

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

GRIEVANT,	)	
	)	
Employee/Grievant,	)	
	)	<b><u>DOCKET No. 22-04-828</u></b>
v.	)	
	)	<b>DECISION AND ORDER</b>
<b>DELAWARE DEPARTMENT OF SERVICES</b>	)	
<b>FOR CHILDREN, YOUTH, AND THEIR</b>	)	<b>PUBLIC (REDACTED)</b>
<b>FAMILIES, DIVISION OF MANAGEMENT</b>	)	
<b>SUPPORT 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 December 7, 2022, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904. The hearing was closed to the public pursuant to 29 Del. C. §10004(b)(8).

**BEFORE** Sheldon N. Sandler, Acting Chair; Victoria D. Cairns, Joseph A. Pika, III, Ph.D., and Dinah M. Davis-Russ, Members; a quorum of the Board under 29 *Del. C.* § 5908(a).

**APPEARANCES**

Victoria R. Sweeney  
Deputy Attorney General  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Employee/Grievant, *pro se*

Donna Thompson  
Deputy Attorney General  
on behalf of the Department of  
Services for Children, Youth, and  
Their Families

## **PRELIMINARY PROCEDURAL MATTERS**

The Grievant was an employee of the Department of Services for Children, Youth, and Their Families (“DSCYF”), Division of Management Support Services (the “Agency”). The Grievant was demoted from a Telecommunications/Network Technologist III position to a Telecommunications/Network Technologist I. Asserting the demotion was too severe, the Grievant sought reinstatement to his former classification and paygrade.

On November 21, 2022, the Grievant voluntarily left his employment with the Agency and began employment with another state agency.

On November 30, 2022, the Agency filed a Motion to Dismiss asserting the grievance was mooted because the Grievant no longer wished to return to an Agency position. The Grievant opposed the Motion, asserting he could still be made whole for the time he was in the demoted position if he prevailed on the merits of his grievance.

As a preliminary matter, the Board heard oral argument on the Agency’s Motion to Dismiss. Section 5931(a) of Title 29 of the Delaware Code provides that the Board “shall have the authority to grant back pay, . . . or otherwise make employees whole, under a misapplication of any provision of [Chapter 59] of the Merit Rules.” The Agency did not present a compelling argument as to why the Board would not be able to modify the Grievant’s record and his demotion should the Board ultimately find in the Grievant’s favor. Further, the Board is authorized to grant back pay pursuant to 29 Del C. § 5931(a). After reviewing the written submissions and hearing the parties’ arguments, the Board denied the Agency’s motion.

## **BRIEF SUMMARY OF THE EVIDENCE**

The Grievant offered twelve (12) documents into evidence. After the prehearing conference, the Board admitted Grievant Exhibits 1 and 3 through 12 into evidence.

The Agency offered twenty-five (25) documents into evidence marked as Agency Exhibits

A through Y. All the Agency's Exhibits were admitted into evidence.

The Grievant testified on his own behalf. Three (3) witnesses testified on behalf of the Agency: Charles Campbell-King, Information and Technology Director, DSCYF; Michael Land, Telecommunications/Network Technologist Manager, DSCYF; and Russell Proctor, II, Telecommunications/Network Technologist Supervisor, DSCYF.

### **FINDINGS OF FACT**

The Grievant was employed by the Agency from March 1998 until November 2022.<sup>1</sup> He began working as a Telecommunications/Network Technologist III ("Technologist III") on March 14, 2010, and was demoted from that position to a Telecommunications/Network Technologist I ("Technologist I") effective March 27, 2022. *Agency Exhibit Y.*

Generally, the Grievant was responsible for planning, designing, and implementing all aspects of local area networks and telecommunication systems for the Agency. *Agency Exhibit W, p. 3.* A Technologist I, the first level of the class series, is responsible for performing basic technical procedures in customer support, maintenance and/or administration of local area networks, as well as less complex, routine activities, all of which are performed under close supervision. Tasks performed by a Technologist I include configuring computers and network dependent devices using standard configurations, maintaining inventory lists, and providing first level Help Desk functions for problem resolution. *Id.* As a Technologist III, which is an advanced level, the Grievant was responsible for performing complex technical support and systems administration independently. *Agency Exhibit W, p. 7.*

Technologist III tasks include performing complex troubleshooting, diagnostics, and repairs, including nonstandard device configurations, providing network design, redesign, and

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<sup>1</sup> Transcript ("TR") at p. 97.

upgrades for switches, hubs, cable runs and other network devices, and providing senior level Help Desk support, resolving complex data network infrastructure malfunctions. *Agency Exhibit W*. The Grievant was primarily responsible for the Agency's telecommunications system.

In May of 2020, the Grievant's chain-of-command changed including a change in his direct supervision.<sup>2</sup> At the time, the Grievant was the only Agency Telecommunications employee.<sup>3</sup> Simultaneously, the Grievant was dealing with issues in his personal life, which affected his mental health and, as he candidly admitted, also impacted his work performance.<sup>4</sup> From November 2020 to December 2020, the Grievant was out of the office on medical leave during which time he received in-patient care after suffering a life-threatening incident.<sup>5</sup> When the Grievant completed treatment in mid-December, he requested to take the rest of the month off to get his personal affairs in order.<sup>6</sup> The Agency denied his request.<sup>7</sup>

On December 22, 2020, the Grievant returned to work. Upon his return, his supervisor met with him and placed the Grievant on a performance improvement plan ("PIP"). The supervisor advised the Grievant that, prior to taking medical leave, he had struggled with prioritizing his workload, completing tasks within required deadlines, and communicating and managing expectations for several months, beginning in May 2020. *Agency Exhibit A*. Thereafter, the Grievant met with his supervisors<sup>8</sup> on a weekly basis, and his supervisors took extensive notes

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<sup>2</sup> Tr. 101:19-21; 102:11-103:4.

<sup>3</sup> Tr. 50:22 – 51:5; 102:18-103:4.

<sup>4</sup> Tr. 97:21-24.

<sup>5</sup> Tr. 98:2-4.

<sup>6</sup> The Grievant also testified, without refute, that he was in a "use or lose" situation wherein he had to use his accumulated annual leave down to the allowable carry-over balance of 318 hours.

<sup>7</sup> Tr. 35:2-21.

<sup>8</sup> In March 2021, the Grievant was again assigned a new supervisor. The new supervisor began "helping and assisting with the PIP in April" along with the previous supervisor. At some point thereafter full responsibility for overseeing the PIP was transitioned to the new supervisor. Tr. p. 54.

reflecting what was discussed during every meeting.<sup>9</sup> Agency Exhibits B – L.

On April 5, 2021, Agency management extended the Grievant's PIP and continued to meet with the Grievant. *Agency Exhibits M – T*. On November 8, 2021, the Agency proposed that the Grievant be demoted from a Technologist III to a Technologist I. *Agency Exhibit X*. At the Grievant's request a pre-determination hearing was held on February 16, 2022. On March 9, 2022, the Agency notified the Grievant that his demotion would be effective March 27, 2022. *Agency Exhibit Y*.

On April 12, 2022, the Grievant appealed his demotion both to the Department of Human Resources and to the Board, pursuant to Merit Rule ("MR") 12.9. Following issuance of the decision by a DHR hearing officer, the Grievant requested his grievance be heard by this Board.

### **CONCLUSIONS OF LAW**

Merit Rule 10.5 states:

Demotion. Employees may be placed in a position in a lower paygrade upon voluntarily requesting such action, when subject to layoff, or for just cause, if they meet the job requirements for the lower paygrade position. When agencies agree to employee requests for voluntary demotions, the Department of Human Resources may waive job-posting requirements upon written request by the agencies, which justify such action.

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.

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<sup>9</sup> The Grievant testified that although he was meeting weekly with supervision, he did not routinely receive the spreadsheets prepared by his supervisor(s) and at times was given two or three spreadsheets at once, weeks after the meetings. Tr. 108 – 109.

The Board concludes that the Grievant failed to meet performance expectations for several months between late 2020 and November 2021. The Board further concludes that while the Agency had just cause to demote the Grievant, it did not impose a penalty appropriate to the circumstances.<sup>10</sup>

The burden of proof in a disciplinary appeal rests with the Grievant.<sup>11</sup> The Board finds the Grievant did not establish by a preponderance of the evidence that the Agency lacked sufficient reasons for imposing accountability.

The Board heard testimony from the Grievant's supervisors that the Grievant was not providing sufficient detail in status reports or service desk tickets, properly labeling and inventorying networking equipment, addressing service tickets in a timely fashion, or communicating with management.<sup>12</sup> The Grievant acknowledged that his performance "slipped" for the better part of a year and that he was not consistently meeting expectations.<sup>13</sup> The Grievant attributed this slip in performance to issues he was having in his personal life that affected his health. He ultimately received in-patient treatment in November 2020.<sup>14</sup> While the Grievant initially kept his personal struggles to himself, he eventually explained the scope of his struggles to his supervisors when he returned to work in December of 2020.<sup>15</sup>

The Grievant's supervisors testified that the Grievant failed to meet performance goals under the PIP.<sup>16</sup> The Board also heard testimony from the supervisors that the Grievant advised

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<sup>10</sup> There is no dispute that the Grievant received the due process required by MR 12.1.

<sup>11</sup> 29 *Del. C.* §5949 (b).

<sup>12</sup> Tr. 23:6–24:5; 27:7–18.

<sup>13</sup> Tr. 107:9–20.

<sup>14</sup> Tr. 97:21–98:10.

<sup>15</sup> Tr. 98:5–10.

<sup>16</sup> Tr. 55:6–56:6.

them that he was continuing to struggle in his personal life, including his health condition.<sup>17</sup> The supervisors, however, failed to consider the seriousness of the Grievant's condition and the impact on his work performance. While the PIP meeting notes (as recorded in an extensive spreadsheet format) reflect the Grievant's specific performance deficiencies, the amount of detail describing his deficiencies was excessive and not productive in assisting the Grievant in successfully completing the PIP. *Agency Ex. B-L, M-T*. Moreover, the PIP meeting notes did not reflect the performance areas in which the Grievant was meeting expectations or excelling. For example, the Grievant completed various projects throughout this period, and assisted the Agency with his institutional knowledge from his twenty-five years as an Agency technologist. He had a good record of cross-training other employees and leading projects.<sup>18</sup> Even after being demoted to a Technologist I, the Grievant continued to perform many of the same duties he had as a Technologist III.<sup>19</sup> Consequently, the demotion resulted in a reduction in wages without a corollary and comparative reduction in responsibilities.

In deciding whether a penalty is appropriate to the circumstances, the Board considers both mitigating and aggravating factors. *Grievant v. Dept. of Health and Social Servs.*, MERB Docket No. 20-05-756, at 12 (2021). In this case, the Grievant's ability to continue to work on projects, cross-train co-workers, and provide expertise and share his institutional knowledge with less experienced co-workers constitute mitigating factors. The Grievant's work performance issues were due, in part, to his personal struggles, of which his supervisors and managers were aware prior to the institution of the PIP. Conversely, by the Grievant's own admission, he was not consistently meeting his job expectations for about six months to a year, which constitutes an

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<sup>17</sup> Tr. 77:1-6.

<sup>18</sup> Tr. 77 :7-80:3.

<sup>19</sup> Tr. 109:21.

aggravating factor.

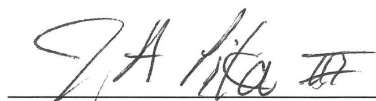
The Board has broad remedial powers under 29 *Del C.* § 5931, which include the ability to modify an inappropriate penalty imposed by an agency. As such, the Board finds that the penalty appropriate to the circumstances present in this case was to demote the Grievant one pay-grade level, to a Technologist II position.


**ORDER**

It is this **8th** day of **February, 2023**, by a unanimous vote of 4-0, the Decision and Order of the Board to uphold the grievance and order the Agency to provide back pay to the Grievant starting the day on which he was demoted through the last day of his employment with the Agency (i.e., March 27, 2022 to November 21, 2022). Any references to a demotion to a Telecommunications/Network Technologist I should be replaced in his personnel records to reflect that the demotion was to a Telecommunications/Network Technologist II.

  
SHELDON N. SANDLER, ESQ., ACTING CHAIR

  
VICTORIA D. CAIRNS, MERB Member

  
JOSEPH A. PIKA, III, PH.D., MEMBER

  
DINAH DAVIS-RUSS, MEMBER