

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	DOCKET No. 20-03-751
v.)	
)	
DEPARTMENT OF SAFETY AND HOMELAND)	<u>DECISION AND ORDER</u>
SECURITY, DIVISION OF CAPITOL POLICE,)	<i>PUBLIC (REDACTED)</i>
)	
Agency/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:10 a.m. on October 15, 2020 at the Delaware Public Service Commission, 861 Silver Lake Boulevard, Dover, Delaware 19904. The hearing was closed to the public, pursuant to 29 Del. C. §10004(b)(8).

BEFORE W. Michael Tupman, Chair; Paul R. Houck, Victoria D. Cairns, and Sheldon N. Sandler, Esq., Members; a quorum of the Board under 29 *Del. C.* § 5908(a).

APPEARANCES

Carla A.K. Jarosz
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Michele Allen, Esq.
Emily Biffen, Esq.
Allen & Associates
on behalf of Employee/Grievant

Allison McCowan
Victoria Sweeney
Deputy Attorneys General
on behalf of Department of
Safety and Homeland
Security, Division of Capitol Police

PRELIMINARY PROCEDURAL MATTERS

As a preliminary matter, the Board heard oral argument on a Motion to Amend filed on October 5, 2020 on behalf of the Grievant. The Grievant sought to amend the grievance to also allege violations of Merit Rules 18.7 and 18.8. He asserts he did not receive a grievance response at Step 2 within thirty (30) days as required by Merit Rule 18.7. He also alleges he did not receive a Step 3 response within the forty-five (45) day period mandated by Merit Rule 18.8.

Merit Rule 18.4 states: “Failure of the employing agency to comply with time limits shall automatically move the grievance to the next step unless the parties have a written agreement to delay, or grievants have opposed in writing moving the grievance automatically to the next step...” The Grievant’s recourse for a failure to receive a timely decision on his Step 2 appeal was to request his grievance be advanced to Step 3. He did not exercise this option and suffered no harm in waiting for the Step 2 decision before proceeding.

Merit Rule 18.9 states, “If the grievance has not been settled, the grievant may present, within 20 calendar days of receipt of the Step 3 decision or the date of the informal meeting, whichever is later, a written appeal to the Merit Employee Relations Board (MERB) for a final disposition according to 29 Del. C. §5931 and MERB procedures.” Receipt of the Step 3 decision is a jurisdictional prerequisite for an appeal to the Board. *See Banner v. DHSS*, MERB Docket No. 12-07-551 (Mar. 12, 2013). Once the Grievant received the Step 3 decision (whether or not in a timely fashion) he filed a timely appeal to the Board so whatever remedy he might be seeking for this claim is moot.

The Board voted unanimously to deny the Grievant’s Motion to Amend.

BRIEF SUMMARY OF THE EVIDENCE

The Grievant and the Agency jointly offered into evidence eleven (11) exhibits marked for

identification as Exhibits A-K. The Board admitted all eleven exhibits into evidence.

The Grievant offered an additional five (5) documents into evidence marked for identification as Exhibits 1-5. The Board admitted Exhibits 1-3 and omitted exhibits 4 and 5.

The Agency called three (3) witnesses: Major David Hunt; Chief Michael Hertzfeld; and Susan Judge, Court Administrator. The Grievant called Karen Taylor, Deputy Court Administrator for Sussex County Courthouse and testified on his own behalf.

The parties jointly submitted a series of stipulated facts to aid the Board.

FINDINGS OF FACT

The Grievant is the Operations Commander for Southern Operations for Capitol Police. He began his employment with the Agency in 2005 and was promoted to his current position in 2014. The Grievant is primarily responsible for the safety and security at the Sussex County Courthouse. He had no prior discipline and received a “Distinguished” performance rating on August 2, 2019. *Grievant Exhibit 3.*

On or about August 26, 2019, the Grievant received a directive from Chief of Police Michael Hertzfeld regarding minimum staffing levels at facilities¹, including the Sussex County Courthouse. The Grievant informed his direct supervisor, Major David Hunt, that same day that he disagreed with the revised minimum staffing levels for the Sussex County Courthouse. Major Hunt responded that the minimum staffing levels were set by the Chief. *Joint Exhibit A.* The Chief testified, without dispute, that the change to the minimum staffing levels at Sussex County

¹ Delaware Capitol Police Divisional Directive 16-2, Minimum Staffing, states, “Purpose: To inform members of the Division of the minimum staffing levels necessary to fulfill the daily responsibilities of the Division and to serve as a reference of available manpower at times when additional personnel resources are needed in any operational area.” The Directive continues under Section II. Policy, in relevant part: “...Because the mission of the Delaware Capitol Police is varied and the personnel resource requirements can change, the Division must establish from time to time the minimum number of police officers, security officers and dispatchers required to accommodate the needs of the community that it serves.” *Joint Exhibit I.*

Courthouse (from three to two police officers) did not alter the number or composition of the staff complement assigned to work there under the Grievant's direction.

On August 27, 2019, the Grievant forwarded his email correspondence with Major Hunt (which included the revised minimum staffing levels) to Karen Taylor, Deputy Court Administrator with the Superior Court at Sussex County Courthouse. In the email, the Grievant advised Ms. Taylor that he had not been consulted on the reduction and stated, "For a Chief to arbitrarily lower a standard for which officers are to be present and working is not only concerning but a clear disregard for safety." The Grievant also stated he had witnesses who heard Chief Hertzfeld commenting that one officer could handle the Sussex County Courthouse, concluding this was "clearly an egregious statement." *Joint Exhibit A.*

Ms. Taylor forwarded the Grievant's email to Sussex County Superior Court Resident Judge Stokes. Judge Stokes then emailed Superior Court President Judge Jurden to express his concerns over the revised minimum staffing levels at Sussex County Courthouse. President Judge Jurden contacted Court Administrator Susan Judge. Ms. Judge subsequently spoke directly with Chief Hertzfeld at a meeting they were both attending. Until this conversation, Chief Hertzfeld was unaware of the Grievant's communication with Court staff.

Chief Hertzfeld assigned Major Hunt to investigate the incident. *Joint Exhibit D.* Major Hunt determined the Grievant violated two provisions of the Delaware Capitol Police Policy Manual, Rules of Conduct: Dissemination of Information and Conduct Unbecoming.

Discipline in the Agency is not assessed according to a progressive discipline matrix. Major Hunt considered mitigating factors like the Grievant's tenure and prior disciplinary record (there was none) as well as aggravating factors including the impact on the Agency's relationship with the Court. Major Hunt recommended a written reprimand for the Dissemination of Information violation and a one-day suspension for the Conduct Unbecoming violation. Following

a pre-decision meeting, the Agency reduced the discipline to a verbal counseling for the Dissemination of Information violation and a written reprimand for the Conduct Unbecoming violation.

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.

Merit Rule 12.2 provides:

Employees shall receive a written reprimand where appropriate based on specified misconduct, or where a verbal reprimand has not produced the desired improvement.

The Grievant does not claim that he was denied due process rights "specified in this chapter." He alleges that the Agency's investigation was inadequate because Major Hunt did not interview Court personnel (the Deputy Court Administrator for Sussex County, Resident Judge Stokes, President Judge Jurden), or the Grievant. The email which the Grievant sent, however, speaks for itself. The Grievant did not dispute that he sent it, its contents, or that he expected it to be forwarded with the intent of alarming Court personnel and undermining the Chief's minimum staffing directive.

The Grievant asserts the written reprimand which was issued to him for violating the Delaware Capitol Police Rules of Conduct was not appropriate. Specifically, he was charged with violating Rule 10, Conduct Unbecoming, which states:

A police officer is the most conspicuous representative of government. To the majority of people, the police officer is a symbol of stability and authority upon which they can rely. Police conduct is scrutinized, and when actions

are found to be excessive, unwarranted, or unjustified, is criticized far more severely than comparable conduct of persons in other walks of life. The conduct of a public employee, on and off duty, reflects the division.

Employees must avoid conduct which could reasonably be construed as having the potential of resulting in damage to the public trust and/or reputation of the division within the community which they serve to such an extent that the ability of the division or the individual member to serve that community could reasonably be affected.

Employees (sworn & civilian) must not act in any manner that, overtly or covertly, promotes divisiveness, dissention or disunity within the Delaware Capitol Police and/or the Department of Safety and Homeland Security. *Joint Exhibit D*, page 3.

The Grievant argues a verbal reprimand should have been issued as the first step of discipline based on the mitigating factors including his exemplary prior record and lack of prior discipline. He also argues that Merit Rule 12.2² requires a verbal reprimand be issued prior to a written reprimand.

The Board finds that Merit Rule 12.2 does not require a verbal reprimand be issued prior to a written reprimand. A written reprimand may be appropriate, in the first instance, based on the specific misconduct. In this case, the Grievant is a Lieutenant of Operations with a long and distinguished tenure with the Agency. He testified he fully understood the chain of command; that he knew his email would likely be circulated and that the Court would have concerns as a result of his email; and that he could be disciplined because he sent the email. The emails from Major Hunt which the Grievant chose to forward all contained a “Confidentiality Notice” which states:

This email, and any files or attachments transmitted with it, should be considered official Delaware Capitol Police communications, therefore being confidential. The email is intended solely for the use of the individual to which it is addressed. Any forwarding or dissemination of the contents of this email in any manner without the expressed permission of the sender may be a violation of state or federal law, and subject the violator to disciplinary action and/or criminal prosecution... *Joint Exhibit A*.

¹ MR 12.2: Employees shall receive a written reprimand where appropriate based on specified misconduct, or where a verbal reprimand has not produced the desired improvement.

The Grievant initially raised his concern by emailing his supervisor, but waited only half a day for a response before sending it to the Deputy Court Administrator. The Grievant did not have permission to disseminate the email outside of Capitol Police. Not only did he circulate the email outside the Agency and his chain of command, but his email contained several inflammatory and negative statements about the Agency and Chief Hertzfeld.

The evidence in this case supports the Agency's stated basis for issuing a written reprimand:

... [The Grievant] chose not to follow through the Chain of Command (Chief, Cabinet Sec DSHS) and decided to route his discontent through the Office of the Courts. The email communication to the courts, upon review, is more than just a mere notification of the change in policy as the Lt. indicated ... The Lt's. decision to author an email, without authorization, clearly noting his objection and providing commentary on how he believes the Chief arrived at making this decision with "clear disregard for safety", was an overt attempt at promoting divisiveness, dissention and disunity within Capitol Police and is conduct unbecoming. *Joint Exhibit E*, page 2.

The Grievant failed to meet his burden to prove that the discipline imposed was not appropriate to the circumstances.

ORDER

It is this **17th** day of **November, 2020**, by a vote of 3-1, the Decision and Order of the Board to deny this grievance. The Board finds the Agency had a sufficient reason to impose accountability, that the Grievant was afforded due process protections, and that the written reprimand issued to the Grievant was appropriate considering all the circumstances in this case.



W. MICHAEL TUPMAN, MERB CHAIR

PAUL R. HOUCK, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER

I respectfully disagree with the conclusions of the majority of the Board.



VICTORIA D. CAIRNS, MERB Member