

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

COPY

IN THE MATTER OF:)	
CHRISTOPHER BERLIN)	DOCKET NO. 03-08-291
)	
Grievant,)	
)	
v.)	
)	ORDER
DEPARTMENT OF NATURAL)	
RESOURCES AND ENVIRONMENTAL)	
CONTROL)	
)	
Agency.)	

BEFORE Brenda Phillips, Chairperson, and Board members John W. Pitts and John F. Schmutz, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* §5908(a).

APPEARANCES:

For the Grievant:
Christopher Berlin, pro se

For the Agency:
Ilona Kirshon
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

PROCEDURAL HISTORY

This grievance appeal was filed with the Merit Employee Relations Board (“MERB” or “Board”) on October 23, 2003 by Christopher Berlin as a direct appeal (See Merit Rule No. 21.010). The root of the grievance is Mr. Berlin’s dissatisfaction at being directed to wear a uniform in the performance of his duties as an Environmental Scientist III with the Environmental Response Branch (ERB) of the Division of Air and Waste Management within the Department of Natural Resources and Environmental Control (DNREC).

Mr. Berlin's sporadic yet persistent refusal to wear the ERB uniform resulted in the imposition of a five (5) day suspension without pay from which he appeals to the MERB. Mr. Berlin complains that the penalty imposed was not appropriate to the circumstances in violation of Merit Rule 15.1. He seeks to have the penalty reduced to no more than 2 hours suspension without pay and to have the policy voided.

SUMMARY OF THE EVIDENCE

The Agency presented four (4) witnesses and introduced twelve (12) exhibits.

William W. Hill, in his sworn testimony, recounted that he is now retired after 32 years employment with the State of Delaware. For the last 15 years he served as Chief of the Enforcement Branch and was, for the last few years, acting supervisor for the ERB. He identified State's Exhibit No. 1 as a copy of the Uniform Policy for the ERB dated September 18, 2001. Mr. Hill testified that the recognition of ERB team members at the site of an emergency response is a matter of high importance. This is particularly true for responses made to residential sites. He also noted that the ERB response team interacts with other responders, many of whom are also in uniform, and that it was common practice in the industry for responders to respond in uniform. Mr. Hill identified a picture of the ERB uniform (State's Exhibit No. 2) and described it as consisting of steel-toe safety boots, Khaki pants, a blue shirt with the DNREC logo and a baseball cap with the same logo.

Mr. Hill stated that, while he was the Chief of Enforcement, he had spoken with Christopher Berlin on multiple occasions about Mr. Berlin not wearing the uniform. He testified that Mr. Berlin had, more than once, agreed that he would wear the uniform and then stopped wearing it. He noted that Mr. Berlin was given a written reprimand for his refusal on April 5,

2002 (State's Exhibit No. 3). Mr. Hill noted that after the April 5th date Mr. Berlin was still not wearing the uniform and so he recommended further discipline be imposed on Mr. Berlin and, in August of 2003, sent a letter to Mr. Berlin advising him of his recommendation for discipline (State's Exhibit No. 4). In his letter Mr. Hill refers to the prior discipline and recommends a five (5) day suspension. In his testimony, Mr. Hill noted that he also sent a memorandum to John Blevins, the Division Director recommending the suspension of Mr. Berlin (State's Exhibit No. 5). Mr. Hill recounted that the recognition factor was an important reason for the uniform and that there was a safety issue since the uniforms were provided and did not have to be taken home with the attendant risk of contamination. It was also a convenience for the ERB personnel who were supplied with clean uniforms at work. Mr. Hill also observed that he wore a uniform for twenty-five (25) years.

James W. Bethard, being sworn, testified that he, like Christopher Berlin, is an Environmental Scientist III in the ERB. Mr. Bethard testified that before the uniform policy was put into effect, individuals would wear anything they wanted to wear to work. Mr. Bethard testified that he was consulted by the then ERB manager John Mohrman about the uniform policy. He recounted that eleven (11) uniform sets are issued and they are picked up and cleaned commercially. This, according to Mr. Bethard, protects the responders who do not take possible contamination home. He acknowledged that he and Christopher Berlin are on opposite ends of the spectrum regarding the uniform policy and he has no problem wearing it. Mr. Bethard noted that he works in the Dover office where the supervisor, Mr. Mohrman, was located and that Christopher Berlin is based in New Castle County. Therefore, Mr. Bethard opined, he was more available to meet with those discussing the selection of the uniform. Mr. Bethard acknowledged

that he was not actively promoting a uniform policy but he did favor giving uniforms to responders. He also noted that if responders had their personal clothing destroyed they were reimbursed and he related that management had determined to stop such reimbursement and go with uniforms.

John B. Blevins, after being sworn, recounted that he is the Division Director for the Division of Air and Waste Management, a position which he has held for the last three (3) years. The ERB is a part of his Division and reports directly to his office. Mr. Blevins identified his signature on the Division Uniform Policy. He noted that he started with the Agency on September 4, 2001 and sat with Mr. Hill and Mr. Mohrman and discussed the policy. Mr. Blevins stated that he had agreed with the policy and has signed it.

Mr. Blevins identified State's Exhibit No. 6 as the 2001 Performance Plan for Christopher Berlin and noted that it included the expectation that Mr. Berlin would be wearing a uniform. Christopher Berlin signed the Performance Plan on September 7, 2001 and did not take exception to the uniform. Mr. Blevins testified that Mr. Berlin's compliance with the policy was hit or miss. In the 2002 Performance Plan (State's Exhibit No. 7), Mr. Berlin took written exception to the requirement that he wear a uniform in an employee comment stating:

Uniforms have been imposed against my will under a threat of potential dismissal. It invades my personal space and creates a hostile working environment where there has always been congeniality. It's the wrong concept. It demeans our scientific credibility. The public sees us as the Orkin Man. Refer to the job dimensions in this document. We clearly function at a high level. Any identification issues can be satisfied by the use of I.D. badges or lettered safety vests. (State's Exhibit No. 7)

Mr. Blevins stated that after Mr. Berlin's comments he directed John Mohrman to either modify the policy or to get everyone into compliance with it. State's Exhibit No. 8 was identified by Mr. Blevins as a memo he received from John Mohrman detailing Mohrman's

attempts to get Christopher Berlin to agree to wear the uniform. In the memo Mr. Mohrman recounts that he met with Mr. Berlin daily from March 4 through 8, 2002 about the uniforms and on each of these days Mr. Berlin stated that he would not wear the ERB uniform.

Mr. Blevins identified State's Exhibit No. 9 as the letter he wrote on August 25, 2003 in which he concurred with the recommendation of Mr. Berlin's supervisor for the imposition of a five (5) day suspension and advised Mr. Berlin of his entitlement to a pre-suspension hearing.

State's Exhibit No. 10 was identified as an e-mail of September 8, 2002 from Mr. Berlin to Merrilyn Ramsey, John Blevins and William Hill concerning the recommendation for suspension. In this correspondence Mr. Berlin states:

It's my intention to place the suspension issue behind me and to move on in a positive and professional manner. To that end I will waive the pre-decision meeting and will not pursue a grievance, except if the punishment is increased. It was never my intention to be insubordinate, a point I emphasized at every occasion and I regret that I bungled into being so perceived. I am complying and will continue as best I can.

In the correspondence Mr. Berlin also noted the severe hardship which a five day suspension would impose on his family and noted that he was making a profound "priming-the-pump gesture" and sought reciprocation, noting "We are after all and always have been on the same team." (State's Exhibit No. 10)

Mr. Blevins testified that the five (5) day suspension was imposed by letter dated September 23, 2003 (State's Exhibit No. 11). He stated that he was advised by the Human Relations Department that he had an option between imposing a five (5) day suspension and giving another written reprimand. He did not think a written reprimand was sufficient because Christopher Berlin had already received one written reprimand concerning his refusal to wear the uniform.

Mr. Blevins stated he liked the uniform policy. It was his belief that it was important for first responders to wear a uniform. According to Mr. Blevins, the uniform presents the agency in a professional manner. Before the uniform policy was in place what he saw was not the image he wanted to see. Mr. Blevins related that the first responders are the ones who get on the television news and they need to be identifiable. He stated that he was aware of one situation where Christopher Berlin had responded to a residential site when he was not in uniform and the home owner would not let him into the house.

Mr. Blevins testified that State's Exhibit No. 12 was an April 12, 2002 e-mail from Christopher Berlin to John Mohrman in which, among other things, Mr. Berlin stated that he had decided to comply with the uniform policy, albeit under protest. Mr. Blevins testified that Mr. Berlin did not adhere to his statement in the April 12th e-mail. He also observed that, with the exception of his boots, Mr. Berlin was in uniform at the hearing.

Merrilyn E. Ramsey was sworn and testified that she is the Human Relations Manager for DNREC. She recounted that she had advised Mr. Blevins that, because Mr. Berlin was a pay grade fifteen (15), a suspension of five (5) days was required at the time it was imposed under the Fair Labor Standards Act. She noted that as of August of 2004 FLSA regulations had been changed to remove that limitation and now a one (1) day or more suspension could be imposed. She also noted that no actual suspension had been imposed on Mr. Berlin because of his direct appeal to the MERB.

Christopher Berlin was sworn and identified two (2) Exhibits. Exhibit A consists of his appeal package to the MERB and Exhibit B is a color picture of the response vehicle for the ERB which he drives to the site of emergency responses.

Mr. Berlin testified about the nature of the work he performs and recounted that, in his view, uniforms are unnecessary and they constitute an embarrassment. Mr. Berlin testified that because he believes that identification is a reasonable requirement, he has recommended safety vests stating "DNREC Site Manager". He emphasized that he is very embarrassed to be seen in public in the uniform and does not see why his concerns cannot be accommodated. Mr. Berlin recounted that he views the uniform policy as having emanated from a supervisor in his declining years prior to retirement and he believes that the policy should have been reconsidered when Mr. Blevins suggested to Mr. Mohrman that it either be modified or enforced.

Mr. Berlin emphasized that not all of the Environmental Scientists in DNREC are required to wear uniforms and those scientists within the ERB are therefore being discriminated against. Mr. Berlin also observed that the parties should not be at this stage and that he should be able to resolve this matter with his managers but has not been able to do so. He noted that he has never intended to be insubordinate but he did acknowledge that he had been approached on a number of occasions by his supervisors about his failure to follow the uniform policy. Regarding State's Exhibit 12, in which he stated that he would comply with the uniform policy, Mr. Berlin testified that he did comply and wore the uniform for a while but later he stopped as he felt it was insulting. He related that he began working with a necktie but abandoned that practice as a safety hazard. Now he gets no respect and has been asked on one response occasion, if he was there to mow the lawn.

Mr. Berlin related that while he recognizes this to be a trivial issue, it is, to him, a personally important matter and he cannot understand why management does not respect his

wishes, and why they cannot see the wisdom of his position. He seeks the rescission of the uniform policy and the reduction of the penalty which was imposed.

Mr. Berlin also presented the sworn testimony of Donna Donovan, the Administrative Assistant for the ERB. Ms. Donovan discussed the institution of the contract for the ERB uniforms and the development of the uniform policy. She recounted that the policy was developed during the latter days of Mr. Mohrman's tenure at the ERB and during a period when he was having difficulty communicating and was leaning more and more on the Administrative Assistant in the performance of his job. Ms. Donovan testified that she was shocked and upset with the severity of the discipline imposed on Christopher Berlin for not adhering to the uniform policy and she did not consider his behavior to be insubordinate.

MERIT RULE NO. 15.1

Employees shall be held accountable for their conduct. 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.

FINDINGS AND DISCUSSION

This grievance was filed for the stated purpose of contesting the reasonableness of the penalty imposed upon Mr. Berlin for his continued refusal to wear a uniform required to be worn by Environmental Scientists working for DNREC in the ERB.

Christopher Berlin contends that scientists are not associated with uniforms and that the management determination to have Environmental Scientists wear uniforms is ill-advised and

places him in the category of “the Orkin man, Mr. Goodwrench, or the Verizon guy.” He has described the uniform policy as “a stupid idea” and observes that no other Environmental Scientists, Hydrologist, Biologist, Chemist, Environmental Engineers or other of his peers are required to wear uniforms. Mr. Berlin emphasizes that he is extremely embarrassed to be seen in uniform by his peers and by the public. He acknowledges his violation of the policy requiring him to wear a uniform but he contends that the imposition of a five (5) day suspension is out of proportion to the infraction and he seeks to have the financial impact reduced to 2 hours pay. He would also like to have the Board void the uniform policy adopted for the Emergency Response Branch of the Division of Air and Waste Management.

Mr. Berlin’s appeal indirectly raises the issue of the extent to which, if any, the MERB is empowered to impose a disciplinary sanction which differs from that imposed by the appointing authority. Under the Merit Rule definition of “just cause” as set forth above, there are three distinct elements to be considered. The relevant element for this appeal is that the penalty imposed must be appropriate to the circumstances. An agency’s determination is prima facie correct and the burden of proof is upon the Appellant to convince the Board that the discipline was *not* imposed with “just cause” as that term is defined in the Merit Rules. See *Hopson v. McGinnes*, 391 A.2d 187 (Del. Super. 1978).

The Board is limited to determining whether the absence of just cause has been established. Stated differently, it is not appropriate for the Board to fix the penalty on appeal or to substitute its’ penalty for the one imposed by the agency. *Aiken v. State of Delaware Department of Services for Children, Youth and Their Families*, 1989 WL 158455 (Del Super.)

citing *Coffin V. Department of Natural Resources, etc.*, 391 A.2d 193 (Del. Super. 1978) and *State v. Berenguer*, 321 A.2d 507 (Del. Super. 1974).

The Board concludes that the penalty of five (5) days suspension without pay is appropriate under the circumstances. There was clear evidence of progressive discipline and of repeated reversals of position by Mr. Berlin concerning whether or not he would comply with the uniform policy. The Appellant has not shown that the uniform policy is either unreasonable or improperly discriminatory for ERB personnel who are first responders to emergency situations. The Board finds that the Agency had just cause for the imposition of this discipline.

Christopher Berlin has been shown to be a highly capable and valuable employee with over 15 years of service to the State. He works in a difficult and potentially dangerous position and brings considerable knowledge, pride and experience to his work. His performance ratings exceed expectations and he had no prior disciplinary actions during his tenure with the State except those related to his contention that the ERB uniform policy is ill-conceived and inappropriate. His actions were grounded in an attempt to change a uniform policy which he asserts is detrimental to the morale of the Response Team and which he believes unnecessarily demeans his qualifications and his stature as a scientific professional. Nevertheless, the Board finds the determination that the ERB Emergency Response Teams will wear distinctive uniforms and the choice of such uniforms is within the legitimate prerogative of management. There were clearly multiple attempts, both orally and in writing, by management to approach this disciplinary action in a progressive manner to secure Mr. Berlin's cooperation with the policy.

Management has considerable leeway in fashioning an appropriate disciplinary sanction which the Board must treat as presumptively correct. The presumption of reasonableness of the

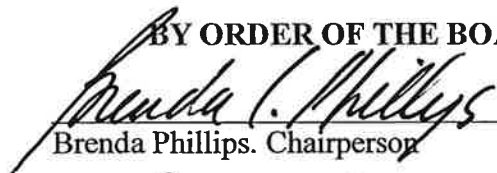
action of the appointing authority has not been overcome and Mr. Berlin's grievance appeal is denied. It has not been demonstrated by a preponderance of the evidence that the policy is improper, unreasonable or that it is improperly discriminatory. Nor has it been established that the penalty imposed is so far out of proportion to a reasonable response as to remove just cause for the imposition of a five (5) day suspension without pay under the circumstances.

In many instances, a uniform is worn to enhance the prestige of the wearer and to engender respect and convey authority. In this instance, despite his reluctance to wear the uniform, Mr. Berlin with his expertise and quality performance, appears to bring these qualities to the uniform rather than visa versa. It helps to identify him as a site manager in an emergency response situation, certainly a position of considerable authority and importance.

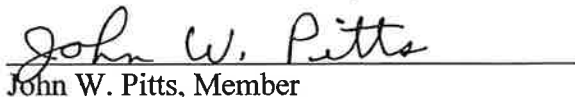
ORDER

The direct grievance appeal of Christopher Berlin is denied and the action of the Appointing Authority is sustained.

BY ORDER OF THE BOARD:


Brenda Phillips, Chairperson


John F. Schmutz, Member


John W. Pitts, Member

APPEAL RIGHTS

29 Del. C. §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.


29 Del. C. § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Nov. 10, 2004
Mailing Date: 

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board counsel