BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

GRIEVANT,	)	
	)	
Employee/Grievant,	)	**DOCKET No. 16-11-660**
	)	
v.	)	
	)	**DECISION AND ORDER**
OFFICE OF MANAGEMENT AND BUDGET,	)	
DIVISION OF FACILITIES MANAGEMENT,	)	**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 April 6, 2017 at the Commission of Veteran's Affairs, Robbins Building, 802 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 R. Houck, Victoria Cairns, and Sheldon 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

Employee/Grievant *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Office of
Management and Budget

PRELIMINARY PROCEDURAL MATTER

As a preliminary matter, the Board unanimously denied the Motion to Dismiss filed by the Office of Management and Budget ("OMB" or "Agency") on March 10, 2017, asserting the Board lacked jurisdiction to directly hear a grievance for a one-day suspension, citing the Board's previous decisions in *Beverly A.Y. Carr v. Department of Health and Social Services*[1] and *Pritchett v. DHSS*.[2]

BRIEF SUMMARY OF THE EVIDENCE

The Agency offered and the Board admitted into evidence, without objection, eight exhibits (marked A-H).[3] OMB called three witnesses: Kimberly Cuffee, Purchasing Services Administrator, Delaware State Police; Jacques Bowe, Physical Plant Maintenance Supervisor, Facilities Management, OMB; and Doug Minner, Chief of Maintenance Operations, Facilities Management, OMB.

The employee/grievant ("Grievant") offered 22 exhibits and the Board accepted six into evidence. The Grievant called Robert Kapp, Physical Plant Maintenance Superintendent, Facilities Management, OMB; and testified on his own behalf.

FINDINGS OF FACT

The Grievant works as a Physical Plant Maintenance/Trades Technician for the Division of Facilities Management, OMB. On September 14, 2016, the Grievant responded to the Division

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[1] *Carr v. DHSS*, MERB Docket No. 09-01-438 (March 5, 2009).

[2] *Pritchett v. DHSS*, MERB Docket No. 13-09-593 (July 14, 2014).

[3] The eighth exhibit (Exhibit H) was offered and admitted into the record at the April 6, 2017 MERB hearing.

of State Police ("DSP") Headquarters in Dover to conduct a service call in the DSP transportation building.[4] This was the second call to that location in two days, each of which resulted from a fire alarm being activated by a leak in the ceiling in the office area of the building. Kimberly Cuffee ("Cuffee"), was the only person working in the office area when the Grievant entered the building through the boiler room located next to her office.

Shortly after his arrival, Cuffee heard cursing as he approached the leaking ceiling and began working on the HVAC unit in the ceiling. She testified she heard him cursing in the hallway immediately outside her office as he worked on the unit. The Grievant admits being frustrated by the situation. At one point, Cuffee called out from her desk, "Excuse me," in an effort to interrupt the profanity by making her presence known. The Grievant, however, continued to curse. Finally, after hearing him say "Jesus F-ing Christ", Cuffee went into the hall to speak to the Grievant. She told him, "you need to stop cursing, this is a professional building, it's not necessary." After Cuffee confronted the Grievant, he ceased cursing.

During his testimony before this Board the Grievant admitted using profanity because he was very frustrated by the problems he encountered with the leaking equipment. He admitted he said, "How the hell am I supposed to get to these bolts", and "freaking".

After the incident, Cuffee contacted the DSP Assistant Director of Human Resources and spoke to him about the incident. He advised Cuffee to contact the Grievant's supervisor, Jacques Bowe ("Bowe"), which she did. Bowe told Cuffee he would take care of addressing the issue with the Grievant. At that point, Cuffee believed the matter was settled.

Bowe spoke with both the OMB Facilities Management Physical Plant Superintendent,

[4] The Grievant was assigned responsibility for maintenance services to DSP, the police shooting range and the Delaware Emergency Management Agency ("DEMA") building in Smyrna.

Robert Kapp ("Kapp") and with the OMB Chief of Maintenance Operations Doug Minner ("Minner") about the incident. Minner and Kapp suggested Bowe speak with the Grievant directly. During his meeting with Bowe, the Grievant stated he did not believe he used profanity.

After the meeting with Bowe and Kapp, Minner contacted Cuffee, discussed the incident and asked her to put what happened with the Grievant in writing. Cuffee sent an email, dated September 21, 2016, detailing the inappropriate language incident to Minner, who in turn forwarded the email to Trudy Mifflin, Human Resources Manager for OMB. Cuffee never requested any discipline be imposed against the Grievant for his inappropriate language.

In a letter dated September 28, 2016, Minner notified the Grievant of his intention to impose a one-day suspension without pay for his continued inappropriate workplace behavior on September 14, 2016 at DSP Headquarters.

In a letter dated October 20, 2016, the pre-decision meeting hearing officer informed the Grievant of his recommendation to uphold the one-day suspension after the pre-decision meeting held with the Grievant on October 12, 2016.

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 Grievant committed the charged offense

of using inappropriate language in the workplace while repairing a leaking HVAC unit in the ceiling at the DSP Transportation Building and that he was afforded his due process rights under the Merit Rules.

The Board, however, was not able to agree whether the one-day suspension was an appropriate penalty to the circumstances. Two Board members felt it was appropriate, and two Board members did not. The Grievant, therefore, did not meet his burden to establish by a preponderance of the evidence that the agency did not have just cause to discipline him.

ORDER

It is this **28th** day of **August**, 2017, by a vote of 2-2, a majority of the Board was unable to conclude the employer did not have just cause to issue a one-day suspension for the incident which occurred on September 14, 2016. Consequently, the grievance is denied.

. MICHAEL TUPMAN, MERB CHAIR

PAUL R. HOUCK, MERB Member

VICTORIA D. CAIRNS, MERB Member

SHELDON N. SANDLER, ESQ., MEMBER