

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

GRIEVANT,)	
)	
Employee/Grievant,)	DOCKET No. 18-11-710
v.)	
)	DECISION AND ORDER
DEPARTMENT OF CORRECTION,)	
)	PUBLIC - REDACTED
)	
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 September 5, 2019 at the Public Service Commission Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904. The hearing was closed to the public, pursuant to 29 *Del.C.* §10004(b)(8).

BEFORE W. Michael Tupman, Chair, Paul Houck, Jacqueline Jenkins, Ed.D, and Victoria Cairns, Members, a quorum of the Board under 29 *Del.C.* §5908(a).

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Grievant
Pro Se

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Correction

BRIEF SUMMARY OF THE EVIDENCE

The Department of Correction (“DOC”) offered and the Board admitted into evidence without objection nine (9) exhibits marked for identification as Agency Exhibits A-I. DOC called seven (7) witnesses: Perry Phelps (“Phelps”), former Commissioner, DOC; Alan Grinstead (“Grinstead”), Deputy Commissioner, DOC; Kolawole Akinbayo (“Akinbayo”), Warden, DOC; Shane Troxler (“Troxler”), Bureau Chief, DOC; Natasha Hollingsworth (“Hollingsworth”), Deputy Warden, DOC; Beverly Barr-Ford (“Barr-Ford”), Labor Relations Manager, DOC; and James Elder (“Elder”), Bureau Chief, DOC.

The Employee/grievant (“Grievant”), offered ten (10) exhibits of which the Board admitted into evidence six (6), without objection, marked for admission as Grievant Exhibits 1, 5-6, and 8-10. The Grievant called five (5) witnesses: Brian Emig (“Emig”), Warden, DOC; Natasha Hollingsworth, Deputy Warden, DOC; Madeline Lynch (“Lynch”), BWCI, DOC; Kelly Lewis (“Lewis”), BWCI, DOC; and Patrick Sheets (“Sheets”), HRYCI, DOC. The Grievant testified on her own behalf.

FINDINGS OF FACT

The Grievant was employed for more than twenty-six years by the Department of Correction. She was the Warden of the Baylor Women’s Correctional Institution until mid-May 2017, when she was reassigned to an Acting Warden position at Howard R. Young Correctional Institution (“HRYCI”). *Tr. at 195.* The prior HRYCI Warden, Steven Wesley, had been promoted to the position of Bureau Chief of Prisons.

On July 13, 2017, the Grievant emailed the Bureau Chief of Prisons to report an incident in which a DOC weapon was removed from HRYCI without her knowledge or approval as the Acting Warden. A copy of the email was also sent to the DOC Commissioner, Deputy

Commissioner, DOC Human Resources and Labor Relations, and Employee Relations staff in the Office of Management and Budget. *Agency Exhibit D.*

The Grievant also asserted in the July 13, 2017 email that she had been treated in a disrespectful manner by the Bureau Chief of Prisons, who she alleged had publicly humiliated her; that the manner in which DOC treated women was “deplorable, disrespectful, belittling and hostile”; and that she had been personally mistreated by DOC since she was promoted to Deputy Warden in 2009. *Agency Exhibit D.*

Commissioner Phelps assigned DOC Labor Relations Manager Barr-Ford to investigate the allegations in the Grievant’s email. On July 19, 2019, Deputy Warden Alan Grinstead and Barr-Ford met with the Grievant. They informed her the incident involving the removal of the firearm would be investigated by DOC Internal Affairs and would not be discussed at that meeting. *TR. p. 93.*

On July 31, 2017, a second meeting was convened with the Grievant which was attended by Commissioner Phelps, Grinstead and Barr-Ford. During the meeting Commissioner Phelps notified the Grievant that she was being referred to the State’s Employee Assistance Program, and that she was being placed out on paid administrative leave during the investigation of her complaints. Phelps directed the Grievant that she was to have no contact with anyone concerning the investigation and that she was not permitted to be on the premises of BWCI during the investigation. *Tr. at 27-28, 31.*

At the conclusion of the meeting, the Grievant signed a memorandum from Commissioner Phelps which stated:

This is notification that effective immediately, you are hereby removed from the workplace with pay, pending completion of investigation, in accordance with policy 9.22, Removal of Employee from the Workplace, when that employee poses immediate safety/security risk or jeopardizes the public’s confidence.

This is to notify you that you are not permitted on the premises of the Baylor Women's Correctional Institution without approval from this office." *Grievant Exhibit 5*.

The Grievant signed the letter at the end of the meeting to acknowledge receipt. *Tr. at 170*.

Commissioner Phelps also initialed the document.

On August 9, 2017, BWCI Deputy Warden Troxler contacted Bureau Chief Wesley by email to inform him that the Grievant had contacted him on his personal cell phone on August 8, 2017. *Agency Exhibit G*. Troxler testified he "... knew I was not supposed to be communicating with her regarding BWCI operations," and that the Grievant was identified as the caller on his phone. *TR. p. 52*. He testified that he had a choice as to whether to answer the call and that he chose to answer it. Following this telephone conversation, Troxler sent a detailed email to the Bureau Chief. At no point in the email summary, nor in the evidence received at this hearing, did Troxler assert that the Grievant had inquired or talked about the investigation into the complaints of her July 13 email.¹

On or about August 16, 2017, DOC initiated a disciplinary investigation into allegations that the Grievant had "... violated Commissioner Phelps verbal directive to not contact anyone at BWCI following her being temporarily removed from duty." The alleged violations were identified as:

- Code of Conduct 1.4 – Principles of Conduct
- Code of Conduct 1.5 – Unbecoming Staff Conduct, (N) Insubordination
- Code of Conduct 2.10 Insubordination
- Failure to follow the Commissioners Directive *Grievant Exhibit 5*

Bureau Chief Richman² conducted the investigation and issued the 210 Investigative

¹ The Board notes that Deputy Warden Troxler was not copied on the July 13, 2017 email which included the Grievant's complaints. He testified that he had been instructed by Bureau Chief Wesley not to have contact with the Grievant. *Tr. at 65*.

² Marc Richman, Ph.D. was the Chief of the Bureau of Correctional Health Care Services.

Report on August 30, 2017. During the course of the investigation, Commissioner Phelps, Deputy Commissioner Grinstead, Labor Relations Manager Barr-Ford, BWCI Captain Hollingsworth, and Deputy Warden Troxler were interviewed. The Grievant was interviewed last on August 24, 2017. She was asked if she had received "... a verbal directive NOT to contact anyone at the facility." The Grievant responded that she did not recall any such directive and "that she followed the 7/31/17 Memorandum that she not be on the facility premises." She did not deny speaking with Deputy Warden Troxler. Richman concluded the 210 Report, "Based on my review of the materials, interviews with participants and the Warden, I believe there was insubordination and a violation of code of conduct. As such, I am recommending disciplinary action to be determined at the next level." *Grievant Exhibit 5.*

By letter dated September 29, 2017, Barr-Ford informed the Grievant of the findings of DOC's investigation of her July 13 concerns. The report stated:

...[T]he DOC takes such allegations very seriously and will not tolerate rudeness or disrespectful behavior in the workplace. Employees are encouraged to bring such matters to the attention of Human Resources at any time.

Relevant employees including those you identified have been interviewed. This investigation is now completed. During the course of this investigation, no evidence was found to substantiate Allegations 2, 3, 4, or 5. In Allegation #1, an Internal Affairs (IA) investigation was conducted and this allegation was also not substantiated. Therefore, the investigation results in these allegations are determined to be unfounded.

We are hopeful that your referral to the State's Employee Assistance Provider (EAP) has proved helpful in assisting you in processing the concerns brought forth above.³ Serving in the capacity of Warden is a very serious and demanding role at any prison system. The safety of BWCI staff and inmate population are the Warden's responsibility, as well as, maintaining the public's trust during that

³ In the report, the Grievant's concerns were enumerated and defined as:

- #1 A .38 caliber gun was removed from HRYCI without your authority.
- #2 Being treated in a disrespectful manner by Bureau Chief Wesley.
- #3 Women at DOC are treated deplorable, disrespectful, belittling and hostile.
- #4 Your [*sic*] being publicly humiliated by Bureau Chief Wesley, "culminating and destroying you in front of your peers".
- #5 Being mistreated by the DOC since 2009. *Agency Exhibit H.*

endeavor.

Although privacy considerations limit our ability to share confidential information with you about other employees, I can tell you that we have thoroughly investigated the allegations brought forth. Further, appropriate action was taken where deemed necessary.

Thank you again for bringing this matter to our attention. *Agency Exhibit H.*

The Grievant continued to be out of work on paid administrative leave until the State's Employee Assistance Program released her to return to work on or about October 26, 2017. *Tr. at 226.* When she returned to work, DOC reassigned her to work in the Bureau of Community Corrections at the Cherry Lane facility. She continued to be classified and compensated as a Warden, at pay grade ("PG") 23. She reported to Bureau Chief James Elder, who assigned her to develop a resource manual for persons leaving prisons and their families, as part of the delegated work of the Governor's Family Services Cabinet Council. *Tr. at 296.*

On June 13, 2018, Bureau Chief Elder informed the Grievant of DOC's intent to demote her to a Pay Grade 17 position within the Bureau of Community Corrections.⁴ *Agency Exhibit*

B. In the letter, Elder states:

The proposed discipline is the result of the substantial findings from the 210 Disciplinary Investigation initiated on 8-16-17. You were charged with not following a verbal directive from the Commissioner of the Department of Correction. The expectations of a Warden's position include following verbal directives from the Commissioner. Failure to do so constitutes insubordination as well as a violation of the DOC's Code of Conduct. A copy of the 210 Disciplinary Report is provided to you as part of this correspondence." *Id.*

On June 30, 2018, Elder convened a pre-decision meeting in order to give the Grievant the opportunity to "... give any reasons why [*she*] felt the demotion is not justified." *Agency Exhibit*

B. The pre-decision meeting was suspended when the Grievant made allegations which triggered

⁴ The Grievant went out of work on a medical leave of absence in December, 2017. That leave was later converted to short-term disability. She returned to work in May, 2018, after successfully completing the requisite return to duty examination. *TR at 236 – 237.*

an internal affairs investigation of the Bureau Chief of Prisons. *Tr. at 229.* The meeting reconvened on September 19, 2018, after that investigation was completed. *Tr. at 231.*

In a letter dated October 15, 2018, Bureau Chief Elder finalized the proposed demotion from the position of Warden (PG 23) to the position of Probation and Parole Operations Administrator (PG 17) for failing to follow the Commissioner's directive in violation of DOC Code of Conduct:

- 1.4 Principles of Conduct serves as a general conduct rule including public trust, duty to perform duties, avoid misuse and waste of public property, courteousness, honesty, positive attitude and pride in the profession. *Agency Exhibit I.*
- 1.5 (n) Unbecoming Staff Conduct states, "Staff shall conduct themselves at all times so as to reflect favorably on the Department. Unbecoming conduct shall mean, but not be limited to insubordination." *Agency Exhibit I.*
- 2.10 Insubordination states, "Staff shall obey lawful job-related orders from supervisors. No staff shall knowingly disobey a lawful command or order, either verbal or written, from a senior officer. The failure to obey lawful orders constitutes insubordination. Staff may require review of the order, by a higher authority within the Department, only after the order is obeyed." *Agency Exhibit I.*

The Grievant's demotion was effective on October 29, 2018. *Agency Exhibit A.*

She officially retired from State service on August 1, 2019. *Tr. at 240.*

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 Agency did not have just cause to demote

the Grievant. The Grievant met her burden to prove that she did not commit the charged offense of insubordination.

Section 2.10 of the Agency's Employee Code of Conduct provides: "Staff shall obey lawful job-related orders from supervisors. No staff shall knowingly disobey a lawful command or order, either verbal or written, from a senior officer. The failure to obey lawful orders constitutes insubordination." *Exhibit I, at p.10.*

At the July 31, 2017 meeting, Commissioner Phelps informed the Grievant that he was placing her on paid administrative leave pending an investigation of the complaints of sexual harassment and hostile work environment she had made against the Agency. The Agency contends that Phelps gave the Grievant a verbal directive not to have any contact with anyone at BWCI. Phelps testified that he intended to direct the Grievant "not to contact anyone to try to find out what's going on with the investigation." *Tr. at 28.* The Board Chair asked Phelps to clarify the scope of his directive: "Q: Sir, you just didn't say no contact. You said no contact with anybody regarding the status of the investigation?" *Tr. at 28.* Phelps confirmed that was the scope of his directive. "A: Correct." *Id. See also Tr. at 29* ("don't try to contact anybody to find out what's going on."). Phelps further testified about his expectations of the Grievant: "Again, they know how investigations work. And they know that once you're place on administrative leave, you're not to involve yourself in any part of the investigation." *Tr. at 49.*

The Agency asserted that the scope of the Commissioner's verbal directive was broader and prohibited *any* contact with BWCI, regardless of the purpose of the contact. It relied on a one-page set of talking points prepared prior to the July 31, 2017 meeting by Labor Relations Manager Barr-Ford. The "talking points" include the statement, "While you are on paid administrative leave, you are to refrain from reporting to work, and contacting employees at

BWCI.”⁵ There is no evidence in the record, however, that a copy of the talking points was either given to the Grievant or read to her at the meeting.⁶

The Board does not find that these prepared talking points are substantial evidence of the content or scope of Phelps’ verbal directive. Prior to the meeting, Barr-Ford also prepared a memorandum to the Grievant (*see Tr. at 170*) which prohibited her from going “on the premises of [BWCI]” but did not mention a no-contact order. *Grievant Exhibit 5*. If the Agency felt that a sweeping no-contact order was warranted, it should have been clearly spelled out in the written memorandum which the Grievant signed at the conclusion of the July 31, 2017 meeting.

The Board believes the best evidence of the scope of the Commissioner’s verbal directive is Phelps’ testimony that he only ordered the Grievant “not to contact anyone to try to find out what’s going on with the investigation.” *Tr. at 28*. As Commissioner, it was his authority to define the scope of his verbal directive to the Grievant.

According to the Agency, the Grievant violated Phelps’ verbal directive by calling Deputy Warden Troxler on his personal cell phone on August 8, 2017. Troxler testified that he had been “instructed to not have contact with [*the Grievant*] and to report any time she tried to reach out to me.” *Tr. at 51*. He testified that when his phone started ringing he knew it was the Grievant. “I knew that I was not supposed to be communicating with her regarding BWCI operations” but “I thought it would be best to answer it at the time. Whether that was right, wrong, I don’t know.” *Tr. at 52, 56*.

⁵ Barr-Ford testified that Commissioner Phelps “did say that [highlighted] part” of the talking points. *Tr. at 173*. But even she admitted that the purpose of the no contact order was to protect the integrity of the investigation. *Tr. at 174-75* (“We did not want to have any influence on the investigation that was going on . . . I did not want my investigation to be tainted.”).

⁶ Phelps could not recall whether he read the talking points to the Grievant. The Grievant testified that “I didn’t remember receiving a verbal directive that I could not contact anyone.” *Tr. at 203*.

The day after the call, Troxler sent an e-mail notifying Bureau Chief Wesley about the call and memorializing the conversation in detail, with multiple quotes attributed to the Grievant. *Grievant Exhibit G* (e-mail dated August 9, 2017).⁷ The Board does not find that anything in that e-mail suggested an attempt by the Grievant to interfere with the ongoing investigation of her complaints against the Agency, or, to use Phelps' own words "to find out what's going on." *Tr. at 29.*⁸

At the hearing before the Board, the Agency spent considerable time presenting evidence of the Grievant's managerial style, citing instances (*e.g.*, a two-line revision to a policy manual, a missing gun at Gander Hill) which the Agency claimed she "blew all out of proportion." *Tr. at 13.* Those issues, however, were not cited in the letter of demotion and the Board will not entertain "an after-the-fact rationalization."⁹

The October 15, 2018 letter of demotion, signed by Bureau Chief Elder, cites three sections of DOC's Employee Code of Conduct (1.4, 1.5, and 2.5¹⁰) and the Grievant's "failure to follow the Commissioner's directive." *Agency Exhibit A.* Elder testified that all of the codes, sections, and violations cited in the letter were based on a single instance of the Grievant's violation of

⁷ Troxler could not recall how long the telephone conversation lasted, only that it was more than five but less than thirty minutes. *Tr. at 56.* He does not appear to have made any effort to shorten or end the call. While he may have hesitated to take the call at first, he could have simply said, "Wendi, I'm sorry, I cannot talk to you, I am under a no contract order" and then reported the call to his superior.

⁸ The Agency cherry picks one sentence from Troxler's e-mail: "She then stated: You must have said something to them that you feel guilty now so you aren't calling me." The Board finds that statement ambiguous, at best.

⁹ *Schmitz v. St. Regis Paper Co.*, 811 F.2d 131, 132 (2nd Cir. 1987). "A company may have several legitimate reasons to dismiss an employee. But when a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual." *Domínguez-Cruz v. Suttele Carib, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000).

¹⁰ The reference to Section 2.5 (Fraternization) was a typographical error, and should have been Section 2.10 (Insubordination). *Tr. at 304, 309.*

Phelps' July 31, 2017 verbal directive. *Tr. at 309* (“Q: So all four of them, of the four different sections that are all cited, eventually fall back on the verbal directive given at the meeting when she was put on paid administrative leave. A: Correct.”).

The Board concludes as a matter of law that the Agency cannot rely on any instance of employee accountability except those relied on in the letter of demotion. Elder confirmed in his testimony that the demotion was based solely on one instance of insubordination: the Grievant's violation of the Commissioner's July 31, 2017 verbal directive. *See Tr. at 305* (“Q: So all of those codes and numbers and violations cited were all from one incident?” A: That's right.”).

The Board concludes as a matter of law that the Grievant did not violate the July 31, 2017 verbal directive by calling Troxler on August 8, 2017, because she did not interfere with or otherwise attempt to find out what was going on in the investigation of her complaints against the Agency. The Board, therefore, concludes as a matter of law that the Agency did not have just cause to demote the Grievant.

In addition to Merit Rule 12.1, the Grievant also claims that the Agency engaged in discrimination in violation of Merit Rule 2.1¹¹ and retaliation in violation of 29 Del.C. §5931(c).¹² Since the Agency did not have just cause to demote the Grievant, it is unnecessary for the Board to render a decision on the merits of those claims.

ORDER

¹¹ Merit Rule 2.1: Discrimination in any human resource action covered by these rules of Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, gender identity, genetic information or other non-merit factors is prohibited.

¹² 29 Del.C. §5931(c): No state employee shall be discharged, threatened or otherwise retaliated against with respect to the term or conditions of their employment due to the exercise of their rights under the grievance and complaint procedure established under subsection (a) of this section.

It is this 15th day of November, 2019, by a vote of 4-0, the unanimous decision of the Board that the grievance is granted because the Agency did not have just cause to demote the Grievant.

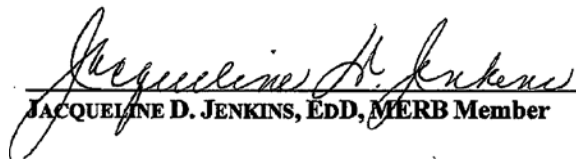
The Agency is ordered: (1) to pay the Grievant back pay and benefits, from the effective date of her demotion (October 29, 2018) to the date of her retirement; and (2) to delete any records pertaining to her demotion from her personnel file, within thirty (30) days of the date of this Order. Counsel for the Agency is directed to notify the Board in writing when the Agency has complied with this Order.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member