

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	
v.)	<u>Docket No. 23-06-880</u>
)	
DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION FOR THE VISUALLY IMPAIRED,)	DECISION AND ORDER
)	<i>PUBLIC (redacted)</i>
)	
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 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 grievance concerning the one-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 Grievant testified on his own behalf. The Board heard testimony from two (2) witnesses on behalf of the Agency: Julie O’Donnell, Vocational Rehabilitation Administrator, DVI; and Jamie Towns, Deputy Director, DVI.

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.

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 Deputy Director Towns provided two documented verbal warnings to the Grievant prior to the one-day suspension at issue here, the first on August 11, 2021, and the second on February 3, 2022.

In late 2021, Deputy Director Towns began meeting with the Grievant weekly to provide oversight and guidance on assigned tasks and to "resolve some objectives for the [BEP] program".⁴

Ms. O'Donnell was hired as the Social Services Senior Administrator (also referred to as

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.

⁴ Transcript ("Tr"), page 49.

the Vocational Rehabilitation Administrator) overseeing the BEP and supervising the Grievant in May 2022. She joined Deputy Director Towns and the Grievant in their weekly meetings beginning in the late summer of 2022.⁵

In August 2022, the vending company that provides vending machines utilized by BEP participants failed to issue the participants' monthly commission checks in a timely manner. This failure created a financial hardship for some participants, who are small business owners. On September 7, 2022, the Grievant notified the DVI Director, Deputy Director, and his supervisor that the BEP participants had not received their monthly commissions from the vendor through no fault of their own. He forwarded a request from the BEP participants for emergency funds to cover the period until their commissions were received, at which point they would reimburse the State.

Deputy Director Towns responded to the Grievant by email after business hours on September 7, 2022:

We decided not to approve the use of [BEP] Account 3 for issuing checks to Mira and Thomas. We would encourage them to seek help through the BVC and take advantage of some of the many resources you've provided from SCORE. Here is a course that may help them moving forward: *with link to a Financial Projections Template to download*.⁶

This email was not sent with nor marked in any manner as "confidential".

The following morning the Grievant forwarded Deputy Director Towns' response to the two affected BEP participants, apologizing for the decision "made above [him]" and noting that he had "given it [his] all for [them]".⁷ That night, one of the BEP vendors emailed three State legislators to complain about DVI's decision to deny their request for emergency funding and included the email correspondence the Grievant sent on September 8, 2022. The email further

⁵ See Tr., p. 50. The VR Administrator eventually conducted the meetings without Deputy Director Towns starting in September 2022. Tr., p. 11.

⁶ Grievant Exhibit 2. Deputy Director Towns sent the email at 7:08 p.m.

⁷ *Id.*

stated that the decision to deny their emergency request caused the BEP participants to “feel abandoned by the DVI [Leadership]” and that in the many years of participating in the program, they had “never seen anything of this nature ever happen.”⁸

Ultimately, DVI provided the requested financial assistance by utilizing funds from a different account.

On September 20, 2022, the Grievant’s supervisor issued a letter recommending he be suspended for one (1) day without pay for insubordination, specifically for failing to make Agency leadership aware of escalating issues concerning loans to BEP participants.⁹ The letter also stated the Grievant had violated the Standards of Conduct Policy and DVI/BEP Policy Memorandum Number 4,¹⁰ and failed to meet performance expectations based on the email the Grievant sent the two affected BEP participants on September 8, 2022.¹¹ It further stated “[i]nternal emails and communications containing information related to cases and case decisions should not be shared directly with the [BEP] vendor. Every email sent to you is sent with confidential settings and is not to be shared.” It was noted that the Grievant had no prior disciplinary action on his disciplinary record, but concluded, “... [Y]our insubordination and blatant disregard for the discussions your management teams [*sic*] has had with you regarding your work has led to the recommendation of a one (1) day suspension.”¹²

⁸ Agency Exhibit F, p. 5-6

⁹ Grievant Exhibit 16.

¹⁰ Agency Exhibit F, Delaware BEP Request for Financial Assistance. The Deputy Director testified DVI leadership was not aware of this Policy at the time the BEP participants requested the emergency loans.

¹¹ Grievant Exhibit 16. The recommendation letter cited to the portion of the State of Delaware Standards of Conduct Policy which provides that employees must “[c]onduct themselves in a manner that upholds public trust and preserves public confidence, avoid conduct which violates, or creates the suspicion of violating the public’s trust, which may reflect unfavorably upon the state and its government.” The letter did not state how the Grievant violated DVI/BEP Policy Memorandum Number 4, or how he failed to meet the performance measures established in his “plan.”

¹² *Id.* Ms. O’Donnell testified that she was instructed to issue the one-day suspension by Deputy Director Towns (Tr. p. 32-33). Mr. Towns testified Labor Relations and Human Resources made the decision to

On October 24, 2022, a pre-decision meeting was held at the Grievant's request, and the hearing officer upheld the recommended one-day suspension. The VR Administrator directed the Grievant to serve the one-day suspension on November 17, 2022.¹³

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.

29 *Del. C.* § 5953 provides:

suspend the Grievant. Tr. p. 83-84.

¹³ Agency Exhibit G.

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.¹⁴ The Grievant asserts that in issuing him the one-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 2.1¹⁵ or retaliated against him in violation of MR. 18.1.¹⁶

The Board further concludes that the Grievant met his burden to establish that the Agency violated MR 12.1 and 12.2 because it did not have just cause to suspend the Grievant.¹⁷

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

¹⁴ “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).

¹⁵ 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)).

¹⁶ 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)).

¹⁷ *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))).

instructions even when receiving a clear directive.”¹⁸ An employee is insubordinate when he repeatedly refuses to comply with a directive despite being provided multiple opportunities to comply.¹⁹ The record does not establish that the Grievant was insubordinate. He did not, however, present the Agency’s leadership in a positive or supportive manner by telling the BEP participants that the decision to deny the emergency request for temporary funding was “made above [him]” and that he had “given it [his] all for [the BEP participants]”. The Grievant’s actions were inappropriate and violated the State Code of Conduct by engaging in conduct which reflected unfavorably on the Agency.

The Board has recognized the usefulness of progressive discipline to conform an employee’s performance or behavior to acceptable workplace standards.²⁰ The Board has held that a verbal reprimand does not amount to a disciplinary measure under Merit Rule 12.1.²¹ While the Grievant had received two verbal warnings regarding separate issues prior to this one-day suspension, there is no single incident or event which supports the conclusion that a one-day suspension was the appropriate first step in disciplining the Grievant. The first purpose of

¹⁸ *Grievant v. Dept. of Services for Children, Youth, & Their Families*, Docket No. 11-09-522, at p. 10–11 (MERB Oct. 11, 2012).

¹⁹ *Grievant v. Dept. of Technology and Information*, Docket No. 13-01-577, at p. 6–7 (MERB Aug. 4, 2014).

²⁰ *Grievant v. Dept. of Health & Social Services, Div. of Public Health*, Docket No. 12-06-546, at 6 (MERB March 6, 2013).

²¹ The Board has held, “... as a matter of law that it does not have jurisdiction to decide a grievance over a verbal reprimand. The Board does not believe that a verbal reprimand amounts to a disciplinary measure under Merit Rule 12.1 which an employee can grieve by alleging the employer did not have just cause.” *Trader v. Dept. of Health & Social Services*, No. 07-01-379, at p. 5 (May 15, 2008). The Board further explained in *Trader*, “There are sound public policy reasons for making this distinction [*between verbal and written reprimands*]. In the workplace, supervisors are called upon every day to assess the job performance of employees. Constructive criticism, in the form of verbal counseling or a verbal reprimand, is sometimes necessary to help the employee improve his or her job performance. If a verbal reprimand were subject to the Merit Rule grievance process, supervisors might hesitate to offer constructive criticism, to the detriment of the employee. Without ongoing verbal feed-back from supervisors, an employee might face more serious consequences for short-comings of which he or she is not aware. The Board believes that the Merit Rules should encourage verbal interaction between supervisors and employees, not make every conversation possibly subject to an adversarial grievance process.”

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 an opportunity to rehabilitate his conduct to conform with expectations. Although the Grievant should have known his email to the BEP participants was inappropriate, the Board notes that this was the Grievant's first experience receiving formal discipline in his eight years working for the Agency and finds that the Grievant's conduct did not rise to a level so egregious that it warranted suspension.

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 written reprimand.

ORDER

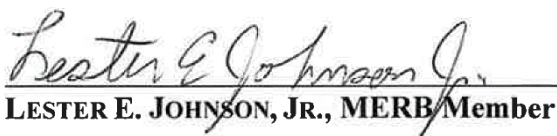
It is this **8th** day of **February, 2024**, by a unanimous vote, the Decision and Order of the Board to deny the Grievant's appeal in part and grant it in part. The Board finds that a one-day suspension was excessive. The Board directs the Agency to modify the one-day suspension by reducing it to a written reprimand, and providing the Grievant with back-pay for serving the unpaid one-day suspension. 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