BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

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| VINCENT BIANCO,<br>GRIEVANT, | ) | |
| v. | ) | MOTION FOR A FINAL DECISION AS A MATTER OF LAW OR FOR NEW HEARING |
| DEPARTMENT OF CORRECTIONS,<br>RESPONDENT. | ) | Docket No. 95-03-03 |



## DECISION AND ORDER

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

**AND NOW**, this 19th day of September, 1996, the Board makes the following determination and enters the following Order:

## APPEARANCES:

For the grievant: Roy S. Shields, Esquire
Brown, Shields & Chasanov
108 East Water Street
P. O. Drawer F
Dover, Delaware 19903

For the Department: Marc P. Niedzielski, Esquire
Deputy Attorney General
Department of Justice
841 Silver Lake Boulevard
P.O. Box No. 7007
Dover, Delaware 19903-1507

## NATURE OF THE PROCEEDINGS

This matter began before the Board on April 18, 1994, with Grievant's filing of an appeal of a disciplinary demotion after a Fourth Step grievance decision.

The Board convened a hearing on this appeal on December 14, 1995 which extended over six hearing days and concluded with deliberations by the Board on April 25, 1996. After public deliberations, the Board voted three to two in favor of the Grievant. As of June 10, 1996, the Board had not issued a written decision on this matter.

On June 10, 1996, the Department of Corrections ("Department") filed a motion seeking to have the Board enter a final decision as a matter of law in favor of the Department or, in the alternative, to order that a new hearing be conducted.

The Grievant was afforded the opportunity to provide a written response to the Department's motion and did so in a timely manner by letter dated July 19, 1996.

## DEPARTMENT'S MOTION

Merit Rule 21.0111 provides that a permanent employee may take a direct appeal to the Board for dismissal, demotion or suspension or, as an alternative, may elect to process his or her appeal through the grievance procedure. In this instance, the employee chose the grievance procedure.

The Department contends that as a result of that choice, further action is governed by the Fourth Step Grievance decision and the Grievant is required to prove that the Fourth Step Decision was a misinterpretation or misapplication of statute or Merit Rule. The Department argues that the Board has no jurisdiction to hear an appeal of the May 4, 1993 demotion letter which presumably would have been the focal point for a direct appeal under Merit Rule No. 21.0111.

The Department further takes the position that the Board's determination that the hearing was *de novo* is legal error; that the Board is limited to reviewing the propriety of the Fourth Step Ruling; and that the Grievant presented no evidence, statement or argument challenging the Fourth Step decision and, in fact, successfully objected to it as irrelevant and therefore the Department is entitled, as a matter of law, to a decision in its favor as the Grievant has not met his burden of proof.

In the alternative, the Department moves for a new hearing. The Department's premise on the request for a new hearing is that the erroneous legal ruling by the Board, prompted by advice of its legal Counsel, Deputy Attorney General John Brady, prejudiced the Department, particularly as to the limited admissibility of the Fourth Step Grievance decision.

The Department asserts it was prejudiced by allowing Board consideration of the Grievant's allegations concerning the Department's allegedly improper activities resulting from pressure outside the Department and the failure to allow the Grievant the opportunity to respond to ensure a complete picture of the events leading to the demotion.

The Department complains that Deputy Attorney General John Brady was guilty of improper and unethical conduct because, at the time he was advising the Board on this matter, he was also negotiating for employment with the law firm of Brown, Shiels and Chasanov while Roy S. Shields of that firm was representing the Grievant. The Department asks the Board to conclude that Mr. Brady's actions and substantial legal advice during the six days of hearings tainted the proceedings which resulted in a close vote in favor of the Grievant and, therefore, the Board should order a new hearing on this matter if it does not grant the Department's motion for Final Decision.

## GRIEVANT'S RESPONSE

The Grievant contends that the Board was correct in its decision to have a de novo hearing on the basis for his demotion and denies that case law, statute or the Merit Rules require proof that the Fourth Step decision was a misinterpretation or misapplication of statute or Merit Rule. The Grievant asserts that the Board is not limited by the Fourth Step hearing.

Grievant takes the position that no legal advice was requested of Mr. Brady by the Board on April 25, 1996 and suggests that no negotiations of terms of employment took place with Mr. Brady until after April 25, 1996. Grievant, through counsel, further points out that Mr. Brady advised the Board of any communications regarding employment by the law firm prior to any testimony or deliberations by the Board on May 25, 1996. Grievant further asserts that the last evidentiary hearing was conducted on March 21, 1996 and no employment discussions were held or contemplated at that time.

Grievant contents that, in the absence of any legal rulings by Mr. Brady at or after conversations with any member of the law firm, there was no prejudice to the Department in this case and the Department's motion for new hearing should be denied.

## DEPARTMENT REPLY TO GRIEVANT RESPONSE

On August 5, 1996, the Department filed a written reply to the Grievant's response and attached thereto an affidavit of the State Solicitor concerning the employment discussions issue.

The Department's response reiterates its position that the only matter properly before the Board was the Fourth Step Grievance decision of April 6, 1994 and that the demotion decision of May 4, 1993 was not before the Board because the Grievant elected to go through the grievance

process, as he is entitled to do under Merit Rule No. 21.0111 rather than file a direct appeal with the Board. The essence of the Department's position is that the Board only had jurisdiction to review the Fourth Step Grievance decision to which it claims the Grievant admits he did not present any challenge, thereby entitling the Department to a denial of the grievance as a matter of law.

With regard to the application for a new hearing, the affidavit of the State Solicitor provides, *inter alia,* the following chronology which is stated to be based on representations from Mr. Brady:

(a). On April 22, 1996 Andre Beauregard, Esquire of the law firm of Brown, Shields, & Chasanov contacted Mr. Brady regarding his interest in employment with that firm.

(b). On April 24, 1996, Mr. Brady received a firm offer of employment with the firm from Mr. Beauregard.

(c). On the morning of April 25, 1996, prior to the recommencement of the proceedings in Bianco v. Department of Corrections, Docket No. 95-03-03, Mr Brady informed the Chairperson of the Board that he had received the employment offer, but would limit his participation in the pending matter. During the luncheon recess of the proceedings, Mr. Brady informed the other Board members of the employment offer. Mr Brady did not inform anyone else of the employment offer on April 25, 1996.

(d). In the late afternoon of April 25, 1996, the Board by majority vote announced its [sic] decision in favor of Grievant who was represented by a named partner in the firm offering employment to Board's counsel.

(e). In the late evening or April 25, 1996, or the following morning, Mr. Brady made a counter-offer regarding employment with Grievant's counsel's law firm. Mr. Brady's counter-offer was accepted and he tendered his resignation from the Department of Justice to be effective on May 31, 1996.

## BOARD DECISION AND ORDER

In this case, the hearing before the Board was conducted as a de novo review of a disciplinary action of demotion taken against the grievant and not merely a review of the action of the Fourth Step hearing officer. It is clear that the Board either upholds or finds against the action of the appointing authority. It does not, except perhaps incidentally, find against or uphold the Fourth Step grievance results. See 29 Del. C. §5949(b).

The Department correctly notes that the burden is on the employee to persuade the Board to rule in his favor by a preponderance of the evidence presented. See Hopson v. McGinnes, Del. Supr.,391 A.2d 187 (1983). The Grievant must have a fair opportunity to do so by presenting evidence to the Board. Merit Rule No. 21.0200 which describes the procedure for a hearing on an appeal, either directly or through the grievance procedure, clearly contemplates such a de novo hearing opportunity.

The Department contends that the Board must presume the Fourth Step decision denying the grievance was correct. In this case, since the decision of the hearing officer at the Fourth Step hearing was that the grievance was denied and the demotion was justified and proper, to the limited extent that the decision upholds the dismissal, it is presumptively correct as is the original demotion decision. The Board however is not bound by the findings or the reasoning of the Fourth Step decision and hears the matter *de novo* and is either persuaded or not by the evidence presented.

Consistent with the determination made by the Board on the record on January 11, 1996, the Board concludes that when a Grievant appeals a disciplinary action to the Board either directly or from an adverse Fourth Step Grievance proceeding, the subject of the appeal is the action which the appointing authority took which gave rise to the grievance.

As to the Department's motion for a new trial, the Board observes that all legal advice given to the Board by Deputy Attorney General John Brady was given in open public session on the record. The advice and opinions of the Attorney General are advisory and not binding. Sullivan v. Local Union 1726 of AFSCME, Del. Supr., 464 A.2d 899 (1983).

The correctness of Mr. Brady's advice and guidance, where it was taken by the Board, is a subject that can be tested by appeal to the Superior Court since the Board's decisions are subject to review as to whether they are supported by substantial evidence and free from legal error. Tulou v. Raytheon Serv. Co., Del Super., 659 A.2d. 796 (1995).

Mr. Brady advised the Board members of his employment discussions with the law firm of Brown, Shields and Chasanov prior to the Board deliberations on April 25, 1996. It is not for the Board to determine the ethical propriety or impropriety of the actions alleged in the Department's motion. Appeal of Infotechnology Inc., Del. Supr., 582 A.2d 215 (1990). Under the circumstances presented here the Board finds no prejudice to the Department. The decisions and legal determinations are made by the Board and not its legal advisors.

The motion of the Department for a final decision in its favor as a matter of law is denied. The alternative motion of the Department for a new hearing is also denied. The Board will issue its written findings, opinion and decision on this matter forthwith.

**IT IS SO ORDERED:**

Katy K. Woo, Chairperson

Robert Burns, Vice-Chairperson

Walter Bowers, Member

Gary Fullman, Member

Dallas Green, Member

Docket No. 95-03-03

Mailing Date: September 24, 1996

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