BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
ROBERT S. JAMESON	)	
Appellant,	)	**DOCKET NO. 010-12-249**
	)	
v.	)	
	)	
STATE OF DELAWARE	)	**DECISION AND ORDER**
DEPARTMENT OF HEALTH	)	
AND SOCIAL SERVICES,	)	
Agency.	)	
	)	

BEFORE Dallas Green, John F. Schmutz, Esquire, John W. Pitts, and Paul R. Houck, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* §5908(a). Brenda C. Phillips, the Board Chairperson, was unavoidably absent from the hearing and did not participate in the decision of this matter.

APPEARANCES

For the Grievant:
Jeffrey M. Weiner, Esquire
1332 King Street
Wilmington, DE 19801

For the Agency:
Ilona M. Kirshon, Esquire
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

PROCEDURAL HISTORY

This matter comes before the Merit Employee Relations Board ("MERB" or "Board") on an appeal filed by Robert S. Jameson after a Step 3 grievance decision (see Merit Rule 21.0120) issued by the designee of the Director of the Office of State Personnel dated December 4, 2001. Mr.

COPY

Jameson filed his appeal with the Board on December 13, 2001 seeking the restoration of 40 hours of vacation with which he was charged for his attendance at the National Convention of the Fraternal Order of Police during August 13 - 16, 2001. This is the Decision and Order of the Board after hearing the evidence and arguments presented at the hearing held before the Board on May 2, 2001.

RELEVANT MERIT RULE

MERIT RULE NO. 6.0480

An employee other than casual, temporary, seasonal, or emergency, may be granted leave of absence with pay to serve as a delegate to conventions of unions or employee organizations; or to engage in other similar job-related activities provided the absence of the employee will not interfere with proper operating efficiency of the employing agency. Such leave for any individual full-time employee shall not aggregate more than 37.5 hours or 40 hours when authorized, in any calendar year. The allowable aggregate for part-time employees shall be on a pro-rata basis. Such leave and allowance must be with prior written approval of the appointing authority.

SUMMARY OF THE EVIDENCE

The appealing Grievant, Robert S. Jameson, a Drug Control Enforcement Agent in the Division of Public Health, presented sworn testimony concerning the circumstances surrounding his attendance at the National Conference of the Fraternal Order of Police ("FOP") in Phoenix, Arizona from August 13 through August 16, 2001. Agent Jameson testified that he retired as Captain after 23 years with the New Castle County Police. He has been involved with the FOP for 27 years and is second vice-president for the local FOP and registered lobbyist for that organization. According to Agent Jameson, the state FOP convention and the national FOP convention occur in alternating years. In 1999 he attended the national convention and was granted "union leave" under Merit Rule 6.0480. Agent Jameson described a typical agenda at an FOP conference as consisting of the election of officers, by-law changes, and finally a legislative review.

Agent Jameson testified that in July of 2001, Agent Mike Campbell had asked him if he wanted to attend a seminar in Delaware in August. Agent Jameson replied that he was going to be away during that period attending the national FOP convention and, on July 25, 2001, he applied by e-mail to his immediate acting supervisor Agent Campbell for 40 hours of leave pursuant to Merit Rule 6.0480 to attend the FOP national conference from April 13 - 16, 2001. (Appellant's Exhibit 1-C) The Grievant testified that he heard nothing about his request and assumed it would be approved as previous requests had been so he left on Saturday, April 11th for the conference. When he returned to work on August 23, 2001, the Grievant found an e-mail from Acting Chief Agent Mike Campbell, dated August 13, 2001, which approved the request for leave. On the same day (August 23, 2001) Agent Jameson was notified by David Dryden, Director of the Office of Narcotics and Dangerous Drugs, that the request for leave was denied and that Jameson would have to take the 40 hours as vacation rather than authorized leave. Agent Jameson told Mr. Dryden to put it in writing and he would file a grievance concerning the leave denial. This discussion was followed by an e-mail, dated Thursday, August 23, 2001 from Dryden to Jameson, stating that the leave was not approved prior to its being taken nor was it approvable under time taken as 'other' for the purpose of a national FOP meeting. The e-mail required Agent Jameson to determine whether he wished to take the time as vacation or be docked the 40 hours (Appellant's Exhibit 1-E).

Agent Jameson identified an e-mail dated July 16, 2001 from William Knotts, the Chief Agent which noted his impending vacation and which directed that all vacation and leave requests were to be submitted to Acting Chief Agent Mike Campbell during Knotts' absence (Appellant's Exhibit 1-B). The e-mail also noted that Agent Campbell would have direct access to Knotts' computer during the period. According to Agent Jameson that is why he sent his leave request for the period

beginning at 7:00 a.m. on August 13, 2001 and ending on August 16, 2001 at 5:00 p.m to William Knotts' computer address. Agent Jameson testified that no one asked him for any further information concerning his request and that he had been with David Dryden during the office move which had occurred prior to August 13, 2001. Neither he nor David Dryden spoke about his leave request. Agent Jameson indicated that he had intended to go to the FOP conference whether he was given leave or whether he had to take vacation.

During cross-examination, Agent Jameson testified that after he attended the 1999 FOP National Convention in Mobile, Alabama with approved leave, he and David Dryden had discussed the appropriateness of attendance at such a conference as "union leave" where the individual attending the conference was not affiliated with an organization which was the recognized bargaining agent.

Agent Jameson indicated that he felt that his attendance was authorized under those circumstances under the Merit Rules and Mr. Dryden did not agree. Agent Jameson identified State's Exhibit 1 as a copy of the e-mail from David Dryden sent on September 2, 1999 to office supervisors after the Mobile, Alabama FOP conference setting forth what purported to be "current office policy" for state time and leave time. This e-mail provided, "Authorization to use state time for any outside activities such as training, conventions, etc. must have my approval prior to the absense (sic) and/or event. Sick, compensatory, and vacation time should be submitted to you as an immediate supervisor. This should then be forwarded to myself for my approval. I will forward the approved leave slip to Grace, the immediate supervisor, and the employee". Agent Jameson admitted that he was aware of this direction from Director Dryden and had been the recipient to whom this e-mail message had been forwarded. Agent Jameson testified that the FOP had picked up the expenses for his attendance at

the conference in Phoenix since he was a convention delegate. He also acknowledged that, at that time, the FOP did not represent the law enforcement agents in the Department for collective bargaining.

David Dryden, after being sworn, testified that he is employed by the State of Delaware in the capacity of Drug Control Administrator (Director) in the Office of Narcotics and Dangerous Drugs. Mr. Dryden testified that there are five Drug Control Enforcement Officers working under the supervision of a Chief Agent who reports to him. Agent Jameson is one of those agents. Mr. Dryden stated that the law enforcement officers in his office belong to FOP Lodge #3 and, while the FOP is not the bargaining agent for these officers, there was an election later in the day which may change that situation. Mr. Dryden told the Board that he was a member of the FOP until approximately one month ago. He has never attended the FOP national conference but has attended the state conference as a delegate and also as the Parliamentarian. He stated that he and his boss believed that agents should go to the state conferences because it was work related but that same belief did not apply to attendance at national conferences. After the national FOP Conference in 1999, according to Mr. Dryden, he was directed by his superiors to clarify and communicate the limitations on the use of state leave and vacation time which he did by his e-mail of September 2, 1999 (State's Exhibit 1). Mr. Dryden stated that he was also directed to speak directly to Agent Jameson and others about this situation and did so. In addition, Mr. Dryden stated that he sent another e-mail to Agent Jameson in January of 2000 stating that all vacation approvals were to come though the Chief Agent to him (Dryden) and receive his approval before the vacation was taken. Mr. Dryden testified that approval for attendance at FOP conventions both state and national would be based upon a determination of whether or not attendance at the convention was considered to be job related.

Director Dryden testified that he received Jameson's request for vacation after the fact on the Tuesday following the Saturday when Agent Jameson had departed for the Phoenix FOP National Convention. Director Dryden noted that Agent Campbell had improperly "approved" the vacation request at 3:18 p.m. on August 13th and forwarded the message on to David Dryden at 3:19 p.m. Mr. Dryden stated that Agent Jameson's vacation request did not receive his prior written approval as required by the Merit Rules and that Agent Campbell, who was not disciplined for improperly approving the vacation request, perhaps should have been.

FINDINGS OF FACT

There is no material dispute concerning the factual situation giving rise to this grievance. The nature of the dispute surrounds Agent Jameson's and Director Dryden's differing views of the propriety of attending national conferences with authorization as "union leave" and the technical absence of prior written approval of Agent Jameson's leave request.

Agent Jameson made a request for 40 hours of leave time as "union activity" under Merit Rule 6.0480[1]. He submitted that request to his immediate supervisor as he had been specifically instructed to do by Director Dryden. Agent Campbell, the immediate supervisor, did not forward that request to Director Dryden in a timely manner as he was required to do. Rather, without authority he approved the request when what he should have done was to send it forward to Director Dryden for approval or disapproval. Agent Jameson was not aware of the written (e-mail) approval until he returned from the conference. The Board also finds that Agent Jameson knew of Mr. Dryden's

[1]Agent Jameson's schedule, as shown on his leave request, provides for work between 7:00 a.m. and 5:00 p.m. He works Monday through Thursday for a 40 hour work week.

position that his attendance at the FOP national convention did not qualify for treatment as approved leave because of Mr. Jameson's status as a union delegate to the conference and Mr. Dryden's position that work related justification was necessary for such attendance to be treated as other than personal vacation. Indeed, Agent Jameson left for the conference not knowing whether his request had been approved or disapproved and testified that he would have gone whether the time was treated as authorized leave or vacation. After his experience with this issue when it was raised after the 1999 conference, Mr. Jameson was on notice that any approval of such leave as "union leave" under Merit Rule 6.0480 was not assured and he was aware that he needed Director Dryden's prior written approval. Mr. Dryden, as soon as he found out about the request by Agent Jameson for the treatment of his attendance at the FOP National Conference, conveyed his disapproval both orally and in writing to Mr. Jameson, and noted the absence of the prior written approval from the appointing authority (Mr. Dryden) as required by Merit Rule 6.0480.

DISCUSSION

The issue presented by this grievance appeal requires the application of Merit Rule No. 6.0480 to the facts and circumstances surrounding Mr. Jameson's attendance at the FOP National Convention in April of 2001. The Merit Rule at issue (6.0480) is permissive by its terms and does not create any vested right in an employee for a leave of absence to serve as a delegate to conventions of unions or employee organizations. This Merit Rule clearly establishes annual limitations for any such activity when approved, and requires prior written approval of the appointing authority. After his experience with this issue when it was raised after the 1999 conference, Mr. Jameson was certainly on notice that any approval of such leave as "union leave" under Merit Rule 6.0480 was not assured

and he was aware that he needed Director Dryden's prior written approval. Normally such prior approval would reflect a determination by the appointing authority that there was sufficient job related content to justify treating the absence as "work related" and/or that attendance was properly in connection with service as a delegate to either a union convention or employee organization. In either event there would be a determination that the absence of the employee would not interfere with the proper operating efficiency of the employing agency. That determinative process was short-circuited in this case through no fault of the employee who submitted a timely request for approval through his chain of command as he was instructed to do. His request was improperly processed and approval, albeit unauthorized, was granted by his immediate supervisor. An employee who follows instructions in submitting a timely request for leave has a legitimate expectation that his or her request will be approved or denied in a timely manner. The applicable Merit Rule clearly provides that it is necessary for the employee to have prior written approval for such absences. However, inasmuch as Agent Jameson followed the instructions from Director Dryden in submitting his vacation request, and through no fault of the employee the request was not timely processed, the Board unanimously concludes that the Grievant has established that he should not be required to take the entire 40 hours as vacation time. The approval for Mr. Jameson's leave came at approximately 3:00 p.m. on August 13, 2001. Agent Jameson was absent on the following three 10 hour work days after the approval by Acting Chief Agent Campbell had been given. Therefore, the Board unanimously determines that 32 hours of the requested 40 hours should, under these circumstances, be treated as authorized absence and not a personal leave or vacation.

The Board did not accept the invitation to opine on question of whether Merit Rule 6.0480 is limited to delegates to conventions of unions or employee organizations which are designated as

the collective bargaining unit. Such a determination is not required for the resolution of this grievance appeal. However, it is noted that the Step 3 grievance decision by the designee of the Director of the Office of State Personnel concluded: "This Merit Rule does not apply only to employees covered by a collective bargaining agreement." (Appellant's Exhibit 1-A, at 3.)

ORDER

For the reasons stated, the grievance is upheld in part. Agent Jameson's leave records are to be adjusted to reflect the reinstatement of 32 hours of annual leave. References to this grievance in any electronic grievance tracking system such as the Payroll Human Resources System Technology ("PHRST") system shall reflect the reinstatement of 32 hours of annual leave.

IT IS SO ORDERED.

John F. Schmutz, Member

Dallas Green, Member

Paul R. Houck, 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: June 21, 2002

Distribution:
Original:File
Copies: Grievant
Grievant's Representative
Agency's Representative
Board Counsel

E:\TISCHER\MERB\JAMESON.F&OE:\tischer\MERB\JAMESON.F&O