

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

GRIEVANT,)	
)	
Employee/Grievant,)	DOCKET No. 13-01-577
v.)	
)	DECISION AND ORDER
DEPARTMENT OF TECHNOLOGY AND)	
INFORMATION,)	Public Decision (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 June 5, 2014 in the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

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

Roy S. Shiels, Esquire
on behalf of employee/grievant

Laura Gerard
Deputy Attorney General
on behalf of the Department of
Technology and Information

BRIEF SUMMARY OF THE EVIDENCE

The Department of Technology and Information (“DTI”) offered, and the Board admitted into evidence nineteen documents marked for identification as Exhibits A-S. DTI called two witnesses: William Hickox, DTI Chief Operating Officer; and Danka Prilepkova, DTI Security Administrator.

The employee/grievant (“Grievant”), offered, and the Board admitted into evidence five documents marked for identification as Exhibits 1-5. The Grievant testified on his own behalf but called no other witnesses.

Prior to the hearing, DTI filed a motion to dismiss for failure to state a claim upon which relief can be granted as a matter of law. The Board deferred consideration of the motion until after receiving the evidence. Upon the close of the evidentiary record, the Board denied DTI’s motion to dismiss and decided the appeal on the merits.

FINDINGS OF FACT

The Grievant worked as an Information Security Officer at the Department of Transportation (“DOT”). Pursuant to the Governor’s Executive Order 20, the Grievant and five other DOT information and technology positions were reallocated to DTI, effective July 11, 2012.

By memorandum dated July 3, 2012, the Grievant was notified his position was organizationally transitioning from DOT to DTI control. Specifically, the Grievant was told that he would remain in a merit position under DTI, which would administer his benefits. He was advised who his supervisor would be, how to request leave and that his performance plan would be updated.

DTI requires all employees (full-time, consolidated, part-time, casual/seasonal and temporary employees, as well as contractors and vendors) who have access to the State's information systems and infrastructure to qualify for a security clearance based on a criminal background check ("CBC") completed by the State Bureau of Information ("SBI").¹ DTI Policy DTI-0074.02 states: (1) "the outcome of these checks determines hiring approval, system and facility access at DTI" and (2) "if criminal history reports are not provided within the first 90 days in order for DTI to determine final security clearance, employment/contract may be terminated."

The Grievant declined to attend a meeting on July 5, 2012 to initiate his criminal background check. On July 12, 2012, the Grievant met with his DTI supervisor, Danka Prilepkova, about the criminal background check process. The Grievant informed DTI he refused to participate in the criminal background check until he received a letter from Human Resources Management at OMB outlining his transition to DTI. This letter was sent to the Grievant via email on July 31, 2012 and provided the transition details he requested.

The Grievant cancelled an August 6, 2012 meeting with Prilepkova and on August 8, she notified the Grievant that he had two days to complete the criminal background check. On August 10, 2012, the Grievant was again informed by DTI that he had until close of business that day to complete the criminal background check or a written reprimand would be issued.

The Grievant met with DTI's Chief Security Officer on August 16, 2012 to discuss the required criminal background check. Because he had not complied with the CBC requirement and was insubordinate in failing to comply with a directive, a written reprimand was issued. DTI gave the Grievant until August 17, 2012 to complete the full criminal background check

¹ Pursuant to 10 *Del.C.* § 8513, SBI is the repository of all criminal history record information in the State and conducts all criminal background checks requested by the individual or any criminal justice agency, courts of any State or any State agency.

process. The notification stated “If you continue to refuse to comply with the criminal background check policy, we will move forward with the steps of progressive disciplinary action up to and including termination.”

The Grievant grieved the written reprimand with this Board. In its July 3, 2013 decision, MERB concluded DTI had just cause to reprimand the Grievant for insubordination for failing to submit to the criminal background check. *MERB Docket 12-11-573*

When the Grievant had still not completed the CBC as directed, DTI notified him in a September 6, 2012 memorandum that a one-day suspension without pay would be issued. The Grievant was again given an extension until September 20, 2012 to complete the criminal background check. He was also notified, “If you continue to refuse to comply with the criminal background check policy, we will move forward with the steps of progressive disciplinary action up to and including termination.”

On September 20, 2012, DTI notified the Grievant his new, temporary work location would be 900 North King Street in Wilmington, beginning October 1, 2012. The assignment in Wilmington did not require CBC clearance which allowed the Grievant to work at this location. In addition, on October 10, 2012, DOT sent an email asking DTI if the Grievant continued to need a DOT office because they needed to relocate staff in order to complete renovations in the Dover DOT building in which the Grievant had worked.

The Grievant filed a merit system grievance alleging DTI discriminated against him by suspending him based on a non-merit factor (i.e., requiring him to complete a criminal background check), retaliated against him for filing a prior grievance by denying him a day of annual leave,² and transferring him to DOT’s Wilmington office where he is subject to city

² DTI denied the Grievant’s September 20, 2012 request for leave November 19, 2012 through November 21, 2012.

wage taxes and daily parking costs. The grievance was denied at Step Three. His appeal of that decision to MERB was voluntarily withdrawn on December 12, 2013. *MERB Docket 13-02-580*.

On November 8, 2012, DTI suspended the Grievant for three days without pay for failing to complete the criminal background check and for insubordination in failing to comply with a work directive. DTI again provided the Grievant an extension until November 21, 2012 to complete the criminal background check. The notification stated, "If you continue to refuse to comply with the criminal background check policy, we will move forward with the steps of progressive disciplinary action up to and including termination."³

In a December 10, 2012 memorandum, DTI informed the Grievant that due to his failure to complete the criminal background check and insubordination in failing to comply with DTI's repeated directives, he would be terminated. In a January 4, 2013 letter to the Grievant, DTI informed him he was terminated and his last work day was January 4, 2013.

In addition to grieving his termination, the Grievant also asserts DTI denied his request to return to his former Dover DOT location on December 10, 2012; DTI denied his December 12, 2012 request to carry over leave on December 14, 2012; and improperly issued him a written reprimand for not being at his work location on October 29, and October 30, 2012.⁴

The Board finds as a matter of fact that the Grievant continuously refused to submit to the criminal background checks even though he was given numerous opportunities to meet this condition of his employment. DTI continued to direct the Grievant to complete the criminal background check from July until December 2012. DTI maintained a written policy (of which

³ The Grievant did not file an appeal of the three-day suspension with MERB

⁴ It was later determined that State offices were closed on October 29 and October 30, 2012, due to the inclement weather associated with Hurricane Sandy.

the Grievant was admittedly aware) requiring the check to be completed within 90 days of joining the agency.

The Board finds as a matter of fact DTI gave the Grievant a written reprimand, a one-day suspension without pay and a three-day suspension without pay for not completing the criminal background check, each of which included notification that continued refusal to submit to the policy would result in future discipline up to and including termination.

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 Grievant does not claim that DTI denied his specified due process rights. The Board finds as a matter of law that DTI had just cause to terminate the Grievant’s employment.

Just cause requires discipline (including termination) be based on a legally sufficient reason supported by job related factors that rationally and logically touch upon an employee’s competency and ability to perform his duties.⁵ This Board has previously held insubordination may be a sufficient basis for termination.⁶

The Grievant admitted he repeatedly refused to submit to a CBC prior to his termination,

⁵ *Stanford v. DHSS*, 44 A.2d 923, 2012 WL 1549811 @ p.3.

⁶ *Christman v. DHSS*, MERB 12-01-532 (2012); *Olsen v. DSCYF*, MERB 11-09-522 (2012).

despite repeated requests from DTI supervision. He further admitted that he was provided additional opportunities to comply well beyond the 90 day period established in DTI Policy DTI-0074.02. Consequently, the Board finds there was a legally sufficient reason to discipline the Grievant.

The second prong of the just cause standard requires that the discipline imposed be appropriate. The Board takes into account aggravating factors such as prior discipline for similar misconduct in assessing the appropriateness of imposed discipline. In this case, the Grievant was repeatedly warned and received progressive discipline, including a written reprimand, a one-day suspension and a three-day suspension. He served both suspensions.

The Board has also considered the adverse impact of the employee's misconduct on the workplace in its just cause determinations. DTI's policy prohibited employees from having access to the secured statewide information system without appropriate security clearance, which it based upon successful completion of a criminal background check performed by an external provider. By refusing to meet this reasonable requirement as directed, the Grievant could not perform the essential functions of his job. DTI was not required to retain an employee who could not perform required duties of his position.

The Grievant asserted he never refused to ever submit to a CBC but testified that he was waiting for a decision from this Board as to whether DTI could require him to meet that requirement to continue to hold his merit position. The Board finds no merit to this argument.

The Grievant had the option to complete the criminal background check and grieve the requirement rather than refusing to comply with DTI's directive. The Grievant testified he believed that submitting to the policy and then grieving would make his objection moot. His belief did not justify his insubordinate behavior.

The Board finds no merit to the Grievant's proposal at the pretermination meeting to have his fingerprints taken but request SBI delay performing the criminal background check until this Board had decided the Grievant's appeal of the written reprimand. This proposed solution would not have allowed the Grievant to perform his essential job functions because he would not have had the required security clearance.

Merit Rule 18.1 provides:

Merit employees have the right to use this grievance procedure free of threats, intimidation or retaliation, and may have union or other representation throughout the process.

The Board finds as a matter of law DTI did not retaliate against the Grievant for filing an appeal to this Board of the written reprimand issued to him on August 16, 2012. The Grievant alleged there were several discrete adverse employment actions prior to his termination from which this Board could infer intentional retaliation: (1) Departing from the steps of progressive discipline otherwise applicable because of Appellant's use of the grievance system, preventing the MERB's final ruling on the criminal background check requirement which would have led to the Grievant's taking same before termination; (2) Treating the Grievant differently by imposing discipline upon him for being absent from work on inclement weather days when State offices were closed; (3) Denying leave sought by the Grievant for false reason, and then denying the carrying over of leave, resulting in his forfeiture of accumulated earned leave; and (4) Transferring the Grievant from Dover to Wilmington for false reasons, which made work more difficult for the Grievant and had no effect on the security of the State's information system.

The Board finds no merit to the Grievant's contention that DTI did not properly administer progressive discipline prior to terminating him on January 4, 2013. DTI repeatedly directed and provided many opportunities for the Grievant to complete the criminal background

check before his termination. The Grievant's statement that he did not realize DTI could fire him if he did not submit to the criminal background check is not credible. DTI notified him each time he was disciplined that continued insubordination and refusal to submit to a CBC could result in further discipline up to and including termination.

The Board finds the Grievant's contention that DTI retaliated against him by disciplining him for being absent from work on October 29 and October 30, 2012 when State offices were closed due to Hurricane Sandy without merit. His supervisor testified she was monitoring the Grievant's attendance biweekly. When she noticed he had not logged in on those two days, she was unaware they were days the State was closed due to inclement weather. She testified that when she confronted the Grievant about his absences on these dates, he had no explanation for why he was not at work and responded that he was "pretty sure" he did work those days. The Board found her testimony that this was an error no one caught (including the Grievant) to be credible.


The alleged denial of his annual leave request for September 20, 2012, his transfer to a temporary work location at 900 N. King Street in Wilmington, and the cancelling of his keycard access to the Dover DOT location, were considered and resolved as part of the Grievant's grievance of his one-day suspension. The Step 3 decision in that case was not appealed and therefore constitutes final resolution on those issues.

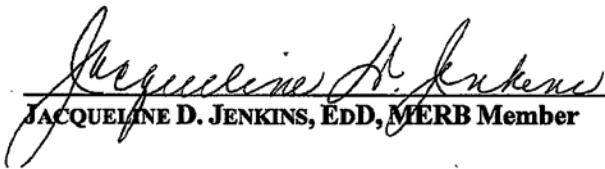
Similarly, the Board finds the Grievant's contention that his annual leave requests for October 5, 2012, October 17 – 19, 2012, and November 19 – 21, 2012, were improperly denied were addressed and resolved in a grievance for which no timely appeal was filed after the Step 1 decision.

ORDER

It is this 4th day of August, 2014, by a unanimous vote of 5-0, the Decision and Order of the Board to deny the Grievant's appeal. The Board finds there was just cause to terminate and no retaliation for utilizing the grievance process.


MARTHA K. AUSTIN, MERB Chairwoman


JOHN F. SCHMUTZ, MERB Member


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: **August 4**, 2014

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel