BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

James J. Nuttall,	)	
Appellant,	)	
v.	)	**MERB DOCKET NO. 98-07-162**
Department of Services for Children, Youth and their Families,	)	
Agency.	)	

COPY

BEFORE, Susan L. Parker, Esquire, Chairperson, Robert Burns, Vice-Chairperson, and Merit Employee Relations Board ("MERB" or "Board") members Dallas Green, John W. Pitts and John F. Schmutz, Esquire constituting a lawful quorum of the Board pursuant to 29 Del. C. §5908(a).

AND NOW, this matter having been before the Board for an evidentiary hearing on February 18, 1999 and on March 24, 1999; the Board, for the reasons stated below, makes the following findings and conclusions and enters its Order upholding the action of the appointing authority in imposing a one-day disciplinary suspension on James J. Nuttall:

APPEARANCES:

For the Appellant: James J. Nuttall, pro se

For the Agency: A. Ann Woolfolk, Esquire
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street - 6th Floor
Wilmington, DE 19801

NATURE OF THE PROCEEDINGS

This grievance comes before the Board as a direct appeal under Merit Rule No. 21.0111 from the imposition of a one-day disciplinary suspension on James J. Nuttall by his supervisor Guy Sapp, then the Director of the Department of Services for Children, Youth and their Families ("DSCYF") on May 14, 1998.

The one-day suspension without pay was served on June 3, 1998. The suspension was imposed for what the Director characterized as an inappropriate communication from the appellant to the Deputy Director of Family Services.

PRELIMINARY MATTERS
MOTION TO DISMISS

On February 16, 1999, two days prior to the hearing scheduled for this appeal, the Department filed a motion to dismiss the appeal as untimely and requested a continuance of the hearing pending a ruling on the motion. The basis for the motion to dismiss was that the appeal had been received and clocked in at the Merit Employee Relations Board on July 6, 1998 and that the Merit Rule under which the appeal was filed specified that the appeal must be filed within thirty days. The Department took the position that the time for counting the thirty day period should begin on May 14, 1998 when Mr. Sapp notified the Appellant that a one-day suspension would be imposed to be served on June 3, 1998. The Department asserted that even if the date for the commencement of the thirty day period was June 3, 1998, (the actual date the suspension without pay was charged to the appellant) the filing, having been clocked in at MERB on July 6, 1998, was untimely. The Board denied the request for a continuance and took up the motion to dismiss as a preliminary matter on February 18, 1999.

Mr. Nuttall introduced a copy of a postal receipt showing that his appeal had actually been received at the Tatnall Building in Dover where the Board office is located on July 2, 1998. (Appellant's Exhibit No. 1). He observed that this was a long holiday weekend and suggested that was a possible explanation for why the appeal was not actually stamped as received by MERB until July 6, 1998. Mr Nuttall also introduced a copy of an e-mail message he relied upon which he had received from Mr. Sapp concerning a previous grievance appeal wherein the Director had stated that Mr. Nuttall had to serve the suspension before the grievance was filed. (Appellant's Exhibit No. 2)[1]

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[1] The Board views this advice as misleading. Merit Rule No. 21.0111 is less than precise on when the thirty day period in which to file an appeal from a suspension commences. In this instance, Mr. Nutall, and apparently Mr. Sapp, read it to commence the filing period from the date

Under these circumstances, the Board finds that Mr. Nuttall, based upon the e-mail advice from his Director which he indicated he relied upon, had grounds to believe that he had thirty days from the date he served his one-day suspension to file his appeal with the Board. The appeal was in fact received in the mail box of the Board (see Merit Rule No. 20.0300) on July 2, 1998 and will be treated as having been timely filed. The motion to dismiss is therefore denied.

SUMMARY OF THE EVIDENCE PRESENTED

The following is a summary of the evidence presented pursuant to the Administrative Procedures Act. 29 Del. C. §10128(b)(1):

Testimony of Guy Sapp

Guy Sapp, being sworn, testified that he is presently the Executive Director of the Domestic Violence Coordinating Council, a position he has held since September 1998. Prior to that, he was the Director of the Department of Services for Children, Youth, and their Families where Mr. Nuttall was employed as the New Castle County Regional Manager within the Division of Youth Rehabilitative Services under the direct supervision of Timothy J. Brandau.

The Division of Youth Rehabilitative Services (YRS) is one of three operating divisions (the "Divisions") within the Department. The other two are the Division of Child Mental Health and the Division of Family Services (DFS). The support division is the Division of Management Services.

Mr. Sapp testified that he imposed a one-day suspension without pay as a disciplinary action against Mr. Nuttall because of a three page Memorandum which Mr. Nuttall sent on January 29, 1998 to Margaret Timko (the Acting Director of DFS), who, at the time, was the Deputy Director. (State Exhibit No. 1 at Tab 6). Mr. Sapp testified that he viewed Mr. Nuttall's correspondence to Ms. Timko as an "inappropriate business communication." This was based on his view that it was inappropriate for Mr. Nuttall to use a departmental process as a device to argue his personal views on matters which were under sensitive negotiations between Divisions, and to use the participation

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his suspension was served, i.e., June 3, 1998. An appeal filed with the Board within thirty days after the imposition of a suspension by an appointing authority is normally considered timely.

of a manager outside of YRS to demonstrate what appeared to Mr. Nuttall to be a lack of awareness and appreciation of the skills and abilities of Community Service workers in YRS. The correspondence was also deemed to be inappropriate because it was a formal communication to a Deputy Director of another Division and should have followed business protocols.

The correspondence was also deemed inappropriate by Mr. Sapp because it placed him in an untenable position between the Divisions. The communication did not represent either his views or those of the Division of YRS and also required him to address the participation of DFS representatives on future career boards. A career board, according to Mr. Sapp, conducts interviews, asks questions of employees, and at the end of the process makes a recommendation about whether or not the employee should be advanced up the career ladder or, in other words, promoted. The vote of the board must be unanimous. Mr. Sapp observed that the insinuation in Mr. Nuttall's memorandum that personnel from DFS cannot appreciate the competencies of YRS candidates was disruptive and damaging to YRS and had implications for future career board participation. (State's Exhibit No. 1 at Tab 7)

Mr. Sapp traced the origin of his concerns with Mr. Nuttall's communications back to an incident which occurred in June 1996 when he sent an internal memorandum (State's Exhibit No. 1 at Tab 1) to Mr. Nuttall concerning the loss of two pagers by staff members. Mr. Sapp testified that he was attempting to provide proper documentation as to what had happened to the pagers and, in the process, asked Mr. Nuttall to submit an incident report detailing how the pagers were lost and to recommend discipline for the employees involved. Mr. Nuttall responded to the memo by writing the word "attached" beside the request for an incident report and the word "none" beside the request for recommended discipline for the employees involved. In the "attached" memo (State's Exhibit No. 1 at Tab 1) Mr. Nuttall provided a 4 paragraph response to the request of documentation on the two pagers which had been lost by Community Based Services staff. Thereafter, on June 13, 1996, by e-mail, Mr. Sapp indicated to Mr. Nuttall that he would process the paperwork for the pagers because of the end of the [fiscal] year crunch but that he would not consider the matter closed until it was properly handled to include a police report and a recommendation from Mr. Nuttall as to accountability and responsibility for the lost state property or "who should pay for the pagers?"

(State's Exhibit No. 1 at Tab No. 1) Later that same afternoon, (June 13, 1996) Mr. Nuttall responded to Mr. Sapp by e-mail (State's Exhibit No. 1 at Tab 2) with copies to Jacqueline Young and George White which included the statement "Had we known in a timely manner that discipline was required, perhaps recognition and lunch should have been withheld from Ms. Young and Ms. Bey at the 6/26 co-worker appreciation ceremony; likewise, perhaps Ms. Bey's KUDO from Secretary Eichler could have been withheld as well".

Mr. Sapp testified that he viewed this statement and others in Mr. Nuttall's memo as being sarcastic and that he viewed the response as unprofessional, unbusinesslike and inappropriate. Mr. Sapp stated that he then sent out a communication to the employees involved in which he stated: "Good morning. I regret the tenor of the e-mail message that you were sent by Mr. Nuttall. The information contained in that message was inappropriate and certainly did not express my intentions. What should have been an effort by Mr. Nuttall and I to tidy up administratively the replacement of your pagers has turned into something much more and, unfortunately, you have been caught in the middle. Have a good weekend."

Mr. Sapp identified State's Exhibit No. 1 at Tab 3 as a June 21, 1996 memorandum he sent to Mr. Nuttall proposing a one-day suspension without pay for the correspondence surrounding the incident with the lost pagers and the June 13, 1996 e-mail message from Nuttall. Mr. Sapp identified State's Exhibit No. 1 at Tab 4, as an agreement he had prepared and Mr. Nuttall had signed on June 27, 1997. This document, captioned "Discipline/Settlement - Written Reprimand" memorialized the settlement agreement reached prior to a hearing before the Merit Employee Relations Board concerning the one-day suspension without pay imposed for the pager incident. Under the agreement, the suspension was reduced to a written reprimand and Mr. Nuttall agreed that management had just cause for discipline for actions involving the e-mail; that negative comments about the Department's management would cease immediately when Mr. Nuttall was on state property or representing the state through his employment; and that any recurrence of similar inappropriate business communications or negative commentary would result in a higher level of discipline such as suspension.

Mr. Sapp identified State's Exhibit No. 1 at Tab 5 as the memorandum he received from Margaret J. Timko transmitting and commenting upon the memorandum she had received from Mr. Nuttall on January 20, 1998 after her service as a member of a career board of a YRS employee. In her communication, Ms. Timko expressed concerns about the memo from Mr. Nuttall stating that it should not have addressed any issues that were dealt with at the hearing, which is confidential, and that it could affect ongoing negotiations in the Department concerning the assignment of certain youth and their cases to either DFS or to YRS.

Mr. Sapp testified that these two Divisions had for some time before his arrival been trying to determine which of them was going to treat a certain class of youth that were not classically dependent, neglected or abused and not delinquent. Several committees had grappled with this question. Mr. Sapp testified that in the four years he was Director there still had not been any conclusion reached as to how these youths were going to be serviced. Mr. Sapp testified that, at the time the memo was written by Mr. Nuttall to Deputy Director Timko, there was a special committee dealing with these issues and they were in the process of putting together final recommendations to the management leadership team. Mr. Sapp testified that they were awaiting the committee's recommendations in hopes that they would be able to implement some new policy or procedure that would once and for all resolve the handling of these complex cases. Mr. Sapp testified that both he and Deputy Director Timko were concerned about the memo from Mr. Nuttall and the effect which it could have on the negotiations. Mr. Sapp stated that they both viewed the memo as negative and counterproductive.

Mr. Sapp stated that, given the history he had with Mr. Nuttall, the disciplinary settlement agreement Mr. Nuttall signed and the conversations he and Mr. Nuttall had on the day the disciplinary settlement agreement was signed, it should have been clear to Mr. Nuttall that the communication he sent to Deputy Director Timko was unbusinesslike, unprofessional and inappropriate.

According to Mr. Sapp, Mr. Nuttall's correspondence to Ms. Timko had jeopardized the sensitive ongoing negotiations surrounding a very important issue in the Department. It was, according to Mr. Sapp, something that was being handled by others and that Mr. Nuttall was not assigned to that process. He was not expected to insert himself into that process. According to Mr.

Sapp, it was upon these factors, including the prior written reprimand, that he based his determination to impose the one-day suspension without pay upon Mr. Nuttall.

Mr. Sapp related that, after he notified Mr. Nuttall of the proposed one-day suspension, there was a lot of correspondence with Mr. Nuttall about how the matter would unfold and whether there would be an alternative method or approach to resolving this grievance. Mr. Sapp testified that, after consultation with his personnel department, it was agreed that the grievance would be handled within the context of the Merit System disciplinary procedure.

Mr. Sapp identified State's Exhibit No. 1 at Tab 9 as the written pre-decision hearing report prepared by Gwendoline B. Angalet on May 7, 1998, which upheld the imposition of the one-day suspension without pay imposed upon Mr. Nuttall by Mr. Sapp for the communication with Deputy Director Timko. Without objection from Mr. Nuttall, Mr. Sapp discussed other incidents involving memoranda of Mr. Nuttall as follows: 1) a situation with a snake in a state vehicle which occurred in the fall of 1995 (State's Exhibit No. 2 at Tab 16); 2) an August 30, 1995 e-mail regarding "transitional responsibilities" (State's Exhibit No. 2 at Tabs 17 and 18) which Mr. Sapp testified he found to be condescending and sarcastic; 3) a memorandum regarding profile information on a probation worker's typical day and 4) a progress report for a monthly diversity management report (State's Exhibit No. 2 at Tabs 18-20). These incidents resulted in an internal memorandum from Mr. Sapp to Mr. Nuttall dated November 3, 1995 (State's Exhibit No. 2 at Tab 17) in which Mr. Sapp concluded:

> "This letter will serve as instructions that in the future I expect your written communications with this office to be done in a professional manner that is representative of the level of your function within this organization. In addition to the unprofessional impression that this creates, follow-up on incomplete and/or lackadaisical responses causes additional work for all concerned."

Mr. Sapp testified that he did not believe the January 20, 1998 memorandum from Mr. Nuttall to Deputy Director Timko complied with the above instructions.

On cross examination Mr. Sapp agreed with Mr. Nuttall that they had different management styles and that, over the years, Mr. Nuttall had supported and been an advocate for the interest of the Department line staff. Mr. Sapp agreed that, at the time of the incident involving the lost pagers,

there was no written policy on how to deal with such a situation but that he nonetheless still viewed Mr. Nuttall's memo as sarcastic. Mr. Sapp responded that he recalled a conversation with Mr. Nuttall in which Mr. Nuttall had explained that he had taken the events with the two pagers less seriously because of his frustration on that day with the potential loss of $11,000 in furniture money because of the impending closure of the fiscal year. This had caused him to get up at 4:00 a.m. to go to the Carvel State Office Building and measure offices in order to be able to order furniture. By the time he found the e-mail about the pagers he had been working 9 or 11 hours and was tired. Mr. Sapp testified he recalled Mr. Nuttall had told him that this had caused him to take the two $25 pagers less seriously.

Mr. Sapp stated that, at the time of the objectionable e-mails from Mr. Nuttall, there was no policy governing the protocols for e-mails, such as who was to be copied. He noted that there was no such policy today and, further, that it is a matter of professional judgment that can not be spelled out point by point in any policy or procedure. It is, according to Mr. Sapp, a matter of common sense and professional judgment, particularly when criticizing a superior.

At the request of Mr. Nuttall, Mr. Sapp set out his concept of a professional and stated that he considered himself a professional police officer with a bachelor's degree in criminal justice and twenty-three years in the police department. When he moved into YRS he considered himself in management. He agreed that he did not have experience in the youth rehabilitation area or how to deliver therapeutic services to children. Rather, he was brought in to manage a large, diverse operation, which he felt he could do in a professional manner.

Mr. Sapp acknowledged that he and Mr. Nuttall had a number of discussions on the topics of ethics codes and professional expectations of Mr. Nuttall as a member of a professional organization. Mr. Sapp stated that he believed that he had taken progressive steps with Mr. Nuttall with respect to professional, appropriate and businesslike communications and that he was convinced Mr. Nuttall was not going to receive the counseling or suggestions made by Mr. Sapp. According to Mr. Sapp, Mr. Nuttall had his own belief as to what was professional and businesslike and Mr. Sapp had his belief. Mr. Sapp stated that at some point he felt Mr. Nuttall's approach to communication became deleterious to both the Division and the Department and that is why he

instituted disciplinary action. According to Mr. Sapp, he did not have a specific performance plan for Mr. Nuttall because Mr. Nuttall's overall performance was not the problem. Rather, the problem was specific to Mr. Nuttall's communications and it was this which gave rise to the need for correction and disciplinary action.

Mr. Sapp testified that he and Mr. Nuttall had discussed that a Departmental policy on confidentiality needed to be understood before Mr. Nuttall could be held accountable for a confidentiality violation in connection with the memo to Ms. Timko. Mr. Sapp agreed that sensitive negotiations had been going on for a long period and prior to Mr. Sapp's arrival at the Division. Mr. Sapp acknowledged that there was considerable frustration with the process. The management leadership team had not developed a solution and the matter was dragging on. Mr. Nuttall's frustration and the friction between DFS workers and YRS workers was still not resolved by the third week of August 1998 when Mr. Sapp left the Department for new responsibilities.

As for the reaction of the individuals who had been copied on Mr. Nuttall's memorandum regarding the pager incident, Mr. Sapp testified that he had gotten a response from one of them who indicated that she was not offended by Mr. Nuttall's memo. Mr. Sapp testified that he was aware there was a great deal of respect for Mr. Nuttall among the people he supervised. Mr. Sapp clarified his view that Mr. Nuttall's memo had not been demeaning to the individuals copied, but was demeaning to the Secretary to suggest taking away a luncheon or an award from an employee. Mr. Nuttall observed that it was poor humor and ill advised but that it was, nevertheless, supposed to be humorous.

Mr. Sapp indicated that most of his time early on in YRS was spent dealing with the effects of civil litigation against Ferris School and the New Castle County Detention Center. It was only toward the end of his tenure that he was able to turn his attention more to the services being provided. Mr. Sapp disagreed with Mr. Nuttall's observation that a number of the employees who had worked for the Division in community-based services long before Mr. Sapp arrived, and who remained after he left, felt that the only time they had met Mr. Sapp was when he came around to say good-bye. He further disagreed that there were a number of such individuals who had had no face-to-face contact with Mr. Sapp during his five years as Director.

Mr. Sapp testified that, when he arrived at the Division in June of 1993, there were regular escapes from the institutions. He identified that there was no sense of accountability or responsibility among the staff. As a result, policies and procedures were implemented to address this problem as well as the problem of overtime and absenteeism. He stated that this situation may have resulted in an increase in the number of personnel disciplinary actions.

Turning to the codes of conduct and ethics (Appellant's Exhibit No. 3), Mr. Nuttall asked Mr. Sapp if he was aware of the standards to which a social worker is expected to adhere. Mr. Sapp indicated that, although he was not previously familiar with those standards, nothing he read in them changed his impression of the nature of Mr. Nuttall's communications.

Mr. Sapp and Mr. Nuttall reviewed several of Mr. Nuttall's Employee Performance Plans (Appellant's Exhibit No. 15). Mr. Sapp testified that Mr. Nuttall's performance exceeded expectations and that he never had a problem with Mr. Nuttall's work performance outside of the area of professional, appropriate, business communications. It was solely in this area that Mr. Nuttall continued to fail to meet expectations.

When asked what documented assistance he had provided to Mr. Nuttall to improve in the specified problem area, Mr. Sapp stated that it was clear to him that an attempt had been made in 1996 to spell out what was expected in written and verbal communication and that a written agreement was signed by Mr. Nuttall after the disciplinary reprimand was given. Mr. Sapp testified that he offered his services and those of Dr. Brandau in any future cases where Mr. Nuttall might have a question about a proposed communication. Mr. Sapp stated that he did not think it was necessary, given Mr. Nuttall's level of education and recognition status as a certified social worker, to sit down and go through a language and grammar exercise. Mr. Sapp testified that Mr. Nuttall had a command of the English language unlike anyone he had ever seen. He stated that Mr. Nuttall knows how to write effectively when he wants to and that he can also clearly communicate a sarcastic and condescending tone when he wants to. Mr. Sapp, finally, reiterated his attempts to try to communicate with Mr. Nuttall about the specific problem area and how the prior disciplinary proceeding before the Merit Employee Relations Board was resolved so that there would be no future inappropriate, unprofessional or unbusinesslike communications.

Testimony of Timothy Brandau

Timothy Brandau, being sworn, testified that he is the Chief of Community Services for the Division of Youth Rehabilitation and has held that position since it was created on July 1, 1996. He is a professional social worker with a masters degree in social work from Temple University and a member of the National Association of Social Workers. He is the supervisor of Mr. Nuttall and had been from 1985 until 1991 in the former Community-Based Services and was again since 1996 in YRS.

Dr. Brandau identified State's Exhibit No. 1 at Tab 12 as a memorandum from Mr. Nuttall to Gwen Angalet, the executive assistant to Secretary Eichler. Ms. Angalet conducted the pre-decision meeting which Mr. Nuttall had requested regarding the proposed one-day suspension. The memorandum related to Mr. Nuttall's determination not to take an assignment to serve as liaison between the Department and various school districts in the State of Delaware. Dr. Brandau testified that he had given Mr. Nuttall this assignment in his capacity as his supervisor. He felt that the memo was an inappropriate business communication in that Mr. Nuttall was writing to someone else stating that he was not going to do what Dr. Brandau had assigned him to do. Dr. Brandau also stated that he believed the memo contained negative commentary about Mr. Sapp's management style.

Dr. Brandau identified another memorandum dated April 15, 1998, which he testified he hand delivered to Mr. Nuttall on April 16, 1998. (State's Exhibit No.1 at Tab No.13) The memo provided, among other things, that Dr. Brandau would pre-review any documents Mr. Nuttall proposed to send to those outside of the immediate area of Community Services. Dr. Brandau stated that this action was proposed to facilitate Mr. Nuttall's performance of the liaison position and because of an incident that had occurred in the Community Service Management team involving student interns. The Management Team was in the process of developing a policy on the use of student interns and Mr. Nuttall indicated that he was about to send a letter to colleges and universities telling them that they should no longer send student interns to YRS because the organization was exploiting them. Dr. Brandau stated that he and Mr. Nuttall discussed the proposed correspondence and, in his capacity as Mr. Nuttall's superior, he directed him not to send the letter. Mr. Nuttall

responded that he had a First Amendment right to free speech and Dr. Brandau testified that he then told Mr. Nuttall that if the letter were sent he would pursue disciplinary action against him.

Dr. Brandau testified that, if he had seen the memo Mr. Nuttall sent to Deputy Director Timko, he would not have been permitted to send it out because they were in the process of trying to work out sensitive issues between the two Divisions. There were group meetings concerning this matter on a regular basis and, according to Dr. Brandau, it made no sense to have Mr. Nuttall communicate directly to the Deputy Director of another Division about the issue. Dr. Brandau stated that he had been given the assignment to work on this problem between the Divisions.

Dr. Brandau testified that, as a member of the National Association of Social Workers, he is familiar with that organization's code of ethics. According to Dr. Brandau it provides, among other things, that social workers are advised to consult with a supervisor if an ethical issue arises. Dr. Brandau stated he believed that it would have been consistent with that provision for Mr. Nuttall to speak to him as his supervisor before he sent out the January 20th memorandum to Deputy Director Timko. Dr. Brandau further stated that, as a social worker, he did not believe the code of ethics compelled Mr. Nuttall's correspondence with Ms. Timko.

Dr. Brandau acknowledged that training was a recognized deficiency in Community Services and one which he was trying to correct. He stated that he had discussed training for Mr. Nuttall after the January 20th memorandum and had consulted with Bob Challenger, the Department's training expert. Mr. Challenger and Dr. Brandau went through a series of questions to determine whether or not it was a training situation and, at the end of the exercise, determined that it was not a training issue with Mr. Nuttall.

Dr. Brandau told the Board that he had discussed this with Mr. Nuttall. Mr. Nuttall told him he had some materials on training, so Dr. Brandau invited Mr. Nuttall to send them. Most of the material Mr. Nuttall sent was related to expensive, far distant seminars that were not realistic given budget constraints. Dr. Brandau offered to have Mr. Nuttall go back through the front line leadership training again but, according to Dr. Brandau, Mr. Nuttall felt that would be a waste of his time.

Dr. Brandau testified that, even though Mr. Sapp was not a social worker, it was a pleasure to work with him and that Mr. Sapp applied a great deal of common sense to the job of Director of

YRS. Dr. Brandau testified that he did not always agree with Mr. Sapp, but that he was accessible and he was always willing to listen.

On cross examination by Mr. Nuttall, Dr. Brandau related that he did not think that the liaison assignment he had given Mr. Nuttall was inconsistent with the level of responsibilities Mr. Nuttall had in the organization. He further testified that his memo about Mr. Nuttall sending correspondence through Dr. Brandau was an attempt to address Nuttall's concerns about possible criticism for outside communication. Concerning the memorandum which he directed Mr. Nuttall not to send, Dr Brandau stated that he recalled Mr. Nuttall indicating that he felt a professional obligation to advise schools for whom he had provided intern supervision that conditions had fallen below a minimally acceptable standard and that Mr. Nuttall no longer wished to supervise such interns.

Dr. Brandau testified that he was not an expert on all of the different organizational models in social services agencies but that every one with which he was familiar was organized to have supervisors and those who were supervised. Whether a hierarchical "stovepipe" or flat structure is appropriate is an issue of how many levels of supervision there are. Dr. Brandau acknowledged that he was present for training on the Delaware Model and that he was aware that it espoused the idea of members of different organizations communicating more freely in coming to conclusions about shared client services.

Dr. Brandau stated that he was aware from Mr. Sapp's testimony that Mr. Sapp was not familiar with the Social Worker Code of Ethics. Dr. Brandau further stated that he had a good working relationship with Mr. Sapp and that during the five years they worked together Mr. Sapp had never asked him to do anything that would be an ethical violation. He rejected Mr. Nuttall's suggestion that he had an ethical obligation to ask Ms. Timko about having untrained YRS staff handle child protective service work. Dr. Brandau indicated that, at the time, Mr. Nuttall was aware that the problem was being addressed by a committee and he did not know why Mr. Nuttall felt that he had to get involved in the debate. Dr. Brandau discussed the applicability of certain sections of the Social Worker Code of Ethics to Mr. Nuttall's communications. He also discussed the applicability of the Standards for Social Work Personnel Practices (Appellant's Exhibit No. 3) and its requirement that an agency shall respect and uphold a social worker's right and responsibility to

adhere to the professional standards in the NASW code of ethics. Dr. Brandau testified that he could understand Mr. Nuttall's rationale for writing the memo to Ms. Timko, but did not feel that he was compelled to do so under the standards of the NASW. Mr. Nuttall indicated that he was raising questions about training in a situation when his workers were being asked to do things that they were not trained for and asked Dr. Brandau if the ethical standards had any relevance to Mr. Nuttall's calling into question what was being mandated for workers who reported to him. Dr. Brandau replied that the matter was already being addressed by a group of people which included professional social workers. He stated that the issue of the division of responsibilities between the DFS versus the YRS was still outstanding. Dr. Brandau told the Board that he had recommended to Mr. Sapp that Mr. Nuttall be given a reprimand for his conduct but, at the time he gave his recommendation, he was not aware of all of the other exchanges between Mr. Sapp and Mr. Nuttall. He stated that, if he had been aware of this history, his recommendation would have been to impose a greater sanction.

In response to questions about how the implementation of the Delaware Model was intended to impact the culture of the organization, Dr. Brandau testified that there were liaison persons in place to exchange information, but that this did not amount to a change in the culture of the organization. Dr. Brandau testified that, because of his previous discipline, Mr. Nuttall should have understood that the communication with Ms. Timko was inappropriate. He stated that he had offered to review all of Mr. Nuttall's written communications so that a problem would not happen again. Dr. Brandau testified that he did not believe Mr. Nuttall thought that the correspondence was inappropriate. Dr. Brandau related that training was identified as a serious deficiency in Community Service for all levels of staff. There has, according to Dr. Brandau, been a documented concern about the lack of training in Community Services.

Turning to the "Renaissance Report" (Appellant's Exhibit No. 18), Dr. Brandau testified that he was involved with this two day quality exercise. He stated that there was some frustration expressed about what was viewed by some as a patronizing, hierarchal and controlling management style with a lack of respect for or courtesy shown to staff. Dr. Brandau also stated that he recalled the frustration of the management team about not being able to get good feedback from other parts of the organization.

Testimony of Robert Wright

Robert Wright, a principal in the firm of Organization Development Associates, was sworn and testified that over the last four years his firm has worked on a series of assignments around team development and strategic planning and the redesign of some of the work units in the Department. In the case of YRS, Mr. Sapp and Dr. Brandau had asked him to come in and help when the Alternatives Unit and the Community-Based services Unit merged into the current Community Services Unit. He was also asked by Mr. Sapp to help when Ferris School moved from its old structure to help redesign the program in a way that tapped the wisdom and the participation of a broader section of employees. The type of work included "360 degree feedback." This is where a leadership team in the Division solicits input from subordinates, peers and internal customers to help in the development of leaders who are more responsive to the needs of the employees in the organization.

When asked by Mr. Nuttall about the search for organizational models that worked better than the classic bureaucratic hierarchal model that posed barriers to the service integration which was part of the legislative mandate, Mr. Wright testified that the Secretary and the Division Directors had wanted to more strongly integrate the different Divisions of the Department. He stated that a project has been worked on for as long as the Secretary has been in the Department. Mr. Wright observed that it is conceivable that some of the quotes from the Secretary about "fuzzing up the boundaries" and "making the organization more seamless so that information passes quickly through the boundaries" could set up a situation where some of the messages that go out are not completely in line with the organization's culture. Mr. Wright described such a situation as cognitive dissonance between espoused theory (what we say we are trying to do) and reality. It is the tension between vision and reality and creates the opportunity for mixed signals.

Mr. Wright stated that he would not use phrases such as patronizing, hierarchal, controlling or lacking in respect for staff to describe the leadership of the organization because those are judgmental terms. He stated that he would be more comfortable with language that was more descriptive of behavior. Mr. Wright agreed that there was a tendency towards fairly hierarchal interaction. He stated that the Division Directors realized, along with the Secretary, that they wanted

to make sure they were in agreement before making changes in structure. He felt this would happen after these individuals felt themselves more aligned. Mr. Wright stated that the team focus approach has had limited implementation in certain places in the organization. He stated that YRS had made a commitment to using a participatory process to make transformational changes in one of its institutions, the Ferris School. Mr. Wright stated that for the past four or five years they have been a little more active with the other Divisions with the exception of the Management Services Division.

Testimony of Margaret J. Timko

Margaret J. Timko, being sworn, testified that she is currently employed by the Department of Services for Children, Youth and Their Families as the acting director of DFS. In January of 1998, she was the Deputy Director for that same Division.

Ms. Timko testified that she wrote to Mr. Sapp after having received a memorandum from Mr. Nuttall which involved her participation on a career board. She was the one DFS member serving on the board, along with two members from YRS and an individual from Human Resources who staffs the board. Ms. Timko stated that her reading of the January 20th memorandum from Mr. Nuttall was that he was charging her, as someone who sat on a panel where an employee was unsuccessful, to indicate within the department that she did not believe YRS employees were competent to carry out certain functions that had been under debate between the Divisions. The career board was a specific example of why she should support the position taken by YRS and not the position that her Division had taken. Ms. Timko testified that she found the memorandum from Mr. Nuttall to be objectionable and that her concerns were set out in a subsequent memorandum which she had sent to Mr. Sapp. She felt that it was improper for Mr. Nuttall to take a private individual employee process and use it as a means of addressing his own system-wide concerns. The memo had been copied to individuals who had nothing to do with the individual's performance before the board and who would have no reason to know about it. Her second concern was that she did not know how to respond to the memo. It looked like it was an official communication from the Division and she needed clarification from Mr. Sapp, the Director of that Division, to know if it was an agency position or just an individual's (Mr. Nuttall's) position. Ms. Timko's third concern was why the memo had been directed to her personally rather than to the full board, since the full board had made

the decision. She wondered if there was some question or issue that had to do with the performance of the board. Ms. Timko testified that, although both she and Mr. Nuttall work in the same Department, the frequency with which they interact is very low.

On cross examination, Ms. Timko reiterated that she is not a social worker. She stated that, to her, the term "professional" speaks to a certain level of expectation regarding how people relate to one another, and the kinds of issues they address with one another. It brings to mind courtesy, appropriateness, and respect. She stated that, while she did not consider herself to be a formal member of professional organizations, she has had involvement with several national associations.

Ms. Timko was asked if she had considered calling Mr. Nuttall directly regarding her concerns with his memorandum. She replied that she had considered that, but had determined that she needed some guidance from Mr. Sapp about where he stood on the issues in the memo before attempting a discussion with Mr. Nuttall. Ms. Timko testified that she received a memo back from Mr. Sapp in which he conveyed his apologies because he felt Mr. Nuttall's memo was an inappropriate communication and stated that it did not reflect the position of YRS. Ms. Timko testified that, after receiving the memo from Mr. Sapp, she felt that the matter was his to handle and that she did not need to do anything further. Ms. Timko recounted that she did not recall having any conversations with Mr. Sapp about the matter after she had received his memo and that she did not know that Mr. Sapp had made several offers to try and straighten this out "professional to professional" and "colleague to colleague". When asked if she considered the normative culture of the organization to be a professional one, Ms. Timko testified that she expected everyone in the department would be respectful in their dealings with others, would be polite, would attempt to be helpful, and would try to focus on appropriate business interactions. She testified that there was no single place where this was written, such as an employee handbook.

Ms. Timko testified that such expectations are expressed in a variety of policies including the Merit Rules and union contracts, which provide some expectations for employees. She stated that she did not believe every piece of human behavior expected in a work environment needed to be articulated in writing. She opined that there were certain expectations that you have to outline, but that there are other things that are inherent in appropriate organizational behavior. Ms. Timko

observed that the tone and the nature of the memorandum from Mr. Nuttall did not convey to her a desire to work together on an issue.

Concerning the application of the principles espoused by Secretary Eichler's presentation that top-level and middle managers needed to remove roadblocks standing in the way of the success of team based behavior, Ms. Timko testified that she was a member of the management team for the department and that all of the principles in the Secretary's presentation applied to her. In response to Mr. Nuttall's assertion that services integration requires the building of a legacy of trust, and his question as to whether Ms. Timko's actions regarding this incident have created a legacy of trust, Ms. Timko stated that she did not believe that either the initiation of the communication or anything that happened subsequently would have fostered trust.

Testimony of Gwendoline B. Angalet

Gwendoline B. Angalet, being sworn, testified concerning her understanding of the normative culture of the Department. Ms. Angalet, who had conducted the pre-decision hearing concerning the imposition of a one-day suspension of Mr. Nuttall, and who had concurred with the decision to impose such discipline, stated that the normative culture and dominant paradigm of the department is hierarchical as opposed to some other organizational model. She testified that State government is by nature hierarchical. Expectations of performance from employees is transmitted through training or coaching from one's administrative superior. Further, according to Ms. Angalet, the nature of an employee/supervisor relationship is that there are responsibilities on both ends.

Ms. Angalet described the "Delaware Model" as the "agency school collaboration partnership". It was the common terminology used to describe the Family Services Cabinet Council's efforts to integrate services with state agencies and schools. In her role as staff person to Secretary Eichler's participation on the Cabinet Council Ms. Angalet was actively involved in the initiative. Inherent in the model is the concept of teamwork in all contexts, both horizontal and vertical, and, according to Ms. Angalet, the notion of the department has been from the beginning to work together across disciplines to help children and families. Ms. Angalet testified that she believed trust was important as a part of organizational culture. Ms. Angalet testified that she could not speculate on whether or not, in the January 1998 time frame, the normative culture of the organization was one

of common trust where people could freely venture opinions without fear of punishment or reprisal. Ms. Angalet opined that a supervisor has the authority to direct the actions of an employee and to indicate what performance expectations are with respect to communications and work.

Re-Examination of Mr. Sapp

Mr. Sapp was recalled by Mr. Nuttall and under oath testified that he could not use the term "normative culture" to talk about the YRS experience. He testified that he talked frequently in management meetings, that there were several styles of management that might be used from time to time and that in some decisions he would have to be very autocratic and make decisions so they could move forward. In other situations, there would be teamwork and consensus building. Mr. Sapp testified that the children in facilities where YRS provided services were trained and educated in the normative culture and given lots of guidance on the appropriate conduct. He stated that he would not expect to give the same level of guidance to Mr. Nuttall. Mr. Sapp noted that he did not feel that there was any more guidance or education he could provide to Mr. Nuttall about how to properly communicate. Mr. Sapp reiterated his view that Mr. Nuttall's communication skills are superlative and that when he wants to be positive about those communications he can be very positive and when he wants to be negative he can be very negative. It was, according to Mr. Sapp, not a matter of teaching Mr. Nuttall how to write, how to complete a sentence or how to make sure there was agreement between the verbs and the nouns. Rather, it was a matter of the negative attitude that Mr. Nuttall put forth in his communications, and the inappropriate times such an attitude was expressed. Mr. Sapp testified that he never attempted to habilitate Mr. Nuttall; rather, he attempted to rehabilitate him when it became clear that Mr. Nuttall's communications were not appropriate. Mr. Sapp testified that he had met with Mr. Nuttall on several occasions and had urged him to check with either Dr. Brandau or him before sending out any communications that Mr. Nuttall thought might be questionable.

Testimony of Robert A. Challenger

Robert A. Challenger, in sworn testimony, stated to the Board that he is a Training Administrator II in the Division of Management Services. Dr. Brandau met with him to discuss the issue of inappropriate communications by Mr. Nuttall. Mr. Challenger testified that he was asked to

do a performance analysis and determine whether there was a gap between the desired level of performance as it related to Mr. Nuttall's communications and the actual state of his performance. It was determined that Mr. Nuttall had sufficient knowledge and skills to communicate appropriately, yet he did not do so. Mr. Challenger recommended to Dr. Brandau that he provide support for Mr. Nuttall to help him communicate appropriately in a consistent manner. Mr. Challenger suggested that Dr. Brandau meet regularly with Mr. Nuttall and clearly spell out his expectations and offer support by offering to review any communications that Mr. Nuttall had questions about before he sent them out.

The other portion of Mr. Challenger's recommendations was that there be consequences for Mr. Nuttall if he continued to choose to communicate inappropriately. The consequences could take any number of forms, including discipline, to make sure that Mr. Nuttall knew he would be held accountable for not communicating appropriately. Mr. Challenger stated he believed Mr. Nuttall to be a graduate of the Front Line Leadership Program which is a program developed by a nationally recognized training and development organization which deals with helping supervisors understand their role as supervisors and gives them the knowledge and skills to effectively supervise. The course covers skills such as how to get your point across in an appropriate manner.

On cross examination, Mr. Challenger stated that the prescription for addressing Mr. Nuttall's problem was discussed with him well after the incident giving rise to the one-day suspension and it occurred when Dr. Brandau was his supervisor and not Mr. Sapp. Mr. Nuttall asked Mr. Challenger whether it would be fair for an employee to be held accountable for trying to act on behalf of professional ethics in the absence of any direct instructions from a supervisor who had no knowledge of the code of ethics and had no supervisory sessions to discuss problem performance. Mr. Challenger responded that it would not be fair to ask that of someone who did not have the requisite knowledge and skills. However, for someone like Mr. Nuttall, with a high-level position and a high level of education and experience, it would be fair to have a certain level of expectations regarding communication. Mr. Challenger stated that, if he were faced with a situation where a supervisor refused to meet with an employee to discuss concerns, then he would insist on such opportunity and, if the refusal persisted, he would then take the matter to the next higher supervisor. Mr. Challenger

testified that it would be disingenuous for an employee to claim that he did not know a business communication was inappropriate when it had been determined that, if his life depended on it, he could write an appropriate business communication. He testified that he had relied upon Dr. Brandau's characterization of Mr. Nuttall's prior communications as being sarcastic and derogatory.

Testimony of Charles R. Grant

Charles R. Grant, being sworn, testified that he had no involvement in his capacity as the Division's training officer in forming a training plan to deal with any deficiencies in Mr. Nuttall's performance. He stated that there was no such training available for a person in Mr. Nuttall's position. According to Mr. Grant, a person in Mr. Nuttall's position comes in with an inherent knowledge of skills, principles, and leadership. Mr. Grant testified that Mr. Nuttall was in a leadership position as a unit chief and had the knowledge and skill to know the organizational chain of command, organizational structure and what was expected of the employees and what was expected of him. Mr. Grant stated that the Department did not have a performance plan for every employee. There was a clear expectation that there was to be a performance plan for all direct reports and Mr. Grant had no knowledge of whether Mr. Nuttall should be exempt from having a performance plan with specific performance expectations.

Testimony of Charles T. Watkins, Jr.

Charles T. Watkins, Jr., in sworn testimony, told the Board that the employee planning process is expected of all employees in the merit system and most of the employees in the department have performance plans. The plans are developed by employee supervisors in concert with input from the employees and they arrive at a consensus of stated expectations for the following year. In questions related to the absence of a written performance plan for Mr. Nuttall during the period from 1992 when Mr. Sapp became his direct supervisor until 1996 when Dr. Brandau became his immediate supervisor, Mr. Watkins testified that the performance plan is not, in and of itself, a forerunner for disciplinary action unless it is specifically performance-related. There is, according to Mr. Watkins, a distinction between the planning process and disciplinary action. Such plans are standard operating protocol for the Department but they are not the only mechanism for conveying information to an employee regarding expectations. Mr. Watkins testified that discipline can still be

imposed in the absence of a circumstance specifically covered in an employee performance plan. According to Mr. Watkins, whether there is a performance plan or not, an individual should be guided by his own profession or the classification of the position he occupies.

Mr. Watkins testified that he found no correlation between the absence of performance plans and meetings with supervisors and the large number of grievances filed in the Division. Mr. Watkins stated that the large number of grievances could be explained by the fact that during that period Ferris School was going through a transition and there was an attempt to minimize layoffs. The process generated a number of contract grievances regarding reassignments, duty posts, and so forth. Mr. Watkins testified that it is an appropriate tenet to encourage employees to resolve their differences at the lowest and least formal organizational level possible as opposed to resorting to an adversarial process. When asked if there were any alternative mechanisms for dispute resolution besides the grievance process when colleagues disagree, Mr. Watkins agreed that it would have been possible for Ms. Timko's supervisor and his supervisor, Mr. Sapp, to have brought Mr. Nuttall and Ms. Timko together to talk about the situation.

Mr. Watkins stated that the previous discipline which was mitigated at the MERB's request prior to hearing was viewed as being a document which would set the tone for future conduct and inform Mr. Nuttall of some restrictions. Within six months there was another situation where an inappropriate business communication had occurred. Mr. Watkins testified that he did not know of any supportive interventions by Mr. Sapp from the period of June 1996 to January of 1998 to help Mr. Nuttall maintain an appropriate level of business communication. Mr. Watkins testified that Mr. Nuttall's personnel file did contain a performance plan and appraisal and that it would not be expected that one would find in a performance plan an entry that the employee needs to cease making inappropriate business communications. Such a concern could be dealt with in a planning performance review document in the form of a memo or verbally.

Testimony of James J. Nuttall

Mr. Nuttall was sworn and testified that he did not have correct information that it would be inappropriate to write a memo to a colleague in another Division with whom he had 15 years of prior experience on a number of occasions. He testified that it did not occur to him that it would be seen

as a punishable offense. He stated that in his mind there was no coherent set of instructions. Neither was there an opportunity on a regular basis to dialogue with Mr. Sapp or anyone else or participate in training that would have once and for all set the matter to rest. Mr. Nuttall testified that for three years he had had very little opportunity to interact with his direct supervisor or benefit from an annual performance plan or periodic review. He was just told to contact his supervisor if he had any questions.

Overall, according to Mr. Nuttall, his performance was deemed to be acceptable or beyond acceptable and so it was difficult for him to really predict on any given day what might be offensive. The problems arose in the content of occasional e-mails or written instructions of his supervisor rather than any kind of ordinary merit system-supported way of conveying information. Mr. Nuttall testified that he initiated the memo to Ms. Timko based on his belief that he had a professional obligation to raise professional issues with a colleague. Mr. Nuttall testified that when Dr. Brandau became his boss there was no indication there was a problem. They had regular conversation and saw each other several times a week. Mr. Nuttall participated on the leadership management team. He stated that, after the memo from Ms. Timko, Dr. Brandau's recommendation that they try to get over it was rejected by Mr. Sapp in favor of punishment. He stated that there was no problem with Dr. Brandau and that he and Dr. Brandau had an operable resolution to the problem that was overridden by Mr. Sapp. Mr. Nuttall described his work history with Dr. Brandau and testified that in the years when he was Dr. Brandau's equal and in the time since where he had once again come under Dr. Brandau's administrative supervision there were no performance difficulties nor did Dr. Brandau have any exception to his communications except when Mr. Sapp made a point of overriding Dr. Brandau's initial recommendation of a non disciplinary resolution.

Mr. Nuttall testified that he believed his January 20, 1998 memorandum was an appropriate communication under the obligation he had as a professional social worker to call attention to and seek redress for organizational behavior that deviated from acceptable standards and ethical practices under the NASW code of ethics. It was, according to Mr. Nuttall, his profound concern that individuals for whom he was administratively responsible were being asked to do work for which they were neither trained nor equipped. In the particular case giving rise to the memo, there was a minor

child whose mother was in jail and whose father was estranged and Mr. Nuttall's unprepared, untrained worker was expected to implement the full expectations of state and federal statutes with regard to permanency planning and the rights of children who are in the custody of the state. That, according to Mr. Nuttall, was simply not an area in which his workers had any expertise or training. Mr. Nuttall testified that he was objecting to a child getting sub-standard service and to his worker being imposed upon to perform a role that was not something for which he was professionally trained or adequately supported.

Beyond his belief that this was an appropriate business communication based upon the NASW code of ethics, Mr. Nuttall testified that the Department's service integration policies and procedures as well as the Delaware Model supported inquiries about shared cases. He testified that there is no indication in state law that YRS personnel will carry on Child Protective Services' function. The disagreement over the memo concerned an internal policy initiative from the Division of Family Services to ask YRS to do something which, according to Mr. Nuttall, state law ascribes to the Division of Family Services. There had been no organizational response to this issue, despite his daily, weekly, and monthly requests to Dr. Brandau, so Mr. Nuttall testified it was his "...professional obligation to not just sit by and say well when they get around to it, they will provide appropriate levels of professional adequate services." He stated that he thought it was his professional obligation to raise a question with Ms. Timko and to try again to precipitate a decision on the issue. Mr. Nuttall characterized the lack of resolution as a pattern of inaction in response to a very cogent professional concern. He characterized the opposing point of view as being specious and one which he found to be professionally indefensible. He stated that on January 20, 1998 the organization was out of line with ethical standards and he was required to act. He testified that he did not think his communication with Ms. Timko was inappropriate and he had not received any instruction that convinced him otherwise. He described Ms. Timko as one of the progenitors of the position that everybody can do the same kind of work and that his communication with her was an opportunity to once again assert that he believed that this was not a correct way of doing business.

As a result of the incident with Ms. Timko, Mr. Nuttall testified that he received a very constricting mandate from Dr. Brandau which caused other problems in his ability to function as a

highly valued veteran administrator. The mandate from Dr. Brandau was that he was not to write anything to anyone outside of his direct divisional domain. Mr. Nuttall testified that he had no problem with being severely restricted in that way and he had not violated that specific written instruction, which had been given to him in April of 1998. Mr. Nuttall told the Board that it would have taken something very specific in writing to have offset his professional obligation to try to get corrected what he stated was a severe deviation from professional standards -- that is, to have prevented him from writing the memo to Ms. Timko.

Rebuttal Testimony of Guy Sapp

Mr. Sapp was called as a rebuttal witness and testified that, when he joined the department on June of 1993, it was the practice that the Division Director met with each of the chiefs or superintendents on a weekly basis. For him this meant about six meetings a week. When he took over he spoke with the individual unit heads and Mr. Nuttall was the only one who expressed an interest in continuing the process. Mr. Sapp became convinced that nothing that was being accomplished in those meetings could not be accomplished in weekly staff meetings. Mr. Sapp stated that when he came to the Department there was a lot of blaming going on and a lot of tension among the operating units as to who was at fault for all the problems that existed. Mr. Sapp testified that, contrary to Mr. Nuttall's assertions, Mr. Nuttall did have a performance plan in 1996 and in 1997. Mr. Sapp testified that he felt it was important to deal with individual incidents with Mr. Nuttall and described his problems with Mr. Nuttall as neither chronic nor of long-standing, but, rather, episodic.

FINDINGS AND CONCLUSIONS

The Board finds that James J. Nuttall is a skilled and dedicated professional social worker. His management philosophy and his frustrations with the manner in which he believes certain of the managers within the Division of Services for Youth, Children and Their Families either resolved or failed to resolve what Mr. Nuttall perceived to be problems, have brought him into repeated conflict with his supervisor, Mr. Sapp. The contrast in management styles between Mr. Sapp and Mr. Nuttall is pronounced.

There was, at the time of the incident giving rise to the present grievance appeal, a type of "turf war" concerning an inter-divisional case role function involving the various responsibilities of employees of DFS and DYRS in dealing with a certain group of clients. Mr. Nuttall had a concern about his perception of the changing role of YRS Family Service Specialists in situations where they were being asked to take on more specialized responsibilities, which Mr. Nuttall associated with the responsibilities of the Family Service Specialist in DFS. Mr. Nuttall took the position that YRS Family Service Specialist did not have the specialized knowledge or training in the services they were being expected to provide. The proper approach to integration of the provision of services to certain clients was a highly sensitive issue within the Department and had, for some time, been the subject of various management meetings and discussions which had not produced a satisfactory resolution.

It is clear from the testimony that Mr. Nuttall had become increasingly frustrated with the lack of what he perceived to be a timely resolution to the issue of clarification of the roles of Master Family Service Specialist in YRS and DFS. An incident with a career board where a YRS worker was not promoted from Senior Family Service Specialist to Master Family Service Specialist (MFSS) appears to have heightened and focused Mr. Nuttall's concerns. The board was composed of two YRS professionals and Margaret Timko, who was then the Deputy Director of the Division of Family Services. Mr. Nuttall, a manager within the YRS, chose to send to Ms. Timko, who was the Deputy Director of another Division (DFS), a memorandum on January 20, 1998, concerning her participation on the career board. The memo contained his reflections on the professional capabilities of the Family Service Specialist Staff together with his views on the issue, which he acknowledged was under " review/deliberation/consideration, etc.", of "purported" interchangeability between YRS and DFS workers. The specific individual who had been considered and rejected by the career board for MFSS level was, according to Mr. Nuttall's memorandum to Ms. Timko, very highly regarded by his colleagues (including Mr. Nuttall). He had been recommended as fit for consideration for MFSS status by Mr. Sapp, Dr. Brandau, Ms. DiStefano and also by Mr. Nuttall himself. Mr. Nuttall was obviously not pleased with the outcome of the career board and the tone of his memorandum to Ms. Timko reflected his displeasure.

Mr. Nuttall's communication skills, as acknowledged by his former supervisor, Mr. Sapp, are well developed and his vocabulary and skill in the use of language are also apparent. The Board finds that Mr. Nuttall possesses considerable ability to communicate clearly, appropriately and in a businesslike manner when he chooses to do so. The evidence presented shows this is not an area where Mr. Nuttall needed training or remediation. Mr. Nuttall also possesses the ability to be sarcastic and can resort to hyperbole to express his frustration or displeasure and in situations where his sense of the relative importance of a particular matter has been violated. Examples of this behavior are found in the correspondence between Mr. Nuttall and Mr. Sapp concerning the lost pagers, in which Mr. Nuttall suggested the recognition and awards could have been withheld as discipline.

In June of 1996, Mr. Sapp had, in writing, expressly warned Mr. Nuttall about "inappropriate, sarcastic and condescending remarks" and had sought to impose a disciplinary suspension of one day. This imposition of discipline by Mr. Sapp on Mr. Nuttall also found its way to the Merit Employee Relations Board and was, at the urging of the Board, resolved outside of the hearing process by a settlement agreement, where, among other things, Mr. Sapp reduced the discipline imposed from a one-day suspension to a written reprimand and Mr. Nuttall agreed that there was just cause for imposing discipline. In that agreement, Mr. Nuttall also agreed that the negative comments about the Department's management or its actions would cease immediately when Mr. Nuttall was on State property or representing the State through his employment (Department's Exhibit No. 1, Tab 4). The situation got better for a while. Then Mr. Nuttall authored his memorandum to Ms. Timko.

Ms. Timko was distressed enough by Mr. Nuttall's memorandum of January 20, 1998 to write to Mr. Sapp, as well as Mr. Watkins in the Division of Management Services. Mr. Sapp thereby found himself in an awkward situation regarding a sensitive policy/systems issue which had been the subject of much discussion between DFS and YRS. He viewed this as one more episode of inappropriate business communication by Mr. Nuttall and, after appropriate due process considerations, proceeded to impose a one-day suspension without pay as discipline. Dr. Brandau concurred with Mr. Sapp's proposed use of discipline in this incident for what he also saw as an inappropriate communication. While Dr. Brandau testified that he recommended a reprimand, he

also told the Board that, had he been fully aware of the history of Mr. Nuttall's conflicts with Mr. Sapp, his recommendation would have been otherwise. Similarly, Gwendoline Angalet, who conducted the pre-decision meeting concerning the proposed imposition of a one-day suspension, concurred with Mr. Sapp's and Dr. Brandau's sense that this was another episode of an inappropriate business communication by Mr. Nuttall and she too supported the imposition of the one-day suspension.

Mr. Nuttall, through the testimony he elicited and through his own sworn testimony in this two day proceeding, has unsuccessfully attempted to persuade the Board that there was not just cause for the imposition of discipline under Merit Rule No. 15.1. His initial line of defense is that this matter should have proceeded through non-disciplinary channels in order to satisfy the injunction of Merit Rule 20 that, in the interest of harmonious and cooperative working relationships, employees and their immediate supervisors are encouraged to informally discuss and resolve all employee inquiries, requests and suggestions.

In this regard, Mr. Nuttall may very well be correct that it would have been preferable to resolve this matter outside of the disciplinary track. But that is not his decision to make. Disciplinary sanctions through the Merit System disciplinary process remain available to management in the Department and its Divisions to correct acts or omissions by employees and to hold them accountable. This is the second time Mr. Nuttall has appeared before the Board for incidents related to his reactions to the management at YRS.

Mr. Nuttall's further defense that he was justified, and perhaps even compelled, by the social worker's code of ethics to "engage" Ms. Timko in the manner he did is equally unavailing. Indeed, on this record, it is not credible. In this instance, the Board must balance Mr. Nuttall's claims that his conduct was protected against the interest of management in not having its legitimate initiatives undercut. In some cases, speaking out on matters of genuine public interest could stand as reasonable justification for particular employment actions, but this is not such a case. In this case, Mr. Nuttall is attempting to retreat behind such professional principles to avoid the imposition of reasonable accountability for a communication which was inappropriately disruptive, confrontational and calculated to heighten divisional friction.

It is clear to the Board that Mr. Nuttall tended to view his supervisor, Mr. Sapp, as a hierarchical, punishment-oriented former police chief with little appreciation for the professional social worker. Mr. Nuttall was not wholly supportive of Mr. Sapp's leadership and tended to resort on occasions to sarcasm, and even ridicule, as in the incident with the pagers and the other behavior which resulted in the imposition by Mr. Sapp of an agreed-upon written reprimand for Mr. Nuttall. The testimony supports the conclusion that Mr. Sapp tended to view Mr. Nuttall as a talented professional social worker who episodically acted as a disruptive irritant and one who poorly hid his lack of professional respect for Mr. Sapp. Dr. Brandau, also a professional social worker, did not concur with the manner in which Mr. Nuttall purported to satisfy his professional and ethical concerns.

Although there were no precise written protocols or directives concerning appropriate business communications among the managers of the different Divisions, the Board finds that Mr. Nuttall consciously chose to go outside the then-existing lines of communications concerning what he knew full well was a sensitive issue of the appropriate delivery of services to clients. The Board concludes that he was venting his personal dissatisfaction and frustrations and was intentionally "stirring the pot" on an issue he wanted to see resolved according to his own timetable. Mr. Nuttall had brought his concerns to the attention of higher ranking supervisory employees in the Department on a daily, weekly and monthly basis, according to his own testimony. His protestations that his code of professional responsibility compelled him to write the January 20, 1998 memorandum to Ms. Timko are not convincing and they do not insulate Mr. Nuttall from the application of the disciplinary process, having chosen to proceed in a manner which he knew or reasonably should have known was likely to be counterproductive and disruptive and which was, in fact, viewed as inappropriate by the recipient of the memorandum as well as by Mr. Sapp, Dr. Brandau and Ms. Angalet. The memorandum carried the clear potential to disrupt the ongoing efforts of Dr. Brandau and others at resolving a sensitive inter-divisional issue.

Mr. Nuttall protests that he did not know that his communication to Ms. Timko was inappropriate. He claims that he had not been given sufficient training and counseling in what was expected of him and therefore, from his point of view, any imposition of discipline is improper since

he should not be held to know what business communications would be considered inappropriate. He asserts that he did not know he was not supposed to write the memo to Ms. Timko and that, had he known, perhaps he might have taken a different approach. By this argument, Mr. Nuttall ignores the sensitivity that must reasonably be expected by management from someone with his seniority, experience, and abilities. The Board is convinced and finds that Mr. Nuttall knew or reasonably should have known that his memorandum to Ms. Timko was an inappropriate communication. He was not pleased with the outcome of the career board and he knew or should have known the memo would not be well received. He sent it nonetheless as a result of his pique with the outcome of the career board and his continued frustration with what was an inter-divisional squabble concerning the expectation that YRS employees would perform services and accept responsibilities in areas where he believed they did not have adequate training and expertise.

The Board finds by unanimous vote (with Vice Chairman Burns absent) that Mr. Nuttall has not shown by a preponderance of the evidence that the discipline of a one-day suspension imposed upon him was without just cause or is otherwise improper. The Board finds that the agency had legitimate reason and grounds to impose accountability on Mr. Nuttall and that he committed the conduct which was the subject of the sanction. He also received the due process rights to which he was entitled by the Merit Rules and the discipline imposed was, under the circumstances presented, appropriate. The grievance appeal is therefore denied and the action of the appointing authority is upheld.

IT IS SO ORDERED this 26th day of May, 1999.

Susan L. Parker, Esquire, Chairperson

John W. Pitts, Member

Dallas Green, Member

John F. Schmutz, Esquire, Member

APPEAL RIGHTS

29 *Del. C.* § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: May 27, 1999

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