

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

IN THE MATTER OF:)
FRED T. HENGST,) DOCKET NO. 06-05-354
Grievant,)
)
v.)
)
DEPARTMENT OF TRANSPORTATION,) DECISION AND ORDER
Agency.)

BEFORE Brenda C. Phillips, Chairperson, John F. Schmutz, Joseph D. Dillon, and Paul R. Houck, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. § 5908(a).

APPEARANCES:

Fred T. Hengst, *pro se*

For the Agency:
Kevin Slattery, Esquire
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

PROCEDURAL HISTORY

This grievance appeal was filed with the Merit Employee Relations Board (“Board”) on May 4, 2006, after an adverse Step Three grievance decision. *See* Merit Rule No. 18.9.

Fred Hengst is an Application Support Project Leader with the Agency. He claims he was placed on administrative leave of absence for seven weeks in 2005 and when he returned to work, he was not given any assignments and his old job assignments and responsibilities for the traffic count program were assigned to others, in violation of Merit Rule Nos. 12.3, 12.4, 12.5 and 12.9. He alleges the reassignment of his duties was in retaliation for his alleged inappropriate use of the State computer system, and contends that had he not been placed on leave, his responsibilities would not have been reassigned.

The hearing was conducted on March 15, 2007 and July 19, 2007. This is the Decision and Order of the Board based upon the evidence and arguments presented at the hearing.

RELEVANT MERIT RULES

MERIT RULE NO. 1.4

The State has the exclusive right to manage its operations and direct employees, except as specifically modified by these rules.

MERIT RULE NO. 12.3

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 NO. 12.4

Employees shall receive written notice of their entitlement to a pre-decision meeting in dismissal, demotion for just cause, fines, and suspension cases. If employees desire such a meeting, they shall submit a written request for a meeting to their agency's designated personnel representative within 15 calendar days from the date of notice. Employees may be suspended without pay during this period, provided that a management representative has first reviewed with the employee the basis for the action, and provides an opportunity for a response. Where employees' continued presence in the workplace would jeopardize others' safety, security, or the public confidence, they may be removed immediately from the workplace without loss of pay.

MERIT RULE NO. 12.5

The pre-decision meeting shall be held within a reasonable time not to exceed 15 calendar days after the employee has requested the meeting, in compliance with 12.4.

MERIT RULE NO. 12.9

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

MERIT RULE NO. 19.0

"Grievance" is defined as a Merit employee's claim that these Rules or the Merit system statute has been violated. A grievance may not deal with the content of these Rules or the Merit system statute.

SUMMARY OF THE EVIDENCE

Thomas Hruspa, who was sworn, testified he has worked for the Agency since December 1994, and his job duties in the Agency's Traffic Division include responsibility for counter, weigh and motion stations. Counter stations are placed on roads to assess traffic flow on a particular road. The Traffic Division is responsible for the maintenance and construction of these various stations, and Mr. Hruspa is responsible for the maintenance part of the traffic count program. In his work with the Grievant, the Grievant would inform him which stations needed to be reviewed if there was a discrepancy with the data collected, or which station was down or had bad data. Because of the Agency's reorganization in 2000, Grievant was moved out of the Traffic Section and into the Agency's IT Section, where Grievant performed the same job assignments.

Mr. Hruspa testified that counter station information is automatically retrieved at night, forwarded to DelDOT, and would be sent to the Grievant, who would review the data and contact Hruspa about low counts or discrepancies in classification. Currently, the counter information is sent to Paul McKenna. If there are problems, Mr. Hruspa will go to the field to investigate. A contractor handles the portable count stations, while most of Mr. Hruspa's job involves permanent counter sites. Mr. Hruspa does not compile or maintain the Traffic Summary Book ("book").

James Ho, after being sworn, testified he was working with the traffic count program when the Grievant began working at DelDOT in 1985. They worked together in the Traffic Section until the reorganization in 2000. Mr. Ho's job is to collect all information from Mr. Hengst, which is included in the Traffic Summary Book. The book is the largest product resulting from the traffic count program and is published annually, with April or May as the target date. It is preferred for the book to be completed earlier in the calendar year, such as January, but is usually completed late. The completion of the book is dependent upon receiving traffic information from the Delaware River and Bay Authority or the Delaware Turnpike Authority.

Mr. Ho receives data from Paul McKenna¹ and Mr. Hrupsa; data from portable counts are shipped to DelDOT from an outside vendor. He uses this data to analyze the book. He believes Tradas is a tool that collects and processes the data for the count program. Before the Agency implemented Tradas in the early 1990's, the book was compiled manually. He believes the quality of the book and data have improved since Tradas. Following receipt of the data, the data undergoes qualitative analysis by several people, which he believes increases the time to complete the book.

Mr. Ho testified the traffic counting program has been moved back and forth several times between the Planning and Traffic Sections. The book is used by different Agency Divisions, such as Material Research, Bridge and Road Design, Traffic, and Planning. He anticipates this year's book will be completed in March or early April.

Samuel Gray, who was sworn, testified he works for Computer Aid, Inc., which is a consultant for the Agency, and reports to Mr. Lee. He is a back-up to Paul McKenna, who is the full-time Tradas support person. McKenna used to be the back-up for the Grievant. In his position, Mr. Gray supports hardware and software, and his role is to ensure the Agency has access to and can utilize the data for the purpose needed.

Paul McKenna, who was sworn, testified he is employed with Computer Aid and has worked as a consultant for the Agency since 2003. Approximately two weeks after the Grievant was placed on administrative leave, Mr. McKenna was placed in the position of the full-time support Tradas program person.

Under an additional contract with Chapparral Systems for some additional work on the Tradas program, Mr. McKenna received training from Chapparral concerning the Tradas program. He believed the contract amount was approximately \$30,000 for extra hours for the year, and was negotiated in Fall 2005 after the Grievant was placed on leave. He observed the Tradas system was running on a DOS-based system, which he thought was outdated. He upgraded the system to a Windows-based system that increased functionality. He brought Chapparral and Traffic Section employees to work together and improve the system. He believes the system is now more efficient.

¹ The data now received by Mr. McKenna was previously received from the Grievant.

Mr. McKenna did not believe it was realistically possible to complete the traffic book by January, because the last of the needed data is received at the end of December. He believes the end of March has traditionally been the goal for completion, and anticipates completion of this year's book to be as early as next week.² He incorporated some additional quality checks in the data collection, which makes the process run more smoothly. He estimates the traffic book consumes 50 to 80% of his time, but he also performs other projects for the Agency. He believed the traffic book was completed this year earlier than in the past because of Chapparral's involvement and because he monitored the data as it was received, instead of waiting until the end of the year.

Fred Hengst, who had been sworn, testified that his position in the Traffic Section before 2000 involved traffic count manager, maintenance of hardware devices, and data processing. As part of the Agency's reorganization in 2000, he and other employees were moved to the IT Section. Also, with Mr. Ho's retirement, some of the management functions of Mr. Ho's position came to him. Maintenance of the devices remained in the Traffic Section. The traffic count program has grown from approximately 20 sites to nearly 80 sites today.

After Mr. Hengst returned to work following his leave of absence, he had new job duties, which did not include Tradas or the traffic count program. He felt it was unfair for these job assignments to be removed and felt it was directly because of his administrative leave. He also believed it was a bad decision because of the cost of consultants borne by the Agency, which he believed was an amount slightly over \$200,000 a year. His title, salary and office location remained the same. The Grievant submitted a copy of his performance evaluations from 2002, 2003 and the 1990's, which were admitted collectively as Appellant Exhibit #1.

Mr. Hengst was given a choice to resign or be fired based upon an alleged violation of the State's computer acceptable use policy, based upon a folder of emails. Following his return to work, he applied for a Planner III position, but the Agency's Human Resource Section informed by letter dated June 21, 2006 that he was not qualified for the position (the posting of the position and the letter were admitted as Appellant Exhibit #2). Mr. Hengst agreed he did not

² Mr. McKenna testified at the hearing on March 15, 2007.

have the experience listed in the posting. He believed he met the preferred qualification for the position, but did not meet the minimum qualifications in other areas, such as planning.

Mr. Hengst received his full pay and benefits, and continued to accumulate vacation and sick leave and pension benefits during the leave of absence. He returned to work at the same pay grade, and same position and classification. He is not seeking reclassification and not claiming that he worked outside of his classification. He has not worked in Planning. He did not grieve the rejection of his application for the Planner III position. When placed on leave of absence, Mr. Hengst had the impression he was going to be fired, but it was never made official. He believed it was not appropriate to file a grievance until it was official. During the period of leave, he did not attempt to contact the Director of the IT Division, or the Director of DelDOT's Human Resources, because he did not feel it was his place. He believed other employees who had been given the option to resign or be fired went through some administrative grievance process.

Mr. Hengst's current responsibilities include the uninterruptible power supply systems, which he ensures are maintained and in working condition. This is the largest part of his current job assignments. His previous job responsibilities also included uninterruptible power supply system duties. He also coordinates budget numbers submitted from various people in his group, and assists with developing numbers for submission in the annual budget. In his past job responsibilities, he believed 50% to 60%-plus of his time was spent on Tradas; he could not recall projects he worked on for the remaining 40% to 50% of his worktime. He was involved in discussions in 2004 and 2005 about moving the traffic count responsibilities to the Planning Section.

Martha Dobson, after being sworn, testified she is the Agency's Director of Technology and Support Services. Tara Stewart, the Chief Information Officer, is her direct report and supervises William Lee, who supervises the Grievant. She is familiar with the Grievant through the Information Technology Section, which is one of several sections under the Technology and Support Services Division. The Grievant was placed on administrative leave from August 1 to September 19, 2005. The Grievant has not received any discipline from August 1st to present regarding alleged inappropriate use of email. She summarized emails between she and the Grievant from October 2005 set forth at State Exhibit #2-G. During the Grievant's leave of

absence, it was necessary to bring in another person to assume the traffic count program's responsibilities to ensure its continuity; this person was Paul McKenna. Subsequently, it was discovered the Agency was unable to perform the day-to-day support of the system, and McKenna and Lee were sent for training. During training, McKenna learned DelDOT's system was not configured properly and was not taking advantage of the latest advances in software to make tasks more efficient. The Tradas program at the time was running under an outdated system and unsupported by the vendor. Ms. Dobson testified it is important to keep software and hardware current, so systems are functioning as efficiently and effectively as possible. The Agency also learned their field devices were outdated, which prevented intermittent transmission of data. She believed the Grievant, following training, did not undertake necessary steps he should have for maintaining the system and hardware to current standards and releases.

Ms. Dobson had received complaints from two Directors that the traffic book preparation was not timely and not accurate. These complaints occurred when the Grievant worked on the traffic count program. In early 2004, she had been contacted by DelDOT's Chief Engineer about her concerns about the traffic count. Ms. Dobson's concerns about the Grievant's work continued into 2005. During that year, she reviewed the traffic count plan to verify checklist items and expected completion dates, and observed some dates were holidays and weekends. This indicated to her that the timetable had not been compiled carefully or cross-checked with a calendar. She believed it would be more effective to transfer Tradas responsibilities to Planning, because those responsibilities would be best met with the skills and strengths in Planning.

Ms. Dobson believed DelDOT took a financial hit to contract with consultants to prepare needed documentation, where Mr. Hengst had been responsible for this for a long time. She believed this was an expense the Agency should not have incurred. She testified the Grievant did not work on additional projects assigned to him, in addition to the Tradas program, so the additional projects were taken away. The transfer of job assignments was not related to the events underlying the Grievant's administrative leave.

Ms. Dobson testified that while the traffic count plan could be a form of the Tradas documentation requested from the Grievant, she found the plan to be inadequate in defining what

needed to be accomplished by deadline dates. She believed Mr. Lee had indicated that the Grievant did not take on more work, and did the Tradas work and very little more.

William Lee, who was sworn, testified he is a Section Manager with the Agency's IT Section where he oversees Traveler Information Systems; the Grievant is one of his employees and a Project Lead. Mr. Hengst had been assigned to the IT group at the time Lee began working at DelDOT in 2001. IT supports computer hardware and applications; it is not functionally responsible for the function group that use the information IT provides. IT's job is to make sure the engineer has the tools to do his job. Tradas system was the only system IT had where it was actually performing functional issues. Mr. Lee had numerous discussions in 2004 and 2005 about the importance of IT getting out of the functional arena, and moving the Tradas work to the Planning or Traffic Sections; it was not appropriate for an IT professional to be responsible for the Tradas work. Mr. Hengst attended some of these discussions. Currently, the Planning Section is responsible for producing the traffic book.

When the Grievant was placed on leave, Mr. Lee had numerous projects, including the traffic book, but his Section was understaffed. He pulled a contractor he trusted, Paul McKenna, to assess the traffic book project, including training with Chaparral. Following training, he and McKenna learned the Agency had unsupported systems due to a lack of upgrading their counting program, because the software utilized at the time was too old. As Project Lead, Mr. Hengst should have been upgrading software to current revision levels.

Mr. Lee testified it was a problem with Mr. Hengst as a Project Lead in working only on Tradas, when there were 30 or 40 projects underway in his Section. He thought the Grievant as a Project Lead should be doing more assignments than he was fulfilling. Mr. Lee needed the Grievant to step up and take on three or four more projects, to assist other Project Leaders that were overwhelmed. Mr. Lee was also doing project lead work. Mr. Lee did not believe it was fair to the group that Mr. Hengst had one project and nothing more. Mr. Lee believed the Grievant's current functions are appropriate for a Project Leader.

Mr. Lee testified the Tradas responsibilities were removed from the Grievant by necessity, and the Agency was going to do so, regardless. The transfer of the job assignment was not retaliation or punishment. Mr. Hengst had the traffic count job responsibility originally for

historical reasons. Following the consolidation of IT in 2000 - 2001, the traffic count responsibility came to IT, but an IT professional is not qualified for this type of functional work. None of the work reassigned during the leave of absence was returned to the Grievant because there was not much work to return. Paul McKenna is now undertaking the job responsibilities previously assigned to Mr. Hengst. The traffic count collection work remained with McKenna because of customer complaints about the lack of timeliness and accuracy of reports when the Grievant had been running the program, and customer requests to leave the work with McKenna because of increased efficiency and effectiveness.

FINDINGS OF FACT

The Board finds the evidence presented by the Grievant did not meet his burden of proof for finding this matter as a grievance as defined under the Merit Rules and for stating a claim upon which the requested relief can be granted. The Grievant alleges he was punished or retaliated against by being given new job assignments, while old job assignments were given to others, following a leave of absence from work. He claims Merit Rule No. 12.3 was violated because he did not receive written notice. The Board finds there is no evidence in the record to show the change in job assignments was retaliation or punishment. Rather, the Board finds there is substantial evidence that shows reasonable bases for the Agency's initial move of the job assignments at issue to another person, and the Agency's subsequent decision to maintain those job assignments with that person.

In 2000, the Agency underwent an internal reorganization, at which time the Grievant was moved from the Agency's Traffic Section to the IT Section. The job assignments at issue concerned the traffic count program under Tradas, which remained with the Grievant upon reorganization to IT. Undisputed evidence showed there were discussions in 2004 and early 2005, before the Grievant's paid leave of absence, about moving the traffic count program to a position in Traffic or Planning because the program involved functional work and was not an appropriate responsibility for a professional IT position. The traffic count program consumed approximately 50 to 60% of the Grievant's worktime. When the Grievant was placed on

administrative leave, the Agency believed it was necessary to ensure the traffic count program's continuity by finding another person to assume this assignment. During this re-assignment, it was learned the program needed updated support. Also, program customers requested the Agency to keep the newly-assigned person on the program because of improved timeliness, accuracy and efficiency. The Board finds these facts as reasonable bases for the Agency, in managing its workforce, to decide to re-assign these responsibilities. Further, in addition to the Grievant, there were other employees who had been placed on administrative leave for alleged inappropriate use of the State computer system.

The Board further finds that it is undisputed the Grievant received full pay, full benefits, full pension, and continued to accrue vacation and sick leave during his period of leave. The Grievant testified there was no official firing from employment, and he did not believe it was appropriate to file a grievance until it had been made official.

Additionally, the Board finds the Grievant's previous job responsibilities included uninterruptible power supply system duties, which he continues to perform currently and which are the largest part of his job. He also coordinates budget numbers submitted from various people in his group, and works with his supervisor to develop numbers for submission in the Agency's annual budget.

The Board also finds that the Agency issued a letter dated March 7, 2006 to the Grievant (State Exhibit #1) concerning the Agency's conclusion and explanation about his leave of absence and the alleged inappropriate computer use. As part of his requested relief, the Grievant requested a letter or statement from the Agency for closure and an apology. Given the Agency's March 7 letter and its contents, the Board finds there is no basis for affording this requested relief.

The Board further finds the Grievant presented no evidence to support the request for reimbursement for costs incurred for the Grievant's job search during the period of leave.

DISCUSSION

A grievance is a Merit employee's claim that the Merit Rules or the Merit system statute have been violated. *See* Merit Rule No. 19.0; *see also* Merit Rule No. 18.2. Here, the substance

of the Grievant's appeal is that the removal of job assignments concerning Tradas and the traffic count program following a leave of absence was retaliation and the absence of written notification was a violation of Merit Rule 12.3, among other rules. The Grievant seeks: (1) the return of his job assignments as pertaining to the Tradas program; (2) a letter or statement from the Agency for closure and the results of its investigation; and (3) reimbursement of costs incurred searching for another job while he was out on leave. It is undisputed the Grievant received full pay, full benefits, full pension, and continued to accrue vacation and sick leave during the period of leave.

Under Merit Rule 12.3, before a dismissal, suspension, fine or demotion action is finalized, an employee must be notified in writing that such action is being proposed and provided with the reasons for the proposed action. In this case, the Grievant did not believe any official or grievable action had occurred until he returned to work and learned that some job assignments, specifically the traffic count program, had been re-assigned to others. Under these facts, the transfer of one job assignment, which consumed approximately 50 to 60% of the Grievant's worktime and had been discussed on several occasions prior to the Grievant's leave of absence, can not be considered to be a dismissal, suspension, fine or demotion action as contemplated by Merit Rule 12.3. Further, a determination that it was a dismissal, suspension, fine or demotion under these facts would be contrary to the Agency's authority to manage its workforce and direct its employees under Merit Rule No. 1.4. The Agency's authority to manage its workforce and make assignments is clearly a discretionary activity. Additionally, evidence showed there were several discussions about transferring the traffic count assignment before the Grievant's leave of absence. Such evidence clearly refutes any claim of retaliation. Therefore, the Board determines the claim of a violation of Merit Rule 12.3 to be unsupported by the evidence presented.³

With respect to the requested letter and costs, the Board concludes that, based upon the evidence presented, there is no basis for affording this requested relief.

³ Because the remaining allegations concern Rules 12.4, 12.5 and 12.9 which were based upon a violation of 12.3, and with the absence of any evidence to support a violation of 12.3, the Board concludes the allegations on the basis of 12.4, 12.5 and 12.9 are unsupported, and determines it is not necessary to further address those allegations in this decision.

ORDER

It is this 27th day of August, 2007, by a vote of 3 to 1, the Decision and Order of the Board that the Grievant's appeal in the above-captioned matter be denied.

BY ORDER OF THE BOARD:



Brenda C. Phillips, Chairperson



John F. Schmutz, Member



Joseph D. Dillon, Member

Paul R. Houck, Member⁴

⁴ Mr. Houck's vote was the dissenting vote and in favor of granting the appeal.