

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

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|--|---|------------------------------------|
| <b>GRIEVANT,</b>                           | ) |                                    |
|  | ) |                                    |
| Employee/Grievant,                         | ) |                                    |
|  | ) |                                    |
| v.   | ) | <b><u>DOCKET No. 22-06-839</u></b> |
|  | ) |                                    |
| <b>DELAWARE DEPARTMENT OF LABOR,</b>       | ) | <b>DECISION ON THE MERITS</b>      |
| <b>DIVISION OF UNEMPLOYMENT INSURANCE,</b> | ) |                                    |
|  | ) | <b>[PUBLIC, REDACTED]</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 March 1, 2023, 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** Jennifer Cohan, Chairperson; 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

Anthony Delcollo, Esq.  
on behalf of the Grievant

Stacey X. Stewart  
on behalf of the Department of  
Labor, Division of Unemployment  
Insurance

## **PRELIMINARY PROCEDURAL MATTER**

The Grievant filed a grievance against the Delaware Department of Labor (the “Agency”), Division of Unemployment Insurance (the “Division”), alleging that he was issued an unpaid one-day suspension without just cause, in violation of Merit Rule (“MR”) 12.1; that his performance was improperly evaluated under MR 13.2; and that he was retaliated against for supporting other employees in filing grievances against the Agency, in violation of MR 18.1.<sup>1</sup> Following the issuance of a decision on the merits by the State Department of Human Resources, the Grievant requested his grievance be heard by the Merit Employee Relations Board (“Board”) and it was scheduled to be heard on March 1, 2023.

On February 13, 2023, the Agency filed a Partial Motion to Dismiss asserting the Board did not have jurisdiction to hear the Grievant’s claims alleging violations of MR 13.2 and 18.1 because they had not been raised at the previous steps in the grievance procedure. The Grievant filed written argument in opposition to the Agency’s motion.

As a preliminary matter, the Board heard oral argument on the Agency’s motion. In considering a motion to dismiss (even a motion to dismiss part of a grievance), the Board must accept all “well-pleaded factual allegations” and grant the motion only if the grievant could not recover under any reasonably conceived circumstance.<sup>2</sup> The Board held the motion in abeyance in order to develop the evidentiary record necessary for consideration of the Agency’s motion.

## **BRIEF SUMMARY OF THE EVIDENCE**

The Grievant offered seventeen (17) documents into evidence, several of which were

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<sup>1</sup> Grievant Exhibit 5.

<sup>2</sup> *Jackson v. DOC, Probation and Parole*, MERB 22-02-822 at 3 (May 13, 2022), citing *Carta v. Danberg*, 2012 WL 1537167 at 1 (Del. Super., April 30, 2012, *aff’d*, 70 A.3d 205 (Del. 2012))

offered as exhibits by the Agency. Following the prehearing conference, the Board admitted Grievant Exhibits 5, 7, 8, 10, and 11 into evidence.

The Agency offered twelve (12) documents into evidence. Following the prehearing conference, the Board admitted Agency Exhibits A, B, C, D, F, I, and J into evidence.

The Board heard testimony from one witness on behalf of the Agency: Darryl Scott, Director, Division of Unemployment Insurance. The Grievant testified on his own behalf.

### **FINDINGS OF FACT**

The Grievant was, at all times relevant to this grievance, the Chief Appeals Referee for the Division of Unemployment Insurance. He was responsible for oversight of six administrative law judges (Appeals Referees) and four administrative support staff, with offices located in each county of the State. Staff meetings were regularly conducted by teleconference to avoid the need for the Appeals Referees from the Dover and Georgetown offices to travel to Wilmington, where the offices of the majority of Appeals Referees and staff were located. In addition to his managerial responsibilities, the Grievant also conducted hearings on lower level unemployment appeals, tax appeals, and monetary determinations, as necessary. The Grievant reported directly to the Director of Unemployment Insurance.

Darryl Scott was hired as the Director of the Division of Unemployment Insurance and began supervising the Grievant in 2019. Director Scott initiated an effort to increase the Division's use of and reliance on technology for conducting Agency business operations, including Microsoft Outlook for scheduling and maintaining calendars and Teams for videoconferencing and internal communications. The Grievant's January 2020 – May 2021 Performance Review<sup>3</sup> required the

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<sup>3</sup> Agency Exhibit F.

Grievant to complete training for OneDrive, Teams, and Outlook in order to “leverage the capabilities the tools have to offer, facilitate socially distanced interactions with staff<sup>4</sup> and guide and direct staff on the use of these tools.” The Grievant completed the required training.

In June 2021, the Grievant was placed on a Performance Improvement Plan (“PIP”) with two objectives: (1) to timely and adequately respond to emails, requests for information or documents from Director Scott and other Division employees, and; (2) to effectively use Microsoft Outlook and Teams.<sup>5</sup> Specifically, the Grievant was required to create and maintain his Outlook calendar for scheduling hearings, meetings, and appointments, and to use Teams (to replace Skype) to communicate and meet with his staff and other colleagues. The Grievant filed a rebuttal to the PIP, but did not grieve it. He took the required training and regularly met with Director Scott to discuss his progress.

At some point prior to November 2, 2021, one of the Appeals Referees reporting to the Grievant died unexpectedly, leaving a number of cases for which hearings had been held but no decisions issued. Consistent with established practice, the Grievant reassigned the cases to other referees who were provided with the recordings and documents from the hearings. The assigned Referee then reviewed the record and issued the decision on the deceased Referee’s behalf, “co-signing, in a manner” the decision.<sup>6</sup>

After the exchange of multiple emails concerning how the decisions were being issued, Director Scott sent an email on November 3, 2021 in which he asked the Grievant to “direct the referees to reissue the decisions with a footnote” based on the advice of the Agency’s counsel. He

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<sup>4</sup> Socially distanced interactions were of heightened importance under COVID-19 Health Emergency restrictions implemented in March 2020.

<sup>5</sup> Grievant Exhibit 7.

<sup>6</sup> Agency Exhibit B, p. 0418.

directed the Grievant to draft the footnote and to run it by counsel for approval before reissuing the decisions, to copy the Director on the emails concerning the footnote, and to also notify the Director when the fourteen decisions had been reissued.<sup>7</sup> The Grievant responded, “Will do as best as possible.”<sup>8</sup> The Director and the Grievant again discussed the footnote in a one-on-one call on November 9, 2021. The Director reissued his instruction to the Grievant, who again explained why the footnote and the reissuance of the decisions was unnecessary based on legal precedents. The Grievant testified he did draft a footnote which was approved by the Agency’s counsel but did not copy Director Scott in the communications.

Director Scott issued a written reprimand to the Grievant dated January 10, 2022, stating the Grievant’s failure to follow the directive constituted insubordination. The letter notified the Grievant that “further violations of this nature will result in additional disciplinary action, up to and including dismissal”.<sup>9</sup> The Grievant responded in a letter that same day disputing the Director’s characterization of his handling of the issue. He denied any intent to be insubordinate.<sup>10</sup> The Grievant did not file a grievance concerning the written reprimand.

On December 2, 2021, during the course of their regular one-on-one meetings (all of which were conducted by teleconference) Director Scott notified the Grievant that the Secretary of the Department of Labor had requested to attend a quarterly staff meeting. The Grievant responded that the next such meeting was scheduled for January 2022.<sup>11</sup> Director Scott asked the Grievant to send an Outlook calendar request for the meeting directly to Director Scott so that he could

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<sup>7</sup> Agency Exhibit B., p. 0421.

<sup>8</sup> *Supra.*, p. 0413

<sup>9</sup> Agency Exhibit A, p. 0492.

<sup>10</sup> *Supra.*, p. 0056.

<sup>11</sup> Agency Exhibit C.

speak with the Secretary to determine her availability and confirm whether she would attend.

On January 11, 2022, the Grievant sent an email to the Secretary and his subordinates to invite them to attend the “formal quarterly staff meeting”, via teleconference on January 20, 2022 at 11:00 AM.<sup>12</sup> Director Scott and the Grievant met, via teleconference the next day, again for a scheduled one-on-one meeting. The meeting was followed by an email from the Director to the Grievant in which he stated:

... I am baffled as to why you continue to disregard directives, and why you emailed my manager about the staff meeting and did not include me on the email...

To address this issue without further corrective action, the following actions must be taken:

- generate an Outlook meeting notice for your staff meeting on the 20<sup>th</sup>, include me as an attendee, and
- select Teams as the method for your team to connect and conduct the call,
- ensure your staff have Jabra headsets, if needed to utilize Teams. Jennifer is already reaching out to Brenda Santiago to secure an inventory.

This meeting provides an opportunity for you to develop competency with the tool and ensure your team is also developing these skills.<sup>13</sup>

The Grievant did not comply with Director Scott’s instruction. The meeting was held via teleconference as scheduled on January 20, 2022. Director Scott participated in the teleconference.<sup>14</sup> The Secretary did not attend.

On February 28, 2022, Director Scott issued a one-day suspension to the Grievant for failing to comply with his instruction for scheduling and conducting the January 20, 2022 quarterly

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

<sup>13</sup> Supra., p. 0027.

<sup>14</sup> Supra., p. 0524.

meeting.<sup>15</sup> The Grievant requested a pre-decision meeting which was held on March 29, 2022. In approving the recommended one-day suspension, the Agency's Deputy Secretary noted the following:

This result is not about one instance, but a pattern that has resulted in the same request from Director Scott on multiple occasions, which is using the tools the [Agency] and State supports for communication that is common business practice. This includes Microsoft Outlook, specifically the calendar feature, and Microsoft Teams. Director Scott's requests and instructions are not unreasonable and he has provided tools/support to facilitate his requests. Your failure to comply with instructions given to you on December 2 and again on January 13, 2022, after both a performance review and Performance Improvement Plan indicated that these issues were to be corrected, illustrate a pattern of behavior that now reasonably results in a one-day suspension.<sup>16</sup>

Following the pre-decision meeting, the Grievant grieved his one-day suspension. The Grievant served the one-day suspension on April 20, 2022.

### **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 13.2 provides:

Changes in Performance. Recognition of effort, accomplishment, improvement or the need for further skill development shall be addressed as needed by verbal discussions, written communication, and/or formal documentation.

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

<sup>16</sup> Grievant Exhibit 11.

Merit Rule 18.1 provides:

To promote positive working relationships and better communications, employees and their supervisors shall informally meet and discuss employee claims of Merit Rule or Merit law violations prior to filing a formal grievance. Merit employees have the right to use this grievance procedure free of threats, intimidation or retaliation, and may have union or other representation throughout the process.

At the conclusion of the evidentiary hearing, the Agency moved to dismiss the grievance, asserting the Grievant failed to meet his burden to establish there was no just cause for the one-day suspension.

The burden of proof in a disciplinary appeal to the Board rests with the Grievant.<sup>17</sup> The Grievant asserts that: (1) he was issued an unpaid one-day suspension without just cause, in violation of Merit Rule (“MR”) 12.1; (2) his performance was improperly evaluated under MR 13.2; and (3) he was retaliated against for supporting other employees in filing grievances against the Agency, in violation of MR 18.1.

The Board concludes that the Grievant failed to provide evidence that he was retaliated against for supporting other employees in filing grievances against the Agency. The Board also concludes that his claim relating to the 2020-2021 Performance Review was untimely.<sup>18</sup>

The Grievant admitted that he did not follow Director Scott’s instructions in scheduling and noticing the January 20, 2022 quarterly staff meeting. He testified he believed that providing

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<sup>17</sup> “Under § 10125(c) of the Delaware Administrative Procedures Act [“APA”], 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. Dept. of Corr.*, Docket No. 15-09-635 at 5–6 (MERB Oct. 15, 2017). The Board is specifically included in the list of State agencies covered by the Delaware APA. 29 *Del. C.* § 10161(a)(12).

<sup>18</sup> The time limits of the grievance procedure are jurisdictional and when a deadline has “passed, the Board ha[s] no jurisdiction to hear [the employee’s] grievance.” *Cunningham v. DHSS*, 1996 WL 190757, at \*2 (Del. Super., Mar. 27, 1996), *aff’d*, 679 A.2d 462 (TABLE), 1996 WL 313503 (Del. June 3, 1996).



information about the meeting to invited attendees via email was tantamount to sending an Outlook calendar invitation and did not view his conduct as insubordinate.

The Board concludes that the Grievant committed the charged offense of insubordination and that the Agency had just cause to suspend the Grievant for one day. Shortly after Director Scott joined the Agency and began supervising the Grievant, the Grievant engaged in several instances of failure or refusal to follow Director Scott's instructions for scheduling, calendaring and conducting virtual meetings. The Grievant testified that he felt he had less autonomy than he had under prior directors, and that he felt he was being "micro-managed" by Director Scott.

Director Scott provided clear, direct, and reasonable instructions to the Grievant on several occasions. He counseled the Grievant multiple times about the importance of utilizing Microsoft Outlook and Teams to promote effective communication. The Grievant, however, disregarded Director Scott's instructions and continued to work as he had under previous directors.

The one-day suspension followed a written reprimand for insubordination issued to the Grievant on January 10, 2022. The Grievant did not grieve the reprimand; consequently, the Board accepts it on its face as appropriate. The Board has recognized the usefulness of progressive discipline to conform an employee's performance or behavior to acceptable workplace standards.<sup>19</sup> 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.

The evidence establishes the Grievant was placed on notice through verbal discussions, written communication, and formal documentation regarding Director Scott's expectation for using Microsoft Outlook and Teams. He was also provided training and multiple opportunities to

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<sup>19</sup> *Grievant v. DHSS/DPH*, MERB 12-06-546 (March 6, 2013, p. 6)

remedy his failure or refusal to use these tools. Although failure to use Microsoft Outlook and Teams may seem like a minor violation in and of itself, the Grievant's failure to comply with Director Scott's directives was not in isolation and constituted a continued and willful disregard on multiple occasions.

**ORDER**

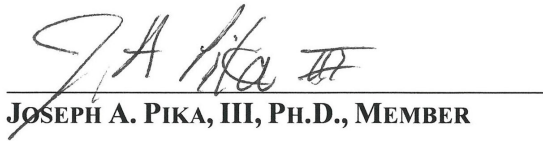
It is this 7<sup>th</sup> day of June, 2023, by a unanimous vote of 4-0, the Decision and Order of the Board to deny the grievance.



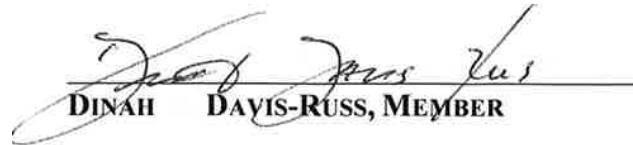
JENNIFER COHAN, MERB Chairperson



VICTORIA D. CAIRNS, MERB Member



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



DINAH DAVIS-RUSS, MEMBER