond to a request for information (similar to an interrogatory).

CONCLUSIONS OF LAW

Superior Court Civil Rule 45 states, "On a timely motion, the Court shall quash or modify the subpoena if it: (i) fails to allow reasonable time for compliance; (ii) requires disclosure of privileged or confidential or other protected matter and no exception or waiver applies; or (iii) subjects a person to undue burden." Parties may obtain discovery regarding any matter, not

privileged, which is relevant to the subject matter involved in the pending action. *Humes v. Charles H. West Farms, Inc.*, 2006 WL 2242715 at *1 (Del. Super. Ct. July 14, 2006). Even if the initial request is inadmissible at trial, it may still be provided so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Id.*

According to the Delaware Rules of Evidence, relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Therefore, the Board must first determine whether the requested documents are relevant to the matter before the Board or reasonably calculated to lead to relevant evidence. If not, the Board may quash the request. If the request is relevant to the matter before the Board, it must look to the three bases for a motion to quash. The Board may quash or modify to request to relieve burden on the entity requested.

The Board issues the following ruling concerning documents that must be produced to the Grievant pursuant to discovery:

Request No. 6 (a-d): The MERB Administrator will provide a copy of the transcript from the prior MERB hearing for Wade Sallings and the parties stipulate the Delaware Public Employees Retirement System (“DPERS”) investigation ceased after the Grievant was placed on administrative leave and has never been completed. Based on the provision of the transcript and the stipulation of the parties, the production request is withdrawn.

Request No. 7 and 8: Motion to Quash denied, the OAOA must provide the documents.

Request No. 9 and 10: Motion to Quash granted.

Request No. 12 -14: Grievant withdrew her request.

Request No. 16: Grievant may obtain the documents online, however, should she not be able to obtain the documents herself the Motion to Quash is denied and the OAOA must provide

the documents.

Request No. 18: Grievant withdrew her request.

Request No. 19: Motion to Quash denied, OAOA must provide the documents within the timeframe of one year prior to Grievant being put on administrative leave.

Request No. 20: Motion to Quash denied in part and granted in part; OAOA must provide all emails and voicemails from the date of the litigation hold, however OAOA does not have to provide any voicemails from any mobile devices.

Request No. 21: Grievant withdrew her request.

Request No. 22: The parties stipulated the OAOA would provide the documents from the timeframe that fits the Department of Technology and Information (“DTI”) retention schedule.

Request No. 23 -25: Grievant withdrew her request.

Request No. 33-34 and 36-37: Grievant withdrew her request.

Request No. 39: Motion to Quash denied in part, OAOA must provide the documents using the timeframe 2015 to May 17, 2016.

Request No. 42 and 43: Grievant withdrew her request.

Request No. 46-48: Motion to Quash denied in part; OAOA must provide the documents the Grievant allegedly forwarded to Representative William that is referenced in the termination letter.

Request No. 50-51, 56 and 65: Grievant withdrew her request.

Request No. 68: Motion to Quash denied; OAOA must provide the documents.

Request No. 69: Grievant withdrew her request.

Request No. 70: Motion to Quash granted.

Request No. 71 and 73: Grievant withdrew her request.

Request No. 80: Motion to Quash granted.

Request No. 81: Grievant withdrew her request.

Request No. 82: Motion to Quash denied in part; OAOA directed to search for and provide a signed copy of the final report from Grant Thornton.

Request No. 83: Motion to Quash denied; OAOA must provide the documents if any exist.

Request No. 86: Grievant withdrew her request.

Request No. 88: This request is subsumed into number 83.

DECISION AND ORDER

It is this 25th day of **June** 2018, by a unanimous vote of 4-0, the Decision and Order of the Board to deny in-part and grant in-part the Office of the Auditor of Accounts' Motion to Quash those requests remaining after the Grievant withdrew her request for certain numbered categories. The Agency is directed to provide all documents, as ordered, on or before the close of business on Wednesday, June 27, 2018.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER