

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

<b>GERARD YATSKO,</b>	)	
	)	
Employee/Grievant,	)	<b>DOCKET No. 19-02-719</b>
	)	
v.	)	
	)	<b>DECISION AND ORDER</b>
<b>DEPARTMENT OF HEALTH AND</b>	)	
<b>SOCIAL SERVICES,</b>	)	
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on June 6, 2019 at the Delaware Public Service Commission Hearing Room, Cannon Building, located at 861 Silver Lake Boulevard, Dover, DE 19904.

**BEFORE** W. Michael Tupman, Chair; Paul R. Houck 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

Gerard Yatsko  
Employee/Grievant, *pro se*

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

## **PRELIMINARY PROCEDURAL MATTERS**

The Grievant, Gerard Yatsko (“Yatsko”), has three grievances pending before the Board. The hearing scheduled on this date involves his initial grievance. The other two grievances will be scheduled and heard at later date.

As a preliminary matter, the Board heard oral argument on a Motion to Dismiss, which was filed by the Department of Health and Social Services (“Agency”) on June 4, 2019. The Agency asserts this grievance is moot and fails to state a claim upon which relief may be granted.

## **BRIEF SUMMARY OF THE EVIDENCE**

The Agency offered fourteen (14) exhibits of which the Board admitted into evidence seven (7), premarked for identification as Exhibits A-D and F-H.

Yatsko offered eleven (11) exhibits of which the Board admitted five (5), premarked for identification as Exhibits 1, 4, 5, 9, and 10.

## **FINDINGS OF FACT**

Yatsko is employed by the Department of Health and Social Services, Division of Management Services, Office of Information Resources Management as a Telecommunication/ Network Technician III. He was assigned to work at the Blue Hen Corporate Center in Dover. In 2018, he requested and was granted a lateral job transfer to a position in the Thomas Collins Building (“Collins Building”).

On September 14, 2018, Yatsko reported to the Collins Building for his first day of work at his new assignment. Shortly after arriving, his supervisor and a manager informed Yatsko that he needed to leave the Collins Building because another employee who worked in the building

reported she had a “no-contact” order in place against Yatsko.<sup>1</sup> The manager escorted Yatsko from the Collins Building and directed Yatsko to return to work at the Blue Hen Corporate Center location until an investigation could be conducted by Human Resources.

Yatsko grieved the move back to the Blue Hen Corporate Center based on the alleged “no contact order”. On November 14, 2018, a Step 2 grievance hearing was held, after which a decision was issued finding that banning Yatsko from the Collins Building was an excessive response, albeit done with the intention of promoting employee safety. Yatsko’s grievance was granted, in part.

On December 3, 2018, the IRM Infrastructure Director informed Yatsko that he was to return to the Collins Building immediately and that he would have a new first-level supervisor. Yatsko was also informed of steps he was expected to follow in the event that he came into contact with the employee who made the allegations, including informing his supervisor immediately and having her call tickets for IT support serviced by another technician.

### **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.**

Merit Rule 2.1 provides:

**Discrimination in any human resource action**

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<sup>1</sup> Yatsko provided a copy of a Stipulation of Dismissal of a protection from abuse order which was signed by both parties and granted by the Family Court of the State of Delaware in Kent County on June 19, 2018.

**covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors is prohibited.**

A “Human Resource action” is defined in the Merit Rules to mean, “any employment action including, but not limited to the hiring process, discipline, promotion, compensation, classification, benefits, employee and labor relations.”

The Board concludes as a matter of law that Yatsko was made whole when he was reassigned to the Collins Building in December, 2018. Consequently, his grievance concerning his temporary reassignment to the Blue Hen Corporate Center is now moot.

The issue of mootness has been discussed by this Board in *Reyes v. Department of Finance*, MERB Docket No. 12-09-559 (March 12, 2013). The Board held:

The general rule is that a case becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” [*Grievance of Moriarty*, 588 A.2d 1063 (Vt. 1991)] at 1064 (quoting *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980)). A controversy must remain alive through the course of appellate review. *Moriarty*, 588 A.2d at 1064. Even though there was once an actual controversy, a change in the facts can render an issue or entire case moot. *Id. Reyes*, p. 4.

While Yatsko may not agree with how the Agency conducted its investigation, the Board finds the Agency had a legal responsibility to respond immediately to the other employee’s complaint. The State’s Domestic Violence Policy and Workplace Violence Policy states, in relevant part:

...This policy requires all individuals who apply for or obtain a protective or restraining order which lists a State location as being a protected area, to provide to the designated management representative a copy of the petition and declarations used to seek the order, a copy of any temporary protective or restraining order which is granted, and a copy of any protective or restraining order which is made permanent.

... Any employee who is the respondent in a civil protective

proceeding, and /or the defendant/offender in a criminal<sup>2</sup> “no-contact” proceeding, and for whom the complainant/victim is employed at the same job site, is responsible for furnishing to management a copy of the criminal and/or civil order.

Consistent with its obligations under the policy, the Agency removed Yatsko from the Collins Building and temporarily reassigning him to his former work location until it could investigate the reported “no-contact” order.

The Board finds the letter issued to Yatsko setting forth the procedures he is to follow when he encounters the other employee does not create a hostile work environment, as he alleged. The letter identified his new direct supervisor as well as a chain of command moving forward. It also establishes a clear process for its staff to respond to a Help Desk ticket for IT services from the other employee.

The Board finds the procedure for reporting interactions and avoiding servicing calls for assistance created by the Agency protects Yatsko rather than harms him as it provides a mechanism to insulate Yatsko from contact with the other employee. A hostile work environment is not merely a change in the workplace environment that the employee does not like or finds inconvenient. In order to prevail on a hostile work environment complaint, the grievant must prove that (1) he suffered intentional discrimination based on a protected classification; (2) that the discrimination was pervasive and regular; (3) that the discrimination detrimentally affected him; (4) the discrimination would detrimentally affect a reasonable, similarly situated employee; and (5) that *respondeat superior* liability existed. *LeCompte v. DHSS*, MERB Docket No. 12-07-550 (February 15, 2013).

The Board finds Yatsko’s grievance fails to assert facts which would support a finding of discrimination and/or hostile work environment.

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<sup>1</sup> There is no allegation or evidence in this case of any criminal proceeding involving Mr. Yatsko.

**ORDER**

It is this **9th** day of **September**, 2019, by a vote of 3-0, the Decision and Order of the Board to grant the Agency's motion to dismiss the grievance because it is both moot and fails to state a claim for which relief under the Merit Rules as a matter of law.



**W. MICHAEL TUPMAN, MERB CHAIR**



**PAUL R. HOUCK, MERB Member**



**SHELDON N. SANDLER, ESQ., MEMBER**