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HOUSE OF REPRESENTATIVES

141st GENERAL ASSEMBLY

HOUSE BILL NO. 504

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 by

16 the panel or members thereof, outside the presence of any officer or other employee of any agency or appointing
17 authority involved in the complaint. Persons other than the complainant and interviewer may, with the approval
18 of the complainant, be present. The review panel shall permit the complainant to be interviewed without loss of
19 pay; and permit the complainant to have a next friend, ombudsman or attorney present during any such
20 interview. Each agency to which a Notice of Complaint is issued shall cooperate fully, and supply such records
21 and materials as may be 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, or hearings, the review panel shall issue and serve a
27 written Notice of Hearing, which notice shall contain a copy of the original written complaint; together with the
28 date, time and place of each hearing. Any such hearing shall be held not less than thirty days after service of the
29 notice of complaint upon the last-served respondent, nor less than ten days after service of the Notice of Hearing
30 on the last-served respondent. If the review panel states in the Notice of Hearing that an emergency exists, such
31 notice may specify a time of hearing less than thirty days after service of the notice of complaint, but not less
32 than the ten days after service of such Notice of Hearing. The review panel may continue hearings or hold such
33 additional hearings as it 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 of
40 witnesses, administer oaths, take testimony, and compel the production of documents. At each hearing, each
41 party may be represented by counsel.

42 (d) Within a reasonable time after the last 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 (or was employed at the time of such retaliation) to
45 insert a copy of such written findings and orders into the personnel file of each individual in the agency who is or was a
46 party to the matter. In addition, the review panel may take such further action or issue such orders as it deems
47 appropriate, including but not limited to:

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

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

52 (3) where the retaliating individual or agency has caused adverse or defamatory material to be added
53 to the Complainant's personnel file, to have such material expunged, and permit the Complainant to review such
54 file after expungement;

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

58 (5) payment of the Complainant's attorney's fees by each State agency or appointing authority found
59 by the investigating agency to have: begun or been involved in a retaliatory action against the complainant; to
60 have threatened or attempted such retaliatory action; knowingly joined or assisted in a retaliatory action by
61 others; or was, at the time of the retaliation, the employer of the individual who committed a retaliatory act;

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

65 (7) recommendations to an agency of steps or procedures which such agency might take to prevent or
66 avoid retaliatory acts by or within the agency.

67 (e) If the review panel finds that a respondent was not involved in nor threatened a retaliatory action, it shall
68 dismiss the complaint as to that respondent. Where such respondent is an individual and not an agency, a copy of the
69 Order of Dismissal shall be included in such respondent's personnel file. If the review panel finds by unanimous vote of
70 all its members that the Complainant filed a frivolous complaint, it shall state its finding and the reasons therefor in

71 writing, and may order the Complainant to pay a portion of the expenses involved in processing such complaint. The
72 Complainant may appeal such finding to the Superior Court, which shall hear the full retaliation complaint *de novo*.

73 (f) The review panel may, at any stage in the proceedings, issue interlocutory orders. Where the respondent is
74 a natural person, and fails to comply with a decision of the review panel, the panel shall have the power to issue a
75 reprimand; to suspend such individual from employment until there is compliance; to suspend any state-issued license
76 used by such person which is related to employment; to recommend termination of such individual's employment, or
77 impose all or any combination of said penalties. Where a person or agency fails to comply with an interlocutory order,
78 the panel may seek compliance through the Merit Employer Relations Board (MERB), the Superior Court, or take any
79 other reasonable course of action to achieve compliance.

80 (g) Except as is herein set forth, no agency, officer or appointing authority shall threaten or be involved in any
81 disciplinary action against a Complainant from the date such complainant files the complaint with the Personnel Office; or
82 gives notice, orally or in writing, that a retaliation complaint will be made, or has been made, whichever is earliest. No
83 disciplinary action shall be brought against such complainant until the full complaint process has concluded; but an
84 agency may use any information which might be the basis for possible disciplinary action in its defense against a
85 retaliation complaint. Where a respondent wishes to initiate disciplinary action against the complainant prior to the
86 resolution of the retaliation complaint, the respondent shall first request and receive permission to do so from the review
87 panel. The review panel shall not approve any such disciplinary action until it holds a hearing on the request, and the
88 Complainant is permitted to contest the proposed disciplinary action.

89 (h) Any party involved in an action under this subsection may appeal any decision directly affecting such party
90 to the MERB in the same manner as a maintenance review appeal or other appeals to the Board; and such appeal shall be
91 handled and processed in the same manner as other appeals heard by the Board.

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

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

95 (2) "Involved in" a retaliation shall include any act, (including any threat or attempt which constitutes
96 retaliation, or the aiding or abetting of a person or agency which is attempting or engaged in retaliation.

97 (3) "Retaliatory Act" or "retaliation" shall include any retribution, reprisal, punishment or other
98 damaging act against an employee, or attempt to do so, which arises from such employee's exercise or intent to
99 exercise his or her rights.

100 (4) "Review Panel" shall mean a panel of five persons appointed by the State Personnel Office,
101 including two from a list supplied by the Complainant and two from a list supplied by all respondents. The
102 Personnel Office shall appoint a fifth member who is not named on either list. Persons appointed to the review
103 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 part of the original complaint or as "punishment" against an employee for doing what the employee had a right to do.

Because such complaints to the Committee appear to have grown in number and severity, this Act sets forth a procedure for the processing of a retaliation complaint. 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.