

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	DOCKET No. 21-03-802
v.)	
)	[Public, redacted]
DEPARTMENT OF TRANSPORTATION,)	
DIVISION OF MOTOR VEHICLES,)	
)	
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 November 4, 2021, in the Public Service Commission Hearing Room, 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, Victoria D. Cairns, and Sheldon N. Sandler, Members; a quorum of the Board under 29 Del. C. §5908(a).

APPEARANCES

Ilona Kirshon
Department of Justice
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Christopher Isaac, Esq.
Offit Kurman
on behalf of the Employee/Grievant

Victoria Sweeney
Deputy Attorney General
on behalf of the Department of
Transportation

BRIEF SUMMARY OF THE EVIDENCE

The Employee/Grievant (“Grievant”) offered nine (9) documents, consisting of 320 pages, into evidence pre-marked as Exhibits 1-9. After the pre-hearing conference the Board admitted the following documents into evidence:

- Grievant Exhibit 1 with the following pages stricken: Bates numbers 2-6; 10-16; 19-21
- Grievant Exhibit 3 with the following pages stricken: Bates numbers 44 and 56-58.
- Grievant Exhibit 4 with the following pages stricken: Bates numbers 71-72; 76-78; 80-85, 89-90.
- Grievant Exhibit 5 with the following pages stricken: Bates numbers 96, 102-103.
- Grievant Exhibit 6
- Grievant Exhibit 7 with the following pages stricken: Bates numbers 180-182.
- Grievant Exhibit 8 with the following pages stricken: Bates numbers 269, 292-293, 297-298, 299-300, 303, 304, 306 and 310.

The Department of Transportation (“DOT”), Division of Motor Vehicles (“Agency”), offered twenty-three (23) documents into evidence pre-marked for identification as Agency Exhibits A-W, all of which were admitted into evidence by the Board after the pre-hearing conference.

DOT Chief of Support Services Vanessa Briddell, DOT Motor Vehicle General Manager Kathy Stevenson, and DOT Motor Vehicle Services Supervisor John Taylor testified for the Agency. Former co-worker Terrance Mixon testified for the Grievant, who also testified on his own behalf.

FINDINGS OF FACT

The Grievant was a Vehicle Lane Inspector Associate II in the Delaware Department of Transportation’s Division of Motor Vehicles. He had received a copy of the DMV’s Absenteeism

Policy¹ (“Absenteeism Policy”) when he began working at DMV and again when it was updated in July of 2020.²

On May 15, 2019 the Grievant received a verbal warning for reporting to work late that day.³ On November 27, 2019 the Grievant received a verbal reprimand for violation of the Absenteeism Policy due to tardiness on November 22, 25 and 27.⁴ On June 3, 2020 the Grievant received a written reprimand for violation of the Absenteeism Policy as a result of three (3) unscheduled absences and four (4) instances of tardiness between February 3 and June 3, 2020.⁵

On July 22, 2020, the Agency proposed a three (3) day suspension for violation of the Absenteeism Policy for tardiness on June 29, July 2 and July 7.⁶ A pre-decision meeting on the proposed discipline was held on August 24, 2020, which resulted in a Memorandum of Understanding (“MOU”) between the Grievant and the Agency to resolve the pending disciplinary matter. The Grievant signed the MOU on October 28, 2020, agreeing to a three-day suspension, acknowledging that he understood the Absenteeism Policy, and that any further conduct related to violation of the Absenteeism Policy would be grounds for further discipline, up to and including dismissal.⁷

On September 23, 2020, the Agency proposed a five (5) day suspension for violations of the Absenteeism Policy on August 20 (tardy), August 26 (tardy) and September 1 (unexcused absence).⁸ A pre-decision meeting on the proposed discipline was held on November 10, 2020,

¹ Agency Exhibit B

² Transcript (“Tr.”) page 318

³ Agency Exhibit D

⁴ Agency Exhibit E

⁵ Agency Exhibit F

⁶ Agency Exhibit G

⁷ Agency Exhibit H

⁸ Agency Exhibit I

which resulted in an MOU between the Grievant and the Agency to resolve the pending disciplinary matter. The Grievant signed the second MOU on December 7, 2020, agreeing to a five-day suspension, again acknowledging that he understood the Absenteeism Policy and that any further conduct related to violation of the Absenteeism Policy would be grounds for further discipline, up to and including dismissal.⁹

By letter to the Grievant dated December 11, 2020, the Agency proposed termination as a result of additional unscheduled absences and instances of tardiness occurring after the five-day suspension had been proposed in September 2020. These additional occurrences took place on September 24, October 5-7, October 23 (unscheduled absences) and November 19 (tardiness in reporting to work without notifying supervisor) and November 20 (tardiness in arrival in the morning and again after lunch break without notifying supervisor).¹⁰ The accuracy of these dates was independently documented by Chief of Support Services Briddell by checking the DMV Event Log, which captured the Grievant's badge swipes.¹¹ Of these six occurrences, three were substantiated.¹²

The Grievant was placed on suspension with pay from December 11, 2020 until January 26, 2021 while the absences were investigated, and he was terminated effective January 28, 2021.¹³ The record indicates that the Agency followed a course of progressive discipline from May 2019 through December 11, 2020, the date on which the termination was proposed.

⁹ Agency Exhibit J

¹⁰ Agency Exhibit P

¹¹ Tr. p. 41 and Agency Exhibit L

¹² There was conflicting testimony regarding: the September 24 absence due to car trouble; the October 5-7 absence due to strep when Grievant recalled calling in on the 5th and 7th; and whether a doctor's note was timely produced for the October 23 absence.

¹³ Agency Exhibit A

CONCLUSIONS OF LAW

Merit Rule 12.1 states:

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 burden rests with the grievant to establish that the discipline imposed was without just cause.¹⁴ The Grievant asserts: (1) that he was treated more severely for absenteeism and tardiness than other DMV employees due to his poor relationship with his supervisor; (2) that his termination was pretextual because it was based on his supervisor’s personal animus toward him; and (3) that the penalty of termination was too severe.¹⁵ While the Grievant and his supervisor both testified to their strained relationship, the Grievant provided no evidence that the Absenteeism Policy was imposed unfairly with regard to his attendance, nor was there evidence that he was targeted for harassment or retaliation.¹⁶

¹⁴ “Under §10125(c) of the Delaware Administrative Procedures Act, in any proceeding which results in a case decision conducted by a covered agency, the burden of proof ‘... is always upon the applicant or proponent’ (i.e., the grievant in this matter).” *Fred Way, III v. DOC*, MERB 15-09-635 (2017). The Merit Employee Relations Board is specifically included in the list of State agencies covered by the APA. 29 Del. C. §10161(a)(12)

¹⁵ The Grievant testified he never reported or complained about his supervisor’s alleged harassment. *Tr. page 264.*

¹⁶ The Grievant points to a situation where he was notified he had no accrued vacation time for the days he took off in August 2020 and was told (after the fact) that he would not be paid for annual leave he had taken. When DOT determined that his accrued leave was misreported due to a computer glitch, the Grievant was paid for the disputed leave. *Tr. page 263.* He points to another situation in April 2020 when he complained to his supervisor about the Governor’s DMV inspection policy during COVID. There is, however, no evidence that he suffered retaliation for expressing his views. In any event “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline.” *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

The Board concludes as a matter of law that the Agency had just cause to terminate the Grievant for absenteeism. The Grievant's employment record shows a history of absenteeism ranging from unscheduled absences to tardiness in reporting to work and/or back to work at scheduled times. The Grievant executed two MOUs with the Agency in October of 2020 for a three-day suspension and in December 2020 for a five-day suspension, both based on violations of the DMV Absenteeism Policy.¹⁷ These MOU demonstrated that absenteeism was an on-going problem for the Grievant despite the Agency's attempts to correct his behavior through progressive discipline.

The Board has recognized the usefulness of progressive discipline to conform an employee's performance or behavior to acceptable workplace standards.¹⁸ The first purpose of discipline is to place an employee on notice that his conduct or performance are not in compliance with workplace standards. The second is to provide the employee the opportunity to rehabilitate his conduct to conform with expectations.¹⁹ The Grievant was placed on notice that his absenteeism was not in compliance with the DMV Absenteeism Policy and he was given the opportunity to rehabilitate his conduct by entering into the two MOUs. The Grievant was terminated from his employment effective January 28, 2021 on the grounds of tardiness and absenteeism in violation of the DMV Absenteeism policy after the progressive discipline did not result in his improved attendance.

The Board also concludes as a matter of law that the Grievant was provided the due process rights he was entitled to under Merit Rule 12.4. When he was notified of the proposed termination by letter dated December 11, 2020 he was offered a pre-decision meeting. That meeting was held

¹⁷ The Grievant was represented by his Union in both MOUs, and a LiUNA Local 1029 representative signed both documents.

¹⁸ *Grievant v. DHSS/DPH*, MERB 12-06-546 (March 6, 2013, p. 6)

¹⁹ *Grievant v. DHSS/DSS*, MERB 20-05-756 (January 11, 2021, p.12)

on January 7, 2021, at which time he was offered the opportunity to respond to the proposed action and offer any reasons why the proposed penalty was not justified or was too severe. Merit Rule 12.6.

Finally, the Grievant's termination was appropriate to the circumstances. The Agency provides motor vehicle inspections to protect the safety and welfare of the driving public. In order to do so, it must rely on its employees to report to work as scheduled. The Grievant disrupted the workflow and staffing of the vehicle inspection lanes by being out for unscheduled absences without providing timely notification to a supervisor, including repeatedly failing to report to work on time and to return from breaks on time.

ORDER

It is this **6th** day of **December 2021**, by a unanimous vote, the Decision and Order of the Board to deny the Grievant's appeal.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER