

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

**IN THE MATTER OF
Appellant,**

v.

**DEPARTMENT OF NATURAL
RESOURCES AND ENVIRONMENTAL
CONTROL,**

Agency.

DOCKET NO. 06-02-349

**PUBLIC
DECISION AND ORDER**

BEFORE Chairperson Brenda Phillips, and Board members John F. Schmutz, and Joseph D. Dillon, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. §5908(a).¹

APPEARANCES

For the Appellant:

Herbert G. Feuerhake, Esquire
The Law Office of Herbert G. Feuerhake
521 West Street
Wilmington, Delaware 19901

For the Agency:

Kevin R. Slattery
Deputy Attorney General
Carvel State office Building
820 North French Street
Wilmington, DE 19801

BACKGROUND

This matter comes before the Merit Employee Relations Board ("MERB" or "Board") as a direct appeal filed by Appellant dated February 14, 2006.² Appellant was terminated from his position as a Program Manager 1 with the Department of Environmental Control and Natural Resources ("DNREC") during his probationary period. Appellant contends that his termination violated Merit Rule 2.1 in that it was the result of discrimination based on a non-merit factor. Specifically, Appellant contends that he was terminated to appease other employees who were envious of his advanced starting salary.

¹ Paul R. Houck participated in the first day of evidentiary hearings on January 18, 2007 only and did not participate in the additional hearings or the final decision.

² Appellant elected to have this matter heard in Executive Session under the provisions of the Administrative Procedures Act at 29 Delaware Code Section 10004(a)8.

DNREC contends that the discharge was based on performance issues and that Appellant was a probationary employee who was subject to discharge under Merit Rule 9.2 at any time during the probationary period for any reason other than discrimination. DNREC denies that Appellant's salary was a factor in the determination and submits further that in order for Merit Rule 2.1 to apply the Appellant must prove discrimination and not just the consideration of a non-merit factor in the decision to terminate an employee during the probationary period.

This is the Decision and Order of the Board that, for the reasons stated below, upholds the termination and grants DNREC's motion to dismiss made following the presentation of the Appellant's direct case.

APPLICABLE MERIT RULES

MERIT RULE 9.0 - PROBATION

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.

MERIT RULE 2.0 - NON-DISCRIMINATION

2.1 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.

SUMMARY OF EVIDENCE

The Board heard sworn testimony from the Appellant and six additional witnesses. The Board also received into evidence and considered the exhibits submitted by the parties.

FINDINGS AND DISCUSSION

This appeal requires the Board to determine whether or not Appellant, a probationary employee, was dismissed from his position during his probationary period on the basis of improper discrimination against him based upon non-merit factors. Under the Administrative

Procedures Act (29 Del. C. §10125(c)) and relevant case law (see *Hopson v. McGinnes*, 391 A.2d 187 (Del. 1978)) The Appellant, has the burden of convincing the Board by a preponderance of the evidence to sustain his claim and to rule in his favor. The appointing agency's action is presumed to be correct and the Appellant has the burden of overcoming that presumption.

In his appeal, Appellant asserts that he was terminated for a non-merit factor; specifically, "salary envy." He contends that he was terminated to placate another employee who was envious of his salary and, as such, he was discriminated against in violation of Merit Rule 2.1.

The Board heard a considerable amount of testimony over four days of evidentiary hearings during which Appellant presented his case.³ The Board also reviewed all of the exhibits that were admitted into evidence. The Board finds first, as a matter of fact, that Appellant failed to prove that salary envy was the motivation for his termination during his probationary period. Also, while the agency is not required to demonstrate just cause for the dismissal of a probationary employee, the preponderance of the evidence convincingly establishes that there were valid merit-based reasons which formed the basis for Appellant's dismissal from his supervisory position as a PM-I during his probationary period.

The Board waited with anticipation to hear the testimony of a former employee who was purportedly going to confirm Appellant's salary envy theory.⁴ Instead of confirming Appellant's

³ A legal hearing was also conducted on September 21, 2007. The parties stipulated at the outset of the evidentiary hearing that the discovery issues stemming from that hearing were no longer in issue. The transcript of those proceedings was lost when the Court reporter's car was broken into after the hearing.

⁴ The employee was a reluctant witness and did not appear until after a joint motion by the Appellant and the Board was filed to compel her appearance.

position, the employee undermined Appellant's credibility by testifying that he wanted her to say things in a letter that she did not witness and could not support. The Board allowed the admission of Appellant's Exhibit 4, the letter Appellant indicated that the former employee wrote for him, but the Board gives it no weight because the employee repudiated it under oath. Although she was unable to detail all of the differences between the exhibit and her original draft which she no longer had, she was very clear on several points. She stated that she never witnessed any hostility over the issue of Appellant's salary. The Board notes that Appellant acknowledged adding the line about hostility to the letter in an e-mail to the employee. She stated that she was also unwilling to state that his salary "set the ground for an ugly confrontation and difficult work environment" because that was not something she ever observed. Appellant also wanted her to say "Many group members were shown the increase on [another employee's] computer." However, the witness stated that she only knew that she saw it and did not know if it had been shown to anyone else. She was also not willing to say "that increase made [Appellant] hated by the group more and they wanted him out." She never knew that anyone hated him.

The witness only worked with Appellant for the first three months of his tenure although she visited the office at some point after she retired. She stated that she and the person who was alleged to have been envious of his salary both thought that Appellant was a very nice person and was very personable. While she worked at DNREC she did not witness any discussions regarding people being envious of Appellant's salary nor did she observe any hostilities towards Appellant. Although the witness stated that she could not say if that changed, Appellant offered no other witnesses to indicate that it did. In fact, the lines about hostility that Appellant wanted the witness to add to her letter are inconsistent with his own testimony that, with the exception of

one employee, everyone else was supportive of him including his supervisor up until November or December of 2005.

The Board finds that the witness' testimony did nothing to help Appellant prove his case. She did state that she saw Appellant's salary on another manager's computer which is inconsistent with his testimony and raises questions about his credibility. That fact that the other manager showed the witness Appellant's salary is unprofessional at best but does not prove that it was shown to anyone else. In fact, the witness could not say that it was, although Appellant wanted her to do so.

The Board is persuaded that the credible evidence demonstrated that it was Appellant's management or lack thereof during his probationary period that formed the basis for his termination. That termination occurred before he achieved merit status. The probationary period provides the employer the opportunity to assess whether the employee is capable of satisfactorily meeting the expectations of the position and does not require a showing of just cause for terminating an employee whose performance is unsatisfactory. In this case there is ample evidence that DNREC released Appellant during his probationary period based upon an assessment of his performance as a manager. Appellant acknowledged that he knew that he could be terminated at any time during his probationary period unless there was a violation of Merit Rule 2.1.

There is no dispute that Appellant came to the position with outstanding credentials and that his supervisor had high expectations for him as a manager even though they both knew he would have a learning curve on the technical side. Appellant acknowledged that his supervisor told him early in his employment that his management experience was more important than the

fact that his air monitoring experience dealt with lead in the air. In addition, the class series description and Appellant's performance plan stressed management as a critical function of the position. (State's Exhibit 1, Tabs D and I).

Based upon Appellant's credentials and experience, his supervisor immediately assisted Appellant in obtaining a large advanced starting salary. Although the salary was more than anticipated, and the supervisor stated that he was initially surprised by the amount, Appellant acknowledged that it did not impact his relationship with his supervisor who remained supportive of him throughout his tenure up until around November or December of 2005.

There is also no dispute that the DATAS project took up to 80-90 percent of Appellant's time during the first several months of his employment and 40-50 percent until in or around June. Everyone agreed that Appellant did a good job on the report and he was recognized for his contribution along with all of the other employees who worked on the project. However, by the time Appellant's staff complained about him in August he had several months of working with his staff without the interference of the DATAS project. It was not until after the project was completed and Appellant returned to his full supervisory duties that the issues with his performance as the PM-I in a highly technical area began to manifest themselves.

The testimony and performance plan established that part of the expectation for Appellant as the PM-I was for him to bring a team focus to the position and work with his team. However, although his subordinates testified that they generally liked Appellant on a personal level, they were consistent in their testimony that they did not believe that he ever fully obtained a grasp of the technical side of what they were doing and did not feel that he had the ability to lead them. In fact, they felt that they could pretty much do their jobs with or without him. He did not agree to

help out in the field even though they were short staffed until pressed to do so by his subordinates and then only operated one of the older less complicated stations after one of his employees wrote out a step-by-step process for him. Appellant acknowledged that his group were mentoring him in regard to the programs and he did not see that as a negative.

By August the quality assurance coordinator had sufficient concerns with discrepancies in what she had heard was being reported to Appellant's supervisor, her own observations and what she was hearing from staff that she decided to go to the supervisor. She advised Appellant's staff that she was going to the supervisor and asked if they wanted to go to the meeting as well. They did, and the quality assurance coordinator documented the meeting in a memo to the supervisor (Appellant's Exhibit 2). The quality assurance coordinator was concerned that Appellant was telling his supervisor that he was doing things that he was not doing including monitoring air stations, doing fieldwork, working with instrumentation in the field and holding meetings. The quality assurance coordinator and the staff were also concerned that Appellant did not understand the operational functions and priorities of the air-monitoring program.

Appellant acknowledged that his supervisor spoke to him shortly after the August 9th meeting and advised him of the staff concerns. Although there was some discrepancy in the testimony about when Appellant and his supervisor first talked about the staff complaints, Appellant acknowledged that, at least by September, his supervisor had made him aware that the staff did not feel that he was on board with what they were doing and that there was frustration and discontent. At that point Appellant was also directed to start holding weekly meetings. However, the record establishes that Appellant did not begin holding meetings until around November or December and viewed his supervisor's direction as a suggestion rather than a

requirement and not something he would be held accountable for. As a manager, he was told to bring his people together as a team and he did not do that. The testimony of his subordinates established that he did not inspire and lead them.

Appellant was also continually urged by his supervisor to get training in management and technical areas in which he lacked a sufficient understanding. He testified that he took management training in the areas he thought was appropriate and did not know if it was the training that was specified in the manual. He also told his supervisor that he did not need training on the GS/MS although his own testimony was that he was not completely familiar with the operation of the newer model of the machine.

The Board accepts the testimony of the supervisor that Appellant's performance plan was developed shortly after he started working although it was not signed until late in August. Although Appellant stated he did not get the plan until late August, that testimony is not consistent with his testimony that he got the GC/MS machine installed at the first opportunity after he completed the DATAS report even though the GS/MS work was not defined or mandated for him in his performance plan. Having reviewed the performance plan, the Board also accepts the supervisor's testimony that he did not incorporate the August 9th staff complaints into the plan because he viewed the plan as setting the goals and expectations and it already had a section on communication with staff.

It is clear that throughout Appellant's tenure, his supervisor's style of management was generally to give oral direction and feedback on performance issues. Appellant acknowledged that they had regular meetings about job related issues including ways to bring his staff together as a team. In addition to the oral feedback, the supervisor did prepare a memo regarding the

deficiencies in the performance plan Appellant prepared for one of his subordinates (State's Exhibit 1, Tab G). That instance occurred in or around December near the end of the probationary period. Given the verbal feedback and written memo, the Board finds that it is not credible for Appellant to state that he had no inkling of any problems with his performance as a manager when, at a minimum, he had been told about staff complaints, he was directed to hold weekly meetings to communicate with staff, and he received a deficiency memo from his supervisor about his performance on the preparation of a performance plan.

There is again no dispute that there was a lot of technical information for Appellant to learn and that he was not expected to have all of the programs and information memorized. He was expected however to have a basic understanding of the basic concepts for ambient air monitoring which his staff and supervisor did not feel he had attained by the end of his probationary period. In addition, Appellant's supervisor felt that Appellant had overstated his GS/MS experience and the supervisor and the other witnesses testified that getting the machine operational was accomplished in a short period after Appellant left by bringing in the manufacturer.

Appellant was hired in February of 2005 and testified that in or around May of 2005 he had received his advanced salary plus state increases. The basis of his asserted discrimination is that the quality assurance coordinator was envious of his salary and that his supervisor fired him at the end of his probationary period to appease her because her attempt at reclassification had failed. Again, the facts do not support Appellant's speculation. The Board found the quality assurance coordinator to be a credible witness. She had discussed reclassification with her administrator several years before Appellant was even hired. There was no evidence to dispute

her testimony that her reclassification is still pending and/or the fact that she did not learn that it was placed on hold due to budgetary reasons until after Appellant was terminated. Although Appellant speculated that her request was denied and that is why he was terminated, he admitted that he did not know if it had been denied. Appellant's Exhibit 3 was unpersuasive on the issue since it only addressed when the process was started.

The testimony was consistent that it was common knowledge that Appellant got an advanced hire. However, with the exception of one witness stating that she saw the salary on [a manager's] computer no other witness said they knew the amount of the salary and there was no documentary evidence that established otherwise. The quality assurance coordinator testified that she knew that Appellant got an advance but did not know his actual salary. She and Appellant's supervisor testified that neither of them discussed Appellant's salary. Even Appellant acknowledged that his supervisor never stated that the quality assurance coordinator knew his salary.

Appellant is asking the Board to find that the quality assurance coordinator behavior toward Appellant was the result of his salary advance. There was testimony that the supervisor and Appellant engaged in speculation that her attitude toward him was due to his salary. However, there was no independent testimony or documentary evidence to enable the Board to make such a finding. Even if the quality assurance coordinator's attitude was the result of Appellant's salary advance, rather than her observations of his performance, there is nothing in the evidence to demonstrate that Appellant was terminated to placate her. In addition, the Board notes that receipt of an advanced salary was not uncommon and the evidence established that there were other advanced hires in the department.

The termination memo details legitimate reasons for the employer's decision to release Appellant during his probationary period (State's Exhibit 1, Tab I). Appellant acknowledged some of the deficiencies and disagreed with others. The Board finds, however, Appellant did not sustain his burden of showing that salary envy was the reason for his termination. Instead, the preponderance of the evidence establishes that the basis for his termination was his overall performance as a manager which the employer found unsatisfactory. The testimony clearly established that Appellant's staff and ultimately Appellant's supervisor lost confidence and a sense of trust in Appellant that was critical to his role as a manager. The Board finds that the performance factors discussed above are all merit factors as opposed to non-merit factors and they formed a reasonable basis for the determination that Appellant's performance during the probationary period had been unsatisfactory.

The Board would like to have seen additional written documentation of performance deficiencies but finds that there is sufficient evidence that the deficiencies were reported to Appellant verbally by his direct supervisor. The Board does not find Merit Rule 13.3 controlling for a probationary employee and finds that 29 Del. C. §5922 (a) was satisfied. In addition to the verbal warnings, there was at least one written instance of documenting a performance deficiency in regard to a subordinate's performance plan and Appellant was given a written performance review in conjunction with his termination.

The Board finds that Appellant has not sustained his burden of proving that salary envy formed the basis for his termination. As a result, the State's motion to dismiss is granted.⁵

⁵ The State's motion to dismiss more properly termed a motion for a directed finding. *See Koulegeorge v. Illinois Human Rights Commission*, 738 N.E.2d 172, 173 n. * (Ill. App. 2000). "[A] hearing officer may enter a directed finding where the petitioner has not established a prima facie case . . . by a preponderance of the evidence." 738

Finally, the Board notes that even had Appellant proven that he was dismissed on the basis of his salary, which factually he did not, he would not have a claim of discrimination under Merit Rule 2.1. The Board asked the parties to submit legal memoranda on the issue. The purpose of the discrimination exception to probationary employment is not to open the door to any and every non-merit factor to form the basis of a claim. As noted by the State in its legal memorandum, the Board has extended the list of impermissible non-merit discrimination to include factors such as psychological disability (*Doddato v. DOC*, MERB Docket No. 95-06-039 (12-24-95)) and enrollment in a drug rehabilitation program (*Employee J v. DOC*, MERB Docket No. 95-03-016 (12-14-95)). Those factors are consistent with the class based discrimination contemplated under Chapter 2; salary envy is not.

CONCLUSION

The State moved to dismiss the appeal after the presentation of Appellant's direct case. The State submits that Appellant has failed to meet his burden to establish by a preponderance of the evidence that there was a violation of the Merit Rules by discrimination against him based upon the application of non-merit factors which resulted in his termination of employment within the probationary period. The Board agrees and finds that the Motion to Dismiss should be granted and the appeal denied.

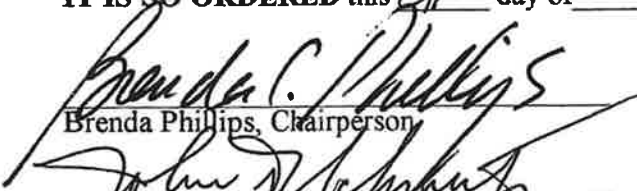
Merit Rule 9.2 allows for termination of a probationary employee at any time during the period of probation absent a violation of Chapter 2. The action of the Department in terminating Appellant during his probationary is upheld and his appeal denied.

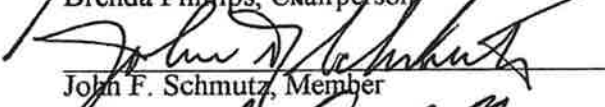
N.E.2d at 178. Accord Koo v. Kentucky Department for Adult & Technical Education, 919 S.W.2d 531, 533 (Ky. App. 1996) ("To require that the party not having the burden of proof go forward, when the hearing officer is unpersuaded by the case presented by the party bearing such burden, would be a futile exercise.").

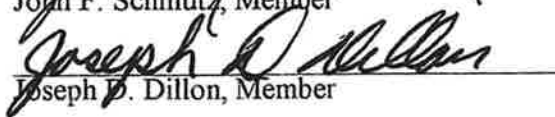
ORDER

The Board, by unanimous decision of the undersigned members, for the reasons stated above, grants the Department's Motion to Dismiss, denies the appeal of Appellant, and upholds the action of the Department in terminating his employment prior to the conclusion of his probationary period

IT IS SO ORDERED this 9th day of May, 2008.


Brenda Phillips, Chairperson


John F. Schmutz, Member


Joseph D. Dillon, Member