

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

<b>GRIEVANT,</b>	)	
	)	
Employee/Grievant,	)	
	)	<b>DOCKET No. 19-10-739</b>
v.	)	
	)	
<b>DEPARTMENT OF HEALTH AND SOCIAL SERVICES,</b>	)	<b>DECISION AND ORDER</b>
	)	[ <i>Public, redacted copy</i> ]
Employer/Respondent.	)	
	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:10 a.m. on August 20, 2020 at the Delaware Public Service Commission, 861 Silver Lake Boulevard, Dover, Delaware 19904. The hearing was closed to the public, pursuant to 29 *Del. C.* §10004(b)(8).

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

**APPEARANCES**

Carla A.K. Jarosz  
Deputy Attorney General  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Grievant  
Employee/Grievant, *pro se*

Victoria Sweeney, Esq.  
Deputy Attorney General  
on behalf of the Department of Health  
and Social Services

## **BRIEF SUMMARY OF THE EVIDENCE**

The Department of Health and Social Services (“Agency”) offered sixteen (16) documents into evidence, premarked for identification as Agency Exhibits A – P. Following the prehearing, the Board admitted fourteen (14) documents including Agency Exhibits A through N, excluding Agency Exhibits O and P. At the hearing, the Agency offered an additional document into the evidence which was admitted as Exhibit Q. The Agency called one witness, Jennifer Colantuono (“Colantuono”).

The employee/grievant (“Grievant”) did not offer any exhibits into evidence.

The Grievant called Hykemia Evans (“Evans”) as a witness and also testified on his own behalf.

## **FINDINGS OF FACT**

On December 14, 2018, the Agency hired the Grievant as a Social Service Technician in its WIC Program, Northern Health Services. *Ex. A.* He was the only African-American male in his workplace. The Grievant began his employment by the WIC Program on January 7, 2019. *Ex. A.* A small group of the Grievant’s coworkers did not like him; they whispered about him under their breath and in Spanish. They called the Grievant “ghetto” and “loud” and said they wished he would leave. These same co-workers told new employees not to ask the Grievant to help them.

The Grievant’s supervisor, Ms. Colantuono, met with the Grievant after 30 days and 60 days into his one-year probationary period in order to provide feedback regarding his performance. The Grievant testified that he complained to Ms. Colantuono at both meetings that he was being discriminated against by the group of co-workers, who he identified as “the crew”. Specifically, he complained that they were calling him “ghetto” and “ratchet.” The Grievant testified that Ms.

Colantuono did nothing about his complaints. Ms. Colantuono denied the Grievant made any complaints to her at either the 30-day or 60-day performance meetings. The Board found Ms. Colantuono's testimony that the Grievant did not complain to her to be credible.

On June 21, 2019, the Grievant and a Hispanic female co-worker engaged in a verbal altercation in their workplace. Several days later all of the WIC clinic employees were required to attend a meeting regarding insubordination and how to treat each other. Ms. Colantuono also met with the Grievant and his co-worker. She asked them both to write up incident reports. *Ex. G* and *Ex. Q*. Ms. Colantuono discussed the incident with her supervisor and sent the incident reports to the Agency's Labor Relations section. Labor Relations recommended a cultural competency training for both the Grievant and the co-worker. Ms. Colantuono directed both of them to register themselves and attend the training, which was offered through the State of Delaware Learning Center.

On August 19, 2019, another co-worker filed a sexual harassment complaint against the Grievant. *Ex. K*. The Agency conducted an investigation of the complaint and partially substantiated the allegations against the Grievant. *Ex. M*.

On October 21, 2019, the Grievant was terminated for failing to meet the State of Delaware's standards during his probationary period. *Ex. N*.

### **CONCLUSIONS OF LAW**

Merit Rule 9.1 states:

**After successful completion of an initial one-year probationary period, the incumbent shall be a Merit employee.**

Merit Rule 9.2 states:

**Employees may be dismissed at any time during the initial probationary period. Except where a violation of Chapter 2 is alleged, probationary employees may not appeal the decision.**

Merit Rule 2.1 states:

**Discrimination in any human resource action 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.**

The Agency terminated the Grievant during his initial probationary period. The Grievant alleges that the Agency discriminated against him because of his sex (male) and race (African-American). The Grievant bears the burden of establishing a *prima facie* case of discrimination. To do so, he must show that: (1) he was a member of a protected class; (2) that he was qualified for the job; (3) that he suffered an adverse employment action; and (4) that there is a causal connection between the protected class and the adverse employment action. *Ennis v. Del. Transit. Corp.*, 2015 WL 1542151, at \*5 (Del. Super. Ct. Mar. 9, 2015) (discussing the *McDonnell Douglas* framework to establish a claim of disparate treatment).

There is no dispute that the Grievant established the first three elements of a *prima facie* case for discrimination: he is an African-American male, he was qualified for his position with DHSS and he was terminated. However, he is unable to establish the final factor: that DHSS' decision to terminate him occurred under circumstances that give rise to an inference of discrimination. The Grievant offered as evidence of discrimination Ms. Evans' testimony that a small group of co-workers did not like the Grievant; called him names like "ghetto" and "loud;" and would not allow new co-workers to ask the Grievant for help. The Grievant also offered his own testimony that co-workers called him "ghetto" and "ratchet," both terms he considered to be racial slurs. He also testified that he complained to his supervisor at both his 30-day and 60-day performance meetings, but that she did nothing. The Board finds this evidence of stray remarks and personality clashes between the Grievant and his co-workers to be of minimal weight when compared to the manner in which the Agency addressed the June 21, 2019 verbal altercation issue

involving the Grievant and his Hispanic co-worker. *See Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992). (holding that “[s]tray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision.”). During the investigation of the complaint, both the Grievant and the complainant were given equal opportunity to make a statement and recommended for the same cultural competency training.

The Board finds that Grievant did not meet his burden of proving that he was terminated in violation of Merit Rule 2.1’s prohibition against discrimination in a human resources decision. Because the Grievant was a probationary employee, he is not entitled to grieve any other aspect of his dismissal.

**ORDER**

It is this **14<sup>th</sup>** day of **September**, 2020, by a unanimous vote of 3-0, the Decision and Order of the Board to dismiss the grievance. The Board finds the Grievant failed to provide sufficient evidence that DHSS violated Merit Rule 2.1 when it dismissed him during his probationary period.

  
\_\_\_\_\_  
W. MICHAEL TUPMAN, MERB CHAIR

  
\_\_\_\_\_  
PAUL R. HOUCK, MERB Member

  
\_\_\_\_\_  
VICTORIA D. CAIRNS, MERB Member