

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

IN THE MATTER OF:)	
)	
)	
Appellant,)	
)	DOCKET NO. 02-12-283
v.)	
)	
STATE OF DELAWARE DEPARTMENT OF PUBLIC SAFETY,)	DECISION AND ORDER
)	
Agency.)	PUBLIC ORDER

COPY

BEFORE Brenda Phillips, Chairperson, Dallas Green, John F. Schmutz, John W. Pitts, and Paul R. Houck, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* §5908(a).

APPEARANCES:

For the Grievant:

Roy S. Shiels, Esquire
Brown, Shiels, Beauregard & Chasanov
108 East Water Street
P. O. Drawer F
Dover, DE 19903

For the Agency:

Iona Kirshon, Esquire
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

PROCEDURAL HISTORY

This matter is before the Merit Employee Relations Board ("Board" or "MERB") as an appeal from a decision of the designee of the Director of the Office of State Personnel dated October 9, 2002 pursuant to Merit Rule No. 20.9. The appeal was filed with the Board on October 30, 2002.

The Appellant, was dismissed from her employment on the basis of job abandonment. The Appellant alleges that the Department's decision to terminate her employment was without just cause because she did not abandon her position.

This matter was considered as the hearing of an employee disciplinary or dismissal case where the employee has not requested a public hearing. Therefore, pursuant to 29 *Del. C.* §10004(b)(8), and 29 *Del. C.* §5948, the Board unanimously voted to enter into executive session for the hearing and determination of this matter. This is the public Order of the Board based upon the evidence presented. The public order will not identify the Appellant.

RELEVANT MERIT RULES OR PERTINENT PORTIONS THEREOF

MERIT RULE No. 15.1

Employees shall be held accountable for their conduct. 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.

MERIT RULE No. 6.1000

In the case of an employee's absence of more than 14 consecutive calendar days due to an employee's illness or accident, or upon the request of the appointing authority, an employee shall provide a certificate from a doctor documenting fitness for duty prior to returning to work.

MERIT RULE No. 6.0600

Any absence from duty that is not in compliance with the rules governing authorized leaves shall be considered an absence without leave and is cause for disciplinary action.

No employee shall absent oneself from duty without authorization by the appointing authority, except in case of emergency illness, accident or serious unforeseen circumstances. Such emergency conditions should be brought to the attention of the appointing authority as soon as practicable.

An employee who is absent from the service without a valid leave of absence for three (3) consecutive working days, may be deemed to have abandoned his position and to have resigned from the service

unless in the period of three working days succeeding such three(3) days the employee proves to the satisfaction of the appointing authority that such absence was excusable. If the employee's excuse does not satisfy the appointing authority, the employee may be considered to have resigned by abandonment of position. In the event of abandonment, the employee shall be notified in writing that such abandonment constitutes voluntary resignation.

Nothing contained herein shall be construed as preventing an appointing authority from taking disciplinary actions against an employee because of unauthorized absence.

MERIT RULE No. 6.0800

An employee who fails to return to work or to request a personal leave upon expiration of an FMLA leave, will be subject to corrective action in accordance with chapter 15.

SUMMARY OF THE EVIDENCE

Deleted from public order.

DISCUSSION, FINDINGS AND CONCLUSION

The Board, in this appeal, is presented with a situation where an employee was unable to continue working because of a combination of circumstances in the workplace which created an unacceptable level of stress. The situation included several inter-personal conflicts. There were allegations by the Appellant of sexual harassment, a hostile work environment, and inappropriate physical contact which resulted in investigations and proceedings before other agencies including the Equal Employment Opportunity Commission and the Industrial Accident Board. The Appellant's health care professionals communicated to various State personnel officials that her condition was expected to be of short term duration with a treatment goal of returning her to work. The State agencies involved attempted to accommodate Appellant's return to the workplace. The Appellant's return was complicated by the reassignment of the individual accused of inappropriate physical contact with the Appellant. This and other inter-personnel conflicts of which management was aware, complicated and limited the positions to which Appellant could return with clearance from her treating health care professionals.

There were extensive good faith efforts on the part of State Agencies involved to find an acceptable position for the Appellant, and there were on-going discussions with her about return to work possibilities. While the efforts to find a suitable position to return the Appellant to the workplace and to maintain her health care coverage are commendable, the level of communication with the Appellant by the human relations professionals could have been more effective.

The Office of State Personnel extended one response deadline from November 16th to November 30th because of communication problems with the Appellant and, as the testimony established, there were continuing discussions about her employment with the Appellant even after November 30th.

It is clear that the Appellant, who was in a leave without pay status, reasonably believed, even as late as March 20, 2002, that she was still in negotiations to find a position within the Agency which would permit her to safely return without encountering the stresses which caused her to leave work. Under the rather unique circumstances presented here, the Board unanimously determines that the Appellant has established that she had not abandoned her position at the time she was served with the Department's termination letter alleging abandonment of her position.

ORDER

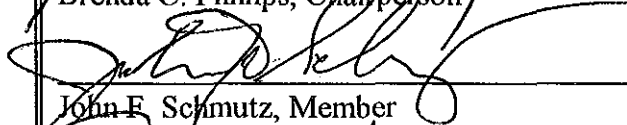
For the reasons stated above, the above captioned grievance appeal is granted and the Appellant is to be returned to her position or other comparable position in New Castle County. The Appellant will, of course, need to produce an appropriate return to work authorization from her treating health care professional or physician. The parties shall confer about appropriate back-pay and pension service credits, and report thereon to the Board within 30 days from the date of this

Order. The Board reserved jurisdiction to take such further action as may be deemed necessary to fairly resolve this matter in the absence of agreement by the parties.

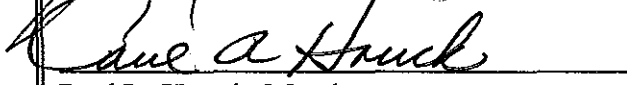
BY ORDER OF THE BOARD this 27th day of August, 2003


Brenda C. Phillips, Chairperson


Dallas Green, Member


John F. Schmutz, Member



John W. Pitts, Member


Paul R. Houck, Member

APPEAL RIGHTS

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 27, 2003 

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board counsel

Merit Employee Relations Board