

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

GRIEVANT,)	
)	
Employee/Grievant,)	<u>DOCKET No. 13-04-589</u>
v.)	
)	DECISION AND ORDER
DEPARTMENT OF HEALTH AND SOCIAL)	
SERVICES/DIVISION FOR THE)	[PUBLIC, REDACTED]
VISUALLY IMPAIRED,)	
)	
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 April 7, 2016 in the Delaware Commission of Veterans Affairs Hearing Room, at the Robbins Building, located at 802 Silver Lake Blvd., Suite 100, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, Jacqueline Jenkins, Ed.D, Victoria Cairns, and Paul Houck, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Employee/Grievant, *Pro Se*

Kevin R. Slattery
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, Division for the Visually Impaired (“DVI”) offered and the Board admitted into evidence without objection five exhibits marked for identification as A-E. DMS called one witness: Genelle Fletcher (“Fletcher”), Senior Vocational Counselor, DVI.

The employee/grievant (“Grievant”), offered and the Board admitted into evidence without objection eight exhibits marked for identification as a-h. In addition, five hearing exhibits marked for identification as H1-H5. The Grievant called two witnesses: Abdullah Hubbard and Durae Johann. The Grievant testified on her own behalf.

FINDINGS OF FACT

The Grievant was employed as an Administrative Specialist I with DVI for seven years prior to being terminated on March 1, 2013.

The Grievant went out on an approved medical leave of absence on September 4, 2012. In a doctor’s note dated the same day, Phyllis James, M.D. provided written documentation that the Grievant “should be off from work from September 4, 2012 until October 5, 2012 and return on October 8, 2012”. On October 2, 2012, DVI received from the Grievant an FMLA request form, dated September 22, 2012. DVI granted FMLA coverage from September 4, 2012 through December 5, 2012 or until available FMLA hours were exhausted. The Grievant was directed to provide additional medical information by October 22, 2012. Her FMLA coverage was exhausted on November 7, 2012.

In a letter dated November 2, 2012, The Hartford Comprehensive Employee Benefits Co. (“Hartford”) informed the Grievant her claim for Short Term Disability (“STD”) benefits had been approved effective October 4, 2012. The Hartford stated they would contact the

Grievant's physician during the week of November 6, 2012 for an update on her condition and progress. The Grievant was advised that her claim would be reviewed for additional benefits beyond November 13, 2012, after additional information was received from her physician.

On December 4, 2012, the Grievant's physician, Phyllis James, M.D., again provided written documentation stating she should be off from work from December 4, 2012. In the section for a date of return, Dr. James noted the Grievant had a follow-up appointment on December 11, 2012.

In a letter dated December 13, 2012, Genelle Fletcher ("Fletcher"), the Grievant's immediate supervisor, clarified her employment status and explained her obligation to return to work. The Grievant had been continuously absent from her workplace since September 4, 2012; her absences would not be covered by FMLA after November 7, 2012; and her STD claim was in terminated status. Consequently, the Grievant's absence from the workplace on November 14, 2012 and thereafter, was unauthorized.

Fletcher notified the Grievant that she was obligated to return to work by not later than Friday, December 28, 2012. Fletcher informed the Grievant that if she could not report by that date she had three options for responding to the direction to return to work:

- (1) Obtain approval from The Hartford to extend her STD claim through the remainder of her absence; or
- (2) Obtain written approval for a leave of absence without pay by December 28, 2012 with a request due five days prior with all days the request would cover as of November 14, 2012 with supporting documentation; or
- (3) Resign her position as an Administrative Specialist I.

Fletcher requested the Grievant contact her immediately concerning her intentions. She also informed the Grievant that if she failed to report back to work by December 28 and did not satisfy one of the three options, DVI would consider her position vacated and would recommend

she be terminated for job abandonment. In addition, Fletcher informed the Grievant that even if she reported back to full duty on or before December 28, 2012, DVI reserved the right to initiate appropriate disciplinary action, up to and including dismissal for any period of unauthorized absence.

On December 20, 2012, the Grievant resubmitted her former FMLA request form with new dates that put her out starting December 6, 2012 until March 7, 2013. On December 24, 2012 DVI denied the FMLA request because the Grievant had exhausted her FMLA entitlement in the applicable 12-month period. On that same day, Fletcher sent a letter to the Grievant informing her DVI received her FMLA request and reminded the Grievant she had exhausted her FMLA leave. In addition, Fletcher reiterated that the Grievant remained in unpaid/unauthorized status as she had neither FMLA nor STD coverage for her period of absence starting November 14, 2012. Fletcher informed the Grievant she must report on December 28, 2012 or her position will be considered vacated and DVI would recommend termination.

In an email to Alice Clark ("Clark"), the Human Resources representative responsible for DVI, on December 27, 2012, the Grievant stated Fletcher continued to harass her with letters and that because of Fletcher's actions and the lack of response by Human Resources, her anxiety and mental status remained the same. The Grievant claimed that she asked Fletcher not to contact her and stated her physicians deemed her unfit to return to work until March. Clark, in an email response on the same day, informed the Grievant that she had left numerous messages for her and that the Grievant responded for the first time on December 27, 2012. In addition, Clark explained Fletcher did not call or attempt to talk to the Grievant, but that Fletcher was required to provide the normal paperwork on all rules and regulations to the Grievant. Specifically, Clark advised that the Grievant had received notification that her FMLA benefits expired on November 7, 2012, that her STD coverage had been terminated by The Hartford, and she was, therefore,

required to return to work on December 28, 2012. The Grievant responded later that day that she had been on approved FMLA leave since September 4 and questioned how she could have used up all her FMLA hours. The Grievant also stated she had been on STD, as approved by The Hartford, since October 4, 2012. She stated that if no one had anything intelligent to say to her, they should contact her lawyer. Clark responded in an email dated December 28, 2012 that the FMLA hours the Grievant used for her son, as well as the hours used for herself, all came from the same annual allotment of FMLA protected hours. Clark reiterated that DVI had not received any additional documentation from The Hartford granting coverage for the time the Grievant was out. The Grievant responded she would come to DVI to speak to Clark in person. The Grievant failed to report to DVI to return to work on December 28, 2012.

On January 4, 2013, The Hartford informed the Grievant they had reviewed her appeal for STD benefits and determined that she no longer met the criteria set forth in her employer's plan. Therefore, her claim was closed and no benefits would be payable beyond November 13, 2012. The Hartford stated that the medical documentation it received did not illustrate a mental or functional impairment to such a degree that the Grievant would be unable to perform her occupation as an administrative specialist.

In a letter dated January 9, 2013, Robert Doyle, ("Doyle") Director of DVI, advised the Grievant that he would be recommending termination from her position as an Administrative Specialist I due to her failure to return to work and her continued failure to comply with DVI and Department directives. Doyle stated that the Grievant's response to the December 13 and December 24 letters were a demand not to be contacted by staff from DVI and submission of new FMLA paperwork despite the fact that she had been notified she had exhausted all her FMLA leave. In addition, Doyle stated her failure to return to work as directed was consistent with her failure to follow supervisory directives as documented in previous communications.

Doyle informed the Grievant she had a right to a pre-decision meeting prior to a final decision in this matter. The pre-decision meeting was scheduled for February 6, 2013.

On February 6, 2013, the Grievant submitted a written statement informing the pre-decision hearing officer, Andy Kloepfer, that although her medical and mental condition prohibited her from returning to DVI, she issued a dual power of attorney to Mr. Abdullah Hubbard (her religious advisor) and Mr. Ernest W. Banner III (her father) to represent her interests and protect her due process rights. In the letter, the Grievant claimed DVI's termination of her employment after learning of her medical and mental condition violated her due process rights. She stated she had informed DVI's Human Resources of the contentious relationship between Doyle and herself, and that DVI's refusal to transfer her when it was a viable solution to the matter was without cause.

In a letter dated March 1, 2013, Rita Landgraf, ("Landgraf") Secretary, Department of Health and Social Services, informed the Grievant she concluded Doyle's recommendation to terminate her employment with DVI was appropriate. The Grievant presented no information at the pre-decision meeting to prove termination was too severe or unjust. Landgraf reiterated DVI informed the Grievant on two separate occasions that her absence as of November 7, 2012 was no longer covered by either FMLA or STD; consequently, her absence since November 14, 2012 was considered unauthorized. In addition, Landgraf noted DVI directed the Grievant to return to full duty on December 28, 2012 with any and all records to document her doctor's release to return to work and advised her that if she did not comply with that directive, her position would be considered vacated and termination would be recommended.

On April 6, 2013, the Grievant appealed to the State of Delaware's Office of Management and Budget the denial of her appeal concerning her STD benefits by The Hartford and was granted coverage retroactively through February 28, 2013.

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 Grievant committed the charged offense of vacating her position with DVI when she failed to report to work at full duty and that DVI offered specified due process rights required under the Merit Rules.

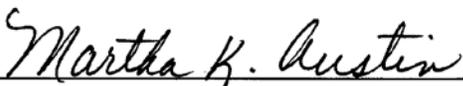
The Board holds the Grievant failed to respond appropriately to her employer, DVI, regarding the status of her Administrative Specialist position. The Grievant exhausted both her FMLA and STD leave as of November 13, 2012 and she failed to inform DVI of one of the three choices that the agency gave her in communications on December 13 and December 24, 2012. Rather than choose one of the three options provided by DVI, the Grievant chose to respond via email that her supervisor was not to contact her and in fact was harassing her. The Grievant failed to report to work on December 28, 2012, as directed.

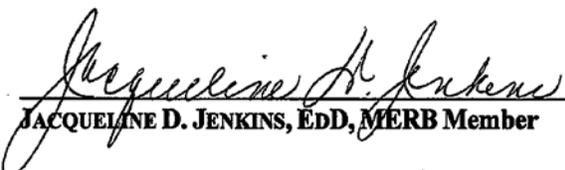
The Board finds the Grievant fails to understand the difference between a doctor’s note and job protection. Specifically, the Grievant needed to let her employer know her plans and the status of her employment when the Grievant no longer had any coverage or leave under FMLA or STD. The Grievant’s supervisor provided her information and was not harassing her when she contacted the Grievant concerning her obligations and rights now that the Grievant was on authorized leave.

The Board holds DVI proceeded with a recommendation to terminate when the Grievant's appeal for her STD benefits was denied by The Hartford. DVI had no knowledge the Grievant appealed this denial in April 2013, four months later. Additionally, the Grievant's receipt of benefits up through February 28, 2013 only concerns the financial relationship between the State of Delaware and The Hartford, the benefit provider, for that time period. The Board finds this provides no protection for the status of the Grievant's employment. In particular, DVI terminated the Grievant on March 1, 2013 about three months after she failed to report to full duty.

ORDER

It is this 28th day of June, 2016, by a vote of 4-0, the Decision and Order of the Board to deny the Grievant's appeal. The Board unanimously found the Grievant committed the charged offense, the Agency provided required due process rights under the Merit Rules, and the penalty of termination was appropriate. The Grievant failed to inform her employer of any action she had taken to comply with one of the three options it provided to her; consequently she remained on unauthorized leave. The Grievant failed to return to work on December 28, 2012, despite a clear directive from her employer to do so.


MARTHA K. AUSTIN, MERB Chairwoman


JACQUELINE D. JENKINS, EDD, MERB Member


PAUL R. HOUCK, MERB Member


VICTORIA D. CAIRNS, 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: **June 28, 2016**

Distribution:

Original: File

Copies: Grievant
 Agency's Representative
 Board Counsel
 MERB website