BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

PUBLIC ORDER

Appellant,	)	
v.	)	**DECISION AND ORDER**
	)	**Docket No. 00-04-204**
STATE OF DELAWARE	)	
DEPARTMENT OF LABOR,	)	
Agency.	)	

BEFORE Brenda Phillips, Chairperson, Dallas Green, and John W. Pitts, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES

For the Department:
Ilona Kirshon, Deputy Attorney General
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, DE 19801

For the Appellant:
Roy S. Shiels, Esquire
Brown, Shiels, Beauregard & Chasanov
108 E. Water Street
P. O. Drawer F
Dover, DE 19903

NATURE OF THE PROCEEDINGS

This matter came before the Merit Employee Relations Board ("MERB" or "Board") for an evidentiary hearing on March 15, 2001 pursuant to Merit Rule No. 20.9 after a Step 3 decision of the State Personnel Office. The Appellant has grieved two disciplinary suspensions imposed on him by the Department of Labor. The first suspension was of five (5) days duration for unacceptable behavior and the second was a two (2) day suspension for returning to the workplace when directed

COPY

not to do so. On April 14, 2000, the Appellant appealed to the Board after the denial of his grievance by the designee of the Director of the Office of State Personnel on April 5, 2000.

The hearing on this appeal was scheduled for September 21, 2000. However, the matter was continued to November 2, 2000. At the request of the Appellant, the matter was further continued to March 15, 2001 when a quorum of the Board convened to hear the appeal. At the request of the Appellant, the hearing was treated as a non-public disciplinary hearing and the record marked confidential pursuant to 29 *Del. C.* § 5948. The Board will issue both a public and a confidential order concerning its decision of this matter. This is the public order of the Board which does not identify the Appellant and does not summarize the evidence presented.

THE LAW

Merit Rule No. 15.1

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

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

FINDINGS OF FACT

The evidence presented clearly compels the conclusion that the Appellant behaved in a loud, threatening, and most inappropriate manner toward both his immediate supervisor and his Director on October 6, 1999. His actions caused genuine alarm among employees in the immediate area and

justified fear for the physical safety of his immediate supervisor. His actions with the Director were inappropriate, insubordinate, challenging, and threatening. Both the Supervisor and the Director were very credible. She believed she was at risk and he believed he was in danger of being hit. A five day suspension for such behavior cannot be said to be inappropriate accountability for such unacceptable behavior in the workplace.

As to the second event and the two day suspension without loss of pay, Appellant asserts that he did not know that he was not to report to a Department of Labor office in Dover while acknowledging that he was on administrative leave. He states that he did not get the letter from the Director until after his visit to the Dover office where he claims to have gone to check his e-mails. His explanations for this behavior have the ring of rationalizations and are unavailing. When he left his Supervisor's office on October 6, 1999 he departed under directions from the Director that he was suspended from his employment. Thereafter, the announced suspension was converted to an administrative leave with pay pending further personnel action. The Appellant was told by his immediate supervisor that he was not to return to work. Appellant is a supervisory employee. His work includes supervision of employees in four locations within the State of Delaware. He violated the instructions he received not to return to work and his professed lack of "understanding" is not persuasive. The imposition of a two day suspension without any loss of pay is not an inappropriate accountability for such actions by a manager.

DISCUSSION AND CONCLUSION

This unfortunate situation arose because of the Appellant's concern that the effectiveness of his unit was being compromised by equipment changes which he apparently sincerely believed were

ill considered. His concern appears genuine although the evidence presented does not permit a conclusion about the validity of his observations. However, such issues are not relevant to the question of whether or not there was just cause for holding him accountable for his clearly unacceptable behavior in the workplace. No matter how well meaning or how sincere the concerns of an employee, they cannot stand as justification for the behavior described on this record. Under the Merit Rules and by law, the Appellant has the burden of establishing there was not just cause to hold him accountable for his bellicose behavior and for his failure to abide by the directions of his supervisor. See *Hopson v. McGinnes*, Del Supr., 391 A.2d 187 (1978) (It is up to the employee to convince the Commission to rule in his favor). It is the unanimous determination of the Board hearing this appeal that the Appellant has not met his burden in this regard. The evidence presented is convincing that the agency has complied with Merit Rule 15.1 in all regards and that its action in imposing accountability should be upheld.

ORDER

For the foregoing reasons, the appeal of this Appellant concerning the two suspensions imposed by the Department of Labor is denied by the unanimous vote of the undersigned members of the Merit Employee Relations Board. The action of the Department is upheld.

IT IS SO ORDERED:

Brenda C. Phillips

Brenda Phillips, Chairperson

Dallas W. Green

Dallas Green, Member

John W. Pitts

John W. Pitts, Member

APPEAL RIGHTS

29 *Del. C.* § 5949 provides that 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.

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: April 17, 2001

Distribution:
Original: File
Copies: Grievant's Representative
Agency's Representative
MERB counsel