

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

THE JUSTICE OF THE PEACE	)	
COURTS	)	
OF THE STATE OF DELAWARE	)	
	)	
Employer-Below/Appellant,	)	
	)	C.A. No.: N11A-04-016 CLS
v.	)	
	)	
MICHELE CARTY, Appellant-Below	)	
and the MERIT EMPLOYEE	)	
RELATIONS BOARD,	)	
	)	
Appellees.	)	
	)	

Date Submitted: October 3, 2011  
Date Decided: January 9, 2012

On Appeal From The Merit Employee Relations Board.  
**REVERSED.**

**ORDER**

Kevin R. Slattery, Deputy Attorney General, Department of Justice, 820 N. French Street, 6<sup>th</sup> Floor, Wilmington, Delaware 19801.  
Attorney for Appellant.

Chandra J. Williams, Esq., Rhodunda & Williams, 1220 N. Market Street, Suite 700, Wilmington, Delaware 19801.  
Attorney for Appellee, Michele Carty.

**Scott, J.**

## Introduction

Before this Court is an appeal from the Merit Employee Relations Board (“MERB”) decision finding Appellant’s, The Justice of the Peace Courts of the State of Delaware (“JP Court 20”), dismissal of Michele Carty (“Carty”) a disproportionate penalty in light of her prior good service to the court. The decision was unreasonable, in light of the events that occurred on April 30, 2010, and not supported by substantial evidence. The decision of the Merit Employee Relations Board is **REVERSED**.

## Facts

Carty was employed as a Judicial Case Processor with the JP Court 20<sup>1</sup> on or about March 23, 2006, until July 29, 2010. JP Court 20 is 24 hour court with judges available around the clock.<sup>2</sup> As a case processor, Carty processed paperwork from Judges, translated Judges’ orders and provided customer service through correspondence. Her responsibilities included interacting with civilians, judges, attorneys, police agencies the general public and processing cases.

Carty was terminated on July 29, 2010, for taking it upon herself to act in a Judge’s capacity by having a Defendant released from custody with the Wilmington Police Department (“WPD”).

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<sup>1</sup> JP Court 20 is located above the Wilmington Police Department Station.

<sup>2</sup> R. at 43.

On April 30, 2010, the WPD arrested Barry “B.J.” Milburn (“Milburn”) and transported him to “turnkey” at the WPD,<sup>3</sup> to be held, pending arraignment. Milburn was detained on a Court of Common Pleas capias.<sup>4</sup> Milburn had to first appear before a magistrate to post bail.<sup>5</sup>

Carty knew Milburn because she was a good childhood friend of Milburn’s cousin. On April 30, 2010, at approximately 3:50 p.m., Milburn’s brother, Brian, came to the clerk’s window at JP Court 20. Carty recognized him and immediately became involved in the case.<sup>6</sup> Milburn’s brother informed Carty that Milburn was being held in the WPD lock-up for a capias. Carty obtained the paperwork and informed another clerk that she was going to “break her cousin loose.”<sup>7</sup>

Carty did not process the paperwork so Milburn could properly go before a JP Court Magistrate for a bail hearing. Instead, Carty ignored the Court of Common Pleas Judge’s order, and took it upon herself to call to the WPD lock-up, for the purpose of getting Milburn released from custody.<sup>8</sup>

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<sup>3</sup> The WPD was located a floor below JP Court 20.

<sup>4</sup> The capias issued was for three traffic violations.

<sup>5</sup> The recommended bail was \$2,000 secured and was based on Milburn’s extensive capias history.

<sup>6</sup> According to Section III (C)(1) of the Code of Conduct for Court Employees, no court employee “may act in a manner that is affected, or reasonably appears to be affected, by family, social, political, or other relationships.” R. at 245. Carty signed the Code of Conduct on March 23, 2006. R. at 251.

<sup>7</sup> R. at 96-97, 115, 119.

<sup>8</sup> The relevant portion of Carty’s conversation with Sergeant Cooper is as follows:

Milburn was released “out of the back door” after Carty’s phone call to Sergeant Cooper. Carty was laughing throughout the call.<sup>9</sup> At the time Carty made the phone call, she knew that the call would be recorded. Milburn had seven prior capiases, all of which Carty was aware of.<sup>10</sup>

On April 30, 2010 at approximately 4:30 p.m., another employee at JP Court 20 called to inform Judicial Operations Manager, Vanessa Marlow (“Marlowe”) that Milburn was released without first going before a Judge. Marlowe spoke with Carty about the incident and stated, “the [J]udge was

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CARTY: Can you let Milburn out the back door?

COOPER: Let who?

CARTY: Milburn.

COOPER: Can I let him out the back door?

CARTY: Yeah.

COOPER: Why?

CARTY: Because, I know he’ll take care of it on Monday. He got [sic] a capias. Just a capias.

COOPER: Ok, whose order is that?

CARTY: Mine.

COOPER: Alright.

CARTY: What?

COOPER: Alright, do the arresting officers know that?

CARTY: Uh-huh.

COOPER: Alright.

CARTY: Alright.

COOPER: Alright.

R. at 62-63.

<sup>9</sup> R. at 102.

<sup>10</sup> Q: And have you seen the capias history of Mr. Milburn?

A: I looked at the number of pages. It was a page and barely [ ] a page and a half, which for the court system[,] is really good. I mean, you shouldn’t have any, but five or six capiases is light compared to some people with ten, 12 and 11 pages. I didn’t look at the specific capiases or what they were for. I just saw the number of pages.

R. at 98.

not there, and [Milburn] was going to turn hi[m]self in on Monday.”<sup>11</sup> On May 3, 2010, Carty provided Marlowe with a short written statement.<sup>12</sup> Thereafter, she was suspended without pay. Carty was advised on or about June 14, 2010, that the Court Administrator recommended her dismissal for inappropriate conduct. A pre-termination meeting was conducted on June 15, 2010, where she was “suspended without pay for violating the Court’s Code of Conduct.”<sup>13</sup> Carty’s employment was terminated on July 29, 2010.

Carty filed a grievance directly to the MERB on August 27, 2010.

The MERB hearing was March 30, 2011. At the hearing, on direct examination, Carty’s attorney asked, “[w]hy did you make that phone call?”<sup>14</sup> Her answer was as follows:

It seemed like a small infraction. It was just a driving charge. A lot of times, defendants don’t even know that they’re suspended because of a fine, they had a capias. They didn’t realize. Any once they did clear the capias, they still have to go back to DMV, and that’s where they still carry the driving while suspended because they didn’t clear it with DMV, not because they didn’t clear the capias.

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<sup>11</sup> R. at 42.

<sup>12</sup> The letter is signed by Michelle Carty and states the following:

On Friday, April 30, 2010, turnkey paperwork came in for a defendant. Our judge had already left. I called turnkey [sic] asked if he had to be seen [] if it could be taken care of on Monday.

R. at 234.

<sup>13</sup> Appellee’s Answering Brief, p. 5 (quotation marks omitted)(citation omitted).

<sup>14</sup> R. at 97.

It was his birthday the day before. So I thought if he could just take care of it on his own instead of having to sit there and wait it out, it wouldn't be so bad.<sup>15</sup>

On April 11, 2011, the MERB concluded that JP Court 20's dismissal of Carty was a disproportionate penalty<sup>16</sup> in light of her prior good service to the court;<sup>17</sup> it ordered Carty to be reinstated but without back pay. JP Court 20 appealed to this Court on April 28, 2011.

### **Standard of Review**

The standard of review of a decision made by an administrative body is well established. This Court is limited in its review of factual findings and overall determination. "[T]he findings of the [MERB] as to the facts, if supported by the evidence and in absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law."<sup>18</sup> This Court will not weigh the evidence, determine questions of credibility, or

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<sup>15</sup> R. at 98-99.

<sup>16</sup> The MERB concluded that placing Carty on administrative leave without pay for ten months was a sufficient penalty; termination from J.P. No. 20, however, constituted too severe a penalty in light of the mitigating factors. R. at 10.

<sup>17</sup> Vanessa Marlowe ("Marlowe") was Carty's direct supervisor during her employment at J.P. No. 20. During Carty's employment, Marlowe conducted four performance reviews in which Carty's review revealed that she "exceed[ed] expectations."<sup>17</sup> In July 2009, Carty was a recipient of a "Caught in the Act" certificate. Marlowe's January 2010 review found that Carty "readily helps her co-workers when they need help," and that she "does not hesitate to take on more responsibility than is expected from her." R. at 47-48, 141.

<sup>18</sup> 19 *Del. C.* § 3323(a).

make its own factual findings.<sup>19</sup> The function of the MERB is to resolve conflicts in testimony and evaluate witness creditability.<sup>20</sup>

“Reversal is warranted if the administrative agency exercised its power arbitrarily or committed an error of law, or made findings of fact unsupported by substantial evidence.”<sup>21</sup> Substantial evidence is relevant evidence that a “reasonable mind might accept as adequate to support [the] conclusion.”<sup>22</sup> This standard requires more than a scintilla of evidence but less than a preponderance of evidence.<sup>23</sup> In determining whether substantial evidence exists to support the MERB’s decision, this Court must view the record in the light most favorable to the prevailing party.<sup>24</sup>

This Court, therefore, does not stand as the trier of fact. If the MERB’s ruling is supported by substantial evidence this Court will not substitute its own opinion for that of the MERB’s.<sup>25</sup> Only where there is

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<sup>19</sup> *Roshon v. Appoquinimink School Dist.*, 5 A.3d 631, at \*2 (Del. 2010).

<sup>20</sup> *Id.*

<sup>21</sup> *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981) (quoting *Kresthool v. Delmarva Power and Light Co.*, 310 A.2d 649, 652 (Del. Super. 1973)).

<sup>22</sup> *Oceanport Ind. v. Wilmington Stevedores.*, 636 A.2d 892, 899 (Del. 1994).

<sup>23</sup> *Olney*, 425 A.2d at 614.

<sup>24</sup> *Brommel v. Chrysler, LLC*, 2001 WL 4513086, at \*3 (Del. Super. Oct. 28, 2010) (citing *E.I. DuPont De Nemours & Co. v. Fanpel*, 869 A.2d 1042, 1046-47 (Del. Super. 2004)).

<sup>25</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

legal error can the decision of the MERB be overturned;<sup>26</sup> in that instance, the Court's review is *de novo*.<sup>27</sup>

### **Discussion**

*The Board Committed Legal Error When They Held That Termination of Employment Was a Disproportionate Penalty.*

State employees are held accountable for their conduct. Therefore, they must be dismissed for just cause.<sup>28</sup> “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.”<sup>29</sup>

The MERB did not condone what Carty did but concluded “that the loss of back pay and benefits for ten months [was] a sufficient deterrent for other court employees who might be tempted to use their official opposition to benefit a family member or friend.”<sup>30</sup> The Board took into account the following mitigating factors: (1) Carty did not try to cover up what she did, but was forthcoming when questioned; (2) Carty showed genuine remorse during her testimony at the hearing and realizes what she did wrong; (3) up until April 30, 2010, Carty had an unblemished disciplinary record; her most

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<sup>26</sup> *Bradley v. State*, 2003 WL 22232814, at \*4 (Del. Super. Sept. 16, 2003).

<sup>27</sup> *Ward v. Department of Elections*, 2009 WL 2244413, at \*1 (Del. Super. July 27, 2009).

<sup>28</sup> Merit Rule 12.1

<sup>29</sup> *Id.*

<sup>30</sup> R. at 10.



recent performance evaluation was “exceeds expectations”; (4) Marlowe described her as an asset to the court; and (5) Carty was a hard worker who helped others when needed. These mitigating factors, MERB concluded, outweighed the penalty of termination under the circumstances.<sup>31</sup>

In *Avallone v. Department of Health and Social Services*,<sup>32</sup> this Court found that because “Delaware Courts have never proclaimed a set legal standard for determining whether a penalty is appropriate for the circumstances, . . . the MERB’s decision regarding the proportionality of a penalty should be given deference unless its conclusion is unreasonable.”<sup>33</sup>

This Court finds MERB’s decision on the proportionality of Carty’s penalty unreasonable. “The Code of Conduct does not mandate dismissal for any violation[,] . . . but provides for a range of possible penalties ‘up to and including dismissal.’”<sup>34</sup> Milburn had seven prior capiases, three of which were for the exact same charges. Carty used her power and position to get Milburn “out the back door” knowing full well of his prior capiases. The Code of conduct, which was signed by Milburn on March 23, 2006, indicated “up to and including dismissal.” JP Court was within their authority to discharge Carty for this one incident.

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<sup>31</sup> R. at 9.

<sup>32</sup> 2011 WL 4391842 (Del. Super. Aug. 17, 2011).

<sup>33</sup> *Id.* at \*3.

<sup>34</sup> R. at 9.

*There Is Not Substantial Evidence In This Case Warranting A Reinstatement Without Back Pay.*

The decision of the Board is not supported by substantial evidence because the mitigating factors present did not overcome Carty's actions on April 30, 2010.

The MERB found that given the mitigating factors in this case, only a loss of back pay and benefits for ten months was a proportionate penalty.<sup>35</sup> However, if this Court to allow Carty to return to work, it would set a certain precedent – a price on one's head.<sup>36</sup> The reality of the situation is that Carty used her position as a JP Court Clerk to usurp the Court of Common Pleas Judge's *capias*. This is unacceptable and simply not tolerated from Court employees.

While there may be a few mitigating factors that can be applied in this case, there is not substantial evidence in the record supporting the Board's decision that disregarding a Judge's order is outweighed by her prior good service to the Court.

First, the MERB indicates in its opinion that Carty was forthcoming when questioned about the incident. The testimony indicates that Carty was

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<sup>35</sup> R. at 5-7.

<sup>36</sup> For example, West Virginia has a statute that states the following: "If a jailer or other officer, or private correctional officer aid or voluntarily suffer a prisoner convicted or charged with felony to escape from his custody, he shall be deemed guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than 5 years." WV ST § 61-5-9.

not initially forthcoming when asked about the incident. Carty explained in a letter that the “Judge had already left” and she called the turnkey to ask if Milburn had to be seen or if it could be taken care of on Monday.<sup>37</sup>

However, the record indicates that a judge was present at JP Court 20 and Carty simply asked Sergeant Cooper to let Milburn out the back door.<sup>38</sup>

Thus, the short statement that was provided to Marlowe was not forthcoming.

Second, Carty did not understand the severity of her actions, nor did she show remorse at the hearing. Carty did not believe the phone call to the Wilmington Police Department was severe enough to warrant termination.<sup>39</sup> She testified that, “[i]t seemed like a small infraction”<sup>40</sup> and that she was only doing Milburn a simple favor.<sup>41</sup> Carty believed Milburn could handle the capias on his own without a Judge’s order.<sup>42</sup> In addition, even at the hearing, Carty did not understand the significance of the prior capiases when she testified that, a page and a half of capiases, “for the court system[,] is really good.”<sup>43</sup>

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<sup>37</sup> R. at 234.

<sup>38</sup> R. at 6-7.

<sup>39</sup> R. at 109. This leads the Court to believe Carty would not hesitate to act again in another instance if she felt her misconduct would not warrant termination.

<sup>40</sup> R. at 97.

<sup>41</sup> R. at 108.

<sup>42</sup> R. at 98.

<sup>43</sup> R. at 98.

Lastly, the egregious actions that were committed on April 30, 2010, cannot be excused by prior good behavior and/or performance reviews. Carty's act of disobeying a Judge's order and having a defendant released on her own order was a blatant violation of the State of Delaware Code of Conduct for Court employees. Carty was not qualified nor was she authorized to take it upon herself to make a decision, whose power was vested in a judicial officer, to release a defendant. JP Court 20 was within its authority to terminate Carty for her actions. The Board's decision to reinstate Carty without back pay is unsupported by Board substantial evidence. Therefore, the Board improperly concluded that Carty should be reinstated without back pay.

### **Conclusion**

For the aforementioned reasons, the MERB decision is **REVERSED**.  
**IT IS SO ORDERED.**

/S/CALVIN L. SCOTT  
Judge Calvin L. Scott, Jr.