

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	DOCKET NO. 22-08-841
v.)	
)	DECISION AND ORDER
)	(PUBLIC – REDACTED)
)	
DELAWARE DEPARTMENT OF STATE, DIVISION)	
OF PUBLIC ARCHIVES,)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the “Board”) at 11:15 a.m. on January 18, 2023, 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, Chairperson, Victoria D. Cairns, Joseph Pika, III, PhD, and Dinah M. 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

Employee/Grievant, *pro se*

Deborah L. Murray-Sheppard
Board Administrator

Laura Gerard, Esq.
Deputy Attorney General
on behalf of the Department of
State, Division of Public Archives

PROCEDURAL BACKGROUND

The Employee/Grievant (the “Grievant”) had two pending grievances against the Delaware Department of State (“DOS”), Division of Public Archives (the “Agency”) pending before the Board. At the Grievant’s request, and without objection from the Agency, the Board scheduled the grievances to be heard on the same day, *in seriatim*. A consolidated prehearing teleconference was convened, and a single set of exhibits was admitted for the Grievant and a single set for the Agency. This decision results from the hearing on the second grievance which concerns placing the Grievant on paid suspension since August 15, 2022.

BRIEF SUMMARY OF THE EVIDENCE

The Grievant offered forty-two (42) documents into evidence. After the prehearing conference, the Board admitted Grievant Exhibits 1–7, 9–12, 14–15, 19–27, 29–30, 33-34, 36-40 into evidence.

The Delaware Department of State (“DOS”), Division of Public Archives (the “Agency”) offered eleven (11) documents into evidence. At the prehearing conference, the Board admitted Agency Exhibits K–U into evidence, without objection, relating to this grievance.

The Board heard testimony from three (3) witnesses called by the Grievant and who also testified on behalf of the Agency: David Littleton, Welcome Center Supervisor, Delaware Public Archives (“DPA”); Stephen Marz, Director, DPA; and Jacqueline Fetzer, Human Resources Manager, Department of Human Resources (“DHR”) assigned to DOS, hereinafter referred to as “DOS-HR Manager.” The decision reached herein results from the record created by the parties.

FINDINGS OF FACT

The Grievant has been employed by the Agency as an Information Resource Specialist since November 2015. Throughout 2021, the Grievant complained to DOS Human Resources that

the Agency managed its employees in a way that discriminated against persons of color.¹ On December 28, 2021, the Grievant filed a Merit Grievance concerning his unsuccessful promotional attempt.² In February 2022 (while his promotional grievance was pending), the Grievant filed a Respectful Workplace Anti-Discrimination (“RWAD”) Complaint with DHR, again claiming that the Agency was discriminating against him.³ He continued to register complaints with DOS/HR⁴ and DPA⁵ through May, 2022. The Grievant also filed a Charge of Discrimination with the Equal Employment Opportunity Commission (“EEOC”) claiming that the Agency was discriminating and retaliating against him due to his race and color.

On July 29, 2022, the Grievant met with his direct supervisor and the Information Resources Manager, Edward McWilliams, for a performance discussion to review his work on a scanning project. The Grievant testified there were no concerns raised with him at that time concerning his work or interactions with other DPA employees.

Agency witnesses testified that there had been verbal complaints made to the DPA Director by Agency employees who said they felt uncomfortable working with the Grievant. According to his testimony, the Director spoke with approximately ten employees who approached him with concerns. It is not clear in the record when these conversations occurred. The Director testified he advised the employees to provide written complaints to HR. None of the employees completed the forms or otherwise provided documented complaints to HR.⁶ Neither the Director, the Grievant’s supervisor, the Information Resources Manager, nor the DOS-HR Manager spoke with

¹ Grievant Exhibits 1 and 4.

² Grievant Exhibit 5.

³ Grievant Exhibit 7, 14; Agency Exhibit G.

⁴ Grievant Exhibits 1 and 4.

⁵ Grievant Exhibits 20, 22 and 23.

⁶ Transcript (TR) 160:5 – 9.

the Grievant about the co-workers' complaints, either generally or specifically.⁷ The Director did not provide details as to why he or other employees felt uncomfortable. While the DOS-HR Manager took notes "at some point" about these complaints,⁸ the Agency did not submit those notes to the Board for consideration. The DOS-HR Manager further testified she did not have any formal documentation because the "investigation" into such complaints was "ongoing."⁹

The Grievant was on vacation for the first two weeks of August, 2022, beginning on August 1. On Tuesday, August 2, 2022, the Information Resources Manager sent an email to the Grievant (knowing the Grievant was on vacation) which accused the Grievant of failing to follow directions in scanning documents as part of the scanning project. The Grievant responded by email on August 7 contesting Mr. McWilliams' accusations, specifically noting that he had not mentioned any failures by the Grievant at their July 29 meeting, which the Grievant characterized as "... the first ever formal weekly meeting regarding the project in [his] two months working on it."¹⁰

When the Grievant returned to work on August 15, 2022, he was called into a meeting with the DPA Director, the DPA Information Resources Manager, and the DOS-HR Manager, where he was verbally told that he was being placed on "paid suspension".¹¹ At the meeting the Grievant was provided with a letter, signed by the DPA Director¹² which stated:

As a result of issues brought forth to the Division of Public Archives and the Department of Human Resources, we have a concern for you and other employees' safety and wellbeing resulting from your continued behaviors that are negatively impacting the Division. As you are aware in the Standards of

⁷ TR 164: 2, 10; 191: 11-16.

⁸ *Id.*

⁹ TR 183:2-15.

¹⁰ Grievant Exhibit 24.

¹¹ TR 98.

¹² Director Marz did not prepare the letter or have input into its content. He testified the letter was prepared for his signature by Human Resources. TR 164. The DOS-HR Manager testified the letter was prepared in consultation with the Department of Human Resources and the Labor Relations section of that office, who provided direction in the handling of this matter. TR 174.

Conduct and Workplace Violence policies, State of Delaware employees are to conduct themselves in a respectful and professional manner without threats or aggressive behavior.

At this time, due to complaints of an aggressive working environment and concerns we have for your wellbeing, you are being required to attend the counseling services provided through ComPsych¹³ for State of Delaware employees. You will be placed on paid administrative leave during this period effective immediately.

You will remain on paid administrative leave until such a time as you are released to return from ComPsych. At the conclusion of the mandatory counseling, ComPsych will determine your ability to perform your essential job functions and the state of your wellbeing. You are being referred to Human Resources to help coordinate your mandated ComPsych counseling. Please contact Jacqueline Fetzer [*email address omitted*] to start this process today by 4:00 PM. It is required that you send each week your appointment dates and times and verification of attendance to Ms. Fetzer as soon as possible, but no later than within 24 hours during this period to verify compliance.

While on paid administrative leave you are not permitted to either enter the buildings or grounds of the Delaware Public Archives Building or any other Department of State Buildings, nor contact employees except for Ms. Fetzer or myself or a higher authority. You are being paid for this leave and remain an active employee. Should we contact you during the regular business hours of 8 a.m. to 4:30 p.m., you are to respond within the hour as there may be necessary questions regarding status of work duties or other relevant information required to be obtained.

Should you fail to follow these directions, you can and will be held accountable, which can result in disciplinary actions up to and including dismissal. This includes not attending scheduled Employee Assistance Counseling sessions, providing the weekly verification of attendance, and following other directives of which you are notified from Human Resources or this office.

Please contact Ms. Fetzer¹⁴ or I, [*sic*] if you have any questions. ¹⁵

After receiving the letter, the Grievant was required to sign a ComPsych release form. He was then accompanied to his desk to retrieve his work bag and to turn off his computer, and then escorted out of the building by the DPA Director.

Prior to being notified of his suspension on August 15, 2022, the Grievant had never been

¹³ “ComPysch” is a contractor that provides services under the State’s Employee Assistance Program.

¹⁴ DOS-HR Manager.

¹⁵ Agency Exhibit R.

accused of engaging in aggressive or threatening behavior, nor was he counselled by the Agency. He was never provided the opportunity to address the alleged complaints from co-workers on which the Agency based his removal from the workplace and mandated counselling. No mention was made at the July 29, 2022 performance meeting or at any time prior to that meeting of concerns for the Grievant's wellbeing or the safety of others. The Grievant was not counselled concerning his workplace interactions with co-workers and/or his compliance or failure to comply with the Standards of Workplace Conduct or the Workplace Violence policies.

The Grievant completed all five of the initial counselling sessions with ComPsych as directed in the August 15 letter.¹⁶

On September 28, 2022, the Grievant submitted to a Fitness for Duty Examination as directed by the Agency.¹⁷ The examination was conducted by Allison Dovi, Ph.D. ("Dr. Dovi") who is affiliated with ComPsych.¹⁸ The Grievant was not provided with a copy of the results of this examination.¹⁹

On October 13, 2022, the Agency wrote to the Grievant to inform him of the status of his paid administrative leave following the Fitness for Duty Examination (the "October 13th Letter").²⁰ The Agency advised that Dr. Dovi recommended, *inter alia*, for the Grievant to continue counseling sessions with and complete training in ComPsych; "[o]btain a consultation with a psychiatric medication prescriber and be prescribed medication that may allow [the Grievant] to function better and reduce risk to others"; and attend another Fitness for Duty

¹⁶ Agency Exhibit Q.

¹⁷ It is not clear from the record why or who directed the Grievant to undergo a Fitness for Duty Examination.

¹⁸ Agency Exhibit T at 161.

¹⁹ The results of the Fitness for Duty Examination were also not entered into evidence in this hearing, nor was Dr. Dovi called by the Agency to summarize her findings.

²⁰ Agency Exhibit T.

Evaluation after complying with Dr. Dovi's recommendations. The Agency indicated that the Grievant was to remain on paid leave and "strongly advised that [the Grievant] follow the recommendations as stated."²¹ The October 13, 2022 letter was provided to the Grievant to review at 3:25 p.m., just prior to a mandated 3:30 meeting with the DOS-HR Manager. The letter further notified the Grievant:

You will remain on paid administrative leave for 30 calendar days as of the date of this letter. During this time, it is advised that you file for Short Term Disability and/or FMLA as it is unknown as to when you may be approved to return to work. There is a 30-day waiting period for Short Term Disability to be approved so it is highly recommended that you complete this process promptly. If you do not get approved for Short Term Disability you may use your available leave until this matter is assessed. Enclosed are the directions to file for Short Term Disability and FMLA for your review and to assist you with the process...

During this time, please remember that you are not permitted to enter either the building or grounds of the Delaware Public Archives or any other Department of State Buildings. You may not contact other employees except [*the HR Manager*], Mr. Marz, my staff assisting you with Short Term Disability and or FMLA or that of a higher authority. Should we contact you during the regular business hours of 8 a.m. to 4:30 p.m. you are to respond within one hour. Please keep me informed of all appointments and counselling session [*sic*] that you attend as you did previously. As stated above, it is strongly advised that you follow the recommendations as stated. Should you not follow the directives given, the State of Delaware can and will hold you accountable which can result in disciplinary action up to and including dismissal.²²

The DOS-HR Manager and two staff members met remotely with the Grievant again on November 9, 2022. Just prior to the meeting, the Grievant was again provided with a letter from the DOS-HR Manager which noted that the Grievant had not applied for either Short Term Disability or FMLA and that the Agency had not been informed or received documentation that he had complied with "any other recommendation given."²³ The November 9 letter stated, 'As of

²¹ Agency Exhibit T.

²² Ibid. Documents for applying for Short Term Disability and FMLA were appended to this email.

²³ Grievant Exhibit 39.

today, we are mandating you to attend five additional counselling sessions with ComPsych wherein you engage in the therapy as recommended by Dr. Dovi. Following the conclusion of the counselling sessions you will be sent for a second Fitness for Duty Evaluation also as recommended by Dr. Dovi.”²⁴ The letter also extended the Grievant’s paid administrative leave through December 14, 2022 and again appended the Short Term Disability and FMLA forms to be completed. It again warned that if the Grievant did not follow the directives given, he could and would be held accountable, resulting in disciplinary action up to and including dismissal.

Following the November 9, 2022 meeting, the Grievant was provided with a completed ComPsych referral form and requested to sign and return it. The referral form states, in part:

A formal referral to the Employee Assistance Program (EAP) is appropriate when an employee demonstrates serious work performance problems, severe behavioral or safety issues. In addition, a referral can be made for a positive drug/alcohol test, refusal to test or if an employee self-identifies a substance use issue.

An Employer/Union Representative (Referral Contact) should meet with the employee to discuss the reason for referral. An authorization form to release information regarding services should be signed and dated by the employee...

Only the information indicated on the form ... will be disclosed to the Referral Contact. Please note that without the signed authorization, ComPsych will not be able to release any information regarding the employee’s participation in the program...²⁵

The form states the purpose of the disclosure by ComPsych was, “To report my compliance/non-compliance with the formal referral process” and further stated the authorization was valid for one year, unless revoked.²⁶

By letter dated December 13, 2022, DOS-HR Manager again extended the paid administrative leave through the date of the scheduled hearing before this Board, January 18,

²⁴ Ibid.

²⁵ Grievant Exhibit 38.

²⁶ Ibid.

2023.²⁷ The Grievant did not submit a second referral authorization, submit to further counselling, or a second Fitness for Duty examination. He remained out of work on paid suspension up to and through the January 18, 2023 MERB hearing.

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.

Merit Rule 12.9 provides:

Employees who have been dismissed, demoted or suspended may file an appeal directly with the DHR Secretary or the MERB within 30 days of such action. Alternatively, such employees may simultaneously file directly with the DHR Secretary, who must hear the appeal within 30 days. If the employee is not satisfied with the outcome at the DHR Secretary's level, then the appeal shall continue at the MERB.

Merit Rule 18.1 provides:

To promote positive working relationships and better communications, employees and their supervisors shall informally meet and discuss employee claims of Merit Rule or Merit law violations prior to filing a formal grievance. Merit employees have the right to use this grievance procedure free of threats, intimidation or retaliation, and may have union or other representation throughout the process.

The Board considered the Grievant's allegation that the Agency had engaged in a continuing violation of 29 *Del. C.* § 5931(c)²⁸ which states, in relevant part:

²⁷ Grievant Exhibit 40.

²⁸ See *Mikkilineni v. PayPal, Inc.*, 2021 WL 2763903, at *7 n.3 (Del. Super. Ct. July 1, 2021), *reargument denied*, 2021 WL 3468060 (Del. Super. Ct. Aug. 6, 2021), and *appeal refused*, 264 A.3d 627 (Del. 2021)

No state employee shall be discharged, threatened or otherwise retaliated against with respect to the terms or conditions of their employment due to the exercise of their rights under the grievance and complaint procedure established under subsection (a) of this section.

The Board concludes that the Agency did not retaliate against the Grievant in violation of MR 18.1 or 29 *Del. C.* § 5931(c). The Grievant established that he filed a Merit grievance, a RWAD complaint, an EEOC Charge and initiated a federal litigation against the Agency, which constitute protected activity under §5931(c). The Grievant also established that the Agency took an adverse employment action against him by placing him on paid suspension,²⁹ which it repeatedly extended, without providing a sufficient explanation for the suspension. At each extension of the paid suspension, the Agency advised the Grievant that his paid status was in jeopardy if he failed to comply with the Agency’s directives to undergo additional counselling, to seek psychiatric medication, and to undergo a second Fitness for Duty Examination.³⁰ The Agency also repeatedly directed the Grievant to apply for FMLA and/or Short Term Disability benefits. The Grievant did not, however, provide evidence that there was a causal connection between his protected activity and his suspension, which is a required element of a retaliation claim.³¹

(discussing how Delaware courts “may entertain claims fairly raised but not explicitly named in a *pro se* complaint” (citations omitted)).

²⁹ The Board notes that the terms “paid administrative leave” and “paid suspension” are used interchangeably and constitute “suspension” as contemplated by MR 12.9. The DOS-HR Manager testified there is no difference between the two terms. TR 167.

³⁰ See *Wevodau v. Pennsylvania Off. of the Attorney General*, 227 F. Supp. 3d 404 (M.D. Pa. 2017) (finding administrative leave to be an adverse employment action when the employer failed to provide a reason for suspension and its anticipated duration). The Court found: “...Although he continued to receive full compensation and other benefits, he was relieved of all job responsibilities, ceased to function in his employment position or any other capacity for Defendant, and was not permitted to come to the workplace. His interaction with fellow employees ceased, as did any on-the-job experience and training he normally would have received. Plaintiff did not receive regular employment reviews that might have laid the foundation for increased responsibilities or pay. As of the date of trial, Plaintiff had remained on paid administrative leave for almost one year, with no indication from Defendant as to when he might be permitted to return to work. The Court concludes that a reasonable employee likely would find such an administrative leave to be “materially adverse”...”

³¹ To establish a *prima facie* case of retaliation, the Grievant must establish that 1) he engaged in a protected activity; 2) the Agency took an adverse employment action against him, and; 3) there is a causal connection

The Board further concludes, however, that this same adverse employment action (i.e., suspending the Grievant with pay and repeatedly extending that suspension), in fact, constituted a disciplinary action. The Agency alleged it placed the Grievant out of work because he failed to conduct himself in a respectful and professional manner without threats or aggressive behavior, in violation of the Standards of Conduct and Workplace Violence policies. In addressing a similar grievance, the Board found:

The first purpose of discipline is to place an employee on notice that her conduct or performance are not in compliance with workplace standards. The second is to provide the employee the opportunity to rehabilitate her conduct to conform with expectations. By not discussing specific complaints and investigation results with the Grievant, the Agency did not provide her adequate notice or opportunity to address the employees' complaints or provide management with her perceptions and her side of the story in order to consider the validity of those complaints.³²

The Board finds the Agency violated Merit Rule 12.1 because it did not have just cause to suspend the Grievant. The Grievant has the burden to establish that the Agency lacked just cause, as defined in MR 12.1 to suspend him.³³ The Board finds that the Grievant met this burden, as the record is devoid of facts or testimony sufficient to establish that the Grievant committed the charged offense of violating the Standards of Conduct and Workplace Violence policies. Other than the hearsay concerns expressed by the Director and the Information Resources Manager, no evidence was presented which revealed that the Grievant was disrespectful, unprofessional, threatening or aggressive in the workplace. The ten employees who allegedly made the complaints

between the protected activity and the adverse employment action. *Finney v. Delaware Dep't. of Transp.*, MERB Docket No. 19-11-741, at 6 (July 22, 2020) (citing *Moore v. City of Philadelphia*, 461 F.3d 331, 340-341 (3d. Cir. 2006)).

³² *Grievant v. Department of Health and Social Services, Division of Social Services*, MERB Docket 20-05-756 (Jan. 11, 2021, p. 12).

³³ *Grievant v. Department of Health & Soc. Services, Division of Child Support Services*, MERB Docket No. 21-07-809, at 7 (Oct. 14, 2022) (citing *Avallone v. Department of Health & Soc. Services*, 14 A.3d 566, 572 (Del. 2011) (citing 29 Del. C. §5949(b)).

inside the Agency were all provided with the opportunity to document their concerns with HR; none chose to do so. The examples offered at hearing of the incidents which allegedly concerned unidentified coworkers were not threatening, disrespectful or unprofessional. The few alleged incidents described in the testimony evidenced a workplace in which the dominant culture was not tolerant of individual differences.

While the Board noted the tone and content of some of the Grievant's email correspondence were problematic for the recipients,³⁴ the emails expressed the Grievant's frustration with the grievance process and his perception of racial discrimination at the Agency. Standing alone as the only documented evidence of perceived aggressiveness, they are insufficient to establish that the Grievant violated either policy.

The Board was not presented with any testimony or documents demonstrating the Grievant was violent or otherwise exhibited inappropriate behavior warranting discipline. When asked if he believed the Grievant violated the Respectful Workplace policy, the Grievant's supervisor testified that he would "have to really thoroughly look at the policy. But . . . I don't believe that the response—I think it could have been handled a little bit nicer, [and the Grievant could have been] a little bit better toward the staff members."³⁵ This testimony does not show that the Grievant was violent or engaged in conduct unbecoming as defined in the Standards of Conduct and Workplace Violence policies.

Similarly, the Director did not provide documented details in his testimony to support the conclusion that the Grievant violated the Standards of Conduct or Workplace Violence policies. Although the Director advised employees to provide written complaints to HR,³⁶ none of the

³⁴ Agency Exhibits I, J, Q.

³⁵ TR 138:3–9.

³⁶ TR 160:5–9.

employees provided a written complaint (formal or informal) to HR.³⁷

Neither the Grievant's supervisor, the Information Resources Manager, nor the DOS-HR Manager spoke with the Grievant to address the alleged complaints.³⁸ While the DOS-HR Manager took notes "at some point",³⁹ the Agency did not submit her notes to the Board for consideration. The DOS-HR Manager further testified that she did not have any formal documentation because the "investigation" into such complaints was "ongoing."⁴⁰ The DOS-HR Manager also failed to explain or describe how the Grievant was a danger to himself or the safety of others in the workplace.

The Board finds, by a preponderance of the evidence, the Grievant has successfully challenged the Agency's conclusion that he committed the offense with which he was charged, i.e., violating the Standards of Conduct and the Workplace Violence Policies and/or engaging in threatening or aggressive behavior in the workplace. Consequently, the Agency did not have just cause to suspend the Grievant.⁴¹

ORDER

It is this 4th day of May, 2023, by a unanimous vote of 4-0, the Decision and Order of the Board to grant the grievance under MR 12.9, finding that the Agency did not have just cause to suspend the Grievant.

³⁷ TR 161:5-162:7.

³⁸ TR 164: 2-10; 181:11-16.

³⁹ *Id.*

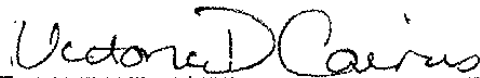
⁴⁰ TR 183:2-15.

⁴¹ The Board notes that the Agency did not impose a penalty appropriate to the circumstances. The Grievant, in his several years of working with the Agency, had never been accused of any aggressive or otherwise threatening behavior. TR 166:7-17. Moreover, the way in which the Agency disciplined the Grievant (*e.g.*, the lack of communication with the Grievant, lack of documentation regarding the employee complaints and apparent investigation, the 'recommendations' that the Agency 'strongly encouraged' the Grievant to follow in the October 13th Letter, and the Agency's overall conduct following the issuance of the suspension) was inappropriate and does not adhere to the spirit of the Merit Rules.

The Board directs the Agency to: (1) retain the Grievant in full-pay status from January 18, 2023 forward and to lift its conditions for his return to work; (2) remove all references to this grievance from the Grievant's personnel file; (3) hold a facilitated Respectful Workplace training for all Delaware Public Archives employees as soon as reasonably practicable, and; (4) within thirty (30) days of the Board's decision to work with DOS and the Grievant to find an alternative position for the Grievant within the same paygrade. Should the efforts to find an alternative position be unsuccessful, the Grievant will be returned to his position at the Delaware Public Archives. 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.



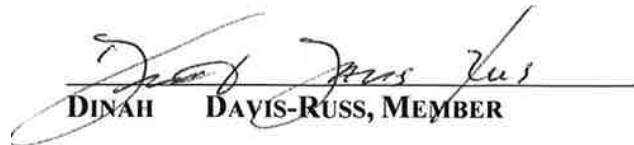
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VICTORIA D. CAIRNS, MERB Member



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



DINAH DAVIS-RUSS, MEMBER