BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

GRIEVANT,	)	
	)	
Employee/Grievant,	)	**DOCKET No. 12-05-545**
	)	
v.	)	
	)	**DECISION AND ORDER**
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,	)	***PUBLIC (redacted)***
	)	
	)	
Employer/Respondent.	)	

After due notice of time and place, this appeal came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on March 27, 2013 at the Commission on Veterans Affairs, Robbins Building, 802 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Paul R. Houck, 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

Grievant
Employee/Grievant *pro se*

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services (DHSS) offered and the Board admitted into evidence without objection fourteen documents marked for identification as Exhibits A-N.

DHSS called two witnesses: Kishan Rao, Manager of Applications Support, Information Resources Management, Division of Management Services; and Michael Smith, Applications Director, Information Resources Management, Division of Management Services.

The employee/grievant, (Grievant), offered and the Board admitted into evidence five documents marked for identification as Exhibits 1-2 and 4-6. The Grievant testified on her own behalf but did not call any other witnesses.

FINDINGS OF FACT

The Grievant is a Senior Application Support Specialist with the Information Resources Management unit in the Division of Management Services. Her immediate supervisor is Kishan Rao.

One of the Grievant's job responsibilities is helping to maintain the Emergency Medical Services Data Information Network (EDIN). The EDIN system collects emergency medical system report data electronically on a real-time basis from over 130 data points covering the demographic assessment and treatment phases of an emergency medical incident.

On August 29, 2011, the Grievant requested intermittent leave under the Family Medical Leave Act (FMLA) to care for her elderly father-in-law who suffers from dementia. DHSS approved intermittent leave (estimated 2-3 hours per day, 2-3 times a week) for one year. DHSS also allowed the Grievant to work a flexed schedule.

On June 30, 2012, the Grievant's supervisor sent her an e-mail to memorialize verbal

counseling he gave her the day before. "[W]hen you are going to come in late you have to call in and let your supervisor know that you will be late."

On December 12, 2011, Michael Smith sent the Grievant an e-mail about attendance issues.

> According to Penny, your flex hours are 9:00-5:00 (½ hour lunch) on Monday and Friday and 8:30 - 4:30 (½ hour lunch) from Tuesday - Thursday. I have been given a copy of your badge time from July forward. According to these reports, you have rarely badged in on time in the morning and many times have been significantly late. . . .
>
> **I will remind you that if you are to be late for any reasons, you are to call your supervisor to notify him. If he cannot be reached by phone, you are to leave a message with him however you must also leave a <u>live</u> message with a person here. That person can be one of your colleagues, Judy [McClafferty] or me or you can also leave a message with the Help Desk. If you do not call in, it may be considered an unexcused absence.**

(original emphasis)

According to Kishan Rao, all IRM employees have access to a manager's list of home telephone or cell phone numbers, and a program list with the office telephone numbers of staff. According to Michael Smith, he gave the Grievant his personal cell phone number to call if she was going to be late to work. According to Smith, his work day starts at 7:30 a.m. Judith McClafferty, the IRM Director, starts work at 7:00 a.m.

On January 6, 2012, Smith sent an e-mail to the Grievant revoking her flexed schedule and directing her "to report during normal business hours of 8:00-4:30. I sent you an email on Dec. 12, 2011 outlining the consequences for continuing to show up late. From Dec. 13, 2011 – present, you showed up late on 13 days. This is unacceptable and as a consequence your flex time privilege is being revoked."

On February 17, 2012, DHSS gave the Grievant "a written reprimand for your failure to

adhere to your reporting instructions." The Grievant did not grieve the written reprimand.

By letter dated March 15, 2012, Kishan Rao notified the Grievant that he was recommending a one-day suspension without pay for not calling in when she was late for work on February 20, 22, 23, 24, 29 and March 1, 2012. "You did not call in as instructed on these dates." The Grievant requested a pre-suspension meeting which was held on March 26, 2012. By letter dated April 16, 2012, DHSS imposed the one-day suspension without pay.

DHSS produced the records of the Grievant's building access card swipes to show that she was late for work on February 20, 22, 23, 24, 29 and March 1, 2012. [1] The Grievant produced her cell phone records for those dates to show that she called in. The parties agreed that the telephone number 255-9215 is Kishan Rao's office telephone, and the number 255-9150 is the Help Desk. The following chart compares that information.

Date	Arrival Time	Phone Call
February 20	08:26:17	6:58 AM 302-255-9215 7:02 AM 302-255-9150
February 22	08:12:27	6:34 AM 302-255-9215 6:50 AM 302-255-9150
February 23	08:11:17	7:01 AM 302-255-9150
February 24	08:13:10	6:58 AM 302-255-9150
February 29	08:12:12	7:01 AM 302-255-9150

[1] The Grievant was late on other days as well, but according to Kishan Rao he did not count them because she was less than ten minutes late which he considers within a "grace" period.

March 1	08:34:27	no call

According to Kishan Rao, his office phone has voice mail but the Grievant did not leave him a message on any of those days. According to Rao, the Help Desk does not have voice mail and is not staffed until 7:30 a.m. According to Michael Smith, the Grievant did not call him on his personal cell phone on any of those days or leave him a voice message.

The Board finds as a matter of fact that DHSS gave the Grievant a written reprimand on February 17, 2012 for failure to comply with directives for calling in when she was going to be late for work.

The Board finds as a matter of fact that the Grievant was late for work on February 20, 22, 23, 24, 29 and March 1.

The Board finds as a matter of fact that on December 6, 2011 Michael Smith directed the Grievant to call her supervisor if she were going to be late for work and, if her supervisor could not be reached by phone, to leave a message with him but also to leave a "live" message with another person at the office.

The Board finds as a matter of fact that the Grievant did not leave a "live" message with a person at work on any of those dates. [2]

[2] The Grievant claims that she left voice mail messages for Kishan Rao. Rao testified that she did not. The Board does not have to resolve that credibility issue because the Grievant's phone records show that she did not try to call Rao on February 23, 24, 29 and March 1 but only called the Help Desk. The Board cannot understand why the Grievant would be calling the Help Desk so early in the morning when she must have known that it was not staffed until 7:30 a.m. and did not have voice mail.

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 DHSS had just cause to suspend the Grievant for one day without pay for failure to comply with the agency's directives for calling in when she was going to be late for work.

The Grievant claims that the agency's call-in policy is unreasonable because it may put employees in potential jeopardy. According to the Grievant, she sometimes has to drive her elderly father-in-law in the morning. When she doesn't reach someone at the office on the first or second call, she cannot keep calling on her cell phone while driving because that is against the law and one time nearly caused her to have an accident. But all the Grievant had to do was pull off the road onto the shoulder or into a parking lot to make another call.

The Grievant claims that the agency's call-in policy is unreasonable as applied to her because of the difficulty in juggling work and care for her elderly father-in-law. But the agency had granted the Grievant's request for intermittent FMLA leave and a flexible schedule and even with those accommodations she was still chronically late for work. [3]

The Board does not believe that it is unreasonable for an employer to have a call-in policy that requires a "live" message. If a message is left on voice-mail, the caller cannot be sure that

---

[3] The Grievant claims that DHSS "singled" her out and discriminated against her on the basis of national origin. The Grievant did not present any evidence that the agency did not enforce its call-in policy against other employees.

anyone will listen to the voice-mail right away because they might be on vacation or sick or working out of the office. As Michael Smith testified, if the Grievant is not in the office, it is important for a supervisor to know so that another support specialist is available to service any problems with the EDIN system.

The Board concludes as a matter of law that DHSS had just cause to suspend the Grievant for one-day without pay for failure to comply with directives for calling in when she was going to be late for work. The Board believes that was appropriate progressive discipline in light of her recent written reprimand for the same offense.

DECISION AND ORDER

It is this **1st** day of April, 2013, by a vote of 3-0, the Decision and Order of the Board to deny the Grievant's appeal.

PAUL R. HOUCK, Acting Chairman

JOHN F. SCHMUTZ, ESQ., Member

VICTORIA D. CAIRNS, Member