IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JOHN A. MANCUS,	)	
Appellant,	)	
	)	C.A. No. N18A-06-005 RRC
v.	)	
MERIT EMPLOYEE RELATIONS BOARD and THE COURT OF COMMON PLEAS,	)	
Appellees.	)	

Submitted: November 28, 2018
Decided: February 1, 2019

On Appeal from the Merit Employee Relations Board.
AFFIRMED.

MEMORANDUM OPINION

M. Edward Danberg, Esquire, The Danberg Law Firm LLC, Wilmington, Delaware, Attorney for Appellant John A. Mancus.

Rae M. Mims, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for Appellee Merit Employee Relations Board.

Kevin R. Slattery, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for Appellee the Court of Common Pleas.

COOCH, R.J.

I. INTRODUCTION

This is John A. Mancus' ("Appellant") appeal of a May 28, 2018, decision of the Merit Employee Relations Board (the "MERB/Board") which upheld the Court

of Common Pleas' decision to suspend Appellant for ten days based on Appellant's violation of the Code of Conduct for Judicial Branch Employees, and for Appellant's violation of the Judicial Branch Authorized Use Policy for the Communications and Computer Systems. Appellant argues that remand is necessary for "further proceedings," because the Board deliberated off the record and therefore failed to create a full record of the underlying proceedings for judicial review.[1] Secondly, Appellant argues that the Court of Common Pleas failed to inform the Office of Management and Budget prior to enforcement of any discipline against Appellant, which Appellant contends violated 29 *Del. C.* § 5924. Appellant contends such a violation separately merits reversal.

Appellees argue that the Board's decision should be affirmed because it is supported by substantial evidence and that the Board committed no error of law by conducting deliberations off the record.

The Court concludes that the Board committed no error of law by deliberating off the record. The Court does not reach Appellant's § 5924 claim, the Court finds that the Board's decision was supported by substantial evidence. Accordingly, the Court affirms the decision of the Board.

II. FACTS AND PROCEDURAL HISTORY

Appellant is employed by the Court of Common Pleas as a Management Analyst III. At the time of the underlying violations, Appellant's job responsibilities included managing the Living Disaster Recovery Planning System ("LDRPS"), which stored the private personal information of Judicial Branch employees in case of emergencies. Pertinent to the instant matter, the LDRPS included the personal information of a judge of the Court of Common Pleas. In the course of his employment, Appellant allegedly disseminated certain private personal details about the judge and his family to an employee of The George Washington University ("GWU") for the purposes of facilitating charitable donations to the university. Appellant's conduct was brought to the attention of the Court Administrator for the Court of Common Pleas immediately upon its discovery. The Court Administrator completed an investigation into the matter and proposed that Appellant be suspended without pay for ten days for Appellant's violation of the Code of Conduct for Judicial Branch Employees ("Code of Conduct"), and his violation of the Judicial Branch Authorized Use Policy for Communications and Computer Systems ("Authorized Use Policy").

[1] Appellant's Opening Br., at 7 (Sept. 7, 2018).

The Court Administrator concluded Appellant had violated the Code of Conduct and the Authorized Use Policy based on certain conduct from July 2016 to April 2017. The investigation, and subsequent testimony at the Board hearing on the matter, found that on July 21, 2016, Appellant sent an email to a Ms. Jane Kolson, employed at GWU, and supplied Ms. Kolson with a phone number for the judge, which Ms. Kolson believed to be the judge's home land line number. Shortly thereafter however, the judge's personal cell phone number was added to GWU's database. No other phone number for the judge was in the GWU database in the pertinent time frame. On February 15, 2017, the judge received a phone call on his personal cell phone from a young woman who identified herself as a GWU student. The caller solicited the judge for a donation to the GWU alumni fund. The Court Administrator "drew the adverse inference that [Appellant] accessed [the judge's] personal cell phone number from the [LDRPS]," as Appellant had complete access to the database, and supplied the number to Ms. Kolson.[2]

On April 11, 2017, at 2:59 p.m., Appellant received an email to his State email address from Ms. Kolson regarding a charitable donation made by the judge to GWU. In this email, Ms. Kolson stated that she "did indeed pass along the phone number for [the judge] that you [Appellant] gave me, and [the judge] was called during our February student phonathon."[3] This statement aligns with the fact that the judge was contacted on his personal cell phone in February 2017 by a GWU student seeking donations. Ms. Kolson's email continued "[w]hat do you want to bet that he walks away from his remaining payments??? [sic] I'm tempted to call and request a visit to discuss planned giving – although I **know** the chances of his agreeing to it would be very slight. Do you know if he is married and has kids?"[4]

On April 11, 2017, at 3:23 p.m., Appellant responded to the 2:59 p.m. email from his State email address (the "response email"). In the response email, Appellant provided Ms. Kolson with personal details about the judge which included: information about the judge's private life, his marital status, his parents and relatives, his children's educational history, his salary, the name and telephone number of his secretary, and his State email address.[5] In Appellant's attempt to cut and paste the judge's State email address into the body of the response email, Appellant

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[2] Merit Employee Relations Board Decision and Order, MERB Docket No. 17-07-673, at 5 n.4 (May 21, 2018) (hereinafter "MERB Decision").
[3] MERB Decision, at 3.
[4] *Id.* (emphasis in original).
[5] *See id.*

inadvertently copied the judge on the response email and sent it to the judge.[6] The judge was "shocked" and "offended," and immediately emailed Appellant to ask why Appellant was "sharing all [of his] personal and family pedigree information with this lady? Who is Jane Kolson?"[7] Appellant's disclosure of personal details about the judge and his family had not been authorized by the judge or by any other person.

The judge brought Appellant's conduct to the attention of the Court Administrator and to the Chief Judge of the Court of Common Pleas. The Court Administrator conducted an investigation into the matter. The Court Administrator spoke with Appellant multiple times regarding the source of the information he provided to Ms. Kolson. Appellant's explanation changed several times, and the Court Administrator determined that Appellant was intentionally misrepresenting Appellant's source for the judge's personal information. Thereafter, the Court Administrator proposed a suspension for ten days without pay for Appellant's violation of the Code of Conduct and the Authorized Use Policy. Appellant received a formal suspension letter on June 15, 2017, which outlined the Court Administration's reasoning for the suspension. Importantly, the Court Administrator stated:

> The disparaging e-mail conversation you engaged in and the inappropriate e-mail you sent on April 11, 2017 at 3:23 p.m. to Jane Kolson clearly demonstrates that your misconduct was in direct violation of the aforementioned Code of Conduct for Judicial Branch Employees. The e-mail you sent was discourteous and since it was not your place to send such an e-mail, your full time and energy was not being applied to the business and responsibilities of your office during work hours.[8]

Appellant appealed his ten-day suspension and filed a grievance with the Board. At the hearing on Appellant's grievance the Board heard from several witnesses, including Ms. Kolson, the judge, and Appellant, and reviewed the evidence regarding Appellant's conduct. Although Appellant testified that he did not provide anyone at GWU with the judge's personal cell phone number, the Board "did not find him a credible witness because his testimony on this key point changed over time."[9] After deliberations off the record, the Board denied Appellant's grievance by a vote of 5–0. In the Board's written decision and order, the Board

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[6] *Id.*
[7] *Id.*
[8] Court of Common Pleas Formal Suspension Letter, MERB Docket No. 17-07-673, Grievant Ex. 1, at 6 (June 15, 2017).
[9] MERB Decision, at 5.

explained that Appellant's conduct, as described above, constituted a violation the Code of Conduct, a violation of the Acceptable Use Policy, and that Appellant also violated the judge's common law right to privacy.[10] Given the circumstances and nature of the violation, the Board found it appropriate to suspend Appellant for ten days without pay for his violations. Although Appellant committed several violations, the Board explained that Appellant's violation of the Code of Conduct, on its own, was "just cause for the ten-day suspension" as a matter of law.[11] Appellant timely filed an appeal of the Board's decision to this Court on June 20, 2018. This Court heard oral argument on the appeal on November 28, 2018.

III. THE PARTIES' CONTENTIONS

A. Appellant's Contentions

Appellant does not contend that the Board's decision is not supported by substantial evidence. Instead, Appellant argues on appeal that the Board committed two errors of law. First, Appellant contends that this matter must be remanded back to the Board for another hearing because the Board conducted deliberations off the record. Appellant contends that nothing in the Merit System of Personnel Administration, the Administrative Procedures Act, or the Rules of the Merit Employee Relations Board authorize or permit the exclusion of the Board's deliberations from the record. Appellant claims that the Board is "concealing its deliberations ... to avoid review of its actual decision-making process."[12]. Specifically, Appellant alleges that comments made by the Board during the off the record deliberations demonstrated a "lack of comprehension" of Appellant's defense and witness testimony.[13] As such, Appellant contends remand is necessary.

Second, Appellant contends that pursuant to 29 *Del. C.* § 5924, the Court of Common Pleas was required to have informed the Office of Management and Budget ("OMB") prior to the enforcement of any discipline. Section 5924 states that in the event of a violation of the Department of Technology and Information's

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[10] The Board observed that the U.S. Supreme Court has recognized a common law right of privacy "in avoiding the disclosure of personal matters." *U.S. Dep't of Justice v. Reporter's Committee for Freedom of the Press*, 498 U.S. 749, 762 (1989). "[T]he fact that an event is not wholly private does not mean that an individual has no interest in the disclosure or dissemination of the information. *Id.* at 771. Based on the language from the U.S. Supreme Court, the Board found that Appellant's conduct violated the judge's right of privacy.

[11] MERB Decision, at 8.

[12] Appellant's Opening Br., at 7.

[13] *Id.*

Acceptable Use Policy, "any discipline resulting in the loss of wages must first be reviewed by the Office of Management and Budget."[14] Such a review did not take place in the instant matter. At the Board hearing, Appellant moved to dismiss the violations based on the language of § 5924. The Board deemed the motion untimely and denied the request. Appellant argues that the Board's decision should be reversed based on the lack of review by OMB and the Board's denial of Appellant's motion to dismiss the violations.

B. Appellees' Contentions

The Board argues that Appellant has failed "to show any harm for the Board deliberating 'off the record' on the merits of the matter."[15] The Board contends that Appellant failed to raise any specific allegations of how the underlying record is insufficient or a factual basis for how the Board allegedly lacked comprehension of the issues. The Board argues that the issue in the instant appeal is not analogous to prior cases in which Delaware courts overturned quasi-judicial bodies' decision based on comments during deliberations that demonstrated member bias. The Board contends that Appellant has failed to specify any comment by the members of the Board which would imply bias. The Board contends that the final written decision adequately explained the Board's reasoning for its final determination of law and fact. Furthermore, the Board argues that the standard pre-hearing conference was the appropriate place to raise and resolve any factual and legal issues. The Board argues that Appellant's motion to dismiss the violation was untimely, because Appellant did not raise the issue of 29 *Del. C.* § 5924 at the pre-hearing conference.

The Court of Common Pleas argues that § 5924 does not apply to the Judicial Branch Acceptable Use Policy. CCP contends that § 5924 and the Department of Technology and Information's Acceptable Use Policy apply only to Executive Branch agencies. Although the Judicial Branch Acceptable Use Policy is essentially the same as the Department of Technology and Information's Acceptable Use Policy, the Court of Common Pleas argues that the separation of powers doctrine renders the statute's mandate to an Executive Branch agency inapplicable to the Judicial Branch. Second, the Court of Common Pleas argues that even if § 5924

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[14] 29 *Del. C.* § 5924 (2017). Section 5294 was amended effective July 1, 2017, which substituted the Office of Management and Budget with the Department of Human Resources. Appellant's underlying suspension began June 19, 2017, prior to the new amendment. Appellant contends that the pre-amendment version of § 5924 controls. Appellant's Opening Br., at 11 n.5. Which version controls is irrelevant, because this Court ultimately finds the Board did not commit an error of law in its dismissal of Appellant's § 5924 motion.

[15] Merit Employee Relations Board Answering Br., at 20 (Sept. 28, 2018).

applied to the Judicial Branch Acceptable Use Policy, the language of the statute is not mandatory. The Court of Common Pleas contends that because the statute uses both "shall" and "must" the phrases should have different meanings, and "must" does not carry the same weight as "shall." Thus, the Court of Common Pleas argues that the statutory language "must be interpreted as directory only."[16]

Third, and notably, the Court of Common Pleas contends that when there is more than one legitimate basis for discipline, the failure to follow "procedure associated with one of the alternative bases for discipline" does not make all other bases invalid.[17] Even if the proper procedures for a violation of the Department of Technology and Information's Acceptable Use Policy or the Judicial Branch's Acceptable Use Policy were not followed, Appellee argues the Board's decision is still supported by the Code of Conduct violation. The Board concluded that the violation of the Code of Conduct, standing alone, was a sufficient basis to impose a ten-day suspension.

IV. STANDARD OF REVIEW

This Court does not sit as trier of fact, nor should this Court replace its judgment for that of the Board.[18] "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."[19] In reviewing a decision of the Board, "the function of the Superior Court is to determine whether the Board's decision is supported by substantial evidence and free from legal error."[20] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[21] If the Board's decision is free from legal error and supported by substantial evidence, this Court must sustain the Board's decision even if this Court would have decided the case differently if it had come before it in the first instance.[22] "The burden of persuasion is on the party seeking to

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[16] The Court of Common Pleas Answering Br., at 12 (Sept. 28, 2018).
[17] *Id.* at 9.
[18] *See Weiss v. Delaware Dep't of Health and Soc. Servs.*, 2003 WL 21769007, at *3 (Del. Super. Ct. July 30, 2003); *see also Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1106 (Del. 1988); *Holowka v. New Castle Cty. Bd. of Adjustment*, 2003 WL 21001026, at *4 (Del. Super. Ct. Apr. 15, 2003).
[19] 29 *Del. C.* § 10142(d).
[20] *Weiss*, 2003 WL 21769007, at *3 (citing *McIlroy v. Dep't of Health and Soc. Servs.*, 2000 WL 703672 at *2 (Del. Super. Ct.)); *see Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).
[21] *Forrey v. Sussex Cty. Bd. of Adjustment*, 2017 WL 2480754, at *3 (Del. Super. Ct. June 7, 2017).
[22] *Id.*

overturn a decision of the Board to show that the decision was arbitrary and unreasonable."[23] In this process, "the Court will consider the record in the light most favorable to the prevailing party below."[24]

V. DISCUSSION

A. The Board was not required to deliberate on the record.

Title 29 divides agency actions into two distinct categories: an "agency's regulation"[25] and an agency's "case decision."[26] Title 29 provides different rules regarding the creation of a record for the different categories. Under § 10117, "when an agency is required by law to hold public hearings before adopting, amending or repealing a regulation" the agency must provide a "record from which a verbatim transcript can be prepared ... *[n]o part of the public hearing is exempt from this record requirement.*"[27] By contrast, a case decision is expressly differentiated from an agency's regulatory decision to which § 10117 refers.[28] Under § 10125, in a case decision, "[a] record from which a verbatim transcript can be prepared shall be made of all hearings in all contested cases."[29] Section 10125(d) does not contain language that requires all parts of the hearing to be on the record, as opposed to the language in § 10117(3) emphasized above.

In the instant matter, the Board decided whether or not Appellant was in violation of several rules which would warrant discipline. Thus, the underlying action in this matter is not a regulatory decision, but rather the Board's "case decision." As such, § 10125 guides the Board's procedure, not § 10117. Importantly, § 10125, unlike § 10117, does not mandate the entirety of the hearing be on the record. This language variation demonstrates the different requirements for case decisions versus regulatory decisions. Case decisions are different, and the Court

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[23] *Forrey*, 2017 WL 2480754, at *3 (quoting *Mellow v. Bd. of Adjustment of New Castle Cty.*, 565 A.2d 947, 955 (Del. Super. Ct. 1988)).

[24] *Holowka*, 2003 WL 21001026, at *4 (quoting *Gen. Motors Corp. v. Guy*, 1991 WL 190491, at *3 (Del. Super. Ct. Aug. 16, 1991)) (internal brackets omitted).

[25] A regulation is defined as "any statement of law, procedure, policy, right, requirement or prohibition formulated and promulgated by an agency as a rule or standard, or as a guide for the decision of cases thereafter by it or by any other agency, authority or court." 29 *Del. C.* § 10102(7).

[26] A case decision is defined as a "proceeding or determination that a named party as a matter of past or present fact, or of threatened or contemplated private action, is or is not in violation of a law or regulation[.]" 29 *Del. C.* § 10102(3).

[27] 29 *Del. C.* § 10117(2) (emphasis added).

[28] *See* 29 *Del. C.* § 10102(2).

[29] 29 *Del. C.* § 10125(d).

will turn to the Board's own procedural rules for further clarification on the proper procedure for the instant underlying case decision.

Title 29, Section 10113 empowers agencies, such as the Board, to informally adopt rules of procedure that do not conflict with other mandates of Title 29.[30] Section 10113 expressly permits the Board to informally adopt "[r]ules of practice and procedure used by the agency."[31] The Board effectuated the grant of authority and adopted rules of practice and procedure in the form of the Merit Employee Relations Board Practice and Procedure Manual.[32] The Practice and Procedure Manual states that during a case decision hearing, after the parties submit evidence and give closing arguments, "the Board goes *off the record to deliberate* in the presence of [the] parties and counsel. After deliberating, the Board goes back on the record to entertain a motion to grant or deny the appeal."[33]

In the instant matter, after the presentation of the parties' cases-in-chief, the members of the Board went off the record, but remained in the presence of the parties and counsel, to deliberate. The Board returned to the record, moved to deny Appellant's grievance, and then voted to deny Appellant's grievance. A written decision followed which detailed the Board's reasoning. The members of the Board conducted themselves in accordance with the Board's procedural rules. The Court finds no error of law was committed by deliberating off the record.

Lastly, the Court will note that the lack of deliberations on the record does not render the record insufficient for judicial review. The Board's written decision thoroughly explains the reasoning for the Board's determination. The transcript of the hearing and witness testimony is extensive, as is the evidence submitted. The Court has a more than sufficient record from which to review the Board's decision for substantial evidence or errors of law.

B. The Board's decision to uphold Appellant's ten-day suspension is supported by substantial evidence based on Appellant's violation of the Code of Conduct for Judicial Branch Employees.

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[30] 29 *Del. C.* § 10113(b).
[31] 29 *Del. C.* § 10113(b)(2).
[32] *Merit Employee Relations Board Practice and Procedure Manual* (2013), https://merb.delaware.gov/wp-content/uploads/sites/131/2017/03/MERB_Practice__Procedure_Manual_2013.pdf (last visited Feb. 1, 2019).
[33] *Merit Employee Relations Board Practice and Procedure Manual*, at 17 § I. Deliberations (emphasis added).

It is well established that an agency's decision will not be overturned if one of the multiple bases for the agency's decision is potentially invalid when "there is other sufficient competent evidence to support the administrative agency's decision."[34] In the instant matter, there is alleged controversy regarding one prong of the Board's determination: that Appellant violated the Acceptable Use Policy. Specifically, Appellant contends that the 29 *Del. C.* § 5924 notification requirements apply to the Court of Common Pleas, and that the Court of Common Pleas' failure to follow those requirements renders his discipline invalid. The Court of Common Pleas contends that § 5924 applies only to Executive Branch agencies, and, even if § 5924 applied to the Judicial Branch, the language of the statue is not mandatory.

However, the Court need not address the merits of this controversy because the Board's decision is supported by substantial evidence. The Board expressly stated that Appellant's violation of the Code of Conduct, on its own, was sufficient justification for the ten-day suspension. This Court agrees with the Board's assessment and approach. The determination that Appellant's conduct was in gross and direct violation of the Code of Conduct, and that a ten-day suspension was warranted for that violation, is supported by substantial evidence.

The evidence demonstrates that Appellant disseminated private personal details of a judge and his family—without the judge's consent or knowledge—to a third party seeking monetary contributions. The specific statements in the ill-advised email exchange between Appellant and Ms. Kolson disparaged the judge. The Court of Common Pleas concluded that Appellant intentionally misrepresented facts during the post-conduct investigation as well. The Board did not find Appellant to be a completely credible witness at the hearing and rejected his explanation for his conduct.

This Court finds that the evidence of Appellant's conduct to be "such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion"

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[34] *Stanford v. State Merit Employee Relations Bd.*, 44 A.3d 923 (Table), 2012 WL 1549811, at *4 (Del. May 1, 2012) (quoting *Trader v. Caulk*, 1992 WL 148094, at *2 (Del. Super. Ct. June 10, 1992)). *See Charney v. Charney*, 356 P.3d 355, 361 (Idaho 2015) ("If a lower court makes a ruling on two alternative grounds, even if the court erred with respect to one ground the ruling will be upheld on the alternative ground."); *McKeesport Area School Dist. v. McKeesport School Serv. Personnel Ass'n*, 585 A.2d 544, 546 (Pa. Cmwlth. 1990) (where termination was based upon three grounds and an arbitrator found only one ground provided just cause for discipline, it was appropriate to modify the discipline, but not eliminate it in its entirety); *see also ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 731 A.2d 811, 813 (Del. 1999) (declining to adopt the lower court's analysis, but affirming the ruling of the lower court on an alternative basis).

that Appellant abused his position at the Court of Common Pleas in direct violation of the Code of Conduct, and in a manner which would warrant a ten-day suspension without pay.[35] Thus, the Board's decision to uphold the ten-day suspension is supported by substantial evidence, and this Court will affirm the Board's decision.

VI. CONCLUSION

The decision of the Merit Employee Relations Board is **AFFIRMED.**

IT IS SO ORDERED.

Richard R. Cooch, R.J.

cc: Prothonotary
Merit Employee Relations Board

[35] *Forrey*, 2017 WL 2480754, at *3.