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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM FASANO, Appellant-Below, Appellant, v. DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, Appellee-Below, Appellee.	)	No. 481, 2025. Appeal from Superior Court No: N25A-04-002

APPELLANT FASANO'S OPENING BRIEF

Dated: January 13, 2026

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NATURE OF THE PROCEEDINGS

On April 8, 2021, Appellee Delaware Department of Natural Resources and Environmental Control (DNREC) terminated Appellant William Fasano's employment as Superintendent of Bellevue and Fox Point State Parks. (A264.)

Mr. Fasano filed a grievance appealing his termination to the Merit Employee Relations Board (MERB). On November 24, 2021, DNREC moved to dismiss Mr. Fasano's grievance based on untimeliness, which MERB eventually granted during the merits hearing on June 16, 2022. (A182 at Tr. 238:19–239:6.)

Mr. Fasano appealed the dismissal, which the Superior Court subsequently reversed and remanded for a continuation of the hearing on the merits. *Fasano v. DNREC*, 2024 WL 469638 (Del. Super. 2024).

On May 15, 2024, MERB continued the hearing on the merits, ruled against Mr. Fasano's grievance on the same day, and affirmed his termination. (A219 at Tr. 134:14–22.) MERB released its written opinion on March 6, 2025. (A220–231.)

Mr. Fasano timely appealed again to the Superior Court. (A5–7.) On October 31, 2025, the Superior Court affirmed MERB's March 6, 2025 order. *Fasano v. DNREC*, 2025 WL 3049041 (Del. Super 2025). Mr. Fasano timely appealed to this Court.

SUMMARY OF THE ARGUMENT

1. MERB lacked substantial evidence to find that Mr. Fasano violated the Delaware Department of Technology and Information (DTI) Acceptable Use Policy, misused his fleet vehicle in September 2020, and disabled GPS tracking equipment. The administrative record contains no competent evidence to support these findings.

2. DNREC expressly grounded Mr. Fasano's termination on violations of both the Fleet Services Policy and the DTI Acceptable Use Policy. Because substantial evidence did not support the DTI violation, MERB erroneously concluded that Mr. Fasano "committed the charged offense" within the meaning of Merit Rule 12.1.

3. DNREC's assertion on appeal that Mr. Fasano's dishonesty alone justified termination is impermissible *post hoc* rationalization. The lawful decision-maker, Secretary Garvin, did not mention dishonesty and adopted reasoning that identified only Fleet Services and DTI Acceptable Use Policy violations as grounds for termination. Under the *Chenery* doctrine and Delaware's Merit Rules, neither MERB nor this Court may uphold termination based on grounds the decision-maker did not state.

4. DNREC violated Mr. Fasano's due process rights by escalating the penalty from a three-day suspension to termination after he requested a pre-

decision hearing on the suspension. The escalation to termination was based on the same conduct subsumed by the suspension, supplemented only by the unsubstantiated allegations addressed in paragraph 1 above. Escalating the penalty after an employee requests a pre-decision hearing, without genuinely new evidence, violates due process.

5. When the same attorney participates as an advocate for one party and then advises the quasi-judicial decision-making body in the same case, due process is violated. No showing of actual bias is required. Deputy Attorney General Victoria Sweeney's personal commingling of advocacy and adjudication created an intolerable appearance of partiality that constituted structural error where, in the same case, she filed a motion to dismiss as an advocate for DNREC and then advised MERB on the merits of Mr. Fasano's grievance.

STATEMENT OF FACTS

Mr. Fasano began his career with DNREC in 2011, and over the course of a decade of state service, he had no disciplinary history prior to the events underpinning the instant case. (A196 at Tr. 42:7-9;) (A257.) In August 2016, Mr. Fasano took over as Park Superintendent for Bellevue and Fox Point State Parks, and he held that position until his termination effective April 2021. (A195–196 at Tr. 41:23-42:2.) During his tenure as Park Superintendent, Mr. Fasano lived in a State-owned house on park property, a living arrangement that blended work and personal time. (A197 at Tr. 46:18-47-11.)

A. Mr. Fasano's January 16, 2021 Fleet Services Violation and Related Dishonesty.

On January 16, 2021, Mr. Fasano had the day off work, and he drove a DNREC fleet vehicle from his State-provided residence to various locations in New Castle County over the course of several hours. (A132–133 at Tr. 40:23–41:2; 44:6–7.) During the drive, the fleet vehicle was flagged for a speeding violation. (A132 at Tr. 38:18-22.)

DNREC received notice of the speeding violation and then undertook an investigation to determine the identity of the driver of the speeding vehicle,[1] including through the involvement of Mr. Fasano's direct supervisor, Regional

[1] The vehicle was available for use to multiple DNREC employees. (A132 at Tr. 39:1–10.)

Park Administrator Susan Staats. (A132 at Tr. 38:18-22.) From January 20, 2021 until February 23, 2021, Mr. Fasano denied involvement, but by February 19, 2021, DNREC knew that Mr. Fasano had been the driver of the speeding vehicle. (A135 at Tr. 50:21-24.)

On February 19, 2021, Staats issued Mr. Fasano a "meets expectations" performance evaluation for calendar year 2020. (A275–276.) As part of the evaluation, she wrote, "Bill was asked to remove personal items and empty boxes being stored in the park office for Bill's on-line marketplace sales so as not to cause a distraction to his work duties and to present a more orderly workspace." (A275.)[2]

On February 23, 2021, Mr. Fasano met with Staats, Tonya Brady, DNREC's Human Resources Employee and Labor Relations Specialist, and Grant Melville, DNREC's Parks Operations Section Manager. (A135 at Tr. 51:16–22.)

During the February 23 meeting, Melville showed surveillance footage that proved Mr. Fasano was the driver of the fleet vehicle on January 16. (*Id*.) Mr. Fasano then admitted to being the driver but explained that he suffered from Post Traumatic Stress Disorder and had a dissociative episode on the day in question. (A135–136 at Tr. 52:1–53:6.) Staats referred Mr. Fasano to the Delaware Employee Assistance Program several days later. (A243.)

[2] Mr. Fasano handwrote the objection, "Not in 2020." (*Id*.)

B. DNREC's Punishment.

On March 3, 2021, Staats issued Mr. Fasano a letter stating that he was being recommended for a three-day suspension without pay for his conduct between January 16 and February 23, 2021, for his violation of Fleet Services Policy No. VO-6 **and** Delaware Code Title 29, Chapter 58, related to public trust and integrity of state employees. (A245–246.) The March 3 Suspension Letter advised that additional disciplinary action was pending further review of Mr. Fasano's actions (A246,) and the letter further stated that Mr. Fasano could request a pre-decision meeting before the suspension would be imposed. (*Id*.)

DNREC did not remove Mr. Fasano from his position at the time he received the March 3 Suspension Letter, and he continued to serve as Park Superintendent. (A150 at Tr. 110:22-111:8.) Prior to March 12, 2021, Mr. Fasano requested a pre-decision meeting under Merit Rule 12.4 regarding the three-day suspension. (A248.)

On March 12, 2021, Mr. Fasano emailed Melville requesting to reschedule his pre-decision meeting regarding the three-day suspension due to an appointment with his mental health provider appointed by the Employee Assistance Program. (A248.) The same day, Melville via reply email acknowledged that Mr. Fasano's proposed punishment was a suspension. (*Id*.) Also on the same day, Melville wrote

Mr. Fasano a letter that DNREC intended to terminate his employment. (A250–252.)

Melville's March 12 Termination Letter reiterated much of Staats' March 3 Suspension Letter, though the March 12 Letter included as alleged additional misconduct two trips to Goodwill that Mr. Fasano undertook in September 2020, a statement that the GPS was disabled in a DNREC vehicle for several months, and a charge that Mr. Fasano violated the Delaware Department of Technology and Information (DTI) Acceptable Use Policy. (*Id*.)

On March 18, 2021, DNREC notified Mr. Fasano that he would be suspended without pay pending termination. (A254.)

On March 25, 2021, Mr. Fasano provided a written response to DNREC in which he detailed the reasons termination was inappropriate. (A256–260.) Therein, Mr. Fasano explained that his trips to Goodwill stores were for work purposes, namely to donate the park's lost-and-found items and to obtain used books to replenish the Free Little Library on park grounds, a library that he maintained within the scope of his employment. (A260.) Finally, Mr. Fasano objected that he had not operated a business out of his DNREC office and that he did not know how to manipulate State-owned vehicles to disable GPS tracking. (*Id*.)

On March 31, 2021, DNREC held a pre-decision meeting on Mr. Fasano's termination. (A262.) The next day, April 1, 2021, Director of Parks Raymond

Bivens upheld termination based on Mr. Fasano's "failure to follow Fleet Services Operating Procedures **and** Information Technology Acceptable Use Policy for state-owned computer equipment." (*Id*.) (emphasis added).

Secretary of DNREC Shawn Garvin imposed Mr. Fasano's termination on April 8, 2021, adopting Director Bivens' decision. (A264.) Neither the Bivens memorandum nor Secretary Garvin's letter identified Mr. Fasano's dishonesty as a basis for termination.

C. Proceedings before MERB.

On or before May 10, 2021, Mr. Fasano filed a grievance appealing his termination to MERB. On November 24, 2021, Deputy Attorney General Victoria Sweeney, then-representing DNREC, filed a motion to dismiss Mr. Fasano's grievance based on the alleged untimeliness of Mr. Fasano's filing with MERB. (A232–237.)

During a June 16, 2022 hearing with different DNREC counsel, MERB granted the motion to dismiss, necessitating the first round of appeal in this matter. *Fasano v. DNREC*, 2024 WL 469638 (Del. Super. 2024).

On May 15, 2024, MERB continued Mr. Fasano's grievance hearing on remand, but now with DAG Sweeney serving as legal counsel to MERB. (A186 at Tr. 3.) MERB proceeded to orally rule against Mr. Fasano's grievance on the same day. (A219 at Tr. 134:14–22.) On August 19, 2024, Mr. Fasano inquired as to the

status of the overdue written opinion from MERB, to which DAG Sweeney replied, "I'm the hold up with this. . . the written decision will be issued soon." (A47–48.)

Thereafter, several more inquires from Mr. Fasano went unanswered. (A46–47;) (A52.) On March 6, 2025, one day after Mr. Fasano served MERB with a complaint for a writ of mandamus,[3] MERB issued the written opinion on the merit of the grievance, authored by DAG Sweeney. (A220–231.)

[3] Superior Court of Delaware Case No. N25M-02-048.

ARGUMENT

I. MERB'S DECISION MUST BE VACATED BECAUSE IT RESTS ON FACTUAL FINDINGS WHOLLY UNSUPPORTED BY THE ADMINISTRATIVE RECORD.

A. Questions Presented.

1. Was there substantial evidence to support MERB's factual finding that Mr. Fasano violated the Delaware Department of Technology and Information Acceptable Use Policy? (Preserved at A42–44.)

2. Was there substantial evidence to support MERB's factual findings that Mr. Fasano misused a fleet vehicle in September 2020 and disabled GPS equipment? (Preserved at A29–30.)

3. Did MERB err by upholding termination where substantial evidence did not support multiple grounds DNREC expressly identified as warranting termination and Secretary Garvin did not impose or consider termination solely for dishonesty? (Preserved at A21–28; A31–32.)

B. Scope of Review.

The Delaware Supreme Court utilizes the same standard as the Superior Court in reviewing a MERB decision. This Court reviews "to determine whether [MERB] acted within its statutory authority, whether it properly interpreted and applied the applicable law, whether it conducted a fair hearing and whether its

decision is based on sufficient substantial evidence and is not arbitrary." *Avallone v. State/Dep't of Health & Soc. Services*, 14 A.3d 566, 570 (Del. 2011).

Questions of law, including issues of due process, are reviewed *de novo*. *Id*. *See also Gibson v. Merit Employee Relations Bd.*, 2010 WL 2877234, at *5 (Del. Super. 2010) citing *In re Philadelphia Stock Exch., Inc.*, 945 A.2d 1123, 1135 (Del. 2008) ("To the extent this argument raises a due process question, that is an issue of law which this Court reviews *de novo*.").

C. Merits of Argument.

At the time of Mr. Fasano's termination in April 2021, DNREC expressly grounded its decision on two alleged policy violations. Director Bivens memorialized DNREC's rationale as follows:

> The recommendation [for termination] was based on your failure to follow the State of Delaware Fleet Services Operating Policies and Procedures **and** the Delaware Department of Technology and Information Acceptable Use Policy for state-owned computer equipment.

(A262) (emphasis added). The March 12 Termination Letter likewise emphasized DNREC's reliance on the DTI Acceptable Use Policy Violation. (A252) (characterizing Mr. Fasano's "misuse of the State's computer equipment and network" as "very serious.")

DNREC Secretary Garvin adopted Director Bivens' reasoning in imposing termination, the endpoint of the agency's internal review of its disciplinary

decision under Delaware's Merit Rules.[4] (A264.) DNREC's allegation that Mr. Fasano violated the DTI Acceptable Use Policy was therefore not ancillary; it was an express foundation for his firing.

However, the merits hearing before MERB revealed that DNREC had no competent evidence that Mr. Fasano violated the DTI Acceptable Use Policy. None of DNREC's witnesses testified from personal knowledge that Mr. Fasano misused a state computer, DNREC produced no documentary evidence of misuse, and Mr. Fasano, by contrast, denied any wrongdoing with his State computer. *See* (A208 at Tr. 92:10-93:10.)

Likewise, DNREC's other "newly discovered evidence" — supposedly found between March 3 and March 12 — also lacked factual support in the MERB hearing. There was no evidence that Mr. Fasano misused a fleet vehicle in September 2020 or that *anyone* disabled a GPS device. *See* (A196–197 at Tr. 45:14-46:14.)

Well after Mr. Fasano's termination, DNREC, through counsel, reformulated its justification for firing and asserted that Mr. Fasano's lack of candor from the driving incident was "central to DNREC's reasons for terminating him" despite the total absence of this reasoning from the Bivens memorandum or

[4] Only Secretary Garvin had ultimate authority to terminate Mr. Fasano's employment under Merit Rule 19.0; *see* 19 Del. Admin. Code 3001-2.0 ("Only the Cabinet Secretary or agency head may dismiss employees.").

from Secretary Garvin's letter, and despite the fact that DNREC had, just nine days earlier, recommended only a three-day suspension for Mr. Fasano's lack of candor. *See* (A75.) DNREC's shifted rationale on appeal is an impermissible *post hoc* rationalization and a denial of due process.

1. The Administrative Record Contains No Competent Evidence That Mr. Fasano Violated The DTI Acceptable Use Policy.

The sum total of the "evidence" MERB cited in the administrative record from which MERB erroneously concluded that Mr. Fasano violated the DTI Acceptable Use Policy (A228)[5] is as follows:

- Staats testified, "Tonya [Brady] was able to bring out additional information about [Mr. Fasano's] activities on the park pertaining to his misuse of a State computer for personal business[,]" and then deferred entirely to Brady's supposed knowledge. (A143–144 at Tr. 84:23–85:2;) *see also* (A144 at Tr. 86:7–9) ("[Q:] So, you were aware that other things were going on. But you weren't really involved? [A:] Correct.")

- Melville admitted that he "never saw that information" regarding Mr. Fasano's alleged computer misuse. (A147 at Tr. 97:16–20.)

- Brady testified that, "we also pulled records for computer use and

[5] *See* Footnotes 14 and 26 of MERB's March 2025 opinion, supporting MERB's Findings of Fact and Conclusions of Law, respectively. (A226.n4 & A228.n26.) MERB characterized the evidence of a DTI Acceptable Use Policy violation as "weaker" than Mr. Fasano's admitted-to speeding violation. (A228.) In reality, the evidence was nonexistent.

things of that nature," (A154 at Tr. 126:23–24,) but subsequently backtracked and said that it was Staats — not Brady herself — who had made the allegation of computer misuse. (A155 at Tr. 130:11-19.)

DNREC did not offer any such "records" for evidence at the administrative hearing, and Mr. Fasano denied misusing his state computer or running a business out of his DNREC office. (A208 at Tr. 92:10-93:10.) In short, DNREC's witnesses each pointed to someone else as having knowledge of computer misuse, yet no witness actually possessed such knowledge, and no records were introduced to overcome Mr. Fasano's denial.

Moreover, Mr. Fasano's February 19, 2021 performance evaluation — issued while the Fleet Services investigation was ongoing — undermines DNREC's subsequent charge of a DTI Acceptable Use Policy violation. Staats therein referenced Mr. Fasano's alleged "on-line marketplace sales" as a workspace organization issue related to clutter, not as a policy violation and not as computer misuse; she rated his overall performance "meets expectations" despite this alleged conduct. (A275.) This contemporaneous writing shows DNREC did not actually believe a DTI Acceptable Use Policy violation had occurred, let alone that it warranted serious discipline.

This is not a credibility contest between competing versions of events but rather the complete absence of evidence. An administrative finding cannot rest on

circular testimony and unproduced documents. The administrative record lacks even "reliable" hearsay that Mr. Fasano violated the DTI Acceptable Use Policy.[6] MERB's factual findings and legal conclusion to the contrary were therefore unsupported and prejudicially erroneous.

Judicial review begins with whether the employee committed the charged offense. *Avallone*, 14 A.3d at 569. Where one of the express grounds for termination is wholly unsupported by the record, there cannot be just cause for discipline under Merit Rule 12.1,[7] and as further discussed *infra*, the agency may not refashion its reasoning years later on appeal. *Cf. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action[.]").

2. The Administrative Record Contains No Competent Evidence That Mr. Fasano Misused His Fleet Vehicle In September 2020 Or Disabled GPS Equipment.

As with the unsupported allegation that Mr. Fasano violated the DTI Acceptable Use Policy, the March 12 Termination Letter's bulleted list of additional "issues of concern" supposedly uncovered by further investigation in the intervening nine days after March 3 lack any evidentiary support.

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[6] *See Mullin v. W.L. Gore & Assocs.*, 2004 WL 1965879, at *1 (Del. Super. 2004) ("Generally, administrative boards have discretion to consider otherwise reliable hearsay. . .but its ruling cannot rest alone upon hearsay.") (internal citations omitted).

[7] 19 Del. Admin. Code 3001-13.1.

The March 12 Termination Letter implies as misconduct Mr. Fasano's September 2, 2020 trip to Goodwill, Mr. Fasano's September 13, 2020 trip to Goodwill, and a bare assertion that "GPS was disabled" from September 13, 2020, through January 7, 2021. (A251.)

The only competent evidence in the administrative record on these points came from Mr. Fasano himself, and it directly contradicted DNREC's allegations. Mr. Fasano testified that the trips to Goodwill were within the scope of his duties as Park Superintendent to maintain a steady supply of books for the Free Little Library within the park. (A196–197 at Tr. 45:14-46:14.) Further, there was zero evidence introduced to substantiate that anyone, let alone Mr. Fasano, disabled a GPS device in a fleet vehicle. *See* (A258) (Mr. Fasano's denying knowledge of how to disable GPS device.)

The only other evidence on these points was Brady's testimony that, in reviewing the preceding year's worth of GPS data related to Mr. Fasano's fleet vehicle data, "There were other questionable violations, but nothing that rose to the level where I felt that it needed to be addressed at that time." (A156 at Tr. 135:11–136:7.)

This testimony underscored that DNREC's HR Specialist *did not* feel Mr. Fasano's historical fleet vehicle usage warranted any punishment. Yet DNREC cited these same September 2020 trips as justifying termination in the March 12

Termination Letter, and MERB found as fact that this supposed "newly discovered evidence" was a basis for Mr. Fasano's termination. (A226.) As authority for this finding of fact, MERB cited solely the March 12 Termination Letter. (A226n.17 citing Agency Exhibit L [included within appendix at A250–252].)

An administrative finding that rests solely on allegations in the agency's charge letter is akin to a conviction based solely on allegations in an indictment. MERB's findings and conclusions to the contrary were therefore unsupported and prejudicially erroneous.

3. MERB Erred By Upholding Termination, And DNREC's Reformulated Theory That Dishonesty Alone Justified Mr. Fasano's Firing Is Impermissible.

The nine-day timeline in this case evinces DNREC's arbitrary escalation of punishment from a three-day suspension to termination without any truly newly discovered evidence.

Staats was Mr. Fasano's direct supervisor and was authorized to issue the March 3 Suspension Letter. (A146 at Tr. 95:15-18.) Both Staats and Brady testified that the three-day suspension subsumed Mr. Fasano's dishonesty. (A143 at Tr. 83:6-21;) (A166 at Tr. 175:8-22) (" So, a three-day suspension is consistent with the discipline in this particular case, for the unauthorized driving of the vehicle in combination to the deception that was part of that investigation. A lot of the

recommendation was based on the intent behind the deception that I believe was part of the whole investigation.")

Brady and Melville both made clear that DNREC continued a *second*, *separate* investigation into Mr. Fasano's other alleged conduct after Staats issued the March 3 Suspension Letter. (A155–156 at Tr. 132:23–133:11) ("[T]here were two — there was a second investigation. . .that was into any other misconduct that Mr. Fasano had.") (A147 at Tr. 97:21–24) ("[Q:] So, there is this parallel investigation that is going on regarding improper use of a State computer? [A] Yes.")

It is undisputed that DNREC had concluded its investigation into Mr. Fasano's Fleet Services violation and alleged dishonesty — the conduct forming the basis of the suspension — before issuing the March 3 Suspension Letter. (A150 at Tr. 109:8-11.) DNREC was not continuing to investigate any conduct encompassed by the suspension letter after March 3 but rather "cast a wider net" and fished for other reasons to discipline Mr. Fasano. (A155 at Tr. 129:7-8.)

Brady's testimony further clarified that Mr. Fasano was entitled to a pre-decision meeting on the March 3 Suspension Letter notwithstanding the issuance of the March 12 Termination Letter because the two letters were intended to be separate actions. (A158 at Tr. 143:1-18.) In other words, Brady's testimony shows

that the March 12 Termination Letter was not intended to be additional punishment for the conduct subsumed within the March 3 Suspension Letter.

However, despite the apparently wide-ranging review of Mr. Fasano's other conduct, the record here shows DNREC actually did not have proof of the additional misconduct or the "newly discovered evidence" Melville described in the March 12 Termination Letter and instead has recast its reasoning *post hoc* to argue that dishonesty was the central reason for Mr. Fasano's termination.

Ultimately, MERB's finding that termination was the appropriate sanction is untenable because it rested on unsupported allegations. (A230.n33) ("[The suspension] became moot once the Agency decided to terminate the Grievant in light of new evidence regarding his misconduct.")

i. DNREC's belated assertion that Mr. Fasano's dishonesty alone warranted termination violates the *Chenery* doctrine and is unsupported by its own witnesses.

On judicial review of administrative agency action, the *Chenery* doctrine provides that the reviewing court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons then-stated by the agency. *See*, *e.g.*, *State Farm Mutual Auto. Ins. Co. v. Hale*, 297 A.2d 416, 419 (Del. Ch. 1972) (citing *S.E.C. v. Chenery Corp.,* 332 U.S. 194 (1947)) ("The orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be 'clearly disclosed and adequately sustained.'").

That is to say, an appellate court may not sustain agency action for reasons the agency did not contemporaneously identify. *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981) ("[T]he *post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action."); *Michigan v. E.P.A.*, 576 U.S. 743, 758 (2015) (characterizing as a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action."); *see also United Steelworkers of America AFL-CIO, Loc. 2610 v. Bethlehem Steel Corp.,* 298 Md. 665, 679 (1984) (collecting cases).

On appeal, DNREC has argued that the March 3 Suspension Letter was not a final decision on punishment for the misconduct reflected therein but rather a stopgap to remove Mr. Fasano from supervision "while determining next steps." (A84.) This after-the-fact reasoning fails because it is not what really happened: Mr. Fasano continued working in the wake of the March 3 Suspension Letter. (A150 at Tr. 110:22-111:8.)

Brady's testimony that Mr. Fasano was still entitled to a pre-decision meeting on the March 3 Suspension Letter despite the subsequent issuance of the March 12 Termination Letter should eliminate any argument that the March 3 Suspension Letter was interim. (A158 at Tr. 143:1-18.) It would defy logic to hold a pre-decision meeting on interim punishment that has been fully superseded.

Secondly, at the heart of this case is whether Mr. Fasano's deception was "central to DNREC's reasons for terminating him" as DNREC has belatedly argued. *See* (A75.) Contemporary writings show again this is a *post hoc* reformulation.

Only the Appointing Authority has the ability to terminate a state employee under Merit Rule 19.0, but the Appointing Authority cannot conduct every investigation. The structure of Delaware's Merit Rule grievance system is such that the Appointing Authority relies on inferior managers to accurately state the bases for termination.

Here, only Secretary Garvin could terminate Mr. Fasano, and in so deciding Secretary Garvin necessarily relied upon Director Bivens' Memorandum, which itself relied upon a pre-decision meeting stemming from Melville's March 12 Termination Letter. *See* (A264.) Neither Secretary Garvin nor Director Bivens identified dishonesty as a basis for termination. *See* (A262 & A264.)

The Bivens Memorandum and Melville's March 12 Letter both contain allegations in support of termination that subsequently proved unfounded, and DNREC may not substitute new reasoning for Secretary Garvin *post hoc*. To do so undermines the entire structure of Delaware's Merit Grievance system as neither

Director Bivens nor Secretary Garvin had an opportunity to consider whether dishonesty alone justified firing.[8]

Even Melville's March 12 Letter described Mr. Fasano's dishonesty only as a *compounding* factor for other, now unsubstantiated, allegations. *See* (A251–252) ("This compounded the already very serious issues relating to your personal use of the State-owned vehicle and your misuse of the State's computer network and equipment.").

If deception were "central" to Mr. Fasano's termination, that reasoning needed to appear, at a minimum, in the April 1 Bivens Memorandum after the constitutionally required pre-decision hearing on punishment. It does not, and DNREC's *post hoc* justification must be rejected. *See also Burton v. Civ. Serv. Comm'n*, 76 Ill. 2d 522, 527 (1979) ("Contrary to the Department's persistent efforts to have its documents indicate otherwise, it is evident that both the 10-day suspension and the subsequent discharge related to the same course of misconduct.").

[8] The Superior Court's observation that dishonesty was mentioned in the March 12 Termination Letter effectively promoted Melville to the status of Appointing Authority, ignored Melville's characterization of dishonesty as only "compounding," and usurped MERB's role in determining whether the penalty was proportionate to the *proven* misconduct. *See Fasano*, 2025 WL 3049041, at *5.

ii. DNREC violated due process by escalating the penalty after Mr. Fasano requested a pre-decision hearing on the suspension.

Merit Rule 12.4[9] implements the constitutionally required pre-deprivation hearing established by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The *Loudermill* hearing serves as "an initial check against mistaken decisions" and an opportunity for the employee to present reasons why the proposed discipline should not be imposed. *Id*. at 545–546.

Critically, *Loudermill* presupposes that the employer has made a good-faith determination of appropriate discipline before offering the hearing. Merit Rule 12.6[10] incorporates this presumption: "Pre-decision meetings shall be informal meetings to provide employees an opportunity to respond to the proposed action, and offer any reasons why the proposed penalty may not be justified or is too severe."

The employee must know what penalty is actually being proposed to meaningfully respond. An employee cannot respond to a "proposed penalty" if the employer reserves the right to escalate that penalty after the employee requests a pre-decision meeting. Allowing such escalation would render Merit Rule 12.4's

[9] 19 Del. Admin. Code 3001-13.4.

[10] 19 Del. Admin. Code 3001-13.6.

pre-decision meeting meaningless and undermine *Loudermill's* protection against arbitrary deprivations of property interests in continued employment.

Here, DNREC proposed a three-day suspension on March 3, 2021, for Mr. Fasano's January 16 Fleet Services violation and dishonesty and offered Mr. Fasano a pre-decision meeting. (A245–246.) Mr. Fasano elected a pre-decision meeting on the suspension. (A248.) Though the March 3 Letter stated, "additional disciplinary action is pending further review," DNREC's own witnesses confirmed this referred to a second investigation into other possible misconduct. (A155–156 at Tr. 132:21-133:18;) (A147 at Tr. 97:21-24.)

Final disciplinary determinations may not be escalated absent legal authorization. *See Burton*, 76 Ill.2d at 527 ("Final disciplinary actions, like other administrative decisions, may be reconsidered, modified or altered only if authorized by statute."). Merit Rule 12.4 allows for immediate removal from the workplace, but DNREC did not avail itself of this provision in connection with the March 3 Suspension Letter, and the Merit Rules contain no provision authorizing escalation of a proposed penalty after an employee requests a pre-decision hearing.

It was objectively reasonable for Mr. Fasano to believe that his maximum punishment for the January 16 Fleet Services Violation and dishonesty was a three-day suspension as outlined in the March 3 Letter. It was objectively reasonable for Mr. Fasano to elect a pre-decision meeting on the suspension, as the March 3

Letter advised him. *See* (A258) ("I believe that this process of disciplinary action violates both my right to procedural and substantive due process as a Merit Employee[.]")

DNREC acted arbitrarily and in violation of Mr. Fasano's due process rights by increasing the suspension to termination, without any actual additional new evidence of misconduct, after Mr. Fasano requested a pre-decision meeting on the suspension.[11] Testimony before MERB has established that DNREC's escalation was based on the same core conduct from the March 3 Letter supplemented only by allegations that, as demonstrated *supra*, lacked any evidentiary support.

iii. Additionally and alternatively, termination was not an appropriate penalty under Merit Rule 12.1.

This Court's judicial review includes examining whether the penalty imposed was appropriate to the circumstances as required by Merit Rule 12.1. *See Avallone*, 14 A.3d at 569.

Because it erroneously found that Mr. Fasano engaged in other unsubstantiated misconduct, MERB failed to reconcile the testimony from Staats and Brady that a three-day suspension was appropriate discipline for Mr. Fasano's

[11] The timing underscores the arbitrary nature of the escalation. On the very day Mr. Fasano requested to reschedule his pre-decision meeting on the suspension due to a mental health appointment, Melville drafted the termination letter. (A248 & 250–252.) This sequence suggests the escalation was a response to Mr. Fasano's exercise of his Merit Rule 12.4 rights, not to discovery of genuinely new terminable misconduct.

January 16 Fleet Services violation and dishonesty. (A143 at Tr. 83:6-21;) (A166 at Tr. 175:8-22.) That testimony should have been conclusive as to proportionality.

Even Melville acknowledged that lesser discipline could have been an option before termination. (A149 at Tr. 108:12-17.) Here, though, the progression went directly from no discipline in ten years of satisfactory state service to termination for the first offense. This violated basic principles of progressive discipline and rendered the penalty disproportionate. *See Gibson*, 2010 WL 2877234, at *4 ("The Board found that Mr. Gibson lied to his supervisor [and] committed the three vehicle-related offenses. The Court recognizes that those offenses standing alone may not have warranted termination.").

Finally, Mr. Fasano disclosed his PTSD diagnosis on February 23, 2021, before the termination decision. DNREC acknowledged this disclosure by referring him to Employee Assistance Program. (A243.)

While PTSD does not excuse misconduct, it is a relevant mitigating factor in assessing proportionality of discipline. MERB appears not to have considered Mr. Fasano's PTSD as a mitigating factor because Mr. Fasano did not "[notify] the Agency of such conditions previously." (A230–231.)

But MERB failed to analyze whether Mr. Fasano's statements in the wake of the January 16 incident were, in fact, products of ongoing PTSD symptoms,

notwithstanding his untimely disclosure to DNREC. The failure to properly consider this mitigating factor further rendered the penalty disproportionate.

II. THE PARTICIPATION OF THE SAME ATTORNEY IN THE SAME CASE AS BOTH ADVOCATE FOR DNREC AND ADVISOR TO MERB WAS STRUCTURAL ERROR.

A. Question Presented.

Are the due process rights of a public employee violated where the same deputy attorney general participates, in the same case, both as an advocate for the employer-agency and as legal counsel to the administrative adjudicator sitting in a quasi-judicial capacity? (Preserved at A36–37.)

B. Scope of Review.

A deprivation of a constitutional right constituting structural error is subject to *de novo* review. *Thomas v. State*, 293 A.3d 139, 142 (Del. 2023). *See also Down Under, Ltd. v. Delaware Alcoholic Beverage Control Comm'n*, 576 A.2d 675, 677 (Del. Super. 1989) ("[C]onstitutional issues need not be presented to an administrative agency as a prerequisite for their consideration by a reviewing court.").

C. Merits of Argument.

Separate and aside from MERB's erroneous findings and DNREC's shifted theory of why just cause existed for termination, the decision below must be vacated because the proceedings were infected with a structural due process violation.

At the outset of Mr. Fasano's quest to regain his job, DAG Sweeney appeared before MERB as an advocate on behalf of DNREC and filed a Motion to Dismiss Mr. Fasano's grievance. (A232–237.) Though DNREC switched counsel before the Motion was argued, it was eventually granted and necessitated the first round of judicial review in this matter. *See Fasano v. DNREC*, 2024 WL 469638 (Del. Super. 2024).

On remand, DAG Sweeney should have been categorically precluded from counseling MERB, but instead DAG Sweeney advised MERB during its merits deliberation and crafted MERB's written opinion denying Mr. Fasano's grievance and appeal. (A186 at Tr. 3;) (A220–231.)

1. The Superior Court Erred In Extending *Blinder* From Institutional Commingling To Personal Commingling.

In its opinion, the Superior Court principally relied upon this Court's decision in *Blinder, Robinson & Co., Incorporated v. Bruton*[12] to hold that Mr. Fasano's due process rights were not violated by DAG Sweeney's dual roles in the absence of either specific evidence of bias or "a showing sufficient to overcome the strong presumption that adjudicators act honestly and with integrity." *Fasano*, 2025 WL 3049041, at *7.

However, the actual facts in *Blinder* involved only institutional commingling, and this Court only approved of *different* attorneys from the

[12] 552 A.2d 466 (Del. 1989).

Delaware Department of Justice working as advocate and adjudicator respectively. 552 A.2d at 473 ("The mere prosecution of a case by **one** Deputy Attorney General before **another** Deputy Attorney General, acting in an adjudicative capacity, is not sufficient to overcome the strong presumption [of honesty], in the absence of specific evidence of bias.") (emphasis added).

Blinder did not answer the question now posed.[13] This Court should adopt the widely followed rule that an attorney who performs as a party advocate in an administrative case may not then advise the decision-making body in the same case. *See Uhrich & Brown Ltd. P'ship v. Middle Republican Nat. Res. Dist.*, 315 Neb. 596, 609–610 (2023); *Botsko v. Davenport C.R. Comm'n*, 774 N.W.2d 841, 850 (Iowa 2009); *Nightlife Partners v. City of Beverly Hills*, 108 Cal. App. 4th 81, 94 (2003); *Dorr v. Wyoming Bd. of Certified Public Accts.*, 21 P.3d 735, 745 (Wyo. 2001) (citing *Painter v. Abels*, 998 P.2d 931, 938–39 (Wyo. 2000)); *Horn v. Hilltown Township*, 461 Pa. 745, 748 (1975).

See also Taylor v. Arizona Law Enforcement Merit Sys. Council, 152 Ariz. 200, 206 (Ariz. App. 1986) ("A conflict of interest would clearly arise if the same assistant attorney general participated as an advocate before the council and

[13] *Blinder* expressly reserved the question whether due process permits the same government attorney to alternate between advocate and advisor in the same case. *See Blinder*, 552 A.2d at 473 ("While it is possible under the Delaware Securities Act for the Commissioner to both prosecute and adjudicate a case before him, that is not the present situation.").

simultaneously served as an advisor to the council in the same matter."); *Walker v. City of Berkeley*, 951 F.2d 182, 185 (9th Cir. 1991) (holding that a "staff attorney's dual role violated due process" where the attorney both advised an agency decision maker on a public employee's termination and represented the agency in litigation on the public employee's challenge to termination); *Weissman v. Bd. of Education of Jefferson County*, 190 Colo. 414, 425 (1976) ("[C]ounsel who has [advocated] in the proceedings should take no part in the final deliberations of the board, in order to avoid any appearance of impropriety or unfairness.").

As the above authorities recognize, there is no requirement of evidence of "actual bias" in a personal commingling challenge because the risk of impartiality is too great when an advocate later has a role in the adjudication of the dispute. *See Uhrich*, 315 Neb. at 609 ("The realistic appraisal of psychological tendencies and human weakness is different when the same person on the same case participates in adjudicatory functions after acting in a prosecutorial role.") (citations omitted); *Botsko*, 774 N.W.2d at 850 ("By definition, an advocate is a partisan for a particular client or point of view. The role is inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator.") (citation omitted); *Dorr*, 21 P.3d at 745 ("Fundamental considerations require not just fairness in fact but also fairness in appearance."); *Horn*, 461 Pa. at 748 ("While no prejudice has

been shown by this conflict of interest, it is our opinion that such a procedure is susceptible to prejudice and, therefore, must be prohibited.").

These courts uniformly acknowledge that when the same attorney performs both advocacy and advisory functions in the same matter, the risk of partiality is constitutionally intolerable, regardless of subjective intent.

The defect in this case — a quasi-judicial decision-maker advised by an attorney who previously advocated against a party in the same matter — constituted structural error, and no showing of actual bias or prejudice is required. At minimum, MERB's decision must be vacated and Mr. Fasano afforded a new hearing before an impartial tribunal advised by conflict-free counsel.

2. Even Superficial Participation As An Advocate Precludes Subsequent Adjudicative Advice In The Same Case.

The due process prohibition on personal commingling of advocacy and adjudication does not turn on the degree of prior participation. Even nominal or mere formal participation as counsel in a case categorically disqualifies the attorney from later participating in adjudication of that same matter, and the same principle holds true for adjudicative advice.

In *Trans World Airlines v. Civil Aeronautics Board*, the U.S. Court of Appeals for the D.C. Circuit found that a member of the Civil Aeronautics Board must be disqualified because he had merely signed a brief in the same case which

argued different questions than those involved in the subsequent proceeding upon which he sat after his appointment to the Board. 254 F.2d 90, 91 (D.C. Cir. 1958).

As the D.C. Circuit recognized, automatic disqualification is necessary to preserve justice and public confidence. *Id*. ("The fundamental requirements of fairness. . .require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case."); *American General Insurance Co. v. F.T.C.*, 589 F.2d 462, 464 (9th Cir. 1979) ("That the judge's or quasi-judicial officer's participation in the case as counsel may have been superficial rather than substantial does not affect the applicability of the principle."); *Matter of Robson*, 575 P.2d 771, 774 (Alaska 1978) ("When an administrative official has participated in the past in *any* advocacy capacity against the party in question, fundamental fairness is normally held to require that the former advocate take no part in rendering the decision.") (emphasis added).

See also State Div. of Human Rights v. Dorik's Au Natural Restaurant, Inc., 610 N.Y.S.2d 266, 267 (N.Y. App. 1994) ("The fact that Commissioner Rosa was no longer General Counsel at the time of the hearing is of no moment under the circumstances. . . .[she] was clearly attorney for the agency when the charges were formulated, investigated, and set down for a hearing after a determination of probable cause. Having 'participated' in the case, she should not have sat in

judgment in the same matter."); *Guthrie v. Wisconsin Emp. Rels. Comm'n*, 111 Wis. 2d 447, 461 (1983) ("We simply adopt the rule that, where there has been prior participation as counsel representing any party in any way in earlier proceedings, due process requires that the decisionmaker [sic] be disqualified and the decision must be vacated.").

No less an authority than Chief Justice Rehnquist observed that "a Justice Department official is disqualified if he either signs a pleading or brief[.]" *Laird v. Tatum*, 409 U.S. 824, 828 (1972) (Memorandum of Rehnquist, J.).

Ethics guidance from this Court analogously supports disqualification. On July 14, 2025, this Court added a comment to Rule 2.11(A)(4) of the Delaware Judges' Code of Judicial Conduct, stating, "[A] judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association." The concern highlighted by this Court is the same due process concern that animates disqualification rules in quasi-judicial administrative proceedings. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) ("[M]ost of the law concerning disqualification because of interest applies with equal force to administrative adjudicators.") (citation omitted).

These authorities establish that once an attorney participates in a case as an advocate, whether procedurally or substantively, that attorney may not later take

part in the decision-making. The rule applies with equal logic to counsel's advising the decision maker to prevent the intolerable risk and appearance of partiality inherent in personal role-switching.

The procedural irregularities in this case underscore why bright-line disqualification rules are necessary. MERB violated the 90-day requirement in 29 *Del. C.* § 5949(a) by issuing its written decision 289 days after the hearing and only one day after Mr. Fasano served a petition for writ of mandamus. During the unexplained delay, the attorney who previously advocated against Mr. Fasano was advising the tribunal and drafting the decision against him. This process had the appearance of impropriety.

Here, DAG Sweeney undisputedly represented DNREC and filed DNREC's initial motion to dismiss Mr. Fasano's appeal. Though filing a dispositive motion is arguably significant work on a case, whether DAG Sweeney's initial advocacy is characterized as procedural or substantive is irrelevant. That participation, standing alone, categorically disqualified her from later advising MERB and drafting its adjudicatory decision on the merits of Mr. Fasano's case. Her subsequent role as advisor to MERB in the same matter after filing a motion to dismiss on behalf of DNREC was structural error requiring reversal.

CONCLUSION

For the reasons stated herein, this Court should reverse the judgment of the Superior Court and remand with instructions to vacate the decision of the Merit Employee Relations Board for further proceedings consistent with 29 *Del. C.* § 5931. In the alternative, this Court should reverse the judgment of the Superior Court and remand for a new hearing on the merits before the Merit Employee Relations Board.

TRIAL COURT'S JUDGMENT AND RATIONALE

[Commences on next page]

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

WILLIAM FASANO,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	C.A. No. N25A-04-002 CLS
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	)	
	)	
	)	
Appellee.		

Date Submitted: July 22, 2025
Date Decided: October 31, 2025

MEMORANDUM OPINION

On Appeal from the Merit Employee Relations Board,
AFFIRMED.

Kate L. Butler, Esquire of KATE BUTLER LAW, LLC, *Attorney for Appellant*.

Devera Breeding Scott, Deputy Attorney General of the DELAWARE DEPARTMENT OF JUSTICE, *Attorney for Appellee.*

SCOTT, J.

INTRODUCTION

This matter comes before the Court on appeal by William Fasano from a decision of the Merit Employee Relations Board to uphold his termination from his position as Park Superintendent for the Delaware Department of Natural Resources and Environmental Control. The Board found that Mr. Fasano's termination was supported by just cause. Mr. Fasano contends that: (1) the Board legally erred by determining the penalty was appropriate under the circumstances; (2) the Board's decision was not supported by substantial evidence; and (3) the Board's proceedings violated Mr. Fasano's due process rights.

For the reasons set forth below, the Board's decision was supported by substantial evidence, free from legal error, and afforded Mr. Fasano his specified due process rights. Thus, the Board's decision is **AFFIRMED**.

FACTUAL AND PROCEDURAL BACKGROUND[1]

I. FACTUAL BACKGROUND

William Fasano worked as a Park Superintendent of Bellevue State Park for over 10 years for the Delaware Department of Natural Resources and Environmental Control ("DNREC") before he was terminated on April 8, 2021. As Park Superintendent, Mr. Fasano was responsible for the "overall operations" of Bellevue

[1] The facts are derived from Record of the Merit Employee Relations Board ("MERB"), Docket No. 21-05-803 (hereinafter "R. at __).

State Park, including the management of: park finances that involved a multi-million dollar budget, park employees, and natural and cultural resources.[2] Park Superintendents are held to a high standard of conduct given the nature of their responsibilities. Mr. Fasano received satisfactory performance reviews as Park Superintendent for DNREC.[3]

DNREC authorized its employees to lease vehicles from Fleet Services. The Fleet Services Handbook restricted the use of a Fleet vehicle to official State business and required drivers to abide by Delaware traffic laws.[4] All Fleet vehicles were equipped with a GPS tracking system. Mr. Fasano signed the Fleet Services Authorized Designation Application when he began employment with DNREC and operated a Fleet vehicle as a Park Superintendent.[5]

On Saturday January 16, 2021, Mr. Fasano violated Fleet Services' policies by speeding in his authorized Fleet vehicle and using the vehicle for a personal errand. From January 20, 2021 until February 23, 2021, Mr. Fasano denied that he was driving the Fleet vehicle on January 16, 2021. Mr. Fasano had multiple opportunities to explain what happened and he continued to tell his supervisors and Human Resources personnel "that it was not him who had been driving."[6]

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[2] R. at 219.
[3] R. at 93–103.
[4] R. at 122, 123.
[5] R. 129–30.
[6] R. at 222.

On February 23, 2021, Mr. Fasano met with Susan Staats, Regional Park Administrator and Mr. Fasano's supervisor; Tonya Brady, DNREC Human Resources Employee and Labor Relations Specialist; and Grant Melville, DNREC Parks Operations Section Manager. After Mr. Melville showed security footage identifying Mr. Fasano at a Goodwill one minute after the Fleet vehicle was turned off in the parking lot of Goodwill on January 16, 2021, Mr. Fasano admitted to being the driver.[7] Mr. Fasano, however, explained that he suffered from Post Traumatic Stress Disorder ("PTSD") and on the day in question, "he had a dissociative episode, and he did not . . . remember what . . . occurred that day."[8]

In a letter dated March 3, 2021 ("Suspension Notice"), Ms. Staats informed Mr. Fasano that, as a result of the January 16, 2021 speeding violation and his untruthfulness about being the driver, he was being recommended for a three-day suspension without pay pending "[a]dditional disciplinary action . . . [upon] further review of [his] conduct and actions in [the] matter."[9]

According to Mr. Melville, Mr. Fasano was not recommended for termination at the time of the suspension because Mr. Fasano "raised a lot of mental health issues" that needed to be addressed with Human Resources first.[10] Mr. Melville

[7] R. at 161–63.
[8] R. at 224.
[9] R. at 170.
[10] R. at 234.

explained that the recommended suspension gave DNREC the ability to "remove Mr. Fasano from his position at the park while . . . trying to figure out the full ramifications of [the] investigation."[11]

Further investigation revealed additional misconduct, including: (1) Mr. Fasano's use of his State computer for his "Video Trading hobby;"[12] (2) use of his Fleet vehicle to visit Goodwill three different times on September 2, 2020 and September 13, 2020; and (3) that the GPS on Mr. Fasano's Fleet vehicle was disabled from September 13, 2020 until January 7, 2021.[13]

Nine days later, in a letter dated March 12, 2021 ("Termination Notice"), Mr. Melville informed Mr. Fasano that he was being recommended for termination of his employment with DNREC.[14] The Termination Notice stated,

> As a Park Superintendent, DNREC expects a high degree of candor, truthfulness, and integrity for your position of great responsibility as you are ultimately responsible for an entire State park. Your demonstrated mistruths regarding the use of the State vehicle were only established by obtaining video confirming your use instead of you admitting to your misconduct of your own accord. This compounded the already very serious issues relating to your personal use of the State-owned vehicle and your misuse of the State's computer equipment and network. The result is a complete loss of confidence and trust in your ability to exercise good judgment . . . in your very responsible capacity as Park Superintendent.[15]

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[11] R. at 234.
[12] R. at 174.
[13] R. at 173.
[14] R. at 173–75.
[15] R. at 174–75.

The Termination Notice also stated that Mr. Fasano's conduct was in direct violation of Fleet Services' Operating Policies and Procedures and DTI"s Acceptable Use Policy.[16]

Mr. Fasano then requested a pre-decision meeting with Raymond Bivens, Delaware State Parks Director. The meeting occurred on March 31, 2021. After reviewing the relevant information, including a prepared statement from Mr. Fasano, Mr. Bivens sent a letter dated April 1, 2021, upholding the termination action.[17] In a letter dated April 8, 2021, Shawn Garvin, Secretary of DNREC, informed Mr. Fasano that his employment was terminated, effective immediately.[18]

II. PROCEDURAL HISTORY

Mr. Fasano appealed his termination to the Merit Employee Relations Board (the "Board). On November 24, 2021, DNREC filed a motion to dismiss, arguing that the notice of appeal was untimely. In February 2022, the Board denied the motion without prejudice because DNREC did not provide sufficient evidence to show Mr. Fasano's notice of appeal was untimely.

The Board held a hearing on the merits of Mr. Fasano's grievance on June 16, 2022. DNREC called five witnesses: Ms. Staats, Mr. Melville, Ms. Brady, Sharae Goff, Human Resources Associate with the Department of Human Resources

[16] R. at 174–75.
[17] R. at 185, 200–04.
[18] R. at 187.

("DHR"), and Theresa Williams, a receptionist for DHR. Mr. Fasano called two witnesses: David Koller, Esquire and Paul Kenton, Esquire. The Board entered 27 exhibits into evidence. After its case-in-chief, DNREC renewed its motion to dismiss Mr. Fasano's appeal as untimely.

On July 26, 2022, the Board issued a decision finding that Mr. Fasano's appeal to the Board was untimely.[19] Mr. Fasano appealed the Board's decision to this Court. This Court remanded the case to the Board, concluding that that the Board erred by misapplying the mailbox rule.[20] Accordingly, this Court found that Mr. Fasano filed a timely notice of appeal on May 10, 2021.[21]

The Board held a hearing on remand from this Court on May 15, 2024. The Board heard testimony from Mr. Fasano and Mr. Fasano's therapist, Marcia Winters, on behalf of Mr. Fasano. The Board entered 28 exhibits into evidence. The Board based its decision on both the June 16, 2022 and May 15, 2024 hearings.

On March 6, 2025, the Board issued its decision on the merits of the case.[22] The Board found that DNREC had just cause to terminate Mr. Fasano under Merit Rule 12.1. First, the Board found that DNREC provided sufficient evidence to show

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[19] *See generally Fasano v. Del. Dep't of Nat. Res. and Env't Control*, MERB Docket No. 21-05-803 (July 26, 2022).
[20] *Fasano v. Del. Dep't of Nat. Res. and Env't Control*, 2024 WL 469638, at **3 (Del. Super. Feb. 2, 2024).
[21] *Id.*
[22] *See generally Fasano v. Del. Dep't of Nat. Res. and Env't Control*, MERB Docket No. 21-05-803 (Mar. 6, 2025) ("MERB Decision").

that Mr. Fasano violated the Fleet Services' Operating Policies and Procedures, violated the DTI Acceptable Use Policy, and lied to his supervisors about the January 16, 2021 incident. Next, the Board concluded that Mr. Fasano was afforded due process because he was given notice stating the reasons for his termination and was afforded a pre-decision meeting. Finally, the Board found that the termination was an appropriate penalty under the circumstances based on mitigating and aggravating factors. The Board explained that Mr. Fasano's satisfactory performance reviews and mental health revelations did not outweigh the fact that Mr. Fasano's actions fell below the high standard of professional conduct he was held to as a Park Superintendent. Mr. Fasano now appeals the Board's decision.[23]

STANDARD OF REVIEW

The Court reviews decisions of the Merit Employee Relations Board only to determine whether the decision is free from legal error and whether the Board's findings are supported by substantial evidence.[24]

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"[25]—it "falls somewhere between a

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[23] *See generally* William Fasano's Opening Brief, D.I. 10 ("Opening Br.").
[24] *Gibson v. Merit Emp. Rels. Bd.*, 2010 WL 2877234, at *3 (Del. Super. June 17, 2010) (citations omitted).
[25] *Baxter v. Verizon Commc'ns*, 2024 WL 3581660, at *3 (Del. Super. July 30, 2024). (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

scintilla and a preponderance of the evidence."[26] It is not the Court's role to "independently weigh the evidence, determine questions of credibility, or make its own factual findings, but rather, to 'view the record in the light most favorable to the prevailing party below.'"[27]

The Court "reviews questions of law, including claimed constitutional violations and the interpretation of statutes and regulations, *de novo*."[28]

DISCUSSION

On appeal, Mr. Fasano raises various arguments. First, Mr. Fasano proffers that the Board committed legal error by considering untruthfulness in upholding his termination. Second, Mr. Fasano argues that the Board's decision lacked substantial evidence. Third, Mr. Fasano claims that his specified due process rights were violated throughout the proceedings on numerous grounds.

I. THE ISSUE OF RETALIATION IS WAIVED.

As a preliminary matter, Mr. Fasano's argument concerning retaliation under 29 *Del. C.* § 5931(c) is waived. In general, "[w]hen the Court acts in its appellate capacity on an appeal from an administrative agency, it is limited to the record and

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[26] *Diamon Fuel Oil v. O'Neal*, 734 A.2d 1060, 1062 (Del. 1999) (citing *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988)).
[27] *United Parcel Serv. v. Willis*, 2024 WL 5039034, at *6 (Del. Super. Dec. 6, 2024) (citing *Kelley v. Perdue Farms*, 123 A.3d 150, 153 (Del. Super. 2015); *Wyatt v. Rescare Home Care*, 81 A.3d 1253, 1258–59 (Del. 2010)).
[28] *Stanford v. Merit Emp. Rels. Bd.*, 2012 WL 1549811, at *3 (Del. Super. May 1, 2012) (citing *Avallone v. DHSS et al.*, 14 A.3d 566, 570 (Del. 2011); *Ward v. Dep't of Elections*, 977 A.2d 900 (Del. 2009)).

will not consider issues not raised before the agency."[29] The waiver rule encourages "agencies to apply their own specialized expertise, correct their own errors, and discourage litigants from reserving issues for appeal."[30]

Mr. Fasano claims that DNREC retaliated against him for exercising his right to a pre-decision meeting of the recommended three-day suspension.[31] DNREC contends that Mr. Fasano's Section 5931(c) argument is waived because it was not raised below.[32] Mr. Fasano posits that the issue of retaliation was "implicitly raised and recognized by [the Board] itself" because it questioned the nine-day period between the Suspension Notice and the Termination Notice.[33]

The Court finds Mr. Fasano's argument lacks merit. Mr. Fasano does not provide authority for the assertion that an issue can be implicitly raised. Mr. Fasano had ample opportunity to raise the issue of retaliation, including—as Mr. Fasano points out—when the Board addressed the timing of the Suspension Notice and Termination Notice. Nothing in the record shows that the issue of retaliation was

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[29] *Lewis v. Dep't of Agric.*, 2007 WL 315359, at * 4 (Del. Super. Jan. 31, 2007) (quoting *Potts Welding & Boiler Repair Co. v. Zakrewski*, 2002 WL 144273, at *4 (Del. Super. Jan. 11, 2002)) (internal quotation marks omitted).
[30] *Lewis*, 2007 WL 315359, at * 4 (quoting *Down Under, Ltd. v. Alcoholic Beverage Control Comm'n*, 576 A.2d 675, 677 (Del. Super. 1989)) (internal quotation marks omitted).
[31] Opening Br. at 22–23.
[32] DNREC's Answering Brief, D.I. 18, at 22–23 ("DNREC Answering Br.").
[33] William Fasano's Reply Brief, D.I. 20, at 14 ("Reply Br.").

presented to the appropriate tribunal: the Board.[34] Consequently, the Court will not consider the issue of retaliation under 29 *Del. C.* § 5931.

II. THE BOARD'S DECISION TO UPHOLD MR. FASANO'S TERMINATION IS FREE FROM LEGAL ERROR.

Mr. Fasano argues that the Board erred by concluding that termination was an appropriate penalty under the circumstances.[35] Mr. Fasano claims it was legal error for the Board to consider his untruthfulness because it was not included in the Termination Notice.[36] Because the Board could not consider untruthfulness in its decision, Mr. Fasano avers that termination for a speeding violation and computer misuse was not an appropriate penalty under the circumstances.

Under Merit Rule 12.1, an employee may be disciplined only for just cause—i.e., "management has sufficient reasons for imposing accountability."[37] Just cause requires a "showing that the employee committed the charged offense; offering specified due process rights . . .; and imposing a penalty appropriate to the circumstances."[38] In *Vann v. Town of Cheswold*, the Delaware Supreme Court defined "just cause" as "a legally sufficient reason supported by job-related factors

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[34] *Zakrewski*, 2002 WL 144273, at *4.
[35] Opening Br. at 11–12.
[36] *Id.* at 12, 13.
[37] *See also* 19 *Del. Admin. C.* § 3001-13.1.
[38] *Id.*

that rationally and logically touch upon the employee's competency and ability to perform his duties."[39]

The Court disagrees with Mr. Fasano. The Termination Notice expressly indicates that Mr. Fasano's untruthfulness was a reason for his termination. Further, Mr. Fasano does not dispute that Park Superintendents are held to a high standard of conduct based on the responsibilities entrusted to them by DNREC. Therefore, the Board did not legally err by considering Mr. Fasano's dishonesty in upholding his termination as it is not only included in the Termination Notice but is also a job-related factor that rationally and logically touches upon Mr. Fasano's competency and ability to perform his duties.

III. THE BOARD'S DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Mr. Fasano next argument on appeal states that the Board lacked substantial evidence to find that Mr. Fasano violated the DTI Acceptable Use Policy, disabled his Fleet vehicle's GPS, and used the Fleet vehicle to go to Goodwill on September 2, 2020 and September 13, 2020. DNREC claims that the Board's decision was supported by substantial evidence, even "without the allegations about Mr. Fasano's improper use of state equipment and vehicles[.]"[40]

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[39] 945 A.2d 1118, 1122 (Del. 2008).
[40] DNREC Answering Br. at 19.

The Court agrees with DNREC. On January 16, 2021, Mr. Fasano was speeding in the Fleet vehicle, which he used for a personal trip to Goodwill. Both actions are: violations of Fleet Services Policies and Operating Procedures; these facts are undisputed by Mr. Fasano; supported by surveillance footage and a receipt from Goodwill; and confirmed by the GPS systems installed in Fleet vehicles.

Moreover, DNREC presented the Board with evidence that Mr. Fasano was untruthful. Mr. Fasano challenged DNREC's evidence by explaining to the Board that his mental health issues caused him to forget he was driving and presenting satisfactory performance reviews. Ultimately, the Board chose to accept DNREC's evidence over Mr. Fasano's. The Board makes clear that its decision is based on inconsistencies in Mr. Fasano's and Ms. Winter's testimony and the standard of conduct to which Park Superintendents are held.

The Court "will not re-examine the evidence presented to an administrative board in order to reach its own factual conclusions."[41] Nothing in the record indicates that the evidence supporting the Board's decision is unreasonable. In conclusion there is substantial evidence of Mr. Fasano's actions on January 16, 2021, and his dishonesty thereafter, regardless of whether there was substantial evidence of State computer misuse, additional trips to Goodwill in September 2020, and a disabled GPS.

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[41] *Gibson*, 2010 WL 2877234, at *4.

IV. MR. FASANO'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

Mr. Fasano argues that he was not afforded a fair hearing because termination was improper under the doctrine of industrial double jeopardy; the Deputy Attorney General had a conflict of interest based on representation of DNREC before remand and representation of the Board after remand; the Board issued its decision late in violation of 29 *Del. C.* § 5949(a); and that the Chairperson of the Board acted with a closed mind.

A. The Suspension Notice does not invoke the doctrine of industrial double jeopardy.

Mr. Fasano invokes the industrial double jeopardy doctrine as a basis for improper termination. The industrial double jeopardy doctrine, "a subset of 'industrial due process[,]' is an 'esoteric area of labor relations law' that 'enshrines the idea that an employee should not be penalized twice for the same infraction.'"[42] The doctrine "applies only where a final decision on the merits of a sanction has been made and the sanction or penalty subsequently is increased."[43] This Court explained that a penalty is not "final" for the purposes of industrial double jeopardy when "employers suspend employees pending investigation of alleged misconduct[.]"

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[42] *Khan v. Del. State University*, 2016 WL 3575524, at *11 (Del. Super. June 24, 2016) (quoting *Zaya v. Bacardi Corp.*, 524 F.3d 65, 66, 69 (1st Cir. 2008)).
[43] *Khan*, 2016 WL 3575524, at *11.

Mr. Fasano claims that the Termination Notice violated the industrial double jeopardy doctrine because it included the conduct from the Suspension Notice, which was a separate offense and final decision on the merits.[44] On other hand, DNREC contends that the Suspension Notice was not a final decision.[45]

The Court finds that the Termination Notice is not a violation of industrial double jeopardy. Consistent with *Khan*, the Suspension Notice does not invoke the doctrine of industrial double jeopardy because the letter *recommended* a three-day suspension without pay pending additional disciplinary action upon further investigation of Mr. Fasano's conduct. Moreover, the record shows that the Suspension Notice was not meant to be a final decision on the merits, and Mr. Fasano could not have understood it as such.

B. District Attorney General Victoria Sweeney's representation of the Board on remand did not deprive Mr. Fasano of a fair hearing.

Mr. Fasano argues that he did not receive a fair hearing before the Board because District Attorney General Victoria Sweeney's representation of DNREC on its motion to dismiss and subsequent representation of the Board on remand created an impermissible conflict of interest.[46] DNREC and the Board argue that this issue is waived as Mr. Fasano "knew or should have known that DAG Sweeney wrote DNREC's motion to dismiss, but he did not object to DAG Sweeney's participation

[44] Opening Br. at 15–16.
[45] DNREC Answering Br. at 30.
[46] Opening Br. at 25.

on May 15, 2024, as counsel to" the Board.[47] In response, Mr. Fasano contends that the issue falls under the exception to the waiver rule as a constitutional issue.[48]

This Court has held that the waiver rule is "not absolute" as "constitutional issues need not be presented to an administrative agency as a prerequisite for their consideration by a reviewing court."[49] Although Mr. Fasano should have raised this constitutional issue before the Board, the issue is not considered waived here.

Citing a Nebraska Supreme Court case, Mr. Fasano claims that Ms. Sweeney's involvement in the case was a violation of due process because her role as an advocate to DNREC, and subsequent representation of an administrative agency acting in a quasi-judicial capacity, in the same case, is analogous to judicial disqualification for commingling a prosecutorial and adjudicative role in the same controversy.[50]

The Court finds the Delaware Supreme Court's decision in *Blinder, Robinson & Co., Incorporated v. Bruton* instructive here.[51] In *Blinder*, the Court determined whether the appellant's due process rights were violated because the commissioner of the administrative hearing was "responsible for investigating and prosecuting

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[47] DNREC Answering Br. at 26; MERB's Answering Brief, D.I. 15, at 8 ("MERB Answering Br.").
[48] Reply Br. at 20.
[49] *Down Under, Ltd.*, 576 A.2d at 677 (citing *Califano v. Sanders*, 490 U.S. 99, 97 (1977); *Tenneco Oil Co. v. Department of Energy*, 475 F. Supp. 299, 311 (D. Del. 1979)).
[50] Reply Br. at 20–21 (citing *Uhrich & Brown Ltd. P'Ship v. Middle Republican Nat. Res. Dist.*, 315 Neb. 596, 609–10, 615 (2023)); *see also* Opening Br. at 26.
[51] 552 A.2d 466 (Del. 1989).

violations" of the statute in question while "simultaneously discharging . . . administrative responsibilities."[52] The *Blinder* Court held that commingling prosecutorial and adjudicative roles is not a due process violation unless there is a showing "sufficient to overcome the strong presumption" that adjudicators act honestly and with integrity, "in the absence of specific evidence of bias."[53]

Here, the Court finds that the record does not indicate that Ms. Sweeney's role in the case is sufficient to overcome the strong presumption that the Board acted honestly and with integrity. Even though Ms. Sweeney was undersigned counsel on DNREC's procedural motion to dismiss, there is nothing in the record to indicate that arguing Mr. Fasano's grievance as untimely affected the Board's honesty and integrity when she stepped in to represent the Board on remand almost three years later.

Further, Mr. Fasano's arguments that her alleged bias affected the Board's honesty and integrity is unpersuasive. Mr. Fasano claims that Ms. Sweeney "undoubtedly learned off-the-record information about Mr. Fasano through her involvement as DNREC's counsel that may have impacted her advice, even unconsciously, to the Board."[54] This argument is speculative and not specific evidence of bias. As the Board points out, "the hearing transcript is . . . devoid of

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[52] *Id.* at 472.
[53] *Id.* at 473 (citing *Withrow v. Larkin*, 421 U.S. 35, 47, 95 (1975)).
[54] Opening Br. at 26–27.

any argument, advice, or . . . comment by Ms. Sweeney demonstrating bias in favor of DNREC" and against Mr. Fasano.[55] Similarly, Ms. Sweeney's response to Mr. Fasano's counsel about the Board's untimely decision does not show that Ms. Sweeney was biased towards Mr. Fasano.[56] Accordingly, the Court rejects this claim.[57]

C. The Board's untimely decision was not prejudicial to Mr. Fasano.

Mr. Fasano argues that he was not afforded a fair hearing because the Board issued its decision late under 29 *Del. C.* § 5949(a).[58] The Board concedes that the decision was issued late, but contends that it did not violate Mr. Fasano's right to a fair hearing because there is no showing of actual prejudice.[59] DNREC also argues that the Board's decision was untimely and claims that Mr. Fasano's argument is "speculative."[60]

Under 29 *Del. C.* § 5949(a) the Board must "take final action on an appeal within 90 calendar days of submission to the Board." Despite the Board's untimely decision, Mr. Fasano has not demonstrated that the delay caused him actual

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[55] MERB Answering Br. at 10.
[56] *See* Ex. A to Opening Br.
[57] The Court also notes that lawyer discipline for alleged violations of the Delaware Rules of Professional Conduct as cited by Mr. Fasano in his opening brief is reserved for the Office of Disciplinary Counsel and the Delaware Supreme Court. Office of Disciplinary Counsel, Office of Disciplinary Counsel - Supreme Court - Delaware Courts - State of Delaware (last visited Oct. 30, 2022).
[58] Opening Br. at 26–27.
[59] MERB Answering Br. at 11–12.
[60] DNREC Answering Br. at 32.

prejudice.[61] Mr. Fasano claims that he "was forced to bring an action for writ of mandamus . . . to compel [the Board] to issue a final decision."[62] In *Jain v. Delaware Board of Nursing*, the Delaware Supreme Court stated that "[t]he type of 'actual prejudice that must be established to challenge the validity of an administrative agency's determination must relate to an individual's due process rights and to his or her ability to obtain a 'fair administrative hearing.'"[63] Here, Mr. Fasano does not demonstrate that filing a writ of mandamus relates to his due process rights or his ability to obtain a fair administrative hearing. Consequently, the Court rejects this argument.

D. The Chairperson's comment during the May 15, 2024 hearing did not deny Mr. Fasano his right to due process.

Finally, Mr. Fasano contends that the Board's Chairperson impermissibly "prejudged the case against Mr. Fasano, and her statements off the record indicated that she considered impertinent factors in ruling against Mr. Fasano."[64] Specifically, Mr. Fasano claims that it was wrong for the Chairperson to make a comment during the hearing that Ms. Winters' testimony "did [Mr. Fasano] no favors."[65]

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[61] *Walker v. Bd. Of Examiners of Pyschologists*, 2011 WL 1045634, at *5 (Del. Super. Mar. 22, 2011) (citing *Sandefur v. Unemployment Ins. Appeals Bd.*, 1993 WL 389217, at *5 (Del. Super. Aug. 27, 1993)).
[62] Opening Br. at 27.
[63] 72 A.3d 501, 2013 WL 3788095, at *3 (Del. Super. July 16, 2013) (TABLE) (quoting *Walker*, 2011 WL 1045634, at *5 & nn. 45–46).
[64] Opening Br. at 28.
[65] *Id.* at 28 (internal quotations marks omitted); *see also* R. at 324.

The Court is guided by *Rehoboth Art League, Incorporated v. Board of Adjustment of Town of Henlopen Acres*.[66] There, the Delaware Supreme Court considered whether "the Board failed to act impartially" by prejudging the issues based on comments from Board members that appellant argued "essentially denied [a zoning variance] application before hearing any substantive evidence."[67] The Court concluded that "Board members are entitled to have a view of the evidence and express that view *during a hearing* held to deliberate on the issue."[68]

Similarly, Mr. Fasano is arguing that the Board's Chairperson prejudged the issue based on a comment made during the hearing on the merits. The Chairperson was expressing their view on Ms. Winters' testimony and her credibility during the hearing, which the Chairperson was entitled to do. Neither the record nor Mr. Fasano's argument indicate that the comment demonstrated "a preconceived bias regarding the merits of [the just cause determination for Mr. Fasano's termination] such as would deny due process."[69] Thus, the Court finds the Chairperson's comment did not deny Mr. Fasano a fair hearing such that reversal is warranted.

In sum, Mr. Fasano fails to demonstrate that the hearing did not afford him his specified due process rights under Merit Rule 12.1.

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[66] 991 A.2d 1163, 1167 (Del. 2010).
[67] *Id.* at 1168
[68] *Id.* (citing *Lynch v. City of Rehoboth Beach*, 2005 WL 1074341, at *5 (Del. Ch. Apr. 21, 2005)) (emphasis added).
[69] *Rehoboth Art League, Inc.*, 991 A.2d at 1168.

CONCLUSION

For the foregoing reasons, the Merit Employee Relations Board's decision upholding Mr. Fasano's termination is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Calvin Scott
Judge Calvin L. Scott, Jr.