

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

**IN THE MATTER OF
RANDALL RUST,
Grievant,**

v.

**DEPARTMENT OF TRANSPORTATION,
Agency.**

DOCKET NO. 96-09-102

DECISION AND ORDER

BEFORE Katy K. Woo, Chairperson, Robert Burns, Vice-Chairperson, Walter Bowers and Dallas Green, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES

For the Appellant: Randall Rust, *Pro se*
 Patricia Bailey, Staff Representative
 AFSCME, Council 81
 610 Basin Road - First Floor
 New Castle, Delaware 19720-6412

For the Agency: Elizabeth D. Maron, Deputy Attorney General
 Department of Justice
 Carvel State Office Building
 820 North French Street
 Wilmington, Delaware 19801

NATURE OF THE PROCEEDINGS

This matter came before the Merit Employee Relations Board for an evidentiary hearing on June 5, 1997 pursuant to Merit Rule No. 21.0120 after a decision adverse to the Grievant at the fourth step on September 17, 1996. The appeal to the Board was filed on September 26, 1996.

COPY

In his appeal to the Board, Randall Rust sought to be paid for 7.5 hours of sick leave taken on May 10, 1996 for which payment has been denied and which denial has been heretofore sustained through the prior steps in the grievance process. Mr. Rust alleges that Merit Rule No. 6.01311 has been misapplied to deny him paid sick leave for May 10, 1996 by the insistence upon additional information as to the nature of his illness over that provided by him when he returned to work on May 13, 1996.

SUMMARY OF THE EVIDENCE

Randall Rust, in sworn testimony, stated that he has worked for the Department of Transportation for approximately 7.5 years. On Friday, May 10, 1996, he called in sick and when he returned to work on May 13, 1996 filled out an Application for Leave slip on a Department of Transportation form and placed it on the desk of his supervisor, Mr. Harry W. Minner, Jr. In the "Remarks" section of the Application for Leave, Mr. Rust wrote "Ill." He was notified that day by Mr. Minner that "Ill" was not an adequate reason to justify approval of the application. Mr. Rust then added the word "Personal" after the word "Ill" and resubmitted the Application for Leave form. (Grievant's Exhibit No. 1). Mr. Rust testified he was informed that the information provided was still not sufficient. Whereupon, after consultation with his union representative, he submitted a second application for leave with the following notation in the "Remarks" section: "Ill. Unable to perform duties." (Grievant's Exhibit No. 1).

Mr. Minner insisted on an explanation of the reason for the illness and stated that he would accept a verbal explanation. Mr. Rust indicated that the matter was private and personal and none of Mr. Minner's business and that he refused to provide a further verbal explanation to Mr. Minner and will not do so.

On cross-examination, Mr. Rust admitted that he had provided reasons for sick leave on previous applications for leave slips. (State's Exhibit No. 1).

On an Application for Leave for sick leave for March 19th and 20th, 1996, he wrote "Head Ache," and on a similar application for sick leave for January 1, 1996, he wrote "Lower Back Pain" in the remarks section. Rust testified that he had been told to put the reason in the explanation section and did so. Both of the Applications for Leave were approved. Mr. Rust stated that the reason for the absence on May 10, 1996 was illness, but it was not a headache or lower back pain; that the reason for the absence was personal; and he would not tell his supervisor then or now.

Counsel for the Department stipulated that there was no uniform policy in the Department of Transportation in any of the three counties regarding the necessity for placing a diagnosis of the illness on an Application for Leave form.

The Department presented the sworn testimony of the Grievant's immediate supervisor, Harry W. Minner, Jr. Mr. Minner testified that he has been the Area 6 Maintenance Supervisor since 1993 and Randall Rust's supervisor during that entire period. Mr. Minner related that on May 13, 1996 Mr. Rust turned in an Application for Leave slip which in the remarks section stated "Ill". Mr. Minner related that he told Mr. Rust that he needed a better explanation. Mr. Rust then wrote "Personal" on the slip and gave no other oral explanation of the basis for the sick leave request. Mr. Minner testified that Mr. Rust later that day submitted a second Application for Leave slip on which he had written in the remarks section, "Ill. Unable to perform duties" and asked Mr. Minner if that was good enough. Mr. Minner stated that he then told Mr. Rust to bring in a doctor's slip, and, according to Minner, Mr. Rust then said that the slip he turned in was good enough, and the reason for the illness was none of Minner's business. Mr. Minner told Mr. Rust that he would take a verbal explanation of the reason for the absence. Mr. Rust refused to give one. Mr. Minner testified that

if Mr. Rust would give a verbal explanation of the symptoms of the illness that he would approve the application for sick leave.

On cross-examination, Mr. Minner testified that he believed that he had the right under the Merit Rules to ask for a doctor's excuse or a written reason for the absence. He again related that he asked Mr. Rust for a doctor's slip after he had been told that the reason for the illness was none of his business. Minner stated that he has nineteen (19) employees working under his supervision and has never denied anyone sick leave before. Others have filed applications with "personal" written in the remarks section, but according to Minner, they had always provided a sufficient verbal explanation of the basis for the sick day which Minner kept confidential. Mr. Minner stated that even today, if he received a verbal explanation from Mr. Rust as to the basis of the illness he would approve the sick day application and would not write the reason on the application form. Also, Minner stated that a note from a doctor would suffice, and he would approve the sick leave.

Randall Rust was recalled and testified a doctor's certificate was not mentioned by Minner on May 13, 1996 and that he did not go to the doctor on May 10, 1996 when he was absent. And, according to Rust at this late date, he cannot now go back and get a doctor's certificate.

Mr. Minner was recalled and testified that he did ask for a doctor's certificate when Rust handed in the second Application for Sick Leave approval form and that he did not recall who called in sick for the Grievant on May 10, 1996 nor to whom they talked when they called.

THE LAW

29 Del. C. § 5931. Grievances.

"(a) The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The Director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this Chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of

submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days."

MERIT RULE NO. 6.0310

Usage - An employee eligible for sick leave with pay may use such sick leave for absence due to illness, injury, temporary disability, exposure to contagious disease, or due to serious illness of a member of the employee's immediate family requiring the employee's personal attendance. (See definition Immediate Family, Chapter 2.) In addition sick leave can be used for appointments with doctors, dentists or other recognized practitioners, subject to prior approval of the appointing authority. An employee at his/her option may also use sick leave to provide full regular pay during periods when he/she is paid less than full pay under worker's compensation provisions. Such leave shall be charged in proportion to the difference between worker's compensation pay and full pay. Employees cannot take sick leave with pay in excess of the hours actually accrued, except as provided in 6.0324.

MERIT RULE NO. 6.0311

An employee needing sick leave shall inform his/her immediate supervisor of the fact and the reason in advance when possible, or otherwise before the expiration of the first hour of absence or as soon thereafter as practicable; failure to do so may be cause for denial of pay for the period of absence. Before approving pay for sick leave, an appointing authority or the Director may at their discretion require either a doctor's certificate or a written statement signed by the employee setting forth the reason for the absence. In the case of an absence of more than five consecutive days, a doctor's certificate is required as a condition of approval. (See also 6.0330).

MERIT RULE NO. 6.0330

Records and Transfer - All sick leave credit and use shall be recorded in the personnel records of the agency and shall be subject to review by the Director. Appointing authorities will review sick leave records to reveal discernible patterns of repeated use of sick leave which may be construed as possible abuse. In such cases, supervisors should counsel, require medical evidence, make formal contact or take other appropriate action. Pertinent data shall be available for inspection by the employee concerned.

MERIT RULE NO. 18.0110

Every employee is required to report to work on time each day. When because of emergency or sudden illness the employee cannot report for work, he shall notify his supervisor within the first hour of absence, or as soon as practical thereafter, giving reason for his absence. (See also 6.0311 and 6.0330.)

FINDINGS OF FACT

In this case, the Board is presented with a substantially consistent version of the events surrounding Mr. Rust's applications on May 13, 1996 for approval of sick leave taken on May 10, 1996. There is a dispute between Mr. Rust and Mr. Minner as to whether or not a doctor's certificate was requested of Mr. Rust on May 13, 1996 at the time of the submission of the second application. However, it is not necessary to resolve this difference in recollection to decide whether or not to sustain this grievance. The facts are that Mr. Rust has explained in writing that his absence on May

10, 1996 was for illness; that the exact reason for absence is viewed by Mr. Rust as a personal matter; that he has stated in writing that he was ill and unable to work; and, that he has not and will not explain further to his supervisor the basis for the illness because it is personal. His application for approval of sick leave for May 10, 1996 has been denied. The Board also finds that the Department of Transportation does not have a uniform policy in any of the three counties concerning the requirements for employees to place a diagnosis of the illness on the Application for Sick Leave approval slip. The Board also finds that the supervisor and the Department by the representations of its counsel are willing to accept in this case the written explanations given if supplemented with a verbal explanation of the nature of the illness and approve the application for one day sick leave with pay. The Board further finds that there is no reason to believe that Mr. Rust has ever abused his use of sick leave.

DISCUSSION AND CONCLUSION

The question for the Board is whether or not Mr. Rust's written explanation is sufficient under the Merit Rules to warrant the Board upholding his grievance and requiring that he receive 7.5 hours paid sick leave for his absence.

This Grievant clearly and sincerely believes that the explanation which he has given that he was ill and unable to perform his duties and that the exact nature of his illness is a personal matter should be sufficient reason to warrant approval of his application for sick leave with pay for May 10, 1996. His supervisor similarly believes that he needs further information as to the nature of the illness to fulfill his responsibility to make a determination whether or not to approve the application for sick leave with pay. The supervisor, Mr. Minner, has indicated that he will accept a doctor's certificate or a confidential verbal explanation from Mr. Rust of the reason for the absence explaining the nature of the illness.

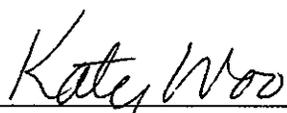
It is clear under the Merit Rules that sick leave with pay is not an absolute right for a State employee nor is approval of sick leave with pay automatic upon application. There is in the Merit Rules a clear statement of authority for the appointing authority to hold employees accountable for the legitimate use of sick leave. Merit Rule 6.0311 provides in pertinent part, "Before approving pay for sick leave, an appointing authority or the Director may at their discretion require either a doctor's certificate or a written statement signed by the employee setting forth the reason for the absence." The reason for the absence should be stated with sufficient particularity that management has information to enable it to reasonably judge the legitimacy of the application for approval of sick leave beyond the employee's subjective determination or assertion that he or she was sick or ill. At the same time, the privacy interests of the State employee need to receive appropriate and sufficient consideration. Discretion and judgment is clearly required. The supervisor in this situation expressed a willingness to forego his insistence on further written elaboration on the nature of the illness for a confidential oral explanation. Mr. Rust chose not to make such further oral explanation. That is his right. However, it is also the right of the supervisor not to approve an application for sick leave unless he or she has sufficient information to determine the legitimacy of the application. The behavior of a supervisor in such a situation must not be inflexible or unreasonable. It is clear that every entry of "Ill" or "Ill. Unable to work," is not automatically entitled without more to acceptance by management for sick leave approval. Mr. Minner testified that he has accepted such remarks when they have been accompanied by some additional verbal explanation. There was no indication that a precise medical diagnosis was being required; indeed Mr. Minner indicated a simple verbal explanation of the reason for the absence would suffice. There is also no indication that Mr. Minner's insistence on additional information was arbitrary, unreasonable, or improperly motivated. To prevail on his grievance, Mr. Rust must convince the Board to rule in his favor by a preponderance of the

evidence. The Board by majority vote, with Vice-Chairman Burns abstaining, has determined that Mr. Rust has not met that burden, and on the facts presented, the grievance of Mr. Rust should be denied and the action of the Department in denying sick leave approval under the circumstances presented without further explanation of reason for the absence upheld.

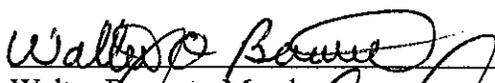
ORDER

For the foregoing reasons, the grievance of Randall Rust is denied by vote of the undersigned members of the Merit Employee Relations Board with Vice-Chairman Burns abstaining.

IT IS SO ORDERED:



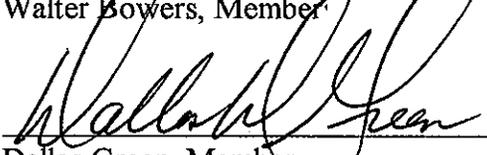
Katy K. Woo, Chairperson



Walter Bowers, Member



Robert Burns, Vice-Chairperson
(Abstained from voting)



Dallas Green, Member

APPEAL RIGHTS

Pursuant to 29 Del. C. § 5949, the grievant May appeal to the Superior Court. The burden of proof in any such appeal to the Superior Court is on the appellant. All appeals to the Superior Court are to be filed within thirty (30) days of the notification of final action of the Board.

Mailing Date: 6/20/97

- Distribution:
- Original: File
- Copies: Grievant's Representative
- Agency's Representative
- Merit Employee Relations Board
 - Katy K. Woo, Chairperson
 - Robert Burns, Vice Chairperson
 - Walter Bowers, Member
 - Dallas Green, Member

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