

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

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| ANTONY R. WARD, |) | |
| |) | |
| Employee/Grievant, |) | |
| |) | DOCKET No. 08-09-427 |
| v. |) | |
| |) | |
| DEPARTMENT OF HEALTH AND |) | |
| SOCIAL SERVICES, |) | DECISION AND ORDER |
| |) | |
| Employer/Respondent. |) | |

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on October 15, 2009 in the Delaware Room at the Public Archives Building, 121 Duke of York Street, Dover, DE 19901 and continued at 9:00 a.m. on January 7, 2010 at the Delaware Commission for Veteran's Affairs, 802 Silver Lake Boulevard, Suite 100, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Joseph D. Dillon, Paul R. Houck, and Jacqueline Jenkins, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Roy S. Shiels, Esquire
on behalf of Antony R. Ward

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The employee/grievant, Antony R. Ward (Ward), offered and the Board admitted into evidence without objection five documents (Exhibits 1-5).

Ward testified on his own behalf and called five witnesses: Lisa Satterly; Willie Aizenman; Linda Robinson; Rodney Holderbaum; and JoAnn Marvel.

The Department of Health and Social Services (DHSS) offered eleven documents into evidence (Exhibits A-J, L, N). The parties stipulated to the admission of Exhibit D for the purpose of establishing that Ward's appeal is properly before the Board. The parties stipulated to the admission of Exhibits H, J, L, and N for the purpose of refreshing the witness' recollection should that be necessary. With those stipulations, the Board admitted the eleven DHSS exhibits into evidence.

DHSS called eight witnesses: Attlay Bennett; Eric Ymeh; Dr. Tracey D. Frazier; Dr. Joseph P. Grande; Barbara Stanley; Tina Ford; Kathleen Gibson; and Cheryl Hollis.

THE BOARD'S JURISDICTION

The Board considered as a preliminary jurisdictional issue whether DHSS took action to demote Ward within his one-year probationary period pursuant to 29 *Del. C.* §5922(b). If DHSS demoted Ward within his one-year probationary period, then Ward does not have standing under the Merit Rules to appeal his demotion. If DHSS did not demote Ward within his one-year probationary period, then DHSS must have just cause to demote Ward because of unsatisfactory job performance.

Section 5922(b) provides: “If the probationary employee’s services are unsatisfactory, the probationary employee shall be dropped from the payroll, except in the case of promotional probation in which case the probationer shall be handled per applicable merit rules. If the probationary employee’s services were satisfactory or no action taken within the probationary period, the appointment shall be deemed permanent. The determination of the appointing authority shall be final and conclusive.”

On October 26, 2006, DHSS notified Ward of his probationary promotion from Quality Assurance Administrator to Director of Rehabilitation and Human Support Services at the Delaware Hospital for the Chronically Ill (DHCI) effective Monday, November 13, 2006. According to Ward, he assuming responsibilities as Director of Rehabilitation on October 31, 2006 and moved into the previous Director’s office. The payroll records, however, show the “position entry date” as “11/12/2006.” The parties agreed that Ward’s probation was for one year.

By letter dated November 8, 2007 Jack Askin, the Director of DHCI, notified Ward “that you are being proposed for demotion from your current position as the Director of Rehabilitation and Human Service at [DHCI], pay grade 20, to a Quality Assurance Administrator position, pay grade 17, with Community Health, Division of Public Health.” The letter directed Ward “to report to Kris

Bennett, Blue Hen Corporate Center, Suite 218, Room B105 on the second floor at 8:00 a.m. Friday, November 9, 2007.” The letter further stated:

Prior to a final decision in this matter, you may request a pre-decision meeting to respond to the proposed action and offer any reasons why this demotion may not be justified or too severe. If you desire a pre-decision meeting, you must submit a written request to David Wesley, Labor Relations Specialist, within 15 calendar days from the date of this notice. However, your move to the Blue Hen Corporate Center will take place on November 9, 2007, and a final decision will be pending the result of the pre-decision meeting.

Ward made a timely written request for a pre-decision meeting which took place on November 30, 2007. By letter dated December 6, 2007, Barbara Jarrell, Deputy Director and Chief Operating Officer of the Division of Public Health, notified Ward: “Based on the information provided at the meeting, you did not offer any reasons why the proposed penalty is not justified or is too severe. As a result, your demotion shall be imposed immediately.”

Ward argued that DHSS did not take action to demote him during the one-year probationary period because he was notified of his promotion on October 26, 2006 and took up his new job responsibilities on October 31, 2006, but DHSS did not notify him of his proposed demotion until November 8, 2007 more than twelve months later. DHSS argued that the relevant date of Ward’s promotion was November 12, 2006 as reflected in the payroll records.

The Board believes that a promotion is effective on the employee’s first date of work in the new position based on the payroll records. The payroll records show that DHSS moved Ward from pay grade 17 (Quality Assurance Administrator) to paygrade 20 (Director of Rehabilitation and Human Support Services) on November 12, 2006 (a Sunday, the beginning of the pay cycle).

Ward's first date of work in the Director's position was Monday, November 13, 2006.

The issue then is whether the November 8, 2007 letter regarding Ward's demotion was the type of "action" contemplated by 29 *Del. C.* §5922(b). DHSS argued that the November 8, 2007 letter and Ward's transfer to another position the next day was sufficient action within the one-year probationary period and that Ward's promotion did not become permanent by operation of law.

The problem with this argument is that DHSS did not demote Ward on November 2007. This is clear in the text of the November 8, 2007 letter: "Prior to a final decision in this matter, you may request a pre-decision meeting to respond to the proposed action and offer any reasons why this demotion may not be justified or too severe." DHSS did not demote Ward until after his pre-decision meeting on November 30, 2007 as confirmed by Ms. Jarrell's letter to Ward dated December 6, 2007: "Based on the information provided at the meeting, you did not offer any reasons why the proposed penalty is not justified or too severe. As a result, your demotion shall be imposed immediately."

At the Board's request, DHSS produced a payroll record for Ward which showed the effective date of his demotion as "12/06/2007." The Board believes that is the date DHSS took "action" to demote Ward for purposes of Section 5922(b) because that was the date of his change in paygrade. The Board believes that the statute requires more than a notice of intent to demote, even if coupled with a transfer to another position.

As a probationary employee, Ward was not entitled to a pre-decision meeting prior to his demotion for unsatisfactory job performance. However, when DHSS decided to afford Ward a pre-decision meeting on November 30, 2007, his salary continued at pay grade 20 until December 6, 2007, the effective date of his change back to pay grade 17. DHSS cannot have it both ways: it

cannot rely on the payroll records for the start date of his one-year probationary period, and then claim the demotion was effective before the change in his pay grade.

Section 5922(b) provides that if “no action is taken within the probationary period, the appointment shall be deemed permanent.” The Board concludes as a matter of law that the action required by Section 5922(b) is a change in pay grade as reflected in the payroll records. The effective date of Ward’s demotion as confirmed by his payroll records was December 6, 2007. At that time, he was more than three weeks past his one-year probationary period so, by statute, “the appointment shall be deemed permanent.” DHSS therefore must have just cause to demote Ward as required by Merit Rule 12.

FINDINGS OF FACT

Dr. Tracey D. Frazier is a Licensed Clinical Psychologist who works at DHCI under contract between the hospital and Liberty Health Care.

Dr. Frazier filed a complaint against Ward in May 2007. On June 8, 2007 Dr. Frazier prepared a written report for the investigators investigating her complaint detailing eleven different complaint incidents. Dr. Frazier alleged that “I have repeatedly been the subject of unwelcomed verbal comments and harassment by Mr. Ward during the past year. The following events detail a pervasive problematic work atmosphere which has included the use of intentional negative, hostile, and unprofessional conduct by Mr. Tony Ward toward me in the work environment.”

The Division of Public Health assigned two outside investigators to investigate Dr. Frazier’s complaints. The lead investigator was Kathleen Gibson from Emily P. Bissell Hospital. According to Gibson, she interviewed 23 employees at DHCI. They not only substantiated many of Dr.

Frazier's charges, but also made additional complaints against Ward for rude, insensitive, demeaning, and unprofessional conduct towards them. In all, Gibson substantiated the complaints of 14 different complainants (including Dr. Frazier) from almost every section of the hospital including nursing, dietary, physical therapy, and Gero-Psych.

Ward refused to be interviewed by the investigators. He insisted that the investigators provide him with written questions to respond in writing, which they did. According to Ward, he provided the investigators with a list of his own witnesses whom the investigators did not interview. But according to Gibson the investigators had already interviewed two of those witnesses. The other witnesses offered by Ward were only character witnesses who did not have personal knowledge of the incidents underlying the various complaints.

In the November 7, 2007 letter proposing Ward's demotion, the Director of DHCI (Jack Askin) concluded:

[A]s the Director of Rehabilitation and Human Support Services, you are expected to ensure that you and your staff adhere to DHSS policies and procedures. The investigation substantiated that you displayed unacceptable behaviors for a manager and have failed to adhere to the DHSS Beliefs and Principles doctrine in the above referenced matters. Your overall supervisory approach has been viewed as negative, intimidating, and unprofessional, and has resulted in a number of employees making complaints regarding your conduct. The investigation found that the evidence strongly supported Dr. Frazier's allegations, as well as the allegations of the other staff members including contract employees' allegations of intimidation, inappropriate conduct and creating an environment inconsistent with the Beliefs and Principles.

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.

DHSS charged Ward with violating the Department’s Beliefs and Principles which promote “an environment of mutual respect for all people so that everyone, both employees and citizens, has the ability to achieve his or her very best. . . . Behaviors which demean or offend people are not acceptable and will not be tolerated.”

The Board concludes as a matter of law that the evidence in the record proves that Ward committed the charged offense and that the penalty of demotion was appropriate to the circumstances. The testimony of numerous and credible witnesses at the hearing showed that his management style was intimidating and negative, and that he was often loud, rude, and condescending to staff and contract employees throughout the hospital.

The Board particularly credits the testimony of Dr. Frazier. Even though almost three years have passed, the emotional trauma she suffered as a result of Ward’s conduct is still quite evident. The Board does not believe that Dr. Frazier had any reason to tell anything but the truth about her experiences with Ward (many of which were substantiated by other witnesses) which created a

hostile work environment.

In contrast, the Board did not find Ward a credible witness. According to Ward, every thing alleged against him by hospital staff “didn’t happen” and the witnesses were all “lying.” Ward would have the Board believe that Dr. Frazier’s articulate and heart-felt testimony was all a pack of lies to retaliate against him for requiring her to document her time as a contract employee and use vacation time for continuing training classes offered by the State. The Board does not believe that Dr. Frazier was motivated by anything other than legitimate fear and emotional distress about Ward’s abusive, intimidating, and demeaning conduct towards her. After suffering this unacceptable behavior for six months, she finally stood up and filed her complaint pleading for “protection against further negativity and unfair treatment in the work environment.”

The Board concludes as a matter of law that the evidence in the record proves that DHSS had just cause to demote Ward. By his abusive and intimidating management style, he created a hostile work environment and demonstrated that he was not fit to be in a management position at DHCI.¹

¹ The Board notes its concern that even after the complaints against Ward were investigated and substantiated, he remained as Director of Rehabilitation for another six months supervising the same employees he had subjected to a hostile work environment. While the Merit Rules generally require due process prior to disciplinary action, Merit Rule 12.4 provides: “Where employees’ continued presence in the workplace would jeopardize others’ safety, security, or the public confidence, they may be removed immediately from the workplace without loss of pay.” If DHSS had acted more quickly to remove Ward from DHCI, it would have ensured that Ward was not in position to continue his abusive management style well before his probationary period ended, foreclosing any right by Ward to appeal his demotion to the Board.

ORDER

It is this **19th day of January, 2010**, by a unanimous vote of 5-0, the Decision and Order of the Board to deny Ward's appeal.

Martha Austin

MARTHA AUSTIN, MERB Member

Joseph D. Dillon

JOSEPH D. DILLON, MERB Member

John F. Schmutz

JOHN F. SCHMUTZ, MERB Member

Paul R. Houck

PAUL R. HOUCK, MERB Member

Jacqueline Jenkins

Jacqueline Jenkins
Member