

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

IN THE MATTER OF
JOHN RUTHERFORD
Grievant,

v.
STATE OF DELAWARE
DEPARTMENT OF NATURAL
RESOURCES AND ENVIRONMENTAL
CONTROL
Agency

DOCKET NO. 95-08-50

FINDING OF FACT

CONCLUSION OF LAW

OPINION AND ORDER

COPY

BEFORE Katy K. Woo, Chairperson, Gary Fullman and Dallas Green, Members of the Merit Employee Relations Board, constituting a lawful quorum of the Board pursuant to 29 Del. C. § 5908(a).

APPEARANCES:

For the Grievant: Paul J. Kania, Esquire
Heyden, Kania & O'Neill
1201 King Street
Wilmington, DE 19801-3217

For the Department: Elizabeth D. Maron
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

AND NOW, to-wit, this 26th day of June, 1996, the above-referenced matter having been before the Board for an evidentiary hearing on June 6, 1996, for the reasons set forth hereinafter, the Board makes the following findings and conclusions and enters the following Order:

NATURE OF THE PROCEEDINGS

This is an appeal after an adverse decision at the fourth step in the grievance process under 29 Del. C. Ch. 59 and the Merit Rules. In October, 1994, the grievant, an Environmental Protection Officer with the Department of Natural Resources and Environmental Control ("DNREC"), submitted an application for six (6) weeks sick leave to care for his wife and soon-to-be-born child. His application was initially approved by his supervisor but subsequently reviewed and denied. Upon review, in lieu of total sick leave, the request was approved for one (1) week of sick leave and five (5) weeks of vacation leave.

As a remedy, the grievant sought the conversion to sick time of the time actually taken as vacation time as a result of the reconsideration of his original request for six (6) weeks paid sick leave and the establishment of a Departmental policy on paternity leave.

SUMMARY OF EVIDENCE

Jamie Rutherford was sworn and testified that she is the wife of the grievant and is also a DNREC employee. In October 1994, she was pregnant with her first child who was born on November 12, 1995. She and her husband, the grievant John Rutherford, had no relatives in the area and determined to apply for leave for the grievant so that he could be home after the birth to assist. Ms. Rutherford asked several male employees in her department what they had done when their children were delivered and determined that several of them had applied for and been approved for six (6) weeks paid sick leave. The witness identified three documents marked as Merit Employee Relations Board ("MERB") - Grievant's Exhibits 1A through 1C. The first document is a 1993 doctor's note requesting excuse from work after the birth of a child which the witness testified was given to her as an example of an excuse which was sufficient for the Department to have granted six weeks paid sick leave. The second document purports to be a July, 1995 affidavit of the individual named in the foregoing Doctor's excuse to the effect that he received prior approval to use six (6) weeks of sick leave for paternity leave without any request to provide extenuating circumstances surrounding the birth as a prerequisite for approval. The third document is a copy of an excuse from a physician dated

August 5, 1986 which the witness testified was given to her by a co-worker as having been sufficient to support the granting of six (6) weeks sick leave upon the birth of a child.

Ms. Rutherford testified that she searched out examples of physician's excuses which had been previously approved as sufficient for granting six (6) weeks paid sick leave and spoke to Merrillyn Ramsey at the DNREC Human Resources office in order to "get all of our ducks in a row" to have a similar sick leave request approved for her husband. She acknowledged that the physician excuse examples she provided were from employees in the Air and Waste Management Division where she works and not from the Fish and Wildlife Division where her husband is employed. She further stated that she had not discussed the specific examples with Merrillyn Ramsey, the Department of Human Resources Administrator.

The grievant, John Rutherford, was sworn and testified that prior to the birth of their daughter he had asked his wife to check and see what had been done in the past with respect to paternity leave for husbands. He also called Barbara Sullivan in the Human Resources section and was told that for six (6) weeks sick leave he would need a doctor's excuse.

The grievant identified a two-page document received into evidence without objection as being a copy of the application for sick leave that he had submitted on October 26, 1994 and the attached Doctor's request that he be excused after his wife delivers in order that he may help at home.

The application was submitted for "approximately 225.0" hours of "sick" and "maternity" leave to begin on the date of the birth. The application was signed as approved on October 26, 1994 by Robert Hutchins, the grievant's immediate supervisor.

John Rutherford testified that he was thereafter advised by telephone that Major Harmic had countermanded the approval on the basis that the length of sick leave requested was excessive. Rutherford testified that he spoke to Major Harmic who persisted with the disapproval and stated to the grievant, "If you want to grieve it, have at it!" Approximately one week later, Rutherford was advised that Major Harmic and Merrillyn Ramsey had approved one (1) week of paid sick leave. Rutherford stated that he was left with the impression that any further leave authorizations would have to be granted on a week-to-week basis.

Rutherford testified that his daughter, Samantha, was born on November 12, 1995 after a difficult delivery. Samantha weighed 9 pounds 4 ounces, and Ms. Rutherford suffered medical complications from the delivery of such a large child, and approximately two weeks later, Samantha was diagnosed as having a broken collarbone as a result of the difficult

delivery. As a further complication, approximately two and one half weeks after the delivery, Ms. Rutherford developed shingles. Rutherford testified that he took one week sick leave after the birth of his child and then submitted weekly vacation requests to his immediate supervisor and kept him advised of the medical problems his wife and child were experiencing. The vacation leave requests were approved for a total of 110.5 hours.

Rutherford related that the second step grievance decision dated December 27, 1995 (MERB Grievant's Exhibit #3) noted that the extenuating medical conditions could be considered in the application of sick leave should the grievant resubmit his request. Similarly, DNREC Secretary Tulou, offered the option to sit with Director Manus and Merrilyn Ramsey to redefine the leave request.

Rutherford testified that on June 29, 1995, prior to the fourth step grievance hearing, he filed with the Department a "Resubmission" of his leave application seeking 110.5 hours sick leave and attached thereto a determination by Dr. Robert Wisniewski, in his capacity as Jamie Rutherford's treating physician, that for the medical reasons stated therein, it was medically necessary that John Rutherford be available to attend to Jamie's medical needs and those of their daughter Samantha, for a period of five (5) weeks following Samantha's birth on November 12, 1995. (MERB Grievant's Ex. #5).

According to Rutherford, as a part of the decision of denial of the grievance at the fourth step, the hearing office called a recess to allow Major Harmic and Merrilyn Ramsey to leave the hearing room to call the Director regarding the revised submission. Upon their return, they took the position that the resubmission of the medical justification was too late. The hearing officer rejected consideration of the extenuating circumstances as a basis for allowing sick leave on the basis that the revised justification for sick leave was not submitted in a timely manner, and the grievance at the fourth step was denied.

Rutherford testified that he was never advised of how long he had to resubmit his application of sick leave based on the extenuating medical circumstances and was not aware of time requirements until he saw the information bulletin from the Human Resources Office of DNREC dated June 19, 1995 dealing with the acceptable procedures for having leave approved under the Family Medical Leave Act. This notice (MERB Grievant's Exhibit #6) also noted that upon birth/adoption/serious illness, a father could request up to five (5) days of sick leave, with a supervisor's approval under Merit Rule 6.0310. Beyond five (5) days, the provisions of Merit Rule 6.0311 require a doctor's certification and supervisor's approval. Rutherford

testified that seven (7) days later, on June 26, 1995, he got a doctor's certificate which, on June 29, 1995, in an effort to resolve the pending grievance, he resubmitted to comply with the revised policy. It was this resubmission (MERB Grievant's Ex. #5) which the fourth step hearing officer concluded was not timely. In response to questions from Board members, the grievant stated that he actually took one (1) week of sick leave and 110.5 hours of vacation leave. He stated that he had waited until after he had seen the June 19, 1995 Human Resources Office Information Bulletin (MERB Grievant's Ex. No. 6) to resubmit his documentation for sick leave, because there was no one to advise him. The legal department at DNREC was not available to assist him, and he felt that the matter had gotten "adversarial" in nature.

The Department, at the conclusion of the grievant's presentation, moved to dismiss the grievance on the basis that the grievant had not established his entitlement to sick leave instead of the vacation leave he actually used. The Board unanimously voted to deny the motion having determined that the grievant had established a *prima facie* case that the extenuating medical circumstances surrounding the birth of his daughter were sufficient to qualify him for sick leave under the circumstances presented.

The Department introduced as State's Exhibit #1, the decision by the hearing officer at the fourth step and presented the sworn testimony of Merrilyn Ramsey, the Department of Human Resources Administrator. Ms. Ramsey testified as to the requirements for approval of sick leave requiring documentation in the form of a doctor's certificate for leave in excess of five days. She stated that documentation is examined and approved or disapproved on an individual basis. Ms. Ramsey testified that she had reviewed Rutherford's leave request and that the practice in the Fish and Wildlife division was to grant one (1) week sick leave in the absence of extenuating circumstances. This was what was approved for the grievant. It was not until the January second step grievance proceeding that the Department became aware of the extenuating circumstances but that the resubmission of the application did not occur until June 29, 1995 which she felt was an unreasonable and, from a manager's viewpoint, unworkable length of time. Ms. Ramsey testified that there was no firmly established period of time within which an individual was required to submit proof of extenuating circumstances such as necessary to justify the approval of sick leave. It was required to be accomplished in a reasonable period of time and, in her view, the six (6) months Rutherford waited was not reasonable.

Ms. Ramsey identified a four-page document SLRS (State Labor Relations Services) #35 captioned "Attendance Accountability" as the policy on justification of sick leave usage for family illnesses which was used to determine the appropriate treatment of the Rutherford sick leave request. (State's Exhibit #2).

Merrilyn Ramsey also testified that, as of January 1996, the Department has established more specific time frames for the submission of sick leave documentation. Ms. Ramsey candidly admitted that had the Rutherford resubmission (MERB Grievant's Exhibit No. 5) been more promptly submitted after either the second or third step grievance hearings that it would probably have been approved as requested. She also acknowledged that the Department, in the past, had approved six weeks sick leave for fathers upon the birth of a child and that, at the relevant times in this matter, there was no established time limitation other than a "reasonable period" on the resubmission of proof of extenuating circumstances to qualify for approval of sick leave.

THE LAW

29 Del. C. §5931. Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days. (29 Del. C. 1953, §5931; 55 Del Laws, c. 443, §6, 69 Del. Laws, c. 436, §7.)" Effect of amendments -- 69 Del. Laws, c. 436, effective July 14, 1994, rewrote this section.

CHAPTER 6.0000

Merit Rule No. 6.0310

An employee eligible for sick leave with pay may use such sick leave for absences due to illness, injury, temporary disability, exposure to contagious disease, or due to serious illness of a member of the employee's immediate family requiring the employee's personal attendance. (See definition Immediate Family, Chapter 2). In addition, sick leave can be used for appointments with doctors, dentists or other recognized practitioners,

subject to prior approval of the appointing authority. An employee at his/her option may also use sick leave to provide full regular pay during periods when he/she is paid less than full pay under worker's compensation provisions. Such leave shall be charged in proportion to the difference between worker's compensation pay and full pay. Employees cannot take sick leave with pay in excess of the hours actually accrued, except as provided in 6.0234.

Under exceptional circumstances, the appointing authority may request, in writing, approval from the Director for the use of sick leave by the employee in cases requiring the employee's personal attendance for someone not included in the definition of immediate family.

FINDING OF FACT

The Board, by a preponderance of the evidence presented, finds:

1. That John Rutherford has provided the Department with sufficient medical documentation to justify approval of 110.5 hours of sick leave with pay following the birth of his daughter.
2. That John Rutherford, by his uncontroverted testimony, kept his immediate superior continually advised of the medical complications and the situation resulting from the difficult birth of his daughter on November 12, 1995.
3. That, at all relevant times during this grievance, there was no specific time limitation established for the submission by John Rutherford of medical documentation for approval of the requested sick leave with pay.
4. That the circumstances surrounding this particular grievance, including the information conveyed to the immediate supervisor, the actual pendency of the grievance, and the absence of specific time periods for the submission of the necessary physician's certification for sick leave establish that the grievant's submission on June 29, 1995 was not unreasonable or untimely.
5. That the grievant's requested relief of the establishment of a Departmental Policy for paternity leave is moot.

CONCLUSIONS OF LAW

The Board concludes that John Rutherford has, under the circumstances presented, been improperly denied a right or benefit under to Del. C. § 5938 by the refusal of the Department of Natural Resources and Environmental Control to allow him 110.5 hours paid sick leave following the birth of his daughter on November 12, 1994.

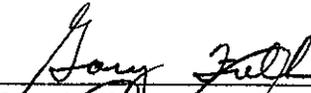
ORDER

The grievance is upheld in that the grievant, in accordance with Merit Rule 6.310 has established his entitlement to 110.5 hours sick leave with pay. The Department shall forthwith correct the leave records of the grievant to reflect 110.5 hours paid sick leave in lieu of the 110.5 hours of vacation time previously approved following the November 12, 1994 birth of grievant's daughter and that all other economic factors and benefits, if any there may be, associated with the correction of said vacation time to sick time with pay be credited to the grievant.

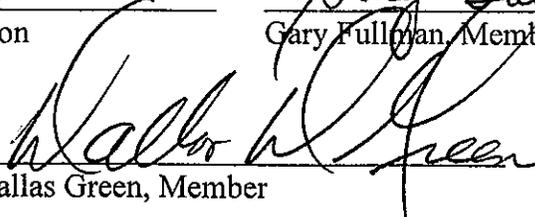
IT IS SO ORDERED



Katy K. Woo, Chairperson



Gary Fullman, Member



Dallas Green, Member

APPEAL RIGHTS

29 Del. C. §5949 provides that the appointing agency shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the appointing agency. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

Mailing Date: _____

6/28/96 

Distribution:

Original: File

Copies: Grievant

Grievant's Representative

Agency

Agency's Representative

Merit Employee Relations Board

Katy K. Woo, Chairperson

Robert Burns, Vice Chairperson

Walter Bowers, Member

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