

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	DOCKET No. 20-03-752
v.)	
)	
DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DSAAPD,)	DECISION AND ORDER OF DISMISSAL
)	
Employer/Respondent.)	[Public, redacted]

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 April 1, 2021, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904. Pursuant to Governor John Carney’s 27th Modification of a State of Emergency Declaration, the Board also provided a teleconference line for participation. The hearing was closed to the public pursuant to 29 *Del. C.* §10004(b)(8).

BEFORE W. Michael Tupman, Chair; Jacqueline D. Jenkins (*via teleconference*), Victoria D. Cairns (*via teleconference*), and Sheldon N. Sandler, Esq., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Ilona Kirshon (*via teleconference*)
Deputy State Solicitor
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Michele Allen, Esq.
Emily Biffen, Esq.
Allen and Associates
on behalf of Employee/Grievant

Allison McCowan, Esq.
Deputy Attorney General
on behalf of the Department of
Health and Social Services,
DSAAPD

BRIEF SUMMARY OF THE EVIDENCE

The Employee/Grievant (“Grievant”) offered nine (9) exhibits into evidence of which the Board admitted eight documents marked for identification as Grievant Exhibits 1 - 3 and 5 - 9.

The Department of Health and Social Services (“DHSS”), Division of Services for Aging and Adults with Physical Disabilities (“Agency”), offered twenty-four (24) documents into evidence of which the Board admitted sixteen documents, marked for identification as Agency Exhibits A - E, H - K, N, P - T, and X.

The Agency called the following witnesses: Patricia S. Justice, Department of Human Resources (“DHR”) Regulatory Specialist assigned to DHSS Labor Relations; Linda Bazemore (nee Lawrence), Senior Social Worker/Case Manager Supervisor, Adult Protective Services, DHSS/DSAAPD; Michael Serfass, Senior Social Services Administrator, Adult Protective Services, DHSS/DSAAPD; and Bryan Roberts, Master Family Service Specialist, Adult Protective Services, DHSS/DSAAPD.

The Grievant testified on her own behalf.

FINDINGS OF FACT

The Grievant had been a State employee for approximately ten years, having worked previously at the Department of Justice, the Division of Family Services, and Family Court.¹ In August 2019 she was hired by the Agency as a Master Family Service Specialist.

On or about February 14, 2020, the Grievant was issued a letter recommending her dismissal for misconduct. *Grievant Exhibit 6*. She was charged with violating the State’s Respectful

¹ The Grievant testified, “I accepted a position at DOL, Department of Labor. And that’s when I was offered a position at APS [Adult Protective Services].” Transcript (“TR”) p. 142. Grievant Exhibit 1 does not indicate prior employment by the Department of Labor.

Workplace and Anti-Discrimination Policy, the State and the Agency's Beliefs and Principles, and the State's Fleet Services Policy. The charges stemmed from an investigation conducted by DHSS Labor Relations into colleagues' complaints that the Grievant had driven a State vehicle in which other State employees were passengers in a dangerous or aggressive manner and that she had engaged in instances of unwanted sexual advances, touching, or comments which constituted harassment and made others uncomfortable in the workplace.

At the Grievant's request a pre-determination meeting was convened on March 9, 2020.

The Grievant was terminated effective March 19, 2020 based on the behaviors alleged in the pre-termination letter. *Grievant Exhibit 5*. The letter concluded:

A review of your disciplinary record shows that you have no prior disciplinary action. However, your violations are of such a serious nature and so numerous that the appropriate level of discipline in this matter is termination. Your conduct has been wholly unacceptable and cannot be tolerated.

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.

It is undisputed the Grievant is a full merit employee as she had successfully completed an initial probationary period during her previous ten years of State employment. In August, 2019 she accepted a Master Family Service Specialist position with the Agency. Because this was a promotion, she was required to serve a one-year promotional probationary period. If she were unable to successfully complete the promotional probation, she had a right under Merit Rule 9.4 to be placed in another classified position or to return to her prior position (if it was still available)

at her previous salary.

Because the Grievant had full merit protections, she could only be terminated for just cause pursuant to Merit Rule 12.1. Just cause requires first that the Agency establish that the employee has committed the charged offense(s). The Grievant was charged with multiple offenses which the Agency concluded amounted to misconduct sufficient to justify termination.

The alleged offenses fall into three categories. First, the Grievant is alleged to have driven a State fleet vehicle in which her co-workers were passengers in a manner that made them fearful for their safety and uncomfortable. Following complaints by two co-workers, the Grievant, her supervisor and one of the co-workers met to discuss the concerns. They agreed that the Grievant would no longer drive her co-workers. Since the agreement was reached, there have been no further complaints about the Grievant's driving. TR p. 128, 156.

The Board finds this issue has been satisfactorily resolved by the Agency and the Grievant. It cannot, therefore, serve as a justifiable basis for the Grievant's termination.

The Agency characterized the second group of alleged offenses as sexual harassment. The State of Delaware Respectful Workplace and Anti-Discrimination Policy defines sexual harassment to mean:

Conduct defined in 19 *Del. C.* §711A(c)² which includes when an employee is subjected to unwelcome sexual advances, requests for favors, and/or other verbal or physical conduct of a sexual nature when: 1) submission to such conduct is explicitly or implicitly a term or condition of the employee's employment; 2) submission to or rejection of such

² (c) Sexual harassment of an employee is an unlawful employment practice when the employee is subjected to conduct that includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- (1) Submission to such conduct is made either explicitly or implicitly a term or condition of an employee's employment;
- (2) Submission to or rejection of such conduct is used as the basis for employment decisions affecting an employee; or
- (3) Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment.

conduct is used as the basis for employment decisions affecting an employee; or 3) such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile or offensive work environment. *Agency Exhibit A*, p. 2.

The two alleged incidents which occurred while the Grievant and three colleagues (all of whom were relatively new hires and who had not previously met) were attending a work-related conference in Texas were unsubstantiated by the Agency's investigation. The other two incidents, which occurred in the workplace, were uncorroborated by the alleged victims. Both of these men testified there was nothing sexual, intimidating or menacing in their contact with the Grievant. Neither expressed to her that they were uncomfortable or that they found her physical proximity inappropriate. In the case of the individual with the beard, he granted the Grievant permission to touch his beard the first time, but denied subsequent requests. He testified she never touched his beard without his permission.

The Board notes that the Grievant does not have a supervisory relationship to any of the complainants in this case, and, in fact, is a subordinate of a number of them. The Board finds the evidence of record is insufficient to support the Agency's conclusion that the Grievant engaged in sexual harassment in any of the incidents investigated and/or relied upon as a basis for her termination.

The third group of alleged offenses includes a medley of comments and behaviors about which co-workers complained that were either inappropriate or which created uncomfortable situations for them in the workplace. A number of the incidents involve the Grievant talking about her personal life or commenting on the personal lives of others. The Board believes that some of the reported incidents did cross the line between personal and appropriate workplace conversations. The Board notes that while her colleagues made complaints to a supervisor, they did not directly express their discomfort to the Grievant. Neither did supervision nor management

directly counsel the Grievant concerning the complaints of her colleagues (except for the driving concerns discussed above). Many of the complaints came from colleagues who were not in regular contact with the Grievant, including the individuals who travelled to the Texas conference with her, the APS software trainer, and the individual who was three levels above her in the organizational structure.

The Board finds that some of the comments and actions of the Grievant did cross the line and were inappropriate for workplace interactions. Comments about matters such as personal relationships, marriages, physical and emotional challenges are best confined to conversations outside of the workplace. The Board finds that the Grievant's colleagues were uncomfortable in these situations. The Grievant exhibited a social and cultural insensitivity which impacted the workplace. That insensitivity did not, however, rise to the level for which termination was the appropriate penalty under Merit Rule 12.1. The Board concludes the Agency did not have just cause to terminate the Grievant.

There were no documented complaints from persons or clients outside of the Agency, nor was there documented progressive discipline in her personnel record. The Agency admitted it had not considered demoting the Grievant back to her previous position because DHSS considered her failure to successfully complete the probationary period to be based on misconduct and not performance.

The record supports the conclusion that the Grievant was not a good fit in her promotional position where she was required to work with others to meet the needs of older persons, persons with disabilities and caregivers.

Section 5922, Probation, of the Delaware Merit System of Personnel Administration, 29 Del. C. Chapter 59, states:

(a) The *[Merit]* rules shall provide for a period of probation before

appointment or promotion is made complete and during which period a probationer may be discharged or reduced in class or rank. Probationary employees shall be entitled to receive an appropriate performance report or reports during the probationary period, providing warning of any poor performance.

(b) If the probationary employee's services were 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.

Merit Rule 9.4 was adopted pursuant to the statutory mandate for promotional probationary periods. It states:

Merit employees serving a probationary period after promotion who fail to satisfactorily complete the probationary period, may be placed by agencies internally without loss of benefits or agencies may notify the DHR Secretary who shall decide the matter. If available, the employee may be returned to his/her former position and salary without any loss of benefits.

When a merit employee does not successfully complete a promotional probationary period, the Merit Rules provide that she may be returned to her previous position and/or paygrade.³ The Board concludes as a matter of law that termination was not an appropriate penalty under the circumstances. The Board concludes as a matter of law that the appropriate penalty was to remove the Grievant from the position of Master Family Service Specialist and demote her.

ORDER

It is this 29th day of **June 2021**, by a vote of 4-0, the Decision and Order of the Board to deny the Grievant's appeal in part and to grant it in part. The Board finds the Grievant failed to successfully complete the probationary period of her employment with DHSS. In this case, the

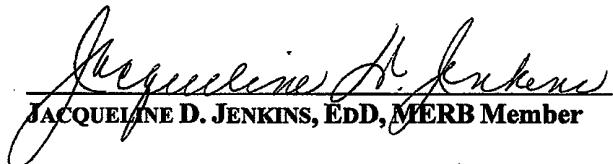
³ See *Ward v. DHSS*, MERB Docket No. 08-09-427 (January 19, 2010).

appropriate penalty under the Merit Rules for failure to satisfactorily complete a probationary period after promotion is to demote.

The Board directs the Agency to modify the penalty imposed by: 1) rescinding the termination; 2) demoting the Grievant consistent with Merit Rule 9.4; and 3) issuing backpay to the Grievant at the reduced rate of pay from the date of her termination until the date of her reinstatement. Counsel for the Agency is directed to notify the Board in writing within thirty (30) days of the date of this Order of the Agency's compliance.



W. MICHAEL TUPMAN, MERB CHAIR



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER