BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

GRIEVANT,	)	
	)	
Employee/Grievant,	)	**DOCKET No. 16-09-655**
v.	)	
	)	**DECISION AND ORDER**
DEPARTMENT OF LABOR,	)	
	)	**PUBLIC *(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 December 1, 2016 in the Public Service Commission Hearing Room, located in the Cannon Building of Silver Lake Plaza, at 861 Silver Lake Boulevard, Dover, DE 19904. The hearing was closed to the public, pursuant to 29 Del.C. §10004(b)(8).

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

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Anthony Delcollo, Esq.
Cooch & Taylor
on behalf of the Grievant

Kevin Slattery
Deputy Attorney General
on behalf of the Department of Labor

BRIEF SUMMARY OF THE EVIDENCE

The Department of Labor ("DOL") offered and the Board admitted into evidence seventeen (17) exhibits, premarked for identification as Exhibits A-C, E-P, T, and Z. DOL called four witnesses: Vanessa Phillips ("Phillips") Director, DOL Division of Administration; David Beaver ("Beaver"), former DOL Prevailing Wage Investigator; Kyle Maguire ("Maguire"), former DOL Prevailing Wage Investigator; and Theodore Robinson ("Robinson"), former DOL Prevailing Wage Investigator.

The employee/grievant ("Grievant"), offered and the Board admitted into evidence twenty-four (24) exhibits, premarked for identification as Exhibits 2-10, 15, 18-21, 23-26, 29, 31, 32, 34-36. The Grievant testified on his own behalf, and called five additional witnesses: David Burns ("Burns"), DOL Prevailing Wage Investigator; Daniel Nelson ("Nelson"), DOL Prevailing Wage Investigator; Salina Crossland ("Crossland"), DOL Prevailing Wage Investigator; Anthony DeLuca ("DeLuca"), Administrator, DOL Division of Labor Law Enforcement; and Robert Strong ("Strong"), former Director, DOL Division of Employment and Training.

This grievance was heard by the Office of Human Resource Management where the Step 3 Hearing Officer directed DOL to rescind the transfer and return the Grievant to his position as the Supervisor of the DOL Prevailing Wage Section. The written warning issued to the Grievant on February 25, 2016 was upheld and is the subject of this appeal.

FINDINGS OF FACT

On January 4, 2016, DOL received a six-page anonymous complaint dated December 29, 2015 on behalf of the employees of the Office of Labor Law Enforcement's Pencader Office against three Department of Labor officials in the Division of Industrial Affairs, Labor Law Enforcement section, including the Grievant. The letter alleged workplace conduct by the named

individuals which included verbal harassment; racial harassment; insubordination; protected class violations based on race, gender, and national origin discrimination; inappropriate language in the workplace; violations of the DOL dress code; and conduct unbecoming their positions towards subordinate and superior DOL staff in the performance of their job duties. The letter detailed incidents which occurred between 2012 and through 2015. In addition to DOL, the author sent the complaint to the Office of the Governor, the Wilmington News Journal, and State Senators Karen Peterson and Bryan Townsend.

The DOL Cabinet Secretary assigned the investigation of this complaint to Phillips, who interviewed fifteen (15) individuals at the DOL Pencader worksite, including the Grievant, as well as additional employees who reached out upon learning of the investigation. Phillips obtained written statements from Beaver, Bronson, Robinson, McGuire and the Grievant, but declined to require written statements concerning incidents she deemed untimely or irrelevant. On February 5, 2016, Phillips issued her final investigative report to Strong and recommended the Grievant be laterally transferred to another Division of Industrial Affairs section and that a written warning be issued regarding his failure, in his capacity of supervisor of the Prevailing Wage Unit, to effectively execute the State's management principles.

Phillips concluded the Grievant created an uncomfortable work environment by failing to communicate with specific employees; displayed inappropriate behavior in the workplace; outwardly showed disparity between those involved in the 2012 EEO investigation and the other staff members; and retaliated against employees who report or had reported to him in the past, based on their involvement in the 2012 EEO investigation. Based on the information she gathered, Phillips concluded the Grievant's past behavior toward his employees and co-workers constitutes Workplace Bullying and Retaliation.

In particular, the following conduct and behavior served as the basis for this determination:

- The Grievant excluded Beaver from meetings and started giving Beaver negative

feedback regarding his work product on a regular basis that was unwarranted for minor grammatical mistakes;

- The Grievant gave Beaver inconsistent direction as to his reports and criticized him for his daily work logs;
- The Grievant discussed cases and provided support to Crossland and Burns but failed to provide the same to Beaver and Maguire;
- The Grievant denied Beaver an opportunity to move into an available window office when he became the most senior investigator in the Prevailing Wage Section. The office stayed vacant until Crossland, a lateral Labor Law Enforcement Officer 2 transfer, was given the office after the Grievant once again asked Beaver if he wanted the office and Beaver declined;
- The Grievant granted Crossland permission to use a pink hard-hat and glasses with lights – specialized equipment not offered to Beaver and/or Maguire;
- Maguire observed Beaver sobbing in the workplace after he became upset that the Grievant told him "maybe you will be happier someplace else."
- The Grievant failed to submit Beaver and Maguire's career-ladder promotion paperwork after the usual one-year period to Human Resources until a less senior employee received his promotion;
- The Grievant met regularly with Crossland and Burns (including daily lunches, walks and smoke breaks) and they had more access to him than Beaver or Maguire;
- The Grievant failed to offer Beaver or Maguire an opportunity to serve on a hiring panel, though Crossland served on a panel;
- The Grievant required Maguire to stop inspections to catch up on paperwork as there was no documentation for his daily mileage logs.

In a memorandum dated February 25, 2016, Strong upheld Phillips' discipline recommendation for the Grievant. Strong stated that the disparate treatment of Beaver and Maguire constituted a violation of the State's Management Principles for the Workplace, which says that the "State of Delaware believes a supportive environment must exist for citizens and employees." Strong reiterated that the policy advises managers and supervisors to adhere to practices such as inclusive information sharing, the inclusion in staff decision-making within appropriate boundaries, as well as improvement of the workplace through "respect, trust and professional courtesy." According to Strong, the findings of the final report conclude that the Grievant had not adhered to the State's Management Principles for the Workplace.

PRELIMINARY OBJECTIONS

A. Merit Rule 2.0

The Grievant listed in his Rule 13A summary three witnesses (Crossland, Stephanie Holt, and Heather Comstock) to testify about disparate discipline of the grievant in violation of Merit Rule 2.0. At the pre-hearing conference, the DOL objected to those witnesses testifying in support of a Merit Rule 2.0 discrimination claim because the grievant did not raise that claim at the Step 3 level. The Grievant argued that he preserved the discrimination claim by citing Merit Rule 2.0 in his Merit Rule Appeal to the Board.

Under the Merit Rules, grievances must be timely raised at each step of the process, otherwise the Board lacks jurisdiction to hear the grievance. However, the Chair of the Board ruled in the pre-hearing order that the Grievant's Merit Rule 2.0 claim is not "in the nature of a new, stand-alone claim against the agency, but rather a defense under the just cause standard to show that management did not have sufficient reasons for imposing accountability if it treated similarly situated employees more favorably."

At the hearing, the DOL asked the full Board to reconsider the Chair's ruling. After legal argument by the parties, the Board voted 3-1 to deny the request for reconsideration.

Later in the hearing, the grievant decided not to call Stephanie Holt or Heather Comstock as witnesses and did not elicit any testimony from Crossland about disparate discipline, in effect withdrawing the discrimination claim and mooting any Rule 2.0 issue.

B. Merit Rule 12.8

Merit Rule 12.8 provides: "Adverse documentation shall not be cited by agencies in any action involving a similar subsequent offense after 2 years, except if the employees raise their past

work record as a defense of mitigation factor." [1]

The Grievant objected to the testimony of any agency witness about events more than two years prior to February 25, 2016, the date of his written reprimand. Specifically, the Grievant objected to testimony about the discipline of another DOL employee in 2012 and alleged retaliation by the Grievant against employees who gave statements during the Towns investigation.

The DOL argued that these earlier events were intended, not to justify the Grievant's written reprimand in 2016, but rather to provide the Board with background "history" to better understand the later event. The Board has serious reservations about allowing an agency to circumvent the proscription of Merit Rule 12.8 simply by labeling the evidence as "background" or "history" for the discipline at issue. [2]

In any event, the agency's representative, Vanessa S. Phillips, the DOL Director of Administration, testified at the hearing that her recommendation to discipline the grievant was based solely on more recent disparate treatment of two employees, David Beaver and Kyle Maguire.

> The focus of my recommendation of the written warning was the treatment of Mr. Maguire and Mr. Beaver. The anonymous letter mentions Mr. Towns. It says that after the situation with Mr. Towns that the office became a tense environment. But that wasn't the focus in my subsequent investigation once I realized the time period of when it actually occurred.

Tr. at 56. *See also* Tr. at 57 ("my investigation wasn't into what happened in 2012"). According to Ms. Phillips, she focused on disparate treatment of Beaver and Maguire "close to the time that

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[1] Merit Rule 12.8 refers to adverse "documentation." The Board interprets its own rule to also prohibit the testimony of witnesses about a similar offense which occurred outside the two-year rule, otherwise the prescription of the rule could be easily circumvented.

[2] The Board notes that the 2012 Towns incident and aftermath were described in detail in the anonymous complaint letter received by the DOL in early January 2016 which the Board admitted into evidence as Exhibit A. The members of the Board reviewed all of the admitted exhibits prior to the hearing so they are familiar with this prior history.

the [anonymous] letter came in" in early January 2016. Tr. at 36.

Based on the agency's stated position, the Board excluded the testimony of witnesses regarding matters which occurred more than two years prior to the Grievant's disciplinary action, including those regarding the 2012 EEOC investigation, discipline, and aftermath.

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 the DOL did not have just cause to discipline the grievant with a written reprimand because the grievant did not commit the charged offense of disparate treatment.

In the written reprimand dated February 25, 2016, the DOL charged the grievant with violating the State's Management Principles for the Workplace, specifically: "inclusive information sharing"; "inclusion of staff in decision-making within appropriate boundaries"; and "improvement of the workplace through 'respect, trust and professional courtesy.'" According to the letter of reprimand, the grievant violated those principles in "the disparate treatment of David Beaver and Kyle McGuire" which "negatively affected" the "work environment in the Labor Law Enforcement Office."

The Board has some concerns about the vagueness of these management principles, which appear aspirational rather than specific rules of workplace conduct subject to discipline for violation. A claim of disparate treatment, however, is sufficiently concrete to obviate any

vagueness concerns. [3]

The Board does not believe that any form of disparate treatment based solely on the subjective impression of the employee can be just cause for disciplinary action against a supervisor. A supervisor may have valid reasons to treat employees differently. For example, a supervisor may mentor a new employee to bring her up to speed, or expect a higher level of job performance for experienced employees.

For disparate treatment to rise to the level of a disciplinary offense, the Board believes that the aggrieved employee must show that he or she suffered adverse employment action as court decisions have construed that term to mean a significant change in employment status, such as termination, failure to promote, reassignment with significant different responsibilities, or change in benefits. The Board does not believe that any of the instances of disparate treatment recounted by Beaver or Maguire rose to the level of an adverse employment action.

Both Beaver and Maguire testified that the grievant never appointed them to serve on an interview panel, but the evidence in the record shows that there may have been only one interview panel appointed in 2015, when another investigator retired. The agency's practice was to promote diversity on hiring panels (at least one woman and/or minority) so that hardly shows a pattern of excluding Beaver and McGuire (both white males) from serving on an interview panel.

Beaver testified that when a coveted window office became available after the retirement of another investigator, Beaver was the most senior person in the unit and the unwritten practice was for the senior person to get the office. Beaver testified that the grievant offered him the office, but Beaver turned it down. Moreover, Crossland, who moved into the window office, had more seniority than Beaver working at the DOL.

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[3] The Board notes that the Management Principles provide: "This policy is not intended to create any individual rights or causes of action not already existing and recognized under state or federal law." An employee could have a cause of action under state or federal law for disparate treatment.

Beaver testified that he became frustrated when the grievant revised the language of a form letter Beaver drafted one way, and the next time revised the same language another way. Beaver also testified that the grievant questioned him about the age of pending cases which, according to Beaver, were within the normal bounds for case processing or could not move forward because of external constraints (*e.g.*, waiting for a court decision). Beaver also testified that the grievant "dressed" him down for the form of his daily logs. There was no evidence in the record that the grievant singled out Beaver for extra scrutiny and reviewed the same work of other investigators less stringently.

A few of Beaver's claims of disparate treatment bordered on the trivial, like allowing Crossland to choose a different hard hat (pink, rather than the standard issue white, with lights). The two most substantial allegations for disparate treatment were: (1) the Grievant, at lunch or during break walks, passed along inside information to Crossland to promote her career to the detriment of other employees in the unit; and (2) the Grievant arbitrarily delayed John Beaver's career ladder promotion.

According to Beaver, he became eligible for a career ladder promotion in 2011 after one year on the job, but was not promoted until eighteen months later. According to Beaver, when he asked the grievant about the promotion the Grievant told him that another investigator had to wait more than one year for his career ladder promotion and it would be unfair to treat Beaver more favorably. Beaver did not pursue the matter further, even though Vanessa Phillips testified that if a supervisor did not take steps to facilitate a career ladder promotion, the employee could go to Human Resources which would intercede and, if the employee satisfied all of the criteria, would back date the promotion.

Maguire became eligible for a career ladder promotion in January 2013 and the agency promoted him in April 2013. Unlike Beaver, Maguire took the initiative to write up a three-page career ladder promotion request. Maguire's promotion date was comparable to that of David

Burns, who received his career ladder promotion 13-14 months after his hire date (apparently it takes the agency several months to process the paperwork for a career ladder promotion). Beaver cannot pick and choose his comparators (Burns over Maguire) to establish disparate treatment.

Robinson testified that he once saw the Grievant and Crossland at lunch with a DOL file and he surmised, from comments made by Crossland, that she was privy to inside information from their common supervisor, an overt act of personal favoritism. Robinson could not be sure whether the file he saw was one of Crossland's prevailing wage files, nor did he overhear any of the lunch conversation between the Grievant and Crossland.

Even if discrete employment actions, standing alone, do not rise to the level of adverse employment action, taken as a whole they might be the basis for a hostile work environment claim. There was no evidence that the Grievant showed animus against Beaver or Maguire based on their race or gender or other protected class to support a hostile work environment claim. But, according to the agency, the Grievant created an "uncomfortable work environment" for Beaver and Maguire. Tr. at 27.

If the Board is even to consider an "uncomfortable work environment" as actionable under the Merit Rules, the Board believes it is appropriate to incorporate the legal standard the courts use for a hostile work environment "Workplaces are not always harmonious locales, and even incidents that would objectively give rise to bruised or wounded feelings will not satisfy the severe or pervasive standard." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d, 306, 315 (4th Cir. 2008) (citing as examples not satisfying the severe or pervasive standard, "rude treatment," "callous behavior by one's supervisor," or "routine differences of opinion and personality conflicts with one's supervisor").

The Board concludes as a matter of law that the examples of workplace treatment cited by Beaver and Maguire did not rise to the level of severe or pervasive harassment so as to constitute just cause for discipline of the grievant.

For these reasons, the Board concludes as a matter of law that the DOL did not have just cause to discipline the Grievant with a written reprimand for alleged disparate treatment of Beaver and McGuire.

ORDER

It is this **31st** day of January, 2017, the unanimous decision of the Board to grant the Grievant's appeal. The DOL is ordered to remove the letter of reprimand dated February 25, 2016 from the Grievant's personnel file and from any other file in which a copy of the letter is maintained and to remove any notation of the reprimand in any other agency file.

W. MICHAEL TUPMAN, MERB CHAIR

PAUL R. HOUCK, MERB Member

VICTORIA D. CAIRNS, MERB Member

SHELDON N. SANDLER, ESQ., MEMBER