

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

DANIEL LACOMBE,)	
)	
Employee/Grievant,)	
)	DOCKET No. 13-10-595
v.)	
)	
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) at 9:10 a.m. on March 26, 2014 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Paul R. Houck, and Victoria D. Cairns, 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

Daniel LaCombe
Employee/grievant, pro se

Catherine C. Damavandi
Deputy Attorney General
on behalf of the Department of
Transportation

BRIEF SUMMARY OF THE EVIDENCE

The Department of Transportation (“DOT”) offered and the Board admitted into evidence without objection five documents marked for identification as Exhibits A-E.

DOT called two witnesses: Paul (Jay) Gerner; and Roberta (Bobby) Geier.

The employee/grievant, Daniel LaCombe (“LaCombe”), testified on his own behalf and called one witness: Marco Boyce, who testified by telephone. LaCombe did not offer any documents into evidence.

FINDINGS OF FACT

Prior to his retirement on March 1, 2014, LaCombe worked as a Project Planner at DOT in the Statewide Regional Planning office. He worked for DOT for twenty-three years.

LaCombe’s son was graduating from Appalachian State University in Boone, North Carolina on Friday, May 10, 2013. LaCombe wanted to attend the ceremony but for several weeks before his son had vacillated: his mother and father had recently gone through an acrimonious divorce and he was concerned there might be friction which would put a damper on the graduation ceremonies.

LaCombe was scheduled to participate in a bike safety program at Trapp Pond on Thursday, May 9, 2013. The day before, he told two co-workers (Jay Gerner and Anthony Aglio) that he would be out of town for his son’s graduation so that one of them could cover the bike safety program. According to LaCombe, he had talked with his son that morning and his son seemed to be all right with his father attending the graduation ceremonies. However, by the end of the day LaCombe was having second thoughts and decided not to attend to spare his son any added stress.

When asked why he did not submit a request for annual leave well prior to his son’s

graduation just in case, LaCombe explained that he could submit a request by e-mail from home and it was not uncommon for employees at DOT to submit leave requests at the last minute, subject to management approval. Bobby Geier testified that if LaCombe had requested annual leave to attend his son's graduation she would have granted it.

According to LaCombe, he was very upset about missing his son's graduation and he became physically ill with stomach cramps. The next morning (Thursday, May 9, 2013) LaCombe called his immediate supervisor, Marco Boyce, between 8-8:30 a.m. Boyce did not answer his phone so LaCombe left a message that he was calling in sick. LaCombe followed up with a call to Liddy Campbell, an Administrative Assistant in the office, who told him that Boyce was in the office just away from his desk and she would tell Boyce that LaCombe had called in sick.

The next morning (Friday, May 10, 2013), LaCombe called in sick again between 8-8:30 a.m. leaving a message for Marco Boyce. Again, LaCombe followed up with a call to Liddy Campbell who said she would tell Boyce that LaCombe had called in sick.

In his testimony, Boyce verified that he received the two calls from LaCombe. Boyce testified that he approved the two days of sick leave but that he was overruled by his supervisor, Bobby Geier.

According to Geier, she had directed LaCombe by e-mail on September 9, 2010 to call her directly on her work phone or cell phone "when you are going to be late or not in at all." Geier could not recall if she was LaCombe's immediate supervisor at the time or when Boyce became LaCombe's immediate supervisor. However, Geier acknowledged that it was proper for LaCombe to call Boyce on May 9 and 10, 2013 rather than to call her directly.

Geier became suspicious about LaCombe calling in sick after she learned that he had

mentioned to a co-worker he was going to be out of town attending his son's graduation. When LaCombe returned to the office on Monday, May 13, 2013, he found a Written Reprimand for Unacceptable Attendance from Grier. "Based on your actions, it is evident that you had planned to be off from work, but chose not to request annual leave. Therefore, your sick leave request for May 9, 2013 and May 10, 2013 is denied. You will not be paid for either of those two (2) days." Geier never talked with LaCombe to get his side of the story before she disciplined him.

The Board finds as a matter of fact that LaCombe decided towards the end of the day on May 8, 2013 that he was not going to attend his son's graduation so he did not need to request annual leave.

The Board finds as a matter of fact that LaCombe was sick on May 9 and 10, 2013 with physical symptoms brought on by emotional distress.

The Board finds as a matter of fact that LaCombe called in sick to his immediate supervisor on May 9 and 10, 2013 in compliance with office policy.

The Board finds as a matter of fact that LaCombe's immediate supervisor approved his request for two days of sick leave.

The Board finds as a matter of fact that Bobby Geier did not talk with LaCombe before she disciplined him.

CONCLUSIONS OF LAW

Merit Rule 5.3.6 provides:

Upon supervisory approval, which shall not be unreasonably denied, employees may take sick leave for the following reasons:

5.3.6.1 Employee illness, injury temporary disability or exposure to contagious disease.

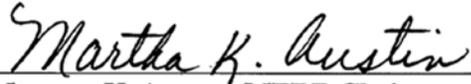
The Board concludes as a matter of law that DOT unreasonably denied LaCombe's sick leave on May 9 and 10, 2013.

The Board can understand that Bobby Geier may have had some suspicion when she learned about LaCombe's plans to attend his son's graduation, but then calling in sick instead. The Board cannot understand, however, why Geier never even talked with LaCombe before disciplining him the day he returned to work. The Board found LaCombe a credible witness. His explanation as to why he changed his mind about attending his son's graduation was believable. If Geier had only taken the time to talk with LaCombe this grievance might never have come to pass. ¹

¹ At the hearing, DelDot started to cross-examine LaCombe using a print-out of his personal EZ Pass account which showed a toll charge for his vehicle on the Chesapeake Bay Bridge suggesting that he had driven to North Carolina to attend his son's graduation. The Board is deeply troubled by this invasion of personal privacy which is not legally justified because of "litigation," as the agency contended. "Jurisdictions throughout the United States have found that citizens have a reasonable expectation of privacy in their prolonged travels on public thoroughfares." *State v. Holden*, 54 A.3d 1123, 1129 (Del. Super. 2010)

ORDER

It is this **28th** day of March, 2014, by a vote of 4-0, the Decision and Order of the Board to grant LaCombe's appeal. DOT is ordered to make LaCombe whole by paying him for two sick days which may also require a pension adjustment.


MARTHA K. AUSTIN, MERB Chairwoman


JOHN F. SCHMUTZ, MERB Member


VICTORIA D. CAIRNS, MERB Member


PAUL R. HOUCK, MERB 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 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: **March 28, 2014**

Distribution:

Original: File

Copies: Grievant

 Agency's Representative

 Board Counsel

 MERB Website

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