

COPY

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF  
NANCY DISTEFANO,

Grievant,

v.

STATE OF DELAWARE,  
DEPARTMENT OF TRANSPORTATION,  
Agency.

DOCKET NO. 05-03-324

ORDER OF DISMISSAL

BEFORE Brenda Phillips, Chairperson, and John F. Schmutz, Esquire, and Paul Houck, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. § 5908(a).

APPEARANCES:

For the Appellant: Nancy DiStefano, *pro se*

For the Department: Frederick S. Schranck  
Deputy Attorney General  
Delaware Department of Justice  
P.O. Box 778  
Dover, DE 19903

BACKGROUND

Nancy DiStefano filed a grievance with the Merit Employee Relations Board ("MERB" or "Board") on March 1, 2005 concerning a letter of reprimand she received in October of 2004. By the terms of the reprimand it was to be removed from her personnel file following a period of one year. That period ended on October 18, 2005. The employer, Delaware Department of Transportation, ("DelDOT" or "Employer") filed the motion now before the MERB arguing that the hearing on the grievance is moot due to the fact that the reprimand has been removed from Ms. DiStefano's personnel file.

The Employer was represented by Deputy Attorney General Frederick H. Schranck, and Ms. DiStefano appeared, pro se. Ms. DiStefano elected to have the motion considered in open session.

### DISCUSSION

The Board heard argument from both parties. The Employer submitted that the issue to be decided by the MERB is moot in that the only relief that can be granted by the Board if Ms. DiStefano is successful in her appeal is the removal of the written reprimand from her personnel file. The Employer contended that has already occurred due to the passage of time. In fact, the written reprimand was removed from Ms. DiStefano's file and shredded on October 18, 2005; an event to which she was invited but declined to participate in.

Ms. DiStefano submitted that the issue is not whether the reprimand has been shredded but whether it should have ever been issued in the first instance and asks for a hearing on the merits of her appeal. Specifically, Ms. DiStefano argued that even though the reprimand has been removed from her personnel file, Merit Rule 12.8 would require her to disclose that she has been subject to discipline if she raises her past record as a mitigating factor in any future disciplinary action. Specifically, Merit Rule 12.8 provides that "Adverse documentation shall not be cited by agencies in actions involving a subsequent offense after two years, except if the employees raise their past record as a defense of a mitigating factor." Ms. DiStefano submitted that there is a big difference between not getting a reprimand and having it expunged due to the passage of time and asked the Board to consider the appeal on the merits as to whether there was just cause for the reprimand.

In response, Mr. Schranck submitted that the likelihood of such an occurrence is remote because the exception under Merit Rule 12.8 requires that it be a subsequent and similar offense

which is very unlikely due to the underlying facts resulting in discipline. In addition, if Ms. DiStefano were asked if she had been disciplined she could respond to check her file and nothing would be found. He stated that he was not aware of any computer or e-mail record of the disciplinary action but submitted that the Board under its equitable powers could order that, to the extent any such records exist, they be purged as well. Mr. Schranck agreed that there could still be individuals with institutional knowledge of the discipline. In his opinion, Rule 12.8 is very limited and not intended to keep the grievance alive.

Ms. DiStefano stated that she has been in labor relations for 10 years with the State and there are computer records of discipline and Merit Rule 12.8 gives the Employer the right to bring up past discipline.

### **ORDER**

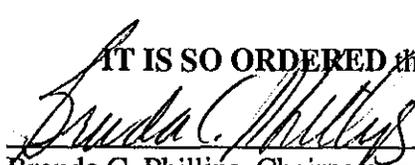
The Board has considered the arguments of the parties and agrees that, by no fault of either party, Ms. DiStefano's grievance has become moot due to the passage of time. The relief sought by Ms. DiStefano in her appeal is the removal of the written reprimand from her file. That has already occurred. The Board is cognizant of Ms. DiStefano's concerns about future reference to the discipline under Merit Rule 12.8. The Employer has argued in support of its motion to dismiss that there are no records concerning the discipline to be raised in a future disciplinary proceeding under the limited exception provided by Merit Rule 12.8. The Board intends for the Employer to be bound by its representation.

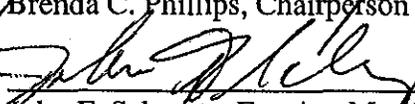
In granting the Employer's motion, the Board orders that any computer records or e-mails that may exist related to the discipline be purged in addition to the paper records. In addition, the dismissal is granted with the express finding that the Employer has waived its right to assert the exception under Merit Rule 12.8 in regard to any future disciplinary action involving Ms.

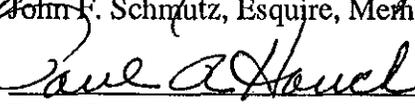
DiStefano. No reference may be made to the reprimand or the proceedings surrounding the disciplinary action and it may not be used in connection with assessment of any future penalty in any future proceedings.

**NOW, THEREFORE**, it appearing to the Board that this matter is moot, this matter is hereby **DISMISSED** with the conditions stated above, and this docket is **CLOSED**.

IT IS SO ORDERED this 1<sup>st</sup> day of December, 2005.

  
Brenda C. Phillips, Chairperson

  
John F. Schmutz, Esquire, Member

  
Paul Houck, Member

Mailing Date: Dec 6, 2005

Distribution:  
Original: File  
Copies: Grievant  
Agency's Representative  
Merit Employee Relations Board