

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

GRIEVANT,)	
)	
Employee/Grievant,)	
)	DOCKET No. 12-06-546
v.)	
)	
DEPARTMENT OF HEALTH)	PUBLIC DECISION AND ORDER
AND SOCIAL SERVICES/DIVISION)	<i>(redacted)</i>
OF PUBLIC HEALTH,)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on February 27, 2013 at the Commission on Veterans Affairs, Robbins Building, 802 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, and Victoria D. Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

GRIEVANT
Employee/Grievant *pro se*

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services (DHSS) offered and the Board admitted into evidence nine documents marked for identification as Exhibits A-I.

DHSS called two witnesses: Jason Gardner, Management Analyst III, Family Health Systems, Division of Public Health; and Alisa Jones, Section Chief, Family Health Systems, Division of Public Health.

The employee/grievant, (the Grievant), offered and the Board admitted into evidence three documents marked for identification as Exhibits 1-3.

The Grievant testified on her own behalf but did not call any other witnesses.

FINDINGS OF FACT

The Grievant worked as an Administrative Specialist II in the Family Health Systems section of the Division of Public Health (DPH).

On July 13, 2010, DPH suspended the Grievant for one day without pay for unprofessional behavior. According to the suspension letter, on June 28, 2010 the Grievant confronted her supervisor (Joan Mitchell-Williams) in a loud and aggressive manner and accused her of lying and cheating on her time-sheets. According to Alisa Jones, the Grievant used profanity ("I'm tired of all this s * * *."). Other co-workers overheard the confrontation.

On April 14, 2011, DPH suspended the Grievant for three days without pay for aggressive and hostile behavior towards the Adolescent Health Administrator (Walt Mateja) during a disagreement about contract documentation. According to the suspension letter, "You were observed throwing your hands in the air and stated in a loud tone of voice, 'just go around and

ask everybody why don't you." Other co-workers overheard the confrontation.

On December 7, 2011, the Grievant sent an e-mail to Jason Gardner, Management Analyst III. The Grievant was preparing travel approval requests for four managers to attend a conference sponsored by the Association of Maternal and Child Health Programs. The Grievant listed the chart fields for each manager with the code "Acct: 54xxx." The Grievant reached out to Gardner because his job responsibilities included invoice processing and contract management using the First State Financial System.

In an e-mail dated December 9, 2011, the Grievant asked Gardner, "Jason this information goes to the Department Secretary. Is there a better account code to use than 54xxx?" Gardner responded by e-mail: "Becky, you have to pick the account codes that correlates [sic] to the specific travel, i.e. tolls, parking, hotel, rentals, taxi, etc. There isn't just one account code that we can use."

Rather than continue the e-mail string, the Grievant walked down to Gardner's office. What happened next was disputed by the Grievant and Gardner.

According to Gardner, his door is always open and he keeps a second chair across from his desk for a co-worker to sit and talk. According to Gardner, the Grievant did not come into his office and sit down, but rather positioned herself in the doorway, with one hand on the door handle and the other hand on the door jamb. According to Gardner, the Grievant was very upset and unfriendly. In an angry and elevated tone, the Grievant said "Why do you make my job so difficult?" According to Gardner, the Grievant grew "louder" and "more aggressive." To defuse the situation, Gardner asked the Grievant to leave. According to Gardner, the Grievant "stormed off" and walked in the direction of a building exit.

According to the Grievant, the account code book – used to log data into the First State Financial System – was about an inch thick and contained thousands of codes. She never had to search for the right travel code before because other Management Analysts always provided them to her. According to the Grievant, the four managers who were going to the conference were contacting her to find out if their travel requests had been approved. According to the Grievant, she did not understand why Gardner did not know the travel codes, and she went to his office to talk to him about that. She felt frustrated that Gardner could not provide her with the codes and “his attitude towards me was very shut off.” According to the Grievant, she left Gardner’s office in tears and had to leave the building to compose herself.

Later that morning, the Grievant met with a supervisor to discuss the situation. According to the Grievant, she got a list of the codes later that day.

The Board finds as a matter of fact that DPH suspended the Grievant for one day without pay on July 13, 2010 for unprofessional conduct.

The Board finds as a matter of fact that DPH suspended the Grievant for three days without pay on April 14, 2011 for unprofessional conduct.

CONCLUSIONS OF LAW

Merit Rule 12. 1 provides:

Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. “Just cause” means that management has sufficient reasons for imposing accountability. Just cause requires: showing that the employee has committed the charged offense; offering specified due process rights specified in this chapter; and imposing a penalty appropriate to the

circumstances.

The Board concludes as a matter of law that DHSS had just cause to discipline the Grievant for the December 9, 2011 incident with Jason Gardner, but that a five-day suspension was not a penalty appropriate to the circumstances.

The members of the Board struggled with the threshold issue: whether the evidence in the record proved that the Grievant committed the charged offense.¹ While there were some commonalities in the testimony of the Grievant and Gardner, they diverged on key points. The Grievant was adamant that she did not just stand in the door to Gardner's office but went inside and sat down at Gardner's invitation. Gardner was equally adamant that at all times the Grievant remained in the doorway, gripping the door handle and door jamb in an unfriendly manner. The Grievant's demeanor and tone of voice may well have appeared to Gardner to be hostile, but then the Grievant may not have intended to provoke a confrontation, she was just frustrated and needed some answers in order to process the travel request authorizations.

In this "he said, she said" situation, with no apparent other eyewitnesses,² the Board can only fall back on the burden of proof.

"The burden of proof in employee [disciplinary] proceedings is well established in Delaware. When the State [disciplines an employee], the MERB presumes that the State did so

¹ DHSS charged the Grievant with violating the agency's "Beliefs and Principles doctrine." That doctrine "promotes an environment of mutual respect for all people . . . Behaviors which demean or offend people are not acceptable and will not be tolerated."

² At the hearing, Gardner testified that two co-workers, Jamie Peacock and Mary Manson, were in their cubicles near his office and after the incident with the Grievant they approached him and asked what had happened. Counsel for DHSS advised the Board that she had interviewed those two potential eyewitnesses, but they could not conclusively confirm that the date was December 9, 2011.

properly.” *Avallone v. DHSS*, 14 A.3d 566, 572 (Del. 2011) (en banc).

“The [grievant] has the burden of proving that the [discipline] was improper. Thus, [the grievant] is required to prove the absence of ‘just cause,’ as that term was defined in Merit Rule 12.1.” *Id.* (citing 20 *Del. C.* §5949(b) (“The burden of proof of any such appeal to the Board or Superior Court is on the employee.”)).³

The Board concludes as a matter of law that the Grievant did not meet her burden to prove that she did not commit the offense charged for the December 9, 2011 incident with Jason Gardner.

However, the Board also concludes as a matter of law that the Grievant met her burden to prove that a five-day suspension was not a penalty appropriate to the circumstances.

To justify a five-day suspension, DPH appears to have accepted Gardner’s account of the December 9, 2011 incident, and viewed the Grievant’s account through the lens of prior disciplinary actions for similar misconduct. The Board does not believe, however, that prior misconduct is evidence that the Grievant acted unprofessionally towards Gardner on December 9, 2011. The first step is to decide whether the evidence – the testimony of the only two eyewitnesses – proves that she did. If so, then prior misconduct can be taken into account for progressive discipline to determine the appropriate penalty. *See Steiner v. City of Akron*, 2000 WL 960958, at p.4 (Ohio App., July 12, 2000) (the law “forbids the submission of evidence of a previous incident if used to prove the *existence* of the conduct *for which the employee is being removed*” but allows such evidence “to show that the employee was on notice that such behavior

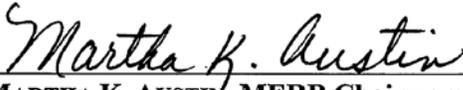
³ *Avallone* was a termination case, but the same allocation of the burden of proof applies in any case before the Board.

was unacceptable” or “that the harsher discipline was required”) (original emphasis).

The Board recognizes the agency’s need to continue progressive discipline to conform the Grievant’s behavior in the workplace to acceptable standards. While the Grievant may not have met her burden to prove that she did not act unprofessionally towards Gardner, splitting the difference between her testimony and Gardner’s, the Board does not believe that her conduct was so unprofessional as to warrant a five-day suspension. It certainly did not rise to the level which prompted her one-day or three-day suspensions, when she used profanity and was hostile towards supervisors, both of which incidents were overheard by co-workers. The Board believes that a lesser, three-day suspension will serve the purposes of progressive discipline.

DECISION AND ORDER

It is this **6th** day of March, 2013, by a vote of 3-0, the Decision and Order of the Board to deny the Grievant’s appeal in part and to grant her appeal in part. The Board orders DHSS to re-pay the Grievant for two of the days that she was suspended for the December 9, 2011 incident.



MARTHA K. AUSTIN, MERB Chairwoman



JOHN F. SCHMUTZ, MERB Member



VICTORIA D. CAIRNS, MERB 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 on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must 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: **March 6**, 2012

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel