IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANTHONY V. AVALLONE, Employee,	)	
v.	)	C.A. No. 08A.-08-008 JRJ
STATE OF DELAWARE/ DEPARTMENT OF HEALTH AND SOCIAL SERVICES ("DHSS"), Employer	)	On Remand from Decision of the Supreme Court of Delaware

UPON APPEAL FROM THE MERIT EMPLOYEE RELATIONS BOARD:
AFFIRMED

Roy S. Shiels, Esquire, Brown, Shiels, & O'Brien, LLC, 108 East Water Street, Dover, Delaware 19901, Attorney for Employee.

Kevin R. Slattery, Esquire, Deputy Attorney General, Department of Justice, 820 North French Street, 6th Floor, Wilmington, Delaware 19801, Attorney for Employer.

Jurden, J.

INTRODUCTION

This matter comes before the Court on remand from the Supreme Court of Delaware. On remand the issue is whether the Merit Employee Relations Board ("MERB") erred in determining that the Division of Health and Human Services' ("DHSS") dismissal of Anthony V. Avallone ("Avallone") was a disproportionate penalty in light of Avallone's prior service record. For the reasons that follow, the Court finds that there is substantial evidence to justify reversal of Avallone's termination. Additionally, the MERB did not commit an error of law. Thus, the MERB's decision is **AFFIRMED**.

FACTS AND PROCEDURAL HISTORY[1]

Avallone began working for the State of Delaware in the early 1990s, in the Department of Services for Children, Youth and Their Families ("DSCYF"). In that capacity, he made an orientation video for the New Castle County Detention Center. In 2004, the Division of Youth Rehabilitative Services ("YRS") asked Avallone to produce an updated orientation video for the New Castle County Detention Center and a new video for the William Marion Stevenson House Detention Center. Avallone and YRS agreed that Avallone would produce the videos "at cost." Initially, Avallone decided to rent equipment to produce the videos, but later he concluded that he could reduce costs if he purchased the equipment. He obtained price quotes from B&H Photo-Video-Pro Audio ("B&H") and faxed a business credit application to B&H.[2]

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[1] The facts are taken from the Supreme Court Opinion remanding to the Superior Court; *see Avallone v. State/Dept. of Health & Soc. Services (DHSS)*, 2011 WL 250994 (Del. Jan. 27, 2011).

[2] The comments section of the credit application stated: "Please accept this application for credit to purchase specific items of Quote #141889610. As per our telephone conversation, I am contracted through State of Delaware and needing this equipment to complete the project. Please refer to the purchase order number on the trade reference as their guarantee of payment to me."

One day after faxing the business credit application, Avallone sent a facsimile to B&H on his State-issued laptop computer. The header of the facsimile read, "State of Delaware," and the first line of the facsimile read, "[p]lease review the following State of Delaware Purchase Order." Avallone attached an order form, which included the DHSS logo and a Division of Substance Abuse and Mental Health ("DSAMH") address.[3] The total amount of the order was $2,359.29.

When Avallone received the equipment, he realized that B&H believed that the State of Delaware had purchased it. Avallone called B&H to correct the misunderstanding, but B&H informed him that it could not change the name on the order until it received full payment. Over the next eighteen months, B&H repeatedly attempted to collect payment, but Avallone stalled. Thereafter, DSAMH received a B&H invoice for $2,187.20. Because the State accounting system did not have a record of such an order, DHSS initiated an investigation.

Avallone eventually paid the amount due to B&H. However, the Director of DSAMH advised Avallone that the Deputy Director of DSAMH was recommending Avallone's dismissal. A pre-termination meeting was held. Three weeks after making the final payment on the order, DHSS Secretary, Vincent P. Meconi, sent Avallone a letter, which recounted the relevant facts and concluded as follows:

> Your conduct is unacceptable and cannot be condoned. The Code of Conduct provides: "Each state employee . . . shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such state employee . . . is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government." 29 *Del. C.* § 5806. Your actions violated [] the Code of Conduct. You obtained video equipment for your personal use by

[3] According to Avallone, he was unaware that the cover sheet included a header that read "State of Delaware." He was also unaware that the order template automatically included a DHSS logo at the top of the document.

> misrepresenting the purchaser – as the State of Delaware/DSAMH – to the vendor.
>
> A review of your disciplinary record reveals no prior disciplinary action. Your record was considered when determining the penalty in this case.
>
> Your dismissal is effective as of the date of this letter.

Avallone filed a grievance from his dismissal, which was denied after a hearing.

Avallone then appealed to the MERB, which voted 3—1, to reinstate him without backpay. DHSS appealed to the Superior Court. The Superior Court held that the MERB "has the authority to either accept the dismissal or find against the appointing authority," but it may not substitute its own discipline for that of the agency involved.[4] The Superior Court found that the MERB improperly shifted the burden to DHSS to prove just cause.[5] The Superior Court remanded to the MERB, and did not rule on the issue of whether Avallone's dismissal was a disproportionate penalty in light of his prior service record.

Avallone appealed to the Supreme Court arguing that the Superior Court erred in concluding that the MERB did not have the statutory authority to modify the discipline DHSS imposed, and that the Superior Court erred in concluding that the MERB had improperly shifted the burden of proof to DHSS. The Supreme Court agreed with Avallone, and remanded to the Superior Court to determine whether the MERB's holding that dismissal was a disproportionate penalty in light of Avallone's prior service was in error.[6] Thus, this Court must now determine whether Avallone's dismissal was an appropriate penalty under the circumstances.[7]

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[4] *Department of Health and Social Services v. Avallone*, 2010 WL 1266879, at *3 (Del. Super. Mar. 29, 2010).
[5] *Id.*
[6] *See Avallone v. State/Dept. of Health & Soc. Services (DHSS)*, No. 234, 2010 (Del. Mar. 26, 2011) (ORDER).
[7] *See* Merit Rule 12.1.

STANDARD OF REVIEW

On appeal to the Superior Court from a decision of the MERB, the Superior Court's function is to correct any errors of law as well as determine whether the record contains substantial evidence to support the Board's findings of fact and conclusions of law.[8] "In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below, resolving all doubts in its favor."[9]

PARTIES' CONTENTIONS

DHSS argues that the MERB failed to articulate a standard by which it gauged whether Avallone's dismissal was a disproportionate penalty under the circumstances. It contends that "the MERB's failure to formulate the standard it applied in reaching its conclusions constitutes an error of law."[10] Further, DHSS cites to *Weiss v. DHSS*,[11] a case in which the Superior Court upheld a MERB decision that found an employee's deceptive acts and unauthorized use of agency property supported a finding of termination as proportionate to the offense. Finally, DHSS asserts that the MERB's reversal of Avallone's termination sets bad precedent because, "[i]t says to every employee of the State that an employee can use the State's credit to purchase goods for the employee's own personal use, not pay for those goods for almost two (2) years, and still keep your job."[12]

Avallone argues that the question of whether termination is a "penalty appropriate under the circumstances" is a mixed question of law and fact. Further, Avallone asserts

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[8] *Gibson v. Merit Employee Relations Bd.*, 2011 WL 1376278, at *2 (Del. Apr. 12, 2011).
[9] *General Motors Corp. v. Guy*, 1991 WL 190491 at *3 (Del. Super. Aug. 16, 1991) (citation omitted).
[10] *See* DHSS Opening Brief at 22.
[11] *Weiss v. DHSS*, 2003 WL 21769007 (Del. Super Apr. 28, 2003).
[12] DHSS's Opening Brief at 25.

that a MERB decision concerning the appropriateness of a penalty should be reviewed for abuse of discretion because neither the Board nor the Superior Court has articulated a legal standard or requirement for determining such.[13]

DISCUSSION

MERB Rule 12.1 mandates that state employees be held accountable for their conduct, and permits dismissal for misconduct only when there is "just cause." Just cause requires: showing that the employee has committed the charged offense; offering specified due process rights; and imposing a penalty appropriate to the circumstances.[14] In the case *sub judice*, the Board did not find "just cause" because it concluded that the penalty of dismissal was not appropriate to the circumstances.[15] The Board "[did] not believe that Avallone ever intended the State to pay for the video equipment but was hoping to complete the video project, submit his invoices for unreimbursed expenses, and use those monies to repay B&H."[16]

The Court finds that the MERB had substantial evidence to justify reversal of Avallone's termination. The MERB's interpretation of its own rules is within the MERB's discretion, as long as the interpretation is reasonable.[17] Delaware Courts have never proclaimed a set legal standard for determining whether a penalty is appropriate for the circumstances, and thus, the MERB's decision regarding the proportionality of a

[13] Avallone's Answering Brief at 18.
[14] Merit Rule 12.1.
[15] *See* Merit Employee Relations Board Decision at 17-8 (July 17, 2008), attached as Ex. A to Avallone's Answering Brief.
[16] *Id.*
[17] *See Riley v. Chrysler Corp*., 1987 WL 8273, at *1 (Del. Super. Mar. 6, 1987) ("The Board's interpretation of its own rule is entitled to great weight and I find no justification for reversing the Board's ruling on this issue"), *aff'd,* 531 A.2d 1235 (Del. 1987); *Smith v. Rodel, Inc.*, 2001 WL 755929, at *2 (Del. Super. June 19, 2001) ("The Board's interpretation and application of its own rules is entitled to great deference, and the Court will upset the Board's interpretation only when it determines that 'the Board exercised its power arbitrarily or committed an error of law....'"), *aff'd,* 784 A.2d 1081 (Del. 2001).

penalty should be given deference unless its conclusion is unreasonable.[18] Substantial evidence exists to support the MERB's conclusion that Avallone never intended the State to pay for the video equipment, and Avallone ultimately paid for the equipment. Further, substantial evidence exists to conclude that, up until this incident, Avallone's fifteen-year career with the State of Delaware was untarnished. While the Court does not condone Avallone's actions in this particular circumstance, it does not find the MERB's conclusion that termination was a disproportionate penalty unreasonable.

CONCLUSION

For the aforementioned reasons, the decision of the MERB is **AFFIRMED**.

IT IS SO ORDEDED.

Jan R. Jurden, Judge

[18] *See, e.g. Smith*, 2001 WL 755929, at *2; *Yellow Freight Sys. v. Berns*, 1999 WL 167780, at *4 (Del. Super. Mar. 5, 1999) ("[T]his Court will not force the Board to impose a literal and hyper-technical interpretation of [its] rules where the Board itself has chosen not to do so."); *Riley*, 1987 WL 8273, at *1. ("The Board's interpretation of its own rule is entitled to great weight...."); *Bingham v. Jamesway*, 1992 WL 240435, at *1 (Del. Super. Sept. 2, 1992) ("The Board's ruling involves the interpretation of a rule of the Board and the exercise of discretion.").