BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF **BETTY JEAN CANIFORD** **Grievant,**	)	**DOCKET NO. 98-09-165**
v. **STATE OF DELAWARE** **DEPARTMENT OF INSURANCE** **Agency.**	)	**DECISION AND ORDER**

BEFORE Susan L. Parker, Esquire, Chairperson; Robert Burns, Vice-Chairperson; Dallas Green, John F. Schmutz, Esquire, and John W. Pitts, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

PROCEDURAL HISTORY

This matter is before the Merit Employee Relations Board ("MERB" or "Board") pursuant to Merit Rule No. 21.0120 as a timely filed appeal from a fourth step grievance decision adverse to the grievant. The matter was heard by MERB on February 24, 1999 and this is the decision and order of the Board on the basis of the arguments presented. The parties agreed that this matter would proceed as a non-disciplinary and therefore open public case.

DISCUSSION AND FINDINGS

The facts are not contested and both the Department and the appellant agree that this case is to be controlled by the Board's construction of Merit Rule No. 15.4.

Ms. Caniford was employed by the State of Delaware Department of Insurance as an

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Administrative Assistant. She was away from work on sick leave when the Department became aware of the existence of certain apparent financial irregularities involving the appellant and the funds of the Department. On April 13, 1998, Ms. Caniford returned to her workplace and was immediately "suspended without pay". She was eventually terminated from her employment.[1]

Upon her return to work on April 13, 1998 Ms. Caniford was presented with a letter from the Director of Administration, Jacqueline F. Brown, which advised her that the Department had uncovered apparent problems with the way in which Ms. Caniford had handled Department funds and that the Department was conducting an investigation into the matter. This letter from Ms. Brown further advised Ms. Caniford that she was "suspended on a preliminary basis, without pay, until this investigation is complete." The letter also offered Ms. Caniford the right to meet with Ms. Brown and to discuss the suspension by requesting such a meeting, in writing, within 15 days. That same day, April 13, 1998, Ms. Caniford met with two management representatives and discussed the suspension.

After the Department had sufficiently concluded its investigation, the appellant was notified in writing by letter dated April 24, 1998 of the specific allegations against her. In the same letter Ms. Caniford was informed that the Department proposed, on the basis of such charges, to terminate her employment and that she had a right to a pre-decision meeting concerning the proposed termination.

In this appeal the appellant does not contest the imposition of the suspension from work; rather she contests the imposition of the suspension <u>without pay</u> during the period from April 13 through April 24, 1999. The Appellant's contention is that the letter of April 13, 1998 and the

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[1] The present appeal concerns only Ms. Caniford's grievance that she should have been paid between April 13 and April 24, 1998 and does not address other issues of her suspension by the Department nor her eventual termination from employment.

meeting she had that day with management was not sufficient to justify her suspension without pay prior to the time (April 24, 1998) when she was advised of the proposed discipline and of her right to a pre-decision meeting. The parties have agreed that this appeal requires the Board to apply Merit Rule 15.4. to the facts stated above.

Merit Rule No. 15.4 provides:

> 15.4 Employees shall receive written notice of their entitlement to a pre-decision meeting in dismissal, demotion for just cause, fines and suspension cases. If employees desire such a meeting they shall submit a written request for a meeting to their Agency's designated personnel representative within 15 calendar days from the date of the notice. Employees may be suspended without pay during this period provided that a management representative has first reviewed with the employee the basis for the action and provides an opportunity for response. Where employees continued presence in the workplace would jeopardize others' safety, security, or the public confidence, they may be removed immediately from the workplace without loss of pay.

There is no question that Ms. Caniford has certain due process rights with regard to her employment. *Gilbert v. Homar* 520 U.S. 924, 117 S. Ct. 1807 (1997).

Furthermore, due process is a relative concept and not a technical concept unrelated to time, place or circumstances. *Kotler v. Board of Medical Practice*, Del. Super., C.A. No. 92A-03-004, Ridgley, J. (Jan. 19, 1993) (1993 WL 54587).

Under the last sentence of Merit Rule 15.4, an employee may be removed immediately from the workplace where his or her continued presence in the workplace would jeopardize others' safety, security, or the public confidence. However, such a removal from the workplace is expressly without loss of pay. The same Rule provides that an employee may be suspended without pay prior to a pre-decision meeting (which is required by Merit Rule No. 15.3) provided that prior to such suspension without pay two things occur:

1. A management representative has reviewed with the employee the basis for the action and;
2. The employee is provided with an opportunity for response.

These two requirements are clearly an attempt to inject an appropriate level of due process into a proceeding where an employee is to be deprived of his or her pay during such a suspension pending the pre-decision meeting and the finalization of the disciplinary sanction. In this case, there was such a meeting with an opportunity for response on April 13, 1998. The Department takes the position that it was within its authority to at that point suspend Ms. Caniford without pay after following the requirements of Merit Rule No. 15.4 concerning the pre-deprivation meeting.

The question for resolution by the Board is whether or not under Merit Rule No. 15.4 such an "investigatory suspension" without pay can commence before the employee is advised of a proposed disciplinary sanction and his or her right to a pre-decision meeting.

Merit Rule No 15.4 embodies three distinct but related concepts:

First; The Rule provides notice of the entitlement to the pre-decision meeting which is provided for in Rule 15.3 in those cases where the agency is proposing to discipline an employee by dismissal, demotion for just cause, or fines or suspensions. The employee is given a period of 15 days from such notice within which to request such a hearing.

Second; The Rule provides that an employee can be suspended without pay during this period (the period after notice of the proposed disciplinary action) provided that a management representative has first reviewed with the employee the basis for the proposed suspension and provides an opportunity for response.

Third; and finally, the rule articulates the right of the agency to immediately remove an employee from the workplace where the continued presence jeopardizes others' safety, security or

the public confidence. Such removal or "suspension" is without loss of pay. The Department contends it turned such a suspension with pay into a suspension without pay by meeting with the employee and discussing the suspension with her. Ms. Caniford argues that the authority of the Department under Merit Rule No. 15.4 to suspend her without pay is triggered by giving her notice of proposed discipline and offering her a pre-decision hearing, an event which the Department concedes did not occur until April 24, 1998.

The Board concludes that the final sentence of Merit Rule No. 15.4 creates a right of immediate removal from the workplace without a hearing as a precautionary measure. This provision is broad enough to include precautionary removals during an investigation where the continued presence of the employee in the workplace would jeopardize others' safety, security, or the public confidence. Such removal from the workplace is not disciplinary in nature and does not carry with it a loss of pay.

In this case, the Department removed Ms. Caniford from the workplace pending, and in order to facilitate, the completion of the investigation. The Department termed such removal from the workplace as a "suspension on a preliminary basis" and asserts that such suspension was justified by the last sentence of Merit Rule No. 15.4. The Department further asserts that such suspension was converted to a suspension without pay as a non-disciplinary investigative action and was permissible because Ms. Caniford met on April 13, 1998 with two management representatives and discussed the suspension.

In this case, there were two different "actions" taken by the Department both of which are provided for in Merit Rule No. 15.4. The first action was an immediate investigatory removal from the workplace or "suspension" effective on April 13, 1998. The Rule does not utilize the term

"suspension" in describing such a removal from the workplace. Ms. Caniford was advised that she was being "suspended" and was advised in writing by Ms. Brown that she could request a meeting to discuss the suspension within fifteen days.

Thereafter, on April 24, 1998, with the investigation sufficiently complete, the Agency then determined that it had just cause to terminate the Appellant's employment and gave her the notice of Merit Rule 15.3 as required by Merit Rule 15.4. At that point, the second concept embodied in Merit Rule No. 15.4 as discussed above was triggered and Ms. Caniford could thereafter properly be suspended without pay by following the enumerated steps.

The proper construction of Merit Rule No. 15.4 contemplates a balancing of the interest between the employer and the employee. The Rule provides for removals from the workplace both with and without pay. Under the present form of this Merit Rule, there are two things which must be present to impose a non-disciplinary or "investigatory" removal from work or "suspension" on an employee without pay. First, the employee must be advised of the allegations and the proposed sanction and also of his or her right to a pre-decision meeting concerning such allegations. Second, the employee must actually receive a pre-deprivation meeting where a management representative reviews with the employee the basis for the suspension without pay and provides an opportunity for response. The Rule expressly provides that an immediate investigative suspension or removal from the workplace without loss of pay can be imposed by the employer at any time the employer determines that the employees' continued presence in the workplace would jeopardize others' safety, security, or the public confidence. The period after which an employee can be suspended without pay commences under Merit Rule No. 15.4 when the employee is given the notice required by Merit Rule 15.3. During this period for the deprivation of pay to be effective there must also be a pre-

deprivation meeting as required by Merit Rule No. 15.4. The Department admits that for Ms. Caniford, these requirements were not met until April 24, 1998.

For these reasons, upon the vote of Chairman Parker, Vice-Chairman Burns, and Board Members Schmutz and Pitts with Board member Green dissenting, the Board does not agree with the action of the Appointing Authority in determining that the appellant is not entitled to pay for the period between April 13, 1998 and April 24, 1998. Dissenting Board member Green takes the position that an employee can be suspended without pay after a pre-deprivation meeting but prior to the time he or she is provided with notice of the proposed disciplinary action required under Merit Rule No. 15.3.

ORDER

The action of the Department is reversed and the appeal is sustained. Ms. Caniford is to be made whole by the return of her pay for period between April 13, 1998 and April 24, 1998 which has been withheld from her.

BY ORDER OF THE BOARD this 4th day of March, 1999.

Susan L. Parker, Esquire, Chairperson

Robert Burns, Vice-Chairperson

Dallas Green, Member

John F. Schmutz, Esquire, Member

John W. Pitts, Member

APPEAL RIGHTS

29 *Del. C.* § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: March 5, 1999
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