

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	DOCKET No. 20-05-766
v.)	
)	
DELAWARE DEPARTMENT OF HUMAN)	DECISION AND ORDER
RESOURCES,)	[PUBLIC, REDACTED]
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on November 17, 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; Paul R. Houck, and Victoria D. Cairns, Members,
a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Employee/Grievant, <i>pro se</i>	Deborah L. Murray-Sheppard Board Administrator Victoria Sweeney, Esq. Deputy Attorney General on behalf of the Department of Human Resources
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BRIEF SUMMARY OF THE EVIDENCE

The employee/grievant (“Grievant”) offered fifteen (15) documents into evidence, of which five (5) were admitted, marked as Exhibits 1, 2, 5, 10 and 11.

The Department of Human Resources (“Agency”) offered thirty-three (33) documents into evidence, of which thirty-one (31) were admitted, marked as Exhibits A, C through FF.

The Grievant testified on his own behalf.

At the conclusion of the Grievant’s presentation, the Agency moved for involuntary dismissal of the grievance. The Board granted the Agency’s motion.

FINDINGS OF FACT

The Grievant was hired as a Regulatory Specialist on June 10, 2019. The Regulatory Specialist position is part of the Department of Human Resources staff. The Grievant was assigned to manage the Labor Relations section of the Department of Services for Children, Youth and Their Families (“DSCYF”). He reported directly to Suzanne Milewski. Ms. Milewski is the DSCYF Human Resources Director.

The Grievant’s Performance Plan (dated September 16, 2019) describes the Grievant’s responsibilities:

The Human Resources Regulatory Specialist performs a full range of professional HR level work in areas of Labor and Employee Relations. This position has significant responsibility in the areas of: Affirmative Action/Equal Employment Opportunity compliance, union/contract administration, ensures the proper handling of grievances, employee disciplines, performance improvement plans, random and reasonable *[sic]* drug testing, provides coaching and counseling to management on Labor Relations matters and assists in the development of Departmental policies and procedures. *Grievant Exhibit 10.*

The Grievant testified he was the supervisor of two employees in the DSCYF Labor Relations Office: a full-time Human Resource (“HR”) Specialist II and a part-time HR Specialist. During his tenure, both of the individuals who held these positions when he was hired left. The

full-time employee left at the end of October, and a replacement was in place by the end of November. The Grievant testified that prior to her leaving, he relied upon this employee to do all the work which required using DSCYF's case tracking system. He admits that he was responsible for inputting and maintaining the system, but he had trouble learning to use it.

By August 21, 2019, DSCYF management expressed frustration with the Labor Relations section under the Grievant's leadership. *Agency Exhibit E.* Beginning in September 2019, Ms. Milewski met with the Grievant weekly in order to provide guidance, answer questions, and provide feedback on the Grievant's work. These meetings continued throughout his tenure. Ms. Milewski followed up these meetings with email summaries which included reminders of training he needed to take, reports he needed to complete, and corrections and editions to his written work.

By email dated October 25, 2019, the Grievant advised Ms. Milewski that he believed he suffered with a learning disability, Central Auditory Processing Disorder. Along with information from a webpage explaining the condition, the Grievant wrote:

...[L]earning just takes me more time. Some of the symptoms you will see in this article I probably have as a difficulty. I am in a class for Outlook and I'm in week two of a six week course. I will be able to manage this issue but it always takes time. You have complained about my misunderstanding details, and my inability with our electronics. I am taking class time at my expense and I will see a specialist in January. I have hearing aids that help somewhat in filtering out multiple voices in meetings. I am attempting to upgrade my skill levels in areas that are new to me. I thought this may help you comprehend my dilemma with your style. This is not age related, it is commonly diagnosed in children, my daughter has this issue and it is most likely hereditary. Most adults learn to cope as I have. This position requires maximum use of electronics and I will get skilled in that area but probably not as fast as normally expected. I hope this helps to explain my issue. *Agency Exhibit S.*

By email dated November 4, 2019, Ms. Milewski provided the Grievant with ADA Accommodation forms after she met with him to discuss his October 25, 2019 email. She provided specific direction as to what was required from his medical provider and where and to whom to send the completed forms. *Agency Exhibit T.* By email dated November 6, 2019, the

Grievant provided completed forms to the DHR ADA Coordinator. He did not, however, provide the required medical documentation, explaining:

I have a mild learning issue that is called central auditory processing disorder. Critically at my position now, my skillsets with computers are behind where most people are now. I have hearing aids, but my audiologist... does not test for CAPD. She referred me to the audiology group at Christiana Hospital and they do not test adults. I have ... a renowned ENT Physician and he does test adults for CAPD. I have an appointment with him in early January.

There is not a specific treatment for adults other than tolerance, knowledge of or help with computer and listening skill sets. I do not think I can get an appointment any sooner... *Agency Exhibit U*.

On November 20, 2019, the Grievant, Ms. Milewski and the Statewide ADA Coordinator met to discuss the Grievant's concerns. Ms. Milewski summarized the meeting in an email:

We met today to talk about accommodations and came up with some items to get us started. We know your doctor's appointment is not until January and we can always reassess at that time. Here is what I have us agreeing to:

- **Notes** – *[Grievant]* it will be important to bring a notepad to all meetings and take notes on what takes place and assignments given.
- **Repeat** – To be clear on instructions, you can repeat the steps back to me for clarification to make sure we are on the same path.
- **Cheat Sheets** – *[Grievant]* it will be important for you to come up with resources and items for you to refer back to. The example save as instead of save.
 - I mentioned before I like to keep post it notes on my computer with quick steps.
- **Fast Talking** – It has been noted that I am a fast talker. I am working on it, if it is still occurring you need to let me know so I can make sure I slow down.
- **Deadlines/Timelines** – We discussed how structure to when assignments are due would help. We discussed this yesterday in our one to one. I will follow up with timeframes we set with my notes from that. *Agency Exhibit X*.

By letter dated January 6, 2020, the Grievant was terminated from his position “during *[his]* probationary period due to *[his]* unsatisfactory performance.” *Grievant Exhibit 1*. The letter from the DHR Secretary concluded:

You have been provided weekly and sometimes daily coaching and counseling sessions by Ms. Milewski addressing concerns regarding your performance and were advised of the importance of meeting established performance expectations of your role. You were asked for input on further assistance that could be provided but did not respond with suggestions. Despite coaching, counseling, guidance, and provision of job tools, unsatisfactory performance has continued. As a result of your continued failure to meet the performance expectations of your role as a Regulatory Specialist, your dismissal is effective as of the date of this letter. *Grievant Exhibit 1.*

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 asserts that the Agency failed to provide him with due process prior to his termination because he was not provided with a formal performance evaluation during his employment. The Grievant's reliance on Merit Rule 13, Performance Review, is misplaced. The protections afforded by Merit Rule 13 are secured only "after successful completion of an initial, one-year probationary period..." Merit Rule 9.1.

Under the Merit System, the employing agency may dismiss a probationary employee at any time during the probationary period for reasons of unsatisfactory service or conduct, and that determination is final and conclusive. *Kopicko v. Department of Services for*

Children, Youth and Their Families, 805 A.2d 877, 888 (Del. 2002).

Merit 9.2 provides the sole basis upon which a probationary employee may appeal his dismissal is a violation of Merit Rule 2.1 which prohibits discrimination based upon protected status. The enumerated protected classes include “...race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors.”

The Grievant alleges that the Agency discriminated against him based on his age and an auditory learning disability. The Grievant bears the burden of establishing a *prima facie* case of age discrimination. To do so, he must establish that: (1) he was a member of a protected class; (2) that he suffered an adverse employment action; and (3) 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., Mar. 9, 2015) (discussing the *McDonnell Douglas* framework to establish a claim of disparate treatment).

The Board concludes as a matter of law that the Grievant did not establish a *prima facie* case of age discrimination. The Age Discrimination in Employment Act¹ forbids discrimination against individuals who are 40 or older. There is no dispute that the Grievant is 72 years old and that he suffered an adverse employment action when he was terminated. However, he is unable to establish the final factor: that the Agency’s decision to terminate him occurred under circumstances that give rise to an inference of discrimination.

The only circumstantial evidence of age bias offered by the Grievant was that the individual who assumed responsibility for his work after his termination was twenty-nine (29) years old. This Board has held that it cannot draw an inference of age discrimination solely based on an age differential. *Thomas v. Dept. of Transportation*, MERB 13-03-587 (December 27, 2013).

The Board also concludes as a matter of law that the Grievant did not establish a *prima*

¹ 29 USC §621.

facie case of discrimination based upon disability. Federal law defines a “disability” as a “physical or mental impairment that substantially limits one or more major life activities.” 42 U.S.C. §12102(2) (“ADA”). In order to prevail in a claim of discrimination based on disability, a grievant must establish that he: (1) has a disability; (2) is otherwise qualified to perform the essential functions of the job, with or without accommodation; and (3) suffered an adverse employment action because of his disability. *Hilferty v. Dept. of State*, MERB 07-12-406 (August 27, 2008).

The Grievant testified he believed that he was suffering from a learning disability which was related to an auditory condition and that his condition was aggravated by stress. When he communicated his concern to his supervisor, she responded by providing him with the appropriate ADA forms. She also promptly scheduled an interactive meeting between herself, the Grievant and an ADA Coordinator for purposes of discussing and identifying reasonable accommodations in order to support the Grievant in his efforts to successfully meet the performance expectations for his position. This was all done before the Grievant secured a medical diagnosis. The Grievant testified that although the agreed-to plan was fully implemented, he was still unsuccessful. He testified that what he needed was more time and tolerance and argued that the accommodations were not reasonable because he was still failing.

The Grievant was unable to establish either that he had a disability² or that he was otherwise qualified to perform the essential functions of the job, with or without accommodation. Unfortunately, not everyone is well-suited for every job for which he or she is hired. In this case, the Grievant testified he had difficulty with the large volume of work and the turn-over in staff. He struggled, by his own admission, with the Agency’s computerized case tracking system which

² The Grievant testified he did meet with the specialist on January 8, 2020, but the physician, “...came to the conclusion that he couldn’t come to a conclusion. He said that he felt that the problem was probably less auditory processing and more lack of confidence because of the way I was being managed.” *Transcript p. 40-41*.

he was responsible to maintain and from which he was required to report to Agency management on a weekly basis.

The probationary period provided for under the Merit Rules met its purpose in this case in allowing the employer to evaluate the Grievant's fit for its labor relations management position. Upon identifying a perceived mismatch, the Grievant's supervisor began meeting with him weekly in September (before he made any mention of his perceived learning disability) in order to provide guidance and to discuss missteps and errors. The Grievant testified it was obvious to him that he was not doing well. He expressed that there was simply too much work and that both he and his supervisor became frustrated. The record establishes that the Grievant was separated during his probationary period because he was not well-suited for the position into which he had been hired seven months earlier.

ORDER

It is this **10th** day of **December**, 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 the Agency 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