

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

<b>GRIEVANT,</b>	)	
	)	
Employee/Grievant,	)	
	)	<b><u>DOCKET No. 22-04-827</u></b>
v.	)	
	)	
<b>DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF MANAGEMENT SERVICES,</b>	)	<b>DECISION AND ORDER</b>
	)	
Employer/Respondent.	)	<b>PUBLIC (redacted)</b>
	)	

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 September 15, 2022, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904. The hearing was closed to the public pursuant to 29 Del. C. §10004(b)(8).

**BEFORE** Jennifer Cohan, Chair; Victoria D. Cairns, Sheldon N. Sandler, Esq., Joseph A. Pika, III, Ph.D., and Dinah Davis-Russ, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

Victoria R. Sweeney  
Deputy Attorney General  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Gary Aber, Esq.  
on behalf of the Grievant

Gabriela Kejner  
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 the Grievant's Motion to Compel which requested the Agency be directed to provide personnel records for three of the Agency's witnesses<sup>1</sup> limited to the production of "... Evaluations, documents commenting or evaluating their work performance, Service Letters issued by DHSS, disciplinary matters, or any other documents commenting on or relating to or mentioning the quality of their job performance"<sup>2</sup> over the last ten years. The Agency filed written argument in opposition to the Grievant's motion.

Merit Rule ("MR") 16.1 provides personnel records are confidential and shall be maintained by the Department of Human Resources ("DHR") as necessary to ensure their confidentiality. The Grievant did not present a compelling argument as to why the requested records should be produced, especially for a period which extends beyond the time in which the witnesses worked with the Grievant. The Board notes the Grievant has the opportunity to explore the background of the Agency's witnesses on cross-examination. Further, for some period of time, he was the supervisor of the three witnesses and would have first-hand knowledge of their work performance and evaluations. After reviewing the written submissions and hearing the arguments of the parties, the Board denied the Grievant's motion.

The Board also heard oral argument on the Grievant's legal assertion that he had not been afforded due process because the Agency failed to provide sufficient information about the charges against him before the pre-termination hearing. The Agency argued that providing specific information about complainants who file hostile workplace complaints would have a chilling effect on employees coming forward to report misconduct in the workplace. It also noted that the Grievant had been questioned during the investigation and was asked specific questions about his

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<sup>1</sup> Specifically for Agency Witnesses Dobrich, Turner, and Fitzpatrick.

<sup>2</sup> Grievant's Motion to Compel @ p. 6.

conduct. 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 Merit Rule 12.1 or deprived the Grievant of due process when the Agency terminated him.

Following the conclusion of the evidentiary hearing, the Board unanimously denied the Grievant's claim that he was denied due process, and proceeded to a consideration of the merits of his grievance.

### **BRIEF SUMMARY OF THE EVIDENCE**

The Grievant offered twenty-six (26) documents as evidence. After the prehearing conference, the Board admitted Grievant Exhibits 1, 4, 5, 7–15, 19, 21–25 into evidence.<sup>3</sup>

The Agency offered fifteen (15) documents into evidence, marked as Exhibits A through O. After the prehearing conference, the Board admitted Agency Exhibits E–O.

Six witnesses testified on behalf of the Agency: Alexander Dobrich, Trades Mechanic III, DHSS/DMS; Rick Turner, former employee of DHSS/DMS; Greg Fitzpatrick, former employee of DHSS/DMS; Kishia Good, Labor Relations Advisor, Delaware Department of Human Resources (“DHR”); Nikita Marzano, Union Representative, Delaware State and Federal Employees, LiUNA Local 1029; and Dava Newman, DHSS Deputy Cabinet Secretary.

Three witnesses testified on behalf of the Grievant: John Fox, retired Physical Plant Maintenance Supervisor II for Sussex County, DHSS/DMS; Daniel Episcopo, former Director of

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<sup>3</sup> Grievant Exhibits 1–3, 5, 6, 8 and 10 were identical to Agency Exhibits A–D, L–M. The parties agreed to enter the Grievant Exhibits 1, 5, 8, and 10 over the Agency's version of the exhibits to avoid repetitive exhibits and confusion during the hearing. The parties also agreed to enter Agency Exhibits L, M, and N over the Grievant Exhibits because they provided more complete versions of the documents. The Grievant objected to the Agency's description of the exhibits as provided in its 13(B) prehearing submission. The Board considers the documents themselves and the testimony from the witnesses, not the description of a document in a party's table of contents for exhibits.

Facilities, DHSS/DMS; and David Swanner, Master Electrician, DHSS/DMS. The Grievant also testified on his own behalf.

### **FINDINGS OF FACT**

Prior to his termination, the Grievant was employed by the Agency as a Physical Plant Maintenance Supervisor for Sussex County.

On January 5, 2022, DHSS Employee and Labor Relations (“DHSS Labor Relations”) received a Respectful Workplace and Anti-Discrimination complaint naming the Grievant as a respondent to allegations of creating a hostile work environment by engaging in harassing behavior based on a subordinate employee’s religious ethnicity and using profanity in directing the employee to shovel snow. *Agency Exhibits G, H.*

DHSS Labor Relations investigated the complaint, and questioned the complaining employee, other witnesses, and the Grievant about the allegations. *Agency Exhibit J.* During the course of the investigation, the complaint was expanded to include allegations that the Grievant had further created a hostile work environment through the use of racially charged and demeaning comments, demeaning sexually explicit remarks about employees in front of their co-workers, and that he tolerated and permitted his close associates to also engage in this behavior. Ultimately, DHSS Labor Relations substantiated the allegations that the Grievant had created a hostile work environment within the Agency’s Sussex County Maintenance Unit. *Agency Exhibit K.*

On February 10, 2022, the Grievant was issued a letter recommending his termination. *Grievant Exhibit 1.* The Grievant was charged with violating the State’s Respectful Workplace and Anti-Discrimination Policy, and the State’s Standards of Conduct Policy and Procedures by using racially demeaning names and expressions. *Id.* The Grievant was advised in the letter both of the availability of the State’s Employee Assistance Program and of his right to request a pretermination meeting “... to offer reasons as to why the recommended discipline is too severe

or not justified.” *Id.*

Upon being issued the letter recommending his termination, the Grievant was removed from the workplace with pay. *Grievant Exhibit 5.*

On February 17, 2022, the Grievant’s legal counsel contacted DHSS Employee and Labor Relations to request a pre-termination meeting and to assert that the Agency failed to provide sufficient information for the Grievant to be able to respond to the charges against him. *Agency Exhibit L.*

On March 4, 2022, the Agency issued an amended letter recommending termination which superseded the February 10, 2022 letter. *Grievant Exhibit 5.* This second letter detailed that the investigation determined the Grievant had demonstrated a pattern of repeatedly making inappropriate comments towards and in front of staff; had inappropriately yelled and cursed at staff related to work assignments in front of other staff; and had misused his authority as a supervisor related to work assignments and the assignment of overtime. The letter included specific reference to the offensive language the Grievant was alleged to have used. The letter further stated:

As a supervisor, you are expected to adhere to and uphold the mission of the Department which includes avoiding behaviors which may offend or demean others, especially as it pertains to those persons who report directly to you or are in your chain of command. *Id. at page 2.*

At the Grievant’s request, the Agency convened a pre-termination meeting on March 28, 2022, to allow the Grievant to respond to the recommended disciplinary action and offer reasons why the recommended discipline was not justified. *Grievant Exhibits 8, 10.* The Grievant, his counsel, counsel for the Agency, the DHSS Deputy Secretary, and the DHSS Labor Relations employee who investigated the complaint attended the meeting. *Grievant Exhibit 10.*

The DHSS Secretary, noting that the Grievant did not offer any reasons to rescind the recommended termination during the pre-termination meeting, terminated his employment effective April 4, 2022. *Grievant Exhibit 11.* On April 7, 2022, the Grievant filed an appeal of his

termination directly to the MERB, pursuant to MR 12.9.

### **CONCLUSIONS OF LAW**

Merit Rule 12.1 states:

**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 12.3 states:

**Prior to finalizing a dismissal, suspension, fine, or demotion action, the employee shall be notified in writing that such action is being proposed and provided the reasons for the proposed action.**

Merit Rule 12.6 states:

**Pre-decision meetings shall be informal meetings to provide employees an opportunity to respond to the proposed action, and offer any reasons why the proposed penalty may not be justified or is too severe.**

The Board concludes that the Grievant committed the charged offense of creating a hostile work environment by repeatedly making inappropriate ethnic comments and racial slurs in front of staff, and using expletives in addressing subordinate staff. Therefore, the Agency had just cause to terminate him.

The burden of proof in a disciplinary appeal to the Board rests with the Grievant. *29 Del. C. §5949 (b)*. The Board finds the Grievant did not establish by a preponderance of the evidence that the Agency lacked sufficient reasons for imposing accountability.

The Board heard testimony from multiple witnesses who testified that the Grievant referred to employees of color by "the N-word" on more than one occasion (Tr. at 32:20–21; 78:7–17;

110:21–111:15), used “the N word” on multiple occasions (Tr. at 53:18–22; 81:18–21; 165:20–24), and made inappropriate religious comments (Tr. at 32:3–14; 89:21–90:9; 111:20–112:11). Witnesses testified that this language, and other comments the Grievant made at employees’ expense, made them feel uncomfortable. (Tr. at 31:12–22; 32:13–21; 36:17–22; 38:7–10; 111:10.) The Board finds the witnesses’ testimony to be credible.<sup>4</sup>

The Board also heard testimony from the DHSS Labor Relations employee who conducted the investigation. *See generally* Tr. 124–162. She testified she interviewed eleven witnesses, including the Grievant, and asked the witnesses questions about each allegation in the complaint. Tr. 159:1–18; 160:9–23; *Agency Exhibits J and K*. She also testified that the Grievant denied ever hearing or using any inappropriate racial or ethnic terms while at work (Tr. 159:1–18; *Agency Exhibit J*). Ultimately, given the number of witnesses interviewed, and the many incidents alleged to have occurred, she concluded the Grievant’s conduct demonstrated a pattern of behavior which created a hostile work environment. Tr. 130:1–12; 153:16–24; *Agency Exhibit K*. The Board finds her testimony credible. The conclusions reached following the investigation of the complaints made by the Grievant’s subordinates are thorough, well-documented and supported the recommendations included therein.<sup>5</sup>

The Board finds the Grievant was afforded adequate due process as required by Merit Rule 12.1. A public employee who may only be terminated for cause is owed “oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.” *Naples v. New Castle County*, 2015 WL 1478206, at \*5 (Del. Super. Ct. Mar. 30, 2015), *aff’d*, 127 A.3d 399 (Del. 2015) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470

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<sup>4</sup> The Grievant testified and admitted to using the N-word only in his youth. Tr. at 183:2–9; 207:13–208:12. The Grievant further testified that he “became a better person” and stopped saying “racial things” when he was seventeen. Tr. at 183:10–19. He denied using any kind of “racial language” as an adult. Tr. 183:20–21. The Board does not find the Grievant’s testimony to be credible.

<sup>5</sup> *Agency Exhibit K @* p. 12.

U.S. 532, 546 (1985); *Stanford v. State Merit Employment Relations Bd.*, 2012 WL 1549811, at \*4 (Del. May 1, 2012)). The Agency notified the Grievant of his proposed termination in writing on February 10, 2022, and March 4, 2022. *Grievant Exhibits 1 and 5*. Both letters state that the Agency was proposing termination based on the allegations that the Grievant created a hostile work environment, following a comprehensive investigation which substantiated the complaints made by his subordinates.

The Agency afforded the Grievant a pre-decision meeting in which the Grievant was represented by counsel and given the opportunity to respond to the recommended termination. Despite having received both letters detailing the recommendation to terminate his employment, and having been interviewed about the allegations in the complaint in January 2022, the Grievant did not provide a reason why termination was not justified. Tr. 160:24–162:16; *Grievant Exhibit 11*. The Board concludes as a matter of law that the Grievant received due process as required by the Merit Rules and Delaware law.

The Board concludes the Grievant's termination was the appropriate penalty. The Grievant's unwelcomed and offensive conduct in repeatedly making inappropriate and discriminatory comments created and maintained a hostile environment in which subordinate employees felt uncomfortable and/or intimidated in the workplace.

### **ORDER**

It is this **14<sup>th</sup>** day of **December, 2022**, by a unanimous vote of 5-0, the Decision and Order of the Board to deny the grievance.



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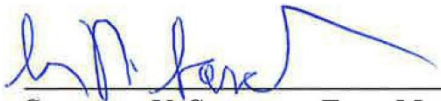
JENNIFER COHAN, MERB Chairperson





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VICTORIA D. CAIRNS, MERB Member



  
SHELDON N. SANDLER, ESQ., MEMBER

  
JOSEPH A. PIKA, III, PH.D., MEMBER

  
DINAH DAVIS-RUSS, MEMBER