

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	
v.)	DOCKET No. 23-02-866
)	
DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION FOR THE VISUALLY IMPAIRED,)	DECISION AND ORDER
)	
Employer/Respondent.)	<i>PUBLIC (redacted)</i>
)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the “Board”) at 12:20 p.m. on October 18, 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; Joseph A. Pika, III, PhD, and Lester E. Johnson, Jr., 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

Alpa Bhatia, Esq.
on behalf of the Grievant

Nicole S. Hartman
Deputy Attorney General
on behalf of the Department of
Health & Social Services,
Division for the Visually
Impaired

PROCEDURAL BACKGROUND

The Employee/Grievant (Grievant”) filed three grievances against the Delaware Department of Health and Social Services (“DHSS”), Division for the Visually Impaired (“DVI”) (“Agency”) contesting a one-day suspension; a three-day suspension; and ultimately termination of his employment.¹

At the Grievant’s request, without objection from the Agency, the Board scheduled the grievances to be heard on the same day, in *seriatim*.² A consolidated prehearing teleconference was convened, and the Board admitted a single set of exhibits for all three grievances. This decision results from the hearing on the second grievance which concerns a three (3) day suspension.

BRIEF SUMMARY OF THE EVIDENCE

The Grievant offered twenty (20) documents into evidence, which were marked for identification as Exhibits 1–20. After the prehearing conference, the Board admitted Grievant Exhibits 1, 2, 5, 6, 8–11, 13–20 into evidence.

The Agency offered eighteen (18) documents into evidence, which were marked for identification as Exhibits A–R. After the prehearing conference, the Board admitted Agency Exhibits F, G, I, K, L, N, Q and R into evidence.

The Board heard testimony from two (2) witnesses on behalf of the Agency: Rachel Hollen, Business Services Supervisor, DVI; and Julie O’Donnell, Vocational Rehabilitation Administrator, DVI. The Grievant testified on his own behalf and called one witness, Gary

¹ MERB Docket Nos. 23-06-880 (1-day suspension); 23-02-866 (3-day suspension); 23-03-869 (termination).

² The Board heard the first two suspension grievances, but rescheduled the hearing on the termination grievance due to time constraints.

Pizzolo, BEP Participant.

FINDINGS OF FACT

The Agency offers educational, vocational, and technical support to individuals with visual impairments. The Agency's Vocational Rehabilitation ("VR") Program assists visually impaired individuals in obtaining employment. It also oversees the Business Enterprise Program ("BEP") to support visually impaired entrepreneurs who operate and manage vending and food service businesses in federal and state government facilities in Delaware. The BEP also serves as a resource for visually impaired participants who operate similar vending machines in other facilities.

The Grievant has been employed by the Agency for eight years as the BEP Director. He is responsible for training, communicating, and working with BEP participants as they establish and operate their respective businesses, as well as assisting the BEP Council with writing rules and regulations. At all times relevant to this grievance, there were four BEP participants. The Grievant had worked with these four individuals throughout his tenure and maintained a friendly (as well as professional) relationship with them.

From November 2019 through May 2022, the Grievant reported directly to Deputy Director Towns,³ Ms. O'Donnell was hired as the Vocational Rehabilitation Administrator.

As the BEP Director, the Grievant also supervises the Business Services Supervisor. The Business Services Supervisor is responsible for assisting BEP participants in finding new vending locations and with assisting the vendors when issues arise. She has direct contact with the BEP participants on a regular basis.

³ Deputy Director Towns served as the Agency's VR Administrator until May 2021, at which time he was promoted to the DVI Deputy Director. The BEP Director reports directly to the VR Administrator, however, because that position remained vacant until May 2022, the Grievant continued to report to Deputy Director Towns until the VR Administrator was hired.

On September 20, 2022, the Vocational Rehabilitation Administrator recommended the Grievant be suspended for three (3) days without pay. When she verbally issued her recommendation to the Grievant, she also notified him that his subordinate, the Business Services Supervisor, would be receiving a verbal warning.⁴

Later that day, the Business Services Supervisor convened a teleconference with two BEP participants to review a contract. During the call, one of the BEP participants told Ms. Hollen that the Grievant told him that she would be receiving a verbal warning related to a recent request by BEP participants for emergency short-term funding. After the teleconference, Ms. Hollen emailed the Deputy Director to inquire about her pending discipline.⁵

On September 21, 2022, the Vocational Rehabilitation Administrator expressed her concern with the Grievant that he had discussed personnel information about his staff with BEP participants.⁶ The Grievant admitted he told the BEP participants that he was recommended for discipline and said that he “had to talk to [the Business Services Supervisor].”⁷

On September 27, 2022, the Vocational Rehabilitation Administrator recommended the Grievant be issued an unpaid three (3) day suspension for insubordination for disseminating confidential personnel information and for violating the State of Delaware Standards of Conduct.⁸ The disciplinary letter explained that the Grievant’s behavior was unacceptable, especially in light of the fact that his conduct occurred the same day he learned that his prior discussions with BEP participants was improper.

⁴ Transcript (“TR”) p. 14. No evidence was provided that a verbal warning was ultimately issued to the Business Services Supervisor by the Grievant or anyone else.

⁵ Grievant Exhibit 8.

⁶ Agency Exhibit I.

⁷ TR. p. 137

⁸ Grievant Exhibit 17.

On January 3, 2023, the Vocational Rehabilitation Administrator conducted a pre-decision meeting held at the Grievant's request, and the hearing officer upheld the recommended three-day suspension, in which she concluded, "It is unacceptable to discuss an employee's discipline with someone outside of their direct line of management or Labor Relations."⁹ She directed the Grievant to serve the three-day unpaid suspension on January 5, 6, and 9, 2023.

CONCLUSIONS OF LAW

Merit Rule 2.1 provides:

Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors is prohibited.

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.

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.

⁹ Grievant Exhibit 19.

29 Del. C. § 5953 provides:

No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or be in any way favored or discriminated against with respect to employment in the classified service because of political or religious opinions or affiliations or race.

The burden of proof in a disciplinary grievance rests with the Grievant.¹⁰ Here, the Grievant asserts that in issuing him the three-day suspension, the Agency violated 29 Del. C. § 5953 as well as Merit Rules (“MR”) 2.1, 12.1, 12.2, and 18.1.

The Board concludes that the Grievant failed to provide evidence that the Agency discriminated against him in violation of 29 Del. C. § 5953 or MR 2.1¹¹ or that the Agency retaliated against him in violation of MR. 18.1.¹²

The Board further concludes that the Grievant met his burden to establish that the Agency violated MR 12.1 and 12.2 because it lacked just cause to suspend him without pay for three days.¹³

¹⁰ “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 Correction*, Docket No. 15-09-635, at 5–6 (MERB Oct. 25, 2017). The Board is specifically included in the list of State agencies covered by the Delaware APA. *See* 29 Del. C. § 10161(a)(12).

¹¹ To establish a prima facie case of discrimination, the Grievant must establish: (1) he was a member of a protected class; (2) he suffered an adverse employment action; and (3) a causal connection between the protected class and the adverse employment action. *Daisey v. Dept. of Services for Children, Youth, and Their Families, Div. of Prevention and Behavioral Health Services*, Docket No. 23-03-870, at 6 (MERB Nov. 6, 2023) (citing *Ennis v. Del. Transit Corp.*, 2015 WL 1542151, at *5 (Del. Super., Mar. 9, 2015) (discussing the *McDonnell Douglas* framework to establish a claim of disparate treatment)).

¹² To establish a prima facie case of retaliation, the Grievant must establish that (1) he engaged in a protected activity; (2) the Agency took an adverse employment action against him, and; (3) there is a causal connection between the protected activity and the adverse employment action. *Finney v. Delaware Dept. of Transportation*, Docket No. 19-11-741, at 6 (MERB July 22, 2020) (citing *Moore v. City of Philadelphia*, 461 F.3d 331, 340-341 (3d. Cir. 2006)).

¹³ *Grievant v. Dept. of Health & Social Services, Div. of Child Support Services*, Docket No. 21-07-809, at 7 (MERB Oct. 14, 2022) (citing *Avallone v. Dept. of Health & Social Services*, 14 A.3d 566, 572 (Del. 2011) (citing 29 Del. C. § 5949(b))).

The Board finds the Grievant provided sufficient evidence to establish that he did not commit the charged offense of insubordination. Insubordination is a “willful refusal to follow instructions even when receiving a clear directive.”¹⁴ An employee is insubordinate when he repeatedly refuses to comply with a directive despite being provided multiple opportunities to comply.¹⁵ The record does not support a finding that the Grievant was insubordinate. The Grievant inappropriately discussed a pending personnel matter with individuals outside of DVI management. His conversation with BEP participants demonstrates a lack of care in safeguarding confidential personnel information. The Grievant engaged in inappropriate and unprofessional conduct which violated the State Code of Conduct.

The Board has recognized the usefulness of progressive discipline to conform an employee’s performance or behavior to acceptable workplace standards.¹⁶ The first purpose of discipline is to place an employee on notice that his conduct or performance is not in compliance with workplace standards. The second is to provide the employee with an opportunity to rehabilitate his conduct to conform with expectations. In this case, the Grievant’s disciplinary history included two verbal warnings and a written reprimand. The Board does not find that the incidents for which the Grievant received the verbal warnings and written reprimand were for similar or related incidents.

The record is insufficient to find that a three-day unpaid suspension was appropriate. The Grievant should have known his behavior was inappropriate in sharing information concerning a

¹⁴ *Grievant v. Dept. of Services for Children, Youth, & Their Families*, Docket No. 11-09-522, at p. 10–11 (MERB Oct. 11, 2012)

¹⁵ *Grievant v. Dept. of Technology and Information*, Docket No. 13-01-577, at p. 6–7 (MERB Aug. 4, 2014).

¹⁶ *Grievant v. Dept. of Health & Social Services, Div. of Public Health*, Docket No. 12-06-546, at 6 (MERB March 6, 2013).

pending discipline to be issued to his subordinate. To his credit, he immediately admitted that doing so was wrong. The Board finds this conduct warranted a one-day suspension and that the Agency violated MR 12.1 and 12.2 for failing to progressively discipline the Grievant.¹⁷

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 discipline appropriate to the circumstances present in this case is a one-day suspension.

ORDER

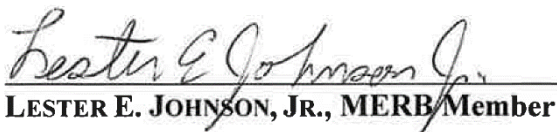
It is this **12th** day of **February, 2024**, by a unanimous vote, the Decision and Order of the Board to deny the Grievant's appeal in part and grant it in part. The Board finds that a three-day suspension was excessive. The Board directs the Agency to modify the three-day suspension by reducing it to a one-day suspension for violating the State of Delaware Code of Conduct, and by providing two days back pay to the Grievant. Counsel for the Agency is directed to notify the Board in writing of the Agency's compliance within thirty (30) days of the date of this Order.



JENNIFER COHAN, MERB Chairperson



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



LESTER E. JOHNSON, JR., MERB Member

¹⁷ This finding is consistent with the Board's rationale in the Grievant's first grievance heard immediately prior to the grievance at issue. *See Grievant v. Dept. of Health & Social Services, Div. for the Visually Impaired*, Docket No. 23-06-880 (MERB Feb. 8, 2024).