



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE’S AMENDED ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: February 12, 2026

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NATURE OF THE PROCEEDINGS

On April 8, 2021, the Department of Natural Resources & Environmental Control (“DNREC”), informed Appellant, William Fasano, that his employment as the Superintendent for Bellevue and Fox Point State Parks had been terminated.¹ R003. In response, Mr. Fasano filed a dual Step 3 grievance and Merit Employee Relations Board (“MERB”) appeal. R003.

On August 25, 2021, the State of Delaware Division of Human Resources (“DHR”) denied Mr. Fasano’s Step 3 grievance because the grievance was not filed within the 30-day period prescribed by the Rules of the Merit Employees Relations Board (“MERB Rules”).² Following DHR’s decision, the MERB scheduled a hearing.

On November 24, 2021, DNREC moved to dismiss Mr. Fasano’s MERB appeal for lack of jurisdiction based on Mr. Fasano’s untimely dual appeal. Mr. Fasano’s appeal was received by DHR on May 11, 2021, and by the MERB on May 26, 2021. R003.

On February 28, 2022, the MERB denied DNREC’s Motion to Dismiss without prejudice and ordered that the MERB would schedule a “hearing on the merits at which time the parties may submit additional evidence regarding the

¹ References to the Record of the Merit Employee Relations Board, Docket No. 21-05-803, filed with the Superior Court on June 10, 2025, and this Court, as part of the record below, on December 12, 2025 (D.I. 7).

² 19 Del. Admin. C. § 3001.

application of the Uniform Electronic Transactions Act and the mailbox rule and the Agency may renew its motion to dismiss.” R59-60.

The MERB appeal was held on June 16, 2022, and DNREC made its presentation on the merits, which was followed by the parties’ arguments on DNREC’s renewed Motion to Dismiss. R282. The MERB granted DNREC’s motion, which was memorialized in its written decision on July 26, 2022. Mr. Fasano appealed that decision to the Superior Court. R282.

After briefing and oral argument, the Superior Court found that Mr. Fasano’s notice of appeal was timely and then remanded the matter to the MERB for further proceedings. R282.

On May 15, 2024, the MERB continued the hearing on the merits on remand and proceeded with Mr. Fasano’s case-in-chief. R281-282. At the conclusion of the hearing, the MERB announced its decision to uphold Mr. Fasano’s termination. R327. The MERB’s written decision was issued on March 6, 2025, and Mr. Fasano appealed that decision to the Superior Court. R277.

On October 31, 2025, the Superior Court affirmed the MERB’s decision. The Court first found that Mr. Fasano waived his argument that DNREC retaliated against him for requesting a pre-decision meeting in response to DNREC’s recommendation that he receive a three-day suspension.³

³ *Fasano v. Del. Dep’t of Nat. Res. and Env’tl. Control*, 2025 WL 3049041, at *4 (Del. Super. Oct. 31, 2025).

Second, the Court rejected Mr. Fasano’s argument that it was legal error for the MERB to consider his untruthfulness as a basis for his termination alleging that DNREC did not include this claim in the Termination Notice.⁴

Third, the Court also denied Mr. Fasano’s argument that the MERB “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.”⁵ The Court agreed with DNREC that there was substantial evidence in the MERB record to show that Mr. Fasano was terminated because of his dishonesty.⁶

Fourth, the Court rejected Mr. Fasano’s 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.”⁷ The Court agreed with DNREC that the Suspension Notice was not a final decision.

Fifth, the Court found that Mr. Fasano’s due process rights were not violated because DAG Victoria Sweeney filed DNREC’s initial motion to dismiss and later represented the MERB on the merits hearing on remand.⁸

⁴ *Id.*

⁵ *Id.* at *5.

⁶ *Id.*

⁷ *Id.* at *6.

⁸ *Id.*

Sixth, the Court held that Mr. Fasano received a fair hearing despite his arguments that the MERB's delay in issuing its March 6, 2025 decision violated his right to a fair hearing.⁹

Finally, the Court held that the MERB Chairperson's comments during the May 15, 2024 hearing did not violate Mr. Fasano's due process rights.¹⁰

In his appeal of the Superior Court's decision here, Mr. Fasano's arguments are limited to: [1] whether the MERB's factual findings were supported by the administrative record; and [2] whether the participation of the deputy attorney general who filed DNREC's initial motion to dismiss and later served as counsel to the MERB was structural error.

This is DNREC's Answering Brief.

⁹ *Id.* at *7.

¹⁰ *Id.* at *8.

SUMMARY OF ARGUMENT

1. *Denied.* There is substantial evidence in the record before the MERB to support its finding that DNREC had just cause to terminate Mr. Fasano's employment based on the substantial evidence that Mr. Fasano misused a Fleet car on January 16, 2021, and then continued to lie about being the driver until February 23, 2021, when he was presented with video evidence.

2,3. *Denied.* DNREC's decision to terminate Mr. Fasano's employment for dishonesty was not a *post hoc* rationalization, and he was not terminated solely because he misused state computers and misused Fleet cars prior to January 16, 2021. DNREC terminated Mr. Fasano because of his dishonesty throughout the investigation and subsequent proceedings.

4. *Denied.* DNREC did not violate Mr. Fasano's due process rights when DNREC found just cause to terminate Mr. Fasano's employment after recommending a three-day suspension that was not a final decision.

5. *Denied.* Deputy Attorney General Victoria Sweeney did not prejudice Mr. Fasano and did not deny his due process rights when she filed a motion to dismiss on behalf of DNREC and then three years later served as counsel to the MERB in the same matter. The Court's standard in *Blinder* provides adequate protection against due process violations, and the Court need not go outside Delaware law for other persuasive authority.

STATEMENT OF FACTS

William Fasano was employed by DNREC as the Superintendent of Bellevue State Park and Fox Point State Park at all times relevant hereto, including Saturday, January 16, 2021. R283-284. The superintendent of a state park has a significant, trusted role. As the superintendent of Bellevue and Fox Point State Parks, Mr. Fasano was responsible for the overall operations of the parks, including the administration of a multi-million-dollar budget, managing personnel, natural resources, cultural and historic resources, maintenance operations, and programming.” R283. Mr. Fasano was also responsible for disciplining employees. R219. Because of Mr. Fasano’s great responsibilities as the superintendent, he had the opportunity to live with his family on state property, in close proximity to the park in a state-owned residence that was one half mile from Bellevue. R283.

Mr. Fasano admits that he was not working on Saturday, January 16, 2021, but he took the state-owned vehicle assigned to the Bellevue State Park office and traveled south where Mr. Fasano made a few stops. Op.Br.4. Mr. Fasano also concedes that Fleet Services received a notification that Mr. Fasano had been speeding during the drive. Op.Br.4.

Fleet Services’ records show that Mr. Fasano left the Bellevue property at 2:10 p.m. and traveled to Townsend, where he stopped at a residence at 3:10 p.m. R284. According to Fleet Services, which is responsible for overseeing and

managing the state-owned vehicles, Mr. Fasano then drove to the Middletown Shopping Center, where he visited a Goodwill store from approximately 3:32 p.m. to 4:28 p.m. R284. Mr. Fasano purchased eight (8) books and 30 DVDs in cash for \$37.62. R105. After he left Goodwill, Mr. Fasano drove north on Route 1, which is a toll road. R284. Mr. Fasano arrived at his residence on state property at 5:06 p.m., and then drove to Bellevue at 5:11 p.m. R284.

State-owned cars, referred colloquially as “Fleet cars,” are equipped with GPS to track vehicle activity. R313. A Fleet car user is required to sign an agreement that he will abide by the Fleet Handbook and acknowledge that while driving a Fleet car, Fleet Services would monitor his operation of the vehicle electronically. R130. The Fleet Handbook also requires a Fleet car user to abide by Delaware motor vehicle laws, which includes speeding. R123. Mr. Fasano signed the Fleet User Acknowledgement on July 7, 2011. R130.

The Fleet Services Handbook outlines the procedures for requesting, using, and returning a Fleet car, and the responsibilities of the driver. R114. Among other things, using a Fleet car for anything other than Official State business is prohibited, pursuant to 29 *Del. C.* § 7106. R122. And speeding violations are treated as a “misuse of a State-owned vehicle, which may result in the operator being subject to disciplinary action.” R284. The GPS system in the Fleet cars allows Fleet Services to monitor the use of the vehicles.

On January 19, 2021, Vincent Porcellini, the administrator in charge of Fleet cars, notified Mr. Fasano that someone used the vehicle on January 16, 2021, and was clocked speeding on Route 1. R305, R316. The Office of Management and Budget (“OMB”) had emailed a “Speeding Violation Alert” to Jacqueline Bryant and Tonya Brady on January 19, 2021, which Ms. Bryant forwarded to Ray Bivens, the former Director of the Division of Parks and Recreation; his assistant, Esther Knotts; and Ms. Brady. R153. DNREC had two weeks to respond to the notice and identify the name of the driver. R153-154.

The next day, January 20, Mr. Porcellini contacted Susan Staats, Regional Park Administrator, and Mr. Fasano’s supervisor. R220. Mr. Porcellini advised Ms. Staats that there was a speeding alert on a pickup truck assigned to Bellevue. R220. He asked Ms. Staats to find out what unit at Bellevue the truck was assigned, and to identify the driver. R220. Ms. Staats identified the truck as being assigned to the Park Administration – to wit, Superintendent Fasano and Assistant Superintendent Tyeast Amankawah. R220. Ms. Staats first contacted Mr. Fasano and advised that the Administration Fleet truck was logged as speeding. R220.

Whenever Fleet Services notified Ms. Staats that someone was speeding in a Fleet car assigned to Parks, she would first ask a supervisor to identify the driver and counsel that employee. R220. The driver would be counseled on using a Fleet car in a responsible and safe manner, obeying the Delaware road

laws. R220. After the supervisor counseled the employee, the supervisor would notify DNREC Human Resources, Fleet Services, and former Parks Director Bivens about the steps that were taken to counsel the employee. R220.

Ms. Staats contacted Mr. Fasano and advised that she had received a speeding notification from Fleet Services on S6967, a vehicle assigned to Bellevue. R170, R221. Mr. Fasano was identified as the contact person for that vehicle. R170. But Mr. Fasano already knew about the speeding notification because Mr. Porcellini had notified him of the speeding notice the day before. R170, R305.

Mr. Fasano's first response to Ms. Staats was that Jack Durr, a seasonal employee, must have been the driver. R221. Mr. Fasano also blamed Mr. Durr when he spoke to Mr. Porcellini. R170. Nevertheless, Mr. Fasano told Ms. Staats that he would investigate. R221. According to Mr. Fasano, Mr. Durr was working on that Saturday, so Mr. Durr must have been the driver. R221. Mr. Fasano asked Assistant Park Supervisor Amankwah, to question Mr. Durr. R170. But Mr. Durr denied using the Fleet car. R170.

Mr. Fasano's statements to Ms. Staats about the Fleet car and Mr. Durr raised more questions. R170. Why would Mr. Durr use that Fleet car when he had another vehicle assigned to him? R221. Mr. Durr was working on Saturday because he was meeting someone who wanted to rent the Bellevue special-use

facility, so why would Mr. Dirr drive to Middletown, stop in Middletown, stop at Mr. Fasano's residence, and then return to the Park? R221.

The next day, January 21, Ms. Staats and Mr. Fasano spoke again. R170. For the first time, Mr. Fasano claimed that he had been on Park property on January 16, to empty trash at the maintenance shop. R222. Mr. Fasano claimed that he found the maintenance gate open, which led him to suspect that the maintenance staff used the Fleet car. R170. But the maintenance supervisor, Bob Brokus, ruled out that theory. Undeterred, Mr. Fasano still raised suspicion about a third-party driver. He explained that the vehicle keys were kept in the Park office and locked in Ms. Amankwah's office. The Park office was also locked and secured by a coded alarm. R170. Mr. Fasano then instructed staff to change the locks on the office doors and change the alarm code. R171. These expenses were borne by Parks. R171.

Afterwards, Ms. Staats received the "breadcrumbs" from Fleet Services, a list of detailed information about when and where the vehicle was operated. R155-157, R170. The breadcrumbs showed that at the end of the trip, the vehicle stopped at Mr. Fasano's residence. R170. With that information, Ms. Staats met with Mr. Fasano again on January 22, and asked Mr. Fasano if he was the driver. R170.

Mr. Fasano did not admit to being the driver. Instead, he said that he had used the Fleet car on Friday, January 15, the night before, to jump start his

personal vehicle.¹¹ Mr. Fasano expressed concern that someone would sit in a vehicle in front of his residence, and he relayed an incident that happened a year earlier when a former resident of the home, Marissa Wright, parked in front of the residence. R170.

On February 12, Ms. Staats emailed Mr. Fasano and asked if he had any additional information. R171. She also instructed Mr. Fasano to schedule a meeting with Tonya Brady, DNREC HR Employee and Labor Relations Specialist. R171. Mr. Fasano was defensive and stated that he was being unfairly targeted. R171.

On February 19, Mr. Fasano met virtually with Ms. Staats, Ms. Brady, and Grant Melville, Parks Operations Section Manager. R002, R171. Mr. Melville asked Mr. Fasano point blank if he was the driver, and Mr. Fasano stated, “I don’t think so.” R171. Mr. Melville then advised Mr. Fasano that he was going to ask the stores in the Middletown Shopping Center for video surveillance footage for January 16, 2021. R171. In fact, Mr. Melville already had photographs taken of the video footage which showed Mr. Fasano in the Goodwill store that day. R161-

¹¹ The record contains conflicting information about which night – Friday or Saturday – Mr. Fasano used the Fleet car to jump the battery in his personal vehicle. Mr. Fasano’s March 25, 2021 written statement [R201] states that the jump occurred on Saturday, but his testimony provided different information. (Q: “Had you needed to jumpstart your vehicle on Saturday? Or on Friday? A: Yes. I think so. It was – I don’t recall but it – almost – it was a pretty routine daily occurrence that was something that had to be done.”) R306. In contrast, Mr. Melville and Ms. Staats stated more than once that Mr. Fasano said he jumped the vehicle on Friday night. R170, R227, R261.

163, R223. Mr. Melville was trying to give Mr. Fasano the opportunity to come clean and admit that he took the Fleet car on January 16, and not one of the Park staff as Mr. Fasano had alleged. R223, R239.

Again, Mr. Fasano maintained that he was not the driver. R223.

On February 23, Mr. Fasano met again with Mr. Melville, Ms. Staats, and Ms. Brady. Mr. Melville told Mr. Fasano that he knew Mr. Fasano was the driver because the Goodwill video from January 16 identified him. R171, R223.

At that point, Mr. Fasano finally admitted to driving the Fleet car. R223, Tr. 52:5-7.

After admitting that he was the driver, Mr. Fasano was still trying to avoid responsibility during the February 23 meeting. At first, Mr. Fasano said that he thought Ms. Staats was the driver and followed Mr. Fasano to Middletown that day. R223, Tr. 52:5-24, 53:1-6. But he realized that he was wrong after talking to his therapist and recognizing that he was the driver.¹² R223. In his March 25, 2021 written statement, Mr. Fasano stated that “I have little memory of my activity during this entire day, but I do recall visiting a Goodwill store in Middletown.” R201.

At the June 16, 2022 MERB hearing, Mr. Fasano told another story:

¹² This meeting was February 23, 2021, but Mr. Fasano did not start treating with Ms. Winter until March 2021. R288. Nevertheless, on or before February 23, 2021, Mr. Fasano knew that he was the driver but did not confess until presented with the Goodwill evidence. Notwithstanding his confession on February 23, Mr. Fasano continued to claim that he was not the driver.

A: I don't remember coming home that night. I don't – no, I don't – I don't remember the rest of that day.

Q: Was there a time when you did recall?

A: No.

Q: You never recalled being at the Goodwill?

A: I don't recall the rest of the day. R313.

Q: So in the Goodwill bag, you would've seen, "Oh, I went to Goodwill." When did you find the receipt?

A: Long after I was told that I was the driver of the vehicle." R316.

After the meeting with Mr. Fasano on February 23, Ms. Staats met with Mr. Fasano again and told him that his Fleet driving privileges had been revoked. R174, R223. For the first time, Mr. Fasano told Ms. Staats that he had PTSD and experienced a dissociative episode that day. R223-224. Mr. Fasano's revelation about his mental health issues for the first time prompted Ms. Staats to consult with DNREC Human Resources, who instructed her to refer Mr. Fasano to the Employee Assistance Program. R224. Similarly, Mr. Fasano's revelation about his mental health issues triggered Ms. Brady's obligation to notify Mr. Fasano about the Americans with Disabilities Act ("ADA"). R165. Mr. Fasano had not requested an accommodation. R165. Nevertheless, Ms. Brady sent Mr. Fasano ADA paperwork on her own initiative on February 25, 2021. R165, R256.

Until February 23, 2021, Ms. Staats was not aware of his mental health issues, and although Mr. Fasano mentioned that he had irritable bowel syndrome ("IBS") a year earlier, Mr. Fasano never requested an accommodation for any condition. R224. Mr. Fasano's request for a second bathroom in his state-owned

residence was for his convenience; it was not a request under the ADA. R227-228. Parks considered his request and would have added a second bathroom, which would have cost approximately \$8,000.00. R227. Ultimately, Parks did not build the second bathroom because there was not enough money in the budget. R227. In addition, in his March 25, 2021 written statement, Mr. Fasano stated that Parks never offered or asked if he needed an accommodation for his hearing loss. R200. Mr. Fasano testified that until February 2021, he never submitted a request for an ADA accommodation. R321. Nevertheless, during the pandemic, when Mr. Fasano asked for over-ear headphones to accommodate his hearing aids, Ms. Staats provided those headphones. R237, R321.

The Employee Assistance Program referred Mr. Fasano to a counselor, Marcia Winter. R288. Ms. Winter wrote a letter on Mr. Fasano's behalf, dated March 18, 2021. R082. Ms. Winter opined that on January 16, while he was driving the Fleet car, Mr. Fasano had a "dissociative event following a panic attack" and took a ride to calm down. R082. Ms. Winter stated that Mr. Fasano did not realize that he drove the Bellevue Fleet car; he thought that he drove his personal vehicle. R082.

At the time she wrote her opinion letter, Ms. Winter had seen Mr. Fasano twice – an intake on March 8, and a visit on March 16, two days before she wrote the letter. R300. Mr. Fasano testified that in the past, he treated with a psychiatrist and psychologist for his mental health issues, and he had been an inpatient at the

Rockford Center. R200, R311. But Ms. Winter did not have Mr. Fasano's medical records to inform her opinion. Instead, her understanding of his medical history was based solely on his subjective statements. R300.

Mr. Fasano also asked Ms. Winter and a nurse practitioner in a family medicine practice to complete "Healthcare Provider Questionnaire[s] in Response to an Accommodation Request, Americans with Disabilities Act (ADA)."¹³ Ms. Winter completed the questionnaire, which was dated March 18, 2021, the same date as her opinion letter. R085. Ms. Winter stated that Mr. Fasano was capable of working if he received accommodations for his "high stress, panic attacks" and "ongoing insomnia, IBS or other symptoms related to diagnoses." R085. There is no evidence that Ms. Winter is a medical doctor, let alone a gastroenterologist, and she is not qualified to diagnose IBS. R107-109. Moreover, Ms. Winter's signed questionnaire made vague, overly broad, and unsupported statements that Mr. Fasano experienced "other symptoms related to diagnoses." R085. Ms. Winter did not include insomnia or IBS in her opinion letter, dated the same day as her questionnaire response.

DNREC holds park superintendents to a high standard of professional conduct. R085, R171. For 35 days – from January 19 to February 23 – Mr. Fasano denied being the driver of the Fleet car. R170. Mr. Fasano only confessed after

¹³ The nurse practitioner, Anne Archibald, did not testify before the MERB, nor did she provide an opinion letter. Ms. Archibald's documentation is limited to her Accommodation Questionnaire responses. R084-087.

being confronted with the fact that the Goodwill video showed Mr. Fasano making purchases at the Middletown store on January 16, 2021. R170-171. For over a month, Mr. Fasano failed to admit that he was the driver of the Fleet car. R170-171.¹⁴ Even worse, Mr. Fasano attempted to place the blame on people who reported to him, and he spent state money to change the locks and the security code on the Park office for no reason. R170-171.

On March 3, 2021, Ms. Staats wrote to Mr. Fasano and outlined the chronology of events that led up to, and included, Mr. Fasano's confession. R170-171. Ms. Staats also informed Mr. Fasano that his deception demonstrated a lack of integrity and a loss of trustworthiness, and his behavior violated the Fleet Services Operating Policies and Procedures, State Employee Code of Conduct, and DNREC's Core Values. R170-171. Mr. Fasano was advised that his conduct was being reviewed, and additional disciplinary action was pending. R170-171. In the interim, Ms. Staats *recommended* that Mr. Fasano be suspended without pay for three (3) days. R170-171. (emphasis added). Mr. Fasano was advised of his right to a pre-decision meeting "[b]efore imposing the suspension without pay." R171. Mr. Fasano was instructed to submit a meeting request in writing to Ms. Brady within fifteen (15) calendar days. R171.

¹⁴ As stated previously, Mr. Fasano's story about the events of January 15 and 16, have not been consistent. Supra p.10.

A pre-decision meeting was scheduled for March 16, 2021, but at Mr. Fasano's request, the meeting was postponed. R078, R291, R308, R322. Ultimately, the three-day, unpaid suspension was not imposed and became moot when Mr. Melville recommended that the Secretary terminate Mr. Fasano's employment. R291.

Mr. Fasano offered conflicting testimony about the March 16, 2021 pre-decision meeting. He testified that he was available on March 16, at 11 a.m. for the meeting, but Mr. Melville did not appear. R319. Mr. Fasano also testified that he requested the March 16 meeting be postponed to accommodate his doctor's appointments. R322. In his written statement, Mr. Fasano states the meeting was scheduled for March 17. R203.

On March 15, 2021, Mr. Melville advised Mr. Fasano in writing that he was recommending Mr. Fasano's termination. R173, 177. The focus of Mr. Melville's recommendation was Mr. Fasano's deception about his use of the Fleet car. R173-175. As part of the Fleet car investigation, questions arose about Mr. Fasano's use of the state's computers and network. R173-175. This related investigation revealed that Mr. Fasano was accessing Facebook and eBay on state computers in violation of DTI's Acceptable Use Policy. R173-175. Mr. Melville also cited Mr. Fasano's misuse of state computers as part of his recommendation that Mr. Fasano be terminated. R173-175.

On March 18, 2021, Carlina Nickerson, DNREC's Human Resources Manager, informed Mr. Fasano that he would be suspended without pay pending the outcome of the termination recommendation. R175. Ms. Nickerson also advised that under Merit Rule 12.4, at his request, Mr. Fasano was entitled to a pre-decision meeting. R177. Mr. Fasano had fifteen (15) days from the date he received the termination recommendation to request a meeting. R177.

On March 29, Mr. Fasano submitted a timely request for a pre-decision meeting that was scheduled for March 31, with Director Bivens. R180. During the meeting, Mr. Fasano read a prepared statement in which he recanted everything that he had previously stated. R201. Following that meeting, Director Bivens wrote to Mr. Fasano on April 1, and advised that he was upholding the recommendation to terminate Mr. Fasano's employment because Mr. Fasano had failed to provide compelling evidence to rebut the recommendation. R185. Subsequently, former Secretary Garvin advised Mr. Fasano that his employment was terminated. R187.

ARGUMENT

I. There is substantial evidence in the record before the MERB to support its finding that DNREC had just cause to terminate Mr. Fasano's employment.

A. Question Presented.

1. Whether DNREC had just cause to terminate Mr. Fasano based on the substantial evidence that Mr. Fasano misused a Fleet car on January 16, 2021, and then continued to lie about being the driver until February 23, 2021, when he was presented with video evidence.

2. Whether DNREC terminated Mr. Fasano for his dishonesty, which Mr. Fasano claims was a *post hoc* rationalization, or on issues regarding his misuse of state computers and misuse of Fleet cars prior to January 16, 2021.

3. Whether DNREC violated Mr. Fasano's due process rights when DNREC found just cause to terminate his employment after DNREC recommended a three-day suspension.

B. Scope of Review.

The Delaware Supreme Court's role in reviewing MERB decisions is limited.¹⁵ The Court reviews MERB decisions to determine if the 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

¹⁵ *Norcisa v. Dep't of Health & Soc. Servs.*, 2014 WL 1258304 at *3 (Del. Supr. March 25, 2014) (citing *Ward v. Dep't of Elections*, 2009 WL 2244413 (Del. July 27, 2009)).

on sufficient substantial evidence and is not arbitrary.”¹⁶ Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁷ But the Court does not “reweigh the evidence, determine issues of credibility, or draw our own factual conclusions.”¹⁸ Errors of law are reviewed de novo.¹⁹

C. Merits of the Argument.

On appeal to this Court, Mr. Fasano transposes DNREC’s bases for terminating his employment by giving his dishonesty a minor role in DNREC’s decision and placing the peripheral issues regarding his computer use and separate misuse of Fleet Services vehicles front and center. The MERB records show, however, that DNREC terminated Mr. Fasano’s employment because he perpetuated the lie that he was not the driver of the Fleet car for over five weeks, causing DNREC to spend time and money to investigate the matter.

¹⁶ *Avallone v. State/Dep’t of Health & Soc. Servs. (DHSS)*, 14 A.3d 566, 570 (Del. 2011)(quoting *Hopson v. McGinnes*, 391 A.2d 187, 189 (Del.1978)).

¹⁷ *Id.* (quoting *Person–Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del.2009)).

¹⁸ *Id.* (citing Ward, 2009 WL 2244413, at *1).

¹⁹ *Id.*

1. The primary basis for Mr. Fasano's termination was his dishonesty during DNREC's investigation to determine who drove the Fleet car on January 16, 2021.

Under Merit Rule 12.1,

Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. "Just cause" means that management has sufficient reasons for imposing accountability. Just cause requires: showing that the employee has committed the charged offense; offering specified due process rights specified in this chapter; and imposing a penalty appropriate to the circumstances.

Mr. Fasano was terminated, because for weeks, he repeatedly lied about his use of a Fleet car, and he blamed his subordinates for using the vehicle on January 16, 2021, which resulted in DNREC's "complete loss of confidence and trust in your ability to exercise good judgment on behalf of the State of Delaware in your very responsible capacity as Park Superintendent." R174-175.

Only when confronted with the knowledge that there was video evidence demonstrating that he drove the Fleet car at the February 23 meeting, did Mr. Fasano come clean. R223. Mr. Fasano claimed he had suffered "some type of dissociative episode" that day, but even if that is true – at the earliest – on February 23, before the meeting started, Mr. Fasano knew that he was the driver. R223, Tr.52:8-15.²⁰ Before the meeting began, or before he learned of the video

²⁰ Mr. Fasano claims that he only realized that he was the driver after discussing the incident with his therapist. The record shows, however, that Mr. Fasano began treating with his therapist, Ms. Winters, after he admitted being the

evidence, Mr. Fasano could have come forward and admitted being the driver, but he did not. R223, Tr. 51:16-24, 52:1-7.

Once Mr. Fasano admitted to being the driver, DNREC switched the investigation from identifying the driver to reviewing Mr. Fasano's actions. The investigation continued "because of lack of candor and untruthfulness to your managers which you only acknowledged when confronted with evidence of your wrongdoing, and that your fleet privileges were suspended." R174. The investigation further revealed that Mr. Fasano was using his state computer to access Facebook and eBay "often." R174. Mr. Fasano admitted that he spends time on his media-collecting hobby during the week. R202. In addition, the investigation showed that on September 2 and 13, 2020, Mr. Fasano took two other trips to Goodwill Stores and showed that the Fleet car's GPS was disabled from September 13, 2020 to January 7, 2021. R174. Even without the allegations about Mr. Fasano's improper use of state equipment and vehicles, there is substantial evidence to show that the extent of Mr. Fasano's deception constituted just cause to support his termination.

After hearing Mr. Fasano's presentation at the March 31 pre-decision meeting, Director Bivens upheld Mr. Melville's recommendation to terminate Mr. Fasano's employment based on the reasons cited in the charge letter. R185.

driver on February 23, and after he received the suspension on March 3. R308, Tr.60:1-22.

Merit Rule 19.0 provides that a Cabinet Secretary has the authority to dismiss employees, and Secretary Garvin made the decision to terminate Mr. Fasano based on Mr. Bivens' recommendation, which considered Mr. Melville's charge letter and Mr. Fasano's presentation.

2. Mr. Fasano's misuse of state computers and September 2020 misuse of a Fleet car were not the primary bases for his termination.

In his Opening Brief, Mr. Fasano argues that DNREC grounded Mr. Fasano's termination on his misuse of state computers in violations of the Department of Technology and Information (DTI) Acceptable Use Policy, and misusing a Fleet car in September 2020 and disabling the car's GPS tracking equipment. Op.Br.11.

As the Fleet car investigation progressed, questions arose about Mr. Fasano's use of the state's computers and network. R173-175. This related investigation revealed that Mr. Fasano was accessing Facebook and eBay on state computers in violation of DTI's Acceptable Use Policy. R173-175. Mr. Melville also cited Mr. Fasano's misuse of state computers as part of his recommendation that Mr. Fasano be terminated. R173-175.

Mr. Fasano now places those violations front and center and reimagines his dishonesty as a "post hoc rationalization" for DNREC's decision to terminate his employment.

DNREC disagrees with Mr. Fasano's statement that "DNREC did not include untruthfulness in its termination memorandum." Op.Br.11-13. Moreover,

Mr. Fasano states that DNREC reformulated its justification for his termination “[w]ell after Mr. Fasano’s termination [] through counsel.” Op.Br.12.²¹ But the record is replete with evidence to demonstrate that Mr. Fasano’s deception was central to DNREC’s reason for terminating him. The testimony from Ms. Staats, Mr. Melville, and Ms. Brady detail Mr. Fasano’s “untruthfulness,” as does the record documents, including the following:

- March 3, 2021 letter from Ms. Staats details Mr. Fasano’s “deception” and “dishonesty” throughout the initial investigation to identify the driver. R170-171.
- March 12, 2021 charge letter from Mr. Melville provides a timeline of the events from January 19 to February 23, 2021, in which Mr. Fasano demonstrated a “lack of candor” and “untruthfulness” and “lied during the course of the investigation.” There are seven paragraphs in the charge letter that describe Mr. Fasano’s deception. By contrast there is one paragraph discussing his misuse of state computers, and one paragraph addressing Fleet car violations in September 2020, and the disabled GPS system in the Fleet car from September 13, 2020 through January 7, 2021. R173-175.

²¹ Undersigned counsel objects to Mr. Fasano’s characterization that she “reformulated” DNREC’s justification for Mr. Fasano’s termination. Mr. Fasano’s counsel’s statement is improper and not based on evidence. Op.Br.12.

- April 1, 2021 letter from Mr. Bivens upholding Mr. Melville's March 12, 2021 charge letter, and recommending that Secretary Garvin terminate Mr. Fasano's employment. R185.

Mr. Fasano hangs his hat on the paragraph in Mr. Melville's charge letter that states his conduct violated Fleet Services' Operating Policies and Procedures and DTI's Acceptable Use Policy by inferring that the Fleet policy violations only included those violations that occurred from September 13, 2020 to January 7, 2021. Op.Br.11. On the contrary, his misuse of the Fleet car on January 16, 2021, was a violation of Fleet policies, and that his misuse of the Fleet car triggered an investigation lasting more than five weeks because of his continued deception.

As such, Mr. Fasano's argument that DNREC made *post hoc* rationalizations in violation of the *Chenery* doctrine²² cannot stand. From the beginning of the disciplinary action, Mr. Fasano's dishonesty was central to his termination, as outlined in Ms. Staats' March 3, 2021 suspension recommendation,²³ and Mr. Melville's charge letter.²⁴

²² Op.Br.19 (citing *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947)).

²³ R171.

Bill, as a Park Superintendent you are placed at a high standard of professional conduct. Your failure to admit that you were the driver of vehicle S6967 on January 16th when first questioned on January 20th, unnecessary caused staff time, including police resources, be devoted to investigating the incident. Your deception caused monetary expense to the park to change the office locks. Your implication of other staff members in the incident showed a lack of integrity. Your dishonesty during the investigation resulted in the loss of trust in you as a park leader, supervisor, and employee. Your actions were a violation of Fleet Services Operating Policies and Procedures, State Employees Code of Conduct under Delaware Code, and Department Core Values in your interactions with co-workers and staff and in how you carry out your job responsibilities. Under Merit Rule 12.1 Employee Accountability, you are accountable for your conduct. It is my expectation that you comply with Department and State Policies and Procedures.

²⁴ R175.

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 on behalf of the State of Delaware in your very responsible capacity as Park Superintendent.

Mr. Fasano made similar arguments before the Superior Court, and the Court disagreed that Mr. Fasano's termination was not based on his untruthfulness.²⁵

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.²⁶

Therefore, DNREC had just cause to terminate Mr. Fasano's employment as the superintendent of Bellevue and Fox Point State Parks for his misuse of the Fleet car on January 16, 2021, and his lack of candor, truthfulness, and integrity during the Fleet car investigation. R174. The record demonstrates that there is substantial evidence to support the MERB's decision to uphold Mr. Fasano's termination.

²⁵ *Fasano*, 2025 WL 3049041, at *4 ("Mr. Fasano claims it was legal error for the Board to consider his untruthfulness because it was not included in the Termination Notice.")

²⁶ *Id.* at *5.

3. DNREC did not violate Mr. Fasano’s due process rights because DNREC found just cause to terminate his employment after recommending a three-day suspension.

Mr. Fasano claims that DNREC violated his due process rights by “escalating the penalty from a three-day suspension to termination after he requested a pre-decision hearing on the suspension.” Op.Br.23. Mr. Fasano then reasons that the “escalation to termination was based on the same conduct subsumed by the suspension” and supplemented with allegations regarding his misuse of state computers and Fleet cars on occasions prior to January 16, 2021. Op.Br.3. Therefore, Mr. Fasano argues that he was denied due process because the termination recommendation included these additional violations. Op.Br.3.

Mr. Fasano admits that after receiving the March 3 *recommendation* for a three-day suspension, he was not suspended. Mr. Fasano continued to serve as Park Superintendent. Op.Br.6. In fact, Mr. Fasano was not removed from the workplace until March when he was served with the March 12, 2021 letter recommending his termination. Op.Br.7.

The March 3 letter advised Mr. Fasano that his conduct was being reviewed, and additional disciplinary action was pending. R170-171. In the interim, Ms. Staats *recommended* that Mr. Fasano be suspended without pay for three (3) days. R170-171. (emphasis added).

Mr. Fasano was also advised of his right to a pre-decision meeting “[b]efore imposing the suspension without pay.” R171. Mr. Fasano was instructed to submit a meeting request in writing to Ms. Brady within fifteen (15) calendar days. R171.

A pre-decision meeting was scheduled for March 16, 2021, but at Mr. Fasano’s request, the meeting was postponed. R078, R291, R308, R322. Ultimately, the *recommended* three-day, unpaid suspension was not imposed and became moot when Parks recommended that Mr. Fasano be terminated. R291.

DNREC’s final decision was to terminate Mr. Fasano’s employment. And when DNREC decided to move to termination, DNREC satisfied the procedural requirements outlined in Merit Rule 13.²⁷

- Under Rule 13.3, Mr. Fasano was given written notice that outlined DNREC’s reasons why he was being recommended for termination. Therefore, Mr. Fasano was on notice as to DNREC’s reasons for recommending his termination.²⁸
- The termination recommendation also advised Mr. Fasano of his right to a pre-decision meeting according to Rule 13.4.²⁹

²⁷ 19 Del. Admin. C. § 3001-13.0. “Employee Accountability.”

²⁸ § 3001-13.3.

²⁹ § 3001-13.4.

- The pre-decision meeting was held within the time prescribed by Rule 13.5.³⁰
- Mr. Fasano requested a meeting on March 29, 2021, and the meeting was held on March 31, 2021. R20.
- Mr. Fasano was given the opportunity to respond to the proposed action as required by Rule 13.6,³¹ and on March 25, 2021, he submitted a ten-page, single-spaced letter disputing DNREC’s allegations, which he read at the March 31 pre-termination meeting. R200-205.

Mr. Fasano was not denied due process to challenge his proposed suspension because he was never suspended. To require a hearing on a suspension that was superseded by a final disciplinary recommendation would be akin to a court rendering an advisory opinion. Moreover, in the proposed suspension letter, Mr. Fasano was advised that DNREC was considering further disciplinary actions. R171.

Mr. Fasano argued that DNREC increased the discipline because of the “newly discovered evidence” about his misuse of state computers and other Fleet car violations. Op.Br.17. But during the MERB hearing, Mr. Melville testified that Mr. Fasano raised mental health issues *after* he admitted driving the Fleet car. For that reason, Mr. Melville wanted to consult Human Resources about next steps because mental health issues were out of his wheelhouse. R234, Tr. 19-22. As the Superior

³⁰ § 3001-13.5.

³¹ § 3001-13.6

Court found, “Mr. Melville 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.’” R234, Tr. 94:5-9.³²

Mr. Fasano’s due process rights were not violated because the suspension was taken off the table. Therefore, Mr. Fasano has no basis to challenge discipline that had been superseded by a recommendation to terminate his employment. Holding a pre-decision meeting on the lesser penalty would have been futile.

³² *Fasano*, 2025 WL 3049041, at *2 (citing R234, Tr. 5-9).

II. DAG Sweeney did not prejudice Mr. Fasano and did not deny his due process rights when she filed a motion to dismiss on behalf of DNREC and then served as counsel to the MERB in the same matter.

A. Question Presented.

Whether the Superior Court erred when it extended the findings in *Blinder, Robinson & Co., Inc. v. Bruton*³³ here because the aforementioned case addressed “institutional commingling” and not a deputy attorney general’s roles on behalf of the appellee and later the tribunal.

B. Scope of Review.

The Delaware Supreme Court’s role in reviewing MERB decisions is limited.³⁴ The Court reviews MERB decisions to determine if the 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.”³⁵ Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”³⁶ But the Court does not “reweigh the evidence, determine

³³ 552 A.2d 466 (Del. 1989).

³⁴ *Norcisa*, 2014 WL 1258304 at *3 (citing *Ward*, 2009 WL 2244413).

³⁵ *Avallone*, 14 A.3d at 570 (quoting *Hopson*, 391 A.2d at 189)(emphasis added).

³⁶ *Id.* (quoting *Person–Gaines*, 981 A.2d at 1161).

issues of credibility, or draw our own factual conclusions.”³⁷ Errors of law are reviewed de novo.³⁸

C. Merits of the Argument

Mr. Fasano again repeats the claim that he brought in the Superior Court appeal about Deputy Attorney General Victoria Sweeney (“DAG Sweeney”). Mr. Fasano alleges that the actions of DAG Sweeney prejudiced him and denied him due process based on her roles in the proceedings before the MERB, which “infected” the proceedings with a structural due process violation. Op.Br.28. Again, Mr. Fasano makes unsupported, conclusory statements, and without substantial evidence that “a reasonable mind might accept as adequate to support a conclusion,” the Court must dismiss these claims.³⁹

Mr. Fasano rejects the Superior Court’s reliance on *Blinder*, which 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.’”⁴⁰ Mr. Fasano attempts to draw a distinction here because the *Blinder* case

³⁷ *Id.* (citing *Ward v. Dep’t of Elections*, 2009 WL 2244413, at *1).

³⁸ *Id.*

³⁹ *Stewart v. Connections*, 2008 WL 2700290, at *2 (Del. Super. Ct. July 9, 2008)(citing *Breeding v. Contractors-One, Inc.*, 549 A.2d 1102, 1104 (Del.1998)).

⁴⁰ *Fasano*, 2025 WL 3049041, at *7 (quoting *Blinder, Robinson & Co., Incorporated v. Bruton*, 552 A.2d 466 (Del. 1989)).

addressed a scenario in which one deputy attorney general served as an advocate and then another deputy attorney general counseled the decision-making body in the same case. Op.Br.29-30.

Without more, Mr. Fasano urges the Court to adopt findings in other jurisdictions that address the same situation – one attorney acting in dual roles. Op.Br.30. Those courts stand for the proposition that *anytime* an attorney serves in different roles in the same matter, the proceedings present a de facto finding of bias.⁴¹ Mr. Fasano argues that in that situation the procedure is “susceptible to prejudice and, and therefore, must be prohibited.” Op.Br.31.

But this Court need not rely on cases from other jurisdictions because the analysis in *Blinder* provides sufficient protection for potential due process violations and should be extended to the circumstances here.

Unlike the attorney in *Blinder*, who acted in an adjudicative capacity, DAG Sweeney’s role as counsel to the Board was not as the decision maker. This is a difference without a distinction. The chance of bias when an attorney advises the administrative board is less than if the attorney becomes the fact finder.

Counsel to the Board instructs the adjudicative body on what it can do legally, not what it should do.

Mr. Fasano claims that he was deprived due process and the right to a fair hearing because of DAG Sweeney’s role on behalf of DNREC, and her later role

⁴¹ Op.Br.30 (citations omitted).

as counsel to the MERB more than three and a half years later. To wit, DAG Sweeney filed DNREC's initial Motion to Dismiss on November 24, 2021, which alleged procedural, not substantive, deficiencies.⁴²

Drafting and filing that Motion to Dismiss was the extent of Ms. Sweeney's representation of DNREC. Undersigned counsel argued the motion to dismiss on February 3, 2022, and has continued to represent DNREC in this matter. Later, during the May 15, 2024 MERB hearing, for the first time here, DAG Sweeney served as counsel to the MERB. Mr. Fasano claims that she should have been "categorically precluded from counseling MERB." Op.Br.29.

But there is no evidence that "commingling" DAG Sweeney's prosecutorial and advisory roles here presented a due process violation, because Mr. Fasano has failed to show evidence 'sufficient to overcome the strong presumption' that adjudicators act honestly and with integrity, 'in the absence of specific evidence of bias.'"⁴³

This Court has stated that "courts will not entertain suits seeking an advisory opinion or an adjudication of hypothetical questions."⁴⁴ Without any

⁴² *Fasano v. Del. Dep't of Nat. Res. and Env'tl. Control*, 2024 WL 469638, at *1 (Feb. 2, 2024) ("The Board convened to hear a preliminary Motion to Dismiss filed by DNREC, arguing the timeliness of the filing of the appeal.").

⁴³ *Fasano*, 2025 WL 3049041, at *7 (quoting *Blinder* 552 A.2d 466).

⁴⁴ *Wayne County Employee's Retirement System v. Corti*, 2009 WL 2219260, at *16 (Del. Ch. Ct. July 24, 2009), *aff'd*, 996 A.2d 795 (Del. 2010) (quoting *Rollins Int'l, Inc. v. Int'l Hydronics Corpo.*, 303 A2d 660, 662 (Del. 1973)).

bias evidence, Mr. Fasano's argument is hypothetical and not ripe for adjudication. Therefore, this Court should reject Mr. Fasano's argument that DAG Sweeney's roles in this case denied his due process rights.

CONCLUSION

Appellee, Delaware Department of Natural Resources and Environmental Control, respectfully request that the Court dismiss the appeal of Appellant William Fasano's appeal of the decisions of the Superior Court and the Merit Employee Relations Board that found DNREC had just cause to terminate his employment because of Mr. Fasano's deception during the course of the Fleet car investigation. Moreover, there is no evidence that Deputy Attorney General Victoria Sweeney's dual roles as counsel to DNREC and advisor to the MERB violated Mr. Fasano's due process rights.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: February 12, 2026

CERTIFICATE OF SERVICE

The undersigned certifies that on February 19, 2026, she caused the attached *Appellee's Answering Brief* to be electronically filed with this Court and served via File and ServeXpress to: Kate Butler, Esquire, Kate Butler Law LLC, 1509 Gilpin Avenue, Suite 3, Wilmington, Delaware 19806.

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