BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

CHRISTOPHER G. GIBSON, Employee/Grievant, v. VIOLENT CRIMES COMPENSATION BOARD, Employer/Respondent.	))))))))))	**DOCKET No. 08-07-424** **DECISION AND ORDER**

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 March 19, 2009 at the Margaret M. O'Neill Building, Suite 213, 410 Federal Street, Dover, DE 19901 and continued on March 25, 2009.

BEFORE Brenda J. Phillips, Chair, John F. Schmutz, Joseph D. Dillon, Martha K. Austin, and Paul R. Houck, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Christopher G. Gibson
Employee/Grievant *pro so*

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Violent Crimes Compensation Board

BRIEF SUMMARY OF THE EVIDENCE

The Violent Crimes Compensation Board ("VCCB") called five witnesses: Andrea L. Lewis, former VCCB Support Services Administrator; Mariann Kenville-Moore, Director of Victim's Services at the Department of Justice ("DOJ"); Stephanie R. Hamilton, Domestic Violence Coordinator for the Wilmington Police Department; Barbara A. Brown, VCCB Executive Director; and Thomas Castaldi, Chairman of the VCCB.

The employee/grievant, Christopher G. Gibson ("Gibson"), called two witnesses: Luellen Williams, VCCB Administrative Specialist II; and Andrea M. Powell, VCCB Investigator II. Gibson did not offer any exhibits into evidence or testify on his own behalf.

The VCCB offered and the Board admitted into evidence without objection eleven exhibits: Letter dated July 22, 2008 from Thomas Castaldi to Gibson (S-1); Letter dated July 3, 2008 from Barbara Brown to Gibson (S-2); e-mail dated February 27, 2008 from Andrea Lewes to Gibson (S-3); Telephone Conversation/Contact Log (S-4); e-mails dated June 6, 2008 between Barbara Brown and Gibson (S-5); Gibson's Authorized Driver Designation Application (S-6); Operating Policies and Procedures: Vehicle Operation (S-7); excerpts from Fleet Services Handbook (S-8); GPS tracking June 6-8, 2008 (S-9); GPS tracking for June 8-9, 2008 (S-10); MapQuest map of Brandywine Town Center and vicinity (S-11).

PRELIMINARY PROCEDURAL MATTER

Before the hearing started, Board Member Houck disclosed on the record that he knew and had worked with one of the employer' s witnesses (VCCB Chairman Castaldi) but he did not believe that would affect his ability to decide the case fairly and impartially. Gibson did not

object to Mr. Houck's hearing the case.

FINDINGS OF FACT

Gibson worked at the VCCB as an Investigator II from May 2, 2005 until his termination on July 22, 2008. He investigated claims by victims of violent crimes for lost wages, living and relocation expenses, and other monetary relief.

One of the claims assigned to Gibson was Lakeisha Truitt's. Truitt was the only eyewitness to a brutal murder in September 2006 of Cameron Hamlin by Truitt's ex-boyfriend (Shannon Johnson, a notorious drug dealer). Before apprehended by the police, Johnson tried to gun down Truitt in November 2006. While Johnson was incarcerated awaiting trial, a man came forward to reveal that Johnson had tried to hire him to kill Truitt to prevent her from testifying at trial.

On January 8, 2008, the Superior Court issued a material witness warrant to place Truitt in police protective custody pending Johnson's criminal trial. Truitt was housed at a confidential location with no contact with family or friends, protected around-the-clock by two Wilmington police officers.

On January 8, 2008, the DOJ entered into a witness protection agreement with Truitt to provide living expenses and mental health counseling.

Johnson's criminal trial began on March 10, 2008 and in mid-April a jury convicted him of first-degree murder and attempted murder. (He is now on death row.) No longer subject to the material witness warrant, Truitt was still under her witness protection agreement with the DOJ (revised on April 22, 2008) to provide for housing at a confidential location; her daily living

expenses; and police custody if she had to go out in public.

Truitt made a claim to the VCCB. The Board initially denied her claim, and Truitt appealed to a "live" hearing before the Board on February 26, 2008 where the Board awarded her lost wages. Truitt appeared at the live hearing in the protective custody of two Wilmington police officers.

By e-mail dated February 27, 2008, Andrea Lewis (who attended the live hearing) advised Gibson that the Board "rescinded their decision. [Truitt] will be awarded lost wages through 5/1/08. Please make sure to send all correspondence to Stephanie [Hamilton]. (That includes dispositions, checks, etc.). We want to make sure we stay on top of this situation. (Lakeisha is in protective custody)."

The Delaware Coalition against Domestic Violence held its 12th Annual Advocates' Retreat at the Atlantic Sands in Rehoboth Beach on June 9-10, 2008. Gibson was part of a VCCB team scheduled to conduct a workshop at 1:15 p.m. on June 9, "The VCCB from A to Z."

On June 3, 2008, Kenville-Moore and Hamilton met with Truitt at her safe house to discuss a re-location plan to another state. Truitt told them Gibson had asked her to attend the retreat to give a victim's perspective of the VCCB claims process. According to Hamilton, Truitt was not excited about going and said she did not plan to attend.

Kenville-Moore talked with Truitt on June 3, 2008. Again, Truitt mentioned that Gibson had asked her to attend the retreat. According to Kenville-Moore, she told Truitt she did not have to attend if she did not want to. Kenville-Moore testified that she did not pursue the matter further by questioning Gibson or notifying his supervisor because Truitt was a grown woman who could make her own decisions.

According to Gibson, he called Fleet Services on Friday, June 6, 2008 to reserve a State vehicle and asked to pick it up between 6-7:00 a.m. on June 9. Fleet Services told him that no one would be at work until 8:00 a.m. to give him that keys. Gibson picked up a vehicle Friday evening. GPS tracking shows that he drove to shopping malls and other locations in New Castle County over the course of Saturday and Sunday (totalling 88 miles).

Gibson used the State vehicle to pick up Truitt at her safe house on Monday, June 9, 2008 and drive her to the retreat in Rehoboth Beach. Kenville-Moore, Hamilton, and Brown were shocked to see Truitt there because Gibson had never mentioned during their planning sessions and dress rehearsal for the workshop that he would be bringing her, and he had not asked Brown's permission. According to Kenville-Moore, they were concerned not only for Truitt's physical safety, but for the safety of the attendees at the retreat. Kenville-Moore took Truitt to her hotel room until they decided what to do. According to Brown, there was a consensus that Truitt's presence at the retreat might jeopardize her physical safety and Gibson should drive her back to the VCCB office in Newport.

According to Kenville-Moore, she suspected there might be something "romantic going on" between Gibson and Truitt and he may have learned the location of Truitt's safe house. Kenville-Moore asked Brown to ask the Office of Management and Budget (Fleet Services) to print out GPS tracking records for Gibson's State vehicle. Kenville-Moore then compared some of the locations with MapQuest and determined that the vehicle had stopped for an hour around on June 9, 2008 within 100 yards of Truitt's safe house.

Kenville-Moore shared this information with Brown, who conducted an investigation. Brown met with Gibson on June 13, 2008. According to Brown, Gibson told her that he had

picked up Truitt at the VCCB parking lot in Newport on June 9, 2008 and returned her there after he drove her back from the retreat in Rehoboth Beach. Brown confronted Gibson with the GPS tracking records which proved that he lied.

By letter dated July 3, 2008, Brown notified Gibson: "I am recommending that you be terminated from your position as an Investigator II with the [VCCB] . . . for the following reasons:

1. Jeopardizing the personal safety of a VCCB client under protective custody whose unauthorized attendance at this event put that client in physical danger;

2. Jeopardizing the personal safety of the attendees of a VCCB event by bringing a VCCB client under protective custody to this event.

3. Failure to obtain approval from your supervisor to bring a client to the retreat either as a participant or attendee.

4. Providing false statements to your supervisor in a meeting on June 13 about the pick up location of the client. You stated that she met you at the VCCB parking lot. The vehicle GPS tracking system shows that you drove to the area of the Brandywine Towne Center in the morning and left from there for Rehoboth. The vehicle was never positioned at any time during the day at the VCCB parking lot.

5. Transporting a non-State employee in a State vehicle for personal reasons without permission.

6. Utilizing a state-owned vehicle for personal reasons on Saturday, June 7 and Sunday, June 8, without permission.

7. Taking the fleet vehicle home on the evening of Monday, June 9, and, subsequently, using the vehicle to drive to and from work on June 10, rather than returning it the previous night when you returned home from Rehoboth Beach.

Gibson had a pre-decision meeting with the VCCB Chairman on July 21, 2008. By letter dated July 22, 2008, Chairman Castaldi notified Gibson: "I have reviewed the information presented at this meeting and find that the recommendation for termination should be upheld. Accordingly, you will be terminated from the position of Investigator II with the [VCCB] effective July 22, 2008."

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.**

A. Charged Offenses

Three of Gibson's seven charged offenses involved misuse of a State vehicle. The Board concludes as a matter of law that there is substantial evidence in the record to support those three charges.

Gibson did not dispute that he used the vehicle for personal reasons on Saturday, June 7 and Sunday, June 8, 2008. Gibson did not dispute that he drove a non-State employee (Truitt) in the vehicle to the retreat in Rehoboth Beach on June 9, 2008. Gibson did not dispute that he did not return the vehicle when he got back from Rehoboth Beach on June 9, 2008 but used it to

commute to work the next day.

Gibson's only defense was that he did not receive a copy of the Fleet Services Handbook from his employer so he did not know that his personal use of a State vehicle was prohibited. The record, however, shows that Gibson completed an Authorized Driver Designation Application on May 2, 2008 and checked the box: "I agree to comply with the guidelines specified in the Fleet Handbook. I further understand that the vehicle I am driving may be monitored electronically at any time at Fleet Services' discretion."

The record also shows that Fleet Services sent Gibson an e-mail on May 5, 2008 notifying him: "This is to let you know that you have been entered into our Fleet Services data base and are now authorized to utilize state vehicles. Please refer to www.state.de.us/dss and click on Fleet Services and then go to our Fleet Services Handbook to read up on the rules and regulations of using a Fleet vehicle and for sites that house pool vehicles."

Gibson agreed to abide by the Fleet Services Handbook and Fleet Services provided him a hyperlink to access that Handbook. Gibson has only himself to blame for not taking the time to familiarize him with the acceptable uses for a State vehicle before he picked up his vehicle on June 6, 2009.

The Board concludes as a matter of law that there is substantial evidence in the record to support two of the other charges against Gibson: failing to obtain permission from his supervisor to bring Truitt to the retreat; and lying to his supervisor about where he picked Truitt up. Gibson did not dispute that he did not obtain permission to bring Truitt to the retreat. And the GPS tracking records show that Gibson did not pick Truitt up at the VCCB parking lot as he told the Executive Director on June 13, 2008.

That leaves the two remaining charges against Gibson: he jeopardized the personal safety of (1) Lakeisha Truitt and (2) the attendees at the retreat in Rehoboth Beach by bringing a VCCB client under protective custody to the event.

Gibson claimed he was not aware Truitt was still under protective custody because the DOJ witness protection agreement was not part of the investigative file, and Truitt had visited the VCCB offices several times before the retreat alone or with her son but without a police escort. Gibson, however, received an e-mail on February 27, 2008 from Andrea Lewis noting that Truitt "is in protective custody" and that all correspondence and checks must be sent to the Wilmington Police Department's Domestic Violence Coordinator to protect Truitt's safe location. Under the circumstances, the Board does not think that Gibson could have credibly believed that Truitt was not in some sort of protective custody for her personal safety even though she was no longer subject to a material witness warrant.

B. <u>Penalty</u>

Chairman Castaldi testified that he believed termination was appropriate because Gibson "violated the trust of a victim." Of all the charges against Gibson, it appears the most serious in the mind of the VCCB was the first charge: that Gibson put in potential jeopardy a victim who was still in protective custody at a safe house awaiting re-location to another state. According to Kenville-Moore, Truitt was totally dependent on the VCCB for financial support and saw Gibson as an authority figure so she was particularly susceptible to his invitation to attend and drive her to the retreat even though she had doubts and did not want to go.

The legal standard in reviewing an employer's disciplinary action is not whether the Board "would have imposed the same penalty as the agency, but whether that punishment is so disproportionate to the offense in light of all the circumstances as to be shocking to one's sense of fairness." *Johns v. Council of the Delaware Association of Professional Engineers*, Civ.A.No. 03A-07-001, 2004 WL 1790119, at p.4 (Del. Super., July 27, 2004) (Witham, J.) (citing *Warmouth v. Delaware State Board of Examiners in Optometry*, 514 A.2d 1119, 1123 (Del. Super. 1985) (Bush, J.)).

Chairman Castaldi testified that he was not aware if Gibson had any prior disciplinary record. A first offense, however, may be grounds for termination if it is serious enough. The courts "have not regarded the theory of progressive discipline as a fixed and immutable rule to be followed without questions. Instead, [the courts] have recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." *Carter v. Township of Bordentown*, 924 A.2d 525, 531 (N.J. 2007). "[A] single instance of misconduct" can be just cause for termination "if the misconduct is patently egregious." *Wilmington Savings Fund Society v. Moehller*, Civ.A. No. 97A-04-015, 1998 WL 283397, at p.4 n.3 (Del. Super., Mar. 19, 1998) (Barron, J.).

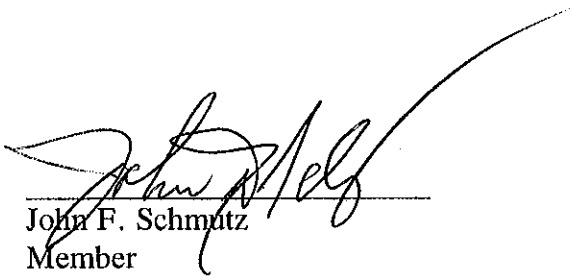
One of the dissenting Board members takes issue with the Gibson's termination for the first offenses based on his taking Truitt to the retreat because the VCCB did not rely on a specific written rule. The majority of the Board, however, concludes as a matter of law that "[a]n employer need not have an established rule where the behavioral conduct is so inimical to the employer's best interests that discharge is a natural result." *Biggs v. Unemployment Compensation Board of Review*, 443 A.2d 1204, 1206 n.3 (Pa. Cmwlth. 1982).

The Board concludes as a matter of law that the penalty of termination for Gibson's seven offenses based on his taking Truitt to the retreat in Rehoboth Beach was not so disproportionate as to shock one's sense of fairness. Truitt had experienced unimaginable horror in witnessing Shannon Johnson's murder of Cameron Hamlin. Johnson then tried to murder Truitt, and even after he was incarcerated tried to hire a hit man to kill her so she could not testify at Johnson's trial. Truitt had been in protective custody for almost six months, cut off from her friends and family in a secret location, and financially dependent on the checks she received from the VCCB. Still concerned for her personal safety, the DOJ and the Wilmington Police Department were working to re-locate her to another state.

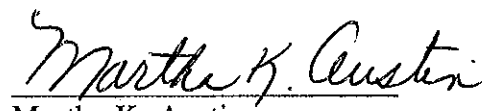
Under those circumstances, the Board believes it was more than poor judgment for Gibson to invite Truitt to the retreat, pick her up at her safe house, and drive her to Rehoboth Beach, particularly since he never advised his supervisor or other workshop presenters (even during a dress rehearsal) that he was bringing her. The Board concludes as a matter of law that the penalty of termination was appropriate to the circumstances and that the VCCB had just cause to terminate Gibson.

DECISION AND ORDER

It is this 2nd day of April, 2009, by a vote of 3-2, the Decision and Order of the Board to deny Gibson's appeal.

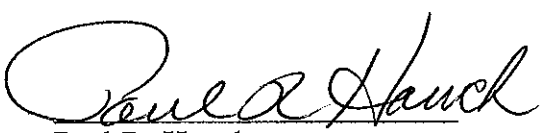


John F. Schmutz
Member



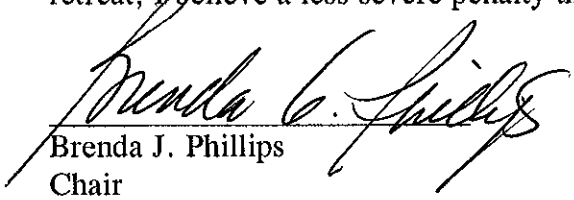
Martha K. Austin
Member

Joseph D. Dillon
Member



Paul R. Houck
Member

I respectfully dissent. I do not believe the penalty of termination was appropriate to the circumstances. Gibson did not have any prior disciplinary record, and the VCCB did not rely on any written rule to terminate Gibson. While Gibson showed poor judgment in taking Truitt to the retreat, I believe a less severe penalty than termination would have been more appropriate.



Brenda J. Phillips
Chair

I respectfully dissent. I do not believe the penalty of termination was appropriate to the circumstances. The employer's claim that Gibson put Truitt and the attendees at the retreat at great personal risk was belied by Truitt's prior disclosure to Kenville-Moore and Hamilton that Gibson had invited her. They did not take any action to make sure she would not attend by notifying Gibson's supervisor, and allowed Gibson to drive Truitt back from Rehoboth Beach.

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's 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.
>
> © 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: May 1, 2009

Distribution:
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Board Counsel

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