

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

**IN THE MATTER OF
THOMAS SMITH, III,
Appellant,**

v.

**STATE OF DELAWARE
DEPARTMENT OF HEALTH AND
SOCIAL SERVICES,
Agency.**

DOCKET NO. 96-03-86

**FINDINGS, CONCLUSIONS AND
ORDER OF THE BOARD**

BEFORE Katy K. Woo, Chairperson, Robert Burns, Vice-Chairperson, Walter Bowers, Gary Fullman, and Dallas Green, Members, constituting a quorum of the Merit Employee Relations Board ("Board") pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES

For the Appellant: John C. Butera, Esquire
Butera, Beausang, Cohen & Brennan
630 Freedom Business Center
King of Prussia, Pennsylvania 19406

For the Agency: Loretta G. LeBar, Esquire
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

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NATURE AND STAGE OF THE PROCEEDING

This matter comes before the Board on a timely filed direct appeal under Merit Rule No. 21.0111 after a termination of employment of Thomas C. Smith, III, from the position of Director of the Business Enterprise Program ("BEP") in the Division of Visually Impaired by Carmen R. Nazario, Secretary of the Delaware Department of Health and Social Services. All proceedings were conducted in public session at the request of the Appellant.

Evidentiary hearings were held on November 21, 1996, November 27, 1996, and December 5, 1996. Written closing arguments of the parties were received by the Board by January 15, 1997, and the Board met in public session on January 23, 1997 with the parties present to consider the evidence and arguments presented and to deliberate concerning this matter. This is the written Order of the Board required by 29 *Del. C.* §10128.

SUMMARY OF EVIDENCE

Deborah Ann Wallace was sworn and testified as follows: She is currently acting Director of the Division of Visually Impaired ("DVI"); a role she assumed on June 1, 1996. She has a Bachelor of Science degree in Business Administration from the University of Delaware and has been a State employee for over sixteen (16) years.

DVI is organized with a Director and a Deputy Director and into various units which provide services to support consumers who are visually impaired. Services include vocational rehabilitation, education, and counseling services, the Business Enterprise Program, Independent Living Services, Delaware Industries for the Blind, outreach services, fiscal services, information services, the Material

Center and Volunteer Services, Orientation and Mobility, and the Training Center. Thomas Smith was the Director of the Business Enterprise Program (hereinafter "BEP"). According to Ms. Wallace, the BEP had a Senior Accountant, a Supervisor II position, a Supervisor I position, Managers from various Randolph-Shepard Cafeterias, a Food Service Manager in charge of the Campus Garden Cafe, and clerical support. Mr. Smith, as Director, was directly below the Division Director.

The Randolph-Shepard Law is a Federal statute which sets up a program for employment of the visually impaired and provides for a State Licensing Agency which is authorized to have vending facilities, whether it be a cafeteria, a gift shop, or strictly vending machines operated by visually impaired individuals.

DVI is the Delaware state licensing authority for the Randolph-Shepard program and provides certain services including management services. Under the BEP, there is a Food Service Manager, responsible for the direct supervision of the Summer Food Service Program, as well as the Senior Nutrition Program.

There was an auditor's report made about abuse of funds in the Summer Feeding Program. In approximately November of 1994, the State Auditor began looking into the Summer Feeding Program. Wallace was contacted on March 1, 1995 to begin looking at the DVI's BEP to assist the State Auditor's office in reviewing BEP fiscal operations and to assist in establishing internal controls and procedures. Wallace reviewed bank statements, checks, deposit tickets, profit and loss statements, vendors invoices, contracts, various memos, and correspondence which outlined functionalities of the programs.

Wallace testified that the Summer Feeding Program started in 1993 and ended in 1994 because of the review that was in process and that it appeared that there were fiscal violations and improprieties associated with the receipt and distribution of funds.

Ms. Wallace explained that her testimony was in support of reasons given for Mr. Smith's dismissal as specified in the February 13, 1996 dismissal letter from Secretary Nazario, specifically: check registers not being maintained for any of BEP's several checking accounts; account reconciliations which were untimely or not completed; checks which were written without funds in the account but held for late release; bank balances were reported in monthly reports instead of check book balances, thus misrepresenting the financial status of the account; funds were not properly or timely transferred between accounts; deposits were not made on a daily basis; and checks were drawn from incorrect accounts.

Ms. Wallace testified that from her review of available documentation (State's Exhibit 6, Section 1, Page 1) the account balance on a BEP checking account was a negative \$7,813.13, and a check number 15275 written in the same period had a dollar amount of \$26,033.16, and if that was so, there should not have been any checks written on that account since they did not have sufficient funds to release the checks.

Ms. Wallace identified Exhibit 6, Section 1, Parts 1-7 as the corresponding June, 1995 bank statement from the Delaware Trust Company. She testified that when the accounting staff at BEP would go through and add up the individual deposits to get a summary total that is what actually was entered into the check register document. Wallace testified this is incorrect; as you make a deposit, there should be one entry into the actual check register.

Ms. Wallace, referencing State's Exhibit 6, Section 1, Page 9, identified a check written in June of 1994 for \$300.00 from account number 4 as a reimbursement at the request of the Blind Vendors Committee to account number 2 for a prior expenditure in March, 1994 to open account number 4. The accounts, according to Wallace, are unrelated. Account number 2 is the Randolph-Shepard program account for cafeterias, and account number 4 is the Campus Garden program. According to Wallace, the funds were co-mingled and should not have been. State's Exhibit No. 7 was a copy of a Department of Health and Social Services check number 14402, dated March 7, 1994, which Ms. Wallace testified was issued from BEP account number 2, the primary checking account for the Randolph-Shepard cafeterias, and was the check used to open account number 4 which is the primary checking account for the Campus Garden Cafe. State's Exhibit No. 6, Section 1, Part 10 is the deposit ticket showing the deposit into account number 2.

State's Exhibit No. 6, Section 1, Parts 11-12-13-14 represent copies of deposit tickets where receipts were supposed to have been deposited on a daily basis, and as indicated on the bank statements, they were not. The deposit tickets show daily receipts from different days were all deposited on the same day. This, according to Wallace, is in violation of state law which requires that all deposits received prior to 3:00 P.M. on a date are supposed to be in the bank, deposited on that date.

Ms. Wallace, referring to State's Exhibit No. 6, Part 1, Sections 17-18-19, testified that a Ms. Yoko Taylor was paid from an internal BEP payroll account incorrectly as she should have been paid through the state payroll system. Checks to Ms. Taylor were signed by Thomas Smith and by Deborah Simpson, and by Gino Iubatti and by Charles Gebhart. The signature authority for such checks from account number 4 was Dianne Post as the Division Director, Charles Gebhart as the

Deputy Director, Thomas Smith, as the BEP director, Gino Iubatti as the senior accountant for BEP, and Deborah Simpson as the fiscal person for the Division of Visually Impaired.

Ms. Wallace testified that Defense Exhibit No. 6, Section 1, Page 20 was a monthly Report from Tom Smith to Dianne Post for the month of June, 1995 which contained a report of bank accounts for the four BEP accounts. The amount listed for account number 2 is \$45,960.01. According to Ms. Wallace, this amount represents the bank balance and not the book balance in that it does not reflect any outstanding checks. The balance shown on the bank statement for June 27, 1995 is \$45,960.01. (See State's Exhibit No. 6, Section 1, Page 6).

Ms. Wallace identified State's Exhibit No. 6, Section 1, Pages 21 and 22 as weekly transfer accounts for the Nanticoke Homes and the Indian River Randolph-Shepard locations. She testified that these accounts have never had a check register maintained nor have they been reconciled. The significance of this is that if there were errors on the statement the accounting office would not know about it nor would the fiscal office, and the result could be either an over or an under withdrawal from the account.

Ms. Wallace testified that State's Exhibit No. 6, Section 1, Pages 22-23-24 shows that the register was never maintained for these accounts, and Page 25 shows that the account was actually overdrawn by \$1,573.36. On January 5th, the account was overdrawn by \$1,304.51, and on the 6th by \$962.86. On Page 26 of the same exhibit, according to Ms. Wallace, there is a negative balance reflected in the account, because there was a telephone transfer that was inadvertently done five different times. Pages 29 and 30 further reflect the absence of necessary weekly transfers and show that, in one case, there were no transfers for the entire month of November, 1993. Pages 30 and 31,

according to Ms. Wallace, reflect that there is no check register done. Page 32 reflects another transfer account and indicated that there were no transfers done for the month of January, 1991.

According to Ms. Wallace's testimony, State's Exhibit No. 6, Section 1, Page 33 represents a worksheet prepared by the fiscal office with respect to the charging of BEP administrative salaries to the Randolph-Shepard program and shows the transfer of \$63,045.00 for FY 93 through FY 96, but at no time was there ever a transfer into BEP account number 2 to replenish what was disbursed, and these expenditures were never reflected on the profit and loss statements during any of those particular periods. Pages 35-36-37 and 38 of this Exhibit reflect activity in account number 2 for the period March, 1989, and as indicated on Page 38, the ending balance in the account is \$83,859.81.

State's Exhibit No. 6, Section 1, Page 39 through 46 show the bank statement from March, 1990 for the same bank account, and on Page 46, the balance shown in the account is \$80,830.55. Pages 47 through 55 reflect the bank statement from December, 1990 for the same account number 2, and on Page 53, show the account balance is \$27,157.64. Pages 56 through 61 reflect the bank statement from January, 1993, and on Page 61, show a negative balance of \$109,368.80.

According to Ms. Wallace, Pages 68 through 70 represents an after the fact check register and reconciliation and does not indicate who prepared it or when it was done, and Page 68 shows the beginning balance for June, 1993 was a negative \$26,789.72. Pages 84 through 88 show the bank statement for April, 1994, and Pages 84 through 88 are the bank statements for April, 1994 for BEP account number 2. Pages 89 through 91 are the corresponding reconciliation and after the fact check register for the primary BEP checking account for the Randolph-Shepard cafeterias. Page 89, a reconciliation statement, has a book balance of negative \$35,016.80. Pages 92 through 97 are copies of a bank statement for account number 2 for June, 1994. Page 98 shows the beginning balance

brought forward as a negative \$633.47, and Page 100 shows the ending balance was \$33,076.49 in the negative. Ms. Wallace testified that in reviewing these statements it appeared that there was insufficient cash to have checks written, but because they did not maintain the check register in a proper and timely manner, they did not know what the account balance was. Ms. Wallace testified that based on her interviews with Gino Iubatti and Stella Martin she found times when checks were written and were maintained in the safe and then the bank was contacted to determine how much money was in the bank account. If they felt there were sufficient funds, the checks were released.

According to Ms. Wallace, the reconciliations do not have a date when they were prepared and were used as both registers and reconciliations. The reconciliations do not indicate whether an amount outstanding is composed of more than one check, because they did not list the check numbers. Ms. Wallace pointed to State's Exhibit No. 6, Section 1, Page 119 as an example of the proper method of reconciliation of the account. It brings forward the ending balance from the statement, subtracts out any outstanding checks, and each check is listed. It also indicates who prepared the reconciliation and the date prepared. Pages 122 through 125 represent the proper method of maintaining a check register. Ms. Wallace testified that the examples of the proper methods were developed as a result of her review in conjunction with the State Auditor's Office. The prior methods had been developed by the BEP Senior Accountant, Gino Iubatti, who reported to Thomas Smith, the BEP director.

Wallace testified that State's Exhibit No. 6, Section 1, Pages 139 and 140 are a summary worksheet prepared indicating that checks were issued from account number 4 (Campus Garden Cafe account) for a Randolph-Shepard employee. The Campus Garden Cafe is not a Randolph-Shepard site. The employee was an employee of the Randolph-Shepard program and was paid from the State

payroll which is reimbursed from account number 2. The checks were written from account number 4, and according to Ms. Wallace, the monies not timely transferred back to account number 2. Pages 142 through 144 is a ledger or documentation prepared by Senior Accountant Gino Iubatti indicating how much monies were supposed to have been transferred between the various accounts, but according to Wallace, the amounts were never transferred. In addition, Wallace testified that Page 150 represented documentation obtained from Senior Accountant Iubatti; is the report used to transfer monies between accounts; and was the only documentation that existed. In reviewing it, Ms. Wallace was not able to determine what the transfer was for, where it was supposed to be going, who authorized it, and, furthermore, it appeared to be untimely. In addition, Page 151 is a work sheet prepared, according to Ms. Wallace, by Gino Iubatti indicating that account number 2 was used to pay expenses which should have been paid from account number 4 in the amount of \$39,946.85. Ms. Wallace testified that it appeared that the transfer recorded on Page 150 had never been made.

Ms. Wallace, turning to the second listing of reasons given by Secretary Nazario, asserted that the employer's Quarterly Federal tax required for all of 1994 and for the first two quarters of 1995 were not timely prepared or submitted. Federal taxes withheld during 1994 and 1995 from employee pay checks, as well as the employer's share, were not deposited by the appropriate due dates. Also, State and Wilmington City wage taxes withheld from employee's pay checks during 1994 and 1995 still have not been paid. BEP's internal payroll was never registered with the Delaware Department of Labor for unemployment insurance nor was there any research performed to determine whether or not the Federal Unemployment Tax form 940, Federal Corporation Income Tax return form 1120, or the state corporate income tax return form 2200 had to be completed for the operations. The Department of State was never contacted to determine whether or not BEP would have to pay

franchise tax. Also, due to insufficient funds in account number 4, the July and August 1995 federal taxes were not paid on time prompting the Internal Revenue Service to levy against account number

4. Ms. Wallace testified that no penalties had yet been assessed.

Wallace identified and discussed State's Exhibit No. 6, Section 2, Pages 1 through 17 describing the nonpayment in a timely manner of withholding taxes due to the Federal, State and Wilmington City revenue agencies. Ms. Wallace defined the term "payroll kickers" and related that Randolph-Shepard employees are paid from the State payroll. Because the program maintains an internal checking account, the monies for salaries are not deposited directly into the general fund. When payroll is to be charged, there is a report from central payroll indicating the salary charges as well as fringe benefits, and a check is supposed to be issued from the internal checking account and deposited in the general fund so that when the payroll charges actually hit the State's accounting system, there will be sufficient money available to cover those charges. Wallace testified that there were insufficient funds in the internal checking accounts of BEP with which to pay the outstanding payroll kickers.

Ms. Wallace described State's Exhibit No. 6, Section 2, Page 21 as a memorandum dated July 5, 1995 from Thomas Smith to start the Summer Feeding Program for 1995. Ms. Wallace testified that at that time the decision had been made not to proceed with the Summer Feeding Program for 1995. Mr. Smith, in the memorandum, recommended that the accounting firm of Daney, Cannon, Truitt and Sarnecki be hired to oversee the accounting for the Summer Feeding Program. Ms. Wallace described e-mail documents marked as Pages 22 through 24 of State's Exhibit No. 6, Section 2 as discussing significant outstanding vendor payments for both the Randolph-Shepard program in BEP and the Campus Garden Cafe. The BEP program, according to Wallace, had outstanding

vendor payments in the amount of \$57,746.28, and Campus Garden Cafe had outstanding vendor payments in the amount of \$105,301.83. Page 25 of Section 2 of State's Exhibit No. 6 is a memo from Thomas Smith to Dianne L. Post dated April 4, 1995 noting that the IRS is developing a payment schedule for BEP withholding tax and that BEP will pay the 1st Quarter of 1995 taxes in April and that the state and city withholding taxes for 1994 have not yet been paid, and BEP owes \$5,449.59 to the State and \$2,237.82 to the City. Page 26 is a worksheet prepared, according to Ms. Wallace, by Gino Iubatti showing total taxes owed as \$50,693.79 from the Campus Garden and the Summer Feeding program for calendar year 1994 noting that none of the state or city taxes have been paid for 1994 or 1995. Pages 76 through 78 of this Exhibit relate to correspondence between various tax agencies and the BEP Director Dianne Post and Deputy Director Charles Gebhart requesting tax penalty abatement and waiver of late fees and interest for late filing and acknowledging that the State of Delaware, Division for the Visually Impaired, Business Enterprise Program has been delinquent in completing the necessary tax forms since the 1993 tax year.

Deborah Wallace testified with respect to allegation Number 3 in Secretary Nazario's letter of February 13, 1996 as follows: The third basis set forth for termination of Thomas Smith was that Profit and Loss Statements (P&L) of the Blind cafeteria operations, the Campus Garden Cafe, and the Summer Feeding Program were consistently late or not completed at all; the most recent P&L for the Campus Garden Cafe was completed for the period October, 1994 through July, 1995 and reflected a loss of \$51,338.35; numerous vendor payments and payroll charges for this operation are outstanding and there are insufficient funds in account number 4 with which to pay them; as of October 13, 1995, outstanding vendor invoices and state payroll charges were \$108,855.77 and \$20,000.00 respectively.

Ms. Wallace described State's Exhibit No. 6, Section 3, Pages 1-2-3 as the P&L prepared for the 1994 Summer Feeding Program and Pages 3-4-5 as another P&L prepared for the same period for the same program. Page 1 reflects a negative net income of \$79,758.40, and Page 4 reflects a negative net income of \$19,636.72. This reports two different negative net incomes for the same period from the same program. There is no indication that one is a revision of the other; no indication of when prepared or by whom; and which one is correct.

Ms. Wallace testified that the Blind Vendors Committee is a group of managers who operate cafeterias in the Randolph-Shepard Program. The Committee is required by the Federal Act and works in conjunction with the state licensing agency which is the Division for Visually Impaired, to develop procedures and policies and general operation of the BEP.

Pages 10 and 10A of Section 3 of State's Exhibit No. 6, a copy of the minutes of a meeting of the Blind Vendors Committee for March 9, 1995, was discussed by Ms. Wallace as regarding accounting procedures, regulations, and the philosophy of the State Licensing Authority regarding the Committee.

This exhibit contains a correction to previous minutes reflecting a statement that when the Open Systems contract package is open and running, Profit & Loss statements shall/must (instead of could) be generated within two weeks.

Pages 11 and 11A are minutes from the Committee from a meeting of February 3, 1995 attended by Dianne Post, Chuck Gebhart, Tom Smith, and Danette McGhee and were referenced by Ms. Wallace as an indication that the Blind Vendors Committee was concerned that bills were not being paid timely by BEP accounting and that they were getting complaints from their vendors about untimely payments, and the possibility existed that deliveries would be cut off if bills were not paid

up to date. It also points out concern with payments being made out of the wrong accounts and describes steps to be taken to correct this accounting error. Ms. Wallace testified that Section 3, Page 12 of State's Exhibit No. 6 evidences a concern by the Blind Vendors that the Campus Garden Cafe had been removed from the normal packet of P&Ls, and they wanted it reinstated as it used to be out of a concern that funds from the Randolph/Shepard locations were being diverted to support the Campus Garden Cafe operations.

Regarding the fourth allegation in the termination letter of February 13, 1996 by Secretary Nazario, Ms. Wallace testified as follows: The allegations were that reconciliations of the Campus Garden accounts payable were not performed; as checks were received by the BEP secretary, they were compared against the billing for the customer. However, if the amount of the check was different, it was never questioned, and the check was simply deposited, and outstanding bills were not followed up with late notices.

Ms. Wallace testified that Page 1, Section 4, of State's Exhibit No. 6 was a copy of a check from St. Anthony's to whom the Campus Garden Cafe provided meals through the Senior Nutrition Program. Pages 2-3-4-5-6-7 represent copies of invoices for which the check (Page 1) was received. The amount paid is less than the amount billed, and there is no reconciliation of the difference between the amount paid and the amount billed. In other instances, St. Anthony's actually overpaid, and in reviewing the invoices, there is, according to Ms. Wallace, no accountability and no indication why St. Anthony's overpaid.

Ms. Wallace testified that there were eight (8) visually impaired individuals employed by the Campus Garden Cafe and fourteen (14) who were sighted for a total of twenty-two (22) employees. For the Summer Feeding Program, there were nine (9) individuals employed who were visually

impaired, and eighty-one (81) sighted for a total of ninety (90), and for the Randolph-Shepard locations, twenty-eight (28) were sighted and eleven (11) were visually impaired for a total of thirty-nine (39).

On cross-examination, Ms. Wallace testified that certain sources of funds had a numerical identification in the state accounting system. 0137 is the general fund appropriation; 1296 is Vocational Rehabilitation grant (Federal funds); 9880 is the special fund account through the state accounting system that the people who work for the BEP are charged to their payroll. The Division for the Visually Impaired pays staff salaries for staff who work for the BEP. The portion paid by the state depends, according to Ms. Wallace, on the particular position and the particular Federal program. Ms. Wallace testified that the Federal portion of salaries under the Randolph-Shepard program depended on what the agency, within Federal guidelines, determined to charge the Federal program. Deborah Wallace testified that State's Exhibit No. 6, Section 1, Page 33 was a chart prepared by Deborah Simpson, the fiscal officer from DVI, for a meeting of the Blind Vendors Committee on February 19, 1996. The chart was prepared after Tom Smith no longer worked for BEP but contains, according to Ms. Wallace, information reflecting salary charges during his tenure. The chart contains a handwritten notation that this money--\$63,045.00--for Fiscal Years 93 through 96 was not reflected on a P&L of BEP. Therefore, according to Ms. Wallace, this expense item was not reflected when the BEP P&Ls were prepared by Senior Accountant Gino Iubatti who was responsible for the preparation of the P&L statements. Ms. Wallace testified that she had no knowledge of who told Mr. Iubatti not to include this expense item on the P&Ls during the time Tom Smith was the Director of BEP.

Ms. Wallace testified that it was discovered that there were some Delaware Industries for the Blind employees who were erroneously on the State payroll, but she did not recall when they were removed from the payroll.

Ms. Wallace testified that she attended a meeting with Secretary Nazario in April of 1995 where there was discussion of the salary funds which were not reflected on the BEP statements. Wallace stated at the time of the meeting the number was a little bit higher than the \$63,045.00 shown on Page 33, because the state was in the process of recording some salaries to take advantage of some Federal funding that was available. Ms. Wallace related that she had told Secretary Nazario that these funds which had been paid from BEP accounts were not reflected on the BEP profit and loss statements. Ms. Wallace stated that her testimony presents inaccurate accounting procedures in the BEP fiscal operations and that checking account reconciliations and check registers are just one piece of that. The registers and reconciliations were performed by Gino Iubatti, the senior accountant. Tom Smith was the supervisor of Iubatti, and according to Wallace, responsible if Iubatti was not doing it properly as a part of Smith's supervisory duties to oversee the BEP operation.

Wallace testified that Iubatti retired on disability and that Dianne Post who was Tom Smith's supervisor, was still employed by the State. Also on cross-examination, Ms. Wallace testified that in 1993 Tom Smith had gotten a 6.2 score on his employee evaluation by his supervisor Dianne Post. The explanatory comments on his evaluation included the observation that vendors' salaries have increased during FY 93 by an average of \$3,000; that meal preparation and distribution tripled in value during recent years; that Mr. Smith is directly responsible for procuring and maintaining all new contracts, all programs continue to flourish with sound planning; that revenues from programs have

increased from approximately \$700,000 to \$3,000,000 in less than four years; and that the next twelve months are projected with an increase to \$4,000,000.

On cross-examination regarding the bank accounts, as of June 27, 1995 as reported by Tom Smith to Dianne Post by memorandum dated June 26, 1995, Ms. Wallace testified that she had no knowledge of how those balances were reported prior to the time Tom Smith came to BEP and did not ask Smith about that when she interviewed him. Ms. Wallace related that she had no knowledge whether or not anyone ever told Tom Smith that these things were problems and should be done in a different way and that such was not part of her investigation. Wallace stated that the purpose of her review had been to look at the fiscal operations and determine if there were any improprieties or inefficiencies related to the fiscal operations.

Ms. Wallace testified that all she knew about Tom Smith having tried to solve the BEP accounting problems was that a CPA audit firm was called in to review the accounting practices. She stated that she had no first hand knowledge but has heard that Tom Smith was responsible for bringing in the Open Systems accounting system to the BEP.

Wallace, on cross-examination, stated that Gino Iubatti had told the Internal Revenue Service that he mistakenly thought that the 941 reporting forms were to be submitted with payments.

Wallace also testified that there were expenditures which were occurring out of accounts which were not properly reflected on the P&L nor were the transfers between the accounts proper or timely. Ms. Wallace testified that she had documentation that Tom Smith had authorized transfers of funds from BEP accounts.

In cross-examination concerning the Summer Feeding Program P&L set out at State's Exhibit No. 6, Section 3, Page 4, Ms. Wallace testified that the P&L was improperly prepared and showed

a loss of \$19,636.72 as net income. The net income figure did not include an account receivable in the amount of \$116,050.60. Ms. Wallace indicated that she was aware that there was approximately \$58,000 transferred to a state account rather than a BEP account on behalf of the Summer Feeding Program by the Department of Public Instruction, and she agreed that if the numbers on the P&L on Page 4 were correct, there would have been a profit for the Summer Feeding Program in 1994 with the addition of the \$58,000.00.

When asked whether or not Tom Smith ever took any funds while at BEP to which he was not entitled, Ms. Wallace testified that on one occasion there was a travel reimbursement which was calculated incorrectly, but as a result of the review, the amount of the overpayment was identified, and Mr. Smith had reimbursed the State for the amount of the overpayment. Wallace testified that from her investigation it did not appear that Tom Smith had misappropriated funds from the Summer Feeding Program and that no one she talked to during her investigation said that Tom Smith had taken any money that did not belong to him. Wallace testified that her investigation was not looking for Tom Smith but rather reviewing the general fiscal practices that were used in the BEP fiscal office.

In response to Board questions, Ms. Wallace reiterated that she is now Acting Director of the BEP and that there was a reorganization of the fiscal staff, and they now report to Deborah Simpson who is the chief fiscal person in the Division of Visually Impaired. She stated that there is a Delaware Code and State Budget and Accounting Manual requirement that receipts before 3:00 P.M. are to be deposited on the date received.

Ms. Wallace reiterated that Senior Accountant Gino Iubatti was the person responsible for maintaining check registers and performing checking account reconciliations and for timely deposits,

for tax return preparation, and filing. Ms. Wallace stated that Thomas Smith, as the Program Director, should have made sure they were done timely. No disciplinary action was taken against Gino Iubatti, and he retired on a disability pension.

Ms. Wallace testified that the Auditor's Office, during their review of the Summer Feeding Program fiscal procedures, determined that there were other inefficiencies relating to BEP fiscal. The Department had not been involved in the accounting at BEP, because the transactions took place in an internal accounting system and did not necessarily go through the Division of Management Services. The BEP maintained a separate internal accounting system entitled "open systems," and those transactions were all handled through the BEP fiscal office. The only transactions that came from that office to the Division of Management Services in the Department of Health and Social Services were those that were for payment related to expenses incurred for the State payroll system. Ms. Wallace stated that in her investigation on two separate occasions she saw checks that were issued but that were put in the safe and held so as to have sufficient funds.

Ms. Wallace, in response to a question by Mr. Butera, responded that she was not aware that the BEP program was audited four times--three times by the state and once by the Federal government prior to her investigation.

Loretta Brasci was sworn and testified as follows: She has been working for the Department of Health and Social Services since July, 1995 and has been doing human resources work since 1989. She investigated a complaint against Gino Iubatti made by Mike Greenfield. Mr Iubatti was perceived to be a difficult employee by many of his co-workers, and some of his inappropriate, abusive, and offensive remarks and comments around the office were racial, ethnic, and were about different religions. Ms. Brasci interviewed Thomas Smith, and he acknowledged that he heard Mr. Iubatti

saying these type of things. She asked Mr. Smith if he had ever instituted disciplinary action against Mr. Iubatti for such actions, and Smith responded that he did not feel that he could. He thought that his hands were tied because Mr. Iubatti had gone over his head to the Division Director on different issues, and the Director has supported Mr. Iubatti. Smith said that he just did not think that he had any influence where Mr. Iubatti was concerned and did not initiate any disciplinary actions.

Ms. Brasci stated that she was not aware of Mr. Iubatti ever having been disciplined. There was a disciplinary action pending when Mr. Iubatti applied for a disability pension, but he was never disciplined.

On cross-examination, Ms. Brasci testified that as a result of her investigation she made a recommendation to the Department that Mr. Iubatti be disciplined. She stated that Mr. Iubatti would go over Mr. Smith's head to his supervisor, Dianne Post. The witness testified that there were issues on which Mr. Smith and Mr. Iubatti disagreed, and Iubatti would go to Dianne Post, and she would direct Mr. Smith to do what Iubatti wanted rather than what Mr. Smith had directed. Mr. Greenfield had complained on the basis of discrimination by Mr. Iubatti against him on the basis that he was Jewish.

According to her investigation, Ms. Brasci did not show that any of the actions taken by Mr. Iubatti were the result of any discrimination on account of Mr. Greenfield being Jewish. What it did show, according to Ms. Brasci, was a lot of very severe, inappropriate, offensive, and abusive language around the issue of race, ethnicity, and other things. She stated that she recommended to Dana Jefferson that there be disciplinary action taken against Iubatti, and she also recommended that there were grounds for disciplinary action to be taken against Mr. Iubatti's supervisors, Dianne Post

and Thomas Smith, based on unsatisfactory performance. Ms. Brasci stated that she never notified Thomas Smith concerning her recommendations and that it was not her responsibility to do so.

Martha Austin was sworn and testified that she is employed by the Division of Management Services as the Personnel Administrator, and included in her responsibilities, she oversees labor relations, the Equal Employment Opportunity function, and the special investigations of the Department of Health and Social Services. Mr. Bergner and Dana Jefferson called her to Mr. Bergner's office in April, 1996 to review some issues which the auditor's office had discovered when it was investigating the Summer Feeding Program.

Ms. Austin testified that employees may only be disciplined for just cause and that prior to a dismissal employees are entitled to a letter listing the charges, and that letter was given pursuant to Merit Rule 15.3 and 15.4 to Mr. Smith on December 15, 1995 by both certified and regular mail. Ms. Austin testified that on December 16, 1995, Mr. Smith received his pre-dismissal letter which offered a pre-decision meeting to provide information why he should not be dismissed or that the penalty was too severe. On December 27, 1995, a pre-decision meeting was requested and was held on February 8, 1996. Mr. Thomas Fritz from the Division of Alcohol and Drug Abuse and Mental Health conducted the meeting for Mr. Gebhart who signed the letter proposing termination. Mr. Gebhart was the acting Director of the Division of Visually Impaired at that time and Mr. Smith's supervisor. Somewhere around February 13th, Mr. Fritz communicated to Martha Austin that his decision was that the dismissal should go forward based on the information he had reviewed from the pre-decision meeting. Austin testified that on February 13, 1996 she prepared the final dismissal letter for signature by Secretary Nazario. The letter was mailed by certified mail to Mr. Smith on February 20, 1996. There was insufficient postage on the letter, and it was not accepted and returned

on the 23rd. The letter was mailed again on the 23rd by first class mail, and Austin testified that she assumed that Mr. Smith received it.

The witness testified that disciplinary letters other than dismissal are signed by various agency officials, supervisors, managers, division directors, as determined by the division director in each division. However, termination letters were required to be signed by the Secretary, and there is no designee for termination letters unless the Secretary is totally away from the agency and an Acting Secretary is appointed. Ms. Austin testified that she had at least two meetings with Secretary Nazario to discuss the findings of the investigation. The meetings lasted close to an hour or longer.

Ms. Austin related that her testimony in these proceedings was to concern the allegations for dismissal of Mr. Smith related to his entry into an oral contract in the amount of \$9,000 for the production of a video to promote the Summer Feeding Program. Ms. Austin testified that the video was never used.

Ms. Austin was also testifying concerning the allegations for termination relating to the purchase by Mr. Smith of cellular telephones for use by Mr. Richard Thornton and Mr. James Sample who were involved in the Summer Feeding Program that was under investigation by the Auditor's office. Neither Thornton nor Sample were employees of the Business Enterprise Program. Ms. Austin stated that there was no legitimate business interest for them to have phones, and when the Business Enterprise Program ended in 1994, Mr. Smith did not take possession of the phones. Additionally, Mr. Smith authorized reimbursement to Mike Greenfield, a Campus Garden employee, for personal calls made from a cellular telephone purchased for his use by Thomas Smith.

Smith also, according to Austin, authorized wage payments to Richard Thornton, an hourly employee, without the benefit of a time sheet to verify the hours worked. Smith, according to Austin,

advanced \$15,000 to James Sample from the \$75,000 loan Smith had obtained without authorization. Austin related that Smith also reimbursed Richard Thornton for \$403.48 for expenses incurred by Thornton and Nancy Ford of the Summer Feeding Program to testify before a congressional subcommittee when the purpose of the trip was unrelated to the Business Enterprise Program.

According to Austin, Smith authorized reimbursement to himself in the amount of \$393.40 to cover expenses for himself, Ford, and Thornton while attending Summer Feeding Program activities in Washington D.C. with no itemized receipts which Ms. Austin could find as required by the Department of Health and Social Services' travel policy. Austin related that her testimony would also address the reimbursement in the amount of \$871.62 authorized by Smith for Thornton, Ford, and himself for expenses in Cincinnati unrelated to the Business Enterprise Program. The total cost of the trip was \$1,971.62, and Smith advanced Thornton \$1,100.00 from petty cash prior to the trip. The items reimbursed included in-room movies, books, a T-shirt, poster, water, and a Kodak camera which Austin contended were unauthorized reimbursement items. According to Austin, the trip was billed to account number 4 but paid from account number 2 which is a general checking account for the Blind Cafeteria Managers and was unrelated to the purpose of the Business Enterprise Program. Smith also authorized reimbursement to Thornton in the amount of \$135.00 for three meals per day for three days while attending a conference in Baltimore at a time when Thornton was not an employee of the Business Enterprise Program. Austin also related that Smith had authorized a petty cash advance to Richard Thornton in the amount of \$1,425.00 to cover expenses for two for a conference in April of 1994, and there was no documentation that the conference was actually attended nor was Thornton an employee of the Business Enterprise Program at the time, and the purpose of the trip was unrelated to the Program.

Austin testified that Smith entered into an oral contract with Mr. Harold Pritchett for the video production. The contract was signed for Thomas Smith without authority from Thomas Smith by Richard Thornton. Harold Pritchett showed up at the Division for the Visually Impaired, gave Mr. Iubatti the contract, and Iubatti issued a \$5,000 check as an advance on the contract. The check was signed by Dianne Post and Gino Iubatti.

Ms. Austin testified that Smith had told her that he purchased cellular telephones for James Sample and for Richard Thornton at the same time he purchased his own cellular telephone. Smith also purchased a cellular telephone for Mike Greenfield, the head of the Campus Garden Cafe. Greenfield made personal calls on the telephone, and Smith authorized reimbursement for such personal telephone calls, including calls from Florida while Mike Greenfield was on vacation, which Austin opined were unlikely to be related to business.

Ms. Austin identified a state exhibit (Exhibit No. 8-11) as a letter of reprimand Mr. Smith received for securing a \$75,000 loan from Delaware Trust Company and thereby encumbering the State.

Ms. Austin testified that in State's Exhibit 6, Section 5 there was documentation that Thomas Smith obtained a \$75,000 loan for start-up costs for the 1994 Summer Feeding Program and advanced a total of \$15,000 thereof to James Sample at the Pyle Center as start-up funds. Exhibit 5-D-3 is an electronic mail to Ms. Austin indicating that there were two checks--one for \$5,000 and the other for \$10,000 to the Pyle Center and identifying the check numbers and who signed them. In the e-mail, Iubatti also stated that he had read the IRS notice incorrectly and that the amount owed was \$34,797.91 of which approximately \$240 was interest and late charges.

Regarding the allegation of reimbursement of Richard Thornton in the amount of \$403.48, Ms. Austin testified that State's Exhibit No. 6, Section 5, Page 5-D-7 is a memo from Thomas Smith to Gino Iubatti directing him to issue a check in that amount from account number 2 and make it payable to Richard Thornton for expenses incurred for Mr. Thornton and Nancy Ford for a trip to Washington, D.C. to testify before a Congressional Subcommittee. Pages 5-D-7 through D-12 are further documentation including receipts.

Regarding the allegation of improperly reimbursing of Tom Smith, Richard Thornton, and Nancy Ford for attending the Summer Feeding Program in Washington, D. C. on February 23, 1994 without providing itemized receipts as required by the Delaware Health and Social Services travel policy, Ms. Austin referred to Exhibit 6, Section 5, Page 5-F, a memo from Tom Smith to Gino Iubatti requesting the issuance of a check from account number 4 in the amount of \$393.40, payable to Thomas Smith, covering expenses incurred while attending the Summer Feeding Program meeting in Washington, D.C. on February 23, 1994 with Nancy Ford and Richard Thornton. 5-F-1, according to Austin, appeared to be American Express receipts that Smith submitted for reimbursement with a handwritten note questioning that it appeared that Smith had paid for all three individuals' train tickets.

Regarding the allegation that Smith authorized reimbursement in the amount of \$871.62 to Richard Thornton and Nancy Ford for the Children's Defense Fund Conference in Cincinnati on March 2-5, 1994, there was an advance of \$1,100.00 for a total trip cost of \$1,971.62, and items reimbursed included in-room movies, books, poster, a T-shirt, water, and a Kodak camera. The trip was charged to account number 4, the Campus Garden Summer Feeding Program, but was paid from account number 2, the general checking account for the blind cafeteria managers. State's Exhibit No.

6, Section 5, Page 5-G is a memo from Smith to Iubatti directing Iubatti to reimburse Thornton in the amount of \$871.62 to be charged to account number 4 and paid from account number 2 for now. Pages 5-G-2 through 10 are receipts submitted for reimbursement.

Martha Austin identified Pages 5-H-1 as a memo from Smith to Iubatti requesting a check issue to Richard Thornton in the amount of \$135.00 from account number 4 covering meals for three days while attending the USDA National Conference on Summer Feeding Program in Baltimore, Maryland. Austin testified that this supported the termination allegation by Secretary Nazario, because Mr. Thornton was not an employee of BEP at the time the expense was incurred.

Concerning the allegation that Thomas Smith improperly authorized a petty cash advance to Richard Thornton in the amount of \$1,425 to cover expenses for two individuals to attend the USDA Regional Nutrition Conference on April, 11-16, 1994, Ms. Austin referenced Pages 5-i-1 through 8 and testified that, in her view, there was no documentation that anyone actually attended the conference and that Thornton was not a BEP employee at the time the expense was incurred and the purpose of the trip was unrelated to the BEP program. Page 5-i-1 is a memo from Smith to Iubatti authorizing payment, and Pages 5-i-3 through 8 is, according to Austin, the only documentation which could be secured for the trip. There are no receipts or meal tickets or hotel room expenses for the trip.

Austin identified State's Exhibit No. 6, Section 7, Page 1 as a Delaware Department of Health and Social Services travel request form submitted by Tom Smith indicating that Smith was aware of and used this document for his own travel. Page 7-4 was described by Austin as the travel expense reimbursement instruction for the budget and accounting policy manual on state-wide travel to which,

according to Austin, is accessible to every manager to determine whether or not travel expenses are appropriate.

Concerning the allegation that Smith condoned the abusive and harassing misbehavior of Iubatti toward Mike Greenfield, Austin identified State's Exhibit No. 10 as a letter she drafted for signature by Dianne Post to Iubatti proposing to suspend him for misconduct. Iubatti received the letter, according to Austin, but never served the suspension because he went out on a disability pension and was not available for his pre-decision meeting and therefore never served his suspension.

Ms. Austin further testified that Thomas Smith's disability pension request was approved to be effective May 1, 1996. Austin testified that employees whose pension requests are approved are advised that they are considered permanently separated from state employment, and so there is no way that if they become well they can come back to their jobs. Rather, they must reapply and go through the regular application process if they become well again. (State's Exhibit No. 12).

On cross-examination, Austin testified that she has never worked with Tom Smith, although she has given him advice on subordinate employee issues. She did not remember asking Smith about the memoranda concerning reimbursements to Richard Thornton. Concerning the production of the video on the Summer Feeding Program, Austin acknowledged that Tom Smith did not sign the contract for the video and that the advance check was signed by Iubatti and Dianne Post. Austin iterated her belief that Mr. Smith was disciplined for this event because he contracted orally for a video for \$9,000 that was produced and never used. Austin acknowledged that Smith's supervisor who signed the check was perhaps wrong but that she still works for DVI and was not disciplined.

Austin agreed that the total of the reimbursed expenses discussed in the discipline letter come to about \$4,200. Austin maintained that it was a lot of money to spend for unnecessary travel for people who were not employed by the Business Enterprise Program.

Concerning the \$75,000 loan from Delaware Trust Company for start-up funds for the Summer Feeding Program, Ms. Austin testified that Smith borrowed the funds because the USDA was late in getting the funding to the Department of Public Instruction. The USDA pays the Department of Public Instruction, and DPI contracts with James Sample of the Pyle Center for the Summer Feeding Program, and the Pyle Center contracted with Mr. Smith as the food service provider. Smith went to the bank, borrowed the money, and advanced Mr. Sample two checks--one for \$5,000 and a check for \$10,000--which Mr. Sample gave to Mr. Thornton and which Thornton used to make a down payment on a house.

Ms. Austin testified that Tom Smith was on disability when he received his dismissal letter. The predisposition hearing for Mr. Smith was scheduled on February 8, 1996 when Smith had been on disability for six months, and he was still on disability when he received the February 13, 1996 dismissal letter from the Secretary. Austin testified that the same thing was not done with Mr. Iubatti, because he continuously avoided coming in to have his predisposition hearing, and according to Austin, he could not be suspended without such a meeting.

Austin, on cross-examination, admitted that she wrote the letter of December 15, 1995 sent to Tom Smith by Charles Gebhart as well as the February 13, 1996 letter sent to Smith by Secretary Nazario.

Martha Austin stated that she did not have any communications with Thomas Smith that any of the issues could cause his dismissal, and she is not aware of anyone else who had such

communication with Mr. Smith. She stated that she began her investigation on April 26, 1995 and completed it in September, 1995, and Tom Smith was out on disability in August of 1995, so she would not have been able to discuss it with him.

According to Martha Austin, Merit Rule No. 16.3 provides that when an employee's work performance is considered unsatisfactory, the performance must be documented in writing and the specific weaknesses must be made known to the employee. The employee shall be given documented assistance to improve by the designated supervisor. An opportunity for re-evaluation will be provided within a period of three to six months. Austin testified that this was not done for Thomas Smith, because in this case the supervisor, Dianne Post, was not aware of the mismanagement and unsatisfactory performance until the auditors came in and found some inconsistencies and asked that they be looked into.

Austin acknowledged that some of the state's exhibits (5-D-5 and 5-D-7) consist of memos from Tom Smith to Dianne Post advising her about some of these things and that in February, 1995 Tom Smith got a letter of reprimand from Dianne Post for the \$75,000.00 loan. Austin further acknowledged that Post had given Smith a 6.2 rating on his personnel evaluation in January of 1994 and observed that this told her (Austin) that Post did not know what was going on but that Post was not disciplined.

Austin could not identify what law or regulation was violated when Smith got the \$75,000.00 loan for the advance on the 1994 Summer Feeding Program.

Austin testified that Smith's position was regraded through a reclassification and increased two pay grades from a paygrade 14 to a paygrade 16. She also stated that she had indirect

knowledge that the sum of \$58,000.00 was paid in June of 1995 from an account receivable and used for payroll, because there was not enough money in BEP to pay the salaries due.

In response to Board questions, Austin testified that Richard Thornton was first employed as an hourly employee making \$12.00 an hour and later was employed by BEP as a contractual employee and paid \$2,000.00 a month. In the summer of 1993, he was the coordinator for the Summer Feeding Program through December, 1993, and in January, 1994, he became a contractual employee until May of 1994. After that, Thornton was employed by James Sample with the Pyle Center Summer Feeding Program. Nancy Ford ran the Summer Feeding Program, and BEP prepared the meals.

Austin stated that there was no evidence that Thomas Smith took money personally, it was just that the paperwork was in such disarray it was hard to pinpoint where all of the money went, but there is no evidence that Smith improperly took any. At the time Smith was dismissed, the BEP was in the red, payrolls were kicking, and bills were not being paid. It is now, under different management, coming out of the red according to Austin. Dianne Post is still employed by the Division but in a position of less responsibility and less pay after a voluntary demotion.

Ms. Austin testified that Mr. Smith's actions in borrowing the \$75,000.00 were improper because, according to Austin, the State of Delaware was responsible for repayment of the loan, and he had encumbered the state although it was his intent to borrow the money for BEP. She stated that state law prohibits it, and the state accounting practices prohibit it.

On redirect examination, Ms. Austin testified that there was nothing in Mr. Smith's job description that provided that he had authority to authorize payments for things that were outside of the state travel policy nor does he have any authority to give out "perks" such as payment for

personal telephone calls for Mike Greenfield or any subcontractor, executive, or employee. Thus, the \$4000.00 or more given in reimbursements and payments was not, according to Austin, a perk that he was able to extend to anyone even though it may appear to be a small price.

Deborah Wallace was recalled and identified a packet of documents given to counsel for Mr. Smith pursuant to his request at the last hearing date. The documents describe transfers authorized by Thomas Smith between various BEP accounts and the parties so stipulated.

Leonard L. Junker, Esquire, was sworn and testified as the Appellant's first witness. Mr. Junker testified that he is a solo legal practitioner in Pennsylvania and Mike Greenfield's brother-in-law. Prior to law school in 1990, Mr. Junker was employed from 1981 as the chief financial officer for a Maternal and Family Health Services, a 501-C nonprofit corporation in northeastern Pennsylvania where he had taken his accounting system, which was a manual system, and integrated and incorporated a computerized accounting system. In addition to his law degree, the witness testified that he has a bachelor of arts degree with an economic concentration and a Masters degree in Business Administration with a concentration in accounting. He testified that at Thomas Smith's request he entered into an agreement with the Division of Visually Impaired in the winter of 1993-94. Mr. Smith had indicated that his financial department seemed disorganized; that the accounting data, at least in terms of income/expense reports was months behind; that he had acquired an accounting package and the only segment that he knew was being used was the payroll portion of it; that he had requested and spoken to Gino Iubatti several times about when it was going to be on line and what the delays were; that he was uncertain of the status of all of it; and was dissatisfied with the situation at that time. Mr. Junker testified that he was originally hired to go in, see what software and hardware they had, and the status of the conversion to the automated accounting package. The

witness related that Tom Smith faxed him a contract which Junker signed and faxed back to Smith. Junker testified that his employment lasted about ten minutes after he arrived in the DVI office. He went in to see Senior Accountant Gino Iubatti and advised him that he had been hired to assist in getting the system on line; to assist him in implementing internal controls that may have been lacking, if any; and to review the accounting system basically from the ground up and to get it current. At this point, Iubatti said that he did not want Junker there and that Mr. Smith had no authority to have him there, and he wanted him out immediately. Junker stated that he tried to explain that he had an agreement and that he was there to assist. Iubatti was belligerent, and ultimately Junker, according to his testimony, left the office in search of Thomas Smith who was not on the grounds at the time.

Mr. Junker testified that after he succeeded in reaching Thomas Smith that Tom said that there was no problem, and he would talk to Dianne Post telling Junker "You are on. You are hired. That's the way it is. We'll talk to Gino and that was it." Later, Smith got back with Junker and indicated that they would have to forget the contract. Mr. Junker described Appellant's Exhibit No. 47,¹ a packet containing the material containing the contract for accounting services between him and the Department of Health and Social Services and a fax page to him from Tom Smith dated June 26, 1994, saying that it is a preliminary copy for review. It carried the signature line for Dianne Post, Director. Junker testified that he recalled signing and faxing the agreement back to Smith. He did not know if Dianne Post had ever signed it.

On cross-examination, Junker stated that he had gone to work without having Ms. Post's signed contract and was eventually paid approximately \$200.00 for travel to Delaware. He was

¹ The Appellant pre-marked exhibits and identified them as "Defendant's Exhibits." Hereafter, they will be referred to as Defendant's Exhibits.

referred to Smith by his brother-in-law, Mike Greenfield. Junker testified that he subsequently represented his brother-in-law concerning a salary dispute with the state.

Michael N. Greenfield was sworn and testified that he is presently the food service manager with the Wood Company at Mary Washington College in Fredericksburg, Virginia and was formerly the manager of the Campus Garden Cafe, a job which he held for four and one-half years. He was responsible for the Campus Garden Cafe and the Summer Feeding Program. He was hired by Thomas Smith who established his compensation package. He has a claim pending against the state for unpaid compensation.

Greenfield testified that he wrote a memorandum to Dianne Post complaining about Gino Iubatti and gave a copy to Tom Smith. (Defendant's Exhibit No. 46). He did not write the memo to Tom Smith because it was his opinion that, with regard to Iubatti, Tom had little control over his actions. That conclusion was based on a number of instances where Greenfield went to Smith for help in regard to the production of profit and loss statements which were very, very far behind and which was a great concern to Tom Smith. Smith had talked to Dianne Post about it on a number of occasions, and it seemed that the harder he pressed, the less Mr. Iubatti did.

Mike Greenfield testified that there was nothing that he observed with Tom Smith that would indicate that he condoned Iubatti's behavior in any respect.

Greenfield testified that the Campus Garden Cafe operated as a cafeteria that was open to the public as well as a commissary to supply meals to senior nutrition programs. That program was expanded to include the Summer Feeding Program as well as several other senior nutrition program clients. The Cafe produced and shipped meals to the Meals on Wheels program 365 days a year to

senior citizen centers. Roughly 1,000 meals were shipped each day and at one point about 12,000 meals were shipped.

Witness Greenfield explained that the Summer Feeding Program's proper name was the "Summer Food Service Program for Children," and it is funded by the United States Department of Agriculture and is administered by various agencies on a state level. In Delaware, the administering agency was the Department of Public Instruction. The purpose of the program was to feed qualified needy children, and essentially it was a continuation of the free school lunch program over the summer months. Greenfield was directly responsible for conceptualizing how to put the program into effect in Delaware and getting the physical plant up and running and then managing the production end of the program. The Pyle Center is a state service center for Kent and Sussex counties that operates under DHSS and contracted with BEP to produce meals for the program which culminated in the production of about 10,000 lunches and about 3,000 breakfasts a day from the third week in June until about the third week in August.

Greenfield testified that the video Tom Smith had produced was used and shown at a regional USDA conference for the Summer Food Service Program that was held in Wilmington and hosted by the Department of Public Instruction with the Mayor and Superintendent Dr. Forgione in attendance.

The witness identified Defendant's Exhibit No. 29 as a Profit and Loss statement which was assumed to be prepared by Gino Iubatti for the period June 19, 1993 to August 21, 1993 showing net income of \$58,000.00 and was a fair representation of what Greenfield understood the program to be in terms of gross sales and profit. There were other revenues for the Campus Garden Cafe from

the approximately 13,000 senior citizens' meals each day in addition to the \$773,000.00 paid from the Pyle Center for the Summer Feeding Program.

Greenfield testified that the Summer Feeding Program did not, to his knowledge, have any responsibility to pay salaries to DVI personnel and that the program did not budget for it. State's Exhibit No. 6, Section 3, Page 4 shows total sales for the Summer Feeding Program are \$922,000.00 and the account includes \$116,000.00 in accounts receivable and does not show any DVI salary deductions. Greenfield stated that he had heard that a portion of the \$116,000.00 receivable, approximately \$58,000.00 had been collected but had never gotten to BEP. Rather, it had been used to cover state payroll. Greenfield agreed that if the entire receivable was included, there would show a profit for the program of \$96,413.00.

Greenfield testified that there were a number of contract employees for the Summer Feeding program, including the Delaware Industries for the Blind run by Mr. Wingrove, and also the Division of Mental Retardation. The majority of these employees were visually or otherwise impaired or retarded. Greenfield testified that he and Tom Smith disagreed over hiring practices. Greenfield was concerned with the higher cost per meal using such employees, but Tom Smith convinced him that it was going to produce well over a hundred jobs in the state for disabled people, and so it was an additional expense that the program could afford even at the expense of the bottom line.

Greenfield stated that it was Tom Smith's goal to train and employ as many visually impaired people as possible. Greenfield stated that there was not a major holiday in 1993 or 1994 that he and Tom Smith were not working. Greenfield came to work about 5:00 A.M. and would be out by 6:00 or 7:00 at night, working five and one-half days a week.

Greenfield stated that he used the cellular phone he was given for business matters and for personal phone calls. It was given to him so that he could be reached when he was going between operations. There was a lot of travel involved, particularly in the second year between the feeding sites downstate and the operation in Wilmington. There were some telephone calls from Florida while on vacation. Some were personal, and others were to Tom Smith's office and to Greenfield's office concerning business.

According to Mike Greenfield, Nancy Ford ran the Summer Feeding Program for the Department of Public Instruction and was the person with whom you had to deal if you were going to prepare meals for the Summer Feeding Program. According to Greenfield, she had control of the money.

Greenfield testified that Richard Thornton began employment with a man by the name of Vernon Grice under a foundation called the Camp Hebron Foundation. During the first year of the program operation, Mr. Grice was put in place by Nancy Ford who hired his organization. Greenfield testified that he and Tom Smith did not think that Grice was needed and told him that money was not budgeted for a consultant for the Summer Feeding Program, but there was money budgeted for a food service director. Nancy Ford, according to Greenfield, became very insistent that Grice be hired, and at the final meeting, she said "You will pretty much hire him." He was hired because Nancy Ford was holding the purse strings and nobody wanted to step on her toes, according to Mike Greenfield. Thornton came along with the Grice employment, and he and Greenfield had an altercation on the occasion of their first meeting. Thornton was a coordinator in basically a public relations-type position to promote the program and increase the number of meals being prepared. Eventually, Thornton was hired on the BEP payroll after Grice's contract was discontinued at, Greenfield

speculated, the strong urging of Nancy Ford to Tom Smith. Greenfield testified that Ford and Thornton were romantically involved and lived together.

Greenfield reviewed Defendant's Exhibit No. 33, a collection of memoranda from him to Alan Wingrove, the Acting Deputy Director of the Division of Visually Impaired at the time, which relate to, among other things, request for payroll expenses and good solid financial information to make bids. Many of the expenses which developed were not budgeted for. Greenfield stated that there could have been a profit of \$119,000.00 from the Campus Garden Cafe, but it does not have that money or so he was told during his last year of employment. He had not received a Profit and Loss Statement for about a year and one-half. He discussed this situation with the acting director, with Gino Iubatti, and with Tom Smith.

Greenfield testified that, from his observations, Tom Smith was not being supported by Chuck Gebhart and Dianne Post, his superiors. There were a number of instances where Greenfield was very frustrated with Iubatti and his department getting the financial information being requested to the point that Greenfield and his staff wound up attempting to capture that type of information on their own and that met with resistance from Iubatti. Greenfield related that Tom Smith explained that every time he really went after Gino about doing something that he should be doing, Gino either got sick or slowed down. In response to the question of why Tom did not fire Gino, Greenfield responded that he did not believe, from what he knew, that Tom was empowered to fire him. Greenfield testified that he knew of a number of times that Tom Smith had talked to Dianne Post about Iubatti. And, in private conversations, Greenfield wondered to Tom Smith "What does this guy have on her?", because somebody who exhibited that degree of incompetence should not have been holding the position he did.

Concerning invoicing problems with St. Anthony's, Greenfield related that the customer was billed for a variety of different meals, and it got to be complicated. There were some meals that might have been categorized incorrectly and sometimes there were shortages. Sometimes the errors were to the program's benefit and sometimes to St. Anthony's, and this generally happened after a customer was scrutinizing the invoice and taking credits.

Greenfield testified that he noticed a change in Tom Smith during the end just before he went out on disability. You could see that the job was wearing on him.

On cross-examination, Greenfield testified that he has a salary dispute with both BEP and the State, and his attorney is dealing with representatives of the Attorney General's Office and that he had outside business relations with Tom Smith. Greenfield stated that he and Smith looked into the possibility of providing a senior nutrition program in New Jersey after it was determined that BEP would not take on additional business. He stated that it seemed to him like Tom Smith had no power over Gino Iubatti. He did not ever recall Gino using abusive language in Tom Smith's presence but that Greenfield had mentioned a couple of instances to him. He stated that when Dianne Post read his memorandum about Iubatti (Defendant's Exhibit 46) her comment was "I don't doubt this is true." Most of the conversations Greenfield had with Smith about Iubatti were in relation to Iubatti's failure to produce information. Greenfield testified that he was not aware that no reconciliations of his accounts receivable were being performed. It was his job to produce the meals, get them to the customers, and try and run the operation at a breakeven point or a profit. As far as the accounts went, most of those functions were performed through the BEP accounting office which was managed by Gino Iubatti.

In response to Board questions, Greenfield stated that with regard to the telephone bills no one ever stipulated one way or the other whether personal calls could be made, and he never recalled Smith questioning him about the use of the phones. He was asked to review the bill and to highlight any personal calls and he did so. He stated that he told the State it could deduct them from his paycheck. They were not deducted.

Alan Wingrove was sworn and testified that he is the General Manager and runs the Delaware Industries for the Blind in the Division for the Visually Impaired. He worked with Tom Smith when Tom was the Director of the BEP. Wingrove stated that his relationship with the people at the Division for the Visually Impaired, specifically Mr. Gebhart, the Deputy Director, and Ms. Post, the Director, had been challenging because they did not have a lot of background and experience in running businesses or running Industries for the Blind.

Wingrove related that he had worked with Tom Smith in selecting the open systems accounting system and that he had almost completely implemented it in his operation. His accountant was very supportive, and that is why the system was implemented.

Wingrove testified that he was at one time responsible for the operations of the Campus Garden Cafe as the Acting Deputy Director of DVI, and Mike Greenfield reported to him. In a memorandum (Defendant's Exhibit No. 33), Greenfield concluded that there was a \$69,000.00 profit. Wingrove testified that he had no knowledge of where the money from the operations went nor if there was any profit. There have been requests for an audit, and according to Mr. Gebhart, it is very difficult to get a clear picture of what occurred during much of this time. One of the expenses Greenfield notes as unanticipated was a fee to cover merit employees' salaries, specifically the employees of DVI who worked for BEP. During the time Tom Smith was at BEP, the program

substantially increased revenue according to Wingrove. Wingrove testified that he did not know during his tenure as Acting Director that check reconciliations were not being done and that check registers were not being maintained, nor was he aware that account reconciliations were not being done and was not aware that checks were being written without sufficient funds in the account. Wingrove stated that he did not think that he had the authority to borrow money from a private financial institution and encumber the State of Delaware.

Wingrove stated that the installation of the open system accounting system was something that his accountant wanted to do. Wingrove had talked to Tom Smith about the accounting problems Smith was having and indicated that Tom felt a lot of frustration that his accounting person was not as cooperative as Wingrove's accountant. Wingrove stated that he was not aware of anyone as a state employee who has been dismissed without being told of the problems before hand and given a chance to correct them.

Jackie R. Turner was sworn and testified that he is the BEP manager of the Carvel Room, the cafeteria on the second floor of the Carvel State Office Building in Wilmington, and the former Chairman of the Blind Vendors Committee. The Blind Vendors Committee is elected by the BEP managers and is charged with the responsibility of policy making, receiving grievances, and all things to do with the operation of the BEP in the State of Delaware. He interacted with Tom Smith concerning pretty much everything that had to do with BEP during Smith's tenure as Director. Tom Smith and other people from DVI would be in attendance at the meetings of the Blind Vendors Committee where the discussions included the accounting problems of BEP.

Mr. Turner testified that there have been accounting problems in BEP since 1968 and possibly even earlier. Solutions for the problems have been worked on with Ms. Post, with Chuck Gebhart,

and Tom Smith proposed certain solutions but none ever were implemented. The main problem was timeliness. Turner stated that he met several times with Gino Iubatti and Tom Smith concerning mistakes regarding Turner's facility and other locations. Mr. Turner testified that he was aware that Tom Smith had purchased the open systems accounting system and that he had discussed it with Smith several times. He stated that the system was not implemented for the same reason that a lot of things did not take place in terms of accounting and that was the fact that Gino Iubatti refused to use it. Iubatti was there before Dianne Post and Tom Smith and almost everyone else at BEP, and it was his attitude that he knew what he was doing and you could not tell him and that was sort of accepted behavior from him by his superiors.

Mr. Turner related one incident when he met with Gino and Tom Smith concerning some mistakes with the account at his facility. Turner had a proposal to remedy the situation with which Tom Smith agreed and Gino got real upset about it and said that he was not going to do it. He didn't care what Tom or anybody said and was upset with Turner for exposing a weakness in his system. At that time, Tom Smith issued him a directive in front of everyone telling Iubatti what he wanted done and for whatever reason it fell apart and never happened.

Mr. Turner stated that the position of the Blind Vendors Committee was that it was improper for the State Licensing Authority, in this case the DVI, to transfer or use funds from account number 1, the set-a-side account, for state employees' salaries and that it was improper that the practice was never reported on the Profit and Loss statements, and the matter was never discussed with the Blind Vendors Committee.

Mr. Turner testified that his employment with BEP did not subject him to the State Code of Ethics and that he is exempt from other State requirements such as bidding. His is an independent

business with an entrepreneurial spirit. This independence was something that Thomas Smith encouraged. Delaware is the only state, according to Turner, where the Randolph-Shepard programs do not operate totally independent including accounting. Turner indicated that he was unaware of anything that Tom Smith did that would have jeopardized the income of any blind vendor. Turner heard about the taxes and other things during the hearing, but the Blind Vendors were never officially apprised of why Tom Smith was dismissed. There were accounting problems, but there has always been accounting problems at BEP, according to Turner.

Mr. Turner stated that there was absolutely, positively, no possibility that Dianne Post and Chuck Gebhart, during the time Tom Smith was program Director, did not know about what was going on with respect to the fiscal operations and accounting problems at BEP, because they both attended managers' meetings, and those problems were discussed in such meetings, and Turner in his capacity as Committee Chairman discussed the problems one-on-one with Ms. Post several times.

Mr. Turner was not aware of either Post or Gebhart ever indicating that Tom Smith's performance was less than expected. Dianne Post was always very supportive of Tom Smith. She became Director in 1990 or 1991, and according to Turner, there were already accounting problems at BEP, and those problems still exist. At one time, there was an attempt to have an outside audit, but Turner testified that never took place because he was informed that the Delaware Code would not allow an outside audit. However, it was now his understanding that an outside audit might be possible provided the State has a hand in developing the scope of it.

Concerning the \$116,000.00 receivable from the Campus Garden Cafe, Turner stated that he has heard that \$58,000.00 was paid and that Wayne Bergner seized it for the DVI payroll and that

the other \$58,000.00 was being held up due to the audit of the program. Turner testified that none of the members of the Blind Vendors Committee were interviewed before Tom Smith's dismissal.

On cross-examination, Turner testified that he did not agree that the Blind Vendors Committee was required to get its legal advice from the State Licensing Agency or its Attorney General Office. Turner disputed the propriety of any transfer of money for payroll kickers, and if the Federal liaison for the SLA has approved it, Turner would like to challenge it under the grievance procedures or the arbitration process. He stated that the Blind Vendors Committee had not been consulted or told about the transfers, and it was about a month ago that he was first told that Mr. Biechner of the RSA had approved the transfer.

In response to Board members questions, Turner related that he is assessed a percentage of his profit which goes into account number 1 which is referred to as the set-aside. Each blind vendor in the State is assessed a certain percentage of his or her profits for the set-aside, and it ranges from 10 to 20 percent based on the level of profitability. Turner testified that he is not a State employee, except for pension purposes.

Mr. Turner testified that he prepares the necessary reports and sends them in to the SLA, and it sends him a bill for the payroll costs and then he sends them a check to cover it since the SLA processes his payroll, and the employees are paid on a state check, although they are not state employees, except for pension purposes. Turner stated that the lack of timeliness in getting P&L reports did not hurt him, because he always knows how much he has in the bank, how much he can spend, etc., so personally he did not need the P&L prepared by the SLA, but it was a requirement. He testified that there were vendors who did depend on the SLA to tell them how much their pay would be and so the accuracy and timeliness of the P&Ls were important.

Turner stated that Tom Smith had instituted a weekly reporting form which Turner took back to the Committee as Committee Chairman. There are four different sheets that are submitted weekly. The vendors got together and reviewed and adopted Tom Smith's proposal with some slight changes.

Lloyd Schmitz was sworn and testified that he is a licensed vendor for the Division of the Visually Impaired Business Enterprise Program and operates the facility at the Wilmington Court House. He has been in the program for six years. He was a licensed vendor for the 1974-75 period, left, and returned in 1991. He is the current Chairman of the Blind Vendors Committee. The first time he heard that money was being taken out of the program for state salaries was in May of 1996. Mr. Gebhart was representing the SLA at one of the Blind Vendors Committee meetings and enlightened them that there were transfers made for salaries. There was, according to Schmitz, no documentation in the P&Ls that were generated by the agency. Schmitz stated that he did not know of any individual vendor whose financial interest was jeopardized because of something done by Tom Smith, but that as a program, it is not on the best of footings in that it does not have sufficient funds to fulfill its obligations because the funds were dispersed and spent on expenditures that the vendors did not know about and which were not recorded in the P&Ls.

Schmitz described BEP account number 2 as a zero balance account. There are ten cafeterias depositing daily receipts into a bank account number 2. All of the vendors that provide their services and products for the various locations submit bills, and the employees from the various facilities have to be paid, and after all of these disbursements from the account, you have a profit from each location. A set-aside assessment is then made, and the remaining funds are the proceeds from the locations which, at that point, are the managers' salaries.

According to Schmitz, the accounting problems was a topic in nine out of ten of the Blind Vendor Committee meetings at which Dianne Post, Chuck Gebhart, and others from DVI attended. In the last four years, there have been 14 to 16 such meetings.

When asked if Tom Smith did anything to impair the success of the BEP program, Schmitz testified that, to him, it appeared just the opposite. Schmitz stated that he was not comfortable with the P&Ls that Mr. Iubatti was preparing, and there was a less than favorable response in going over all of the numbers with Iubatti. At that point, Schmitz and Tom Smith began discussions and implemented Schmitz's independence from the fiscal accounting department and began taking care of his own accounting needs and opened his own business account. Tom Smith encouraged vendor independence and, according to Schmitz, did not have any active control over Gino Iubatti.

Thomas D. Smith was sworn and testified that he will be 53 years old on December 31, 1996 and is currently unemployed. He is a graduate of Claymont High School and does not have a college degree. Prior to employment as the Director of the BEP for the Division for the Visually Impaired, he was a multi-unit manager in the Tampa District for Pizza Hut with responsibility for as many as eight locations at a time. He was manager of the year in the Southeast Region in 1986 and transferred to Philadelphia to open a delivery market in 1988. He came to Delaware in 1989. He has no formal background in accounting but has practical background in the use of accounting principles and their application to the food service business.

Smith testified that he took a reduction in pay and forfeited a \$10,000 bonus to take the job with the Division of Visually Impaired. He felt good about the social end of the program and believed that he could help the managers. It seemed like a good thing to do. He saw his mission as helping

the managers increase their wages and to create new jobs for blind individuals and independence throughout the program. He worked at BEP from March, 1989 through August, 1995.

Smith testified that BEP is an umbrella under the Randolph-Shepard Program, and the funding for the operations comes from the businesses. No state or federal money goes into the running of the businesses. The only state or federal money that goes in is for BEP agency salaries--the people hired by DVI to work for BEP. The BEP employees, according to Thomas Smith, were Smith; his secretary, Jean Jackson; Gino Iubatti, the senior accountant; Yoko Taylor, his clerk; and his deputy, Steve Milman.

Smith related that when he was employed his director was Robert Snyder. Smith stated he was told by Snyder that his salary was paid 80% by the federal government and 20% by the state government. Smith testified that, as far as he knew, never changed, and all BEP salaries were paid on the same basis.

The witness identified Defendant's Exhibit 45 as a chart depicting the main four accounts for the BEP. Account number 1 is the set-aside that is assessed to the blind vendors as a percentage of their profits. Account number 2 is the general checking account and is strictly to pay bills. If there is no separate accounting, then the revenues from the cafeterias comes into this account, and all bills are paid from this account number 2. Account number 3 is the unassigned vending income account which is made up of profits from the vending machines in any building where there is not a manager. Also any profits from anything else that is not run by a blind manager would go into account number 3. Account number 4 is a checking account for the Campus Garden and Summer Feeding Program and was set up to show the difference between account number 2 and account number 4 as far as running those businesses. Before 1994, revenues from the Summer Feeding Program and the Campus

Garden Cafe would go into account number 2, and if there was a profit, it would have, according to Smith, gone into account number 3.

Smith identified Defendant's Exhibit No. 31 as a memo from the former head of the Department of Health and Social Services and provided, among other things, that account number 3 could not be used for salaries.

Smith testified that under the federal regulations governing the use of set-aside funds there was a limit to five (5) purposes for which such funds could be used, including Management Services. The same limitations apply under the state regulations for the program. According to Smith, the regulations also provide that the Blind Vendors Committee is supposed to actively participate in the decisions that are made with respect to their money. The federal regulations also provide that the operations are expected to provide maximum employment opportunities to blind vendors to the greatest extent possible. The federal guidelines also provide a definition of "Management Services" which is defined to mean supervision, inspection, quality control, consultation, accounting, regulating, in-service training, and other related services provided on a systematic basis to support and improve vending facilities operated by blind vendors. (See 34 CFR § 395.1(j)).

Smith testified that there was nothing in the state regulations of which he was aware that says you can use money from set-asides for salaries, and as far as he knew during his tenure at BEP, those funds were not to be used to pay salaries. Smith further testified that the members of the Blind Vendors Committee were not aware that BEP funds were being used for the payment of salaries of the DVI employees.

Defendant's Exhibit No. 2 was identified by Smith as his evaluation for 1993 by his supervisor, Dianne Post, where she refers to revenues from the program increasing from \$700,000.00 to Three

Million Dollars in less than four years with the next twelve months projected with an increase to Four Million Dollars.

Mr. Smith related that he refurbished and opened several facilities in addition to the Summer Feeding Program during his tenure at BEP, and during that time, his staff did not increase.

During the course of the State's investigation, he was interviewed by Martha Austin and by Deborah Wallace, and according to Smith, he answered all of their questions, never refused to answer their questions, and was not represented by counsel.

The appellant testified that he worked 60 to 70, and maybe 80 hours in some weeks, and received no additional stipend for doing it. He liked his job. He was doing good, and it was good for the blind people involved in the program, and the people that received the meals were the elderly and children.

Smith testified that at BEP he was responsible for the supervision of staff, compliance with federal and state regulations, and implementing and following generally accepted business practices. When he arrived at BEP in 1989, according to Smith, they were literally doing accounts by hand, ledger sheets, writing them out in pencil, and writing checks by hand. The first thing he did was look for an accounting system where they could automate particularly the accounts payable area which was a big problem at the time. They were doing all of the compilation by hand and then using Lotus on their PCs to generate profit and loss statements. Smith stated that an accounting package would handle everything they needed to do and in turn, instead of running quarterly profit and loss statements, they could be done faster. The system he initialized was called "Open Systems," and although all modes were not initialized, the accounts payable was put on and then payroll, and they were able to cut the production of the P&Ls to a two month period rather than three month period.

Smith testified that he selected three accounting packages and then Robert Snyder, Allen Wingrove, Gino Iubatti and Smith decided on Open Systems.

The system was not fully implemented according to Smith, because they kept increasing business and that was a problem for accounting, and the accountant hesitated in initializing all of the different modules in the accounting package. Gino Iubatti was the senior accountant, and he had a clerk, and at the end of 1993, he brought a temporary employee in to help him get some things caught up.

Smith stated that he asked Leonard Junker to assist in the accounting section, because the work in accounting was like a balloon--it was fully blown up, it couldn't go any further. In 1993 when the Summer Feeding Program came in, accounting needed more help and needed to get the system on board which would help speed up the accounting, and Leonard Junker had the knowledge to do this. Smith testified that he saw this as a unique opportunity to hire a guy just going into his law practice for \$12.00 an hour to come for six months and help them get caught up and on the right track. Junker was to help Iubatti utilize the Open Systems accounting package, and he was thrown out in ten minutes by Iubatti. Smith testified that he went to Gino Iubatti and was told that he could not work with Mr. Junker. Smith went to Dianne Post, and she said that because Junker was Mike Greenfield's brother-in-law that it would not be a good idea to use him. Smith stated that he and Dianne Post and Chuck Gebhart talked then about having a CPA come in. Smith stated that through a contact of his with the Lions Club, Mr. Cook and Mr. Sarnecki came in during July, 1994, did an inspection, and generated a report (Defendant's Exhibit No. 3) in September, 1994. Smith stated that he, Dianne Post, and Chuck Gebhart discussed the report thoroughly.

Gino Iubatti had, according to Smith, been working for the State for 22 years in 1989 when Smith began with BEP, and he continued to do things the way he had before with the addition of the BEP payroll and accounts receivable on the Open Systems accounting package.

Smith stated that the information he got to put on his monthly report to Dianne Post in the form of bank balances came from either Gino Iubatti or Jean Jackson, and they did it in the same way they had always done. They would not give the information to him. The numbers were a changing variable each day. Gino would do the numbers, give them to Jean Jackson, and she would type them on the bottom of Smith's report, and there was no intent by Smith to misrepresent a number to Dianne Post, and no one complained about the way it was being done during his tenure at BEP. Smith testified that he understood that the Open Systems accounting package reconciled checking accounts and did all the things that were being done by hand.

By letter dated November 10, 1994 addressed to Thomas Smith, the Certified Public Accounting Firm of Daney, Cannon, Truitt & Sarnecki, P.A. offered to make the Open Systems integrated accounting package operational for \$2,800.00. (Defendant's Exhibit No. 3). Smith testified that he discussed this letter with the Director Post, and it was her reaction that they could not afford \$2,800.00 to bring this firm in to do this. Smith stated that he responded that they could not afford not to do it. This was in 1994, and the approximate gross revenues of the BEP were Three Million Dollars having just finished the Summer Feeding Program for 1994.

Smith described Defendant's Exhibit No. 49 as an example of the mini-profit and loss statement that he established with the BEP managers which sets up a weekly history. With this information, the managers could make adjustments at the end of a period as to what they would buy and determine their profits. This form was worked out with Mr. Jackie Turner and then established

among the other managers. When Smith went to BEP, the average manager was making \$15,000 a year, and according to Smith, that jumped to an average of \$23,000 in 1992 and did not decline during his tenure at BEP.

Smith testified that he did not negatively affect the credibility of the program or jeopardize the financial security of the blind cafeteria managers and at no time did anyone, including the Blind Vendors Committee and Martha Austin, ever complain about his jeopardizing the financial security of the blind cafeteria managers.

Smith testified that the quarterly federal taxes were not paid because of an accounts receivable problem. The Summer Feeding Program owed BEP over \$116,000.00 for about ten months before it started to pay it back. With this amount not in your checkbook, there were a few things that were late, and the taxes were one of them. Defendant's Exhibit No. 50 was described as a letter from Dianne Post to James Sample at the Pyle Center requesting the \$116,000.00 balance that was owed to BEP. Smith stated that to his knowledge the reason this was not paid was the ongoing audit of the Summer Feeding Program by state auditors and the Department of Public Instruction withheld the payment to the Pyle Center pending the completion of the audit. Defendant's Exhibit No. 6, a letter from Dianne Post to the Internal Revenue Service, explains that the Division for the Visually Impaired Business Enterprise Program of the State of Delaware operates a non-profit business, employing visually impaired and citizens with other disabilities along with sighted individuals in preparation of food for children during the summer and senior citizens for the entire year. The letter explains that the primary customer has been involved in an audit, and this has delayed the payment of contractual fees and has resulted in the inability of the BEP to pay 1994 withholding taxes in a

timely manner and advising that BEP will not be able to pay such taxes until July 30, 1995. The letter requests an abatement of penalties and interest due to the non-profit status.

Smith stated that no one at DVI believed the BEP would have to pay federal or state corporate income taxes because of its non-profit operation. The same was true for unemployment tax and the franchise tax. This was discussed with Mr. Gebhart and Ms. Post, and everybody, according to Smith, knew it since it was brought up through the accountant.

Smith testified that DVI consistently started adding expenses to the program in 1993. Smith related that he prepared budgets on estimated sales and added in expense lines. He gave the example of DVI having promised him that it would pay for gasoline and then, all of a sudden, after the budget had been prepared, he had to face an expense of \$800.00 a month in gasoline charges that was not in the budget. Another incident occurred when he had to pay for a new roof which, according to Smith, he was not supposed to do but DVI said he had to. He had to pay for a heating system, again according to Smith, against the regulations, but he had to do it. To deal with these situations, Smith would skimp and when people would leave they would not be replaced. He started working with eleven blind people working, and now it is down to six. According to Smith, this went against the BEP mission to employ blind people.

Smith testified that he understood the situation to be that Director Post had gotten herself into financial difficulties, and the way out was to save money anywhere she could. It was her responsibility to pay for these things, and she and Chuck Gebhart couldn't do it.

According to Smith, the Summer Feeding Program was very profitable, but the Campus Garden Cafe was never set up to be a profit-oriented type of program. It was a program set up to employ blind people, and if there was money left over from the Summer Feeding Program according

to Smith, he would use it to help the Campus Garden Cafe. He stated that if the Summer Feeding Program is included in the Campus Garden Cafe's operations there would have been a profit reflected in all of its operations. In response to the question of why, if the programs were all profitable, was BEP without the money to pay its bills including the quarterly taxes, Smith replied that in addition to the \$116,000.00 receivable there was money being drawn out of the BEP without his knowledge. People over the top of him were coming in and pulling money out. The withdrawals never appeared on any of the Profit and Loss statements according to Smith, and no one ever told him that there was money being taken away from BEP for anything that was not listed on the Profit and Loss statements.

Concerning the differences between the bills and the payments from St Anthony's, Smith explained that the bills would go out before the credits would be taken by the customers and that Mike Greenfield and Ellie Pikowski at St. Anthony's would talk and decide where the credits were and where more money needed to be paid. There were items such as a shortage of milk and other shortages or overages. Smith stated that he felt the reconciliation was what occurred when Greenfield and Pikowski got together and came to an understanding.

According to Smith, approximately 30% of his time was in the DVI office with Dianne Post, Mr. Gebhart, and Gino Iubatti with the other 70% being spent in operations out of the office.

Delaware, according to Smith, is the only state in the nation where the State pays the bills for the vendors. Smith asserted that the reason why this state is still involved is that it's stealing money from the blind.

Smith, on direct examination, testified that he ordered a video produced to market the BEP. The video showed everything that BEP did and so it could be used to market Cafeterias, Summer Feeding, and Senior Nutrition Programs. Smith disputed Martha Austin's statement that the video

had never been used and stated that it was shown at two USDA meetings. It was also shown to the Mayor of the City of Wilmington and to the New Castle County Executive in an attempt to get their summer feeding business since the Pyle Center only included Kent and Sussex Counties. He stated that Dianne Post never objected to the video, and she signed the advance check to Mr. Pritchett along with Gino Iubatti.

Regarding the issue of the purchase of the cellular telephones, Smith testified that Mike Greenfield and Mr. Sample got cellular telephones. Sample got two phones and one of them was given to Richard Thornton. According to Smith, the phones were used for business purposes and were to increase the efficiency of the Summer Feeding Program. Smith identified as Defendant's Exhibit No. 9, a memo from him to Dianne Post, which indicated that he expected full reimbursement or return of the phones from the Pyle Center at the conclusion of the Summer Feeding Program. Smith testified that to his knowledge, the two phones were never returned nor paid for. He stated he asked Dianne Post what he should do about that situation, and she told him not to bother with it. The phones were, according to Smith, used in the business of the Summer Feeding Program.

As to the reimbursement of Mike Greenfield for personal telephone calls, Smith testified that it was not state money involved, it was business money, and Greenfield was given the phone because he was working 70-90 hours a week, and it was an easy way for him to stay in communication with whoever he needed to be in communication with. While on vacation, Greenfield would call to talk about business. Calls came in to Smith's home telephone number and to his office number from Greenfield while he was on vacation.

Concerning the allegations surrounding the \$75,000.00 loan which was obtained without authority for the start-up costs of the 1994 Summer Feeding Program, Smith related that he discussed

with Dianne Post the fact that the Summer Feeding rules and regulations allowed you to borrow money. The Department of Public Instruction wrote a letter of credit to use at the bank stating that the money would be repaid. Delaware Trust set up a line of credit for \$75,000.00. and he did not just get a check for \$75,000.00. Smith testified that most of the money went to the rental of the plant used on South Market Street for the Summer Feeding Program.

Normally, the money for the Summer Feeding program comes in advance from the federal government through the Delaware Department of Public Instruction. The money from the federal government was late. The Department of Public Instruction gave DVI a letter of credit, and Delaware Trust opened the line of credit. The loan closing was held in Smith's office in front of everyone. Gino Iubatti was present. The loan was repaid, and if the loan had not been made, according to Smith, there would not have been a 1994 Summer Feeding Program, and 556,000 meals would not have been served to needy children in Kent and Sussex Counties.

Smith identified Defendant's Exhibit No. 13 as the letter of reprimand he had received from Dianne Post on February 22, 1995 regarding the loan. The letter was a written reprimand for securing the loan and provides a comprehensive explanation of the background and purpose of the loan and explains that Smith had received the assurances of the Director of the Summer Food Service Program that he had the legal authority under the federal guidelines for the Summer Feeding Program to secure the loan.

The loan was repaid by July, 1994, and the reprimand goes on to note that the auditors' written report does not allege any ethical or criminal issues surrounding the loan. However, they did recommend that DHSS prohibit DVI or BEP from obtaining loans in the future.

In discussing the allegations of impropriety in reimbursing himself, Nancy Ford, and Richard Thornton, Thomas Smith testified that he was marketing the Summer Feeding Program and trying to get the word out about what BEP was doing. Smith testified that he did not look at the bills for reimbursement completely. Rather, he looked at the bottom line in much the same way he did with the phone bills; if they looked reasonable, then he passed them on to the accountant. It was his job to check them out.

Smith testified that Richard Thornton was convicted of a crime in relation to the Summer Feeding Program and that Smith was a witness for the State at his trial. Smith testified that he hired Thornton because of Nancy Ford's suggestion that he would be a good person for outreach. Smith stated that he discussed the matter with his supervisor, Dianne Post, and she said hire him. Smith related that he, along with Mike Greenfield, felt that the Summer Feeding Program depended on his hiring Thornton. Thornton, according to Smith, also did public relations work for the BEP program and was pretty good at what he did but that he would not have hired him if Nancy Ford hadn't said that he should hire him.

Concerning the allegation that Gino Iubatti discriminated against Mike Greenfield on the basis that he was Jewish and that Smith condoned Iubatti's behavior, Thomas Smith testified that he did not condone any such actions by Iubatti and was confused about how he could have condoned something when he was advising Mr. Greenfield of the steps to take to have his allegations investigated. He advised Greenfield to go to Dianne Post, the head of the Agency, with a letter. She received the letter and turned it over to Chuck Gebhart who, according to Smith, found that there wasn't any evidence to support Mike Greenfield's complaint. Smith testified that Mike Greenfield was

not satisfied with the response, and so Smith advised him to take it to Loretta Brase, the Equal Employment Opportunity (EEO) officer for the Department.

Smith testified that Iubatti was a difficult employee but that the quality of the work he did was fine. However, the quantity needed desperately to be improved and that was what they were trying to do by putting in the Open Systems accounting package and by hiring accounting people such as Mr. Sarnecki. Smith testified that if the Open Systems accounting system had been implemented within the six weeks and for the \$2,800.00 Mr. Sarnecki proposed that it would have been on line and running and none of the fiscal arguments could have been made.

Smith testified that at no time did anyone ever tell him that his work was unsatisfactory or negligent. He is presently taking medication for depression and high blood pressure. In July or June of 1995, his blood pressure problems were out of control, and he was visiting a psychiatrist for depression. Smith testified that his disability was work-related, since he was under two Attorney General investigations, one investigation from Martha Austin pointing fingers at him, and the guy who was his boss, Chuck Gebhart, telling him that he did not care about his clients and screaming at Smith in front of employees.

Smith testified that he received pay increases from the State after all of the events he was accused of by the Secretary in her dismissal letter had occurred and, effective January 1, 1994, was given a job reclassification from a paygrade 14 to a paygrade 16. There was justification submitted for such an increase, and Smith testified that he was told by Dianne Post and Chuck Gebhart that he was getting a salary increase for exceptional merit.

On the documentation for the salary increase from paygrade 14 to 16 (Defendant's Exhibit No. 14, page 132) the funding information reflects that 13% of Smith's salary was coming from the BEP

funding code (9880). On the same exhibit (page 131) which is another change report it shows that 37% of Smith's salary as being attributed to the BEP 9880 code. Smith testified that he was never aware that portions of his salary were being funded by the BEP and at no time while he worked for BEP was he aware that there was a deduction for BEP salaries or administrative expenses.

Excluding the letter of reprimand for the \$75,000.00 loan, Smith testified that he was never presented with any of the items in the dismissal letter as being specific weaknesses, and he was never given an opportunity to correct the alleged reasons for the dismissal. He stated that in accordance with his job description he did have knowledge of accounting principles, practices, and procedures before he came to BEP and that he did oversee the senior accountant to make sure the P&Ls were done. He brought in Mr. Sarnecki and Leonard Junker and instituted the Open Systems Accounting system all in fulfillment of his responsibilities, but none of the things he did were implemented.

Smith testified that, to his knowledge, the notation on Defendant's Exhibit No. 23, his Employee Performance Planning and Appraisal (EPPA) for 1992 relating to the Program having assumed 8% of his salary, was not on the form when he was evaluated, and he had never seen that entry before these hearings.

Smith related that he had never heard about Dianne Post being demoted and read her letter (Defendant's Exhibit No. 32) when she left her position as Director of DVI.

Smith also presented letters of commendation for the work of BEP from the New Castle County Department of Parks and Recreation and from St. Anthony's; several other awards including a plaque he received in November, 1993 from Secretary Nazario called the "Management Extraordinaire Award;" and an August 19, 1994 Memorandum from Secretary Narzario of an item included in the weekly report to the Governor expressing kudos to Tom Smith, Mike Greenfield, and

the entire Summer Food Program staff for outstanding performance in providing more than 500,000 meals to Delaware's children in Kent and Sussex Counties.

Smith testified that around Thanksgiving, 1994, he was told by Diane Smith that the auditors were auditing the Summer Feeding Program and the rest of BEP, and Dianne Post felt that there should be no more new business to come into the BEP until the accounting problems were straightened out. Smith testified that Dianne Post had told him that Wayne Bergner had transferred the one-half of the \$116,000.00 receivable or \$58,000.00 to account 9880. Smith stated that Bergner should not have had such control over the BEP funds. Smith testified that he did not know what has happened to the Summer Feeding Program after 1995 and that no one has ever accused him directly or indirectly of taking any money that did not belong to him.

Regarding the \$75,000.00 loan, Smith stated that he needed the money for his organization but before taking out the loan he spoke to the Pyle Center, Summer Feeding, Department of Public Instruction. BEP, instead of taking out two loans, took out one loan, and he advanced the money to the Pyle Center. Smith stated that he did not know what the Pyle Center was going to do with the money, and he did not care.

Smith acknowledged that he had previously testified that he had advanced the money to the Pyle Center and that it had forwarded the money to Mr. Thornton as an advance to him.

Mr. Smith stated that he was aware that Alan Wingrove at Delaware Industries for the Blind had the Open Systems accounting package in operation but that the problem was with the BEP accounting section which was doing three to four times as much business as DIB. Smith stated that BEP needed outside help to come in and get the accounting on the Open Systems program, but they also needed outside people to come in and help with the work and what they really needed was

someone with more knowledge than Gino Iubatti. Smith noted that Ms. Wallace did her checkbook reconciliations in one way, and Gino Iubatti did checkbook reconciliations for 29 years in another way, but he also acknowledged that part of the problem was that the reconciliations were not getting done.

Smith stated that he did not see it as impossible to adhere to the mission statement of the BEP and comply with his job description. He also testified that the entry on his EPPA concerning the assumption of partial funding of salaries by BEP effective on October 1, 1992, was not on the EPPA when he signed it on December 14, 1992. He did remember the comments on that EPPA where he was being complemented for his performance during a period of massive planned expansion, but according to his testimony, he was not aware of money being taken out for salaries.

Smith acknowledged that a part of his job description required that he was responsible for budget development and monitoring of expenditures and overseeing accounting staff who prepare profit and loss statements for each location. Smith stated that he met with Gino Iubatti, and they would discuss the accounting on a day-to-day basis. As to the preparation of the profit and loss statements, Gino Iubatti would prepare them and present them to Smith who would read them and then they would be sent out. Occasionally, according to Smith, he would question the numbers. Smith also acknowledged that it was a part of the job description of Director of BEP that he was to review and analyze revenues and expenditures, inspection and manager evaluation, determine and report operating problems and provide technical assistance to insure compliance with state and federal regulations as well as to maintain profitability of all operations. As to taxes, Smith stated that when the money was available the taxes were paid. He also stated that he independently decided to pick up the expense for Mike Greenfield's personal telephone calls. He did not ask Dianne Post about

something that minute and indicated that the expense was about a \$100 a month according to his recollection and was a cheap way to get away with providing Mike Greenfield with a phone for the job that he did. He did not contact the State Personnel Office or the Deputy Attorney General to determine if he had the authority to give perks to his staff. Smith testified that if they were low on money and had bills to pay then they would hold the bills until the money came in, and sometimes checks were cut and put with the bills and then put into the safe pending receipt of sufficient funds to pay the bills. Smith said he had seen it done many times.

Smith stated that Dianne Post did know about the \$75,000.00 loan before he got it, but she did not know the exact date he got the loan.

In response to Board questions, Mr. Smith stated that he supervised Gino Iubatti for six and one-half years and his evaluations of him were above standard, but eventually he began to have problems with him. There was too much work, and when Smith tried to get him help, he would combat it. The last evaluation he did for Iubatti was in 1993, and all of the stuff began exploding around 1994. The work just got to be too much for Iubatti. As to the letter of credit for the \$75,000.00 loan, Nancy Ford, the state coordinator of the Summer Feeding Program for the Department of Public Instruction, gave him the letter of credit. Smith, Nancy Ford, and James Sample agreed on the loans, and Smith acknowledged that he did not put in writing to his supervisor, Dianne Post, that he was going to solicit the money. He took the letter of credit, and the bank issued him the loan. Of the loan, \$15,000.00 was advanced to the Pyle Center, and the balance, according to Smith, went for the start-up by BEP of the Summer Feeding Program, including the Designer Foods facility and buying food. When he stated that he did not care what the Pyle Center did with the money, Smith clarified that what he meant was that a portion of the loan was determined in advance

to be for the Pyle Center, and so there was not a need for Smith to know what was to be done with the funds. Smith testified that he had heard that Ford and Thornton did get a portion of the money advanced to the Pyle Center. With respect to his comment about "stealing from the blind," Smith testified that he was referring to the people above him who had authorized payments for DVI salaries out of account 9880.

Smith stated that Thornton was issued the funds for travel and that Nancy Ford travelled with him. Smith stated that he issued no money to Nancy Ford to his recollection.

Smith described the operation by the Department of Public Instruction of the Summer Feeding Program. They would get what they called "sponsors" for the program, and the sponsor would go out and find someone who would prepare and deliver the food and get it to the kids who were the beneficiaries of the program. Smith testified that he contacted Nancy Ford; she came and visited the Campus Garden facility where the meals-on-wheels were prepared; saw what BEP did and then took Smith to meet Jim Sample who ran the Kent and Sussex County program. Smith contracted with Sample to provide him meals. BEP got the food preparation contract through the Pyle Center, and there was no bidding involved in the process.

Smith agreed that the program seemed profitable in 1993 and then in 1994 began experiencing losses, because according to Smith, money was being taken out of the BEP for salaries and not reported such as State's Exhibit No. 6, Section C, Page 7 which shows a state payroll of \$77,000.00 but which was prepared for July in October of 1995, and Smith left the program in September of 1995. Smith reiterated that when he was first employed by BEP 80% of his salary was paid by the federal government and 20% by the State. The \$77,000.00 from the Campus Garden statement for state payroll, according to Smith, in effect, charged his full salary to the Campus Garden Cafe.

Smith, in concluding, addressed in summary the points raised in the dismissal letter of Secretary Narzario as follows:

As to the check registers and account reconciliations, the accounting staff got behind in 1994; they were up to date in 1993, and in 1994, they got behind in doing the registers and reconciliations.

As to the reporting of the bank balance, that was the way it was always done. Each time Smith did a monthly report, the accountant or someone in accounting called the bank, got the bank figures, and put them on the report. That was the way it was done.

As to the tax returns, they were late because BEP was behind in accounting, and there was an account receivable of \$116,000.00 owed which was needed to pay the taxes.

As to the other taxes, Smith stated that these were just in the dismissal letter for "eye wash". There was no federal income tax for BEP nor state corporate income tax nor franchise tax.

As to Profit and Loss statements, Smith related that they were being done for the individual cafeterias, and as far as he knew, they were on time except for the reconciliation of account numbers 1 and 3 which were late and done every four months instead of every two months.

As to the accounts receivables from the Campus Garden Cafe and St. Anthony's, that was a situation where Mike Greenfield conversed with Ellie Pikowski at St Anthony's, and they reconciled whatever was due through themselves and took care of the situation.

As to the video, Smith reiterated that he was going to write a purchase order for it and not even have a signed contract, and he wasn't even in the office when the check for the video which was signed by Dianne Post and Gino Iubatti was written.

As to the cellular telephones, Smith stated that he bought six of them; three were for the trucks, one was for Mike Greenfield and two were for the Pyle Center for the Summer Feeding

Program, and it was supposed to return the phones at the end of the summer or pay for them. Smith stated that Dianne Post had instructed him that the auditors were looking into the situation with the phones at the Pyle Center and that he should not do anything about them. The Pyle Center was the BEP's best customer, and Smith stated that he would bend over backwards to help them in any way he could.

As to the wage payments to Thornton, Smith testified that he was on an hourly payroll, and Smith did not know any other way to handle it.

As to the \$75,000.00 loan, Smith stated that he advanced \$15,000.00 to James Sample at the Pyle Center.

As to the reimbursements for Richard Thornton, Smith related that he did reimburse him for a couple of trips to Washington, D.C. for matters relating to the Childrens' Defense Fund and to testify in front of the Senate Subcommittee, both of which were to promote the Summer Feeding Program. It was a unique program, and it was not done anywhere else in the country like BEP was doing it. The conference in Cincinnati, Ohio was, according to Smith, a similar situation with marketing the program.

As to the incident involving Mike Greenfield and Gino Iubatti, Smith testified that he just did not understand how they could accuse him of condoning Gino's activities when he was counseling Greenfield on how to get something done about it.

THE LAW

29 Del. C. § 5931 Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the

Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this Chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days.

MERIT RULE NO. 15.1 Employee Accountability.

"Employees shall be held accountable for their conduct. Measures up to and including dismissal may be taken only for just cause. 'Just cause' means that management has sufficient reason for imposing accountability.

Just cause requires:

1. Showing that the employee has committed the charged offense.
2. Offering specified due process rights specified in the Chapter, and
3. Imposing a penalty appropriate to the circumstances.

MERIT RULE NO. 16.3 Unsatisfactory performance.

"When an employee's work performance is considered unsatisfactory, the performance must be documented in writing, and the specific weaknesses must be made known to the employee. the employee shall be given documented assistance to improve by the designated supervisor. An opportunity for re-evaluation will be provided within a period of 3 to 6 months."

BURDEN OF PROOF

The burden is on the discharged employee to convince the Board to rule in his favor. *Hopson v. McGinnes*, Del. Supr. 391 A.2d 187 (1978).

DISCUSSION AND FINDINGS

The Grievant asserts, among other things, that his termination violates a fundamental tenet of the Merit Rules because he was not advised of areas of unsatisfactory performance nor were specific weaknesses in his performance ever made known to him. This argument is unpersuasive and unavailing in this situation.

The Grievant has not established that the absence of a performance review contemplated by Merit Rules in Chapter 16 is an absolute bar to disciplinary actions, including termination, in situations where the employee has not been advised of the unsatisfactory performance and given a chance to correct it.

In this case, Thomas Smith left state service on disability in August of 1995. His disability pension was approved with an effective date of May 1, 1996. The State's investigation into the activities of BEP by Martha Austin which ultimately resulted in the allegations leading to the termination of Thomas Smith began on April 26, 1995 and was concluded in September 1995 after Mr. Smith was no longer functioning as the Director of BEP. The provisions of Merit Rule No. 16.3 do not require the State to perform a useless act, and the Board finds that in the circumstances presented there is no violation of Merit Rule 16.3 by the failure of the State to advise Mr. Smith of the conduct it found unacceptable prior to his termination from state service. The Board also finds that Mr. Smith received his appropriate due process rights through and including his right to make a timely filed appeal to this Board.

The Board further finds that Thomas Smith, as the Director of the Business Enterprise Program, was responsible for directing all aspects of the program and that he, as did others with responsibility for the program, failed to carry out his responsibilities in a reliable and judicious manner which negatively affected the program. The Board, therefore, finds that the Grievant has not met his burden of proof to convince the Board that his termination was not for just cause.

The Board affirmatively finds that there was just cause for disciplinary action by the Secretary against Mr. Smith and that the penalty of dismissal was appropriate under the circumstances. If the Board finds, as it does here, that the appointing authority had just cause to discipline the Grievant,

the choice of the appropriate discipline generally rests with the appointing authority. *See State of Delaware v. John Berenguer*, Del. Super., 321 A.2d 507 (1974). There may be situations where the penalty imposed by the appointing authority is so totally out of proportion to the offenses involved that it cannot be found to be appropriate to the circumstances. If such a situation is presented in the future, the Board may determine that the appointing authority did not have just cause for the disciplinary action. However, this is not such a case, and the Board specifically so finds. The high level of trust and responsibility reposed in the director of the BEP as disclosed in the duties and responsibilities of the position should, and in the view of the Board does, afford the Secretary considerable latitude in determining an appropriate sanction for dealing with unacceptable performance by a program director.

The Grievant and the State have both established by a preponderance of the evidence that there were numerous and serious accounting irregularities in the BEP. Mr. Smith has established that the senior accountant was immediately responsible for much of the inability of the accounting section at BEP to meet its functional and statutory obligations.

Mr. Smith has established that he was frustrated in his attempts to improve the accounting situation by the ineptitude and recalcitrance of not only the chief accountant but also of his supervisor, Dianne Post. This does not, however, excuse his responsibility or culpability for his inability and the inability of his staff to meet the statutory requirements for promptly depositing receipts in the bank, for failing to maintain proper check registers, or writing checks from the wrong accounts or without sufficient funds in the accounts to cover the checks. Mr. Smith also had the supervisory responsibility for prompt and proper preparation and filing of state and federal tax returns

which did not occur. The Board views this transgression as a serious violation of the public trust and supervisory responsibility which, under these circumstances, standing alone would justify dismissal.

The Board finds that the Grievant also permitted and condoned unacceptable and poor business practices when he failed to verify the hours worked by Richard Thornton when Mr. Thornton was paid on an hourly basis and when he routinely signed and approved reimbursements for various travel expenses of Richard Thornton and Nancy Ford who were not BEP employees. Mr. Smith acknowledged he did not carefully review the telephone bills for personal calls made by Mike Greenfield, and while he may have felt justified in incurring these expenses because of the long hours Greenfield worked, this action along with the incurrence of cellular telephone expenses for Thornton and Samples, neither of whom were BEP employees, go to further establish the fact that there was not attention to sound management practices by Mr. Smith. The Board is not convinced that there was a legitimate business purpose for all of the phone purchases but finds no responsibility on Mr. Smith to take possession of the phones at the end of 1994 because of the directions from Dianne Post.

While perhaps well motivated, Mr. Smith's procurement of the \$75,000 loan for advances for the start-up costs of the 1974 Summer Feeding program was technically unauthorized and inappropriate.

The allegations by Secretary Nazario that Mr. Smith condoned or failed to properly respond to the complaint against Gino Iubatti by Mike Greenfield have been shown to be misplaced, and the actions of Mr. Smith in assisting Mr. Greenfield to have his complaint considered, as supported by the testimony of both Greenfield and Smith, were, under the circumstances, sufficient to result in proposed disciplinary action against Iubatti.

The allegations of impropriety surrounding the production of the video promoting the activities of BEP and the evidence presented are not convincing to establish that the purpose of the video was inappropriate or that it was never used. The incident with the contracting for, payment for, and use of the video does show that Mr. Smith was running an operation without adequate controls on expenses or the way in which they were incurred.

There were a number of individuals both superior to and subordinate to Mr. Smith who were also shown to have responsibility for the sloppy way in which BEP expenses were authorized, incurred, and accounted for. The fact that they were not terminated from employment or otherwise disciplined is not relevant to Mr. Smith's situation or his case before the Board.

Mr. Smith did a lot of things right. Many of the aspects of his job performance were deservedly award winning. His strengths obviously were in growing the business. Unfortunately for the BEP program, he also did things wrong, ineptly, or without sufficient attention to his management responsibilities. He was certainly not alone in this. The record in this proceeding points to the incompetence of a number of the supervisory personnel at BEP and DVI as well as the obvious difficulties caused by the inability of Mr. Smith's accounting section to do what was required of it. While the activities of others may go a long way to explaining the problems at BEP, they do not, in the view of this Board, exonerate or excuse Mr. Smith's failure to meet his supervisory and other responsibilities as Director of BEP.

Mr. Smith's allegations that the State was stealing from the blind deserve comment. This allegation stems from the use of funds from revenues from BEP operations to pay a portion of the salaries of Thomas Smith and other state employees of BEP and the question of whether or not this is authorized by the Rules and Regulations of the Randolph-Shepard program. Clearly, the use of

funds from the program to cover a portion of state salary expenses reduced the amount of funds available to cover other expenses. The State appears to assert that its use of such funds was proper and within the parameters of the program under Management Services. Mr. Smith and the Blind Vendors Committee have a different view. It is, however, not the place for this Board to attempt to resolve that dispute nor is it necessary to do so in order to determine whether or not there was just cause to discipline the Grievant.

CONCLUSION AND ORDER

The Board finds that there was just cause to discipline the Grievant as set forth in the dismissal letter of Secretary Nazario as discussed above. The Board, therefore, concludes that the Grievant has not met his burden and that the termination decision of the appointing authority is upheld.

IT IS SO ORDERED:



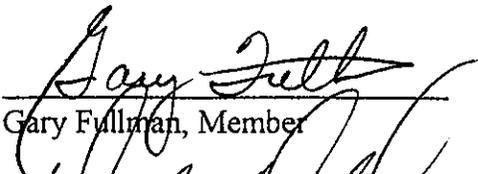
Katy K. Woo, Chairperson



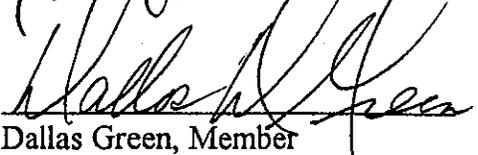
Robert Burns, Vice Chairperson



Walter Bowers, Member



Gary Fullman, Member



Dallas Green, Member

APPEAL RIGHTS

Twenty-Nine *Del. C.* § 5949(b) provides that if the Board upholds the decision of the appointing authority, the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

MAILING DATE 2/10/97

Distribution:

Original: File

Copies: Grievant's Representative

Agency's Representative

Merit Employee Relations Board

Katy K. Woo, Chairperson

Robert Burns, Vice Chairperson

Walter Bowers, Member

Gary Fullman, Member

Dallas Green, Member

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