

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

<b>GRIEVANT,</b>	:	
	:	
Employee/Grievant,	:	
	:	<b>DOCKET No. 20-05-756</b>
<b>v.</b>	:	
	:	<b>DECISION AND ORDER</b>
<b>DEPARTMENT OF HEALTH AND SOCIAL SERVICES,</b>	:	<b>[PUBLIC, REDACTED]</b>
<b>DIVISION OF SOCIAL SERVICES,</b>	:	
	:	
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 October 1, 2020, at the Public Service Commission, 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 R. Houck, Jacqueline D. Jenkins, Ed.D, 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

Employee/Grievant, *pro se*

Victoria Sweeney  
Deputy Attorney General  
on behalf of the Department of Health  
and Social Services

## **BRIEF SUMMARY OF THE EVIDENCE**

The Employee/Grievant (“Grievant”) offered thirty-six (36) documents and seven (7) audio recordings as evidence. After the pre-hearing conference, the Board admitted Grievant Exhibits 1-11, 26-29, 31-33 and 35.<sup>1</sup>

The Department of Health and Social Services, Division of Social Services (“Agency”) also offered thirty-six (36) documents into evidence. After the pre-hearing conference, the Board admitted all thirty-six (36) documents into evidence as Exhibits A-JJ. During the hearing, the Board admitted one additional Agency document into evidence, marked as Exhibit KK.

The parties also submitted a joint stipulation of facts detailing the Grievant’s employment history with the Agency.

Three witnesses testified on behalf of the Agency: Kimberly Boulden, Social Services Chief Administrator for Personnel, DSS; Marietta Wharton, Social Services Chief Administrator, DSS; and Sherry Johnson, Social Services Administrator, DSS. Two witnesses testified on behalf of the Grievant: Jessica Clarkson, Chief of Operations and Performance, DSS; and Tony Sianni, Performance Coach, DSS. The Grievant also testified.

## **FINDINGS OF FACT**

The Grievant was hired in April 2016 into a casual/seasonal position as a Welfare Supervisor at the DSS Canby Park State Service Center. After eight months she was transferred to the Ashley Mansion site, in January 2017. Six months later she was transferred back to Canby Park, in July 2017.<sup>2</sup>

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<sup>1</sup> Grievant’s Exhibits 12-25 and 30 were identical to Agency Exhibits and were excluded by agreement for clarity and to avoid repetitive exhibits. The audio recordings were not admitted into evidence.

<sup>2</sup> Joint Stipulation of Facts, ¶¶1 – 3.

On or about December 24, 2017, the Grievant was hired into a full-time Senior Social Worker/Case Manager Supervisor position at the Agency's Blue Hen Corporate Center office.<sup>3</sup> At the successful conclusion of a one-year probationary period, the Grievant was accorded full merit status per Merit Rule 9.1.<sup>4</sup>

The Grievant was supervised by Senior Social Services Administrator Kevin Taylor until he retired in October 2018. In her monthly supervisor conferences with Mr. Taylor, he consistently evaluated the Grievant as meeting or exceeding expectations.<sup>5</sup> After Mr. Taylor's retirement, the Grievant was supervised by Social Services Chief Administrator Marietta Wharton at the Blue Hen Corporate Center.

There were two sets of notes from supervisor conferences prepared after Mr. Taylor retired. The first was dated December 21, 2018, but was unsigned by either the Grievant or the preparer.<sup>6</sup> Ms. Wharton testified she completed these notes in which she evaluated the Grievant as meeting expectations on sixteen of the enumerated standards, and needing improvement on nine other standards. A second set of notes from a January 31, 2019 conference was issued shortly after the Grievant's transfer to the Hudson Center.<sup>7</sup> There are no ratings or negative comments in these notes. It is not clear who conducted this conference.

The Grievant testified that Ms. Wharton was aggressive and insulting to her. She also testified that she sought Ms. Clarkson's help in dealing with what she considered to be a hostile work environment in November 2018.

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<sup>3</sup> Joint Stipulation of Facts, ¶4.

<sup>4</sup> 9.1 After successful completion of an initial, one-year probationary period, the incumbent shall be a Merit employee.

<sup>5</sup> Grievant Exhibits 1 - 9.

<sup>6</sup> Grievant Exhibit 10.

<sup>7</sup> Grievant Exhibit 11.

On or about January 22, 2019, the Grievant was transferred to the Hudson State Service Center.<sup>8</sup> Ms. Wharton and the Grievant were no longer working in the same location. Ms. Wharton testified she was responsible, however, for supervising the Grievant's "work production" for purposes of "consistency".

Within a few weeks after her assignment to the Hudson Center, the Grievant's daughter was assigned as an interim manager at the same location. The Grievant testified she asked that either she or her daughter be reassigned because she believed that it would be more difficult to supervise employees who knew she was reporting to her daughter.

The Grievant received her first formal performance review on or about February 26, 2019.<sup>9</sup> The review was for the nine and a half month period of April 1, 2018 through January 18, 2019. The review was completed by Ms. Wharton although she only directly supervised the Grievant for the three month period of November, 2018 through January 18, 2019. Ms. Wharton rated the Grievant as needing improvement. The review included both areas where the Grievant's performance exceeded expectations and where her performance was unsatisfactory. The review also noted areas where growth or skills/knowledge development were suggested or needed.

On March 15, 2019, Ms. Wharton placed the Grievant on a Performance Improvement Plan ("PIP") for a period of ninety (90) days which required that she meet with the Grievant every two weeks to discuss her progress in the areas identified for improvement.<sup>10</sup>

During the PIP period, the Grievant met with Ms. Wharton on March 20, April 3, April 15, and May 13, 2019. Ms. Wharton memorialized each meeting in a document entitled, "Update on

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<sup>8</sup> Grievant Exhibit 11.

<sup>9</sup> Agency Exhibit JJ.

<sup>10</sup> Agency Exhibit A; Grievant Exhibit 13.

Performance Improvement Plan Items”.<sup>11</sup> Each of these four documents was signed by Ms. Wharton and the Grievant. Of particular concern to Ms. Wharton was the Grievant’s lack of progress in managing and monitoring her subordinates. Ms. Wharton believed the Grievant needed to monitor and supervise her team better and needed to improve her communications with her team. In her notes from the May 13, 2019 meeting, however, Ms. Wharton noted the Grievant, “continue[d] to be on track to be successful on this plan.”<sup>12</sup>

Following the conclusion of the initial 90-day PIP period, a Labor-Management Committee<sup>13</sup> meeting was held on May 29, 2019, which Ms. Wharton attended. During this meeting, the AFSCME Shop Steward from the Hudson Center provided seven written complaints which specifically related to the Hudson Center and referenced the Grievant and/or her daughter.<sup>14</sup>

Three of the complaints referenced an incident that occurred on or about May 17, 2019 in the lobby of the Hudson Center. An employee experienced breathing difficulties and chest pains. A number of staff members were present, one of whom called 911 for medical assistance. Medically trained staff from the Division of Public Health (who also worked in the Hudson Center) came to stabilize and monitor the employee until the paramedics arrived. When the Grievant was made aware of the situation, she went to the lobby and directed the employees who were not involved in the care of the individual to return to their work. She also told those present that under the Agency’s policy the call to 911 should have been made by a supervisor. The employees complained they felt the Grievant lacked empathy in her response to the situation.

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<sup>11</sup> Agency Exhibits B, C, D, and E; Grievant Exhibits 14 -17.

<sup>12</sup> Agency Exhibit E.

<sup>13</sup> The employees supervised by the Grievant are represented for purposes of collective bargaining by the American Federation of State, County, and Municipal Employees (“AFSCME”), Council 81.

<sup>14</sup> Three of the attached statements were from employees Yancy, Mason, and Knotts, and the other four were anonymous. Agency Exhibit F.

Ms. Wharton testified she told the Grievant on May 30, 2019 about the complaints from the Labor-Management meeting. The Grievant testified Ms. Wharton told her in that meeting that she had 24 hours to decide whether to demote back into a casual/seasonal or temporary position, because she was going to give the Grievant a negative PIP review. The Grievant was very upset by the conversation and it caused her emotional distress.

Ms. Wharton was tasked with investigating the complaints from the Hudson Center. She summarized her investigation and conclusions in a document dated August 30, 2019 and entitled “Disciplinary Investigation Report – Hudson (*Grievant’s Name*)”.<sup>15</sup> The document indicates that Ms. Wharton interviewed only three of the individuals who provided statements and did not interview the Grievant. Ms. Wharton concluded the Grievant committed multiple violations of policy based on the signed and unsigned statements.<sup>16</sup> She shared her investigation report and her conclusions with four members of DSS senior management. There is no evidence that anyone in management spoke to the Grievant about Ms. Wharton’s conclusions at that time.

The Grievant was out of work on FMLA leave from May 30 through September 4, 2019. When she returned to work, she had been reassigned to work in the Lewis Building on the DHSS Herman Holloway campus on a special project. In October 2019 she was again transferred, this time to the Churchmans Center office.<sup>17</sup> Ms. Boulden testified this transfer was to give the Grievant a “fresh start” under a veteran supervisor to whom she had not previously reported.<sup>18</sup>

Ms. Boulden conducted an investigation at the Hudson Center which began on October 1,

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<sup>15</sup> Agency Exhibit I.

<sup>16</sup> Agency Exhibit H.

<sup>17</sup> Stipulation of Facts, ¶7 and ¶8.

<sup>18</sup> Transcript, p. 21.

2019, four months after the Grievant last worked there. Ms. Boulden's notes from the interviews<sup>19</sup> include only two that specifically reference a direct interaction with the Grievant; others reported things they had "heard" but they had not experienced mistreatment or witnessed it first-hand.

Simultaneously, Ms. Wharton conducted an investigation which involved interviewing Blue Hen Center staff, although the Grievant had not worked there for more than ten months.

On October 2, 2019, Ms. Boulden sent an email to the DSS Director (copying Ms. Wharton) which included a spreadsheet that noted complaints from three specific employees.<sup>20</sup> The email, entitled "[*Grievant*] Investigation Spreadsheet", <sup>21</sup> states that she and Ms. Wharton "went to Blue Hen staff and Hudson staff to gather more statements to corroborate what was listed on the spreadsheet."

On or about October 28, 2019, the Grievant received a second Performance Review, this one covering the period of January 19 through October 18, 2019.<sup>22</sup> The review was completed by Social Services Administrator Sherry Johnson who had also not supervised the Grievant for the covered time period. Ms. Johnson rated the Grievant's performance as unsatisfactory.

A Performance Plan for the Social Worker/Case Manager Supervisor position was prepared and provided to the Grievant on November 1, 2019.<sup>23</sup> This plan included standards and expectations for Planning, Employee Supervision, Workload Completion, Management of Resources, Interpersonal Interactions, and Operational Expectations. The plan was to be used for

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<sup>19</sup> Agency Exhibit J.

<sup>20</sup> Two of the complainants had been interviewed as part of Ms. Wharton's investigation of the May 29, 2019 Labor-Management committee discussion and were addressed in her August 30, 2019 report. Agency Exhibits F, G, H, and I.

<sup>21</sup> Agency Exhibit L.

<sup>22</sup> Agency Exhibit N.

<sup>23</sup> Agency Exhibit O.

purpose of performance evaluation beginning November 1, 2019. The document was signed by the Grievant, Ms. Johnson and Ms. Boulden.

The Grievant was also provided with a second Performance Improvement Plan on November 1, 2019.<sup>24</sup> This PIP did not have a specific timeline for completion, except that it noted that training assigned by Ms. Johnson was to be completed within ninety days.

The PIP noted that the Grievant's progress would be evaluated weekly by Ms. Johnson. The Grievant continued to struggle with her supervisory responsibilities such as giving employees directives and making decisions without Ms. Johnson's approval. Ms. Johnson encouraged the Grievant to establish a rapport with her staff and to hold her staff accountable. In order to help the Grievant be successful, Ms. Johnson met with the Grievant daily, gave instructions throughout the day, and sat in on meetings the Grievant held. Ms. Johnson did not write a weekly PIP report documenting her meetings with the Grievant. Ms. Johnson opined that the Grievant was very good at outward facing customer service, but she struggled holding staff accountable, including providing sufficient details in her staff conferences and having difficult conversations. She noted the Grievant did complete all scheduled trainings.

By letter dated November 12, 2019, Ms. Johnson issued the Grievant a letter recommending she "serve a three (3) day administrative suspension" for multiple violations of Agency policies and for failing to "lead by example".<sup>25</sup> The proposed suspension was based on documentation from "Conferences, Investigation Outcomes from staff complaints, Performance Evaluations, and Reviews of Performance Plans." The incidents listed in this letter dated back to August 16, 2018, with the most recent cited incident occurring on May 17, 2019, four months prior

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<sup>24</sup> Agency Exhibit P.

<sup>25</sup> Agency Exhibit S.

to the recommendation to suspend. The letter also states the Grievant had no prior discipline.

Although no final letter of discipline was entered into evidence, Ms. Johnson testified the Grievant did serve a three-day administrative suspension<sup>26</sup> which she did not grieve. She also testified that the suspension was based on incidents which occurred before Ms. Johnson began supervising the Grievant.<sup>27</sup>

The Grievant was provided supervisory coaching sessions to help her with delegation and communication. Tony Sianni was customarily assigned to coach “good” supervisors to build on the skills they already had.

At the conclusion of the November 1, 2019 PIP, Ms. Johnson conducted a performance review in which she found the Grievant’s performance again to be unsatisfactory.<sup>28</sup>

On February 10, 2020, the Agency discovered backlogged work in the offices of two of the Grievant’s supervisees. The Grievant testified the files, which needed to be sent to be imaged and were not active cases, had been accumulating before she was assigned to supervise the employees. Also, on February 10, 2020, the Agency received reports that the Grievant discussed an employee’s house arrest status within hearing of other employees. The Grievant testified the discussion occurred with Ms. Johnson in her office, with the door open at Ms. Johnson’s direction. The Grievant also testified her supervisors were aware that she speaks loudly due to a hearing problem, which is why she usually kept her office door closed.

On March 23, 2020, the Agency issued the Grievant a pre-termination letter.<sup>29</sup> A pre-

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<sup>26</sup> Ms. Johnson testified the 3-day administrative suspension had no economic impact on the Grievant who continued to work and was paid for all three days. *TR. p. 155.* The Board notes that an “administrative suspension” may also be referred to as a “paper suspension”.

<sup>27</sup> Transcript, p. 154-155.

<sup>28</sup> Agency Exhibit AA.

<sup>29</sup> Agency Exhibit GG.

termination hearing was conducted on April 21, 2020. The Grievant was terminated by the DHSS Secretary on May 4, 2020. The basis for the termination was summarized in the termination letter:

... As a supervisor with DSS you are a member of the management team. You are responsible for modeling the Guiding Principles at all times which include delegating and monitoring staff; holding staff accountable; demonstrating an ability to have difficult conversations to improve performance; and providing the best possible internal and external customer service. Management is responsible for ensuring that the Guiding Principles are followed agency wide, creating an atmosphere of trust and positive problem solving.

During a thorough evaluation of your performance it has been identified that you failed to make adequate progress despite being given clear expectations, supports, trainings, and strategies to improve performance. You have consistently failed to adequately perform the duties of a Case Manager/Supervisor with DSS. Your conduct does not fall within the “lead by example” expectation the agency requires.

Your inconsistent and substandard performance is unacceptable as it undermines the mission of DSS, “to provide prompt, respectful and accurate services that promote the potential for self-sufficiency for all Delawareans.” You are required to “lead by example” which you have not done satisfactorily. In addition, your failure to monitor staff workload causes increased client complaints, has a negative impact on your peers, the Division, and most of all, our clients...<sup>30</sup>

The termination was effective May 4, 2020.

### **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 Grievant was ineffective in fulfilling her

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<sup>30</sup> Agency Exhibit II.

duties as a Social Worker/Case Manager Supervisor. The Agency offered the Grievant the due process required by the merit rules by providing her a pre-termination letter and conducting a pre-decision meeting before terminating her employment. The Board concludes as a matter of law, however, that the Agency did not impose a penalty appropriate to the circumstances.

The Agency disciplined the Grievant with a three-day administrative suspension in November 2019 for what was characterized as a “failure to lead by example”.<sup>31</sup> The disciplinary letter documented employee complaints received over the nine month period of August 2018 through early November 2019. It also noted the Grievant’s 2018 Performance Review and the March 2019 Performance Improvement Plan. The Grievant did not grieve the suspension; consequently, the Board accepts it on its face as appropriate.

Because the Grievant had been disciplined for incidents occurring prior to that suspension, the Board focused on the period between November 2019 and March 2020, when the letter recommending termination was issued by Ms. Boulden. The alleged infractions included in the termination letter are of a similar type and nature to those in the suspension letter. In fact, some of the same dates and allegations are included in both disciplinary letters.

The Board concludes as a matter of law that termination was not an appropriate penalty under the circumstances. The Agency relied upon complaints by employees that the Grievant supervised. Many of these complaints and the resulting investigations were not discussed with the Grievant, and many resulted from the May 2019 Labor Management meeting. The employee complaints were all investigated by the same two individuals, Ms. Wharton (in May and October 2019) and Ms. Boulden (in October 2019). Ms. Wharton issued the Grievant’s first performance review (although she had only supervised her for the last three months of the review period) and

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<sup>31</sup> Agency Exhibit S.

also managed the Grievant's first performance improvement plan (although they were not working at the same location during the plan). The Grievant had previously reported Ms. Wharton as being aggressive and hostile toward her and sought management support in late 2018.

The Board has recognized the usefulness of progressive discipline to conform an employee's performance or behavior to acceptable workplace standards.<sup>32</sup> There is no single incident or event which supports the conclusion that termination was the appropriate next step of discipline following the single three-day administrative suspension issued just four months prior to the recommendation for termination. The first purpose of discipline is to place an employee on notice that her conduct or performance are not in compliance with workplace standards. The second is to provide the employee the opportunity to rehabilitate her conduct to conform with expectations. By not discussing specific complaints and investigation results with the Grievant, the Agency did not provide her adequate notice or opportunity to address the employees' complaints or provide management with her perceptions and her side of the story in order to consider the validity of those complaints.

In deciding whether a penalty is appropriate to the circumstances, the Board takes into account both mitigating and aggravating factors.<sup>33</sup> The mitigating factors in this case are that the Grievant appeared to participate fully in both Performance Improvement Plans, actively sought out training and spoke with her supervisors frequently. The Grievant also possessed specialized skills valued highly enough to have her assigned to a special project shortly before the second PIP was issued and was assigned to training with Tony Sianni, which the Agency would not have done had she been a problem employee.

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<sup>32</sup> *Grievant v. DHSS/DPH*, MERB 12-06-546 (March 6, 2013, p. 6).

<sup>33</sup> *See Pritchett v. Department of Health and Social Services, Delaware Psychiatric Center*, MERB 13-09-593 (May 1, 2014, p. 7).

The Grievant's struggles as a supervisor were due, in part, to low morale caused by an undisclosed incident at Blue Hen in 2018 and the Agency's decision to appoint her daughter as the Grievant's interim supervisor at the Hudson Center. The aggravating factors in this case are that as a supervisor the Grievant needed continuous support from her own supervisors and did not seem to be able to remedy her challenges with effective supervision of and relationships with her subordinate staff.

The Board has broad remedial powers under 29 *Del. C.* § 5931 which include the ability to modify an inappropriate penalty imposed by an agency. As such, the Board finds that the penalty appropriate to the circumstances present in this case is to remove the Grievant from a supervisory position in which she has struggled to meet performance expectations. The Agency is directed to demote the Grievant to the highest non-supervisory merit position for which she is qualified with a commensurate reduction in paygrade and wages.

### **ORDER**

It is this **11<sup>th</sup>** day of **January, 2021**, by a unanimous vote, the Decision and Order of the Board to deny the Grievant's appeal in part and grant it in part. The Board finds the Grievant committed many of the alleged shortcomings and was afforded due process to which she was entitled under the Merit Rules. The Board finds, however, that the penalty of termination was excessive.

The Board directs the Agency to modify the penalty imposed by 1) rescinding the termination; 2) demoting the Grievant to the highest non-supervisory merit position for which she is qualified; and 3) issuing backpay to the Grievant at the reduced pay rate from the date of her termination. Counsel for the Agency is directed to notify the Board in writing within thirty (30)

days of the date of this Order of the Agency's compliance.



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**W. MICHAEL TUPMAN, MERB CHAIR**



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**PAUL R. HOUCK, MERB Member**



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**JACQUELINE D. JENKINS, EDD, MERB Member**



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**VICTORIA D. CAIRNS, MERB Member**



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**SHELDON N. SANDLER, ESQ., MEMBER**