

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

COPY

IN THE MATTER OF:)
JOYCE JOHNSON)
APPELLANT)
)
v.)
)
DEPARTMENT OF SERVICES)
FOR CHILDREN, YOUTH AND)
THEIR FAMILIES)
AGENCY.)

Docket No. 98-11-134 7

FINDINGS, OPINION, AND ORDER OF THE BOARD
(Termination)

BEFORE Susan L. Parker, Chairperson, Robert Burns, Vice-Chairperson, John F. Schmutz, member, John W. Pitts, member, and Dallas Green, member, of the Merit Employee Relations Board ("the Board" or "MERB"), constituting the full Board.

AND NOW, WHEREAS the captioned matter came before the Board for a public evidentiary hearing on July 9, July 22, August 26, September 8 and October 8, 1998, the Board hereby makes the following findings and conclusions and enters the following Order upholding the employee's appeal and requiring her reinstatement with appropriate back pay and other allowances in the position of Staff Nurse, from which the Board has determined she was terminated without just cause.

APPEARANCES

For the Appellant:
Carolyn P. Ayres, Esquire
503 West Ninth Street
P.O. Box 85
Wilmington, DE 19899

For the Agency:
James Maxwell, Esquire
Deputy Attorney General
820 N. French Street, 6th floor
Wilmington, DE 19801

NATURE OF THE PROCEEDINGS

On November 13, 1997, after having followed the Merit System grievance step procedure, Joyce Johnson ("Johnson" or "Appellant") filed a timely appeal with the Board pursuant to Merit Rule 21.120. The Board convened to consider the merits of the appeal on five separate dates, heard testimony from seventeen different witnesses and received more than thirty documents into evidence. Although her hearing involved a disciplinary matter, Johnson requested that the proceedings be conducted as an open public meeting.

After consideration of the evidence and public deliberations, the Board, by a vote of three to two, determined to uphold the appeal, finding that Appellant was dismissed in violation of Merit Rule 15.1. This is the Board's Opinion and Order on its findings.

SUMMARY OF THE EVIDENCE

Until the termination of her employment in April 1997, Joyce Johnson worked as a staff nurse at the New Castle County Detention Center ("NCCDC"), a secure facility for delinquent minors run by the Division of Youth Rehabilitative Services ("YRS"), a division of the Department of Services for Children, Youth and Their Families (the "Department" or "DSCYF"). The Department contends that Johnson was terminated from her position because of insubordination: she refused to follow direct orders to take a nursing "refresher course" which, the Department argues, was needed to improve her nursing skills. Johnson admits that she did not take the course, but contends that the claim of insubordination is a pretext for the Department's desire to replace her with nurses working under a contract between the Department and the Medical Center of Delaware (the "contract nurses").

1. Johnson's nursing skills.

Several witnesses testified to the quality of Johnson's nursing practices. Dr. Janet Kramer, a physician who provided medical services at NCCDC under the Department's contract with the Medical Center, testified that she complained several times to YRS management about what she considered Johnson's "gross deficits" in her understanding of complex issues. Kramer testified to several incidents that she believed demonstrated Johnson's lack of basic nursing skills, including failures to properly triage patients, unfamiliarity with narcotics disposal protocols and failures to follow charted physician orders. Kramer also testified that she recommended to YRS that Johnson take a course designed to refresh fundamental nursing skills, and finally warned YRS officials that she was considering recommending to the Medical Center that it terminate its contract with the Department because of her concerns about Johnson.

Debbie Haupt is an Advanced Practice Nurse ("APN")¹ who supervised the contract nurses working at NCCDC and Ferris School (adjacent to NCCDC) beginning in the autumn of 1995. Haupt testified to some ten additional incidents in which she found Johnson's nursing inadequate and described her efforts to counsel and train Johnson. According to Haupt, Johnson was not receptive to these efforts and typically responded by pointing out errors made by contract nurses. Over time, Haupt began documenting Johnson's errors in memoranda to YRS supervisor Darryl Dawson.

Joyce Parker testified on behalf of appellant. Ms. Parker is a Registered Nurse who worked in a variety of nursing positions in the state service until her involuntary termination from

¹ According to testimony received at the hearing, an APN is a registered nurse with a master's degree in a nursing specialty.

her position as staff nurse at Ferris School in January 1996. Parker testified that she supervised Johnson the first year Johnson worked for YRS and saw Johnson make only minor, common errors, which she readily admitted and corrected. Parker also testified that, in her opinion, the contract nurses and doctors made more mistakes than Johnson, though the examples Parker provided of these errors ran more to security breaches (for example, lost keys) than to health care concerns.

Appellant also presented the testimony of several NCCDC Youth Rehabilitative Counselors. None of the Counselors is a nurse or trained health care professional, but each worked with Johnson and had the opportunity to observe her in the course of their duties. John Greene testified that he had heard no complaints about Appellant's job performance before the Department began using contract nurses and explained that, in his opinion, the contract nurses were not comfortable working in a correctional facility and were not attentive enough to security concerns. Dennis Bassette testified that he believed the contract nurses were not cautious enough about guarding medications and that Johnson was very compassionate and concerned about the NCCDC students. Likewise, Rosalyn Sutton testified that the contract nurses do not have the same relationship with the students that Johnson did; as a result, the contract nurses have to seek assistance from YRS staff in situations Johnson could have handled alone. Finally, Tyrone Boger, supervisor of the Youth Rehabilitative Counselors, echoed concerns about security breaches by the contract nurses. Mr. Boger also testified that he was present when a diabetic student was brought into NCCDC, that the student was very aggressive and non-compliant and that, in his opinion, Johnson handled the situation professionally.

2. Performance Plan.

Darryl Dawson, Administrator of NCCDC, hired Johnson in 1992 and was her direct supervisor for most of her time with YRS. He testified that Johnson was the only full-time nurse at NCCDC for several years, that she worked hard, and that she had a good relationship with the students. However, Johnson also chronically ignored the chain-of-command and did not respond to Mr. Dawson's efforts to counsel her about its importance. Dawson testified that additional concerns about Johnson began surfacing when the number of students housed at NCCDC increased. YRS began hiring outside agencies to provide additional nursing services, but Johnson often complained about the nurses provided by the agencies and was inflexible in her approach toward them.

Dawson testified that he first formally reprimanded Johnson for insubordination in March 1996 (several months after the Medical Center began providing nursing services) for ignoring his express order *not* to attend a meeting between Dr. Kramer, himself, YRS Deputy Director Michael Alfree and Nurse Haupt concerning staffing issues. The following month, Dawson received the first written complaint from Dr. Kramer about Johnson's nursing skills, which concerned Johnson's initial treatment of a diabetic student. Mr. Dawson testified that the Medical Center reported an increasing number of patient-specific concerns about Johnson's nursing abilities through July 1996 and, in July, he met with Ms. Johnson as part of his investigation of the complaints. In September 1996, Dr. Kramer notified YRS of her intention to withdraw from the medical services contract unless her concerns about Johnson were addressed.

Guy Sapp, the Director of YRS, testified that he learned of the Medical Center's concerns in early October 1996 and met with Dr. Kramer, Nurse Haupt and Deputy Director Michael

Alfree to assess the situation. Sapp explained that he took the Medical Center's complaints very seriously because inadequate medical services in YRS facilities was a long-standing problem that had begun to improve after the contract with the Medical Center was put in place and because YRS had recently settled a lawsuit with the ACLU, in part by agreeing to improve the quality of the students' medical care. Sapp testified that, during the meeting with Kramer and Haupt, he reached an agreement with them that YRS would develop a 90-day performance plan for Johnson, which would include temporarily transferring her to Ferris School and requiring her to take the refresher course. On October 11, 1996, Sapp sent a memorandum to Darryl Dawson and Diane Gadow, the Superintendent of Ferris School, advising them of the transfer and directing Superintendent Gadow to work with Nurse Haupt to develop the specific terms of the performance plan, which was to include the refresher course. Appellant was copied on the memorandum and testified she did in fact receive it.

Ferris Superintendent Gadow testified that Johnson came under her supervision shortly after October 10, 1996 and that she and Nurse Haupt met with Johnson in November to review the written performance plan that they had developed. Gadow explained that the initial intent was that Nurse Johnson complete the refresher course during the ninety days she was working at Ferris; this proved to be impossible because of the course's availability. The written performance plan actually developed provided that "[i]f the three month program is completed and performance standards are met, a recommendation will be made for the nurse to return to the New Castle County Detention Center to work under the supervision of the nurse clinician there until the nurse successfully completes the University of Delaware Nursing refresher course and its evaluation process...." Gadow testified that Johnson disagreed with the performance plan both initially and

at each of their monthly meetings with her to review compliance with its terms. Gadow testified that in the last month Johnson was at Ferris School, Nurse Haupt documented two nursing errors that in Haupt's opinion confirmed the need for additional education; however, overall, Johnson completed the three month program successfully and was transferred back to NCCDC in January 1997, on the understanding that she would take the refresher course scheduled to begin in February.

Carole Martin, a personnel officer for YRS, reviewed Johnson's performance plan before it was implemented. She testified that such plans are often used in personnel management to address specific areas in which an employee may need improvement. Martin also testified that Johnson did not grieve either her transfer to Ferris School, the preparation or terms of the performance plan, or the orders to take the refresher course. Finally, Martin confirmed that Johnson was notified of her pre-termination due process rights under the Merit Rules and that a pre-termination hearing was conducted.

3. Refresher course.

When Johnson was transferred back to NCCDC in January 1997, she was placed under the clinical supervision of Diane DiSabatino, an APN from the Medical Center. DiSabatino testified that Johnson did not accept DiSabatino's supervisory authority, was very difficult to work with and often would not follow directions. Darryl Dawson testified that he had several conversations with Johnson after her return to NCCDC to address her questions about the need for the refresher course and to work out the details of her attendance (since the Division was paying for her tuition and books and providing her compensatory time for travel and course attendance). DiSabatino was present at one of these meetings and testified that Johnson indicated she was

planning to take the course.

During the first week of February, Director Sapp received a letter from Johnson's attorney questioning why Johnson was being required to take the refresher course and requesting a meeting; Mr. Dawson testified that around this same time, Appellant again suggested that she would *not* begin the course. Deputy Director Alfree testified he instructed Dawson to order Johnson in writing to begin the course as scheduled on February 20, 1997 and Dawson explained that he prepared and gave Johnson a memorandum to that effect on February 19, 1997. The Board was provided a copy of the February 19, 1997 memorandum, which also warned Johnson that not attending the course might result in disciplinary action against her.

Johnson did not attend the first session of the course on February 20. Alfree testified he received a note from Johnson on February 26 requesting that she be exempted from the course; Alfree explained he responded in writing the following day denying her request and directing her to begin the course by attending on its next meeting date. Alfree's memorandum also warned that "failure to comply with this directive will subject you to disciplinary action up to and including dismissal." Johnson did not attend the second session of the course. Shortly after, she was transferred back to Ferris School where she remained until April 8, 1997, when she was terminated from state service on the grounds of insubordination.

4. Insubordination as pretext.

Joyce Johnson testified extensively about the history of her employment with YRS and the events leading to her termination. Ms. Johnson explained that sharply rising enrollment at NCCDC caused her to ask Darryl Dawson for additional help as early as 1994. The Division did provide the requested relief via nurses supplied by temporary employment services and other

short-term, contract agencies; Johnson was concerned about the quality of care these nurses provided. Johnson testified that, when the Department was considering entering the Medical Center contract, Dr. Kramer assured her the contract nurses would be competent and sensitive to the unique student population at NCCDC; in Johnson's opinion, this promise was not kept. Appellant also described the work she did preparing for inspections by the ACLU and an accreditation agency in 1995.

With regard to her own disciplinary matters, Johnson testified that her relationship with Darryl Dawson was "excellent" until the Medical Center contract was put in place. She explained that her first reprimand from Dawson, concerning her attendance at a staffing meeting, was the result of miscommunication: Dawson told her only that she was "not needed" at the meeting, but did not tell her that she could not attend. Johnson also testified about the specific nursing complaints lodged against her by the Medical Center staff. Some, she explained, were the result of administrative difficulties within NCCDC (lack of transportation to take students for medical tests outside the facility, for example) and some were the result of the inherent difficulties in working with the NCCDC students (female students not reporting when they were pregnant, for example).

Much of Johnson's testimony focused on the performance of the contract nurses. Johnson testified that she reported many mistakes by the contract nurses to Darryl Dawson and Nurse Haupt and was concerned that YRS did not discipline the contract nurses for these errors. Johnson was particularly concerned that Nurse Haupt herself was not disciplined after Johnson reported her to the Board of Nursing in October 1996 for being intoxicated at work. Haupt admitted to the Board that she is a recovering alcoholic and that she completed an alcohol rehabilitation program

in June 1996, but began drinking again in October. Haupt denied that she was ever intoxicated at work and Dr. Kramer testified that random alcohol screens conducted on Haupt during 1996 confirmed that she was not using alcohol on the job.

Johnson testified that Director Sapp told her in an October 1996 meeting that she would be subject to a performance plan, including the refresher course, and told her that when she was ready, he would meet with her again about the errors being made by the contract nurses. According to Johnson, Sapp did not condition a second meeting on completion of the performance plan. Johnson requested another meeting with Sapp in November; because the Director was out of the office, she instead met with Deputy Director Alfree about contract nursing errors. When Johnson tried to meet with Director Sapp again in December and January, he refused. Johnson confirmed that she received the February memoranda from Darryl Dawson and Deputy Director Alfree directing her to take the refresher course. She testified that she did not take the course as ordered because Director Sapp had promised her that they would meet again; she believed that if the meeting occurred, she might be excused from the course.

Charles Brittingham also testified on behalf of Appellant. Mr. Brittingham is currently President of the Delaware chapter of the NAACP and began investigating Appellant's termination at her request. He explained that his experience in labor matters was earned during the many years he served as a union vice-president at Bell Atlantic and through course work he has completed at a labor law school. Mr. Brittingham testified that, in his opinion, the Department violated Appellant's due process rights by not using progressive discipline; he was candid in admitting, however, that he has not completed his investigation, testifying that the Department has not cooperated in providing him the information he needs to reach a conclusion.

DISCUSSION AND FINDINGS

Merit Rule 15.1 requires that a disciplinary sanction of termination be imposed only for "just cause," which, as defined in the Merit Rule, has three elements: (1) a showing that the employee has committed the charged offense; (2) offering the due process rights specified in Merit Rule 15; and (3) imposing a "penalty appropriate to the circumstances." An agency's termination decision is *prima facie* correct and the burden of proof is upon Appellant to convince the Board that her termination was *not* for just cause. *Hopson v. McGinnes*, Del.Supr., 391 A.2d 187 (1978). The Board does not have the power to fix the penalties on appeal from disciplinary matters, or to substitute its penalty for the one imposed by the agency. *State v. Berenguer*, Del.Super., 321 A.2d 507 (1974). Here, the Board finds that Appellant *was* insubordinate and *was* offered the requisite due process protections, but that her termination was not "appropriate to the circumstances."

The Board concludes that the Division acted reasonably in requesting that Johnson attend the refresher course. The Board finds Director Sapp to be credible in his testimony that he relied on Dr. Kramer's medical expertise to assess the seriousness of Johnson's nursing deficits and to choose an appropriate retraining mechanism; the Board also finds that the Director's reliance on Dr. Kramer was reasonable, since Sapp did not have a medical background and the Division did not have medical policies in place, and in light of Dr. Kramer's comments about the Medical Center withdrawing from the contract. The course was clearly job-related and was not overly burdensome to Appellant: it met once per week, and YRS was paying for it and providing Appellant compensatory time to attend. The Board also finds that Appellant knew as early as October 1996 that she was required to take the course, that she was aware of the direct orders

from Alfree and Dawson in February 1997 to attend, and that she was aware of the possible consequences if she did not attend. Her belief that she did not have to take the refresher course until she met again with Director Sapp was unreasonable in light of the documentary and testimonial evidence that Johnson was aware her performance plan included the course. In short, the Board finds that there is substantial evidence that Appellant did "commit the charged offense," i.e., was insubordinate, when she refused to begin the refresher course as directed.

There is also little question that the Department fulfilled the second element of the just cause analysis by offering Johnson the due process protections specified in Merit Rule 15.² On February 28, 1997, Director Sapp gave Appellant a memorandum advising her that he was considering her termination for insubordination; the memorandum also advised Johnson that she was entitled to a pre-decision meeting to "present any reasons that [her] termination should not be effective." This document satisfies Merit Rule 15.3, which requires written notice to the employee that dismissal is being proposed, and Merit Rule 15.4, which requires written notice to the employee that he or she is entitled to a pre-decision meeting. Johnson testified that she asked for and received a pre-decision meeting, which her attorney attended. The Board concludes that the due process protections specified in Chapter 15 of the Merit Rules were afforded to Appellant.

As noted, the Department's decision to terminate Johnson for her insubordination in refusing to follow at least two direct orders is presumptively correct and the Board will not lightly

² The Department argues that this issue is not properly before the Board because Appellant conceded in opening statements that the requisite due process was provided; Johnson contends that she conceded only that *post-termination* due process requirements were fulfilled. Since there is substantial evidence in the record before the Board that the Department *did* meet the pre-termination requirements, the Department is not prejudiced in either event.

reverse the agency's determination of appropriate discipline. Rather, the Board will only find the absence of just cause where the agency's discipline is so grossly out of proportion to the employee's misconduct that it shocks the conscience. In order to decide whether Appellant has met her burden and has overcome the presumptive correctness of the termination, the Board has to determine what "circumstances" should be considered in determining an "appropriate" penalty under Rule 15.1.

The Department argues that its termination decision is consistent with the secure correctional setting in which Johnson works and argues that the facility requires a paramilitary structure in which orders must be followed for the protection of both students and staff. The Board agrees that the appropriateness of a sanction must be assessed against the demands of the employment setting, but that is not the only circumstance to be considered. Johnson was not simply an employee of the Department: she was also a health care professional with responsibilities to the students in her care. The Board recognizes that the importance of following orders is self-evident to the Division's management, most of whom testified that their backgrounds were in law enforcement. Appellant's training, on the other hand, was in a profession that stresses independent judgment more than the chain-of-command. By this, the Board does not condone Johnson's insubordination, which may have warranted reasonable discipline in *any* employment setting. However, Merit Rule 15.1 requires the Board to determine whether Appellant established that her termination was not an appropriate penalty. Thus, it is a pertinent circumstance that Appellant was a *nurse* working in a correctional setting, rather than a corrections officer.

The Board also notes the lack of progressive discipline. While Merit Rule 15 does not

compel an agency to use intermediate disciplinary measures before terminating employment, Appellant had only one prior written reprimand, nearly one year before the events leading to her termination.³ She was otherwise a hard-working, dependable employee with a good relationship with the NCCDC students and staff. Her insubordination was more private than public, so that its deleterious effect on other employees was somewhat mitigated. Under the circumstances presented, the Board, by the affirmative votes of Members Burns, Pitts and Green, with Chairperson Parker and Member Schmutz voting no, concludes that Appellant has conclusively demonstrated that her termination was not appropriate. Thus, just cause for the termination, as defined in Merit Rule 15.1, is not present.

ORDER

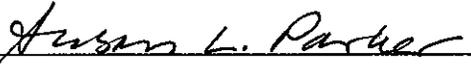
For the foregoing reasons, the Board upholds Joyce Johnson's appeal on the basis that her termination from the position of Staff Nurse was without just cause as that term is defined in Merit Rule 15.1. Pursuant to 29 *Del.C.* § 5949(d), Ms. Johnson shall, effective with the date of this Order, be reinstated into the position from which she was terminated, or a position of like status and pay, with all benefits and rights she was denied and shall be made whole for the period from the date of termination to the date of reinstatement, with all back pay and allowances, less any agency assistance granted to her by any agency, including but not limited to, public assistance and unemployment compensation.

Dissent: Chairperson Parker and Member Schmutz concluded that termination was an appropriate penalty in light of the multiple orders given to Appellant to attend the refresher

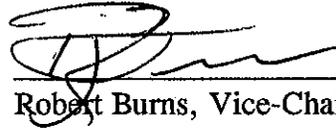
³ The Board notes that the performance plan was designed to address Johnson's nursing skills and, according to the Department's witnesses, was not a form of discipline.

course, the relatively insignificant burden on Johnson in attending, the risk to the NCCDC students posed by Appellant's nursing deficiencies and the Department's inability to discipline the contract nurses as Appellant demanded. For these reasons, they vote to uphold the agency's action.

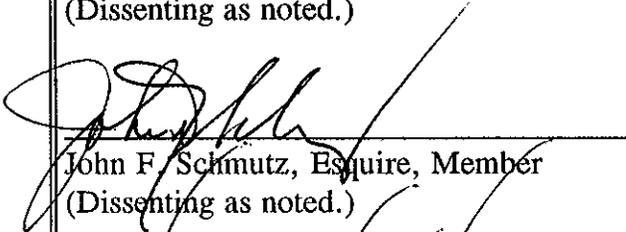
BY ORDER OF THE BOARD this 18th day of February, 1999.



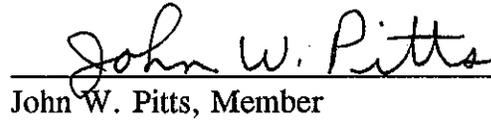
Susan L. Parker, Esquire, Chairperson
(Dissenting as noted.)



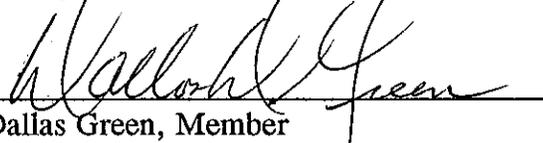
Robert Burns, Vice-Chairperson



John F. Schmutz, Esquire, Member
(Dissenting as noted.)



John W. Pitts, Member



Dallas Green, 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 the 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 thirty (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: 2/22/99

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