

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

JIM ERLANDSON,)	
)	
Employee/Grievant,)	Docket No. 15-03-623
v.)	
)	DECISION AND ORDER
DEPARTMENT OF FINANCE, DIVISION)	
OF REVENUE,)	
)	
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 4, 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 W. Michael Tupman, Chair, Paul Houck, and Victoria D. Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Stacey Cohee
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Jim Erlandson
Employee/Grievant *pro se*

Zoe Plerhoples
Deputy Attorney General
on behalf of the Department of
Finance, Division of Revenue
*(Substituting for counsel of record,
Kevin Slattery, DAG)*

BRIEF SUMMARY OF THE EVIDENCE

A hearing was convened by the Merit Employee Relations Board (the Board) on Thursday, August 4, 2016, to consider a motion to dismiss the grievance of Jim Erlandson (Erlandson), the employee/grievant, against the Department of Finance, Division of Revenue (Agency).

Erlandson was employed by the Agency in the position of Revenue Production Processing Manager. By letter dated February 2, 2015, Erlandson was dismissed from his employment. He filed a grievance directly with the Board (pursuant to Merit Rule 12.9¹) which was received on March 6, 2015.

A hearing on the merits of the grievance was scheduled for June 4, 2015. The parties were notified by letter² dated March 18, 2015 that, pursuant to Merit Operating Rule 13-B, exhibits and witness lists were due on or before Friday, May 22, 2015. The parties were also notified that a prehearing teleconference would be scheduled and convened by the Board's counsel during the week of May 25, 2015. The prehearing teleconference was subsequently scheduled for May 26, 2015.

The Agency timely filed its exhibits and witness list on May 22, 2015. By letter dated May 27, 2015, the June 4 hearing was postponed because Erlandson failed to provide either his exhibits or a witness list. The parties were advised the hearing was rescheduled for August 20, 2015, and Erlandson was notified that his exhibits and witness list must be received by the Board on or before July 20, 2015.

On July 6, 2015, the Board received a Request for Production of Documents from Erlandson. A subpoena duces tecum was issued and delivered that day to the Secretary of

¹ 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 such action..."

² All correspondence from the Board was sent to Erlandson by certified mail and delivery receipts were received indicating he received each correspondence sent by the Board.

Finance, who was directed to provide the requested documentation within fifteen days.

By letter dated July 22 (and received in the Board's office on July 24, 2015), Erlandson complained that he had received nothing as of that date in response to his request for production, which he had served on the Agency's counsel on July 2, 2015. Later that day, Agency counsel responded by filing a Motion to Quash the subpoena duces tecum. The Motion was forwarded to Erlandson and he provided a response to the Motion on August 4, 2015.

By letter dated August 7, 2015, the parties were advised that the hearing scheduled for August 20, 2015, would be used for the Board's consideration of the Agency's Motion to Quash and Erlandson's opposition to the Motion. The parties were specifically advised in that letter:

During the hearing, the State will have the opportunity to present its motion and the Grievant will be provided the opportunity to respond to the State's arguments. The Board will be provided with copies of the initial appeal, the Grievant's subpoena duces tecum, the Agency's Motion to Quash the Subpoena, and the Grievant's Response to review prior to the hearing.

The parties were also advised that a hearing to consider the merits of the grievance would be scheduled after the Board issued its decision concerning document production.

The hearing was convened as scheduled on August 20, 2015. Erlandson did not attend or participate in the hearing. The Board heard the Agency's argument, considered the record before it, and issued an Order of Document Production on August 27, 2015:

The Agency must provide all e-mails to and from Grievant on State e-mail from March 2014 through December 2014, to the extent they are available from the Department of Technology and Information. Any information which is included in those e-mails which is protected under 30 Del.C. §368 shall be redacted. In addition, the Board directs DOR to provide information concerning mailroom security during the renovation. All remaining requests for information are quashed.

The Agency was directed to advise the Board within thirty days of any and all steps taken to comply with the Board's Order.

On September 30, 2015, the Board requested to be advised as to whether the Agency had complied with the Order. The Agency's counsel responded on September 30 that no documents

had been provided to the grievant and that limited resources within his office precluded him from being able to estimate when the Agency would be able to comply with the order.

By letter dated October 6, 2015, the Board advised it was charged with timely disposition of grievances. The Board granted a thirty day extension to the Agency to comply with the Order of Production. It requested the Agency advise the Board as soon as documents were produced for Erlandson's inspection, but in no case later than November 6, 2015.

On November 6, 2015, Agency's counsel advised the Board by email that a disk containing six to seven months of e-mails and a list of redactions had been forwarded to Erlandson that day. The email also indicated that although the final review of all of the e-mails the Agency was directed to produce had not yet been completed, he anticipated sending Erlandson the remaining documents early the following week. By letter dated November 12, 2015, a second disk containing the requested information was conveyed to Erlandson by the Agency's counsel.

By letter dated December 22, 2015, the Board notified the parties a hearing on the merits was again rescheduled (for the third time) for Thursday, March 3, 2016. Erlandson was again advised that his exhibits and witness list must be submitted to the Board on or before February 19, 2016. The parties were reminded that a prehearing teleconference would be scheduled during the week of February 22, 2016. They were also advised:

[F]ailure to participate in the prehearing teleconference and/or to appear for the hearing on March 3, 2016, may result in the Board's dismissal of this grievance.

When Erlandson failed to provide any exhibits or a witness list by February 19, the Board's Administrator spoke directly to him by telephone on February 22, 2016. During this conversation, Erlandson stated he did not believe the Agency had fully complied with the Board's Order of Production. Specifically, he asserted documents relating to the security procedures during the renovation of the Division of Revenue mailroom had not been provided.

By letter dated February 23, 2016, the parties were advised:

The hearing scheduled for March 3, 2016 in the above-captioned matter is postponed because neither exhibits nor a witness list was provided by the Grievant by the February 19 due date set forth in the scheduling letter of December 22, 2016. In a telephone conversation with Mr. Erlandson yesterday, he stated he intended to submit exhibits and a witness list but was unable to do so until he speaks with Mr. Slattery concerning documents which had or had not been provided in response to the Board Order for document production.

This is the third and final time a hearing on this matter will be continued. **Mr. Erlandson is directed to submit his exhibits and witness list by not later than Monday, May 2.** This order requires the documents be physically in the possession of this office and Mr. Slattery on or before the close of business on May 2. Mr. Erlandson should immediately take whatever steps are necessary to ensure that this deadline is met. Failure to comply with this directive may result in the dismissal of the grievance by the Board.

Mr. Erlandson is reminded that he, as the grievant, bears the burden in these proceedings to establish that his employer violated the Merit Rules in effectuating his discharge. Following receipt of his exhibits and witness list, a prehearing conference will be convened by the Board's counsel, as described in MERB Operating Procedure 13 (copy included). The hearing will be rescheduled after the prehearing order is issued. (*emphasis in original*)

Thereafter, the Board was provided with a copy of correspondence from the Agency's counsel to Erlandson dated April 25, 2016, which conveyed a supplemental response to the Board's Order of Production. The letter indicated counsel intended to forward "additional documents on a disk either later today or first thing tomorrow." A subsequent email noted that additional information was sent to Erlandson by US mail on April 27, 2016.

Erlandson did not provide either exhibits or a witness list to the Board by the May 2, 2016 deadline, nor did he contact the Board in any manner to request an extension or to notify the Board of any problems. The Board's Administrator sent a letter to Erlandson on May 20, 2016, which stated:

By certified letter³ dated February 23, 2016, you were directed to submit

³ Postal records indicate Erlandson signed for receipt of this letter on February 24, 2016.

your exhibits and witness list by not later than Monday, May 2, 2016. You were further advised that, “[f]ailure to comply with this directive may result in the dismissal of the grievance by the Board.”

As of today, May 20, 2016, you have chosen not to submit any exhibits or a witness list. You have not contacted this office in any manner since the letter was sent. You have had the agency’s exhibits since last May and despite repeated efforts by this office to schedule a hearing on the merits of your appeal, you repeatedly requested continuances and raised issues at the last minute which have caused the scheduled hearings to be cancelled.

If you are no longer interested in pursuing this grievance, please advise me immediately so that the file can be closed.

Otherwise, the Board will place your case on its docket for August 4, 2016, at which time it will consider a motion to dismiss for failure to provide proof that your termination was not for just cause.⁴

After receiving no response from Erlandson, a final letter was sent on July 7, 2016:

The Merit Employee Relations Board has made repeated unsuccessful efforts to communicate with you concerning your pending appeal by email, U.S. mail and certified mail.

This office has received no response to my letter of May 20, 2016 in which you were requested to contact this office immediately, if you wished to continue to pursue your grievance.

Consequently, the Board will move to dismiss your grievance at its **August 4, 2016** meeting, based upon your apparent abandonment of the matter...

On Wednesday, August 3, 2016, at approximately noon, a 188 page packet of documents was delivered to the Board’s office from Erlandson. The cover letter stated, “Please find enclosed several exhibits. These are not all the exhibits because the Defense has not provided all of the discovery needed to satisfy the Boards [*sic*] order.” This was the first correspondence received by MERB from Erlandson since the grievant filed his response to the Motion to Quash on August 4, 2015.

When the Board convened on August 4, 2016, Erlandson was present.

⁴ In an appeal to the Board, the ultimate burden of proof is always on the grievant. *See* Administrative Procedures Act (APA), 29 *Del. C.* §10125 (“The burden of proof shall always be upon the applicant or proponent.”).

CONCLUSIONS OF LAW

The burden of proof in a dismissal case is on the discharged employee to establish the employer did not have “just cause” to dismiss him, as that term is defined in Merit Rule 12.1.⁵ *Avallone v. DHSS*, 14 A.3d 566, 578 (Del. 2010). In order to meet this burden, the employee/grievant must provide evidence to support his contention that just cause did not exist.

Erlandson was provided with multiple opportunities and direction to provide his exhibits and to disclose his witnesses so that a hearing on the merits could be conducted. Despite scheduling and rescheduling the hearing four times over the last fourteen months, Erlandson has had very limited contact with the Board’s staff and has ignored repeated requests to provide information which would allow his grievance to be processed to hearing.

Although he provided documents to the Board’s office the day before this hearing, he stated at the hearing that packet did not include all of the exhibits he thought necessary to support his grievance. He stated he did not know what evidence the Agency intended to rely upon. The Board notes the Agency submitted its exhibits and witness list in May, 2015, more than fourteen months ago. Erlandson was contemporaneously provided with these documents. It is not credible for Erlandson to assert he has no knowledge of the basis for the Agency’s defense for terminating his employment.

Erlandson did not provide any justification for failing to appear at the Board’s hearing on August 20, 2015, or for not responding to direction and deadlines from the Board which he acknowledged he received. During questioning by the Board at this hearing, he conceded that the information which he provided on August 3 could have been provided by May 2, as the Board directed in its February 23, 2016 letter.

⁵ 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 can understand a sense of frustration on the part of Erlandson in the Agency's long delayed production of requested documents (some more than nine months after the Board's original subpoena), dribbling them out only under constant reminder by the Board. However, that does not absolve Erlandson of his responsibility to produce what records he did have and intended to introduce into evidence at a hearing on the merits, to provide a list of the witnesses he intended to call, and to participate in scheduled pre-hearing conferences where he could have preserved any objection to further production by the Agency. In particular, Erlandson cannot be heard now to complain about the scope of the Agency's production since he did not respond to the Agency's motion to quash, or appear for the hearing before the Board on August 20, 2015 when the Board granted the motion in part and denied it in part.

ORDER

It is this **18th** day of **August, 2016**, by a vote of 3-0, the Decision and Order of the Board to dismiss the Grievant's appeal. This Board is charged with assuring the timely disposition of merit system grievances. The Board has made repeated efforts to move this grievance to hearing, efforts with which the grievant has failed to cooperate.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



VICTORIA D. CAIRNS, MERB Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that if the Board upholds the decision of the appointing authority, the employee shall have a right of appeal to the Superior Court on the question of whether the appointing authority acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the employee. If the Board finds against the appointing authority, the appointing authority shall have a right of appeal to the Superior Court on the question of whether the appointing authority acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the appointing authority. All appeals to the Superior Court shall be by the filing of a notice of appeal with the Court within 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: **August 18**, 2016

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

MERB website