

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

GRIEVANT,)	
)	
Employee/Grievant,)	
)	DOCKET No. 11-08-520
v.)	
)	
DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH, AND THEIR FAMILIES,)	PUBLIC DECISION
)	and ORDER [redacted]
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on August 16, 2012 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Dr. Jacqueline Jenkins, Acting Chair, John F. Schmutz, and Victoria D. Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

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

Deborah L. Murray-Sheppard
Board Administrator

Roy S. Shiels, Esquire
on behalf of Employee/Grievant

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of
Services for Children, Youth and
their Families

BRIEF SUMMARY OF THE EVIDENCE

The Department of Services for Children, Youth and their Families (DSCYF) offered and the Board pre-admitted into evidence eight documents marked for identification as Exhibits A-H.

DSCYF called three witnesses: Debra O’Neal, Training/Education Administrator II; Jeannette Hammon, Human Resources Manager; and Robert Challenger, Training/Education Administrator II.

The employee/grievant (Grievant) offered and the Board pre-admitted into evidence nine documents marked for identification as Exhibits 1, 4-7, 9-10, and 12-13. At the hearing, the Board admitted two more documents marked for identification as Exhibit 14 (Step Three Grievance Decision, dated July 21, 2011) and Exhibit 15 (Executive Order No. 76, dated November 8, 2005).

The Grievant testified on her own behalf and called one other witness: her husband.

PRELIMINARY JURISDICTIONAL MATTER

On April 29, 2011, DSCYF suspended the Grievant for ten days without pay based on four incidents of misconduct (March 24, March 28, March 29, and April 4, 2011).

The Grievant argued that the Step 3 Hearing Officer ruled in favor of the Grievant on the March 28, 2011 incident. According to the Grievant, under Merit Rule 18.8 the Board does not have jurisdiction to consider the March 28 incident.

Merit Rule 18.8 provides: “The Step 3 decision is final and binding upon agency management.”¹ The Board construes Merit Rule 18.8 to mean that if the Step 3 decision grants the grievance then the agency cannot appeal to the Board. In the Grievant’s case, the Step 3 Hearing

¹The Grievant placed great reliance on Executive Order 76 “Regarding Management of Labor (*continued*)

Officer denied her grievance. The Step 3 decision did not grant the grievance in part even though the Hearing Officer felt the March 28th leave issue was an “unfortunate occasion of confusion by all parties.”

Because appeals to the Board are *de novo*, the Board does not believe that the *ratio decidendi* (reasoning) of the Step 3 is ever binding on the Board. In any event, the Step 3 Hearing Officer did not make a finding of fact that the agency did not have sufficient reason to impose accountability on the Grievant for the March 28th incident.

To the contrary, the Step 3 Hearing Officer found: “There is no question that despite being denied approval, [*the Grievant*] nonetheless left work and took no steps to affirmatively clarify with [Debra O’Neal] that she had submitted a timely request. The Department’s desire to hold the Grievant accountable for perceived insubordination, violation of the leave policy and not effectively communicating with her supervisor is understandable.” The Hearing Officer only downplayed the March 28th incident “given that the Department eventually approved the request under FMLA leave status.”

The Board concludes as a matter of law, based on its interpretation of its own rules, that the Step 3 Hearing Officer’s discussion of the March 28th incident is at most *dicta* and is not final and binding on the agency.

(*cont’d*) Relations and Administrative Proceedings in State Government.” Executive Order 76 provides: “[C]onsistent and effective labor-management relations requires that the Executive Branch and its departments and agencies speak with one voice to ensure a uniform employer position. . . The Office of Management and Budget shall maintain the central managerial role over all administrative proceedings relating to personnel matters” The Board does not see how this aspirational language supports the Grievant’s application of Merit Rule 18.8 to her Step 3 decision.

FINDINGS OF FACT

The Grievant worked as an Administrative Specialist II in the Center for Professional Development which is part of the Division of Management Support Services (the Division) and provides education and training for DSCYF employees.

On September 28, 2010, the Division gave the Grievant a written reprimand for “Unprofessional and Insubordinate Behavior.” The Grievant did not grieve that reprimand.

On October 27, 2010, the Division gave the Grievant a written reprimand for “Unprofessional and Insubordinate Behavior.” The Grievant did not grieve that reprimand.

On March 16, 2011, the Division suspended the Grievant for one day without pay for “unprofessional and insubordinate behavior.” The Grievant grieved the one-day suspension. In a Decision and Order, Docket No. 11-04-518 (Apr. 12, 2012), the Board denied the Grievant’s appeal.

On February 28, 2011, the Division suspended the Grievant for three days without pay “for continued insubordination and hostile behavior in the workplace.” The Grievant grieved the three-day suspension. In a Decision and Order, Docket No. 11-04-519 (Aug. 7, 2012), the Board denied the Grievant’s appeal.

By letter dated April 3, 2011, Karryl McManus, the Division Director, notified The Grievant of intent to suspend her without pay for ten days. The notice of intent letter cited four incidents as the basis for the discipline.²

² The Grievant requested and the Division held a pre-decision meeting on April 21, 2011. By letter dated April 29, 2011, the Division Director notified The Grievant that she did not offer “any compelling reasons” at the pre-decision meeting “why the proposed action of a ten (10) day suspension without pay be revoked.”

March 24, 2011

The Division's Policy/Procedure #2, "Leave Policy," provides:

Employees must notify their immediate supervisor within the first half hour of absence, or as soon as possible given the situation. If the immediate supervisor is not available at that time, a message must be left on their voice mail. The employee must contact another staff member to determine if the immediate supervisor will be present during the work day. If the immediate supervisor will not be present during the day, employees must speak with the next level supervisor.

Jeannette Hammon forwarded a copy of the leave policy to all Division staff, including the Grievant, by e-mail dated September 9, 2010.

I have received some inquiries about leave time so I have developed the attached policy for the application and use of leave. Many of us come from different divisions and the expectations may have been a little different. . . . The leave policy is pretty basic and it is consistent with the Merit Rules. My expectation is employees will communicate any leave requests to their supervisor in advance to ensure we have appropriate coverage and backups in place. I realize that there may be times when we have unexpected circumstances that arise which prevent us from providing advance notice, however this should be the exception not the norm. In the absence of your supervisor, you should communicate your leave request to the next level of management.³

The Grievant's work shift starts at 8:00 a.m. At around 4:30 a.m. on March 24, 2011, she awoke at home in pain from a back condition. Before taking her prescription pain medicine (which causes drowsiness), she asked her husband to call out sick for her to the Division

³ DSCYF does not have a department-wide leave policy. Jeanette Hammon testified that some divisions have a one-hour call out policy, others have a thirty-minute call out policy like the Division of Management Support Services. Residential facilities – where staffing may be critical – have a two-hour call out policy. According to Hammon, the Division has a thirty-minute call out policy because training classes start at 9:00 a.m. If an instructor calls out, the Division must either find a substitute instructor in time or advise employees before they travel to training sites around the state that the class was cancelled.

because she was concerned she might not wake up in time for work. She did not, however, tell her husband what time to call to comply with the Division's leave policy.⁴

According to the Grievant's husband, he called his employer at 7:15 a.m. on March 24, 2011 in accordance with his employer's 15-minute call out policy to advise that he would not be coming to work because he had to care for his wife. For reasons he could not explain to the Board, he "forgot" to call the Division on behalf of his wife. At 8:50 a.m., he received a call from Robert Challenger asking why the Grievant had not reported for work. Prompted by that call, he woke his wife, who called Challenger sometime after 9:00 a.m. (According to the Grievant, she called at 9:01 a.m.; according to Challenger, she called at 9:15 a.m.)

The Grievant argued that she did not violate the Division's leave policy because the policy has an exception to the thirty-minute call out policy: "or as soon as possible given the situation." *See* Merit Rule 5.3.2 ("or as soon as practicable"). That exception might apply if the Grievant were home alone, overslept through no fault of her own, and then called out as soon as she woke up. Since her husband "forgot" to call out on her behalf, she might never have called if Robert Challenger had not called her at home. The Board does not believe that the Grievant called out as soon as possible given the situation.

The Board finds as a matter of fact that the Grievant violated the Division's leave policy by not calling out sick for over an hour after the start of her shift. There may have been

⁴ The Grievant argued that the Division's 30-minute call out policy conflicts with Merit Rule 5.3.2 which requires employees to "notify their supervisor within the first hour of absence or as soon as practicable or specified by the agency." According to The Grievant, Merit Rule 19.0 defines "agency" to include any "department" but not a division within a department. Because DSCYF does not have a department-wide leave policy, the Grievant argued that the Division could not derogate from the one-hour call out policy in Merit Rule 5.3.2. Even if a one-hour policy applied, the fact remains that the Grievant did not call in sick until after 9:00 a.m. and only then after she was prompted by a call from Robert Challenger.

mitigating circumstances which might affect the appropriate penalty, but the fact remains that management had sufficient reason to impose accountability for the Grievant's violation of the Division's leave policy.

March 28, 2011

By e-mail dated March 18, 2011, the Grievant's immediate supervisor, Debra O'Neal, notified her staff "that I will be out of the office and unavailable all next week (3/21-3/25). I will return to the office on Monday 3/28/11. During my absence, please refer questions or issues to Bob Challenger and, if absent or not available, Jeanette Hammon." The Grievant acknowledged to the Board that she received this e-mail.

On March 23, 2011, the Grievant sent an e-mail to Debra O'Neal advising: "I have an FMLA appointment Monday [March 28, 2011] in Dover, so we will have to reschedule the bi-weekly meeting to another time." The Grievant was scheduled for a bi-weekly meeting with Debra O'Neal at 3:15 p.m. on March 28 to review the Grievant's 90-day performance improvement plan (PIP). The Grievant had missed her last PIP meeting on March 9, 2011.

Even though the Grievant knew O'Neal was on vacation, she sent her leave request to O'Neal and not to Robert Challenger or Jeanette Hammon. According to the Grievant, she sent the leave request to O'Neal because O'Neal had instructed her not to send leave slips to anyone else. According to the Grievant, she did not interpret O'Neal's vacation e-mail to authorize Robert Challenger to approve leave requests, only to handle "questions or issues."

According to the Grievant, O'Neal had approved her leave requests after the fact in the past, and the Grievant knew O'Neal would be back in the office on March 28, 2011 so she did not think there would be a problem.

When O'Neal returned to the office on March 28, she sent an e-mail to the Grievant at 9:42 a.m. to say: "I am just returning from leave. You have indicated that you have an appointment for this afternoon. Can you please forward the leave approval for this afternoon? Also, I would expect that you would submit an alternate time to meet [for the bi-weekly PIP meeting] since you need to reschedule. As a result, I will reschedule the meeting for 3/29/11 @ 2 pm in the HR area." According to the Grievant, she interpreted the rescheduling of the bi-weekly PIP meeting as O'Neal's approval of her FMLA leave on March 28th.

However, in a March 28 e-mail sent at 12:18 p.m., O'Neal advised the Grievant: "You sent me an email (3/23/11) during the week I was on leave. You did not acquire approval from my designee (Bob Challenger or Jeanette Hammon in his absence) during my absence, therefore the leave is not approved. As a result, we can retain our bi-weekly meeting as originally scheduled for 3:15 pm today in the HR area."

At 1:43 p.m. on March 28, the Grievant responded to O'Neal's e-mail: "You received advance notice via leave slip on 3/23/11 and I need to see my doctor TODAY as scheduled. You did not tell me you were going on vacation and you didn't instruct me to give the leave slips to Bob or Jeanette. . . I have a doctor's appointment today that I plan on keeping. The [bi-weekly PIP] meeting will have to be rescheduled." The Grievant left the office at 2:00 p.m. for her doctor's appointment.

The Board finds as a matter of fact that the Grievant took unauthorized leave on March 28, 2011. She knew O'Neal was on vacation when she put in her leave request on March 23. She knew there was a bi-weekly PIP meeting the afternoon of March 28 when she scheduled her doctor's appointment five days earlier. ⁵ The Board does not find credible the Grievant's explanation that she didn't understand that Challenger was O'Neal's designee to approve leave requests when

O'Neal was out of the office. The Board's finding of fact is not changed because O'Neal ultimately approved the Grievant's FMLA leave request.

March 29, 2011

Jeanette Hammon and Debra O'Neal met with the Grievant on March 29, 2011 to discuss the Grievant's unauthorized absences from work on March 24 and March 28, 2011. Hammon made it clear that the call out policy was thirty minutes. Hammon also made it clear that, in O'Neal's absence, the Grievant should request leave approval from Robert Challenger or, if he was not available, from Hammon. According to Hammon, the Grievant was "combative" and the meeting "did not go well."⁶

Later that day, Hammon stopped by the Grievant's cubicle. The Grievant told Hammon that she was not feeling well and needed to leave work. Hammon told the Grievant "Okay, is there anything you need me to communicate to Debra [O'Neal] about your work?" According to Hammon, the Grievant got angry and disrespectful and accused Hammon of "harassment." According to Hammon, the Grievant told her that the next time she addressed the Grievant, "You better bring a witness."

⁵ According to the Grievant, she was in a recent car accident and needed treatment from her doctor. At first the Grievant testified that she called her doctor's office on March 23, 2011 to make an appointment. She then testified that the doctor's office called her. She was concerned that if she did not go to the doctor on March 28 she might have to wait a long time for another available appointment. The Grievant did not present any evidence to the Board that she tried to schedule an appointment before March 28, or within a reasonable period of time afterwards.

⁶ In the notice of intent to suspend letter, the Division cited the March 29, 2011 meeting characterizing the Grievant's conduct as "combative and disrespectful. As a result of your insubordinate behavior, the meeting was ended." At the hearing, O'Neal could not recall much about the meeting, and the Board does not believe that this offense was substantiated by the evidence in the record.

The Grievant's version of the conversation diverged sharply from Hammon's. According to the Grievant, she did not lose her temper but was in severe back pain and needed to leave work before she became incapacitated. But the Grievant acknowledged to the Board that she said to Hammon, "Go back to your office, send me an e-mail [memorializing the Grievant's request for leave and Hammon's approval] so I will have proof."⁷

With only the two witnesses' version of events, the Board does not feel, based on this record, that it can make a finding of fact that the Grievant engaged in unprofessional or insubordinate behavior on March 29, 2011. In the Board's view, these were but further instances of poor communication and the Grievant's insistence on e-mails rather than personal contact which have plagued her relations with supervisors.

April 4, 2011

On April 4, 2011, Debra O'Neal sent an e-mail to her staff advising: "I will be out of the office today. In my absence, please contact Bob Challenger for any issues, concerns or questions. If he is not available, contact Jeanette Hammon."⁸

According to the Grievant, her back was causing her severe pain at work on April 4, 2011 and she called Jeanette Hammon and left a voice mail that she needed to take time off. (Hammon did

⁷ After talking with Hammon, the Grievant called her husband, who then called Hammon about the Grievant's leave request so he would have "proof from his cell phone." The telephone conversation was brief because Hammon did not believe it was appropriate for the Grievant's husband to call her about his wife's leave request.

⁸ The Grievant claims she did not receive O'Neal's April 4, 2011 e-mail because O'Neal sent it from outside the office and there is no "TO" line on the e-mail header. The Grievant wanted her husband, who is an Information Technology manager with the State of Maryland, to testify about e-mail technology. The Board excluded his testimony because the Grievant did not disclose in her Rule 13A witness summaries or in the pre-hearing conference that he would testify as an expert witness. The Division was thereby prejudiced by not having its own expert witness available to testify.

did not recall receiving that voice mail). The Grievant followed up with an e-mail to Hammon at 3:16 p.m. copied to the Deputy Director, Michael J. Alfree. The Grievant then sent an e-mail to Robert Challenger at 3:28 p.m. to say: “Bob: I have called Jeanette twice leaving a voice-mail message. Mike [Alfree] didn’t respond to my e-mail. I will walk over to Mike’s office to see if he is there. After that, I am taking FMLA for the remainder of the day. I realize I am not supposed to get authorization from you and that is not what I am doing. I am just letting a supervisor know since I am unable to get a hold of anyone else.” The Grievant left the building around 3:30 p.m. Challenger did not read her 3:28 p.m. e-mail until sometime after that.

Hammon sent an e-mail to the Grievant at 3:42 p.m. to say: “I just tried to call you and I spoke to Bob [Challenger]. Debra [O’Neal] sent you an e-mail informing you to go to Bob as she is out of the office today. We had a similar situation last week when Debra was on vacation and we explained to you that when Debra is out and Bob has been designated as the contact person for the unit you should go to him for approval. Please contact Bob regarding your request for leave today.”

The Grievant claimed she followed the Division’s leave policy by going to the “next level of management” for leave approval (first to Hammon and then to Alfree). The Board does not find the Grievant’s explanation credible. Hammon had made it clear at the meeting on March 29, 2011 that in O’Neal’s absence, Challenger should be her contact person for leave approval.

The Grievant claimed she never received the April 4, 2011 e-mail advising that O’Neal would be out of the office that day. The Board does not find that credible. If the Grievant did not know that O’Neal was out of the office, then why did she try to contact first Jeanette Hammon and then Michael Alfree, rather than O’Neal?

The Board also does not believe an unreasonable amount of time passed between the Grievant’s first e-mail to Hammon (3:16 p.m.) and Hammon’s response (3:42 p.m.). Managers are

not always at their desk to receive calls or check e-mails. The Grievant was not free to leave work without authorization especially since Hammon was in the office all the while and the Grievant never bothered to walk down the hall and contact Hammon personally.

The Board finds as a matter of fact that the Grievant violated Division policy by taking unauthorized leave on April 4, 2011.

CONCLUSIONS OF LAW

Merit Rule 12.1 provides:

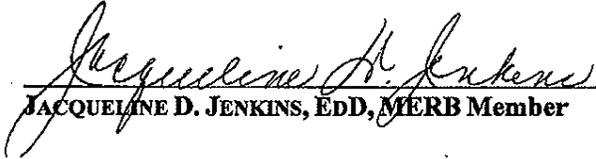
Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. “Just cause” means that management has sufficient reasons for imposing accountability. Just cause requires showing that the employee has committed the charged offense; offering specified due process rights specified in this chapter; and imposing a penalty appropriate to the circumstances.

The Board concludes as a matter of law that the Division had just cause to suspend the Grievant for ten days without pay for the March 23, March 28, and April 4, 2011 incidents.

A majority of the Board concludes as a matter of law that a ten-day suspension without pay was appropriate to the circumstances. The Grievant had two prior written reprimands, a one-day suspension, and a three-day suspension for misconduct over the course of October 27, 2010 and February 28, 2011. A majority of the Board concludes as a matter of law that, based on the Grievant’s prior disciplinary record, a ten-day suspension was appropriate progressive discipline.

DECISION AND ORDER

It is this **24th** day of August, 2012, by a unanimous vote of [3-0], the Decision and Order of the Board to deny the Grievant's appeal.


JACQUELINE D. JENKINS, EDD, MERB Member


JOHN F. SCHMUTZ, MERB Member

I concur in the decision of the Board, but I believe that a five-day suspension would have served the purposes of progressive discipline.


VICTORIA D. CAIRNS, MERB Member