

COOK COUNTY BOARD OF ETHICS

69 West Washington, Suite 3040
Chicago, Illinois 60602

IN THE MATTER OF)	
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Cook County Health & Hospitals System)	Case No. 2012 I 0005
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NOTICE OF DETERMINATION

On or about June 7, 2012, former Stroger Hospital orthopedic technician Gerald Cotton (“Cotton”) complained to the Cook County Board of Ethics (“Board”) that Cook County Health & Hospitals System (“CCHHS”) retaliated against him for providing a government watchdog group with information about a former Stroger Hospital orthopedic surgeon who remained on the County’s payroll months after moving out of the state. Specifically, Cotton alleges that CCHHS placed him on paid administrative leave on February 14, 2012, and terminated him in late 2013 because of his whistleblowing activities.

Based on this complaint, the Board undertook an investigation to determine whether CCHHS took employment actions against Cotton in violation of the whistleblower protections in Section 2-584 of the Cook County Ethics Ordinance (“Ethics Ordinance”). The Board has completed its investigation and determined that there is insufficient evidence of such a violation.

INVESTIGATION SUMMARY

An investigation directed by the Board found evidence supporting the following:

Beginning as early as June 2007, there were a series of labor disputes between the orthopedic technicians at Stroger Hospital and CCHHS management. Cotton appears to have strongly supported the view, for example, that the orthopedic technicians were entitled to special pay for working in Cermak Orthopedic Clinic and to particular staffing (and pay) while on-call. Sources 1-3, 5-8. In addition to grievances and correspondence with management by the union, Cotton went so far as to file a series of complaints with the EEOC and the Cook County Commission on Human Rights in March 2008. These complaints primarily alleged violations of the orthopedic technicians’ collective bargaining agreement, rather than employment discrimination, resulting in both agencies dismissing Cotton’s complaints. *Id.* 9-11.

Whether as a result, or independently, the relationship between Cotton and the other orthopedic technicians also began (or continued) to break down. Another technician (and Cotton’s nephew), Edward Cotton (“Edward”), filed a complaint against Cotton with the hospital police, alleging that Cotton assaulted him in the hospital’s break room. *Id.* 12. Cotton,

in turn, filed a complaint with the Board against his supervisor, Tim Babbington (“Babbington”), and Edward in April 2008. *Id.* 12. That complaint related to less than \$240 that Edward earned over the course of 2.5 years as royalties on the sale of a medical device to a manufacturer that had an indirect distribution deal with Stroger Hospital. . *Id.*; *see also id.* 17. In August 2008, Cotton also complained to the medical director of the hospital about Edward wearing portable music player earbuds when interacting with patients. *Id.* 15-16.

The level of personal acrimony in the work unit was high enough that Employee Health Services retained an outside consultant, Dr. James Cavanaugh (“Cavanaugh”), to obtain recommendations on how to reduce workplace disharmony among the orthopedic technicians. *Id.* at 18. Cavanaugh opined that “the longstanding dysfunctional behavior and acrimony between orthopedic technologists is largely due to a lack of administrative oversight and the absence of consistent enforcement of workplace policies and procedures.” *Id.* Cavanaugh recommended, *inter alia*: 1) a meeting with the orthopedic technicians and their union steward, indicating that any violation of a policy and procedure will be met with progressive discipline up to and including termination without exception; and 2) assignment of a manager to oversee the enforcement of policies and procedures for the orthopedic technicians. *Id.*

CCHHS returned Babbington to duty as an orthopedic technician and transferred his supervisory duties over the orthopedic technicians to an orthopedic surgeon named Dr. James Kapotas (“Kapotas”). Nonetheless, the disputes between Cotton and his coworkers continued. In April 2010, Babbington filed a police report alleging that Cotton had hit him. *Id.* 19-20. A year later, Cotton filed a police report alleging that one of the other doctors with whom he worked—Dr. Richard Keen (“Keen”)—had gotten very close to him during an argument and pointed at Cotton’s face in a threatening manner. *Id.* 21. The labor disputes continued as well. In May 2011, the then-Chairman of the Department of Surgery, Dr. Richard Pulla (“Pulla”), issued a memo to Cotton indicating that orthopedic technicians would no longer receive on-call rotations or pay. *Id.* 22. This lead Cotton to file at least two grievances on May 31, 2011 and June 28, 2011, related to pay for orthopedic technicians. *Id.* 24, 27.

Cotton also filed a third grievance during this time period in which he stated that he had been subjected to unprofessional and inappropriate treatment “in the manner of slave mentality by Dr. Keen” for the past three-and-a-half years. *Id.* 25. Keen had taken over supervisory responsibilities for the orthopedic technicians from Kapotas.

Although Kapotas left Stroger Hospital in mid-2011, CCHHS Compliance learned on October 18, 2011, that the Better Government Association (“BGA”) had obtained information that lead it to believe that Kapotas was continuing to receive a salary from the County months after leaving the state. *Id.* 28. Cotton’s name was not associated with this report, but CCHHS Compliance immediately notified the Office of the Independent Inspector General (“OIIG”) to initiate an investigation into the BGA’s claims. *Id.* The story was reported in the media on November 11, 2011, but once again, Cotton was not named as the BGA’s source. *Id.* 29. In fact, Cotton would not be publicly named as the BGA’s source on the Kapotas story until May 7, 2012. *Id.* 50.

In the interim, Cavanaugh continued his consultation regarding the disharmony in the orthopedics division of Stroger Hospital. As part of this consultation, he met with Keen, Pulla and Dr. Patricia Kelleher (“Kelleher”) (Director of Employee Health Services) on February 9, 2012. *Id.* 31. According to Cavanaugh, Pulla claimed that two orthopedic technicians reported threats by Cotton against Pulla and Keen. As reported by Pulla, Edward allegedly heard Cotton say at a union meeting, “[if] you can’t [get] rid of Keen, I’m going to do it myself.” *Id.* Similarly, as reported by Pulla, Leon Watson (“Watson”) allegedly heard Cotton say that “[Pulla is] next and I’m going to get him soon.” *Id.* Cavanaugh referenced both of these allegations and a pattern of threatening behavior¹ in a February 9, 2012 letter to Dr. Ram Raju (“Raju”), then-CCHHS CEO, recommending that CCHHS undertake “[a]n independent, full investigation” and make any “appropriate intervention to assure . . . the safety of professional staff.” *Id.*

Five days later, CCHHS placed Cotton on paid administrative leave. CCHHS Human Resources advised Cotton that day that the “decision [to place him on leave] is based on allegations that you have made verbal threats against CCHHS personnel and that you have engaged in other threatening behavior.” *Id.* 32. CCHHS Employee Health Services explained to Cotton that he could not return to duty without a fitness for duty evaluation. *Id.* 36. This evaluation would be conducted by an independent physician and would require Cotton to authorize the release of medical data. *Id.* 36. The documentation made available to the Board staff indicates that Cotton authorized the release of medical data on February 14, 2012. *Id.* 34.

For whatever reason, CCHHS Employee Health Services asked Cotton to re-execute the release on February 21, 2012. When Cotton did this, he wrote next to his signature, “I am signing this under duress.” *Id.* 40. CCHHS Human Resources advised Cotton that he could be terminated for failing to submit to a fitness for duty evaluation and that the authorization to release medical data to the physician who would perform that examination was a necessary precursor. *Id.* 42.

After some back and forth, Cotton executed a voluntary release form on April 3, 2012. *Id.* 47; *see also id.* 43-45. Cotton’s contemporaneous notes for the first time show his belief that CCHHS was asking for a fitness for duty evaluation in retaliation for being the BGA’s source on the Kapotas story, but it does not appear that he shared this belief with Kelleher whose notes do not reflect such a statement. *Compare id.* 48 *with id.* 49. Instead, Kelleher’s notes show only that she and Cotton discussed whether Cotton could choose the doctor who would perform the fitness for duty evaluation. *Id.* 49.

¹ Without attributing the information to an identifiable source, Dr. Cavanaugh reported that Cotton 1) boasted to coworkers that he has experience as a sniper (including hiding in trees and bushes) and has worked with plastic explosives; 2) has been observed by coworkers and physicians carrying a leather satchel; twirling sharp, steel instruments; making martial arts gestures and punching walls in clinical/patient areas; 3) has also been observed standing outside of the Administration Building intermittently and 4) has intimidated Babbington, Edward and an unnamed orthopedic surgeon. *Id.* 31.

On May 7, 2012, the story that Cotton was the BGA's source on the Kapotas story was published by local media outlets. *Id.* 50. Less than 20 days later, the OIIG interviewed Cotton about, *inter alia*, the allegations of threatening behavior set out in Cavanaugh's February 9, 2012 letter to Raju. *Id.* 51-53. CCHHS Employee Health Services also retained an independent physician to perform Cotton's fitness for duty evaluation. *Id.* 54.

On or about August 2, 2012, Cotton met with CCHHS Compliance, which was conducting an investigation into the allegations against Cotton alongside the OIIG. *Id.* 57. Cotton told CCHHS Compliance Officer Cathy Bodnar ("Bodnar") that he believed that he had been put on leave in February 2012 for talking to the BGA about Kapotas in late 2011. *Id.* Cotton also told Bodnar that he signed the April 3, 2012 authorization of medical release under duress. *Id.* 59. As a result, CCHHS Employee Health Services cancelled Cotton's scheduled evaluation by the independent physician and obtained the return of Cotton's medical information. CCHHS Human Resources once again advised Cotton that he could be terminated if he failed to submit to the fitness for duty evaluation. *Id.* 58.

By October 2012, CCHHS Compliance and the OIIG had completed their investigation into the allegations against Cotton. *Id.* 61-62. The OIIG reported that there was not sufficient evidence to support the allegations that Cotton intimidated or physically threatened his coworkers, but there was evidence of disruptive behavior by Cotton and systematic operational problems with the work unit of the orthopedic technicians at Stroger Hospital. *Id.* 62.

Notwithstanding, the OIIG's finding, Cotton did not return to active service. For the next year, CCHHS Human Resources and Cotton's union representative exchanged correspondence in which CCHHS warned that if Cotton did not submit to a fitness for duty evaluation, he would be terminated, and Cotton's union representative demanded documentation of the good cause for requiring that Cotton submit to the fitness for duty evaluation while insisting that Cotton be returned to service without an evaluation. *Id.* 63-72. After more than twelve months of additional correspondence and meetings, CCHHS terminated Cotton's County service. *Id.* 71. CCHHS cited Personnel Rules 11.03 (which allows CCHHS to call for post-appointment fitness for duty evaluations on good cause) and 8.03(c)(7) (which allows CCHHS to terminate an employee for gross insubordination).

DISCUSSION

The Ethics Ordinance prohibits retaliation against whistleblowers. Specifically, the operative section provides:

No complainant, or employee acting on behalf of a complainant, shall be discharged, threatened or otherwise discriminated against regarding compensation, terms, conditions, location or privileges of employment because:

- (1) The complainant or employee acting on behalf of the complainant reports or is about to report,

verbally or in writing, a violation or suspected violation of this Ordinance; or

- (2) The complainant or employee acting on behalf of the complainant is requested to participate in an investigation, hearing or inquiry held pursuant to this Ordinance, or in any related court action.

Cook County Code of Ordinances (“County Code”), § 2-584(a).

The Ethics Ordinance certainly protects a whistleblower who makes his or her disclosure of wrongdoing to this Board. Importantly, this protection also extends to disclosures of wrongdoing to entities such as CCHHS Compliance, the OIIG, the media or even, as in this case, a civic watchdog. Section 2-584(a)(2) clearly speaks to protecting complainants and employees whose whistleblowing activity relates to “an investigation, hearing or inquiry *held pursuant to* th[e Ethics] Ordinance,” but subsection (a)(1) uses broader language. *Compare id.* at § 2-584(2) (emphasis supplied) *with id.* at § 2-584(1). Under this provision, a whistleblower receives protection for reporting “a violation or suspected violation of this Ordinance.” *Id.* at § 2-584(a)(1). Subsection (a)(1) does not specify that the report must be made to the Board. *See id.* Inferring such a limitation would, in fact, render Subsection (a)(1) superfluous because a whistleblower who reports a violation of the Ethics Ordinance to the Board is already “participat[ing] in an investigation, hearing or inquiry held pursuant to” the Ethics Ordinance. The most reasonable reading of both provisions in Section 2-584(a) then is that a whistleblower can trigger the anti-retaliation protections of the Ethics Ordinance, even when his or her report is not made directly to the Board.

Yet while the scope of to whom a whistleblower may report under the Ethics Ordinance is broad, the protections that the Ethics Ordinance offers a whistleblower is appropriately narrow. A whistleblower is only protected from an adverse employment action that is taken in retaliation for the whistleblower’s disclosure of wrongdoing. Engaging in whistleblowing does not immunize an employee from an adverse employment decision taken for any other reason (or no reason at all).

As such, the Board must focus on CCHHS’s reasons for putting Cotton on paid administrative leave on February 14, 2012, and its decision to terminate him at the end of 2013. Its investigation into those decisions finds insufficient evidence to support a conclusion that Cotton’s cooperation with the BGA motivated either decision.

Taken in the light most favorable to Cotton, his leave status and termination are the conclusion of mistreatment at the hands of his CCHHS supervisor. Whatever the motivation for this mistreatment, in Cotton’s own estimation, this alleged harassment pre-dates Cotton’s disclosure of Kapotas’s employment/payroll status to the BGA by years. Cotton made a disclosure to the BGA about Kapotas sometime between when Kapotas left Stroger Hospital in mid-2011 and likely October 18, 2011, when CCHHS Compliance opened its investigation on

the basis of a tip from the BGA. According to Cotton's May 31, 2011 grievance, however, he had already been subjected to harassment and inappropriate treatment by his CCHHS supervisors for three-and-a-half years. When the Board staff examined sources of potential friction between Cotton and CCHHS management in 2007, the time period Cotton was referencing in his 2011 grievance, there is no evidence that Cotton was disclosing potential Ethics Ordinance violations; instead, Cotton was engaged in a number of labor disputes related to orthopedic technician pay and rotation.

The Ethics Ordinance only offers whistleblower protection to disclosures of violations (and suspected violations) *of the Ethics Ordinance*. Ordinary violations of collective bargaining agreements and labor standards are serious and should be addressed in some forum, but they are beyond the purview of the Board if they do not implicate the Ethics Ordinance.

Without opining on issues that are beyond the expertise of the Board, the Board shares Cavanaugh's and the OIIG's assessment that the employment unit in which the orthopedic technicians at Stroger Hospital worked at the time of Cotton's allegations was dysfunctional. Whether merited or not, no employer strives for a workplace in which co-workers regularly (or even occasionally) call the police on, or take legal action against, one another. In light of the facts found during this investigation, the Board understands why CCHHS Employee Health Services sought the intervention of a third-party consultant in April 2010 to improve workplace relations.

When that third-party consultant reported to CCHHS CEO that Cotton was a threat to his coworkers on February 9, 2012, and recommended that CCHHS make an "appropriate intervention to assure both the safety of professional staff and the continuity of clinical care to patients seeking orthopedic services," CCHHS had no choice but to place Cotton on administrative leave. Source 31. If it had not taken immediate action against Cotton and Cotton had gone on to hurt any of his coworkers, CCHHS could have just as easily found itself answering to an investigation about why it had ignored the safety recommendations of its own consultant.

Similarly, there is insufficient evidence that the decision to terminate Cotton in late 2013 once he was already on administrative leave was motivated by his disclosure of Kapotas's employment and payroll status to the BGA in 2011. CCHHS documents that Cotton was terminated for gross insubordination. CCHHS's Personnel Rules state that an employee can be terminated for gross insubordination. *See* Rule 8.03(c)(7) (listing "gross insubordination" as a major cause infraction). And there is no dispute about whether Cotton consented to the fitness for duty evaluation that CCHHS requested as a precondition for his return from leave. After initially providing an authorization to release medical records on February 14, 2012, Cotton subsequently either immediately undermined the legal effect of his consent by indicating that he was waiving his rights to medical privacy under duress (*e.g.*, February 21, 2012 authorization) or withdrew his consent by his post-signatory conduct (*e.g.*, April 3, 2012 authorization). As late as October 3, 2013, Cotton's union representatives unambiguously represented on his behalf that Cotton would not comply with CCHHS's request for a fitness for duty examination. CCHHS

warned Cotton repeatedly for months that failing to comply with that request would result in his termination, and by December 2013, CCHHS made good on this promise to punish Cotton's gross insubordination.

All this is not to say that the Board is opining that CCHHS complied with its Personnel Rules, collective bargaining agreements or other applicable labor rules in terminating Cotton. That inquiry is beyond the Board's expertise. The only finding the Board is making is that the evidence of Cotton's "insubordination" in refusing CCHHS's request for a fitness for duty evaluation to return to work makes it more likely than not that the decision to terminate Cotton in 2013 was motivated by something other than Cotton's whistleblowing activity in 2011.

This is an important distinction because Cotton and his union representatives continue to assert that good cause did not exist for CCHHS to require that Cotton submit to a fitness for duty examination. After all, the OIIG investigated Cavanaugh's February 2012 report that Cotton was a physical threat to his coworkers and found insufficient evidence to support the claim by October 2012. The Board concurs with the OIIG's report on the basis of its own investigation. The Board staff conducted its own interviews of Cotton's former co-workers, including orthopedic technicians Edward and Watson about the statements that they supposedly made (directly or indirectly) to Pulla in February 2012. Nearly two years after these supposed conversations, neither could specifically recall doing so, but both recounted that Cotton frequently "threatened" his co-workers on any number of occasions during the relevant time period. Edward's and Watson's impressions were that these threats were nuisances rather than criminal. That is to say, these witnesses' recalled that Cotton frequently threatened to get his coworkers in trouble with their supervisors or the union—these threats were against their jobs, not their persons. The OIIG report on the topic corroborates the Board's impression that while Cotton was likely less violent than Cavanaugh feared in February 2012, Cotton was a disruptive presence in the workplace.

Beyond noting that disruptive behavior itself is a major cause infraction under CCHHS Personnel Rule 8.03(c)(3), the Board need not opine on whether CCHHS, in fact, had good cause to continue to request that Cotton submit to a fitness for duty evaluation under Personnel Rule 11.03 after the OIIG issued its report. This is because there is insufficient evidence that Cotton's whistleblowing activity played any role in Cavanaugh's initial report of Cotton's "threatening" activity or CCHHS's continued insistence on a fitness for duty evaluation after an investigation showed Cotton to be merely disruptive rather than imminently violent. For purposes of determining whether there was a violation of Section 2-584 of the Ethics Ordinance, there would have to be some evidence that the original February 9, 2012 allegation against Cotton was trumped up in an effort to punish Cotton for disclosing Kapotas's employment and payroll status to the BGA. The Board staff's investigation found no such evidence.

There is no evidence that anyone at CCHHS, including Cotton's coworkers, was aware that Cotton had cooperated with the BGA prior the disclosure of this information by the media in May 2012 (several months after Cavanaugh's February 2012 report and the decision to put Cotton on administrative leave had already been made). Cotton was not named as a source in

connection with the internal report to CCHHS Compliance about Kapotas in October 2011 or the media story about the same in November 2011. The union grievance filed on Cotton's behalf on the day he was placed on leave, alleges that Cotton was being harassed for his labor grievances and union activism—there is no claim that someone at CCHHS knew that Cotton was the BGA's whistleblower and that he was being harassed for disclosing CCHHS activities that violate the Ethics Ordinance.

Even after the public disclosure that Cotton played a role in the NBC/BGA stories on Kapotas, Cotton's union representatives continued to contest CCHHS's employment actions against Cotton, but never mentioned Cotton's protected activity as an improper motivation for CCHHS's actions. Although hardly conclusive on its own, this behavior is inconsistent with Cotton's allegations to the Board that CCHHS is persecuting him for his whistleblowing activities. CCHHS may have terminated Cotton for any number of reasons—because he was insubordinate or disruptive or even, as the union alleged in February 2012, for his labor grievances and union activity—but all that is beyond the scope of an ethics investigation into a violation of Section 2-584 of the Ethics Ordinance. The Board's inquiry ends where the cumulative evidence weighs heavily against the conclusion that CCHHS put Cotton on paid administrative leave in 2012 or terminated him in 2013 because he provided the BGA with information about the unethical conduct of another former CCHHS employee.

Section 2-584 of the Ethics Ordinance prevents an employer from retaliating against an employee because he or she engaged in whistleblowing activity, and the Board stands ready to enforce this protection for whistleblowers, even in circumstances where a whistleblower reports wrongdoing to another entity. But the Board is now the third agency to investigate allegations by and against Cotton without finding evidence to substantiate his claims of unlawful retaliation.

CONCLUSION

For the forgoing reasons, with respect to the above-captioned matter, the Board of Ethics finds NO VIOLATION of Section 2-584 of the Ethics Ordinance. Any request for reconsideration of this determination must also be made within thirty (30) days of receipt of this notice.

April 16, 2014

So ordered
COOK COUNTY BOARD OF ETHICS



Roseann Oliver, Chairperson