

19-4 Caryn Devins

Stephen ?, Special Assistant to Jeff Minear, Counselor to the Chief Justice, called me in his personal capacity – not his official capacity, to ask if a friend of his, Caryn Devins MLN, could meet with me on Friday, Feb. 15 about an EDR matter that seems not to be going as it should. I agreed. Caryn and her husband Cooper came to my office at 2 pm on 2/15/2019. My notes follow.

Caryn was a Supreme Court Fellow a few years ago, supervised by Stephen. Prior to that, Caryn clerked for a Vermont Supreme Court clerk and a Second Circuit federal judge. After her term as a Supreme Court Fellow, she became an Assist. (fix) Federal Public Defender in []. She alleges that shortly after beginning that job, the First Assistant who supervised her began making inappropriate sexual-type comments and remarks. She characterized his actions towards her as stalking. She reported the First Assistant's conduct to the Defender. She alleges he did not take her allegations seriously enough, telling her that at least the First Assistant never touched her. She also believes the Defender has been retaliating against her by not hiring her for an AFD position for which she was well qualified.

Caryn's allegations are set forth in the attached Request for Mediation.

Caryn's immediate concern is how her EDR claim is being processed. Caryn stated that Circuit Executive James Ishida is the EDR Coordinator. She says he seems very sincere and willing to help, but nonetheless, the EDR process seems to be bungled. And she believes it is being bungled to protect the Defender.

When she reported the harassment to the Defender, the Defender apparently filed a Wrongful Conduct Report with the Fourth Circuit. The Fourth Circuit treated that as if it were a separate complaint process, rather than simply a reporting mechanism for those who become aware of, but are not victims of, harassment. Caryn was told the EDR complaint process would need to be abated during the Wrongful Conduct investigation. She spent five hours with the HR Specialist assigned to investigate this. James apparently told the HR Specialist was told to redo her investigation because she did such a bare-bones investigation and failed to investigate Caryn's allegations that the Defender retaliated against her for reporting the harassment. Caryn has waited months for the investigation to be finished, and now is being told that the Circuit will not give her the results of its investigation.

In the EDR proceeding, Caryn moved to disqualify the Defender from acting on behalf of the FPD Office (the named Respondent). She is very unhappy that she filed that motion many months ago with Circuit Chief Judge Roger Gregory and he still has not ruled on her motion. She is now at the EDR Mediation stage – she met with the Circuit Mediator for the first-time last week. Caryn has requested that the First Assistant be terminated, or that she either be transferred to a different location within the Defender's office or be allowed to permanently telework. She has been told that neither of these are available options.

Caryn is upset that her EDR matter was abated, and that she is not being given the results of the investigation. Further, when she sought help from OFEP last fall, James and the Defender were very angry at her for doing so, which she feels is a form of retaliation because she has every right to seek guidance from OFEP.

I explained to Caryn that the purpose of the wrongful conduct provision in chapter IX is simply a reporting mechanism for those who become aware of harassment and was not designed or intended as

a separate complaint mechanism. But I said that courts are free to interpret EDR plans they way they see fit and the Fourth Circuit seemed to think that was the appropriate process, which they can do. I said it was very typical not to reveal the results of a wrongful conduct investigation to the parties, as it is an internal investigation. The Chief Judge is obligated to take appropriate action based on that investigation, but the EDR Plan does not obligate the court to reveal the actual investigation report. Nonetheless, I said Caryn could request that as part of her EDR discovery request. Caryn said the Mediator had mentioned it was difficult to mediate the matter without all of the facts. I suggested that Caryn request the Circuit to provide the full report to the Mediator, but if I were the Circuit, I would either disclose to everyone or no one.

Caryn said that she had revealed all of her allegations and supporting evidence to the HR Specialist, but had never revealed all that information in her EDR Request for Counseling or Mediation. I said that surprised me and that I didn't understand why. Caryn said she was told that would upset the Defender and make him defensive, rather than being willing to mediate a resolution. I said this frankly made no sense to me at all. Its fine in normal litigation to provide a short plain statement of allegations in a complaint because there are clear discovery rules, but in EDR, it is fast and short and there are no clear discovery rules, so it seems to me critical for a complainant to reveal all the allegations and evidence as soon as possible. I said Caryn could still amend her Request for Mediation to include all of the allegations and evidence that she provided to the HR Specialist/Investigator. Caryn said she believed that none of her factual allegations, even those in her Request for Counseling and Mediation, had ever been given to the Defender. I said the EDR Plan obligates the EDR Coordinator to provide a copy of the complete Requests for Counseling and Mediation to the UE of the Responding party, so this would make no sense to me at all. Again, though, I suggested she amend her Request for Mediation to include all of her allegations and supporting evidence and insist that the Defender be given a full copy of her amended Request for Mediation. If she was concerned that doing so would make the Defender unwilling to mediate with her on a reasonable basis, she could provide this information at the EDR Complaint stage but (1) that makes mediation even more useless and (2) risks an argument that she is raising new allegations and claims for the first time in her complaint, which is prohibited by the EDR Plan (which obligates all claims to be presented in the Request for Mediation). Caryn said the court is aware of all her allegations and evidence from its investigation, so she doubted the court would say she had waived these allegations/claims. Nonetheless, I said I did not see any benefit in not including everything in the Request for Mediation, whether as a supplement or an amendment.

I also said that it would not be expected that the EDR hearing officer would disqualify the head of the Responding Employing Office to act on behalf of the office, even when the UE is accused of wrongdoing. I explained that almost all EDR complaints allege that the UE violated their employment rights and that it was still entirely contemplated that the UE would act as the head of the Responding Office, just as any defendant to a civil action is the party responsible for acting as the defendant. If the court concluded there was a significant conflict of interest, it could act -- such as hiring an outside law firm to represent the office -- and her motion for disqualification could be a means to do that, but that it would not at all surprise me if her disqualification motion was denied. I explained that disqualification motions were designed to ensure that the EDR Coordinator, Mediator, and Hearing Officer were impartial, not that the defending party was impartial.

Caryn, Cooper and I met for three hours on 2/15. Thus, this is a brief summary of all we discussed. Caryn and Cooper are going to consider their options. I asked if they wanted me to reach out to James

Ishida to discuss their concerns or to provide any EDR guidance. They said they would have to consider this over the weekend, as they fear my involvement might inflame matters. Generally speaking, they believe the EDR process has not been fair and impartial, certainly has not been transparent, and certainly has not provided Caryn with the safety or necessary resolution she desires. I said I did empathize with them about how things have proceeded, but (1) don't share their cynicism about why things have proceeded as they have and (2) reassured them that they are at the start of the EDR process, with all of the due process that it offers.