

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

|                            |   |                         |
|----------------------------|---|-------------------------|
| J.J. CHRISTMAN, M.D.,      | ) |                         |
|                            | ) | C.A. No. 08A-07-010 JTV |
| Appellant,                 | ) |                         |
|                            | ) |                         |
| v.                         | ) |                         |
|                            | ) |                         |
| STATE OF DELAWARE, DEPART- | ) |                         |
| MENT OF HEALTH & SOCIAL    | ) |                         |
| SERVICES, and MERIT        | ) |                         |
| EMPLOYEE RELATIONS BOARD,  | ) |                         |
|                            | ) |                         |
| Appellees.                 | ) |                         |

*Submitted: March 23, 2011*

*Decided: July 14, 2011*

Roy S. Shiels, Esq., Brown, Shiels & O'Brien, Dover, Delaware. Attorney for Appellant.

Kevin R. Slattery, Esq., Department of Justice, Dover, Delaware. Attorney for the Appellee Department of Health & Social Services.

*Upon Consideration of Appellant's  
Appeal From Decision of the  
Merit Employee Relations Board*

**VAUGHN, President Judge**

***Christman v. DHSS, et al.***  
C.A. No. 08A-07-010 JTV  
July 14, 2011

## **OPINION**

This is an appeal from a decision of the Merit Employee Relations Board (“Board”). The decision denied an appeal of a Step 3 decision which denied a grievance filed by J.J. Christman, M.D.

Dr. Christman is the Section Chief of the Community Health Care Access Section in the Division of Public Health of the Department of Health and Social Services (“Department”). In her grievance she alleged that the Department wrongfully used the performance review process for punitive purposes and wrongfully removed duties from her. The remedy she sought was to have her duties restored and to have the Department cease abusing the review process.

## **STANDARD OF REVIEW**

Under 29 *Del. C.* § 5931, the Board has the authority to hear grievances which remain unresolved after prior steps, unless a particular grievance is specifically excluded or limited by the Merit Rules. The Merit Rules do not specifically exclude or limit the grievance which Dr. Christman filed in this case. The statute reads, in pertinent part, as follows:

The Director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules.

Under Merit Rule 18.2, a grievance “means an employee complaint about the application of the Rules or the Merit System Law.” Merit Rule 19 further defines a

***Christman v. DHSS, et al.***  
C.A. No. 08A-07-010 JTV  
July 14, 2011

grievance as a “[m]erit employee’s claim that these Rules or the Merit system statute has been violated.”

This Court has previously held that an employee has the right to appeal a decision of the Board to the Superior Court on the question of whether the Board acted in accordance with law.<sup>1</sup> An administrative board’s final decision should be affirmed as long as there is substantial evidence to support the board’s decision, and the ruling is free from legal error.<sup>2</sup> When the issue on appeal is whether or not the proper legal principles have been applied, the court’s review is *de novo*.<sup>3</sup>

### **FACTS**

Dr. Christman began work at the Division of Public Health in 2000, when she became the Chief of the Community Health Care Access Section. In that position she managed various programs, including: Northern Health Services, Southern Health Services, and the Women Infants and Children program. In 2003, Maureen Dempsey, M.D. became the new Director of the Division of Public Health. A number of changes then occurred in Dr. Christman’s job duties. Dr. Christman was no longer responsible for Northern Health Services, Southern Health Services, Women Infants and Children program, as well as other programs. These changes significantly diminished Dr. Christman’s job responsibilities in the number of personnel she oversaw, her access to federal and state grant monies, and her direct reporting to the

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<sup>1</sup> 29 Del. C. § 5949; *McIlroy v. Dept. of Health and Soc. Ser.*, 2000 WL 703672 (Del. Super.).

<sup>2</sup> *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981); *see also Unemployment Ins. Appeal Bd. v. Duncan*, 337 A.2d 308 (Del. 1975).

<sup>3</sup> *Johnson Controls v. Fields*, 758 A.2d 506, 509 (Del. 2000).

***Christman v. DHSS, et al.***  
C.A. No. 08A-07-010 JTV  
July 14, 2011

Division Director.

On April 5, 2004, Dr. Dempsey gave Dr. Christman an unsatisfactory performance review. Dr. Christman filed a grievance concerning the unfavorable evaluation. That grievance was resolved in her favor. The unfavorable performance review was rescinded, and that grievance is not part of this appeal.

In her second grievance, the one heard by the Board which is now before the Court, Dr. Christman contended (1) that the Department abused the evaluation process, using it for punitive purposes rather than for a sincere evaluation, (2) the Department focused on and systematically reduced the functions, personnel and budget of her position, without State Personnel approval or coordination, claiming that the realignment was general and minor in nature. She relied upon three Merit Rules. One was Rule 3.3 which reads, in pertinent part, as follows:

If a significant change is made in the duties and responsibilities of a position . . . , the position shall be reviewed and be reclassified if justified, in accordance with procedures established by the Director consistent with the Budget Act.

Dr. Christman contended before the Board that Rule 3.3 required the Department to obtain prior approval from the Director of the Office of Management and Budget before making substantial changes in her duties and responsibilities.

The second rule relied upon was 12.1. Rule 12.1 requires that disciplinary measures be taken only for just cause. Dr. Christman contended before the Board that the performance review process was used as a disciplinary tool without just cause.

The third rule relied upon was 13.1. That rule states the purpose of a

***Christman v. DHSS, et al.***  
C.A. No. 08A-07-010 JTV  
July 14, 2011

performance review, which is “to communicate expectations and responsibilities, recognize achievement, and identify areas for skill development and work performance improvement.” Dr. Christman contended before the Board that the Department’s alleged use of the evaluation process as a disciplinary tool constituted a misapplication or violation of Rule 13.1.

The Department denied Dr. Christman’s allegations and contended that the change in job duties was part of a reorganization of the work unit and was not directed at Dr. Christman personally.

### **THE BOARD’S DECISION**

At the Board hearing, after Dr. Christman presented her case and rested, the Department moved to dismiss the appeal on the grounds that Dr. Christman had not met her burden of proving a violation of a Merit Rule or Chapter 59 of Title 29. The Board granted the motion.<sup>4</sup> In its written decision which followed, the Board concluded as a matter of law that an unsatisfactory performance review is not a disciplinary measure for purposes of Rule 12.1. The Board reasoned that an unsatisfactory performance evaluation is intended to bring the employee’s attention

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<sup>4</sup> Some discussion took place by the Board as to whether it could dismiss a grievance after hearing only the grievant’s evidence. If a grievant presents all of his or her evidence, and the Board finds that no grievance is established, I know of no rule or procedure which would prevent the Board from denying the grievance without hearing the agency’s evidence. I find that the broad language which gives the Board its reviewing powers also allows it to entertain a motion to dismiss at the conclusion of the grievant’s case. If at the conclusion of the grievant’s presentation of evidence, the Board concludes that upon the facts and the law the plaintiff has shown no right to relief it would be superfluous to make the opposing party present evidence. Therefore, included within the statutory authority given to the Board is the right to dismiss or deny the appeal, upon motion by the defendant, once the grievant has presented all of his or her evidence.

***Christman v. DHSS, et al.***  
C.A. No. 08A-07-010 JTV  
July 14, 2011

to areas in need of improvement, not to punish the employee for misconduct.

The Board also concluded in a footnote that any claim which Dr. Christman had under Rule 13.3 was resolved in her favor at the Step 3 level in her other grievance mentioned above.

The Board also concluded that a change in job duties or responsibilities is not a disciplinary measure unless it amounts to a demotion. Rule 19.0 defines a demotion as a movement from a higher to a lower pay grade. Since that did not occur in Dr. Christman's case, the Board concluded there was no demotion. The Board further reasoned that although Dr. Christman did not use the terms, she suggested that the changes in her job duties were a constructive or de facto demotion. On that point the Board concluded that it did not have jurisdiction to hear a grievance alleging a constructive or de factor demotion since demotion was expressly defined as a movement from a higher to a lower pay grade.

Based upon these findings, the Board concluded that Dr. Christman had failed to prove that any disciplinary measure had been taken against her.

Dr. Christman restates in this appeal the contentions she made before the Board, and contends that the Board committed error by rejecting those contentions as a matter of law.

### **DISCUSSION**

I will take the three rules relied upon by Dr. Christman in numerical order, beginning with Rule 3.3.

The Board concluded the change in Dr. Christman's job duties and responsibilities was not a disciplinary measure, but did not expressly address Rule

***Christman v. DHSS, et al.***  
C.A. No. 08A-07-010 JTV  
July 14, 2011

3.3. I find, however, that the Board did not err in its implicit rejection of Dr. Christman's contention that the Department misapplied Rule 3.3. Rule 1.4 recognizes that an agency has the right to manage its operations and direct its employees except as specifically modified by the rules. Dr. Christman's contentions regarding Rule 3.3 must be rejected because the plain language of the rule does not require an agency to obtain prior approval of the Office of Management and Budget before making significant changes in an employee's duties and responsibilities. It implicitly recognizes an agency's authority to make significant changes in an employee's duties and responsibilities by the sentence's first phrase, which contemplates that significant changes in duties and responsibilities is a first step, which may lead to the further steps stated in the rule. If significant changes occur, then a review and reclassification becomes appropriate "if justified," and "in accordance with procedures established by the Director consistent with the Budget Act." There is no apparent evidence in the record to explain the circumstances under which a review and reclassification are justified, or as to the nature of "procedures established by the Director." For these reasons, I conclude that Dr. Christman failed to prove a misapplication of Rule 3.3 under the facts of this case. I therefore need not address the Department's additional argument that the Board lacks authority to order the Department to restore Dr. Christman's job duties to the status quo ante.

I also find that the Board did not commit legal error in finding that the unfavorable performance assessment and the reassignment job duties were not disciplinary measures under Rule 12.1. In *Turrurici v. City of Redwood*,<sup>5</sup> the court

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<sup>5</sup> 190 Cal.App.3d 1447 (1987).

***Christman v. DHSS, et al.***  
C.A. No. 08A-07-010 JTV  
July 14, 2011

found that critical comments were not disciplinary measures because “the performance appraisal ... purpose ... was to point out areas in which the employee needs improvement.”<sup>6</sup> Employee evaluations are a necessary place for candor between the employer and employee. The object is not to impose punishment, but to assist the employee in becoming a more productive worker. Dr. Christman acknowledges the proper purpose of an evaluation, but believes that the Department used the evaluation for the purpose of punishing the appellant. I agree with the court in *Turrurici* that a negative performance appraisal is not punishment. If employers feared repercussions for giving negative feedback during evaluations, the evaluation process would be undermined. Therefore, the Court agrees with the Board’s holding that as a matter of law the appellant’s performance evaluation was not a disciplinary measure, and, therefore, was not grievable. If negative performance appraisals lead to discipline, the validity of and motivation behind those appraisals may become an issue in a grievance concerning such discipline, but no discipline occurred in this case.

Dr. Christman was not demoted. The Merit Rules expressly define a demotion as “the movement of an employee from a position in a class of a higher pay grade to a position in a class of a lower paygrade through a process other than reclassification.”<sup>7</sup> That did not occur in this case.

Finally as to Rule 12.1, I agree with the Step 3 hearing officer that Dr. Christman did not prove that a reassignment of job duties away from her was a

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<sup>6</sup> *Id.* at 1449.

<sup>7</sup> Merit Rule 19.0.



***Christman v. DHSS, et al.***  
C.A. No. 08A-07-010 JTV  
July 14, 2011

disciplinary action. As noted by the Step 3 hearing officer, generally, management enjoys broad discretion to determine the job duties assigned to employees. A restructuring of job duties may become reasonable and appropriate as various factors affect how job functions are performed and distributed within an organization. While I do not necessarily agree with the Board that a change in job duties cannot be a disciplinary measure unless it amounts to a demotion, I am satisfied, after reviewing the record, that the evidence does not establish that Dr. Christman's change in job duties was a disciplinary measure under the facts of this case. Therefore, I conclude that the Board's result on this issue is correct. Whether, if ever, or under what circumstances, a change in job duties may rise to the level of a reprimand is an issue I need not address.

As to Rule 13.3, I find no error in the Board's conclusion that any grievance which Dr. Christman had under that rule was resolved when her other grievance was resolved in her favor.

For the foregoing reasons, the decision of the Board is ***affirmed***.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.  
President Judge

oc: Prothonotary  
cc: Order Distribution  
File