BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF WILLIAM REEVES, Appellant,	)	**DOCKET NO. 97-02-116**
v.	)	**FINDINGS, OPINION, AND ORDER OF THE BOARD (TERMINATION)**
FAMILY COURT OF THE STATE OF DELAWARE, Agency.	)	

BEFORE Katy K. Woo, Chairperson, Robert Burns, Vice-Chairperson, and Walter Bowers, Member, of the Merit Employee Relations Board (hereinafter "Board" or MERB"), constituting a lawful quorum of the Board pursuant to 29 *Del. C.*. § 5908(a).

AND NOW, WHEREAS, the above-referenced matter came before the Board for a public evidentiary hearing on August 7, 1997, the Board hereby makes the following findings and conclusions and enters the following Order upholding the employee's appeal and requiring his reinstatement with appropriate back pay and allowances in the position of Family Court Judicial Assistant I from which the Board has determined he was terminated without just cause.

APPEARANCES

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NATURE OF THE PROCEEDINGS

This matter began before the Board on February 5, 1997 with Appellant's filing of a direct appeal under Merit Rule No. 21.0111 from his termination of employment as a Judicial Assistant I with the Family Court of the State of Delaware. Discovery disputes between the parties resulted in a legal hearing on May 15, 1997 and the entry of an Order of the Board on June 6, 1997 resolving those disputes.

The Board convened to hear evidence on the merits of this appeal on August 7, 1997. Although his hearing involved a disciplinary matter, the Appellant requested that the hearing be designated and conducted as an open public hearing.

After consideration of the evidence presented and public deliberations, the Board by a vote of two to one determined to uphold the appeal finding that the Appellant was dismissed without just cause in violation of Merit Rule No. 15.1.

Merit Rule 15.1 requires that a disciplinary sanction of termination be imposed only for "just cause" which, as presently defined in the Merit Rule, has three elements: First, that the employee has committed the charged offense; Second, offering specified due process rights; and, Third, imposing a penalty appropriate to the circumstances.

The sole issue presented to the Board for decision by this appeal is whether or not termination of employment with the Family Court imposed upon William Reeves solely for his criminal contempt conviction imposed by Family Court Chief Judge Vincent Poppiti in a civil proceedings involving a custody/visitation dispute over Mr. Reeves' four year old son, is appropriate under the circumstances.[1]

SUMMARY OF THE EVIDENCE

The Honorable Associate Judge Peggy Ableman provided the Board with testimony under affirmation that Mr. Reeves was terminated from his position as a Judicial Assistant I for the Family Court of the State of Delaware by Judges Ableman and Judge Kenneth M. Millman who together constitute Family Court Judicial Council (State's Exhibit No. 4) on the sole basis of Reeves' conviction by Chief Judge Vincent Poppiti of criminal contempt of Court. The conviction was for behavior which Mr. Reeves exhibited before the Court in a custody dispute in which Mr. Reeves was a litigant.

Judge Ableman testified that she and Family Court Associate Judge Kenneth M. Millman constitute the Family Court Judicial Council which has certain administrative duties for the Court including the termination of employees for, among other things, violations of the Family Court Administrator's Directive No 96.05 which formed the basis for Mr. Reeves' termination. Judge Ableman stated that the exclusive basis for the termination of William Reeves was his violation of

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[1] The parties before the Board stipulated that all of the required procedural elements had been met with respect to Mr. Reeves' termination. The conduct involved in fact occurred as established by the final Order of Contempt entered by the Chief Judge on December 17, 1996. This leaves for resolution by the Board the remaining element of "just cause" under Merit Rule 15.1, to-wit: "imposing a penalty appropriate to the circumstances".

Directive No. 96.05, although she also testified that she had reviewed the recommendation for termination of Court Administrator Edward G. Pollard, Jr. (State's Exhibit No. 4) which recommended termination based on not only Directive No 96.05 but also "[F]or Mr. Reeves' extensive prior disciplinary record of progressive actions taken for rules violations." Judge Ableman told the Board that there had been extensive distribution of Administrator's Directive No. 96.05 which is dated July 3, 1996 and is signed by the Court Administrator and Chief Judge Vincent J. Poppiti. She further testified that the action of the Judicial Council in terminating Mr. Reeves was premised on the provision of Directive No. 96.05 which provides for "Disciplinary action up to and including termination for any misdemeanor not described above". Judge Ableman noted that the Directive provides for immediate termination for any felony conviction; immediate termination for any conviction of a Class A Misdemeanor involving offenses against children, family members or domestic partners, current or former; and permits disciplinary action up to and including termination for any misdemeanor not described in the Directive. (State's Exhibit No. 1). She testified that she believed that while she had the discretion to recommend any penalty from reprimand through termination of employment for Mr. Reeves under the Directive she did not have the discretion to review Judge Poppiti's imposition of a criminal contempt sanction upon Mr. Reeves. Judge Ableman testified that, in her view, the fact of criminal contempt was itself sufficient grounds for termination and that she held court employees to a higher standard than ordinary litigants. Therefore, according to Judge Ableman, an employee who showed any disrespect to the court even as a private litigant such as to cause the imposition of a misdemeanor criminal contempt conviction should not continue to be a family court employee and should be automatically terminated. Judge Ableman testified that, among the documents which she reviewed in the process of coming to her determination that termination was

appropriate, was the Contempt Order entered by Chief Judge Poppiti. However, she also testified that she did not review, or find relevant, the facts factual basis underlying the finding of contempt. She further testified that she did not review the transcript nor listen to the tape of the hearing during which the contempt occurred. Since Judge Ableman did not read the transcript of the hearing or listen to the tape recording of it, presumably her discretion would not have been affected by the statement of the Chief Judge to Mr. Reeves that the contemptuous conduct should cost Mr. Reeves his job. (See Appellant's Exhibit No. 3, Page 31).

The Order of Contempt entered on the 17th day of December 1996 against Mr. Reeves by Chief Judge Poppiti (States' Exhibit No. 2) provides specifically that Mr. Reeves loudly crumpled up a piece of paper on his table; slammed his closed hand onto the tabletop; and that Mr. Reeves snickered at the court when the Court made an effort to address his inappropriate conduct. It was for this conduct, which the court found evidenced a lack of respect, that Mr. Reeves was summarily punished with the imposition of a $200 fine.

Judge Ableman in her testimony provided the Board with several graphic examples of particularly egregious conduct for which she had imposed criminal contempt sanctions in her courtroom and recounted for the Board the sensitive nature of the matters which the Family Court must decide and the high emotional involvement of the litigants in many such cases. Judge Ableman testified that, under Directive 96.05, the Judicial Council had discretion as to the punishment to be imposed for an employee's conviction of an unspecified misdemeanor but that in her view when the misdemeanor involved was criminal contempt of the Court that the ultimate sanction of termination of employment was the appropriate sanction without any necessity to consider the actual conduct involved.

Edward G. Pollard, Jr., in sworn testimony, told the Board that he is the Court Administrator for the Family Court and the author of Administrator's Directive 96.05 (State's Exhibit No. 1) which discusses the effect of criminal charges on employment. Mr. Pollard testified that Directive was revised in May of 1996 to take into consideration the situation where an employee of the Court had admitted the commission of certain serious offenses, but there was no formal conviction, and the prior policy restricted termination of employment to the situations where there was such a conviction. Mr. Pollard related that after discussions with the Attorney General's Office and in light of the prior wording of the Directive, that specific employee had not been terminated from Family Court employment and the Directive had been modified. Mr. Pollard related that, in his view, the Family Court Judicial Council had discretion to impose accountability upon Mr. Reeves ranging from a reprimand through termination for his Criminal Contempt misdemeanor.

William Reeves was sworn and testified that he was hired by the Family Court as a Judicial Assistant in July of 1992. He described the duties he performed in that position and identified the various Judges and Commissioners for whom he had worked as a Judicial Assistant. According to Mr. Reeves, he has not been employed since his termination from the Court in February 1997. He has two sons and a daughter and was involved in a custody/visitation dispute with the mother of his four year old son. A hearing on the matter was scheduled before Chief Judge Poppiti on December 17, 1996. Mr. Reeves testified that he had not received prior notice of the hearing because the notice had been sent to an incorrect address and became aware of the hearing only after he was paged on the Court's intercom system by Charles Warwick, the Chief Judge's Judicial Assistant. He entered the hearing room, waived his right to prior notice, and the hearing began. Mr. Reeves testified that during the hearing he felt powerless and frustrated at the prospect of not having his three children

together at Christmas-time and was concerned about discussions between the Court and his child's Mother about possible incarceration and loss of custody of the child. The hearing resulted in a decision by Chief Judge Poppiti holding him in civil contempt for his failure to provide visitation to the mother of his four year old son, and thereafter, in the criminal contempt determination for the behavior set forth in the Order of Contempt (State's Exhibit No. 2). Mr Reeves, in his sworn testimony, admitted that his behavior before Judge Poppiti was not appropriate and that he has paid a part of the Two Hundred ($200) Dollar fine which Chief Judge Poppiti imposed upon him as a sanction for the misdemeanor criminal contempt of court conviction.

The parties stipulated that Chief Judge Poppiti self-referred this matter to the Court on the Judiciary where the matter was reviewed, and in a panel decision on July 16, 1997, the Court found no violation of the cannons of judicial conduct and dismissed the matter.

APPLICABLE LAW AND MERIT RULE

EMPLOYEE ACCOUNTABILITY

Merit Rule 15.1 Employees shall be held accountable for their conduct. Measures up to and including dismissal shall be taken only for just cause. "Just cause" means that management has sufficient reasons for imposing accountability. Just cause requires:

- showing that the employee has committed the charged offense;
- offering specified due process rights specified in this chapter; and
- imposing a penalty appropriate to the circumstances.

BURDEN OF PROOF

The burden of proof is upon the Appellant to convince the Board that his termination is not for just cause. The termination is prima facie correct. *Hopson v. McGinnes*, Del. Supr. , 391 A.2d 187 (1978).

IMPOSITION OF PENALTY

The Board does not have the power to fix the penalties on appeal from disciplinary actions and to substitute its penalty for the penalties imposed by the appointing authority. *State v. Berenguer*, Del Super., 321 A.2d 507 (1974).

DISCUSSION AND FINDINGS

There is no issue or question that Chief Judge Poppiti acted correctly and Mr. Reeves acted incorrectly in this matter. Furthermore, the Board adheres to its prior determination in its Order of June 6, 1997 that Mr. Reeves may not collaterally attack the imposition of the Order of criminal contempt before this Board.

The Court's expectations for behavior of Court employees is set out in Directive No. 96.05 which establishes a series of offenses for which employees are placed on notice that the appropriate disciplinary sanction will be immediate (and automatic) termination of employment. (State's Exhibit No. 1). The commission of an act of contempt as a party litigant before the Family Court is not listed as conduct for which immediate and automatic termination will be imposed. That is, however, according to the testimony of Associate Judge Ableman, the standard which the Family Court Judicial Council applied to Mr. Reeves' conduct. Judge Ableman testified that had the misdemeanor conviction been for example, a traffic offense, she would have considered a lesser penalty. However, according to Judge Ableman, since the conduct had been found by the Chief Judge to be criminal contempt of Family Court, the maximum penalty of termination of employment was appropriate, and the underlying behavior giving rise to the Order of Contempt was irrelevant.

This determination by the Court Judicial Council to terminate Mr. Reeves exclusively for having been found guilty of Criminal Contempt is presumptively correct, and the Board will not lightly reverse the determination of the appointing authority as to the appropriate punishment.

However, under Merit Rule 15.1, one of the specific elements of "just cause" is the imposition of a punishment appropriate to the circumstances and where, as here, the Board is convinced that the punishment imposed is materially out of proportion to the conduct committed, it cannot conclude that there is just cause for the accountability imposed.

This case requires the Board to construe Merit Rule 15.1 and to determine what are the "circumstances" to be considered in determining the "appropriate punishment".

If the "circumstances" of this case are limited to the fact of the imposition of an order of criminal contempt and automatic termination of employment flows from that fact alone, that would be the end of the matter. If that were the case, then the court employees and the court itself, should be on notice prior to any conduct that the penalty for any criminal contempt committed by a Family Court employee will, in addition to whatever other punishment the Court deems appropriate, be the loss of employment. There was no indication that either the employees or the court are on notice of such an automatic result. Under these circumstances, it is not improper or irrelevant to review the nature of the underlying improper conduct which gave rise to the Court's Order of Contempt. Such review is not for the purpose of relitigating whether or not the behavior occurred or whether or not the behavior was appropriately found to be punishable by an Order of Contempt or even whether or not the penalty imposed for the contempt was appropriate. The conduct is irrelevant in this forum for those purposes. However, solely for the purpose of considering under Merit Rule 15.1 the appropriateness of the ultimate sanction imposed by the Family Court in its capacity not as a court but as an employer, the conduct is relevant.

In this instance, the conduct as described in the Court's Order of Contempt (State's Exhibit No. 2) consisted of loudly crumpling a piece of paper, slamming a closed hand onto the table, and

snickering when the Court made an effort to address the inappropriate conduct. There was no threatening conduct to the Court; no obscenities; the intervention of other Court personnel was not required; there was an unaccepted attempted apology to the court; and there was none of the more egregious disrespectful conduct Judge Ableman graphically described in her testimony to the Board as being some of the more serious incidents of criminal contempt for which she had imposed sanctions.

Chief Judge Poppiti assessed the level of the inappropriate conduct before him and imposed a fine in the amount of $200. He could have imposed considerably greater sanctions including incarceration and chose not to do so. There is some indication in the transcript that the Chief Judge was aware that he was possibly sentencing Mr. Reeves indirectly to the termination of his employment with the Family Court when he said, "That was contemptuous conduct. And it should cost you your job." (Appellant's Exhibit 3, Page 31).

Under the circumstances, the Board, by the affirmative votes of Vice-Chairman Robert Burns and Board member Walter Bowers, with Chairperson Woo voting no, is convinced that the evidence presented establishes that there has been a violation of Merit Rule No. 15.1 in that the penalty imposed was not appropriate to the "circumstances" which we find to be the actual conduct which Chief Judge Poppiti sanctioned in his Contempt Order. Therefore, the termination of William Reeves from his position of Judicial Assistant I cannot be said to be for just cause as that term is presently defined in Merit Rule No 15.1 This is not to say that a misdemeanor conviction for criminal contempt of Family Court cannot serve as an appropriate basis for the termination of a Family Court employee. In many, perhaps most, instances where a Family Court employee is convicted of criminal contempt, the Family Court Judicial Council, after an independent review of the circumstances including the

nature of the conduct, would find with justification that the conduct was such that termination of the employment was appropriate. The Family Court Judicial Council admittedly did not make such a review of the conduct and automatically terminated Mr. Reeves solely by virtue of the conviction.

The Board, by the majority vote of a quorum, finds that under the limited circumstances of this case, with this conduct being the only misconduct which formed the basis for the termination,[2] the penalty of termination is not appropriate to the circumstances, and, thus, just cause for the termination, as defined in Merit Rule No. 15.1, is not present.

The Board suggests that if a criminal contempt misdemeanor is, as it was in Mr. Reeves' situation, to be viewed as requiring automatic termination of employment upon such conviction, then all the employees and all Judges of the Court should be on prior notice of that fact, and it should be listed as one of the offenses in the Directive for which immediate and automatic termination will occur. *Cf., Ortiz v. Unemployment Insurance Appeal Board*, Del. Supr., 317 A.2d 100 (1974).

ORDER

For the foregoing reasons, the Board upholds the appeal of William Reeves on the basis that his termination from the position of Judicial Assistant I was without just cause as that term is defined in Merit Rule 15.1. Pursuant to 29 *Del. C.* § 5949(d), Mr. Reeves shall, effective with the date of this Order, be reinstated into the position from which he was terminated with all benefits and rights denied and shall be made whole for the period from the date of termination to the date of

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[2] The Board is aware of allegations of other misconduct. However, the Court did not consider nor ask the Board to consider anything other than the criminal contempt conviction. The Board has not considered any other misconduct and has viewed this behavior before Chief Judge Poppiti as the only misconduct by Mr. Reeves.

reinstatement with all back pay and allowances less any agency assistance granted to him by any agency including but not limited to public assistance and unemployment compensation.

IT IS SO ORDERED:

Katy K. Woo, Chairperson (Voting NO)

Robert Burns, Vice-Chairperson

Walter Bowers, Member

APPEAL RIGHTS

29 *Del. C.* § 5949(b) provides:

> If the Board upholds the decision of the appointing authority, the employee shall have a right of appeal to the Superior Court on the question of whether the appointing authority acted in accordance with law. The burden of proof of any such appeal to the Board or Superior Court is on the employee. If the Board finds against the appointing authority, the appointing authority shall have a right of appeal to the Superior Court on the question of whether the appointing authority acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the appointing authority. All appeals to the Superior Court shall be by the filing of a notice of appeal with the Court within 30 days of the employee being notified of the final action of the Board.

Mailing Date: September 3, 1997

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