IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE/ DEPARTMENT OF HEALTH AND SOCIAL SERVICES ("DHSS"), Appellant,	)	
v.	)	C.A. No. 08A-08-008 JRJ
ANTHONY V. AVALLONE, Appellee.	)	On Appeal from Decision of the Merit Employee Relations Board Docket No. 07-05-391

Submitted: January 4, 2010
Decided: March 29, 2010

Upon Appeal of the Decision of the Merit Employee Relations Board:
REVERSED AND REMANDED

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Jurden, J.

I. INTRODUCTION

The State of Delaware Department of Health and Social Services ("DHSS") appeals the decision of the Merit Employee Relations Board ("the Board") which concluded that the Division of Substance Abuse and Mental Health's ("DSAMH") dismissal of Anthony Avallone ("Avallone") was a disproportionate penalty in light of Avallone's prior service record, and which reinstated Avallone to his position without back pay. For the reasons set forth below, the Court finds that the Board did not have authority to reinstate Avallone to his position and deny him back pay, which essentially substituted a suspension beginning from his dismissal and ending with the decision. Accordingly, the Board's decision is **REVERSED** and **REMANDED**.

II. BACKGROUND

Avallone began employment with DHSS in September 2004.[1] Avallone was employed as a Management Analyst III, a position which was within DSAMH.[2] On February 26, 2007, Avallone was terminated from this position because he obtained a digital video camera and equipment for his own personal use by misrepresenting that the purchaser was the State of Delaware/DSAMH and used state equipment, time and software in the process.[3]

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[1] Record of Merit Employee Relations Board, Docket # 07-05-391 at 276 (hereinafter "R. at __")
[2] *Id.*
[3] R. at 496-497.

Prior to his position with DSAMH, Avallone worked for the State of Delaware in the Department of Services for Children, Youth and their Families ("DSCYF") in the Division of Youth Rehabilitative Services ("YRS").[4] While at YRS, Avallone made an orientation video for the New Castle County Detention Center.[5] In 2004, YRS contacted Avallone to make an updated orientation video for the New Castle County Detention Center and a new video for the Stevenson House in Milford.[6] Avallone agreed to produce the videos "at cost."[7] However, video production did not go as anticipated. There were delays in production and Avallone underestimated the costs in renting video equipment. As a result, Avallone decided to cut his costs by purchasing the video equipment.[8]

Avallone received a price quote for the video equipment from B&H Photo-Video ("B&H"). On May 30, 2005, Avallone faxed a business credit application to B&H in the name of his company, Avda Bay Ltd.[9] In the comments section of the fax cover sheet, Avallone typed: "Please accept this application for credit to purchase specific items on Quote #141889610. As per our telephone conversation, I am contracted through the State of Delaware and needing the equipment to complete the project. Please refer to the purchase order number on

[4] R. at 275.
[5] R. at 276.
[6] *Id.*
[7] R. at 276-277.
[8] R. at 279-283.
[9] R. at 503.

the trade reference as their guarantee of payment to me."[10] Thereafter, Avallone decided he did not need all of the equipment and received a second price quote. On May 31, 2005, Avallone faxed another purchase order to B&H from his home on a state-issued laptop computer.[11] On the cover sheet of the fax Avallone typed: "Please review the following State of Delaware Purchase Order."[12] According to Avallone, he placed the order for the equipment through the laptop but he was not aware the template had a hidden header which automatically generated a State of Delaware/DSAMH logo on the top of the document.[13] Avallone had the video equipment shipped to his home address.[14] Upon receipt, he realized that B&H thought the purchaser was the State of Delaware. Avallone called B&H to rectify the error, but was advised that the name on the order could not be changed until full payment was made.[15] Avallone was further advised that he could return the equipment and receive a 92% credit but that the credit would be reduced the longer he kept the equipment.[16] Avallone decided to keep the equipment and made incremental payments to B&H over the next several months.[17]

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[10] R. at 502.
[11] R. at 290, 505.
[12] *Id.*
[13] R. at 290-292.
[14] R. at 291.
[15] R. at 296.
[16] R. at 296-297.
[17] R. at 585-592.

In December 2006, B&H contacted DHSS and learned that the State had never authorized a purchase order for the video equipment.[18] DHSS then began an investigation of Avallone which led to his termination in February 2007.[19] Avallone eventually paid B&H in full with his own money. The final payment was made to B&H on February 5, 2007.[20]

Avallone filed a grievance regarding his dismissal and a hearing was held on April 27, 2007 before a hearing officer from Human Resource Management at the Office of Management and Budget. Avallone's grievance was denied. Avallone appealed the grievance decision to the Board. The Board issued its decision on July 21, 2008. DHSS filed the instant appeal, and shortly thereafter, Avallone filed an appeal with Superior Court in Kent County. The two appeals were subsequently consolidated.[21] Avallone has since withdrawn his appeal.[22]

In its appeal, DHSS argues that: (1) the Board exceeded its statutory authority in modifying the discipline imposed by the state; (2) the Board improperly shifted the burden of proof to DSAMH;[23] and (3) the Board's final conclusion of a disproportionate penalty is erroneous as a matter of law.

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[18] R. at 497.
[19] *Id.*
[20] R. at 593.
[21] *See* Order, July 1, 2009.
[22] Avallone's appeal was withdrawn through his legal counsel by way of a January 4, 2010 letter to the Court.
[23] In its brief, DHSS argues that the Board improperly shifted the burden of proof to "DSAMH" when the Decision of the Board actually indicates that the burden of proof was on "DHSS." As noted previously, Avallone's employment with DHSS was within DSAMH. Therefore, for the sake of clarity, the Court will use "DHSS" when discussing the burden of proof issue.

III. STANDARD OF REVIEW

The Superior Court's scope of review on appeals from the Merit Employee Relations Board is to correct errors of law and determine whether the record contains substantial evidence to support the Board's findings of fact and conclusions of law.[24] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[25] The Court must evaluate the record in a light most favorable to the prevailing party below.[26] The Court cannot determine questions of credibility or make its own findings.[27] When the issue on appeal is whether proper legal principles have been applied, the Court's review is *de novo*.[28]

IV. DISCUSSION

DHSS first argues that the Board exceeded its statutory authority when it modified the discipline (Avallone's termination) imposed by DSAMH and DHSS and that is an error of law. The issue is whether the Board has the statutory authority to modify the discipline imposed by an agency of the State. The issue arises because of two provisions of the merit system, 29 *Del. C.* § 5931(a) and 29 *Del. C.* § 5949(b), which are arguably in conflict with one another.

[24] *Raley v. Department of Transp*, 2000 WL 973239, at *5 (Del.Super. 2000)(citing *Foster v. State of Delaware Dep't of Public Safety*, 1997 WL 127002, at *2 (Del. Super. Jan. 27, 1997)).
[25] *Chapman v. Delaware Dept. of Transp.* 2009 WL 2386090, at *3 (Del.Super. July 31, 2009) (citing *Alcoholic Beverage Control Comm'n v. Newsome*, 690 A.2d 906, 910 (Del.1996)).
[26] *Chapman*, 2009 WL 2386090, at *3 (citing *Zicarelli v. Boscov's Dep't Store, LLC*, 2008 WL 3486207, at *2 (Del.Super. June 5, 2008)).
[27] *Raley*, 2000 WL 973239, at *5 (citing *Guions v. Protection Technology*, 1999 WL 1442022, at *3 (Del.Super. Sept. 21, 1999)).
[28] *Johnson Controls v. Fields*, 758 A.2d 506, 509 (Del. 2000).

29 Del. C. § 5949(b) states:

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

This statutory provision has been interpreted to allow the Board to either uphold the dismissal of the appointing authority or find against the appointing authority, and prohibits the Board from modifying the penalty and substituting its own discipline.[29]

In 1994, a new provision was added to 29 *Del.C.* § 5931(a) which reads in pertinent part as follows:

> 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.

[29] *State v. Berenguer*, 321 A.2d 507, 510 (Del.Super. 1974). 29 *Del. C.* § 5949(b) as interpreted by the *Berenguer* Court contains the same text as the current version of 29 *Del. C.* § 5949(b) with the exception that the word "Commission" has been substituted by the word "Board." *See* 69 *Del.Laws*, ch. 436 § 9.

This new provision, as DHSS argues, could enable the Board to substitute its own discipline in the guise of a remedy. DHSS contends that this is precisely what the Board did in this case in that the Board used § 5931(a) to "back door" a substitution by ordering reinstatement but denying back pay, thus imposing a suspension in lieu of dismissal.

The Court finds that the statutory provisions can be harmonized through the order of their application. 29 *Del. C.* § 5949(b) applies to the appeal and the decision and, therefore, must be applied first. 29 *Del.C.* § 5931(a) applies to the remedy and, thus, must be applied last. Given the interpretation of § 5949(b), as set forth by the *Berenguer* Court, the Board has the authority to either accept the dismissal or find against the appointing authority.[30] The Board cannot substitute its own discipline for that of the agency involved. Thereafter, § 5931(a) applies to a remedy and gives the Board the authority to "otherwise make employees whole" in the event the Board finds against appointing authority.[31]

Here, the Board did not act within its authority as prescribed by § 5949(b). The Board neither accepted Avallone's dismissal nor found against the appointing

[30] *See* Berenguer 321 A.2d at 510.

[31] Avallone argues that the case of *State Dept. of Corr. v. Worsham*, 638 A.2d 1104 (Del. 1994) is controlling, and authorizes the Board to correct and compensate for the wrongs which state employees suffered during the course of their employment with the state. The *Worsham* case involved a different scenario, however, and did not interpret § 5931(a) in light of the Board's authority under § 5949(b). *Worsham* involved the re-classification of Department of Correction positions. Grievants' positions were not re-classified as required by an agreement. The issue became whether the Commission had authority to award back pay or order the Department to correct its errors and reassign Grievants to the positions they were wrongfully denied.

authority. Rather, the Board substituted its own discipline, to "reinstate Avallone to his former or a equivalent position at DHSS as of the date of this Order without any backpay."[32] This "suspension"[33] was not within the Board's authority.

In addition to exceeding its statutory authority, the Board improperly shifted the burden of proof to DHSS. "[T]he discharge of an employee under the Merit System is *prima facie* correct and the burden is on the discharged employee to present evidence sufficient to rebut this presumption."[34] The Board improperly shifted the burden of proof and relieved Avallone of his burden of establishing that his termination was not for "just cause."

In its Decision, the Board cites to Merit Rule 12.1 which discusses "just cause" and provides in pertinent part:

> "Just cause requires: showing that the employee has committed the charged offense; offering specified due process rights specified in this chapter; and imposing a penalty appropriate to the circumstances."

The Board then concludes "as a matter of law" that "DHSS met its burden to prove by a preponderance of the evidence the first two elements of just cause: Avallone committed the charged offense (buying the video equipment for personal use using an unauthorized State purchase order); and DHSS afforded

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[32] R. at 30.

[33] The Board did not use the word "suspension" in the Decision but rather states Avallone is reinstated without back pay. *See* Decision at 18-19, R. at 29-30.

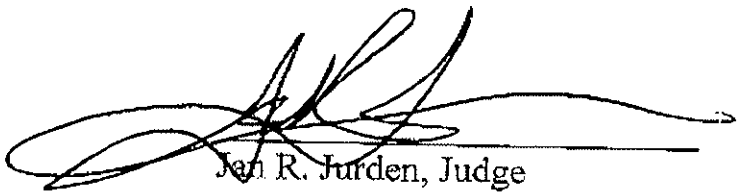
[34] *Weiss v. Delaware Dept. of Health and Social Services*, 2003 WL 21769007, at *3 (Del. Super. July 30, 2003).

Avallone due process required by the Merit Rules prior to termination."[35] The Board also concludes "as a matter of law" that "the penalty of dismissal was disproportionate under the circumstances."[36] The Board was incorrect in placing the burden of proof on DHSS to establish "just cause."

V. CONCLUSION

Because the Board exceeded its statutory authority, and improperly shifted the burden of proof to DHSS, the decision is hereby **REVERSED** and **REMANDED**.[37]

IT IS SO ORDERED.



Jan R. Jurden, Judge

cc: Prothonotary - Original

[35] R. at 28.
[36] *Id.* It can be inferred that the Board placed the burden of proof on DHSS with regard to the third element of just cause because it explicitly stated that DHSS met its burden with regard to the first two elements.
[37] In light of this ruling, the Court need not address the other arguments of the appeal.