

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

GRIEVANT,)	
)	
Employee/Grievant,)	<u>DOCKET No. 21-06-804</u>
)	
)	DECISION AND ORDER
)	
DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF SOCIAL SERVICES,)	[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 March 3, 2022, in the Public Service Commission Hearing Room, 861 Silver Lake Boulevard, Dover, DE 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 Sheldon N. Sandler, Members; a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Ilona Kirshon
Department of Justice
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Grievant
Pro Se

Stephen Ferguson
Deputy Attorney General
on behalf of the Department of
Health and Social Services

PRELIMINARY PROCEDURAL MATTERS

As a preliminary matter, the Board heard oral argument on a Motion to Dismiss filed by the Department of Health and Social Services (“Agency”) asserting the Board lacked jurisdiction to hear the appeal because the demotion of the Grievant occurred within the one-year promotional probationary period. The Grievant filed written opposition to the Agency’s motion on January 4, 2022. After reviewing the written submissions and hearing the arguments of the parties, the Board held the motion in abeyance.

The Board proceeded to consider the documentary and testimonial evidence as to whether the Agency violated 29 *Del. C.* §5922(a) and/or Merit Rule 13.3 when it demoted the Grievant prior to the completion of her one-year promotional probationary period.

BRIEF SUMMARY OF THE EVIDENCE

The Grievant offered seventeen (17) exhibits into evidence, of which twelve (12) were admitted, marked as Grievant Exhibits 1, 4-6, 8-10, 12-16.

The Agency offered nineteen (19) documents into evidence, all of which were admitted and pre-marked for identification as Agency Exhibits A – S.

The Grievant called two witnesses, Ashley Gianacoplis, DSS Chief Administrator of Operations, who supervised her from November 2020 until her demotion in June 2021; and Kimberly Boulden, former DSS Chief Administrator of Personnel, who supervised the Grievant from June to November 2020. The Grievant also testified on her own behalf.

The Agency also called Ms. Gianacoplis.

FINDINGS OF FACT

Prior to her promotion the Grievant was employed by the DHSS Division of Social Services (“DSS”) as a Social Services Administrator, a paygrade 16 position. She was a merit

employee,¹ having successfully completed an initial probationary period.

On June 7, 2020, she was promoted to Social Service Senior Administrator (paygrade 18) and began a one-year promotional probationary period, in accordance with Merit Rule 9.4 and 29 *Del. C.* §5922(a). The Grievant was responsible for management of the operations of Area 5 (which included the Laurel, Pyle, Shipley and Adams Social Service Centers). Her duties included managing Social Service Administrators in each of these locations, as well oversight of the supervisors and employees who are responsible for delivery of public assistance for low-income residents and families in Sussex County.

From June 7 until November 20, 2020, the Grievant worked under the supervision of Kimberly Boulden. The Grievant was provided with a Performance Plan when she was promoted which established her duties and performance expectations.² The Grievant and Ms. Boulden met and discussed the Performance Plan and then had monthly telephone conferences during which the Grievant received formalized feedback on her performance. This feedback was memorialized in writing after the meetings.³

From late November, 2020 through June 3, 2021, the Grievant was supervised by Ashley Gianacoplis. The Grievant's Performance Plan, including the performance expectations, did not change.⁴ Beginning in January, 2021, Ms. Gianacoplis began to meet weekly with the Grievant in order to provide feedback and coaching. During the weekly meetings, Ms. Gianacoplis reviewed the Grievant's work, including her concerns about errors and lapses in meeting reporting deadlines for the Area 5 centers for which the Grievant was responsible. Data from the Agency's case

¹ "Merit Employee": an employee who has satisfactorily completed the initial probationary period for a classified position. Merit Rule 19.0, Definitions

² Grievant Exhibit 5

³ Transcript pp. 50 and 64

⁴ Transcript p. 36

management system was provided to the Grievant and reviewed with Ms. Gianacoplis each week.

The weekly data meetings were documented, and feedback was provided after the meetings by way of email. These weekly meetings were regularly held over the five-month period of January through May, 2021 and were supplemented by email communications between the Grievant and Ms. Gianacoplis.⁵ The Grievant was not placed on a formal Performance Improvement Plan during her promotional probationary period, but her work was regularly reviewed, and she received coaching and training during and as a result of the weekly meetings with her supervisor. Through these regular meetings (and the written follow-up provided after each meeting), the Grievant received reports on her performance and was placed on notice that Ms. Gianacoplis had concerns about her work.

On June 3, 2021, the Grievant was demoted from the position of Social Service Senior Administrator to her former position of Social Service Administrator.

CONCLUSIONS OF LAW

The Delaware Code's section on Probation provides as follows (emphasis added):

29 Del. C. §5922. Probation.

- (a) The 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.

⁵ Agency Exhibits B-H

Promotional probationary periods are also covered in Merit Rule 9, Probation, which states in relevant part:

9.4 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.

Merit Rule 13 provides for Performance Reviews, and if a Merit employee's work performance is unsatisfactory Merit Rule 13.3 applies:

13.0 Performance Review

13.1 Purpose of Performance Review. The DHR Secretary shall provide for systematic performance review to communicate expectations and responsibilities, recognize achievement, and identify areas for skill development and work performance improvement.

13.2 Changes in Performance. Recognition of effort, accomplishment, improvement or the need for further skill development shall be addressed as needed by verbal discussions, written communication, and/or formal documentation.

13.3 Unsatisfactory Performance. When an employee's work performance is considered unsatisfactory, the performance must be documented in writing, and the specific weaknesses must be made known to the employee. The employee shall be given documented assistance to improve by the designated supervisor. An opportunity for re-evaluation will be provided within a period of 3 to 6 months.

13.4 Review Appeal. The employee shall have the right to discuss any performance review or documentation with the next level of authority and may submit written comments.

The determination of the appointing authority as to whether a probationary employee's service is satisfactory is final and conclusive. 29 Del. C. §5922(b). Merit Rule 9.2⁶ restricts an employee's right to grieve the unsuccessful completion of an initial probationary period to circumstances where it is alleged that the decision was based on prohibited discrimination in

⁶ 9.2 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.

violation of Merit Rule 2.1.⁷ Both the Delaware Code and the Merit Rules require that a Merit employee be given written feedback and provided warning of poor performance.

While the Grievant did not receive a formal performance review under Merit Rule 13, she did receive monthly and then weekly calls about her performance that were reduced to writing and then followed up with emails. These efforts meet the statutory requirements of receiving appropriate performance reports under 29 *Del. C.* §5922(b), and the Merit Rule 13.2 provision that recognition of the need for further skill development be addressed as needed by verbal discussions, written communication, and/or formal documentation. They also meet the Merit Rule 13.3 requirement that unsatisfactory performance be documented in writing with the specific weaknesses addressed, with assistance for improvement offered.

The Grievant alleged her demotion was in retaliation for an investigation into the fraudulent activity of some of her subordinates. The Grievant bears the burden of establishing a *prima facie* case of retaliation.⁸ To do so, she must establish that she engaged in a protected activity; that DHSS/DSS took an adverse employment action against her; and that there is a causal connection between her protected activity and the adverse employment action. *Finney v. DelDOT*, MERB Docket No. 19-11-741 at p. 6 (July 22, 2020). The investigation which was conducted in March of 2021 cleared the Grievant of wrongdoing. The Grievant did not present any evidence of a causal connection between the investigation and her demotion, other than temporal proximity, which the Board does not find was unduly suggestive to draw that inference. The Agency offered a legitimate, non-discriminatory reason for her demotion -- unsatisfactory job performance -- and

⁷ Merit Rule 2.1 provides that 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.

⁸ In *Finney v. DelDOT*, MERB Docket No. 19-11-741 at p. 6 (July 22, 2020) the Board found that retaliation constitutes discrimination on the basis of non-merit factors, within Merit Rule 2.1.

the Grievant did not offer any evidence that the Agency's reason was pretextual.

After hearing the evidence, the Board denied the Agency's motion to dismiss for lack of jurisdiction. According to the Agency, as a promotional probationary employee the Grievant did not have any right to appeal her demotion to the Board under Merit Rule 2.1 or Merit Rule 13.3 because the Agency complied with Merit Rule 9.4 by restoring her to her former position. The Agency, however, fails to distinguish between initial probationary employees, and promotional probationary employees. An initial probationary employee is not a member of the classified service, and can only appeal dismissal where a violation of Merit Rule 2.0 (discrimination) is alleged. In contrast, a promotional probationary employee is a member of the classified service, and can invoke the protection of other merit rules, including Merit Rule 2.0 and Merit Rule 13. What the promotional probationary employee cannot do is appeal the agency's demotion decision under Merit Rule 12 (just cause). She can only appeal whether the Agency handled the matter "per applicable merit rules" (29 Del. C. §5922(b)), that is, in accordance with Merit Rule 9.4.

The Grievant did not contend that her demotion did not accord with Merit Rule 9.4. On the merits, the Board concludes as a matter of law that the Grievant did not meet her burden to make a *prima facie* case of retaliation under Merit Rule 2.1. The Board also concludes as a matter of law that the Grievant did not meet her burden to prove that the Agency violated Merit Rule 13.3. The Agency documented her unsatisfactory job performance in writing noting specific weaknesses, and her supervisor gave her documented assistance to improve, and continued re-evaluations.

DECISION AND ORDER

It is this **18th** day of **April, 2022**, by a unanimous vote of 3-0, the Decision and Order of the Board that neither 29 Del. C. §5922 nor Merit Rule 13 were violated when the Agency determined

the Grievant had failed to complete her promotional probationary period and returned her to her previous position consistent with Merit Rule 9.4



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER