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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHRISTOPHER GIBSON,	)	
	)	
Appellant,	)	
	)	
V.	)	C.A. No. 09A-05-001 JRS
	)	
MERIT EMPLOYEE RELATIONS BOARD,	)	
	)	
	)	
Appellee.	)	

Date Submitted: March 16, 2010
Date Decided: June 17, 2010

Upon Consideration of an Appeal from the Merit Employee Relations Board.
AFFIRMED.

ORDER

This 17th day of June, 2010, upon consideration of the *pro se* appeal of Christopher Gibson from the decision of the Merit Employee Relations Board (the "Board"), dated April 2, 2009, and mailed May 1, 2009, terminating his employment with the Violent Crimes Compensation Board ("VCCB"), it appears to the Court that:

1. Mr. Gibson was employed as an Investigator II with the VCCB from May

2, 2005, until his termination on July 22, 2008.[1] The events giving rise to his termination took place between June 6-10, 2008. On June 6, 2008, Mr. Gibson secured a state vehicle so that he could drive to a VCCB retreat in Rehoboth Beach, Delaware, scheduled to take place from June 9-10, 2008.[2] From June 6 to June 10, Mr. Gibson used the state vehicle to drive "to shopping malls and other locations in New Castle County . . . totalling [sic] 88 miles . . . ."[3] On June 9, Mr. Gibson met up with Lakeisha Truitt, a non-state employee whom he knew or should have known was in the protective custody of the Department of Justice, and drove her from the confidential location at which she was secured to the retreat in Rehoboth Beach.[4] When Mr. Gibson's supervisors discovered that he had taken Ms. Truitt from her

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[1] Record of the Merit Employee Relations Board 0007 [hereinafter "R. at __"].

[2] R. at 0009.

[3] *Id.*

[4] *Id.* Ms. Truitt was the only witness to a murder. Her ex-boyfriend attempted to shoot Ms. Truitt, and ultimately killed the driver of the vehicle in which Ms. Truitt was a passenger. Before he was arrested, the ex-boyfriend made a second unsuccessful attempt on Ms. Truitt's life. The ex-boyfriend was subsequently arrested and held in prison pending trial. While the ex-boyfriend was in prison, a man came forward and reported to police that the ex-boyfriend had solicited him to kill Ms. Truitt to prevent her from testifying. The Court issued a material witness warrant and Ms. Truitt was placed in police custody pending the ex-boyfriend's trial. As part of her protective custody, Ms. Truitt was housed at a confidential location, and allowed no contact with family or friends. She was also provided with twenty-four hour police protection by two Wilmington police officers and entered into a witness protection agreement with the Department of Justice to provide Ms. Truitt with living expenses and counseling. The material witness warrant ended when the ex-boyfriend was convicted of first-degree murder in April 2008, but the witness protection agreement continued pending Ms. Truitt's relocation to another state. *Id.* at 0007. *See also id.* at 0213-23.

"safe house" and brought her to the retreat (where she was unprotected), they directed Mr. Gibson to return Ms. Truitt to the VCCB office.[5] After making a one hour stop on the way back from Rehoboth, Mr. Gibson eventually returned Ms. Truitt to her "safe house." Mr. Gibson decided not to attend the second day of the retreat, and eventually returned the vehicle after work on June 10, 2008.[6]

2. In a letter dated July 3, 2008, the Executive Director of the VCCB, Barbara Brown, informed Mr. Gibson that, as a result of the June 2008 incidents, he was being suspended from the VCCB with a recommendation that his employment be terminated.[7] The letter recommended termination based on seven grounds: (1) "Jeopardizing the personal safety of a VCCB client under protective custody whose unauthorized attendance at [the retreat] 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. (5) "Transporting a non-State employee in

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[5] *Id.* at 0009.

[6] Opening Br. 11.

[7] R. at 0025.

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;" and (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."[8]

3. In accordance with Merit Rule 12.4,[9] Mr. Gibson requested a pre-decision meeting with the VCCB Chairman, Thomas Castaldi ("Chairman Castaldi"). That meeting took place on July 21, 2008.[10] After reviewing the relevant information, including the information that Mr. Gibson presented during the meeting, Chairman Castaldi sent a letter to Mr. Gibson, dated July 22, 2008, informing him that his employment was terminated, effective as of that date.[11] On August 13, 2008, Mr. Gibson had a "Step 3" hearing pursuant to Merit Rule 18.8.[12] In a written decision

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[8] *Id.* at 0025.

[9] *See* Merit R. 12.4, *available at* http://delawarepersonnel.com/mrules/ [hereinafter "Merit R. __"].

[10] R. at 0021.

[11] *Id.*

[12] Opening Br. 18. *See also* Merit R. 18.8 ("Step 3: Any appeal shall be filed in writing to the Director within 14 calendar days of receipt of the Step 2 reply. This appeal shall include copies of the written grievance and responses from the previous steps. The parties and the Director (or designee) may agree to meet and attempt an informal resolution of the grievance, and/or the Director (or designee) shall hear the grievance and issue a written decision with 45 calendar days of the appeal's receipt.").

issued August 19, 2008, the hearing officer denied Mr. Gibson's grievance, thereby affirming the VCCB's termination decision.[13]

4. On May 19 and 25, 2009, Mr. Gibson had a hearing before five members of the Board.[14] The 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; Stephanie R. Hamilton, Domestic Violence Coordinator for the Wilmington Police Department; Ms. Brown; and Chairman Castaldi.[15] The Board entered eleven exhibits into evidence.[16] Mr. Gibson called two witnesses: Luellen Williams, VCCB Administrative Specialist II, and Andrea M. Powell, VCCB Investigator II.[17] Mr. Gibson did not testify on his own behalf, and did not offer any exhibits. The Board ultimately concluded that the VCCB had just

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[13] App. to Answering Br. Ex. B at B14-16.

[14] R. at 0005.

[15] *Id.* at 0006.

[16] *Id.*

[17] *Id.* Mr. Gibson alleges that his third witness, Ms. Truitt, appeared but left before testifying because the Board allegedly threatened to call the police and have her arrested. As discussed below, no record evidence supports this contention. Because Ms. Truitt did not testify before the Board, her testimony is not part of the record before the Court in deciding this appeal. Apparently in an effort to fill the gap left by Ms. Truitt's absence, Mr. Gibson has gone to some length in his brief to proffer what Ms. Truitt would have said had she testified at the Step 3 hearing or before the Board. This is not competent evidence and the Court will not consider it. Likewise, because Mr. Gibson did not testify at the Board hearing, he cannot do so now, isolated from cross-examination, through his briefing.

cause to terminate Mr. Gibson's employment, and that termination was an appropriate penalty under the circumstances.[18]

5. Mr. Gibson presents three broad grounds for appeal. First, he argues that the Board committed legal error and violated his due process rights.[19] Mr. Gibson's due process argument contains several sub-arguments. First, he argues that his due process rights were violated because intimidation by members of the VCCB prevented Ms. Truitt from testifying at the Step 3 hearing, depriving him of the right to present all of his evidence.[20] Next, he argues that his due process rights were violated because the VCCB hired new employees, taking the office to the maximum number of employees allowed by statute, before Mr. Gibson had the opportunity to take his grievance through the process set forth in the Merit Rules.[21] And finally, he argues that his due process rights were violated because the Board relied upon Chairman Castaldi's testimony that "violation of client trust" was the reason Mr. Gibson's employment was terminated, even though that reason was not one of the seven charges contained in the original termination letter.[22]

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[18] R. at 0015.

[19] Opening Br. 17-20.

[20] *Id.* at 18.

[21] *Id.* at 19-20.

[22] *Id.* at 23-24.

6. In Mr. Gibson's second ground for appeal, he argues that the Board's decision was not supported by substantial evidence.[23] Mr. Gibson's last ground for appeal is that the Board made a legal error in affirming the VCCB's decision to terminate his employment when "the penalty was not appropriate to the circumstances."[24]

7. In response, the VCCB argues that the Board's decision was free from legal error, and that the Board's findings and conclusions were supported by substantial evidence.[25] Second, the VCCB argues that Chairman Castaldi based his decision to terminate Mr. Gibson's employment on the seven grounds contained in Ms. Brown's letter, and he referred to "the violation of the trust of a victim" simply to summarize the totality of Mr. Gibson's actions that he felt justified termination.[26] The VCCB also asserts that the penalty was appropriate under the circumstances. As to his claim of legal error, the VCCB argues that Mr. Gibson has invoked the incorrect "just cause" standard by which the propriety of his termination should be measured.[27] The VCCB contends that the correct standard in this situation is the

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[23] *Id.* at 20-23.

[24] *Id.* at 24-26.

[25] Answering Br. 8, 17.

[26] *Id.* at 12.

[27] *Id.* at 13-14.

standard set forth in Merit Rule 12.1, which does not (as Mr. Gibson argues) require a showing that the employee engaged in a "willful or wanton act" or "evil intent or malicious behavior" in order to justify termination.[28] This is the standard applied by the Board. Last, the VCCB argues that Mr. Gibson failed to overcome the presumption that the Board and the VCCB acted appropriately. In this regard, the VCCB argues that Mr. Gibson has not provided any authority to challenge the Board's analysis and, therefore, he has not met his burden and his appeal must fail.[29]

8. On appeal from a decision of the Board, the Court's role is to correct errors of law and determine whether the record contains substantial evidence to support the Board's findings of fact and conclusions of law.[30] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[31] The Court must evaluate the record in a light most favorable to the

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[28] *Id.* at 14. *See also* Merit R. 12.1 ("'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.").

[29] Answering Br. 14-16.

[30] *Raley v. Dep't of Transp.*, 2000 WL 973239, at *5 (Del. Super. May 31, 2000) (citing *Foster v. Del. Dep't of Public Safety*, 1997 WL 127002, at *2 (Del. Super. Jan. 27, 1997)).

[31] *Chapman v. Del. Dep't of Transp.*, 2009 WL 2386090, at *3 (Del. Super. July 31, 2009) (citing *Alcoholic Beverage Control Comm'n v. Newsome*, 690 A.2d 906, 910 (Del. 1996)).

party that prevailed below, in this case the VCCB.[32] The Court does not determine questions of credibility or make its own findings.[33] When the issue on appeal is whether proper legal principles have been applied, the Court's review is *de novo*.[34]

9. Mr. Gibson did not offer any defense with respect to the three grounds for termination that relate to the improper use of a state vehicle (grounds five through seven). The VCCB provided the Board with copies of the vehicle's GPS records, indicating where and when Mr. Gibson drove the vehicle.[35] Mr. Gibson's only defense to those charges was that he was not provided with a copy of the handbook governing the use of state vehicles.[36] The evidence, however, indicated that the VCCB was under no obligation to provide Mr. Gibson with the state vehicle use handbook. Mr. Gibson signed a form indicating that he would comply with those

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[32] *Id.* (citing *Zicarelli v. Boscov's Dep't Store, LLC*, 2008 WL 3486207, at *2 (Del. Super. June 5, 2008)).

[33] *Raley,* 2000 WL 973239, at *5 (citing *Guions v. Prot. Tech.*, 1999 WL 1442022, at *3 (Del. Super. Sept. 21, 1999)).

[34] *Johnson Controls v. Fields*, 758 A.2d 506, 509 (Del. 2000).

[35] *See* R. at 0027-33 (indicating that the vehicle was driven to non-work related sites).

[36] Mr. Gibson does not address the state vehicle-related charges in his Opening Brief. *See generally* Opening Br. At the hearing, the following exchange took place between Mr. Gibson and one of the Board members: "Q: Now, what's going to be your response to the charge that you misused the state vehicle between Friday and the next Tuesday? A: First my response to that would be that I was given no vehicle operating procedure as far as the use of a state vehicle." R. at 0178.

rules, and it was his responsibility to familiarize himself with the handbook.[37] Since Mr. Gibson did not present the Board with any competent evidence that he did not commit the three state vehicle policy violations, or any evidence that would adequately explain his actions, the Board's decision with respect to those three grounds was clearly supported by substantial evidence.

10. Similarly, Mr. Gibson did not deny providing false statements to his supervisor about where he picked up Ms. Truitt, which forms the basis of the fourth ground for termination. The VCCB presented the Board with evidence, including GPS records for the state vehicle Mr. Gibson was driving, indicating that Mr. Gibson stopped in the vicinity of Ms. Truitt's confidential location, a location that he had no legitimate reason to know or visit.[38] In addition, the evidence and testimony also indicated that Mr. Gibson was not at the VCCB office, where he claims to have picked up and dropped off Ms. Truitt, at the relevant dates and times.[39] Mr. Gibson provided no evidence or explanation that would challenge the facts as presented to the Board. In light of the evidence presented to the Board by the VCCB, and Mr. Gibson's failure to contradict that evidence in any meaningful way, the Board's

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[37] *See* R. at 0056.

[38] *Id.* at 0326-28, 0330.

[39] *See id.* at 0027-33, 0233-41.

finding that Mr. Gibson committed the fourth ground for termination was supported by substantial evidence.

11. The remaining three grounds (grounds one, two, and three as presented in Ms. Brown's letter) relate to Ms. Truitt's presence at the retreat, specifically Mr. Gibson's role in bringing her there, the danger that her presence posed to Ms. Truitt and the other retreat attendees and Mr. Gibson's failure to get approval from his supervisor before bringing Ms. Truitt to the retreat. Mr. Gibson did not deny that he brought Ms. Truitt to the retreat,[40] so the salient question is whether his actions were as egregious as the VCCB argued and the Board found them to be.

12. In its decision, the Board discussed the evidence with respect to this question. A majority of the Board ultimately decided that termination was warranted in light of the serious nature of Mr. Gibson's infractions. In its decision, the Board stated that "the penalty for termination for Gibson's seven offenses based on his taking [Ms.] Truitt to the retreat in Rehoboth Beach was not so disproportionate as to shock one's sense of fairness."[41] Even Mr. Gibson himself could not explain why he thought his actions were appropriate. The best argument Mr. Gibson could offer on his own behalf was that termination of his employment was too harsh a sanction,

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[40] *Id.* at 0178.

[41] *Id.* at 0015.

and that he was not aware that Ms. Truitt was still under protective custody at the time of the retreat.[42]

13. It is well-settled that this Court will not re-examine the evidence presented to an administrative board in order to reach its own factual conclusions.[43] Rather, the Court's role is to review the evidence in accordance with the applicable standard of review to determine if the Board's decision is sustainable.[44] In this case, the Board was presented with evidence that Mr. Gibson knew that Ms. Truitt was under some form of protective custody in June of 2008, and the Board's opinion reflects its decision to accept that evidence over Mr. Gibson's argument that he was unaware of Ms. Truitt's protective custody status.[45] The Board heard the testimony firsthand and had the opportunity to observe the witness' demeanor and ask any questions it thought pertinent. Moreover, in addition to testimony, the Board was presented with a February 2008 e-mail (sent to Mr. Gibson and others) indicating that Ms. Truitt was under protective custody and that all correspondence with her should go through the Wilmington Police Department's Domestic Violence Coordinator.

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[42] *Id.* at 0177-78, 0468-69.

[43] *See Raley*, 2000 WL 973239, at *5 (citing *Guions*, 1999 WL 1442022, at *3).

[44] *Id.*

[45] *See* R. at 0013 ("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.").

Mr. Gibson failed to identify any subsequent communication or other information sufficient to suggest that Ms. Truitt's status had changed.[46] Simply stated, removing a witness in protective custody from her protected environment without just cause is a very serious matter that could well have led to unthinkable consequences. Even if Ms. Truitt's custody status had changed, Mr. Gibson should not have taken her to the retreat without at least seeking his supervisor's permission, as indicated in the third ground of Ms. Brown's termination letter. Mr. Gibson has the burden of convincing the Court that the Board's decision was not supported by substantial evidence. Because he has failed to satisfy that burden, the Court will not disturb the Board's decision or substitute its own judgment for the judgment of the Board.

14. Having determined the aforementioned factual findings of the Board were supported by substantial evidence, the Court must next determine whether, based on those facts, the Board was correct in affirming the VCCB's decision to terminate Mr. Gibson's employment. The applicable "just cause" standard establishes three requirements: (1) "showing that the employee has committed the charged offense;" (2) "offering specified due process rights specified in this chapter;" and (3) "imposing a penalty appropriate to the circumstances."[47] Based on this standard, the

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[46] *See id.* at 0049.

[47] Merit R. 12.1.

Court is satisfied that the Board's decision to uphold termination reflected an appropriate application of all three "just cause" requirements. The Board found that Mr. Gibson lied to his supervisor about where he picked up Ms. Truitt, and that Mr. Gibson committed the three vehicle-related offenses. The Court recognizes that those offenses standing alone may not have warranted termination. The Board was satisfied, however, that in the aggregate, and when coupled with the serious nature of the offenses surrounding Ms. Truitt's presence at the retreat, Mr. Gibson's actions were sufficient to justify termination.[48] Given the very serious risk posed to Ms. Truitt (a VCCB client) and others by Mr. Gibson's remarkable lapse of judgment, the Court cannot conclude that the Board incorrectly applied the just cause standard in its review of the decision to terminate Mr. Gibson's employment.

15. Mr. Gibson's next claim of error is that several due process violations occurred at various stages in the termination proceedings. Denial of due process is a question of law that the Court reviews *de novo*.[49]

16. Mr. Gibson's first due process argument relates to the VCCB's alleged intimidation of Ms. Truitt at the Step 3 hearing, which Mr. Gibson argues prevented

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[48] Largely as a consequence of Mr. Gibson's actions, Ms. Truitt terminated her witness protection agreement. She no longer receives any protection, and the DOJ is no longer planning to relocate her to another state. *See* R. at 0251-52.

[49] *See In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1135 (Del. 2008) ("To the extent this argument raises a due process question, that is an issue of law which this Court reviews de novo.").

him from presenting a complete argument in his own defense. Mr. Gibson argues that Ms. Truitt would have testified that she received permission from Ms. Kenville-Moore to attend the conference with Mr. Gibson. As an initial matter, the Court notes that Mr. Gibson's allegation of witness intimidation is nowhere supported in the record. This gap in the record alone is sufficient to defeat this argument.[50] The record before the Court on appeal contains only the VCCB's version of events, namely that Ms. Truitt realized she was under no obligation to testify at the Step 3 hearing and chose to leave without doing so.[51] Under that version of the events, and with no evidence in the record to contradict it, the Court cannot find that any of Mr. Gibson's due process rights were violated with respect to the Step 3 hearing.

17. Mr. Gibson's next due process argument stems from the Board's inability to provide him with the records or transcripts of the Step 3 hearing. There are no records or transcripts from Step 3 hearings,[52] and there can be no due process

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[50] Here again, Mr. Gibson chose not to present evidence to the Board regarding his understanding of the events leading up to Ms. Truitt's decision not to testify at the Step 3 hearing or before the Board. Appeals to this Court from administrative boards are "on the record;" the Court cannot and will not receive new evidence at this stage of the proceedings. *See Potts Welding & Boiler Repair Co., Inc. v. Zakrewski*, 2002 WL 144273, at *4 (Del. Super. Jan. 11, 2002) (citing *Tatten Partners LP v. New Castle County Bd. of Assessment Rev.*, 642 A.2d 1251, 1262 (Del. Super. 1993); *Wilmington Trust Co. v. Connor*, 415 A.2d 773, 781 (Del. Super. 1980)) ("[W]hen the Court acts in its appellate capacity on an appeal from an administrative agency, it is limited to the record, and will not consider issues not raised before that agency.").

[51] R. at 0270-73.

[52] *Id.* at 0155.

violation in denying Mr. Gibson access to records that do not exist. Mr. Gibson was given ample opportunity to explain what happened at the Step 3 hearing and how it prejudiced him, either through his own testimony or by calling witnesses, and he failed to do so.[53] In contrast, the VCCB presented testimony regarding the reason Ms. Truitt left the Step 3 hearing before she could testify.[54] It is the Board's responsibility to weigh the credibility of the evidence, and to resolve conflicting testimony as it deems appropriate.[55] In this case, the Board did so and ultimately decided to give more weight to the VCCB's explanation of what took place. As the Board's decision was based on substantial evidence and did not constitute legal error, the Court will not overturn it on appeal.

18. Mr. Gibson's last due process argument is that he was denied due process because Chairman Castaldi determined prior to his meeting with Ms. Gibson that he would uphold the termination decision, and because the VCCB hired new employees before his grievance was formally decided. There is no evidence in the record to support either contention. Moreover, this appeal is the first time Mr. Gibson has

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[53] *See id.* at 0260-63.

[54] *See id.* at 0193-94, 0270-73.

[55] *See, e.g.*, *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965) ("On appeal from the Board, however, the Superior Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions.").

raised this due process challenge. It is well-settled that the Court will not consider an issue raised for the first time on appeal.[56] Chairman Castaldi did everything required of him at the pre-decision meeting. The burden is on the employee to present evidence showing why his employment should not be terminated.[57] Chairman Castaldi felt that Mr. Gibson did not meet his burden, and the Board agreed. There is simply no basis to find that Mr. Gibson was denied due process rights because Chairman Castaldi decided to follow the termination recommendation and had already hired new employees prior to his meeting with Mr. Gibson. Similarly, Mr. Gibson presented no evidence regarding new employees being hired, or the fact that such action would preclude the VCCB from altering its decision to terminate his employment.[58] Even if Mr. Gibson had presented competent evidence that new employees had been hired, the mere fact of the new hires prior to the completion of

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[56] *See, e.g.*, *Potts*, 2002 WL 144273, at *4 (citing *Tatten*, 642 A.2d at 1262; *Wilmington Trust*, 415 A.2d at 781) ("[W]hen the Court acts in its appellate capacity on an appeal from an administrative agency, it is limited to the record, and will not consider issues not raised before that agency.").

[57] *Hopson v. McGinnes*, 391 A.2d 187, 188 (Del.1978) ("[A]n employee must present evidence sufficient to rebut the presumption that the discharge was correct and to convince the [Board] that it was not for cause. Since the burden is on the employee, it is up to him to persuade the [Board] to rule in his favor. Any failure to do so means that the discharge remains effective to that point.").

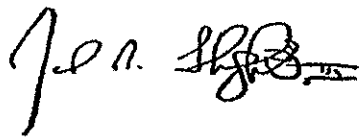
[58] Mr. Gibson's effort to supply that evidence through his own "testimony" in his brief is unavailing. In deciding an administrative appeal, the Court is limited to review of the record and these due process assertions cannot be found anywhere in the record. *See Potts*, 2002 WL 144273, at *4.

the grievance process set forth in Merit Rule 12 is not adequate proof of the due process violation he asserts. The Court, having reviewed the record, has already determined that Chairman Castaldi's and the Board's decisions were supported by substantial evidence and are not subject to second-guessing by the Court.

19. The Board found that Mr. Gibson committed all of the seven charged offenses, he was afforded the due process rights required under the Merit Rules, and the penalty was appropriate under the circumstances. Therefore, the applicable "just cause" standard was satisfied. Because Mr. Gibson has not provided any authority to challenge the Board's analysis, he has not met his burden and his appeal must fail.[59]

20. Based on the foregoing, the decision of the Board to uphold Mr. Gibson's termination is **AFFIRMED**.

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary

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[59] *See Hopson*, 391 A.2d at 188.