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BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

IN THE MATTER OF: PHYLLIS J. HELPER, Grievant, v. DEPARTMENT OF CORRECTION, Agency.	)))))))))	DOCKET NO. 07-02-381 DECISION ON MOTION TO DISMISS

BEFORE Brenda C. Phillips, Chairperson, Paul R. Houck, Joseph D. Dillon, and Martha Austin, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES:

Phyllis J. Helper, *pro se*

For the Agency:
Kevin R. Slattery, Esquire
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

BACKGROUND

In January 2006, a new statute became effective concerning Delaware's Disability Insurance Program ("Program"), which affords short-term disability for six months, and long term disability thereafter provided the insurance company accepts the employee into the program. 29 *Del.C.* § 5251. The effect of the statute is that once short-term disability terminates and an employee is not returned to work, employment status is terminated as a matter of statute. 29 *Del.C.* § 5253(c).

Ms. Helper was employed as a Correctional Officer at the Delaware Correctional Center in Smyrna, Delaware and a member of the Correctional Officers Association of Delaware ("COAD"). In February or March 2006, Ms. Helper went out of work on short-term disability following the tragic loss of her daughter. During this period of short-term disability, the Agency

held open Ms. Helper's position for her. Ms. Helper, to her credit, sought to return to work approximately one month before short-term disability concluded; she was not interested in pursuing long term disability.

In July 2006, Ms. Helper attempted to return to work with the Agency. At that time, Ms. Helper's psychologist released her to return to work subject to certain conditions being in place at work. According to the psychologist's letter dated July 27, 2006, the recommended conditions were that she, prior to her return to work: (1) work only during the week so she could be home on weekends to assist her children, and (2) be transferred to another facility in Dover because of flashbacks of her daughter driving her to the Delaware Correctional Center. The psychologist concluded that once these changes were effected, Ms. Helper would be able to return to full-time work.

Because of these conditions, the Agency attempted to find another institution where Ms. Helper could work. This was difficult because there were no weekday-only positions available in the only-Dover correctional institution, Morris Correctional Institution, and further because there were no open positions available at that facility.

On or about August 29, 2006, Ms. Helper's employment was terminated as a matter of statute, under 29 *Del.C.* § 5253(c).

In September 2006, Ms. Helper's psychologist modified her conditions to allow the possibility of another position State-wide. The Agency believed that because of Ms. Helper's circumstances, she would probably work better at a smaller institution, Webb, which is a 100-bed facility near Kirkwood Highway. The parties dispute as to whether a position at Webb was ever offered to or declined by Ms. Helper. Ms. Helper interviewed for a position at Young Correctional Facility, but was not hired. Following this, the Agency offered Ms. Helper her old position at the Delaware Correctional Center, however, the psychologist did not modify Ms. Helper's return to work conditions that would allow this to occur. The Agency also explored a position at the Women's Correctional Institution.

No evidence was presented to refute the psychologist's conditions concerning Ms. Helper's ability to return to work.

In October 2006, Ms. Helper began sending letters to various personnel requesting resolution of her situation. She also filed an appeal to the Merit Employee Relations Board ("Board") on February 7, 2007.

A pre-arbitration meeting was scheduled for February 26, 2007 between the Agency, COAD representatives, and Ms. Helper, to explore possible options and resolutions. Members of the Agency and COAD attended this meeting; Ms. Helper stated she was not notified or aware of the meeting. Without her presence, the matter was considered concluded at that time.

By Motion dated April 9, 2007, the Agency sought to have the Board dismiss Ms. Helper's appeal, on the basis that the Board lacked jurisdiction to hear the appeal. The Agency presented several arguments: (1) because this matter involves a union member subject to a collective bargaining agreement, the bargaining agreement controls; (2) the appeal was untimely because it was filed six months following the effective termination of employment by statute and therefore, the Board did not have jurisdiction to hear the appeal; and (3) alternatively, the Merit Rules do not address terminations as a result of disability; because such provisions do not exist under the Merit Rules, the Disability Insurance Program applies, which removes this case out of the merit system.

First, the Agency argued the collective bargaining agreement concerns negotiable items, including disciplinary action, which is a measure that only involves warnings, reprimands, suspensions, demotions or dismissals. The agreement provides for a grievance procedure that includes a pre-arbitration meeting followed by a right to invoke arbitration; it does not provide for a hearing before this Board. Second, the appeal was filed approximately six months following the effective termination by statute and therefore, the Board did not have jurisdiction to hear this matter. Alternatively, the Agency argued the Merit Rules do not address terminations as a result of disability. Because such provisions do not exist under the Merit Rules, the Disability Insurance statute must apply, which takes this case outside of the merit system. The Agency argued the language in the collective bargaining agreement is similar to the Merit Rules and therefore, if an issue is not covered by the bargaining agreement, it is not covered by the Merit Rules. If a matter is not a disciplinary or performance issue, then it is not covered by either a bargaining agreement or the Merit Rules. Rather, if covered, it would be addressed under the

Disability Insurance Program. That Program provides that once an employee has been determined to have the ability to return to work, merit employees may be placed in any vacant merit position for which they qualify. The Agency argued this statutory provision did not apply because Ms. Helper was never released to return to work.

Ms. Helper filed her written response dated April 9, 2007. Ms. Helper appeared at the argument *pro se* and after being advised of her right to be represented by legal counsel, presented argument on her own behalf. She argued: (1) the State Benefits Committee is the committee who decides return to work eligibility; (2) the matter is not covered by the collective bargaining agreement because that agreement does not cover disability separation, but covers separation or dismissal due to just cause; and (3) according to the disability statute, once she has been deemed eligible to return to work, the Office of Management and Budget (OMB) is supposed to place her in a position.

Ms. Helper argued that she was informed by OMB that because she was part of a union, she would have to follow her collective bargaining agreement. She contacted her union representative, who said he was working on her matter. She filed for a Step 2 hearing under the agreement. She submitted correspondence to the Commissioner of the Department of Correction and OMB, but received no replies. She argued she would not have declined an offered position. She did not receive any notice about interviewing for a position at the Women's Correctional Institution or any notice about the February 26th meeting. Ms. Helper argued her separation had nothing to do with discipline, as there was no counseling, warning, reprimand, suspension or demotion. She was not terminated for just cause. She argued that her matter should have been presented before the State Employee Benefits Committee, but because that did not happen, she believed it should be before this Board.

The matter was presented to the Board by oral argument on June 27, 2007. This is the decision of the Board on the Motion to Dismiss.

DISCUSSION

Ms. Helper argued that her separation from employment did not involve discipline and just cause, and therefore, the collective bargaining agreement did not apply to this matter. Ms.

Helper's Response to the Agency's Motion to Dismiss cited to the provisions of 29 *Del.C.* § 5257, argued that a pre-decision hearing under the Merit Rules should have been held prior to her dismissal, and requested reinstatement with the Agency and back pay, or job placement if her former position had been abolished.

The issue for the Board to decide is whether Ms. Helper's termination from employment under the State Disability Insurance Program falls within the purview of the Merit System and Merit Rules.

The Board has authority to grant a merit employee relief under a misapplication of any provision of Chapter 59, Title 29, *Delaware Code* or the Merit Rules. 29 *Del.C.* § 5931. The general purpose of Chapter 59 is to establish for the State a system of personnel administration based on merit principles and methods governing the employees of the State in classified service consistent with the right of public employees to organize under Chapter 13, Title 19. 29 *Del.C.* § 5902. The Merit Rules are to provide, *inter alia*, for a position classification plan, uniform pay plan, competitive exams, promotions, eligibility lists, rejection for unfitness, appointment of highest ranking candidates, probation, leaves and discharge for cause. 29 *Del.C.* § 5915 *et seq.*

Delaware's Disability Insurance Program, 29 *Del.C.* Ch. 52A, sets forth the requirements and process concerning the State's short-term disability and long-term disability insurance benefits for eligible employees who elect to participate in that Program. 29 *Del.C.* § 5251(e). The State Employee Benefits Committee has various authority, duties and functions under Chapter 52A, including the power to control and manage the Program, and to adopt rules and regulations for the general administration of the Program. 29 *Del.C.* § 5256. The State Employee Benefits Committee also has the authority to determine an employee's ability to return to employment. 29 *Del.C.* § 5257.[1] A right of appeal concerning the determination of an employee's eligibility includes the involvement of that Committee and the Statewide Benefits Human Resources Administrator of the Office of Management and Budget. 29 *Del.C.* § 5258.

Applying principles of statutory construction, the General Assembly is presumed to have known of existing law when it enacted Chapter 52A. *See, e.g., Giuricich v. Emtrol Corp.*, 449

[1] Ms. Helper argued that her case and her ability to return to work should have been presented before the State Employee Benefits Committee.

A.2d 232, 239, n. 13 (Del. 1982) ("A Legislature is presumed to be aware of existing law."); *DuPont v. DuPont*, 87 A.2d 394, 399 (Del. 1952) ("Laws are assumed to be cumulative, not destructive of other laws."). Given the disability insurance statute and the absence of modification to Chapter 13, Title 19, or Chapter 59, Title 29, there is no statutory provision, expressed or implied, that would allow this Board to infer an intent by the General Assembly that issues concerning disability or termination of employment under the Disability Insurance Program are matters covered by or subject to the Merit Rules or this Board's authority. The Board's authority, duties and functions are as set forth in the statute at Chapter 59, Title 29, and the Board's ability to decide on matters is limited to that statutory authority and functions.

Further, Section 5257 involves the State Employee Benefits Committee and Statewide Benefits Administrator with OMB, as noted above. This Board does not have any oversight authority or powers concerning that Committee or OMB. 29 *Del.C.* § 5931.

Under the circumstances, the Board finds this matter, a dismissal under the State's Disability Insurance Program, does not fall under the Merit Rules as a grievance[2] or within the jurisdiction of the Board. 29 *Del.C.* § 5931.

However, the Board believes the collective bargaining process should have been followed in this case to afford the opportunity for hearing and, if applicable, arbitration. Also, based upon the evidence presented at the legal hearing, it appeared the Agency and perhaps other State entities did not respond to Ms. Helper's letters or requests for assistance. At a minimum, the State should respond to letters or requests for assistance from its own employees. Further, the Board observes that Ms. Helper may have other avenues of redress or relief, to pursue, concerning her dismissal from employment.

[2] Merit Rule No. 19.0 defines a "grievance" as a "Merit employee's claim that these Rules or the Merit system statute has been violated. A grievance may not deal with the content of the Rules or the Merit system statute."

ORDER

The Motion to Dismiss the above-captioned matter, having been considered by the Board, for the reasons set forth above, is hereby GRANTED. THE APPEAL IS DISMISSED.

BY ORDER OF THE BOARD:

Brenda C. Phillips, Chairperson

Joseph D. Dillon, Member

Paul R. Houck, Member

Martha Austin, Member

APPEAL RIGHTS

29 *Del. C.* § 5949 provides that the grievant 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 grievant. 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.

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: Aug. 30, 2007

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