BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

GRIEVANT,	)	
	)	
Employee/Grievant,	)	**DOCKET No. 17-12-680**
	)	
v.	)	
	)	
OFFICE OF THE AUDITOR OF ACCOUNTS,	)	***Public Decision - REDACTED***
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board at 9:00 a.m. on July 19, 2018; October 11, 2018; October 12, 2018; and November 30, 2018 at the Public Service Commission Room, Cannon Building, 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; 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

Michele D. Allen, Esq. on behalf of
the Employee-Grievant

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

BRIEF SUMMARY OF THE EVIDENCE

The Office of the Auditor of Accounts ("OAOA") offered 54 documents into evidence pre-marked for identification as Exhibits A – BBB and the Board admitted 52 documents into evidence without objection. OAOA called seven witnesses: Andrena Burd, née Kardos ("Burd"), Auditor IV; Tammy Smith ("Smith"), Administrative Auditor; Stephanie Tatman ("Tatman"), former Auditor IV; Kim Klein, née Wheatley ("Klein"), Director of Finance, Delaware Department of Education; R. Thomas Wagner, State Auditor; Debbie Kriegisch ("Kriegisch"); and Dianne Guensberg, Independent Consultant (proffered expert).

The Employee/grievant ("Grievant"), offered 63 documents into evidence pre-marked for identification as Exhibits 1 – 63 and the Board admitted 58 documents into evidence without objection. The Grievant called Marcia Buchanan ("Buchanan"), Independent Consultant (proffered expert); and Representative Kimberly Williams ("Rep. Williams"), Delaware State Legislator. The Grievant testified on her own behalf.

QUALIFICATION OF EXPERTS

Both the Office of the Auditor of Accounts and the Grievant made a motion to the Board to qualify their respective witnesses as an expert and allow expert testimony.

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by, knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[1]

Delaware courts utilize a five-pronged test:

> Before admitting expert testimony, the tribunal must determine that: (1) the witness is qualified as an expert by knowledge, skill, experience, training, or education; (2) the evidence is relevant; (3) the expert's opinion is

[1] Delaware Rule of Evidence 702.

> based upon information reasonably relied upon by experts in the particular field; (4) the expert testimony will assist the trier of fact to understand the evidence or determine a material fact in issue; and (5) the expert testimony will not create a danger of unfair prejudice, confuse or mislead the tribunal."[2]

"The party seeking the admission of the expert testimony bears the burden of establishing the relevance and reliability by the preponderance of the evidence."[3] The tribunal's role is "merely to determine whether the proponent of the evidence has demonstrated that scientific conclusions have been generated using sound and reliable approaches."[4]

The Grievant offered Marcia B. Buchanan as her expert witness concerning the Government Auditing Standards, commonly known as the "YellowBook" or "GAGAS." *Grievant Exhibit 6*. Buchanan, who holds a Bachelor's Degree in Accounting from Virginia Polytechnic Institute and State University, is a certified public accountant, certified government financial manager and a chartered global management accountant. Buchanan retired from the U.S. Government Accountability Office's (GAO) Financial Management and Assurance Team as the Assistant Director. Buchanan was responsible for maintaining, interpreting and promoting the Government Auditing Standards. She served as a key staff member in developing and issuing four revisions to GAGAS: in 1994, 2003, 2007 and 2011. In 2015, Buchanan returned to GAO's Center for Audit Excellence where she develops and implements customized fee-based training and technical assistance programs to enhance the capacity of federal, state, local and foreign audit and accountability organizations to share knowledge of audit standards and methodologies. Prior to retiring, Buchanan lectured annually at over 50 national conferences, state audit offices, federal offices of inspectors general, intergovernmental audit forums, CPA societies and other interested groups. During her almost 40-year GAO career, Buchanan gained extensive audit experience on

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[2] *Pignataro v. George and Lynch, Inc. et al*, 2013 WL 1088333, at *4 (Del. Super. Mar. 13, 2013).

[3] Id.

[4] Id.

financial audits, and on performance audits of audit quality, single audit and other issues. Buchanan received numerous awards, including GAO's Meritorious Service Award, the Comptroller General's Integrity Award, GAO's Distinguished Service Award, the Association of Government Accountant's Achievement of the Year Award and the 2013 American Institute of Certified Public Accountants' ("AICPA") Outstanding CPA in Government Award for Career Contribution. *Grievant Exhibit 11.*

OAOA offered Dianne Guensberg as its expert witness concerning the "YellowBook" or "GAGAS." Guensberg, worked for over 30 years with the GAO and Grant Thornton, LLP before becoming an independent contractor. Guensberg led financial and performance audits of major federal entities and programs in accordance with GAGAS, coordinated GAO's involvement in the Joint Financial Management Improvement Program and supported federal financial and performance management legislation passage and oversight while on detail with both House and Senate Oversight Committees. While at GAO, Guensberg served as the Assistant Director of the Financial Management and Assurance Team overseeing various financial and performance audits. While at Grant Thornton, LLP, Guensberg served as the Managing Director in the Public Sector practice where she led audits of government contracts and systems applying the DCAA CAM for Federal agencies and government contractors, as well as directed financial audits, attestation engagements and advisory services for federal military and civilian agencies. As an independent contractor, Guensberg served as an expert witness to a tribunal of the International Court of Justice at The Hague on issues relating to reporting under GAGAS for the Department of State. Guensberg, who holds a bachelor's degree in Accounting from George Mason University, is a certified public accountant and a chartered global management accountant. Guensberg received the GAO's Meritorious Service Award and is a member of the AICPA and the Association of Government Accountants. *Agency Exhibit AAA.*

The Board found both individuals qualified to serve as experts based on their knowledge,

skill, abilities and education, and further found their expert testimony would be relevant and helpful to the Board concerning the allegation the Grievant violated the GAGAS or "YellowBook" standards, one of the bases for the Grievant's termination of employment.

FINDINGS OF FACT

Prior to her termination, the Grievant served as the Chief Administrative Auditor at the OAOA since 2010 where she was responsible for financial, attestation and performance audits, fraud hotline administration, operational and administrative functions, quality control systems, training and the statewide professional services contract. The Grievant is a certified public accountant, a certified government financial manager, a certified information system auditor, a certified government auditing professional and a certified fraud examiner.

In November 2015, OAOA employees Andrena Burd, Stephanie Tatman and Tammy Smith began secretly recording the Grievant on their smart phones because they believed the Grievant was engaging in unethical conduct. The employees never told the Grievant she was being recorded during meetings and individual conversations, and never told State Auditor R. Thomas Wagner ("Wagner") or the Deputy Attorney General who represented OAOA that they were recording their conversations with the Grievant. *TR p. 100.* [5]

In December 2015, the employees went to the Office of Management and Budget ("OMB"), where they spoke with Deputy Director Amy Bonner and shared some of the recordings with her. The employees continued to record the Grievant after this meeting. These employees never approached Wagner with their concerns about the Grievant, because they believed he would take the Grievant's side based on his close relationship with the Grievant. The employees, despite being employed in positions in which they have State merit system protections, were concerned about retaliation from the Grievant. The record did not establish the basis for the employees' concerns

[5] Citations to the hearing transcript are noted as "TR" with a page number.

or that the Grievant ever threatened these employees with any action that might affect their employment.

Following the meeting with the OMB Deputy Director, OMB's former Director, Ann Visalli, called Wagner and asked to meet with him concerning the operations in his office. On or about March 24, 2016, Visalli provided Wagner with a letter containing 13 bullet points focusing on the Grievant. *TR p. 331-333.* In April 2016, Wagner issued an open invitation to members of his staff to meet concerning any complaints they might have. Eight members of the OAOA staff attended the meeting, including the three employees who met with OMB. Wagner scheduled the meeting for a date when the Grievant would not be in the office. *TR p. 333-335.* Following this meeting, Wagner decided, in consultation with counsel and OMB, to conduct an investigation. *TR p. 336.*

On May 17, 2016, Wagner informed the Grievant by letter that he had received correspondence from the OMB alleging she engaged in potentially inappropriate and unethical behavior while acting in her official capacity and notified her he was placing her on administrative leave with pay pending investigation. *Agency Exhibit D.* In the letter, Wagner stated that it had been alleged that the Grievant "knowingly violated Delaware's Budget and Accounting procedures and engaged in other questionable practices that may constitute an abuse of authority. In addition, there are concerns that [the Grievant had] created an atmosphere of intimidation and distrust among the staff making it impossible for them to complete their work." Wagner never interviewed, met with, or spoke to the Grievant about the complaints or any concerns he had either before or after placing her on paid administrative leave.

Wagner contacted Grant Thornton, LLP, to conduct the professional portion of the investigation and requested OMB conduct the personnel portion of the investigation. *Grievant Exhibit 46.* The Grievant objected to OMB's involvement and questioned their objectivity because OMB staff initially met with those who lodged complaints against her and provided guidance to

them. At that point, OMB declined to be involved in the investigation at all. Thereafter, Grant Thornton was contracted to conduct the entire investigation. Grant Thornton finalized its report in August, 2017. Neither party submitted the final report which resulted from Grant Thornton's investigation into evidence during the MERB hearing.

On October 11, 2017 (seventeen months after the Grievant was placed out on paid administrative leave), Wagner informed the Grievant by letter of his recommendation that she be terminated from her position as the Chief Administrative Auditor alleging that:

1. The Grievant violated government auditing standards in connection with the Statewide eSchoolPLUS and Unit Count Performance Audit;
2. The Grievant disclosed a confidential draft report of the Unit Count Performance Audit to Representative Kim Williams of the Delaware General Assembly via e-mail on April 21, 2016;
3. The Grievant consistently withheld information about OAOA matters from the Auditor of Accounts which he either should have been involved or would have been involved but for the Grievant's actions;
4. The Grievant misused a prior Delegation of Authority;
5. The Grievant exerted undue influence in the selection of the accounting firm of Zelenkofske-Axelrod ("ZA") to conduct the FY2015 Treasurer's Office Quarterly Bank Reconciliation Agreed Upon Procedures ("Treasury AUP") engagement and Annual Peer Review; and
6. The Grievant attended an AFL-CIO union conference in Pittsburgh, Pennsylvania in September of 2014, which was not work related, for which she submitted expenses to be paid by the State.

By letter dated December 21, 2017, Wagner informed the Grievant she was terminated from her position as Chief Administrative Auditor at the OAOA. *Agency Exhibit A.* The Grievant filed an appeal of her termination on December 29, 2017. *Agency Exhibit F.*

Statewide eSchoolPLUS and Unit Count Performance Audit

The eSchoolPLUS and Unit Count Performance Audit's objective was to "determine the reliability and sufficiency of the various processes that contribute to the annual Unit Count for the period of July 1, 2015 through June 30, 2016." *Grievant Exhibit 8.* The audit "concentrated on

analyzing the processes that can result in the incorrect funding based on ineligible student enrollment." The work was "intended to supplement the audit coverage already obtained through the annual Statewide Comprehensive Annual Financial Report and the Statewide Single Audit." *Grievant Exhibit 8.* It serves as a performance audit to evaluate school districts and charter schools concerning attendance for the last 10 years. The audit affects the number of teacher, staff and administrative units allotted to Delaware public school districts and charter schools.

On Monday, March 14, 2016, Andrena Burd sent the Grievant an email with "Management's Response – YellowBook" in the subject line. *Agency Exhibit H.* Burd suggested, "For our next discussion, I think we are going to have to send a draft to the districts/charters for comment." Burd pasted portions of the GAGAS Standards into the body of the email. The relevant portions are from the section entitled, "Reporting Views of Responsible Officials":

> 7.32 Auditors should obtain and report the views of responsible officials of the audited entity concerning the findings, conclusions, and recommendations included in the audit report, as well as any planned corrective actions.
>
> 7.33 Providing a draft report with findings for review and comment by responsible officials of the audited entity and others helps the auditors develop a report that is fair, complete, and objective. Including the views of responsible officials results in a report that presents not only the auditors' findings, conclusions, and recommendations, but also the perspectives of the responsible officials of the audited entity and the corrective actions they plan to take. Obtaining the comments in writing is preferred, but oral comments are acceptable.

On March 24, 2016, Burd emailed three individuals at the Department of Education (including Kim Klein, Director of Finance) the draft report containing the Grievant's changes. *Agency Exhibit L, page 2.* The email states Burd plans " to send districts and charters excerpts of their findings here soon for their comments."

On March 29, 2016, Klein responded to Burd's email stating:

> Two things:
>
> - Our authorized position count is 261, not 275 as indicated in the report.
> - Also, I think you should clarify the paragraph on page 20 to read that

> DOE has requested that AOA **audit** units charged to state funds, not perform a reconciliation. Also, please understand that this request is in accordance with 14 Del. C. §1504 (c) which reads:
>
> > In order to ensure that authorized position complements are not exceeded, the Auditor of Accounts is directed to incorporate an examination of the number of authorized positions versus the number of actual positions a district has employed as part of the regular, annual audit review for all public school district audits that commence on or after July 1, 1991. This position audit function shall include, in addition to the formula salary positions, an examination of positions and associated 'option units' authorized by the Secretary of Education under any appropriation. *Agency Exhibit L, p. 2.*

On March 29, 2016, the Grievant emailed Klein asking for her phone number so the Grievant could discuss the second bullet of Klein's email. *Agency Exhibit L, p. 1.* On March 29, 2016, Klein responded to the Grievant's email that,

> … [T]he way the report is worded it leads readers to believe that DOE has asked AOA to perform something that is unreasonable and not within the scope of your legislated charge. Given the language in the DE Code, provided below, we do not feel that is accurate and we do not agree that the audit is a management reconciliation or function for the DOE to perform in the future.
>
> I would be happy to discuss with you, but please understand that we have drawn our position based on the law as currently written. *Agency Exhibit L, p. 1.*

On March 31, 2016, Klein forwarded a link in an email to the Grievant of the type of unit count audit that had been performed by OAOA in the past, in an effort to clarify DOE's position about the functions of OAOA, including "reviewing what was charged to what was earned." *Agency Exhibit N, p. 2.*

On April 6, 2016, the Grievant responded to Klein and others (including Burd), by email reiterating their phone conversation of the week prior in which the Grievant provided numerous reasons why the prior reports Klein relied upon were not relevant to OAOA's current performance audit. The Grievant's email states:

> As I stated on the phone last week, there are a multitude of reasons why this report *[referencing the links provided by Wheatley]* and those like this one are not relevant to AOA's current performance audit. However, since you have

taken your time and the time of OMB staff to pull a copy, I prepared a written response that reflects a few of the items I mentioned during our phone conversation.

1. The period covered in the engagement below is from the operating environment that was in existence more than a decade ago. Since then, and at a minimum, the State Accounting System has changed, in addition to the processing environment for student accounting, which was manual back then. eSchoolsPLUS went live in around 2008 and Unit Count Plus in 2011.
2. The attached report you sent was a follow-up to a prior engagement. It mentions GAGAS but does not mention what type of engagement; however, it has the format of an Agreed-Upon Procedures engagement. The GAGAS Standards in place at that time are completely different for an Agreed-Upon Procedures engagement versus a Performance Auditing *[sic]*. We are currently following applicable GAGAS issued in 2011.
3. Further, we will audit to current day criteria which includes current day legislation and regulations. Not what was in place in 2003.

The list above is in no way an all-inclusive list of reasons why this report is not relevant to AOA's current engagement. *Agency Exhibit N, p. 2.*

On April 6, 2016, Klein responded to the Grievant's email stating that she was not suggesting or recommending the audit be done in the same fashion or that some things have not changed; rather she was trying to explain to the Grievant and her staff that DOE believed the statute required OAOA to perform a unit count audit, which includes district charges to state funds and she was merely providing a copy of what had been done many years ago. *Agency Exhibit N, p. 1.*

On April 22, 2016, Burd emailed school districts and charter schools a draft copy of the FY16 Unit Count and eSchoolsPLUS Performance Audit and a Management Representation Letter. *Agency Exhibit I.* Burd stated, "If you have any comments or concerns, please contact me within the next few business days. We ask that you please provide a copy of the attached letter signed on your letterhead no later than the close of business on April 29, 2016."

GAGAS standards state:

> 7.34 When auditors receive written comments from the responsible officials, they should include in their report a copy of the officials' written comments, or a summary of the comments received. When the responsible officials provide oral comments only, auditors should

prepare a summary of the oral comments and provide a copy of the summary to the responsible officials to verify that the comments are accurately stated…

7.37 When the audited entity's comments are inconsistent or in conflict with the findings, conclusions, or recommendations in the draft report, or when planned corrective actions do not adequately address the auditors' recommendations, the auditors should evaluate the validity of the audited entity's comments. If the auditors disagree with the comments, they should explain in the report their reasons for disagreement. Conversely, the auditors should modify their report as necessary if they find the comments valid and supported with sufficient, appropriate evidence. *Grievant Exhibit 6, p. 174.*

On April 27, 2016, Ada Carter Puzzo, Director of Business and Finance for the Caesar Rodney School District responded to Burd's email. Puzzo stated:

> Thank you for clarifying that your findings/recommendations regarding tracking allocations *[sic]* of units is directed at DOE because they have not developed a process for tracking the allocations *[sic]* of units that is consistent throughout the State. I concur with that finding, but I strongly take issue with the following statement on page 19 of the report:
>
> > … In this particular instance, management (management for the State includes both DOE and the districts and charter schools) is failing to respond to the risks that Division I funding is not properly allocated in accordance with the Delaware Code. Further there are additional unmitigated risks that the State may be overcharged or the schools are not taking full advantage of State funding by under applying Division I funds.
>
> This statement is **not true**. The Caesar Rodney School District **is not failing to respond to the risks.** *Agency Exhibit J, p. 1* [emphasis in original].

In addition, Puzzo took issue with how the report combined all districts and charter schools together in a section titled "Division I Funding", citing to the portion of the report which states:

> During our review, we found broad variations in report submissions, including a lack of information to identify whose salary was being charged to specific Division I categories … Since there is currently no inherent process designed in the system or a manual reconciliation, the districts and charter schools should develop a reconciliation process that would demonstrate proper application of Division I funding throughout the year. This reconciliation should account for the proper application of the complex Division I funding requirements established by Delaware Code. *Agency Exhibit J, p 1.*

Puzzo wrote Caesar Rodney School District had a documented reconciliation process for many

years and always followed it in order to account for the proper allocation of Division I funding. Puzzo cited to an FY09 audit report which noted, "We obtained the District's written policies and procedures regarding the September 30 student count. Our review determined that the necessary processes identified by the State of Delaware are included in the District's written policies and procedures." *Agency Exhibit J, p. 1.* Puzzo requested the language in the two highlighted sections be changed so districts that follow written internal control procedures be given the credit they deserve.

On April 29, 2016, Burd sent an email to all school districts and charter schools stating, "We received additional information regarding the *Division I Funding – Monitoring of Complex Funding Requirements* section of the report and have adjusted the language accordingly." A copy of the revised report was attached. *Agency Exhibit M, p. 4.*

On May 2, 2016, Klein responded to Burd and all of the others to whom the April 29, 2016 email was addressed, school district and charter schools, regarding the revised report. Klein stated,

> … DOE continues to have a number of concerns with the report as written, mainly under the "Monitoring of Complex Funding Requirements," and to a greater extent with the recently revised version that was emailed out late last week.
>
> - As a general note, on pages 1 and 9, this audit is referred to as a supplement to the CAFR and Single Audit, however we believe that this is a stand-alone audit requirement specifically called for in the DE Code.
> - DOE did not (and does not) refer to staffing plans as "spend plans", rather we shared with AOA that we would expect each district to have a 'staffing plan'. It should be clear, as we made it throughout this process, that staffing plans are not required, nor is DOE required to monitor the existence or implementation of any such staffing plans.
> - DOE has not asked AOA to 'reconcile' the use of these funds 'because of their desire to learn if districts and charter schools overcharge', but rather, we asked AOA to audit these funds, as we believe is required by 14 Del. C. §1504 (c) and in accordance with past practice of AOA. For your reference the Code citation is included below:
>
> *(c) In order to ensure that authorized position complements are not exceeded, <u>the Auditor of Accounts is directed to incorporate an</u>*

> *examination of the number of authorized positions versus the number of actual positions a district has employed as part of the regular, annual audit review for all public school district audits that commence on or after July 1, 1991. This position audit function shall include, in addition to formula salary positions, an examination of positions and associated 'option units' authorized by the Secretary of Education under any appropriation.*
>
> - DOE disagrees that the requirement to audit the application of units to state funds is a reconciliation action, and continues to stress our belief that this is an audit requirement of the AOA. Also, to our knowledge AOA has not been required to prepare any accounting records, as is suggested in citation 41.
> - Additionally, as we shared during our meetings, there is no possibility of overcharging on the part of the Charters, as their allocation is based on units and staffing, and they are not restricted to the same pay scales. The Charters get no more, no less than they earn and there is no concern from DOE of overcharging. Also, please note that State funding calculations for charter schools are reconciled each fiscal year prior to the final transfer of funds.
> - It is unclear what is meant by the statements around DOE monitoring of Regular Education, so without further information we would like to be on record that this is not clear... *Agency Exhibit M, p. 1 – 3.*

On May 2, 2016, the Grievant responded to Klein's comments by email to Dr. Godowsky, Secretary of the Department of Education, and included State Auditor Wagner, Burd and others on the DOE staff on the email. The Grievant stated OAOA was reviewing the submissions, however she wanted the Secretary to be aware of the written responses Klein had provided on behalf of DOE. She stated OAOA was working on edits to address bullets 2, 5 and 6, but,

> … With respect to bullets 1, 3 and 4, AOA has not and will not be consulting with Ms. [Klein] regarding how best to cover our audit mandates. Our report draft included information regarding Ms. [Klein's] desire to direct AOA staff on how she believes AOA should fulfill our audit mandate. Our recommendations are consistent with responsibilities that rest with Management and not the independent auditor.
>
> It is unclear why there is an expectation that AOA would subordinate professional judgment to Ms. [Klein]. In previous discussions, I have asked Ms. [Klein] to make reference to exact audit standards she believes AOA has violated.
>
> If you wish to discuss this further my direct line is listed below. Otherwise, AOA will keep this response below as DOE's final and official position.

> From there, AOA will consider what, if any, email response is necessary to those included in her email thread. *Agency Exhibit M, p. 1.*

On May 3, 2016, Monet Smith, on behalf of the Laurel School District, responded to Burd's email contesting OAOA's conclusion that Laurel had failed to develop and implement written policies and procedures. Ms. Smith's email stated:

> The Laurel School District does have a Unit Count Manual that includes procedures, regulations, guidelines, timelines, Unit Count policies, student rosters and additional documentation surrounding the annual Unit Count process. The district has maintained the same manual format since Needs Based Funding went into effect and has never received indication or instruction that the manual was not adequate. Indeed, there are no written requirements, regulations, or state code that stipulate the specific format or components of a Unit Count Manual. 14 DE Admin.Code, 700 Finance and Personnel, 701 Unit Count, Section 1.2 simply states 'each school shall maintain September enrollment records in a manner which will allow for efficient enrollment audits by the Department of Education and the State Auditor of Accounts. At the end of September, each school shall assemble a comprehensive enrollment file that contains all necessary support materials to substantiate the enrollments reported.' This aforementioned criteria was met. The Laurel School District does not agree that there was a failure to develop and implement written policies and procedures.
>
> Additionally, in your email dated 4/18/16, there was a finding listed as 'Full Student Register printed in view that did not display all absences.' I did not find this in the draft report? And the DOE Unit Count manual does not require that the report display all absences, just 'the last 10 days of school in September.' Was this finding removed or do I still need to provide a response? *Agency Exhibit J, p. 4.*

On May 3, 2016, Burd responded by email to Smith, addressing her concerns. Burd stated:

> Attached is the correspondence from AOA back to Laurel requesting your individualized Policies and Procedures. Laurel did not have a formal Policy and Procedure manual as we would have expected. Rather, it included DOE's Unit Count Manual, emails from DOE, a Unit Count calendar specific to Laurel and examples of reports related to Unit Count.
>
> The finding that you are referring to is under the "Enrollment Review: Reporting Issues" section of the report. It describes a scenario at Dunbar Elementary. Please see below for an excerpt of the report.
>
> *Enrollment Review Reporting Issues*
>
> During AOA's review of attendance, we determined that the districts and charter schools are using various views in eSchoolPLUS to produce attendance reports necessary for the Unit Count. It was discovered that there are various views available for running the FSR Attendance reports in eSchoolPLUS. Each

> view displays a variety of attendance information, i.e., tardy – excused/unexcused, absence - excused/unexcused, Home Bound Instruction, Outside Agency, etc. AOA obtained the FSR's to corroborate the numbers submitted during the Unit Count. Upon reviewing the FSRs for each school, we noted several inconsistencies with the view selection. Some views were more descriptive than others. It was determined that no statewide eSchoolPLUS Attendance View standard exists for running the FSR Attendance report which can result in inaccurate data. As an example, Dunbar Elementary School submitted to DOE a FSR that only displayed excused absences. Since the FSR is reviewed by administrators and used to substantiate the students included in the Unit Count, it is critical that the most comprehensive view is used to demonstrate attendance. AOA would recommend DOE specify which "view" the FSR is printed in when submitting for the September 30th Unit Count.
>
> We will be on the lookout for Laurel's Management Representation letter. *Agency Exhibit J, p. 3-4.*

On May 3, 2016, Smith replied to Burd (again by email) and stated her response remained the same. *Agency Exhibit J, p. 3*

On May 4, 2016, the OAOA released its statewide eSchoolPLUS and Unit Count Performance Audit for Fiscal year ending June 30, 2016. *Agency Exhibit G.* The State Auditor attached a letter to the specified users of the report which included DOE Superintendent Dr. Steven Godowsky, All School District Superintendents, School District Business Managers, Charter School Heads, Charter School Business Managers and all Charter Schools. The report was posted online on the OAOA web site. In the letter, certified by his signature, Wagner stated:

> The attached report provides the results of the Statewide eSchoolPLUS and Unit Count Performance Audit for the fiscal year ending June 30, 2016.
>
> My office was authorized, under 29 Del. C., c. 29, to perform post audits of all the financial transactions of all State agencies. The law requires that the audits be made in conformity with generally accepted auditing principles and practices. Such principles and practices are established by the U.S. General Accounting Office, which has issued generally accepted government auditing standards.
>
> We conducted this performance audit in accordance with Generally Accepted Government Auditing Standards issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings, and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives… *Agency Exhibit G.*

In the section of the Audit report entitled, "Failure to Develop and Implement Written Policies and Procedures," it states,

> DOE, in their Unit Count training, indicated that all districts and charter schools should have a set of policies and procedures specific to the Unit Count process that notates roles and responsibilities. Hence, on October 5, 2015, we requested policies and procedures from all school districts and charter schools. AOA found the following districts and charter schools conducted their Unit Count without an individualized Policy and Procedure Manual. *Agency Exhibit G, p. 11*.

Laurel School District was one of the eleven district/charter schools listed.

The Performance Audit also included a section entitled, "Division I Funding", which stated under the subsection, "Monitoring of Complex Funding Requirements":

> During planning of the engagement, DOE requested that AOA include procedures to verify the use of Division I Funding. AOA requested documentation that DOE represented would demonstrate the districts' and charter schools' final application of Division I funds; this documentation was generally referred to as 'staffing plans' by DOE. As the audit progressed, DOE explained that, although not required of the districts and charter schools, the 'staffing plan' should demonstrate that the units filled are consistent with the units earned per the Needs Based Position Entitlement Report.
>
> During our review, we found broad variations in 'staffing plan' submissions. Some schools were more detailed, while others lacked information to identify whose salary was being charged to specific Division I categories. It was very apparent that the reports did not consistently provide proof of a school's process to ensure appropriate application of Division I funding, nor did DOE have a process to monitor this process throughout the funding period.
>
> DOE insisted that AOA should perform procedures to reconcile the use of these funds because of their desire to learn if districts overcharge the State for Division I funding. Since performing a reconciliation is a management function, AOA did not perform the reconciliation procedure. Had AOA spent the time on reconciling, it would have created an audit impairment. DOE's request to have AOA identify overcharges through reconciliation procedures does not address the lack of monitoring that is needed to ensure funds are used appropriately and in accordance with regulations. This is a much broader issue than simply identifying overcharges.
>
> Under Principal 10 Section 10.01 of the United States Government Accountability Office's Standards for Internal Control, management should design control activities to achieve objectives and respond to risk. Management (management for the State includes both DOE and the districts and charter schools) should have control processes in place to mitigate the risks that the

> Division I funding is not properly allocated in accordance with the Delaware Code.
>
> AOA believes that DOE can play a significant role in establishing a requirement for a reconciliation process with a standardized format for reporting the results of the reconciliation. Additionally, we recommend that DOE monitor this process throughout the period to ensure appropriate funding and use of staffing is occurring. *Agency Exhibit G, p. 18-19.*

On May 9, 2016 (after issuance of the Performance Audit), the Grievant responded by email to Secretary Godowsky and other DOE employees including Klein, and the State Auditor, some of the OAOA staff and its counsel. *Agency Exhibit N.* In this email, the Grievant stated:

> I have included prior history with OAOA's response regarding DOE's position on our recently issued Performance Audit. The report referenced by Ms. [Klein] is from 2005 and was a follow-up on work done for fiscal year FY 2003. Not at all relevant to today for the various reasons listed below. We must audit based on today's standards and with respect to today's control environment.
>
> Until and unless DOE provides particulars on what Generally Accepted Auditing Standards AOA violated or failed to adhere to, our audit stands as issued including our recommendation.
>
> We will put DOE on record as non-responsive to our recommendation. If we are asked about DOE's response by oversight bodies, we will provide this email and your email from Friday. [6]

On June 3, 2016, Delaware State Representative Kimberly Williams contacted Wagner by email asking where she could find the May 4, 2016 Unit Count Performance Audit as it had disappeared from the Auditor's web site. *Grievant Exhibit 57.* On June 6, 2016, Wagner replied to Williams, "It was brought to my attention that it did not include all responses. We will add and reissue shortly." Representative Williams again requested of Auditor Wagner as to when the Unit Count Performance Audit would be back up on the website on July 3, 2016. *Grievant Exhibit 57.*

Members of the Unit Count Performance engagement team complained to Wagner about what they believed were violations of GAGAS Standards. They alleged DOE, the school

[6] The original letter or email from Dr. Godowsky to which the May 9, 2016 email was responding was not included in the email string provided by the Agency in its Exhibit N.

districts, and the charter schools were not afforded the opportunity to review the draft report in its entirety or provided responses to findings. A few entities did provide comments on their own; however, they alleged those responses were not included in the report. On June 10, 2016, Tammy Smith and Andrena Burd "unfinalized" the audit report. *TR. p. 206.* That same day, Smith performed a review of the DOE Unit Count Performance Audit work paper and detailed deficiencies in an appendix, including her concern regarding whether the views of the responsible officials were valid. *Agency Exhibit P, p. 2.*

On June 14, 2016, Smith contacted Burd by email, under the caption "Unit Count Pros and Cons." Smith outlined options for revising the May 4, 2016 Unit Count Audit report issued, including "backing into risk assessment/write memo/checklist, modify GAGAS opinion for departures, scrap the project, change to inspection or redo the entire project." *Agency Exhibit P, p. 1.*

On June 20, 2016, Smith, Burd and Wagner discussed correcting the deficiencies found during Smith's review. *Agency Exhibit P, p. 2.* The three decided to change the project to an "inspection" because it followed a less stringent standard, which they believed was the most efficient way to address what they had identified as deficiencies, in order to re-release the report. Wagner admitted if DOE's response to the draft was an official response, it should have been included in the final report. Wagner also testified "if I had to do it all over again, I would not have released that report." *TR. p. 394.* Wagner admitted he approved the report to be released although he knew, at that time, that it did not meet OAOA's criteria on May 4, 2016. "And the rationale for that was, we hadn't made the formal decision on termination and I didn't want to pull that report and have the Grievant do something and realize that she was in some trouble. So, I just decided to let the report go out." *TR. p. 395.*

In the October 11, 2017 letter of intent to terminate, Wagner alleged the Grievant violated GAGAS standards 7.32 through 7.38 in issuing the eSchoolPLUS Unit Count Performance Audit

when the Grievant instructed her subordinate to "… send the draft report to the schools but that the school officials' comments on the draft would not be sought."[7] *Agency Exhibit C, p. 1.* The letter also references information which was allegedly obtained through the Grant Thornton investigation. However, because neither the report nor any portion of that investigation was entered in the record before the MERB, the Board is unable to evaluate or substantiate the statements which the Auditor included in his letter. The letter also charges that,

> Following the receipt of the draft report, several of the schools and the State of Delaware Department of Education (DOE) provided unsolicited responses – most of which were highly critical of the draft report and its finding. In particular, the Director of Business and Finance at the Caesar Rodney School District disagreed with at least two findings, declared one to be untrue and requested that they be changed in the report. The State DOE strongly disagreed with various sections in the report and emails between you and staff at the DOE show there was heated disagreement. Despite these discussions, you wrote to Dr. Steven Godowsky, the Secretary of DOE, in a May 9, 2016 email that the DOE would be put on the record in the audit report as being 'non-responsive'. *Agency C, p. 1.*

Wagner stated that "as a consequence of your actions, I had to re-issue the Unit Count Performance Audit Report on September 6, 2016 after considering the management responses and removing the language the DOE felt was inaccurate." *Agency Exhibit C, p. 2.* In addition, the letter included allegations of statements made by the Grievant during the investigatory interview by Grant Thornton. Because the final Grant Thornton report was not introduced into the record in this hearing, those allegations could not be substantiated.

The Grievant's expert, Buchanan, testified GAGAS does not prescribe a specific manner or format for including responses from auditees. *TR p. 468.* There are a variety of ways including a brief summary, a letter attached on letterhead and summarizing oral comments. Buchanan opined an email is considered and treated as an oral comment under GAGAS. She testified she would not

[7] This allegation is contrary to direct language of the email sent by Burd to all school districts and charge schools on April 22, 2016, forwarding a copy of the draft report and requesting recipients provide any concerns or comments. *Agency Exhibit I.*

attach an email to an audit because it is only an opinion unless it is on letterhead and issued over the signature of an official who is authorized to represent the auditee in an official capacity. Buchanan found no formal responses to the draft audit in the documents she was provided to review. She stated GAGAS places the responsibility on the auditor to evaluate the veracity of comments, *e.g.* do they make sense, does the report need to be changed, etc. *TR p. 468 – 474.*

Buchanan opined the summary on page 19 of the Unit Count report (*Agency Exhibit G)* summarized DOE's comments made in their email to the Grievant Additionally, the emails from the Grievant related to the process under which the audit was conducted and not the purpose of or the conclusions reached in the audit. Buchanan opined the Grievant did not violate GAGAS in her summarization of the DOE's comments in the final report. As to the comments made by Caesar Rodney, Buchanan opined the issue of Division I funding was properly addressed as Caesar Rodney was not listed as a district which had no controls in place. Buchanan stated she would not name Caesar Rodney and then state in the report "we took it out." Rather, Buchanan stated she would just take them out. Buchanan opined there was no violation of GAGAS in how Caesar Rodney's comments were addressed in the final report. Finally, Buchanan was unable to render an expert opinion concerning the comments from the Laurel School District because she did not have enough information. She noted that Laurel's comments were not included in the allegations set forth in the OAOA's intent to terminate letter. She also noted the email from Laurel was received on May 3, 2016, just one day prior to the issuance of the final report on May 4, 2016.

The Agency's expert, Guensberg, opined that manner in which the comments made on page 19 of the final report concerning DOE's comments/position was a judgment call under GAGAS standards. She concluded, based on the documents she reviewed, that they were sufficient to meet the GAGAS standard. Concerning the Caesar Rodney comments, Guensberg stated she could not categorically conclude that they were not addressed by the final report. As to the Laurel School District's comment, Guensberg opined they were not addressed in the final report and that

the documentation made it unclear as to what was left in or was taken out.

Disclosure of draft Unit Count Performance Audit to Rep. Kimberly Williams

On April 21, 2016, the Grievant sent Rep. Williams a draft of the Unit Performance Audit, by email, stating, "This is what we have on this engagement to date. We are anticipating a release in the first week of May." *Agency Exhibit U, p. 2.* On April 26, 2016, Rep. Williams replied to the Grievant's email saying "Hi Kathleen, sorry just catching up. Thank you for sharing. The early admission for pre-kindergarten students is an interesting finding." On April 26, 2016, the Grievant replied "Too many things to tend to and not enough hours in a day. Thanks for writing. I will keep you in the advance loop so you know what is coming. Take care!" *Agency Exhibit U, p. 1.*

On April 30, 2016, the Grievant again contacted Rep. Williams by email and stated:

> FYI I expect this one to go out mid to late this week. The report is fairly technical in sections. Friday was the deadline for all parties including DOE to provide a management representation letter. Some of their staff are very upset because they wanted AOA to confirm the districts were not overpaid. We are recommending that they participate actively in doing such monitoring throughout the funding period. That is a management function not an audit function. *Agency Exhibit U, p. 4*

On May 2, 2016, the Grievant forwarded DOE's comments by email about the audit to Rep. Williams and stated "FYI DOE doesn't want to take responsibility for recommendations directed at them in our audit." *Agency Exhibit U, p.6.* On May 2, 2016, Rep. Williams replied to the Grievant stating: "I read their response, why are they so against the findings?" On May 2, 2016, the Grievant replies "Not sure other than they don't want to be responsible and somehow want to make it an audit responsibility. Ongoing monitoring is a management responsibility, we are doing our job by pointing out that there is room for improvement in the area of regular education funding." *Agency Exhibit U, p. 5.*

On or about January 2005, Policy Number 8-1, Audit Documentation, within OAOA's

Policies and Procedures Manual stated, "No agency personnel will be given copies of audit documentation unless it has been approved by the Auditor of Accounts or his designee. Any request will come through the Audit Manager and Senior Manager." *Agency Exhibit V, p. 1.* In November 2011, Policy 8-1, changed to state, "No AOA staff will provide copies of documents (electronic or otherwise) to requestors unless it has been approved by the Chief Administrative Auditor." *Agency Exhibit V, p. 2.* The later version was in effect when the Grievant sent the draft audit report to Rep. Williams.

OAOA Policy and Procedure 1-4 Fraud states: "The terms defalcation, misappropriation, and other irregularities refer to, but are not limited to: disclosing confidential and proprietary information to outside parties." *Grievant Exhibit 63.* Effective October 2015, OAOA Policy and Procedure 3-1, Security, states "All information pertaining to audit engagements, special investigations, and personnel-related material associated with AOA must be kept confidential. Documents pertaining to matters of a sensitive nature must be secured in a locked area. Staff must uphold their Oath of Office in keeping information secure and free from breach of confidentiality, whether they are working in or outside the office."

Effective April 2013, OAOA's Audit and Investigative Manual section 2.14 stated:

> In the government environment, the public's right to the transparency of government information has to be balanced with the proper use of that information. In addition, many government programs are subject to laws and regulations dealing with the disclosure of information. To accomplish this balance, exercising discretion in the use of information acquired in the course of auditors' duties is an important part in achieving this goal. Improperly disclosing any such information to third parties is not an acceptable practice (GAGAS 1.21). *Grievant Exhibit 19.*

Effective October 2015, OAOA's 7-1 AOA Documentation Requests policy states, "No AOA staff will provide copies of documents (electronic or otherwise) to requestors unless it has been approved by the Chief Administrative Auditor." *Grievant Exhibit 63.* Wagner testified OAOA's policy was not to release draft audit reports and that any information received by

the OAOA from auditees is confidential between them and the OAOA. Wagner stated releasing a draft audit report to someone who initiated a prior complaint, such as Rep. Williams, was against OAOA's policy. Wagner stated only he had the discretion to release information related to an audit. He learned later, however, that the Grievant changed the policy without his knowledge. While Wagner stated he very rarely released draft reports, he admitted he had done so if legislators "had an interest in [it], I would give them a heads up on that." *TR p. 345.* Wagner also admitted he might have released a draft report to the media as "[i]t's standard practice when you have a very complicated report that you can give, in particular, to print media, a head's up on a report." *TR p. 345.* Wagner acknowledged the policy says the Chief Administrative Auditor is authorized to distribute or release investigative reports or complaints/referrals; however he testified he was not aware of the change having been made in the policy. Wagner admitted he received and could review OAOA policies on the intranet, but "the policies get changed quite frequently, you may just be changing a different sentence," and he admitted he may not have not read them, but he believed something of this nature "should have been discussed" with him. *TR p. 376-377.*

In the intent to terminate letter, Wagner stated the Grievant informed her staff she was going to provide the Unit Count Performance Audit to Rep. Williams as a "cold read" because Williams was on the Education Committee. In addition to the draft audit, Wagner stated that the Grievant further provided confidential information to Representative Williams via e-mail regarding DOE's responses to the draft report. *Agency Exhibit C, p 2-3.* The letter also stated:

> According to OAOA staff, it is a standard internal operating procedure that no draft reports are disclosed to anyone other than the auditee. All draft reports are marked "confidential." Furthermore, the OAOA's policy manual indicates that documents may be released to requestors unless approved by the CAA. That manual was changed (without my knowledge) to include you as the persons having sole discretion to authorize the release of information… [E]ven where a CAA, in his or her discretion, allows release of draft reports and related information, the manual does not authorize the release of

> confidential information regarding a subject of the audit. Section 2.14[8] of the Audit and Investigative Manual cites to GAGAS section 1.20 and 1.21, which indicate that improper disclosure of information obtained in the course of an auditor's duties is not an acceptable auditing practice.

Allegations in the October 11, 2017 intent to terminate letter also concerned statements made by the Grievant during her interview with Grant Thornton; however, the final investigative report is not in evidence.

Both Buchanan and Guensberg opined the Grievant did not violate GAGAS standards when she sent a draft of the audit report to Rep. Williams. GAGAS allows solicitation of "other interested parties" and provides no mandate on confidentiality. *Grievant Exhibit 6.* GAGAS 7.33 states, "Providing a draft report with findings for review and comment by responsible officials ***and others*** helps the auditors develop a report that is fair, complete, and objective." *Grievant Exhibit 6.* As a member of the General Assembly and the House Education Committee Rep. Williams qualifies as an "other" person, according to both experts.

Withholding Information about OAOA matters from the Auditor

On or around 2014, Wagner's access to his OAOA folders on the network drive was withdrawn. Wagner was denied access to budget folders, leave slips, research folder, projects not yet started, personnel and CPE (Wagner's folder). Wagner never asked Burd (who had system administrator rights) or any other staff member about changes to his access to the network folders and drive. Burd never told Wagner his access to folders and drives had been changed. All audit work is in TeamMate[9] and not in the folders. Wagner did not have access to TeamMate.

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[8] 2.14 In the government environment, the public's right to the transparency of government information has to be balanced with the proper use of that information. In addition, many government programs are subject to laws and regulations dealing with the disclosure of information. To accomplish this balance, exercising discretion in the use of information acquired in the course of auditors' duties is an important part in achieving this goal. Improperly disclosing any such information to third parties is not an acceptable practice. *Grievant Exhibit 19, p. 2.3*

[9] TeamMate Global Audit Solutions, part of the Tax and Accounting Division of Wolters Kluwer, helps professionals in all industries at organizations around the world manage audit and compliance risks and

On or around November 2015, the Grievant informed staff during a meeting not to tell Wagner that the training fund is up to over $90,000, warning he would want to spend it on a junket. Wagner stated he was surprised by the amount in the training fund because it is comprised of special funds which do not annually revert to the general fund. Wagner knew what was originally budgeted and also knew the fund made money. Wagner stated he would have used the money, had he known, for specialized training such as data analytics or TeamMate. *TR, p. 348.* OAOA provided no documentation that Wagner or any other OAOA employee requested training and was denied. In addition, Wagner received OAOA's budget annually which listed the Training Fund as a line item; however, Wagner testified he did not usually review the budget in that format. The balance in the training fund continued to increase after the Grievant was placed on administrative leave. *TR p. 403.*

Wagner stated OAOA employees told him on or around March 24, 2016 that information was being withheld from him by the Grievant. In April 2016, employees informed Wagner that an alarm/security system had been installed. *TR p. 350.* Wagner stated that as Auditor he had not felt or been threatened; however, his role on the Board of Pardons made extra security necessary. On or around November 24, 2015, the Grievant is alleged to have said, "I'm not inclined to give (remote access to the system) to the political hires or Tom because it'd just be a joke. He doesn't, Tom doesn't even necessarily know we did this. I mean it's that way for a reason." *Agency Exhibit GG.* The Grievant testified the security cameras were very visible and that Wagner knew about them because he used them to monitor the front door when he was alone in the office. *TR p. 775-777.* Additionally, the security system was part of the office renovations which

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business issues by providing targeted, configurable, and efficient software solutions. Solutions include TeamMate+ Audit, TeamMate+ Controls, and TeamMate Analytics. Together, this ecosystem of solutions provides organizations with the combined assurance they need to manage all aspects of risk identification and assessment, electronic working paper creation and management, controls framework management, and data analysis.

were on-going for a number of years. Wagner was aware of the office renovations.

On May 12, 2016, while meeting with staff (including Burd), about the Indian River School District ("IRSD") report the Grievant told them "Even when Tom comes up to you, the proper way to deal with that is keep it light and generic. I'm not telling you to be rude to him or anything, but you could inadvertently tell him something and he doesn't realize that it can't be put out for public… it'll negatively impact the investigation…" *Agency Exhibit C, p. 3-4.* In addition, the Grievant stated "So just you know think of generic ways to say yeah oh my gosh dis da da da. And he may ask you detailed questions. He's out talking to people and you know they're related to some of these people down there. So keeping it close to the vest is really important." *Agency Exhibit FF.*

On or around November 20, 2015, in a meeting with staff (including Burd), the Grievant stated "You guys are hiring us some great people. Another letter came in from somebody that knows Tom that was spewing about one of your interviewees. I'm not even showing him because I don't want him bugging you. Until after… I don't even want you to know who it is. I want you to make your judgment so spot on *[sic]*. I don't want anything clouding your judgment… Yeah because we've had some really great hires." *Agency Exhibit HH.* Wagner stated a person later asked him about the letter but he knew nothing about it.

Wagner admitted he gave the Grievant access to read his email and access to send and change emails from his account. Wagner maintained that personal paper mail came to him, while professional mail went to the Grievant but he received a copy. In addition, Wagner admitted the Grievant could access his calendar.

According to the OAOA Procedures for Incoming and Outgoing Mail, all incoming mail to Wagner was to be logged into CTF, listing date received and company of sender and what it is regarding. Correspondence was then given to the Grievant to handle with a hard copy filed in the "Letters to RTW" folder located in the secretary's desk drawer outside the State Auditor's

Office. "Any mail stamped with *Personal and/or Confidential* is **NOT** to be opened." *Agency Exhibit NN.*

In the intent to terminate letter, Wagner referenced the recorded conversations made by Burd of the above-mentioned statements made by the Grievant, stating he believed these were matters in which he either should have been involved or would have been involved but for the Grievant's actions. Specifically, he alleged that by not informing him of the balance in the training budget, the Grievant denied OAOA staff and Wagner the opportunity to attend training. The letter also alleges the Grievant authorized the purchase and installation of security cameras without notifying Wagner and/or obtaining his approval; instructed staff to misinform him, as an elected State official responsible for running the office, through omission; and withheld a personal letter from a job seeker (although he admitted he did eventually receive it).

Misuse of Prior Delegation of Authority

On March 18, 2011, Wagner executed a notarized Temporary Delegation of Authority that stated:

> In the event of my temporary disability or absence from Office, I, R. Thomas Wagner, Jr., Auditor of Accounts of the State of Delaware, pursuant to my authority set forth in 29 Del. C. chapter 29, hereby delegate to my Chief Administrative Auditor, Kathleen A. O'Donnell[10], for the duration of such disability or absence from Office, the exclusive authority to exercise and discharge in my name any power, duty, or function, whether ministerial, discretionary, or of whatever character vested in or imposed upon the Auditor of Accounts under said chapter. *Agency Exhibit II.*

On March 2, 2011, Deputy Attorney General Frank Broujos advised the Grievant and Wagner (in an email)[11] that the Auditor of Accounts statute permits the Auditor to designate an OAOA employee other than the Deputy Auditor (namely, the Chief Administrative Auditor) to

[10] The Grievant's surname before her marriage was O'Donnell.

[11] Agency Exhibit II.

temporarily fulfill his duties during periods of unanticipated absence or disability (such as serious illness and/or extended hospital stay), and stated his advice was provided solely in that context. Broujos opined rather than a blanket designation (which was ultimately done by the OAOA), the agency should execute a "delegation form" should the delegation become necessary and the Auditor is able to execute it prior to his absence or disability. Broujos further stated he was thinking the form should have Wagner's signature notarized, but simply have the Grievant acknowledge (sign) the delegation to evidence that she was aware of it and accepted it. Broujos did not intend for there to be a notary signature line following the Grievant's signature. *Agency Exhibit II.*

The Delaware Division of Accounting issued Procurement Card ("PCard") Authorized Signature Card Form instructions to OAOA. The Division, serving as the Program Administrator, was required to maintain a list of authorized signatories and their designees to assist with the management of the program. Organizations were required to submit new cards by July 1, annually, to the Division of Accounting PCard Team. Required information included Organization Head Name and Title and Organization Head Signature. *Agency Exhibit JJ.*

On July 14, 2015, Micheale Lessard from the Division of Accounting responded to OAOA staff by email[12] (including Burd and the Grievant) that "Yes, I agree that until a valid signature form is received, in order to remain compliant with the payroll funding expenditure authorization process, a short-term solution is to send the authorization in with the signature of an authorized signer from the most currently accepted form." On July 21, 2015, the Grievant responded to Burd and Tatman, in an email directed to Lessard, stating "To clarify, first, our Chief Administrative Auditor has been fully vested with the authority to act on behalf of AOA and specifically the State Auditor. While her job description supports her authority needed to conduct

[12] Agency Exhibit LL.

operations, there has also been formal vested authority since March 15, 2011." *Agency Exhibit LL.*

On July 24, 2015, Burd submitted OAOA's PCard Authorized Signature Card form. *Agency Exhibit KK.* On September 14, 2015, Ching Mak from the Division of Accounting responds to Burd, "We are reviewing the PCard Authorized Signature card that you submitted back in July, however, it has the incorrect organization head signature at the bottom of the form. Thomas Wagner is the one that will need to sign this instead of [*the Grievant*]." *Agency Exhibit KK, p. 3.*

On September 21, 2015, Burd responded to Ching Mak and stated, "To clarify, first our Chief Administrative Auditor has been fully vested with the authority to act on behalf of AOA and specifically the State Auditor. While her job description supports her authority needed to conduct operations, there has also been formal vested authority since March 15, 2011." *Agency Exhibit KK, p. 2.* On September 21, 2015 Mak asked Burd if she will be able to provide the Division some documentation or email from Wagner to support the Chief Administrative Auditor having been fully vested with such authority since March 15, 2011. Mak stated they will accept the Grievant's signature for the PCard if documentation was provided. On October 28, 2015, Mak followed up with Burd requesting documentation or an email from Wagner to support the Grievant having been fully vested with the authority since March 15, 2011. On October 28, 2015, the Grievant responded to Mak by email that "This matter was concluded throughout various state agencies years ago. AOA continues to revisit the issue each time a new staff person is assigned to a project. Tom is on the thread and would respond if he had exception." *Agency Exhibit KK, p. 1.* The Grievant maintained she served a dual role as Chief Administrative Auditor and Deputy Auditor[13] and testified Wagner never responded to the email to Mak. Burd also confirmed that Wagner never

[13] TR p. 729.

objected to the email string concerning the Grievant's authority to sign the PCard Authorization form. *TR. 164.*

Wagner testified the March 15, 2011 Delegation of Authority was intended to be applicable only if he was in the hospital and/or unable to make a sound decision. Wagner admitted he sat down with the Grievant and discussed his going into the hospital. He stated he thought delegation was a good idea. *TR p. 359.* Wagner testified he did not understand how a constitutionally elected official could totally turn over their rights to running the office, and that he was unsure that would be legal. *TR p. 360.* According to Wagner, "absence" related to an inability to perform his duties.

The Grievant testified Wagner made her his designee on other authorizations such as the PHRST Coordinator in 2011, the FSF Security Authorization in 2012, and the ERP Security Administrator in 2011. *Grievant Exhibits 27, 28, and 29.* The Grievant understood that from 2014 through May 17, 2016, she was responsible for the day-to-day operations of the OAOA office, and she regularly updated Wagner on operations by maintaining contact with him by phone and email. *TR p. 648.*

In the intent to terminate letter, Wagner alleged the Grievant continued to use a limited Delegation of Authority for more than four years to authorize transactions without his approval. The record establishes the Grievant did use the 2011 Delegation of Authority to authorize PCards for OAOA staff members, contrary to the §12.3.3 of the State Budget and Accounting Manual.

Selection of Zelenkofske-Axelrod ("ZA") for the Treasury AUP and Annual Peer Review

OAOA conducted a Request for Proposal ("RFP") Technical Evaluation for the Treasurer's Office Agreed-Upon Procedures ("AUP") engagement. As part of the process, staff reviewed submissions from ZA and Santora, who formerly held the engagement. *TR p. 230.* According to the rules, only proposals received by OAOA in accordance with the RFP process were reviewed by the Technical Committee. The technical committee included Burd, Smith and Tatman. *TR*

p. 83. While the committee members reviewed the applications prior to meeting, they did not score the applications until they met. The Grievant came in to the meeting of the committee and advised she believed the engagement needed a new perspective. All three members of the committee originally scored Santora higher than ZA. *TR p. 86.* After the Grievant's comments, Smith and Tatman changed their score to select ZA. The discussion with the Grievant prior to scoring was the usual procedure of the RFP engagement selection for the technical committee. Tatman testified it was not uncommon for committee members to have discussions prior to meeting as a team, and that team member scores were subject to change before the conclusion of the process. *TR p. 289-290.* OAOA continued to award ZA the Treasurer's Office AUP contract after the Grievant was placed on administrative leave and subsequently terminated. *TR p. 173, 306.*

OAOA selected ZA to conduct its peer review and the Grievant signed the contract for their services on August 14, 2014. *Agency Exhibit YY.* On October 14, 2015, Burd emailed the necessary files for review to Corey Troutman at ZA. *Agency Exhibit SS.* On October 21, 2015, Troutman contacted the Grievant by email attaching a draft peer review for discussion. *Agency Exhibit TT.* On October 21, 2015, the Grievant sent an email to OAOA staff, including Wagner, stating:

> I've been waiting on the draft to share the results. We have passed peer review.
>
> I will do a phone exit tomorrow morning. Once we get the final letter, we can post the new letter up. In my discussion with Corey he said the letter will be dated 10/22/2015. Monday posting will work. Congratulations! I must say contracting the review is much more efficient for our office. Thank you again for your contributions! *Agency Exhibit TT.*

Typically, OAOA pulled auditors from various states who came to the office and conducted the peer review. *TR p. 97, 360.* In the past, OAOA used the National Association of State Auditors who charged $6,000 plus travel. ZA charged $10,000 for the 2015 Peer Review. *Agency Exhibit UU.* In addition to the Treasurer's AUP, OAOA contracted with ZA for the Department of Natural Resources and Environmental Control Hazardous Substance Cleanup Fund, and the

Department of Health and Social Services, Division of Public Health, Delaware Drinking Water Revolving Loan Fund. *Agency Exhibit OO*. According to GAGAS 3.99:

> The peer review team should perform an assessment of peer review risk to help determine the number and types of audits to select for review. Based on the risk assessment, the team should use one or a combination of the following approaches to select individual audits for review with greater emphasis on those audits with higher assessed levels of peer review risk: (1) select GAGAS audits that provide a reasonable cross-section of the GAGAS audits performed by the reviewed audit organization; or (2) select audits that provide a reasonable cross-section from all types of work subject to the reviewed audit organization's quality control system, including one or more audits performed in accordance with GAGAS. *Agency Exhibit QQ, p. 2.*

Under the National State Auditors Association (NSAA) Peer Review Manual: [14]

> Review team members and any specialists who participate in any segment of the review must maintain their independence with respect to the state audit organization being reviewed, its staff, and the audits selected for peer review. The concepts pertaining to independence contained in professional auditing standards are applicable to the performance of external peer reviews. Review team members and any specialists should assume that their actions would be the same as in an audit situation.
>
> The nature of any relationships between potential reviewers and the reviewed state audit organization should be considered before the assignments of team members are finalized. For example, the independence of a potential reviewer should be questioned when the existence of personal or professional relationships might impair independence.
>
> In order to document their independence, all review team members – the team leader, individual team members, the concurring reviewer, and any specialists – should sign a statement of independence. The statement of independence should be completed before the finalization of the review team. A standard form for this statement will be provided by NASACT staff for distribution to each review team member. The signed statements are returned to NASACT staff and then sent to the team leader for inclusion in the working papers." *Agency Exhibit RR, p. II-5.*

OAOA provided no documentation ZA conducted peer reviews involving any of the engagements they had been contracted to complete.

Wagner testified the Grievant convinced him to use ZA for the peer review because it would

[14] These standards are applicable when NSAA members constitute a review team, "…to help insure the adequacy of and compliance with its internal quality control system," of the peer audit organization being reviewed. *Agency Exhibit RR, p. I-1.*

be cheaper to contract out. *TR p. 360.* Wagner testified the Grievant's assertion to him that using the National State Auditors Association to conduct Delaware's peer review would obligate OAOA to provide an equal number of man hours for a peer review in another state proved to be false. *TR p. 361.* Wagner stated he was not aware ZA was doing any of those contracts and he only learned of it after the peer review. *TR p. 362.* Wagner admitted that because of ZA's potential lack of independence, he was concerned OAOA's peer review would not be considered legitimate and it "really scared him." Wagner admitted that at the end of the day, "the determination was made that the legal responsibility on that is on the accounting firm and not our office and it would have been a nightmare to try and change that at the time." *TR p. 363.* Wagner stated he felt OAOA had too many crises going on to try to address the peer review concerns and that he was not sure they had the money to re-do the peer review "because so much chaos going on that it was just another issue that we did not want to deal with." *TR p. 412.* OAOA continued to issue reports under this peer review through the conclusion of the MERB evidentiary hearing in this case.

In the intent to terminate letter, Wagner states the Grievant guided the discussion to award the contract to ZA and that other OAOA managers felt pressured to select ZA. *Agency Exhibit C, p. 4.* In addition, he alleges the Grievant selected ZA to conduct OAOA's annual peer review even though they were not independent and there is no documentation that addresses whether the OAOA or ZA assessed the independence of the ZA team. In addition, there was no site visit conducted by ZA. Buchanan opined there is nothing in GAGAS that prohibits ZA from doing OAOA's peer review while they have other engagements. Under GAGAS 3.02, "In all matters relating to the audit work, the audit organization and the individual auditor, whether government or public, must be independent." *Grievant Exhibit 6, p. 27.* Specifically, GAGAS 3.104(b) states, "The peer review team should meet the following criteria: The organization conducting the peer review and individual review team members are independent (as defined in GAGAS) of the audit organization being reviewed, its staff, and the audits selected for peer review." *Grievant Exhibit*

6, p. 70.

Buchanan opined ZA would need to look at the individual members of its review team and make a determination of independence by conducting a threat risk. This responsibility falls on ZA and not the OAOA. *TR p. 480.* Similarly, Guensberg opined that if ZA found no threat and they never reviewed their own engagements, they were qualified to conduct OAOA's peer review. While Guensberg stated she was not sure how much of ZA's engagement with OAOA compared to their overall business, it was on ZA to make a determination about independence. *TR p. 577.*

The peer review conducted by ZA remained on the OAOA website and was relied upon by the Agency through the completion of the hearing in this case.

AFL-CIO conference in September 2014

The Grievant submitted a Conference/Training Registration form on August 18, 2014 to attend the American Federation of Government Employees ("AFL-CIO")'s District 3 Leadership Training Seminar on Advanced Collective Bargaining in Pittsburgh, PA from September 15, 2014 through September 19, 2014. *Agency Exhibit WW.* The Grievant's husband is a local president of an AFL-CIO affiliated union and was also attending the conference. *TR p. 834, 836.* Tammy Smith and the Grievant approved the request for travel and training expenses. On September 23, 2014, the Grievant submitted her Meals and Incident Expenses and mileage for reimbursement. *Agency Exhibit XX.*

According to OAOA's Policy 4-1 Staff Training, "Employees are permitted to attend approved continuing professional education courses during their work hours as their job duties permit." *Agency Exhibit VV.* Continuing professional education for employees within OAOA includes:

> "(1) Attendance at courses, seminars and teleconferences offered by other agencies of the State of Delaware; (2) Attendance at courses, seminars,

> conferences, programs and teleconferences based on training needs and the cost effectiveness; (3) Educational assistance may be provided to help employees continue their formal training through attendance at recognized and approved education/training facilities. Information regarding educational assistance is contained in Educational Assistance Policy 4-2; and (4) Self-study programs, online courses, and computer-based courses will keep employees updated on professional knowledge and skills. Acceptable programs include training packages, films, publications, video conferences, computer-bases\d CD-ROMs and related items acquired from federal, other governmental, or private sector organizations. Approval for such courses will be in the form of an email from the employee's Senior Audit Manager and the Chief Administrative Auditor." *Agency Exhibit VV.*

Wagner testified he did not remember any discussion with the Grievant about her attending this training conference. He admitted he knew she was out and testified he thought she was a presenter somewhere, "I knew it was Michigan or Ohio or something like that." *TR p. 364.* Wagner stated none of his employees belong to a union and that he knew the State of Delaware negotiates contracts though what was then the Office of Management and Budget, a process which would not be audited by OAOA. *TR p. 365.* According to the Grievant, "as part of [her] job description earlier and [her] day to day duties, [she] was required to have at least five years… of negotiation experience." *TR p. 690.* The Grievant received no Continuing Professional Education credit for attending this conference; she testified, however, other OAOA employees went to training for which they also did not receive continuing education credit. *TR p. 693.*

In the intent to terminate letter, Wagner stated the Grievant began authorizing her own travel in August 2014 and authorized herself to attend the conference in Pittsburgh which her husband was also attending. *Agency Exhibit C, p. 5.* The Grievant's total travel reimbursements claimed were $567.50 and the course fee of $225.00 was paid out of OAOA petty cash. *Agency Exhibit XX, p. 5.* Wagner noted that both he and the OAOA staff are of the opinion that there was nothing at the conference that would have related to the business conducted by the OAOA and it was Wagner's understanding the Grievant was attending as a trainer.

Wagner noted that the Grievant's personnel record included no discipline issued to her in the two years prior to her suspension and termination. While commendable, he did not believe her clean work record mitigated the severity of the conduct he had discovered. *TR p. 365*

On December 18, 2017, legal counsel for the Grievant contacted Wagner by letter, providing him with her formal response to the October 11, 2017 letter recommending she be terminated. *Agency Exhibit B.* The Grievant objected to Wagner delegating the pre-decision hearing to her subordinate, John Fluharty and stated the letter would serve as her answer. The Grievant argued Wagner's decision failed to meet just cause to terminate her as she did not commit the charged offenses.

By letter dated December 21, 2017, Wagner responded that her November 21, 2017 letter did not provide any new information which mitigated the imposition of his recommended discipline. Wagner stated, "You make broad-based assertions and allegations that the stated bases for my recommendation ' reflect a profound lack of understanding, experience, and application of Government Auditing Standards.' Such statements are unproductive and frankly insulting." Wagner stated he found no basis to change the recommendation contained in the October 11, 2017 letter. He concluded, "Therefore, for the reasons stated in that letter, I am finalizing the recommendation and hereby terminate your employment with the Office of the Auditor of Accounts effective immediately." *Agency Exhibit A.*

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 three of the six offenses specified in the notice of intent to terminate letter dated October 11, 2017.[15] The Board concludes as a matter of law that the Grievant received specified due process rights.[16] A majority of the Board concludes as a matter of law that the penalty of termination was not appropriate under the circumstances.

Charged Offense #1 – Violation of Government Auditing Standards/Unit Count Performance Audit

The notice of intent to terminate letter alleged, "The final report issued on May 4, 2016 does not contain information about the comments or responses from the auditee or the DOE. There is no record of those comments or responses being considered by the OAOA in finalizing the report."[17]

The OAOA received comments from three sources on the draft Unit Count Performance audit: (1) Department of Education ("DOE"); (2) Caesar Rodney School District; and (3) Laurel School District. [18] Both parties' expert witnesses agreed that the discussion at page 19 of the final report satisfied the GAGAS standard for including comments from the DOE.[19] The OAOA's expert Guensberg acknowledged there were substantive changes to page 18 of the draft report which could have been in response to Caesar Rodney's e-mail comments on the draft but testified that she "can't really definitively say" whether the final report satisfied the GAGAS standard for including Caesar

[15] Grievant Exhibit 1.

[16] The Grievant took issue with her pre-decision meeting claiming that it should have been conducted by Wagner, who delegated that role to her subordinate, John Flaherty. Merit Rule 12.5 provides that the meeting "shall be held within a reasonable time not to exceed 15 calendar days after the employee has requested the meeting in compliance with 12.4." The Merit Rules do not prescribe that the agency head conduct the pre-decision meeting.

[17] Grievant Exhibit 1 at p. 2.

[18] Agency Exhibits L-M; Exhibit K; and Exhibit J.

[19] *Compare* Buchanan testimony (Tr. at p. 472) *with* Guensberg testimony (Tr. at 568).

Rodney's e-mail comments.[20] She testified that the report did not satisfy the GAGAS standard for including the e-mail comments made by the Laurel School District.[21]

The OAOA issued the final Unit Count Performance audit to the public on May 4, 2016. In a cover letter, Wagner certified:

> The law requires that audits be made in conformity with generally accepted auditing principles and practices. Such principles and practices are established by the U.S. General Accounting Office, which has issued standards.
>
> **We conducted this performance audit in accordance with Generally Accepted Government Auditing Standards issued by the Comptroller General of the United States.**[22]

However, at the hearing Wagner admitted: "If I had to do it all over again, I would not have released that report . . . I let the public report go out that did not meet our criteria."[23] The Board found Wagner's explanation troubling: "And the rationale for that was, we hadn't made the formal decision on termination [of the Grievant] and I didn't want to pull that report and have [the Grievant] do something and realize that she was in some trouble. So I just decided to let the report go out."[24]

There is evidence in the record to support the conclusion that the Grievant did not adequately address the views of some commentators in the final report. The GAGAS standards emphasize inclusion to make sure "a report that is fair, complete, and objective."[25] The Grievant could easily have attached the three comments received and cross-referenced them in the final report even if she felt they were non-responsive.

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[20] Tr. at 587.

[21] Tr. at 591. *See* Tr. at 562 ("nor did their comment or a summary of their comments get included in the draft report"). Buchanan testified that she could not render an expert opinion on Caesar Rodney or Laurel without access to the work papers and draft report. *See* Tr. at 526. Neither party provided the Board with a copy of the draft report, although it was referenced in several exhibits as having been attached to various emails.

[22] Agency Exhibit G (emphasis added).

[23] Tr. at 394-95.

[24] *Tr. at 395.*

[25] GAGAS Standard Section 7.33 (Grievant Exhibit 6).

Even if the evidence in the record supports the conclusion that the Grievant may have violated GAGAS, the Board concludes as a matter of law that the OAOA did not have just cause to terminate the Grievant because discipline was not appropriate under these circumstances. Under Delaware law, audits by the OAOA must "be made in conformity with generally accepted auditing principles and practices."[26] By releasing the final report – despite his stated belief at the time that it did not comply with GAGAS standards – Wagner did not live up to that requirement. The OAOA cannot have it both ways: Wagner cannot certify in the final audit report on May 4, 2016 that the report met all GAGAS standards, and then move to terminate the Grievant for violating those same GAGAS standards by not including comments in the audit.

Charged Offense #2 – Disclosure of Draft Unit Count Performance Audit to Representative Williams

Both expert witnesses agreed that the Grievant did not violate GAGAS standards or improperly disclose information to a third party by sending a draft of the unit count performance audit to State Representative Williams.[27] GAGAS Section 7.33 encourages the disclosure of draft reports "for review and comment by responsible officials of the audited entity **and others**" to help "auditors develop a report that is fair, complete, and objective… including the views of responsible officials."[28]

The OAOA contended that the Grievant violated the agency's internal policy and practice by sharing a draft report with someone other than an auditee. Wagner acknowledged that he had released draft reports to legislators who "had an interest in *[it]*, I would give them a head's up on that."[29] But according to Wagner, only he had the authority to release a draft audit to third parties.

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[26] 29 *Del. C.* §2907(b).

[27] *Compare* Buchanan (Tr. at pp. 476) *with* Guensberg (Tr. at pp. 574-575).

[28] Grievant Exhibit 6 at p. 173 (emphasis added).

[29] Tr. at 345. Wagner also acknowledged that he had disclosed draft reports to the media. "It's standard practice, when you have a very complicated report that you can give, in particular, to print media, a head's

"I learned later that the Grievant had changed the policy certainly without my knowledge."[30] It is noted this change had been in effect since November, 2011. *Agency Exhibit V, p. 2.*

The Grievant may have exceeded her authority to revise the OAOA policy to authorize herself to release draft audits, but that is not a GAGAS issue. It is an iteration of the charge that the Grievant withheld information from Wagner, which the Board will subsume in its discussion of charged offense #3.

The Board concludes as a matter of law that the Grievant did not violate GAGAS standards by sending the draft Unit Count Performance audit to Representative Williams.

Charged Offense #3 – Withholding Information

Based on conversations secretly tape-recorded by OAOA staff, Wagner concluded the Grievant instructed staff not to inform him of certain matters such as: the amount of money in the training budget; the installation and remote access of the security/alarm system; a pending audit with the Indian River School District; and a letter addressed to Wagner concerning an applicant for a college intern position. The Grievant had access to Wagner's mail and e-mail, and Wagner's access to OAOA network drives was deleted in 2014.

Wagner relied heavily on the Grievant to control the flow of information to him. By accepting that role, the Board believes the Grievant had a heightened responsibility to make sure that Wagner was informed of any material matters affecting the office. While that might require day-to-day judgment calls on her part, it does not go so far as to keep him totally isolated. According to the Grievant, she kept Wagner aware of any policy changes by posting them on the internet and advised him about any other significant matters by copying him on her e-mails.

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up on a report." *Id.*

[30] Tr. at 344. In its original form, Policy No. 8-1 prohibited the disclosure of audit documents "unless it has been approved by the Auditor or Accounts or his designee." Agency Exhibit V. In 2011, the policy was revised to authorize disclosure "approved by the Chief Administrative Auditor." *Id.*

The Board believes that was insufficient and the Grievant should have kept Wagner informed of significant issues in a more direct manner. For example, he should not have been expected to parse through a revised 2005 policy to find out about the change made by the Grievant in 2011 authorizing herself to disclose draft audits. She should have brought that policy change directly to his attention.

The Board concludes as a matter of law that the Grievant committed the charged offense of withholding material information from Wagner.

Charged Offense #4 – Exceeding Delegated Authority

Prior to going to the hospital, on March 18, 2011, Wagner executed a Temporary Delegation of Authority to the Grievant in the event he were incapacitated or absent for a period of time.[31] On advice of legal counsel, this document was intended to serve as a form to be re-executed in the event of another serious illness, extended hospital stay, or period of incapacity.[32]

The Grievant, however, treated this delegation as giving her plenary authority to run the office. For example, the Grievant replaced her name with Wagner's on a PCard Authorized Signature Card Form. When the Division of Accounting notified the Grievant that the form required an Organization Head Signature, the Grievant responded: "[O]ur Chief Administrative Auditor has been fully vested with the authority to act on behalf of AOA and specifically the State Auditor. While her job description supports her authority needed to conduct operations, there has also been formal vested authority since March 5, 2011."[33]

The Board concludes as a matter of law that the Grievant misused a delegation of authority which was of limited duration and for a limited purpose to exceed her authority as Chief

[31] Agency Exhibit II, p. 1.

[32] Agency Exhibit II, p. 3.

[33] Agency Exhibit LL.

Administrative Auditor.

Charged Offense # 5 – Selection of ZA to Conduct Audits

The notice of intent to terminate letter alleged that the Grievant exercised undue influence on staff to steer the award of a contract to Zelenkofske Axelrod LLC ("ZA") to audit the Treasurer's Quarterly Bank Reconciliation. The Board concludes as a matter of law that the evidence in the record does not support this charge. Staff members testified that they felt pressured when the Grievant made it clear she wanted a fresh start with ZA, but they also testified it was routine for them to discuss the merits of prospective bidders before initial scoring and then to change their scores afterwards.[34] Most important, there is no evidence in the record that the Grievant had any personal relationship with ZA or stood to gain financially by the award of the contract to ZA.

The notice of intent to terminate letter also charged that the Grievant violated GAGAS standards requiring independence of auditors by engaging ZA for the 2015 OAOA peer review audit. According to the OAOA, ZA should not have been hired to perform a peer review audit because it had other business with the State, thereby creating a conflict of interest. GAGAS requires auditors, before accepting an engagement, to evaluate any "self-interest threat – the threat that a financial or other interest will inappropriately influence an auditor's judgment or behavior."[35]

Both parties' expert witnesses agreed that the Grievant did not violate the GAGAS independence standard because the responsibility for evaluating independence is "a requirement of the firm that is being engaged to do the work," not the auditee.[36]

Wagner testified that, although he had concerns when he learned ZA had other audit contracts with the State, the "determination was that the legal responsibility on that is on the

[34] *See* Tr. at 289-90.

[35] GAGAS Section 3.14 a. (Grievant Exhibit 6, at p. 31).

[36] Tr. at 480-81 (Buchanan); *accord* Tr. at 579 (Guensberg).

accounting firm and not our office."[37] The OAOA posted the ZA peer review audit on the agency's website. GAGAS standards require a new peer review audit every three years. It is undisputed that OAOA continued to issue reports under the aegis of the ZA peer review for the full three year term.[38]

The Grievant's expert testified that, if there were any doubts about the validity of a peer review audit, it "should be taken down immediately. And there also should be notification to the people that are relying on that peer review about what has happened to the peer review."[39]

The Board concludes as a matter of law that the Grievant did not violate the GAGAS standard when OAOA contracted ZA to conduct the peer review audit. The burden was on ZA, not the OAOA, to determine whether it had the requisite independence under the GAGAS standards. If OAOA had any genuine concerns, after the fact, about ZA's independence, it should not have continued to rely on that peer review and should have taken it down from its public website as soon as its concerns were confirmed.[40]

Charged Offense #6 – AFL-CIO Conference in Pittsburgh

The Board concludes as a matter of law that the Grievant self-approved an out-of-state travel expense to attend a conference on collective bargaining which did not have a direct connection with her job responsibilities as the Chief Administrative Auditor.

The OAOA does not, however, have a written travel policy which required prior approval. The Grievant testified that she told Wagner she would be out of the office attending the conference.

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[37] Tr. at 363.

[38] Tr. at 222, 275.

[39] Tr. at 486. "In addition, all future reports that are issued by whatever the organization is that has a peer review that failed needs to include in their [GAGAS] statement." *Id.* at 486-87.

[40] Again, the Board finds Wagner's explanation troubling: "And we had too many crises going on to try and revisit that. Plus, I'm not sure if I had the money to do the peer review again . . . And at the end of the day, we had so much chaos going on that it was just another issue that we didn't want to deal with." Tr. at 411, 412.

Wagner testified that, while he was aware she would be out of the office for a conference, he believed she would be providing training, not attending a training as a participant.[41] Wagner testified that the trip was not job-related because "none of my employees belong to a union" and that there would be no reason for his staff to know anything about collective bargaining."[42]

The Board believes that the Grievant should not have self-approved her travel for the AFL-CIO conference in Pittsburgh and should have been more candid with Wagner about the reason for going.

The OAOA terminated the Grievant for six charged offenses. The Board has concluded as a matter of law that the Grievant did not commit and should not be disciplined for three of those charged offenses. The question remains whether the penalty of termination was appropriate for the other three offenses.

A majority of the Board concludes as a matter of law that the penalty of termination was not appropriate for the other three offenses. The Board can understand that, after everything came to light in March/April 2016, Wagner no longer had trust in the Grievant as his Chief Administrative Auditor. Wagner had, however, personally recruited and hired the Grievant in 2011 to be his strong second-in-command in order to free him up from the day-to-day management of the office so he could focus on legislative and public relations matters and serve on national trade associations.

For the first few years, the arrangement apparently worked, but over time the Grievant arrogated more and more authority while compartmentalizing Wagner and limiting his access to material information, discouraging staff from having direct contact with him. The Board believes that the Grievant's reliance on the 2011 delegation of authority was self-serving and that it was

[41] Tr. at 364.

[42] Tr. at 364-65.

clearly intended to apply only when Wagner was temporarily incapacitated for health reasons. Wagner, on the other hand, took little interest in day-to-day office operations and did not notice or complain when his network drives were removed. The professional relationship would have been much better served if both Wagner and the Grievant had a clearer understanding of Wagner's expectations of the Grievant and the boundaries in acting on his behalf.

At some point, the Board believes that the Grievant crossed a line and was no longer acting merely as a keeper of the gate. For that transgression, a majority of the Board believes some disciplinary action short of termination is appropriate.

The Board does not have the benefit of a disciplinary matrix or OAOA disciplinary comparators. The Board has searched its own decisions for analogous situations to no avail. For this case of first impression a majority of the Board decides that a significant penalty – two months' suspension without pay – will serve the purpose of sending a strong message to the Grievant

ATTORNEY'S FEES REQUEST

The Grievant requested attorney's fees alleging OAOA acted in bad faith.

> Delaware follows the 'American Rule,' which provides that each party is generally expected to pay its own attorneys' fees regardless of the outcome of the litigation. There are, however, several recognized exceptions to the rule, such as the bad faith exception. Although there is no single definition of bad faith conduct, courts have found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified record, or knowingly asserted frivolous claims. Courts have also found bad faith where a party misled the court, altered testimony or changed his position on an issue. The bad faith exception is applied in 'extraordinary circumstances' as a tool to deter abusive litigation and to protect the integrity of the judicial process. The party seeking fees must demonstrate by clear evidence that the other party acted in subjective bad faith.[43]

Specifically, the Grievant asserts Wagner never interviewed her prior to placing her on leave, allowed employees to secretly record meetings with her, and damaged her reputation by

[43] *Shaw v. Elting*, 157 A.3d 142, 149-150 (Del. 2017)

alleging she violated GAGAS standards despite the fact that he signed the attestation that the Unit Count audit met those same standards. Two separate experts opined almost identically there were no GAGAS violations. The Grievant also argued OAOA exhibited bad faith through discovery violations and the prolonged delay in the process. In addition, the Grant Thornton report was leaked to the press prior to the culmination of the grievance process.

OAOA argued Wagner did not intentionally release the audit report to discredit the Grievant, he signed the report but revisited the matter later, after the investigation.

OAOA contends the fact that OAOA employees extensively recorded conversations they had with the Grievant shows no bad faith on the part of the agency. The employees testified they believed surreptitiously taping these conversations was their only recourse because OMB had previously advised them they did not have enough evidence of the Grievant's alleged wrongdoing because there was nothing in writing. In addition, OAOA had to contract with an outside agency to conduct its investigation because there was no State agency that could investigate, once OMB was conflicted out.

Concerning the findings that the Grievant did not violate any GAGAS standards (as OAOA alleged), even though the experts agreed, the lack of substantiation on those portions of the allegations, standing alone, does not constitute bad faith on the part of OAOA.

The Board finds OAOA did not act in bad faith. As to the circumstances that gave rise to the allegations, the Board finds while there were bad facts, the Grievant would have had to establish that OAOA manufactured charges on which to base her termination that they hoped could be substantiated later. That was not the case here.

As to the discovery violations and delay in process concerning the litigation of this matter, the Board finds both parties share responsibility equally for their zealous and hard-fought advocacy on behalf of their clients. Therefore, the Board denies the Grievant's Motion for Attorney's Fees.

ORDER

It is this **4th** day of **March**, 2019, by a vote of 2-1, the Decision and Order of the Board to grant the grievance in part and to deny the grievance in part. The OAOA is ordered to reinstate the Grievant to her previous position within thirty (30) days of the date of this Decision and Order. The Board directs OAOA to reduce the termination it imposed to a 60 day suspension, and to make the Grievant whole for any lost wages related for the period following the 60-day suspension until the date of her reinstatement, in the customary manner. OAOA is further directed to remove any references to the termination from the Grievant's employment records. The Grievant shall bear her own attorney's fees and costs.

W. MICHAEL TUPMAN, MERB CHAIR

VICTORIA D. CAIRNS, MERB Member

I respectfully dissent because I believe that the penalty of termination was appropriate under the circumstances for the offenses committed by the Grievant.

SHELDON N. SANDLER, ESQ., MEMBER