BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

HUBERT J. DANIEL,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 09-05-449**
v.	)	
	)	
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,	)	**DECISION AND ORDER**
	)	
Employer/Respondent.	)	

After due notice of time and place this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on February 24, 2010 in the Delaware Room at the Public Archives Building, 121 Duke of York Street, Dover, DE 19901.

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

APPEARANCES

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

Hubert J. Daniel
Employee/Grievant *pro se*

A. Ann Woolfolk
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The employee/grievant, Hubert J. Daniel (Daniel), offered five exhibits into evidence. The Board admitted four marked for identification as Exhibits 2-5.

Daniel testified on his own behalf and called two witnesses: Carol Forbes and Gerald Shaw.

The Department of Health and Social Services (DHSS) offered five exhibits into evidence.[1] The Board admitted all five marked for identification as Exhibits A-E.

DHSS called three witnesses: Lois Brown; Valerie J. Smith; and Deborah Kresse.

FINDINGS OF FACT

Daniel works for the Division of Developmental Disabilities Services (DDDS) as a Management Analyst III.

In August 2007 Valerie J. Smith, the DDDS Chief of Administration, counseled Daniel for failure to comply with a directive to complete Medicaid billing sheets on time.

By letter dated September 18, 2007 Smith notified Daniel that she was proposing a five-day suspension for his refusing "to do work assigned by me [and] your supervisor." Daniel filed a complaint with Labor Relations which reduced the suspension to an administrative suspension.

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[1] After the pre-hearing conference on February 17, 2010 Daniel objected to the admission of DHSS Exhibits A and B. For the reasons stated in the Pre-hearing Order the Board admits those exhibits for the purpose of establishing progressive discipline. The Board excluded any evidence that Daniel might offer to try to collaterally attack previous disciplinary actions.

On October 14, 2008 DDDS conducted a training session attended by around 15-16 employees including Daniel. The subject of the training session was how to overcome disruptive workplace differences through better communication. Smith asked each employee to choose a partner for the exercise. Several employees were at first hesitant. Smith explained that she was not asking them to select a partner with whom they had a specific work problem.

With the exception of Daniel, all of the employees selected a partner. Daniel refused, saying that "he had no problem with any one, never had, and never would." Smith directed Daniel to select a partner to participate in the training exercise. Daniel again refused. Smith told Daniel that if he did not participate he would disciplined for insubordination. Daniel still refused.

By letter dated October 28, 2008 Smith notified Daniel "that I am proposing you be suspended without pay for one (1) day for your failure to comply with a lawful directive to you during a staff meeting for the Office of Budget, Contracts and Business Services (OBCBS) on October 14, 2008. . . . Your behavior on October 14, 2008 was insubordinate, unacceptable and cannot be condoned. It had a negative impact on an important training activity in which the OBCBS was engaged, as well as our ability to fulfill our mission of providing consistent, quality business services."

Smith advised Daniel of his right to a pre-suspension meeting. Daniel made a timely written request for a meeting held on November 5, 2008. By letter dated November 10, 2008 Marianne Smith, the Director of DDDS, notified Daniel that "I have been informed that based on the meeting . . . you did not offer any reasons why the proposed penalty is not justified or is too severe."

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.**

Daniel does not allege that DHSS did not offer him due process rights. He requested and received a pre-suspension meeting on November 5, 2008.

The Board concludes as a matter of law that the evidence in the record proves that Daniel committed the charged offense of insubordination. Daniel acknowledged that he refused to follow Smith's directive at the October 14, 2008 staff meeting to select a partner to participate in the training exercise. Daniel acknowledged that Smith repeated the directive and he still refused. Daniel acknowledged that Smith told him that if he refused to participate he would be disciplined for insubordination.

Daniel testified that he believed the training exercise was flawed and would be divisive. It was not for Daniel, however, to second-guess the merits of the training exercise. Smith did not direct him to do anything illegal or that would affect his health or safety. While he may have expressed his concerns privately with Smith at a later time, the Board does not believe he had any right to choose not to participate in the training exercise.

The Board concludes as a matter of law that the evidence in the record proves that the penalty of a one-day suspension without pay was appropriate to the circumstances. In August 2007

Smith counseled Daniel for failure to perform a work assignment on time. In September 2007 Smith suspended Daniel for insubordination for refusing to do work assigned by his supervisors. Based on Daniel's disciplinary record within the last two years the Board believes that a one-day suspension for refusing to participate in the October 14, 2008 training exercise was consistent with progressive discipline.

ORDER

It is this 1st day of March, 2010, by a unanimous vote of 3-0, the Decision and Order of the Board to deny Daniel's appeal.

Martha K. Austin, MERB Chair

JOHN F. SCHMUTZ, MERB Member

Jacqueline Jenkins
Member