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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 REPLY BRIEF

Dated: February 27, 2026

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I. THIS COURT SHOULD NOT UPHOLD MR. FASANO'S TERMINATION ON A RATIONALE THAT WAS NOT PRESENTED TO THE APPOINTING AUTHORITY AND IS CONTRADICTED BY MERB'S FACTUAL FINDINGS.

DNREC's arguments fail on every level. First, DNREC acquiesces that substantial evidence did not support the allegations that Mr. Fasano violated the DTI Acceptable Use Policy, misused his State vehicle in September 2020, and disabled GPS equipment. DNREC has forgone any defense of MERB's erroneous findings to the contrary.

Second, DNREC's characterization that the alleged violation of the DTI Acceptable Use Policy was "peripheral" directly contradicts MERB's express determination that DNREC terminated Mr. Fasano "in light of new evidence" of this very misconduct. *See* DNREC Amend. Ans. Brief at 20; (A230.n33.)

Third, the plain language of DNREC's contemporary writings demonstrates that policy violations — not dishonesty — were the stated bases for termination. The March 12 Letter itself characterized dishonesty only as *compounding* other policy violations, not as an independent ground sufficient to support termination, and DNREC makes no attempt to reconcile how two of its own witnesses testified that this very same dishonesty warranted just a three-day suspension. *See* (A251–252;) (A143 at Tr. 83:6-21;) (A166 at Tr. 175:8-22.)

DNREC asks this Court to uphold a termination decision grounded in an

alleged policy violation that DNREC does not defend, belatedly justified by a rationale that the appointing authority never articulated, and supported by MERB findings that DNREC now contradicts. *Chenery* and basic principles of appellate review prohibit this cascading *post hoc* rationalization. *See S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947).

1. DNREC Tacitly Concedes That MERB Lacked Substantial Evidence To Find That Mr. Fasano Violated The DTI Acceptable Use Policy, Misused His Fleet Vehicle In September 2020, And Disabled GPS Equipment.

Despite being reminded by the Clerk that an appellee must admit or deny with specificity appellant's summary of the argument, paragraph by paragraph, DNREC's corrected Answering Brief fails to properly address Mr. Fasano's first point related to the absence of evidence in the record to support MERB's findings that Mr. Fasano violated the DTI Acceptable Use Policy, misused his fleet vehicle in September 2020, and disabled GPS tracking equipment. *Compare* Open. Brief at 2 ¶ 1 *with* DNREC Amend. Ans. Brief at 5 ¶ 1.

DNREC makes no effort in the body of its brief to justify or to support MERB's findings beyond parroting the March 12 Letter,[1] which as shown in the Opening Brief, was unsupported by the testimony of DNREC's own witnesses and

[1] DNREC did not file an Appendix in this Court, nor did it cite to Mr. Fasano's Appendix. DNREC's citations of "R____" are to the record before the Superior Court. For reference, R173–175 in the Superior Court was to Melville's March 12 Letter, which is located at A250–252 before this Court.

the actual record evidence. *See* DNREC Amend. Ans. Brief at 23; *see also* Open. Brief at 13–17.

By failing to defend MERB's findings, DNREC effectively admits the findings are indefensible. *See Cheffers v. Ideagen Software Inc.*, 2025 WL 2549411, at *8 (D. Del. 2025) (reiterating the consistent rule that where an answering party fails to respond to an issue raised in an opening brief, the answering party concedes the issue).

2. DNREC's Attempt To Recast Its Reasoning Exposes That MERB's Findings Regarding Punishment Also Lacked Substantial Evidence.

DNREC's laser focus on the March 12 Letter not only disregards the role of the appointing authority in state employee discipline but also that of MERB, the agency charged with making findings of fact in disciplinary appeals. *See* 29 *Del. C.* § 5949(a). DNREC has abandoned any defense of the supposed "newly discovered evidence" purportedly found between March 3 and March 12, expressly relied upon by MERB in upholding DNREC's actions.

In its opinion, MERB made explicit factual findings that:

> On March 12, 2021, [DNREC] recommended [Mr. Fasano] for termination for failing to follow the State of Delaware Fleet Services Operating Policies and Procedures **and the DTI Acceptable Use Policy**, and for lying to his supervisors, all based on the January 16th incident and investigation that ensued, **including newly discovered evidence of [Mr. Fasano] misusing the same State-owned vehicle in other instances, and misusing his State-issued computer.**

> The newly discovered evidence included two additional unauthorized uses of the State-owned vehicle in September 2020, as well as the disabling of the GPS on the vehicle from September 13, 2020 through January 7, 2021.

(A226–227) (emphasis added).

Most critically, MERB declined to address the impropriety of escalating discipline from suspension to termination because "the suspension was not imposed, and in fact, it became moot once the Agency decided to terminate the Grievant **in light of new evidence regarding his misconduct.**" (A230.n33) (emphasis added).

DNREC's position on appeal is that this "new evidence" — wholly unsupported in the record — was merely peripheral and that dishonesty alone was the agency's primary reason for termination. DNREC Amend. Ans. Brief at 20. This position directly contradicts MERB's express finding that termination occurred "in light of new evidence." (A230.n33.)

DNREC asks this Court to uphold MERB's decision while simultaneously eschewing the factual findings on which that decision rests, despite the requirement of judicial review that only findings based on substantial evidence may be upheld. *Avallone v. State/Dep't of Health & Soc. Services*, 14 A.3d 566, 570 (Del. 2011). Such an argument also runs afoul of *Chenery* by inviting this Court to substitute *post hoc* reasoning for the demonstrably erroneous reasoning of MERB.

Ultimately, MERB's reliance on "newly discovered evidence" lacked substantial evidence in the record and was prejudicial both to Mr. Fasano's due process argument that DNREC arbitrarily increased his punishment from suspension to termination and to the totality of the circumstances review of the appropriateness of the punishment under Merit Rule 12.1.[2]

3. The March 12 Letter Does Not Exist In A Vacuum.

DNREC's argument leans heavily on the March 12 Letter as it asserts, "The primary basis for Mr. Fasano's termination was his dishonesty," while distancing itself from the charged-but-unproven allegations surrounding computer misuse. *See* DNREC Amend. Ans. Brief at 21–23. But DNREC's argument ignores both the plain language text of its own writings and the testimony before MERB from its own witnesses that explained the agency's contemporaneous reasoning.

i. Contemporary writings show dishonesty was a "compounding" issue and not the "primary" basis for Mr. Fasano's termination.

This Court should view the terms of the March 12 Letter through their plain language meaning and decline DNREC's invitation to apply a weighted score to

[2] 19 Del. Admin. Code 3001-13.1.

each allegation of misconduct based on the number of paragraphs devoted thereto.[3] *See* DNREC Amend. Ans. Brief at 24; *cf. Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006) ("A court must accept and apply the plain meaning of an unambiguous term. . . the 'true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.'").

In pertinent part, the March 12 Letter states:

> Your demonstrated mistruths regarding the use of the State vehicle were only established by obtaining video confirming your use instead of you admitting to the 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.
>
> This conduct is in direct violation with the following State and DNREC policies:
>
> - Fleet Services' Operating Policies and Procedures
> - DTI's Acceptable Use Policy
>
> In conclusion, as a result of the aforementioned conduct and policy violations, and as previously stated, you are being recommended for immediate termination of your position.

(A251–252) (emphasis added).

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[3] DNREC's paragraph-counting exercise, if applied consistently, would compel the opposite conclusion: the Bivens Memorandum and Garvin letter devote zero paragraphs to dishonesty while expressly invoking policy violations, demonstrating policy violations were the sole bases invoked by those with actual authority. *See* (A262–264.)

The plain language meaning of the foregoing is that Mr. Fasano's dishonesty made his violation of the Fleet Services *and* DTI Policies worse, Melville lost confidence in Mr. Fasano due to the totality of the circumstances that included alleged misuse of the State's computer equipment and network, and Mr. Fasano's alleged violation of DTI's Acceptable Use Policy was the second of the two-pillar foundation Melville asserted to justify Mr. Fasano's termination.

Melville did not identify dishonesty as an independent ground sufficient to support termination. The use of the plural "violations" in the phrase "aforementioned conduct and policy violations" demonstrates that Melville was recommending termination based on the totality of the alleged misconduct, as does the characterization of the alleged computer equipment misuse as "very serious."

A reasonable person in the parties' position at the time the March 12 Letter was written would understand that the alleged violation of DTI's Acceptable Use Policy was a material basis for termination, not rhetorical window-dressing for a decision already justified by dishonesty alone. This is especially so considering the March 3 Letter expressly identified dishonesty as a statutory basis for punishment while the March 12 Letter did not. *See* (A245)(citing Delaware Code Title 29, Chapter 58).

The plain language analysis cannot stop at the March 12 Letter because Melville did not have unfettered authority to punish State employees. Director

Bivens, after conducting the constitutionally required pre-decision review under Merit Rule 12.4,[4] memorialized that the termination decision "was based on [Mr. Fasano's] 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.) Director Bivens did not mention dishonesty as a basis or even as a compounding factor while expressly invoking the alleged violation of DTI's Acceptable Use Policy.

Secretary Garvin, the only official with authority to terminate under Merit Rule 19.0,[5] adopted Director Bivens' reasoning. (A264) ("At the conclusion of that meeting, Mr. Bivens upheld the termination action. Therefore, please be advised that in accordance with Merit Rule 12.1, this notice serves as 'just cause' for termination of your employment[.]")[6]

Plain language review of these documents requires the Court to consider what they conspicuously omit. If dishonesty alone justified termination, DNREC would have said so in writing prior to Mr. Fasano's legal challenge, as DNREC explicitly listed dishonesty, and its statutory authority to punish dishonesty, in the

[4] 19 Del. Admin. Code 3001-13.4.

[5] 19 Del. Admin. Code 3001-2.0.

[6] *Chenery* forbids this Court from speculating what Director Bivens and Secretary Garvin would have done if presented with the argument that dishonesty alone justified termination.

March 3 Suspension Letter. *See* (A245.) The absence of any such language coupled with the express reliance on policy violations as the dual foundation for termination compels the conclusion that those violations were not ancillary but essential to the termination decision.

ii. Testimony of DNREC's own witnesses shows that the now-unsupported allegations of computer misuse motivated increased punishment.

Mr. Fasano incorporates by reference his arguments from Part I.C.3 of his Opening Brief regarding: the testimony of Staats and Brady that the three-day suspension reflected in the March 3 Letter subsumed Mr. Fasano's dishonesty; and the testimony of Brady and Melville that a second, separate investigation into Mr. Fasano's other misconduct, including computer misuse, was the basis of the March 12 Letter. *See* Open. Brief at 17–18.

In her testimony about punishment, Staats explained that Mr. Fasano's unauthorized use of a State vehicle warranted suspension of his State driving privileges — not anything more. (A143 at Tr. 80:23–82:3.)[7] Staats further opined that "other things came out" "pertaining to [Mr. Fasano's] misuse of a State computer for personal business" that justified the increase in punishment reflected in the March 12 Letter. (A144 at Tr. 85:1–20.)

The former MERB Chairman highlighted that something between March 3

[7] Brady suggested a verbal reprimand would have been the top level of discipline for ordinary traffic infractions. (A168 at Tr. 9–20.)

and March 12 must have occurred to "up the ante." (A157 at Tr. 139:20;) *see also* (A156 at Tr. 134:2–10) ("[MERB Chairman]: But you got specific information from his Supervisor about misuse of the State computer, that we heard from her, that she felt that she had dealt with on a local level or whatnot. But you decided, because you are in a different vantage point, you decided to take a further look at that. And I take it, since it's in the termination letter, that you or somebody concluded that, that was substantiated.")

Brady clarified that Mr. Fasano's alleged misuse of the State computer "bore relevance to candor or truthfulness such that [she was] trying to establish a pattern. . . And also establish the level of the number of issues or incidents where untruthfulness was a factor." (A168 at Tr. 182:12–183:6.) In other words, Brady saw the alleged misuse of the State computer as relevant both to Mr. Fasano's truthfulness and as an additional issue warranting increased punishment.

Accordingly, the testimony of DNREC's own witnesses shows that alleged computer misuse was an essential factor in the decision to terminate Mr. Fasano's employment and not some peripheral afterthought. The total failure of proof of the alleged DTI computer violation requires reversal of MERB's decision to uphold termination.

II. THIS COURT SHOULD PROHIBIT THE PERSONAL COMMINGLING OF ROLES IN ADMINISTRATIVE LITIGATION.

1. *Blinder* Expressly Reserved The Question Now Before This Court, And Persuasive Authority Applying *Withrow* Prohibits Personal Commingling.

MERB's characterization of the *Blinder* Court's analysis is incorrect. MERB Ans. Brief at 10 (citing *Blinder, Robinson & Co., Inc. v. Bruton*, 552 A.2d 466, 472 (Del. 1989)). As Mr. Fasano's Opening Brief noted, the *Blinder* Court did not address a situation where the same *individual* acts as administrative prosecutor and administrative adjudicator. *Blinder*, 552 A.2d at 473. MERB's reliance on *Withrow v. Larkin*, is similarly unavailing because *Withrow* dealt with the combination of *investigative* and adjudicative functions, not the combination of prosecutorial and adjudicative functions. 421 U.S. 35, 47 (1975).

The persuasive out-of-state authority draws this distinction sharply by setting out the rule that administrative agency counsel who performs as an advocate in a given case is generally precluded from advising a decision-making body in the same case:

> 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. It has been said that exercising both prosecutorial and adjudicatory functions is inherently suspect.
>
> It is the general rule that a combination of prosecutorial and adjudicative functions in the same person is incompatible with due process, such as where the person prosecuting a case on behalf of a public body is also a member of the decision-making body *or advisor to it on the same matter*.

Uhrich & Brown Ltd. P'ship v. Middle Republican Nat. Res. Dist., 315 Neb. 596, 609, 998 N.W.2d 41, 53 (2023) (emphasis added, internal citations omitted); *see Botsko v. Davenport C.R. Comm'n*, 774 N.W.2d 841, 849 (Iowa 2009) ("A more serious problem, however, is posed where the same person within an agency performs both *prosecutorial* and *adjudicative* roles.") (emphasis in original).

The persuasive out-of-state authority largely applied *Withrow*'s presumption of honesty and integrity as to investigative commingling but found that presumption was overcome by the structural error of personal commingling in prosecutorial and adjudicative roles. MERB asks this Court to apply *Withrow* and reach the opposite conclusion of those courts. *See* MERB Ans. Brief at 12. MERB's additional suggestion that a gap in time between an attorney's dual roles may cure the error is unsupported by any authority. *See* MERB Ans. Brief at 14.

The reason that courts across the country have adopted categorical rules against personal role commingling is because they have recognized a basic truth about human psychology and institutional design: an attorney who has advocated for one side in a case cannot later provide neutral advice to the decision-maker in that same case, no matter how conscientious they try to be. It is a professional obligation that becomes a structural liability when roles are commingled. *Botsko*, 774 N.W.2d at 850.

2. MERB's Factual Arguments Mischaracterize The Record And Prove The Need For *Per Se* Disqualification.

Beginning with the transcript, MERB argues that Mr. Fasano has failed to show "specific evidence of bias" in DAG Sweeney's conduct or statements. MERB Ans. Brief at 12–13. MERB emphasizes that "the hearing transcript is completely devoid of any argument, advice, or even comment by DAG Sweeney demonstrating bias." MERB Ans. Brief at 13, 15.

This argument is substantively misleading because MERB's deliberations were not transcribed and the reasoning of the MERB members for why they denied Mr. Fasano's grievance is absent from the transcript. *See* (A219 at Tr. 134:4–135:8.) DAG Sweeney sat and conferred with MERB *off the record*. *See Botsko*, 774 N.W. 2d at 853 (finding such "off-the-record conferences" to be a due process concern). MERB's reasoning appears only in the written opinion authored by DAG Sweeney, which apparently took place well after the deliberation on the date of the hearing. *See id*.[8]

DAG Sweeney herself admitted she was "the hold up" in issuing that decision. (A47.) It strains credulity to suggest that her role during those nine

[8] Categorical disqualification rules exist because litigants are not in a position to discover the inner workings of adjudicative agencies. Mr. Fasano has no access to MERB's internal deliberations, draft opinions, or communications, and requiring Mr. Fasano to produce "specific evidence of bias" regarding what occurred in those communications is an impossible standard.

months was purely ministerial or that she transcribed a fully formed decision the Board had already reached without her input. Written opinions in administrative adjudications require legal analysis, synthesis of evidence, application of precedent, and articulation of reasoning. These are substantive legal tasks, not clerical ones, and that is where DAG Sweeney had influence over the outcome.

3. Mr. Fasano Did Not Waive His Due Process Argument Regarding DAG Sweeney's Personal Commingling.

i. The argument did not need to be presented first to MERB.

Relying on decades' old Delaware law, the Superior Court correctly found that Mr. Fasano had not waived the issue of DAG Sweeney's conflict of interest because "constitutional issues need not be presented to an administrative agency as a prerequisite for their consideration by a reviewing court." *Fasano v. DNREC*, 2025 WL 3049041, at *6 (Del. Super. 2025) (quoting *Down Under, Ltd.*, 576 A.2d 675, 677 (Del. Super. 1989)).

Further, this Court has recently opined that structural errors are subject to *de novo* review on appeal regardless of whether the argument was "raised below." *Thomas v. State*, 293 A.3d 139, 142 (Del. 2023). The personal commingling of roles by the same attorney in the same case is such structural error. *Uhrich*, 315 Neb. at 615; *see also Brice v. State*, 815 A.2d 314, 324 (Del. 2003), *overruled on other grounds by Rauf v. State*, 145 A.3d 430 (Del. 2016) (noting that partiality of the tribunal is a traditional category of structural error).

MERB does not argue that this Court should overrule *Down Under* and sidesteps the *de novo* review of structural errors by recasting DAG Sweeney's dual role as a "procedural irregularity." MERB Ans. Brief at 15.

MERB then quotes from *Rehoboth Art League v. Board of Adjustment of the Town of Henlopen Acres* for the proposition that a party's "failure to make a proper objection of bias or request a recusal when it knew the circumstances for potential bias at the time of the hearing, waives the claim of error." MERB Ans. Brief at 16 (citing 991 A. 2d 1163, 1166 (Del. 2010)).

The circumstances of *Rehoboth Art League* are plainly distinguishable from those of this case. First, the appellant in *Rehoboth Art League* failed to properly present its claim of bias to the Superior Court at the first step of judicial review. *Id*. (noting that appellant "insufficiently presented to the Superior Court an argument questioning the Board's objectivity."). Conversely, Mr. Fasano raised the dual-role personal commingling conflict immediately and sufficiently before the Superior Court. *See* (A6 at ¶ 3;) (A36;) (A116.)

Second, in this case, many of the circumstances and "irregularities" suggesting potential bias manifested *after* the MERB hearing. It was not until Fall-Winter 2024 that questions arose, stemming from DAG Sweeney's promise of imminent compliance with 29 *Del. C.* § 5949(a) followed by cessation of contact that ultimately required the threat of mandamus. (A45–52.) Not all material facts

had occurred by the time of the hearing, so Mr. Fasano could not have waived or forfeited his argument regarding DAG Sweeney's apparent conflict by not raising it therein. *Cf. AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005) ("Waiver is the voluntary and intentional relinquishment of a known right. It implies knowledge of all material facts and an intent to waive[.]") (internal citations omitted).

Finally, the Superior Court released a written opinion addressing the propriety of dual-role personal commingling and extending *Blinder*. That opinion may be cited prospectively. The issue is squarely before this Court to determine the propriety of that decision and whether the law in Delaware is such that the same attorney from DDOJ may serve as legal counsel both to a party participant agency and to the administrative adjudicator in the same case.

ii. Procedural irregularities occasioned by DAG Sweeney's involvement continue before this Court.

The Document Properties metadata element of MERB's Answering Brief identifies DAG Sweeney as its author, notwithstanding its filing under the signature of a different attorney. (AR1.) The same is true of MERB's Certificate of Service. (AR2.) This metadata is viewable by any reader of the filed brief through

standard PDF software and is not a product of technical analysis.[9]

These metadata elements show DAG Sweeney's ongoing involvement, and this continued involvement underscores the structural concern presented here: the erosion of role separation that due process requires in quasi-judicial proceedings. The same attorney who initially advocated on behalf of DNREC against Mr. Fasano, then later advised MERB in its adjudicative capacity and drafted its written decision adverse to Mr. Fasano, now participates in an appellate capacity in arguing against a constitutional right that Mr. Fasano asserts.[10]

The appearance or risk of partiality addressed in authorities such as *Botsko* arises not from ill-will, but from the natural human tendency toward institutional alignment once adversarial positions have been taken. 774 N.W.2d at 850. The persistence of the same attorney's involvement across party advocacy, tribunal advice, and now appellate defense illustrates why a bright-line disqualification rule is necessary and why a finding of waiver is inappropriate.

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[9] MERB's Brief and Certificate of Service both include metadata indicting that the author was "Sweeney, Victoria (DOJ)" while the metadata to MERB's Appendix has no author and the metadata to the Certificate of Compliance shows "marc.niedzielski," an apparent former attorney of DDOJ. While the Certificate of Compliance from Mr. Niedzielski may have been template carryover, the variation across MERB's filing package is consistent with primary authorship of the Brief and Certificate of Service by DAG Sweeney specifically.

[10] DAG Sweeney's relegation to the status of ghostwriter implies acknowledgement that her continued formal representation could have the appearance of impropriety.

CONCLUSION

For the reasons stated herein and in the Opening Brief, 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.