BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

GRIEVANT,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 12-10-568**
v.	)	
	)	
DEPARTMENT OF HEALTH AND SOCIAL SERVICES/OFFICE OF THE CHIEF MEDICAL EXAMINER,	)	**FINAL DECISION AND ORDER**
	)	
	)	***PUBLIC [REDACTED]***
	)	
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 March 20, 2014 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Dr. Jacqueline Jenkins, and Paul R. Houck, Members, 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

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of Health and Social Services/Office of the Chief Medical Examiner

Jeffrey K. Martin, Esquire
on behalf of the Employee/Grievant

PROCEDURAL HISTORY

The Board issued an Interim Decision and Order in this case on October 8, 2013 concluding as a matter of law that: (1) the Department of Health and Social Services, Office of the Chief Medical Examiner ("OCME") had just cause to terminate the employee/grievant ("Grievant") for unsatisfactory job performance; and (2) OCME did not discriminate against the Grievant on the basis of his national origin. [1]

The Board instructed the parties to file supplemental briefs on three issues: (1) Does the Board have jurisdiction over the grievant's claims for a violation of Merit Rules 12.4, 12.5, 12.6, 18.1, and 18.4? (2) If so, did the agency violate any of those Merit Rules; and (3) If so, were any procedural defects remedied by the grievant's opportunity to be heard at the Step 3 level and before the Board.

On October 25, 2013, the Grievant filed his Opening Brief in Support of Judgment. The Grievant only addressed Merit Rules 12.4, 12.5, and 12.6. The Grievant did not address Merit Rules 18.1 and 18.4 so the Board finds that the Grievant abandoned any grievance under those Rules (even assuming that the Grievant raised them in a timely manner).

On November 26, 2013, OCME filed its Supplemental Memorandum.

[1] After the Board issued its Interim Decision Order, the Grievant filed a motion for reconsideration/reargument which the Board denied on October 16, 2013. "With regard to paragraph 2 of the Motion, the Board has issued the requested subpoena [for documents related to the seventh sample switch] and directed the OCME to provide the documents by Monday, October 21, 2013. This will give you sufficient time to review the documents prior to the filing of your supplemental brief on October 25, 2013." The Board notes that the Grievant did not try to use those new documents in his supplemental brief to show "how his own review of those same records might exonerate him of responsibility for the sample switch error." Interim Decision and Order at p.10.

FINDINGS OF FACT

By letter dated September 13, 2012, the Deputy Director of OCME (Hal. G. Brown) informed the Grievant: "I am proposing your dismissal from your position as an Analytical Chemist II in the Office of the Chief Medical Examiner (OCME). The reason for this action is your continued unsatisfactory job performance and inability to perform the functions of your job." The letter advised The Grievant: "Prior to a final decision in this matter, you are entitled to a pre-decision meeting to respond to the proposed action, and offer any reasons why the proposed penalty may not be justified or is too severe, provided you submit a written request for such meeting to me within fifteen calendar days of the date of this letter."

On September 26, 2012, The Grievant filed a grievance alleging discrimination based on national origin citing Merit Rule 2.1. In his grievance, The Grievant mentioned "the dismissal letter" but at the time he had only received a notice of intent to dismiss.

By letter dated October 1, 2012, the Secretary of DHSS notified The Grievant: "You are dismissed for the reasons outlined in Mr. Brown's letter of September 13, 2012 and as detailed below." According to the Secretary, The Grievant waived his right to a pre-decision meeting "by filing a grievance on September 26, 2012."

In a Step 3 decision dated January 14, 2013, the hearing officer decided that OCME violated Merit Rule 12.4. "The filing of a grievance does not waive or otherwise by-pass the MR 12.4 requirement for a pre-decision meeting. . . . I am mindful that the Grievant has now been afforded the full opportunity via this Step 3 hearing to present any claim, argument and evidence he desired to challenge the just cause of the Department's actions – a far more expansive opportunity than is typically available at a pre-decision meeting. However, this does not necessarily remedy the irregularity of by-passing the meeting and thereby failing to satisfy one of

the procedural due process rights referenced in the MR 12.1 'just cause' standard."

The hearing officer remanded the matter to OCME "to hold a pre-decision meeting with the Grievant, notify the Grievant of the outcome, and copy this Step 3 hearing officer. A final decision in this matter will be issued after those steps are completed."

According to OCME, The Grievant "met with the Chief Medical Examiner on January 30, 2013 and submitted a statement outlining his arguments against termination." The Grievant does not dispute that he met with the Chief Medical Examiner (Dr. Richard Callery) on January 30, 2013. However, according to The Grievant "there was no action by the employer following this meeting to include the issuance of another termination letter or, in fact, any other recognition of this post-decision meeting."

In preparation for the pre-decision meeting with Dr. Callery, The Grievant submitted a written statement dated January 30, 2013 "in response to why I think my dismissal dated October 1, 2012 was severe and unjustified." The Grievant outlined five points he felt were in his favor and asked "that my numerous positive contributions be taken into consideration as to the future of my employment at the Office of the Chief Medical Examiner and that I be reinstated with my lost wages, benefits and seniority granted."

The Step 3 hearing officer issued a second decision on February 11, 2013 denying The Grievant's grievance. However, "[s]ince the Grievant was dismissed before a pre-decision meeting, the Department is directed to compensate him for 15 days of pay reflecting the maximum amount of time period to hold this meeting after a request has been made per Merit Rule 12.5."

CONCLUSIONS OF LAW

The Board concludes as a matter of law that, on remand from the first Step 3 hearing,

OCME satisfied the requirements of Merit Rule 12.4 and afforded The Grievant a pre-decision meeting. The Board concludes as a matter of law that OCME complied with Merit Rule 12.5 and held the pre-decision meeting within a reasonable time after the remand from the Step 3 hearing officer. [2] The Board concludes as a matter of law that OCME provided The Grievant with "an opportunity to respond to the proposed action, and offer any reasons why the proposed penalty may not be justified or is too severe" in compliance with Merit Rule 12.6.

The Grievant claims that the January 30, 2013 meeting between Dr. Callery and The Grievant did not satisfy Merit Rule 12.4 because it was a "post-decision" not a "pre-decision" meeting. In this context, whether it is called a "pre-decision" meeting or a "post-decision" meeting does not matter to the Board for purposes of Merit Rule 12.4. Merit Rule 12.4 does not require that the discussion at the meeting be memorialized in writing (though the Board believes that is preferable). Nor does the Board believe that the agency was required to re-issue the October 1, 2012 termination letter, with minor changes to reflect the Step 3 hearing officer's remand.

The Grievant argues that his pre-decision meeting "with Dr. Callery four months following his termination does not meet any of the objectives set forth in Merit Rule 12.6." The Board does not agree. The purpose of the meeting with Dr. Callery on January 30, 2013 was to remedy a prior procedural due process violation. The remedy for a violation of due process is to afford the

[2] The Step 3 hearing officer's decision was dated January 14, 2013. Dr. Callery held the pre-decision meeting with the Grievant on January 30, 2013. Merit Rule 12.5 requires the pre-decision meeting to be held "within a reasonable time not to exceed 15 calendar days after the employee has requested the meeting in compliance with [Merit Rule] 12.4." The Board does not know when the agency received a copy of the Step 3 decision, and the time-line in Merit Rule 12.5 begins to run with the employee's request for a meeting. In the context of a remand from a Step 3 decision, the Board believes that the agency held the pre-decision meeting within a reasonable time even though, technically, the meeting took place sixteen calendar days after the date of the Step 3 decision.

process due. Even if the agency had complied with Merit Rule 12.4 and held that meeting prior to the Grievant's termination on October 1, 2012, the result would have been the same because the Grievant committed the charged offense: unsatisfactory job performance based on seven sample switch errors.

"[W]hen an employee would have been terminated (or demoted) even if a full and proper pre-termination hearing had been afforded, reinstatement and/or back pay are not proper remedies . . . The rationale for this is that the wrong suffered by the employee was the deprivation of due process, not the dismissal. To hold that discharge is invalid because of procedural difficulties emphasizes form over substance, and reinstatement is not an appropriate remedy for a due process violation prior to termination." *Clipps v. City of Cleveland*, 2006 WL 1705130, at p.5 (Ohio App., June 22, 2006). "Accordingly, reinstatement or back pay should not be awarded to a public employee for a due process violation unless there is a finding that the discharge would not have occurred if the employee's procedural due process rights had been observed." *Id.*

The Board concludes as a matter of law that OCME remedied the initial due process violation by affording the Grievant a pre-decision meeting on January 30, 2013 at which time he had an opportunity to respond to the proposed action and offer any reasons why the proposed penalty of termination was not justified or too severe. The Board finds that the Grievant's discharge would have occurred even if his procedural due process rights had been initially observed.

DECISION AND ORDER

It is this 7th day of May, 2014, by a unanimous vote of 4-0, the Final Decision and Order of the Board to deny the Grievant's appeal.

MARTHA K. AUSTIN, MERB Chairwoman

JOHN F. SCHMUTZ, MERB Member

JACQUELINE D. JENKINS, EDD, 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: **May 7, 2014**

Distribution:
Original: File
Copies: Grievant
Agency's Representative
Board Counsel
MERB Website