BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

GRIEVANT, Employee/Grievant, v. DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES, Employer/Respondent.	)	**DOCKET No. 11-09-522** **DECISION AND ORDER** ***Redacted***

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 October 4, 2012 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

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

APPEARANCES

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

Deborah L. Murray-Sheppard
Board Administrator

Roy S. Shiels, Esquire
on behalf of Employee/Grievant

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of Services for Children, Youth and their Families

BRIEF SUMMARY OF THE EVIDENCE

The Department of Services for Children, Youth and their Families (DSCYF) offered and the Board pre-admitted into evidence eleven documents marked for identification as Exhibits A-K.

DSCYF called one witness: Debra A. O'Neal, Training/Education Administrator II.

The employee/grievant (Grievant) offered and the Board pre-admitted into evidence eight documents marked for identification as Exhibits 1-3 and 5-9.

The Grievant testified on her own behalf but did not call any other witnesses.

PRELIMINARY MATTER

The Grievant moved to recuse the Board Chair. DSCYF opposed the motion.

The motion to recuse alleged that the Chair may have a conflict of interest because: (1) "While previously employed in HR at DHSS chairperson Austin directly reported to, and worked closely with [Karryl] McManus, and worked with [Michael] Alfree"; (2) "Grievant feels this explains the chair's remark in a prior hearing that she always accepted as accurate the factual testimony of managers, despite any contrary factual testimony by grievant, feeling managers had no reason to 'make things up.'"

At the hearing, the Chair stated for the record that she worked in the Labor Relations Unit at the Department of Health and Social Services (DHSS) and retired in 2003, eight years before the Grievant's termination. While at DHSS, the Chair did not report directly to Karryl McManus (now the Director of the Division of Management Services at DSCYF who recommended the Grievant's termination) or work closely with McManus though they did have some work contact years ago. The Chair stated that she did work with Michael Alfree in Labor Relations (Alfree now works at DSCYF), but Alfree was not involved in the decision to terminate the Grievant.

The "remark" referred to by the Grievant in her motion to recuse was not a generic statement but specific to the facts of the case being deliberated. When faced with conflicting testimony of the Grievant and her supervisor, the Chair like the other members of the Board had to judge the credibility of the witnesses. The Chair felt that the supervisor's testimony was more credible because she did not have any reason to lie.

The Chair stated for the record that she believed "she can proceed to hear the case free of bias or prejudice." *Ebersole v. Evans Builders*, 15 A.3d 217, TABLE, 2011 WL 379409, at p.2 (Del., Feb. 7, 2011) (footnote omitted). The other members of the Board, as objective observers, stated for the record that they did not believe there was any "appearance of bias sufficient to cause doubt about [the Chair's] impartiality." *Id.* (footnote omitted).

The Board unanimously denied the Grievant's motion to recuse.

FINDINGS OF FACT

The Grievant worked as an Administrative Specialist II in the Center for Professional Development (CPD) which is part of the Division of Management Support Services (the Division). The CPD provides education and training for DSCYF employees.

On September 28, 2010, the Division gave the Grievant a written reprimand for "Unprofessional and Insubordinate Behavior." The Grievant did not grieve that reprimand.

On October 27, 2010, the Division gave the Grievant a written reprimand for "Unprofessional and Insubordinate Behavior." The Grievant did not grieve that reprimand.

On March 16, 2011, the Division suspended the Grievant for one day without pay for "unprofessional and insubordinate behavior." The Grievant grieved the one-day suspension. In a Decision and Order, Docket No. 11-04-518 (Apr.12, 2012), the Board denied the Grievant's

appeal.

On November 9, 2011, the Division suspended the Grievant for three days without pay "for continued insubordination and hostile behavior in the workplace." The Grievant grieved the three-day suspension. In a Decision and Order, Docket No. 11-04-519 (Aug. 7, 2012), the Board denied the Grievant's appeal.

On April 3, 2011, the Division suspended the Grievant for ten days without pay for "continued unprofessional and insubordinate behavior." The Grievant grieved the ten-day suspension. In a Decision and Order, Docket No. 11-08-520 (Aug. 24, 2012), the Board denied the Grievant's appeal.

The Grievant served her ten-day suspension from June 1-14, 2011. Before the suspension started, the Grievant's immediate supervisor, Debra O'Neal, sent the Grievant an e-mail on May 27, 2011 to "serve as a reference document and reminder of processes, procedures, expectations and rationale we have discussed on new items moving forward." The e-mail focused on the registration of new hires for training. The Grievant had recently registered nine Youth Rehabilitation Services (YRS) employees for training before Human Resources had cleared them for hire.

According to the Grievant, she "could not afford to wait until the end of the month to get clearance and register staff at the last minute or not be able to register them at all due to me not being here." O'Neal advised the Grievant that this practice was not acceptable.

> The YRS NET [New Employee Training] process was definitively outlined to you in our meeting on 12/23/2010, the process was provided in writing and we discussed the process during at least two separate bi-monthly meetings. It is not acceptable that you chose to register employees in the YRS NET without the proper HR clearance. . . . Your decision and action is out of compliance with the YRS NET registration procedures. It provides a false reporting of the new employees registered for the

NET classes in TMS [Training Management System].

O'Neal directed the Grievant to remove the nine employees from TMS and advised the Grievant: "It is my expectation you will follow the YRS NET registration process as outlined. When registration dilemmas arise, you need to work to direct consultation with me or my designee to resolve the issue. Only cleared new employees are to be registered in TMS for YRS NET course."

O'Neal explained at the hearing that DSCYF makes conditional offers of employment to new employees subject to a criminal background check, a check of the child abuse registry, and a drug screen before Human Resources clears them for employment. To register employees before Human Resources clears them creates a host of problems, skewing the expected number of trainees and disrupting class schedules. If new employees do not pass the background checks, DSCYF may still be liable to pay them for any days in training.

On June 17, 2011, the Grievant sent Debra O'Neal an e-mail asking: "Do you know our customer ID/account number for sending back used toner to KSI [Kent-Sussex Industries]? KSI is asking for it in order to proceed with receiving the toner cartridge." What should have been a simple question and answer turned into a three-week barrage of e-mails from the Grievant, culminating in a July 7, 2011 e-mail from the Grievant to O'Neal.

> In reference to yesterday's e-mail it is just as important for the Administrator of the Unit to communicate and update the staff in her department as it is for me to communicate with her. It is important for the Administrator to give direction as to where to go to find information that I am required to know for my job. When I was supervised by Gail Womble and Robert Challenger, I knew the procedures for everything I did. Since July 1, 2010 I have been living in a topsy turvy world and nothing has been communicated to me.

In early July 2011, the Grievant was on leave and another employee, Raymond H. Brown,

a Trainer/Educator III, registered nine new hires not yet cleared by Human Resources. The morning of July 11, 2011, the Grievant sent O'Neal four e-mails. The one sent at 10:50 a.m. questioned why Ray Brown "entered 9 employees with no clearance from HR. It appears that it is okay for Ray to enter employees without clearance, but when I do it to get my work done, I have not followed procedures and am ordered to delete a huge volume of work." The Grievant went on to write:

> I have been told that we have a 'process' problem with getting clearance from HR. When I try to do the work ahead of time so that it is done when we do get clearance (at the last minute), you tell me that it is inappropriate.
>
> Waiting until the last minute to register employees is getting in the way of having them done on time. For months now, you have said that you are working on getting the process straightened out, yet there has been no improvement. Waiting until the last minute to register employees, it is very time consuming and runs a risk of not getting the work done prior to class starting. However, since you have advised me not to register anyone without clearance first, it appears July registrations will get a late start as well.

Later that same day, O'Neal met with the Grievant to address her concern. O'Neal explained that Ray Brown should not have registered new employees for training because he was not as familiar with the proper procedures. In an e-mail to the Grievant after the meeting, O'Neal confirmed the points of their discussion: "1. Ray Brown has been advised that all registrations will be processed by you. 2. The data Ray Brown entered on 7/11/11 (9 employees) has been removed from TMS. 3. The registration documents for the 9 employees are in the CPD mailbox marked unread and require your follow up with HR to complete the registration process."

O'Neal met with the Grievant on July 12, 2011 to discuss her Performance Improvement Plan. The Grievant questioned why she needed an improvement plan. The Grievant had grieved her performance review and the hearing officer changed the overall rating from "Needs

Improvement" to "Meets Expectations." O'Neal explained that, while the overall rating changed, the deficiencies cited in the performance review remained and needed to be addressed in an improvement plan. One deficiency was the Grievant's overuse of e-mail to communicate with her supervisor. The improvement plan provided: "[C]ommunication will occur in-person, via telephone and when appropriate via e-mail."

The Grievant signed the performance improvement plan but wrote at the bottom: "I do not agree. Ms. Neal is trying to terminate me (retaliation)!" The Grievant testified at the hearing that during the meeting with O'Neal on July 12, 2011, the Grievant said: "You can be personally liable for what you are doing to me. I am going to personally sue you Ms. O'Neal and I will sue McManus too."

O'Neal met with the Grievant again on July 19, 2011. Earlier that year, the Grievant requested an accommodation to work out of the Dover office one day a week to make it easier for her to get to appointments with her doctors in Dover and Smyrna. After the Grievant grieved, a hearing officer decided that an accommodation was in order. O'Neal offered the Grievant the option of working in Dover on Tuesday, Wednesday, or Thursday. The Grievant wanted to work in Dover on Friday or Monday. O'Neal explained that was not feasible because of the operational needs of the unit. Fridays are very busy with last-minute registrations. Mondays are also very busy with last-minute changes in course schedules. The Grievant would not agree to one of the three offered days, so O'Neal designated Wednesday for the Grievant to work out of the Dover office.

By letter dated July 20, 2011, Karryl McManus, the Director of the Division of Management Services, notified the Grievant of intent to terminate "as a result of your continued unprofessional and insubordinate behavior and your unwillingness to work with your supervisor in

a professional and cooperative manner." The letter cited the Grievant's history of progressive discipline. Since the Grievant's most recent ten-day suspension, she had continued to rely on volumes of e-mails to communicate with her supervisor, even though "you have been counseled on numerous occasions that email is not the best form of communication and directed by your supervisor that if/when you have concerns/questions to speak directly with her."

The letter cited four e-mails the Grievant sent O'Neal on July 11, 2011 "on various subject matters within an hour and a half. Your e-mails are disrespectful and hostile and are counterproductive to accomplishing daily tasks and reaching resolution to your concerns/questions." [1]

The notice of termination letter also cited the meetings between the Grievant and O'Neal on July 11, 12, and 19, 2011 where, according to O'Neal, the Grievant was combative, discourteous, insubordinate, and unprofessional.

After an opportunity for a pre-decision meeting (the Grievant did not appear but submitted a written response), the Secretary of DSCYF (Vivian L. Rapposelli) terminated the Grievant by letter dated August 24, 2011.

As in previous hearings, the testimony of the Grievant and O'Neal diverged sharply over what happened at the meetings on July 11, 12, and 19, 2011. The Board, however, does not have to make a credibility determination because there is uncontested evidence in the record to support the Grievant's termination.

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[1] During the testimony of Debra O'Neal, the Board asked her to take time during a break to identify in the hearing exhibits the four July 11, 2011 e-mails referenced in the notice of termination letter. O'Neal was able to identify only one (sent by the Grievant at 10:50 a.m.) but testified that there were numerous others. The parties disputed whether the statement in the notice of termination letter – "Your e-mails are disrespectful and hostile" – referred to those four e-mails or the Grievant's e-mails in general. Whatever interpretation is correct, the Board finds as a matter of fact that one e-mail the Grievant sent O'Neal on July 11, 2011 at 10:50 a.m. was disrespectful and hostile.

The Board finds as a matter of fact that the e-mail the Grievant sent to Debra O'Neal on July 7, 2011 was disrespectful and insubordinate. What started as a simple question about where to return used toner cartridges escalated to the Grievant's accusing O'Neal of mismanagement, keeping her in the dark so she could not do her job, and comparing O'Neal unfavorably to the Grievant's two previous supervisors. The Board finds as a matter of fact that the record is replete with evidence that O'Neal provided the Grievant with clear guidance and directives on the proper procedures to follow. O'Neal always made herself readily available to meet with the Grievant to discuss any of her concerns, while the Grievant preferred to wage e-mail wars.

The Board finds as a matter of fact that the e-mail the Grievant sent to O'Neal at 10:50 a.m. on July 11, 2011 was disrespectful and insubordinate. In spite of clear direction that the Grievant should not register new employees for training until clearance by Human Resources, the Grievant continued to challenge O'Neal because the Grievant wanted to do things her way. What the Grievant could not seem to understand was that the registration procedures laid down by O'Neal protected the Grievant. If Human Resources had not cleared a new employee, then the Grievant could not be criticized for not registering the employee for training.

The Board finds as a matter of fact that the Grievant was threatening and disrespectful during the July 12, 2011 meeting with O'Neal. The Grievant's performance improvement plan was intended to help her improve her work performance so she could keep her job. There was no reason or excuse for her writing at the bottom of the improvement plan: "I do not agree. Ms. Neal is trying to terminate me (retaliation)!" It was highly inappropriate and unprofessional for the Grievant to threaten O'Neal and McManus with a lawsuit if the Grievant did not get her way.

The Board finds as a matter of fact that the Grievant was uncooperative and unprofessional at the July 19, 2011 meeting with O'Neal. O'Neal made a reasonable offer to accommodate the

Grievant's pre-planned doctor visits, but the Grievant dismissed the offer out of hand because she wanted to work in Dover on Friday or Monday. [2]

The Board finds as a matter of fact that the Grievant had a history of progressive discipline prior to her termination (two written reprimands and three suspensions) for combative, unprofessional, and insubordinate behavior towards her supervisor.

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.**

The Board concludes as a matter of law that the Division had just cause to terminate the Grievant.

O'Neal started supervising the Center for Professional Development in July 2010. Almost from the start, the Grievant engaged in a pattern and practice of insubordinate and disrespectful behavior towards O'Neal. The Grievant willfully refused to follow instructions even when she received a clear directive from O'Neal. O'Neal counseled the Grievant many times about the importance of face-to-face communication with her supervisor, yet the Grievant continued to engage in unnecessary and counter-productive e-mail wars. The Division repeatedly warned the Grievant that she needed to correct her behavior. Despite progressive

[2] The Board notes that the Americans with Disabilities Act only requires an employer to make a reasonable accommodation for a disability. It does not give the employee a right to dictate the type of accommodation.

discipline, she did not change. Even coming off a ten-day suspension, she continued to be insubordinate and disrespectful towards O'Neal, even threatening O'Neal with personal liability in a lawsuit if O'Neal would not withdraw the Grievant's performance improvement plan.

The Board believes that DSCYF gave the Grievant every opportunity to correct her behavior through clear directives, verbal counseling, and progressive discipline. Nothing worked, and DSCYF did not have any reason to believe that another suspension would do the trick.

DECISION AND ORDER

It is this **11th** day of **October, 2012**, by a vote of 4-0, the Decision and Order of the Board to deny the Grievant's appeal.

Martha K. Austin
MARTHA K. AUSTIN, MERB Chairwoman

JOHN F. SCHMUTZ, MERB Member

Victoria D Cairns
VICTORIA D. CAIRNS, MERB Member

JACQUELINE D. JENKINS, EDD, MERB Member

I concur in the Decision of the majority of the Board but I believe that a penalty short of termination would have been appropriate to the circumstances.

Paul R Houck
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.
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> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
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> (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.
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> (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: **October 11**, 2012

Distribution:
Original: File
Copies: Grievant
Agency's Representative
Board Counsel
OMB/HRM