RECEIVED
SEP 29 2008
CIVIL DIVISION
DEPARTMENT OF JUSTICE
DOVER, DELAWARE
COPY

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

RONALD S. RINGER,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET Nos. 06-06-360**
v.	)	**06-06-361**
	)	
DEPARTMENT OF TRANSPORTATION,	)	**DECISION AND ORDER**
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board ("the Board") on August 28, 2008 at 9:00 a.m. at the Margaret M. O'Neill Building, Suite 213, 410 Federal Street, Dover, DE 19901.

BEFORE Brenda J. Phillips, Chair, John F. Schmutz, and Paul Houck, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman, Esquire
Deputy Attorney General
Legal Counsel to the Board

Jean Lee Turner
Administrative Assistant to the Board

Frederick H. Schranck, Esquire
Deputy Attorney General
on behalf of the Department of Transportation

BRIEF SUMMARY OF THE EVIDENCE

The grievant, Ronald S. Ringer ("Ringer"), did not appear for the hearing. The Board waited twenty minutes after the appointed hour (9:00 a.m.), and then heard testimony from its Administrative Assistant, Jean Lee Turner, about her efforts to notify Ringer of the hearing.

FINDINGS OF FACT

Ms. Turner testified that she sent notice of the time and place of the hearing to Ringer by first-class U.S. mail on June 20, 2008 to his home address (19 Bryants Corner Road, Hartley, DE 19953). As the hearing date approached, Mr. Turner called Ringer two times at work leaving voice-mails asking him to call her back, but he never did. Ms. Turner testified that on August 21, 2008, she sent an e-mail to Ringer at work asking him if he was going to appear for the hearing. In that e-mail, Ms. Turner reminded Ringer that the Board had not received any request from him to issue subpoenas and that the Board's rules required him to file a summary of witness testimony at least five days before the hearing.

Ms. Turner testified that on August 22, 2008 she sent a certified letter to Ringer's home address (which she confirmed with his employer, the Department of Transportation) with a return receipt requested. In that certified letter, Ms. Turner reminded Ringer of the witness summary requirement and enclosed copies of the hearing notice mailed on June 20, 2008 and Ms. Turner's e-mail to Ringer of August 21, 2008. By the date of the hearing, Ms. Turner had not received the return receipt for the certified letter.

Ms. Turner testified this was the second time Ringer had not appeared for a hearing before the Board. Ringer failed to appear for a hearing on the employer's motion to quash subpoenas

on November 15, 2007.

CONCLUSIONS OF LAW

The Delaware courts have held that when a party appeals to an administrative board but does not appear for the hearing, the board may dismiss the appeal for failure to prosecute. *See Han v. Red Lobster*, Civ.A.No. 03A-04-015, 2004 WL 1427008, at p.1 (Del. Super., June 25, 2004) (Silverman, J.) ("Han failed to prosecute his appeal before the [Unemployment Insurance Appeal Board] and the Board's dismissal, therefore, was justified."); *Salgado v. Chi-Chi's USA, Inc.*, Civ.A.No. 94A-03-020, 1995 WL 339075, at p.1 (Del. Super., Mar. 14, 1995) (Bifferato, J.) ("the appeal was dismissed for failure to prosecute since the claimant failed to appear").

In *Robinson v. Visiting Nurse Association*, Civ.A.No. 99A-10-003, 2000 WL 140785 (Del. Super., Jan. 28, 2000) (Quillen, J.), the Unemployment Insurance Appeal Board dismissed the appeal of a claimant because she did not appear for the appeal hearing. The Superior Court affirmed the dismissal. "While the Court may exhibit some degree of leniency to a *pro se* litigant, it cannot excuse a litigant for failing to appear without explanation." 2000 WL 140785, at p.2. "Here, the Board acted within its authority in dismissing the Claimant's appeal, especially considering the fact that Robinson had been granted two continuances of her appeal at her request, and there was no allegation that she did not receive notice of the appeal." *Id.*

The Board concludes as a matter of law that Ringer has abandoned his appeal by failing to appear for the hearings on November 15, 2007 and August 28, 2008 without any explanation. The record shows that Ringer had ample notice of the August 28, 2008 hearing by mail, telephone, and e-mail. Dismissal is justified by his failure to prosecute his appeal.

DECISION AND ORDER

It is this 24th day of September, 2008, by a unanimous vote of 3-0, the Decision and Order of the Board that the Grievant's appeal is dismissed with prejudice.

Brenda J. Phillips
Chair

John F. Schmutz
Member

Paul Houck
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 on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee's 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: September 25, 2008

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

I:\TUPMAN\FILES\MERB.ringer.DelDot.wpd