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BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

BRUCE E. BENSON, Employee/Grievant, v. DELAWARE DEPARTMENT OF TRANSPORTATION, Employer/Respondent.	))))))))))	**DOCKET No. 07-12-407** **DECISION AND ORDER**

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board ("the Board") at 10:00 a.m. on May 28, 2008 at the Margaret M. O'Neill Building, 410 Federal Street, Suite 213, Dover, DE 19901.

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

APPEARANCES

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

Jean Lee Turner
Administrative Assistant to the Board

Roy S. Shiels, Esquire
on behalf of Bruce E. Benson

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Delaware
Department of Transportation

SUMMARY OF THE EVIDENCE

The Board did not hear testimony from any witnesses only legal arguments by counsel on the motion by the Delaware Department of Transportation ("DelDot") to dismiss the appeal of Bruce E. Benson ("Benson").

DelDot attached five exhibits to its motion to dismiss: Letter dated July 19, 2007 from Libby Craven to Benson (Exh. A); Letter dated June 1, 2007 from Lisa M. Battaglia to Benson (Exh. B); Letter dated August 3, 2007 from Ms. Battaglia to Benson (Exh. C); Benson's appeal to the Board (Exh. D); and Decision on Motion To Dismiss, *Helper v. Delaware Department of Correction*, MERB No. 07-02-381 (Aug. 30, 2007).

FINDINGS OF FACT

Benson is a former employee of the Division of Motor Vehicles. He started receiving short-term disability benefits on January 12, 2007 for a work-related injury.

By letter dated June 1, 2007, The Hartford notified Benson that "your Short-Term Disability (STD) benefits will end on July 10, 2007. Your employer has advised that you also have Long-Term Disability (LTD) coverage and may be eligible for benefits under that Policy. If you and your doctor anticipate that your condition will continue to prevent you from returning to work after July 10, 2007, you should submit an application for LTD benefits at this time."

By certified letter dated July 19, 2007, DelDot advised Benson "that upon the exhaustion of the maximum short-term disability (STD) benefit period, you shall no longer be an employee of the State or any of its political subdivisions, [Ref. 29 Del. C. §5253c(5)]. Once long-term disability (LTD) benefits commence you shall be eligible for a payoff of accrued unused annual

and sick leave based on the rules in place by the employer, [Ref. Merit Rules 5.2.8 and 5.3.4.1]."

According to the letter attached to Benson's appeal to the Board, "On July 23, 2007 I received a letter from Human Resource that indicated that as of July 10, 2007 my employment with the State of Delaware was terminated." The day he received the letter, Benson called the Human Resource office at DelDot and Cindy Derrickson told him that under the "State Code I had exhausted my STD benefits and accordingly I was terminated."

By letter dated August 3, 2007, The Hartford notified Benson "that we have approved your claim for Long Term Disability (LTD) benefits."

CONCLUSIONS OF LAW

A. Timeliness

Merit Rule 12.9 provides: "Employees who have been dismissed, demoted or suspended may file an appeal directly with the Director or the MERB within 30 days of the action." *See* 29 *Del. C.* §5949(a) ("Within 30 days after any such dismissal, demotion or suspension, an employee may appeal to the Board for review thereof."). Benson appealed his termination directly to the Board.

Under the Merit system, a grievant's obligation to file a timely appeal "is jurisdictional." *Cunningham v. Delaware Department of Health and Social Services*, Civ.A.No. 95A-10-003, 1996 WL 190757, at p.2 (Del. Super., Mar. 27, 1996) (Ridgely, Pres. J.). Where the deadline has "passed, the Board had no jurisdiction to hear Appellant's grievance." *Id.*

In the "Date" section of the Merit Appeal Form, Benson wrote "September 5, 2007." [1] Benson did not offer any evidence as to the date he filed his appeal with the Board (the Merit Appeal Form is not file-stamped). The only evidence as to when the Board received his appeal is a fax cover sheet dated December 14, 2007 from Benson to the Board's Administrator "Re: Resubmit Merit Appeal."

In the context of a motion to dismiss, the Board will draw all factual inferences in favor of the non-moving party, so the Board will assume that Benson filed his direct appeal to the Board on September 5, 2007, the earliest possible date in the record. Even using that date, the Board concludes as a matter of law that Benson did not timely appeal to the Board within thirty days as required by Merit Rule 12.9.

In the letter attached to his Merit Appeal Form, Benson acknowledged that he received a letter from DelDot on July 23, 2007 which " indicated that as of July 10, 2007 my employment with the State of Delaware was terminated." He further acknowledged in his letter that he called the DelDot Human Resource Office on July 23, 2007 and learned "I had exhausted my STD benefits and accordingly I was terminated."

The record shows that Benson knew at least by July 23, 2007 that he was terminated because of his disability yet he did not file a direct appeal to the Board until (at the earliest) September 5, 2007, forty-four days later. Merit Rule 12.9 required Benson to file his appeal within thirty days.

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[1] The Board notes that Benson attached to his Merit Appeal Form a letter dated September 7, 2007 suggesting that he filed the appeal sometime after September 5, 2007.

The Board concludes as a matter of law that Benson did not timely appeal to the Board from his disability termination and the Board does not have jurisdiction to hear his appeal.

B. Pre-Termination Hearing

In its motion to dismiss, DelDot argued in the alternative that the Board does not have jurisdiction to hear an appeal of a disability termination because such jurisdiction is vested exclusively with the State Employee Benefits Committee under the Disability Insurance Program, 29 *Del. C.* Ch. 52A. *See Helper v. Delaware Department of Correction*, MERB No. 07-02-381 (Aug. 30, 2007).

Under the Disability Insurance Program, the State Employee Benefits Committee has authority to determine "in its sole discretion" whether an employee is "mentally or physically unable to perform the essential functions of the employee's position as defined in rules and regulations adopted by the Committee, with reasonable accommodation as required by federal law." 29 *Del. C.* §5253(b)(1). The Committee "may adopt rules and regulations regarding proper administration of the disability program. Such rules shall include, but not be limited to standards relating to the determination of a disability," the "requirements for medical or psychological evaluations," "appeal procedures," and "the ability to return to employment." *Id.* §§ 5255, 5257.

The Disability Insurance Program is a comprehensive remedial scheme governing disability benefits to participating employees. Absent a clear statutory provision to the contrary, the Board does not believe that it has jurisdiction to hear an appeal of a termination based on disability because such appeals are the exclusive provenance of the State Employee Benefits Committee.

Benson argues that the Board has concurrent jurisdiction to hear appeals in disability termination cases because the Disability Insurance Program statute provides: "Upon exhaustion of the maximum short-term disability benefits period, the employee shall no longer be an employee of the State or any of its political subdivisions, subject to any pre-termination procedures set forth in the rules and regulations of the Office of Management and Budget." 29 *Del. C.* §5253(c)(5). Benson claims that "the rules and regulations of the Office of Management and Budget" refer to the Board's Merit Rules because OMB is charged with submitting "all proposed Merit Rule revisions to the statewide Labor-Management Committee for review and comment prior to submission to the Board for the public hearing and adoption." *Id.* §5907(3).

The Board does not believe that the legislature intended Section 5253(c)(5) to refer to the Merit Rules adopted by the Board because it is part of the Department of State, not OMB. It is more logical to interpret Section 5253(c)(5) to refer to the rules and regulations to be adopted by the State Employee Benefits Committee (which is part of OMB) as authorized by the Disability Insurance Program.

Even if Benson is correct in his statutory interpretation, he still fails to state a claim for a violation of the Merit statutes or the Merit Rules or regulations. Benson argued that DelDot violated the Merit Rules by not giving him a hearing prior to his disability termination: "I was entitled to a pre-termination hearing, at which I could request an accommodation for my disability."

Merit Rule 12.4 requires a hearing only "in dismissal, demotion for cause, fines and suspension cases." The Board concludes as a matter of law that Merit Rule 12.4 applies only to a dismissal for disciplinary reasons and not to a disability termination.

In *Cordial v. Ohio Department of Rehabilitation & Correction*, 2006 WL 1390843 (Ohio App., May 23, 2006), an employee claimed the employer violated a state law prohibiting punitive action against an employee for filing a workers' compensation claim. After the employee sustained work-related injuries, she received temporary total disability (TTD) benefits. When the TTD benefits ran out, she received an involuntary disability separation (IDS). The Court of Appeals of Ohio held that the IDS was not "inherently disciplinary, punitive, or related in any way to wrongdoing." 2006 WL 1390843, at p.3. "[W]e find that an IDS is not a 'discharge' [for purposes of the state personnel laws] because an IDS employee has the right of reinstatement to his or her position. . . . Ohio [law] mandates [the employee's] reinstatement if she timely applies and demonstrates that she is able to perform the essential duties of her former position. This right of reinstatement distinguishes an IDS from a discharge, which, unlike an IDS, completely severs the employment relationship." *Id.* at p.4.

In *Sullivan v. Morgan*, 276 A.2d 899 (Conn. 1970), a state employee was committed to a mental hospital but remained on the state payroll until he exhausted his accrued vacation and sick time and then was terminated. He claimed the employer violated the state personnel laws by not giving him notice and a hearing prior to dismissal. The Connecticut Supreme Court held that a "dismissal" meant "a complete severance of employment when an employee was guilty of misconduct." 276 A.2d at 901. A dismissal "not only resulted in a separation of the employee from state service but, punitively, the removal of his name from the list of persons eligible for state service." *Id.* at 902. In *Sullivan*, no disciplinary charges "were ever preferred against the plaintiff." *Id.* "It clearly appears that the reason the plaintiff was separated from state service was that through no fault of his own or of the state he had become mentally incapable of performing

any duties for the state." 276 A.2d at 903. *Accord Ruffin v. Department of Public Works*, 914 A.2d 617, 632 (Conn. Super. 2006) ("the just cause requirement for dismissal is not applicable to the plaintiff's separation from service due to disability").

The Board concludes as a matter of law that Merit Rule 12 does not apply to a termination for disability. The Rule applies to "disciplinary measures," which may include dismissal. But the Board does not believe that a dismissal based on disability is a disciplinary measure for employee misconduct. Under the Disability Insurance Program, if the former employee recovers from a disability, he or she may be returned to work. *See* 29 *Del. C.* §5257. This right of reinstatement distinguishes a termination for disability from a disciplinary dismissal for employee misconduct, which bars classified state employment for three years. *See* Merit Rule 6.4.10.

The Board concludes as a matter of law that it does not have jurisdiction over Benson's appeal. Benson has failed to state a claim for any violation of the Merit statutes of the Merit Rules or regulations.

DECISION AND ORDER

It is this 19th day of June, 2008, by a unanimous vote of 3-0, the Decision and Order of the Board that the Grievant's appeal is denied.

Brenda J. Phillips
Chair

Martha K. Austin
Member

John F. Schmutz
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.
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> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
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> (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 26, 2008

Distribution:
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