

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

GRIEVANT,)	
)	
Employee/Grievant,)	DOCKET No. 14-07-609
)	
v.)	
)	DECISION AND ORDER
DEPARTMENT OF CORRECTION,)	
)	[Public - redacted]
)	
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 December 4, 2014 in the Delaware Commission of Veterans' Affairs Hearing Room, 802 Silver Lake Boulevard, Dover, DE 19904.

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

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Michele D. Allen, Esquire
on behalf of employee/grievant

Kevin Slattery
Deputy Attorney General
on behalf of the Department of
Treasury

BRIEF SUMMARY OF THE EVIDENCE

The Department of Correction (“Correction”) offered, and the Board admitted into evidence thirteen documents marked for identification as Exhibits A-M. Correction called six witnesses: Karen Keough, Robert Hume, Kecia Winchester, Perry Allfather, Ken Brandon and Julie Petroff.

The employee/grievant (“Grievant”), offered, and the Board admitted into evidence nine documents marked for identification as Exhibits 1 - 9. The Grievant called two witnesses, Theresa Block and Brian Douty and testified on her own behalf.

Prior to the hearing, the Board encouraged the Grievant to sit, stand and move around as necessary due to her discomfort when sitting for long periods of time.

During the hearing, Correction offered without objection from the Grievant and the Board admitted the following additional documents: a therapy prescription dated February 20, 2012; a recommendation for an ergonomic work space dated August 6, 2013; a progress note dated September 10, 2013 by Nancy Kim, M.D.; and an ergonomic evaluation follow-up dated May 29, 2012 (it was later learned this was for the Grievant’s work space in another building).

FINDINGS OF FACT

The Grievant works for the Department of Correction as a Social Service Specialist (“SSS”) in the Division of Probation and Parole and has been with the agency for 18 years.

On August 1, 2013, Karen Keough (“Keough”), a Probation and Parole Supervisor for the Domestic Violence Unit, was acting as the day-shift duty supervisor. The duty supervisor covers any problems or emergencies that come up during the week. Keough planned to attend a meeting/training session with her unit at 11:30 a.m. when she got a call at 11:10 a.m. from the office receptionist saying her shift was over and there was no one to cover for the rest of the day

or the next day.

As the duty supervisor, Keough decided that all on-duty support staff would cover the front desk responsibilities, including administrative staff and Social Service Specialists in the building (except for those in the monitoring center, who cannot leave their duty stations). Keough determined, based on the timeframe needed to cover for the rest of the day and the number of available staff, each person would have to cover the front desk for 45 minutes. Keough went down the hall, from office-to-office, asking staff to complete a 45-minute shift. One employee initially refused but agreed after Keough advised that everyone would have to participate and if not, they would be written up. Initially, while walking through the Grievant was on the phone so Keough decided to come back.

Because a number of the support staff who were being directed to cover the front desk worked under Robert Hume's ("Hume") supervision, he accompanied Keough to each office. When they spoke to the Grievant in her office, she replied that she could not cover the front desk because she was doing pretrial reports. When Keough advised that everyone had to take a turn, the Grievant again refused. Keough then advised that if the Grievant refused, she would have to write her up. The Grievant then started yelling, "go ahead and write me up, you are not allowed to yell at me." Hume advised that Keough had not been yelling when she advised the Grievant she could be written up for refusing to take a shift on the front-desk phones.

In an email to the Grievant on August 1, 2013 at 11:51 a.m., Keough offered the Grievant another opportunity to withdraw her refusal to cover a 45-minute shift at the front desk. Keough advised that all SSS and clerical staff were required to take a 45-minute shift and failure to do so would result in a formal write-up. Keough requested the Grievant reconsider her refusal and advised her she was scheduled to cover the desk from 1:45 p.m. to 2:30 p.m. Keough then left for her meeting and did not return to her office until later in the afternoon.

Supervisor Hume opted to cover for some of the employees in his unit by covering the phones and the front desk.

In an email response to Keough at 12:10 p.m., the Grievant summarized her perspective on the interaction that morning. She stated Keough stormed into her office interrupting a phone conversation and yelled that she needed to talk to the Grievant. Keough then returned 10 minutes later stating that all SSS and administrative staff are required to take a turn on the phone and the Grievant stated that she would not discuss her disability with Keough, stating only that her chair is not in position with that work station and that she had never been trained on the phones. Further, the Grievant stated in the email:

You owe me an apology for the way you approached me in regard to this, you have threatened me twice in less than an hours' time with a WRITE UP. You were not civil in trying to find some kind of resolution. I feel your conduct towards me is personal due to the office situation. I was told one of your unit members has been going around the office telling others that you and I are having problems so this is a continuation of that. Due to the fact your unit member knows more than I do. Brian has volunteered to cover the phones for that time; your issue is that you need somebody there. He will fit that slot.

Keough saw the email response from the Grievant hours later but did not attempt to speak with the Grievant based on the tone, language and two refusals to cover the phones. Keough prepared an incident report which she sent to her supervisor.

In 2010, the Grievant became injured when she slipped and fell at work. The Grievant went to the emergency room after her ankle, knee, back and shoulder hit the floor. Subsequently, the Grievant has had two ablations on her back, knee surgery and foot surgery. As a result, Correction provided an ergonomic workstation that included a specially-adjusted chair, wrist pad, foot-rest and specially-adjusted computer monitor as an accommodation for her disability. The Grievant can only sit in non-adjusted chairs for 30 to 45 minutes before needing to stand. If the Grievant's workstation is moved or adjusted, a professional ergonomic adjuster

must come in and re-adjust back to the Grievant's normal settings.

The Grievant refused to discuss her disability with Keough as she believed Keough knew about her accommodation and the need for a professionally-adjusted chair/work-station. The Grievant had been placed in an office/work-area that was part of Keough's unit and could not be moved until Correction found a suitable replacement location. The Grievant could not move her chair to the front desk to cover phones because her adjusted-chair becomes unbalanced when moved over concrete flooring. The Grievant sought a substitute to take her 45 minute coverage assignment. Her coworker Theresa offered to cover the Grievant's time slot knowing of her inability to sit in a non-adjusted chair for long. The Grievant's husband, who works in another unit and is not the Grievant's supervisor, overheard their conversation and opted to cover the phones for the Grievant. The Grievant never notified Keough in person because she was told Keough could not be disturbed in her meeting so the Grievant drafted and sent the email. The Grievant believed this to be acceptable as other Social Service Specialists had other employees cover for them.

On January 6, 2014, the Grievant received a formal written reprimand based on the incident that occurred on August 1, 2013 between the Grievant and Keough, the duty supervisor for that day. Correction determined that the Grievant had violated Department of Correction Probation and Parole Policy 1.17, section V, paragraph A, #7e; the Department of Correction Code of Conduct #21 – Insubordination; and Department of Correction Code of Conduct #23 – Conduct Unbecoming Staff.

The Board finds as a matter of fact that Keough asked the Grievant to cover the front desk and the Grievant refused twice to do so.

The Board finds as a matter of fact that the Grievant responded to Keough's email and told Keough that she had found someone to replace her during the time period on the phones.

The Board finds as a matter of fact that the Grievant can sit in a non-adjusted chair for up to 45 minutes.

CONCLUSIONS OF LAW

A. Just Cause for Discipline

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 finds as a matter of law that Correction had just cause to discipline the Grievant for insubordination and conduct unbecoming staff. While Keough was not the Grievant’s direct supervisor, she was the duty supervisor on August 1, 2013 and needed to find coverage for the front desk immediately. Upon being directed to take a shift to cover the phones and front desk, the Grievant refused, citing her need to complete pre-trial reports. Even after being told by Keough that if she did not take the shift she would be written up, the Grievant still refused and became loud and argumentative while Keough and Hume stood in her office. Other employees refused initially to take a shift as well until Keough informed them that they would be written up for failure to do so; the other employees then complied. Even after the Grievant verbally refused, Keough again offered her the opportunity to take the shift or be written up. The Grievant responded by finding a substitute to take her shift. The Grievant did not receive permission to solicit a substitute to cover her shift. The Grievant told Keough (rather than requested) that she would be utilizing another employee to cover her shift.

The Board finds the Grievant’s refusal to comply with the Duty Supervisor’s direction to

cover the front desk and her later response that she would have a substitute provide the coverage constitutes insubordination.

The Board also concludes as a matter of law that the issuance of a written reprimand was not an appropriate penalty, considering all of the circumstances. DOC's Policy 9.12 establishes that the first step of progressive discipline is a written warning, followed by a written reprimand, suspensions (without pay and paper), demotion and ultimately dismissal. The policy states:

V. Policy

It is the policy of the Department of Correction to hold all employees accountable for their conduct. Employee disciplinary actions will be imposed to correct employee behavior. Disciplinary actions will be imposed for just cause. Disciplinary actions will be progressive, where applicable, and as prompt as is reasonably possible under the circumstances of each case. Disciplinary actions will be applied consistently throughout the Department taking into account the circumstances of each occurrence and any aggravating or mitigating factors. Formal disciplinary actions include written warnings, written reprimands, suspensions (without pay or paper), demotions and dismissals.

While this Board is not responsible for enforcing Correction's policy, it is responsible to fairly and uniformly apply Merit Rule 12.1. The Board may look to the departmental policy in order to understand what is considered to be a "penalty appropriate to the circumstances." It is undisputed that the Grievant has been a Correction employee for eighteen years. The record fails to establish that she has a prior disciplinary history for similar or related behavior in the last five years. The record does not establish a reason as to why Correction skipped the first step of its progression in this incident, nor does it establish any comparators to evidence this is the usual and customary penalty for similar incidents.

For these reasons, the Board concludes the issuance of a written reprimand for this single incident was not appropriate to the circumstances. Correction is directed to rescind the written reprimand and to issue, in its place, a written warning, consistent with the principles of just cause

as defined by Merit Rule 12.1 and DOC Policy 9.12.

B. Discrimination

Merit Rule 2.1 provides:

Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors is prohibited.

The Grievant maintains that she was treated unfairly and disciplined based on discrimination by Correction due to her disability. “A grievant must establish that she: (1) has a disability; (2) is otherwise qualified to perform the essential functions of the job, with or without accommodation; and (3) suffered an adverse employment action because of her disability.” *Hilferty v. Department of State* (Docket No. 07-12-406). Federal law defines a “disability” as a “physical or mental impairment that substantially limits one or more major life activities.” 42 U.S.C. § 12102(2).

The Board finds as a matter of law that the Grievant fails to prove a prima facie claim of discrimination. While the Grievant has established that she has a disability due to the accommodation provided by Correction of the ergonomic work space, and she is qualified to perform the essential functions of her job with accommodation, the Grievant did not suffer an adverse employment action because of her disability. The Board holds that Correction issued the Grievant a written reprimand due to her insubordination and not based on her disability. Keough requested all available Social Service Specialists and administrative/clerical staff, including the Grievant, take a shift covering the front desk phones after Keough learned there would be no employee at the reception desk for the rest of the day. The Grievant refused but never stated the reason she could not take a shift was because of her inability to sit at the front

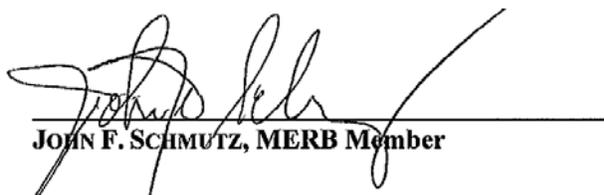
desk where her professional ergonomic adjustments were not available. In fact, initially the Grievant cited her need to complete pre-trial reports as the reason she could not take a shift. In the subsequent email, the Grievant states to Keough that she will not discuss her disability with her. The Grievant provided no documentation that she could not have completed a 45-minute shift covering the front desk. In fact, it was noted that she could work up to 45 minutes in a non-adjusted chair before needing to stand up.

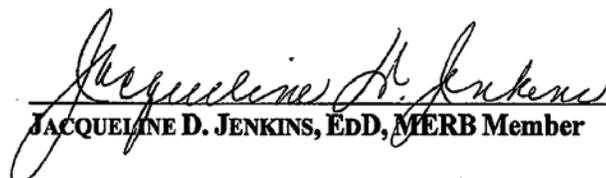
The Board concludes as a matter of law based on the evidence in the record that the Grievant fails to meet her burden to prove that Correction issued a written reprimand to her without just cause or discriminated against her by issuing a written reprimand due to her disability.

ORDER

It is this 30th day of March, 2015, by a unanimous vote of 4-0, the Decision and Order of the Board to deny the Grievant's appeal. The Board finds the Department of Correction had just cause to discipline Grievant and did not discriminate against Grievant based on her disability.

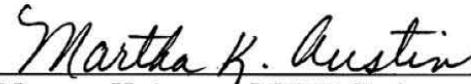
The Board concludes, by a vote of three members to one, as a matter of law that the issuance of the written reprimand was not appropriate to the circumstances. Wherefore, the Board directs the Department to rescind the written reprimand and issue a written warning in its place.


JOHN F. SCHMUTZ, MERB Member


JACQUELINE D. JENKINS, EDD, MERB Member


VICTORIA D. CAIRNS, MERB Member

I respectfully dissent with respect to the modification of the penalty.


MARTHA K. AUSTIN, MERB Chairwoman

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 30**, 2015

Distribution:

Original: File

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Board Counsel
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