



SPONSOR: Rep. D. Ennis

HOUSE OF REPRESENTATIVES

141st GENERAL ASSEMBLY

HOUSE BILL NO. 487

AN ACT TO AMEND CHAPTER 51, TITLE 29 OF THE DELAWARE CODE RELATING TO STATE EMPLOYEES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend §5115, Chapter 51, Title 29 of the Delaware Code by striking said section in its entirety, and
2 substituting in lieu thereof the following:

3 "§5115. Certain retaliatory acts prohibited.

4 (a) Except as set forth in this section, no state agency, officer or appointing authority shall take any retaliatory
5 action against an employee of this State. Where an employee believes that an individual or agency has threatened
6 retaliation; has attempted or is attempting retaliation; has knowingly joined or assisted in a retaliatory action; or has
7 retaliated against such employee, the employee may file a written complaint with the State Personnel Office against each
8 individual or agency involved in this alleged retaliation. Within a reasonable time after receiving such complaint, the
9 Office of State Personnel shall issue a Notice of Complaint to each respondent agency or appointing authority or
10 individual named in the complaint. Each individual or other entity against whom a retaliation complaint or allegation is
11 made shall be designated as a respondent.

12 (b) (1) The State Personnel Office shall also, within a reasonable time after the filing of a retaliation complaint,
13 appoint a review panel. The review panel shall, within a reasonable time after its appointment, investigate each
14 complaint alleging retaliation assigned to it by the Personnel Office. In the course of investigating or otherwise
15 processing a complaint, the panel may order that a confidential interview with the complainant be conducted
16 outside the presence of any officer or other employee of any agency or appointing authority involved in the
17 complaint. Persons other than the complainant and interviewer may, with the approval of the complainant, be
18 present. The review panel shall permit the complainant to be interviewed without loss of pay; and permit the

19 complainant to have a next friend, ombudsman or attorney present during any such interview. Each agency to
20 which a Notice of Complaint is issued shall cooperate fully, and supply such records and materials as may be
21 requested by the review panel.

22 (2) When its investigation is complete, and if the review panel finds probable cause to believe that a
23 retaliatory action has occurred or was threatened, the panel shall have authority to attempt to resolve the problem
24 through alternative methods such as conference, conciliation or persuasion. If such attempt is not successful or
25 the review panel chooses not to pursue alternative methods, the review panel may order a retaliation hearing or
26 hearings on the matter. To initiate a retaliation hearing, the review panel shall issue and serve a written Notice of
27 Hearing, which notice shall contain a copy of the original written complaint; together with the date, time and
28 place of the hearing. Such hearing shall be held not less than thirty days after service of the notice of complaint
29 upon the last-served respondent, nor less than ten days after service of the Notice of Hearing on the last-served
30 respondent. If the review panel states in the Notice of Hearing that an emergency exists, such notice may specify
31 a time of hearing less than thirty days after service of the notice of complaint, but not less than the ten days after
32 service of such Notice of Hearing. The review panel may continue hearings or hold such additional hearings as it
33 deems appropriate.

34 (c) (1) The review panel shall conduct hearings and issue orders in accordance with procedures established
35 pursuant to this section, the Administrative Procedures Act, and §8807 of this Title. Where other procedures
36 conflict with any provision of this section, the provisions of this section shall govern. All hearings by the panel
37 shall be recorded on tape or other sound recording, and each hearing shall be conducted without use of formal
38 rules of evidence.

39 (2) At any hearing, the review panel shall have the power to issue subpoenas, compel the attendance
40 of witnesses, administer oaths, take testimony, and compel the production of documents. At each hearing, each
41 party may be presented by counsel.

42 (d) Within a reasonable time after the hearing, the review panel shall issue its formal written findings and
43 orders to all parties. If the review panel finds that a respondent was involved in, threatened or attempted a retaliatory
44 action, it shall order the agency in which the complainant is employed to insert a copy of such written findings and orders
45 into the personnel file of each individual who is or was a party to the matter. In addition, the review panel may take such
46 further action or issue such orders as it deems appropriate, including but not limited to:

(1) reinstatement or restoration of the Complainant to such person's previous position or employment with or without back pay;

(2) with the agreement of the Complainant, transfer the Complainant to another position within State employment for which such person is qualified;

(3) where the retaliating individual or agency has caused adverse or defamatory material to be added to the Complainant's personnel file, to have such material expunged;

(4) release to the Complainant of any files, not formerly available for inspection by the complainant if such files have been involved in any retaliatory action against the complainant, or have been kept or added to by any retaliating party;

(5) payment of the Complainant's attorney's fees by each State agency or appointing authority found by the investigating agency to have: committed a retaliatory action against the complainant; to have begun or attempted such retaliatory action; or which at the time of such retaliation or to have involved in a retaliation action; employed an individual who committed a retaliatory act;

(6) where an individual who has been found to have committed retaliation is employed with the same agency as when the retaliation was committed, to make specific recommendations to such agency for appropriate sanctions or penalties against such individual.

(e) If the review panel finds that a respondent was not involved in nor threatened a retaliatory action, it shall dismiss the complaint as to that respondent. Where such respondent is an individual and not an agency, a copy of the Order of Dismissal shall be included in such respondent's personnel file. If the review panel finds by unanimous vote of all its members that the Complainant filed a frivolous complaint, it shall state its finding and the reasons therefor in writing, and may order the Complainant to pay a portion of the expenses involved in processing such complaint. The Complainant may appeal such finding to the Superior Court, which shall hear the matter *de novo*.

(f) The review panel may, at any stage in the proceedings, issue interlocutory orders. Where the respondent is a natural person, and fails to comply with a decision of the review panel, the panel shall have the power to issue a reprimand; to suspend such individual from employment until there is compliance; to suspend any state-issued license used by such person which is related to employment; to recommend termination of such individual's employment, or impose all or any combination of said penalties.

74 (g) Except as set forth herein, no agency, officer or appointing authority shall begin or threaten disciplinary
75 action against a Complainant from the date such complainant files the complaint with the Personnel Office; or gives
76 notice, orally or in writing, that a retaliation complaint has been made, whichever is earliest. No disciplinary action shall
77 be brought against such complainant until the full complainant process has concluded, but an agency may use any
78 information which is the basis for possible disciplinary action in its defense against a retaliation complaint. Where a
79 respondent wishes to initiate disciplinary action against the complaint prior to the resolution of the retaliation complaint,
80 the respondent shall first receive permission from the review panel. The review panel shall not approve any such
81 disciplinary action until there is a hearing in which the Complainant is permitted to contest the proposed disciplinary
82 action.

83 (h) Any party involved in an action under this subsection may appeal any decision directly affecting such party
84 to the Merit Employee Relations Board (MERB), and in the process of such appeal each party shall have all of the rights
85 and limitations as any other party in personnel matters heard by the Board.

86 (i) For purposes of this section, the following words shall have the following meanings:

87 (1) "Appointing authority" shall have the same meaning as found in the rules governing the Merit
88 System of Personnel Administration ("merit rules"), adopted in accordance with §5914 of this Title.

89 (2) "Retaliatory Act" or "retaliation" shall include any retribution, reprisal, punishment or other
90 damaging act against an employee which arises from such employee's exercise or intent to exercise his or her
91 rights.

92 (3) "Review Panel" shall mean a panel of five persons appointed by the State Personnel Office,
93 including two from a list supplied by the Complainant and two from a list supplied by all respondents. The
94 Personnel Office shall appoint a fifth member who is not named on either list. Persons appointed to the review
95 panel need not be State employees."

SYNOPSIS

Since its beginning, the Legislative Committee on Personnel Practices has received a large number of complaints in which retaliation against a State employer was involved, either as of the original complaint or as "punishment" against an employee for doing what the employee had a right to do.

Because the retaliation complaints appear to have grown in number and severity, this Act sets forth a procedure when a complaint of retaliation has been made. In general, the steps are:

(a) The employee alleging retaliation files a written complaint with the State Personnel Office, which in turn appoints a review panel to investigate the claim, and notifies both the employee and person or agency involved that it is beginning to investigate the matter.

(b) When the review panel completes its investigation, it may, in its sole discretion, attempt to resolve the problem by bringing the parties together, formally or informally, in an attempt to reach a solution which satisfies all parties.

(c) If these preliminary attempts to resolve the problem are unsuccessful, the review panel (after notice to all parties) holds a formal hearing on the retaliation claim or claims.

(d) When the review panel determines, at the conclusion of the hearing that there has been retaliation, it may take such steps, outlined in the Act, as it deems appropriate.

(e) Any party to the hearing may appeal the review panel's decision to the Merit Employee Relations Board.