

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

<b>GRIEVANT,</b>	)	
	)	
Employee/Grievant,	)	<b>DOCKET No. 15-04-625</b>
<b>v.</b>	)	
	)	<b>DECISION AND ORDER</b>
<b>DEPARTMENT OF LABOR,</b>	)	
	)	<b>[Public – redacted]</b>
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 June 18, 2015 in the Hearing Room of the Public Employment Relations Board, Carvel State Building, 820 N. French Street, 4<sup>th</sup> Floor, Wilmington, Delaware 19801.

**BEFORE** Martha K. Austin, Chair, John F. Schmutz, Paul R. Houck, 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

Gary Aber, Esq.  
on behalf of the Employee/Grievant

Kevin R. Slattery  
Deputy Attorney General  
on behalf of the Department of  
Labor

### **BRIEF SUMMARY OF THE EVIDENCE**

The Department of Labor (“DOL”) offered and the Board admitted into evidence without objection five exhibits marked for identification as A-E. DOL called three witnesses: Pam Garry, client of the Division of Employment and Training/DOL; Ivette Noel, Employment Service Specialist at the Division of Employment and Training/DOL; and Stacey Laing, Operations Administrator at the Division of Employment and Training/DOL.

The employee/grievant (“Grievant”), offered and the Board admitted into evidence without objection four exhibits marked for identification as 1-4.

The parties stipulated in the prehearing order to limit documents and testimony to this incident only, no prior discipline would be discussed unless the Grievant opened the door to such information, per Merit Rule 12.8. The parties stipulated that should the Board find that Grievant committed the charged offense the written reprimand given to him was the appropriate penalty for the circumstance.

At the close of the agency’s case, the Grievant moved for judgment as a matter of law. The Board granted the motion.<sup>1</sup>

### **FINDINGS OF FACT**

The Grievant works as an Area Operating Supervisor in the Division of Employment and Training/DOL.

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<sup>1</sup> “In granting the motion for judgment as a matter of law, the Board did not impermissibly shift the burden of proof. As a matter of practice in disciplinary cases, the Board believes that the agency has the burden of going forward and so the Board asks the agency to present its case-in-chief first. To meet the grievant’s ultimate burden of proof, the grievant can rely on the evidence presented by the agency without having to put on his case-in-chief.” *Grievant v. Department of Services for Children, Youth and their Families/Division of Youth Rehabilitative Services*, Docket No. 13-10-596.

On October 28, 2014, Pam Garry (“Garry”) went to a Division of Employment and Training office to add information to her online resume. She waited for assistance in the registration area and a man (identified as the Grievant) came out. Garry asked the Grievant a question, however he was not much help and made a smart remark to her. The Grievant told Garry “you are from New York, I am from New York too.” Garry stated this did not bother her *per se*, however he just kept saying it. The Grievant also asked Garry if she was “doing this for a check [unemployment insurance compensation]?” The Grievant told Garry that if she did not fill out the online forms correctly, she would not get her unemployment check. Garry stated she was not intimidated by the Grievant, she just needed help and she already knew if she did not file her resume correctly she would not receive her unemployment insurance.

Garry testified she felt attacked so she started to pray. The Grievant overheard her and responded, “[D]o not take God’s name in vain.” She was not speaking a specific prayer, just saying “Jesus” repeatedly. Another woman then came out and helped Garry, while the Grievant just paced back and forth.

Ivette Noel (“Noel”) works in the same office as the Grievant and at one time he served as her supervisor. Her normal duties as an Employee Services Specialist include assisting clients receiving unemployment insurance compensation with registering their resume and profile for job hunting. However, on October 28, 2014 she was working on a special project separate and distinct from her normal responsibilities to assist clients. On that day, the Grievant came to her office and mentioned that she was needed in the registration area because no staff was there to help clients. Noel advised that she had already been informed of the situation and would be out to assist once she was finished what she was doing. The Grievant left her office and returned stating “you know you’re responsible for the registration area,” while pacing back

and forth in front of her office. The Grievant neither raised his voice nor blocked the doorway. Noel felt uncomfortable that she was being asked to do an unassigned duty. She testified, however, that she was not sure the Grievant was aware of her assignment to a special project.

Noel came out to the registration area and asked Garry if she needed assistance. She began to help Garry with her resume and the Grievant came over and commented that he had also instructed Garry to do the same thing. Garry asked Noel not to speak too loudly because she did not want the Grievant to come back. Noel stepped away for a moment to help other clients (just as the Grievant had been doing), and heard Garry say “oh God.” The Grievant replied, “[D]o not use God’s name in vain” loudly enough for others in the room to hear. Noel provided a statement regarding the incident to the Grievant’s supervisor, Stacey Laing (“Laing”), in an email dated October 29, 2014, at Laing’s request.

At the time of the incident, Laing was an Employee and Training Operations Administrator. Her duties included supervising the Grievant, whose job duties included providing assistance to clients with a barrier to obtaining employment. The Grievant typically carried his own caseload and he would help in the Resource Room (an area separate from the registration area) if he had no clients.

Laing did not work on October 28, 2014, but returned to work the next day, when she had a voicemail from Noel regarding the incident the day before with Garry. Laing asked Noel for a written statement and also contacted Garry by phone. Although Laing also requested a written statement from Garry, she never provided one.

After interviewing Garry and Noel, but prior to meeting with the Grievant, Laing drafted a written reprimand based on the similarities between Garry and Noel’s version of events. Laing then scheduled a meeting with the Grievant in order to hear his side of the story. She

informed the Grievant that the purpose of the meeting would be “to discuss some recent incidents”. The Grievant refused to give a statement after Laing explained the complaint made by Garry and Noel. Laing never put the written reprimand in view and did not show it to the Grievant during their meeting.

### **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.**

Merit Rule 12.2 provides:

**Employees shall receive a written reprimand where appropriate based on specified misconduct, or where a verbal reprimand has not produced the desired improvement.**

The Board concludes as a matter of law that DOL did not have just cause to issue a written reprimand.

The Board concludes that the Grievant did not violate or engage in any specified misconduct when he approached Noel about the lack of staff in the Registration area. Under normal circumstances, that would be Noel’s responsibility to staff that area. It was not clear whether the Grievant knew Noel had been assigned to special project work on October 28, 2014.

In fact, Noel testified that another coworker had informed her of the lack of staff and that she was planning to go out there as soon as she was done with what she was doing. Noel seemed to have no problem with this other coworker telling her about the situation even though he or she was not her supervisor. The Grievant never raised his voice to Noel or blocked her doorway; he merely paced back and forth in the hallway. The Board held there was no concrete evidence Noel was bullied into going out in the Registration area.

The Board concludes that the Grievant did not violate or engage in any specified misconduct in his interaction with Garry. The Grievant told Garry that she would not receive her unemployment check if she did not fill out her resume properly per his instructions. This was correct, factual information. Garry admitted that she knew she would not receive benefits if the resume was not done correctly. Contrary to the written reprimand dated November 25, 2014, Garry testified she was neither intimidated nor embarrassed by the Grievant. Garry stated she was frustrated because she was not getting the help she felt she needed, so she repeated the name of Jesus as if in prayer. Taken within context, such repeated use of the Lord's name could be construed to be taking the name in vain, regardless of the intent of the speaker. Garry could not articulate exactly what the Grievant had said or done to make her feel attacked, only that she thought he might have made a smart remark.

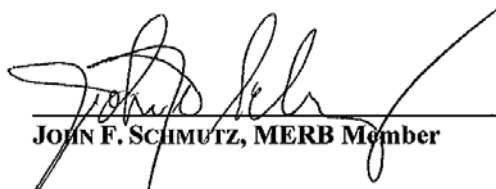
The Board concludes as a matter of law that DOL did not have just cause to issue a written reprimand because there was no evidence of specified misconduct that was the basis of the charged offense. Consequently, there is no basis for a written reprimand.

## **ORDER**

It is this **10th** day of **July**, 2015, by a unanimous vote of 3-0, the Decision and Order of the Board to grant the Grievant's appeal, and sustain the grievance.

Wherefore, DOL is directed to rescind the written reprimand and to remove all references to the October 28, 2014 incident from the grievant's personnel file.

  
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MARTHA K. AUSTIN, MERB Chairwoman

  
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JOHN F. SCHMUTZ, MERB Member

  
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PAUL R. HOUCK, 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: **July 10**, 2015

Distribution:

Original: File

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Board Counsel  
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