

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

ERIKA BENNER,)	
Employee/Grievant,)	
)	DOCKET No. 14-01-602
v.)	ORDER OF DISMISSAL
OFFICE OF MANAGEMENT AND BUDGET,)	
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 Thursday, August 7, 2014, at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, and Victoria D. Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

BACKGROUND

A hearing was convened by the Merit Employee Relations Board (MERB) on Thursday, August 7, 2014, to hear the appeal of Erika Benner (Grievant) against the Office of Management and Budget (Department).

The Grievant filed a dual appeal to the State Office of Human Resources Management (HRM) and to the Merit Employee Relations Board (MERB) on January 8, 2014, in which she asserted:

Ms. Benner received an appointment to be Deputy State Treasurer of the State of Delaware. Upon acceptance of this appointment, she was automatically granted an extended leave of absence under 29 *Del.C.* §5903.¹ Subsequent to leaving her appointed position, she sought reentry into a Classified Service position. The Director of the Office of Management and Budget is required to place her in a position, for which she meets the minimum qualifications, in the same or lower pay grade as the position that she held when she left the Classified Service.

... On December 20, 2013, the Director of the Office of Management and Budget denied Ms. Benner's "... request to return to the Merit System..." As she did not hold a Merit/Classified position at the time of the Director's decision, it is questionable whether the provisions of 29 *Del.C.* §5949(a)² and

¹ 29 *Del.C.* §5903 provides, in relevant part: Any classified employee leaving the classified service to accept a position under paragraph (4), (5), (6) or (23) of this section shall automatically be granted an extended leave of absence. Upon completion of such appointment, the Director of the Office of Management and Budget shall place the employee in a classified position for which the employee meets minimum qualifications in the same or a lower pay-grade as the position that the employee held when leaving the classified service. The salary shall be paid at no less than the equivalent pay grade and percentage of the pay grade midpoint from which the employee took this leave of absence.

² 29 *Del.C.* §5949 Appeals.

(a) An employee in the classified service who has completed a probationary period of service may not, except for cause, be dismissed or demoted or suspended for more than 30 days in any 1 year. Within 30 days after any such dismissal, demotion or suspension, an employee may appeal to the Board for review thereof. Upon such review, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard publicly and to present evidentiary facts. At the hearing, technical rules of evidence shall not apply. The rules shall require that the Board take final action on an appeal within 90 calendar days of submission to the Board. Upon approval of all parties, the 90 days may be extended an additional 30 calendar days.

MR 12.9³ are applicable, since OMB apparently claims she was not dismissed, demoted or suspended.

By letter dated January 15, 2014, the Director of Labor Relations and Employment Practices advised the Grievant:

... The HRM Director reports to the OMB Director. Since the decision was made by a higher level authority there is no relief available at the HRM Director's grievance level. Accordingly we will not be opening an HRM Director-level grievance.

By letter dated February 24, 2014, the Grievant was advised that MERB had scheduled an evidentiary hearing for April 23, 2014. When the Grievant did not file exhibits or a witness list in support of her appeal by April 14, the MERB's Administrator contacted her by certified mail (with a copy also provided by email):

By letter dated February 24, 2014, you were notified that the Merit Employee Relations Board had scheduled an evidentiary hearing on your appeal for **Wednesday, April 23, 2014**. The letter instructed both you and counsel for OMB to submit exhibits and witness statements on or before **Monday, April 14**. The letter also advised the parties to expect contact from MERB's counsel to schedule a prehearing conference for the week prior to the hearing. I have attached a copy of my letter to you for your convenience.

MERB has not received either your exhibits or witness list and all efforts to contact you by telephone and email for the last week have been unsuccessful. Mr. Tupman's staff (Courtney Settles) has left three separate voice mail messages at the phone number you provided (302-535-7987) and has also sent email messages to the address in the header of this letter.

Because we have been unable to contact you, the hearing cannot go forward as scheduled on April 23. **Please contact me immediately if you wish to reschedule this hearing.**

If I do not hear from you on or before Friday, May 2, 2014, the Board will conclude that you have abandoned your appeal and the

³ Merit Rule 12.1: 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.

file will be closed. Thank you for your prompt attention and response.

On April 21, 2014, a signed certificate of receipt of the April 15th letter was received in the MERB offices. There was no communication from the Grievant following her receipt of this letter.

By letter dated May 29, 2014, both the Grievant and the Department were notified:

A letter was sent to Ms. Benner (by certified mail, USPS) on April 15, 2014, which requested she contact me on or before Friday, May 2, 2014, if she wished to reschedule a hearing on her grievance. The previously scheduled hearing was continued because Ms. Benner failed to provide proposed exhibits and witness statements by April 14, 2014, as required by MERB Operating Procedure 13.

MERB did receive a return receipt for delivery of the April 15, 2014 letter which bears a signature of Ms. Benner's name and indicates it was delivered to the address above on April 21, 2014.

I have not been contacted by Ms. Benner requesting to reschedule the hearing.

Consequently, MERB will consider a motion to dismiss this appeal based upon abandonment by the Grievant at its meeting on **Wednesday, June 25, 2014**. The meeting will begin at 9:00 a.m. and will be held in the **Delaware Public Service Commission Hearing Room...**

This letter was sent to the Grievant by certified mail and email. The letter was returned to MERB, marked, "Unclaimed; Unable to Forward" on June 23, 2014.

The MERB hearing scheduled for June 25, 2014, was continued and the parties were so advised by email on June 24, 2014.

A final letter was sent to the Grievant (by certified mail and email) and the Department on July 21, 2014, which stated:

"This letter constitutes a final effort to contact the Grievant concerning the above-referenced appeal. I note that the letter sent to Ms. Benner on May 29, 2014 advising that the Board would

consider a motion to dismiss her appeal on June 25, 2014, was returned as undeliverable.

The Merit Employment Relations Board has rescheduled its consideration of the motion to dismiss this appeal (based upon abandonment by the Grievant) at its meeting on Thursday, August 7, 2014.

The meeting will begin at 9:00 a.m. and will be held in the Delaware Public Service Commission Hearing Room...”

On July 25, 2014, a signed certificate of receipt of the July 21st letter was received in the MERB offices.

A quorum of three members of the MERB met to consider a Motion to Dismiss for abandonment of the grievance on Thursday, August 7, 2014. Neither the Grievant nor the Department was present or represented at the hearing.

DISCUSSION

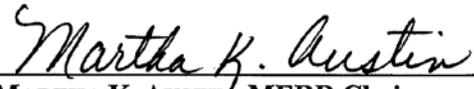
Delaware courts have held that when a party appeals to an administrative board but does not appear for the hearing, the board may dismiss the appeal for failure to prosecute. *Ringer v. Dept. of Transportation*, Nos. 06-06-360/361 (Sept. 24, 2008), (citing *Han v. Red Lobster*, 2004 WL 1427008, at p. 1 (Del. Super., June 25, 2004).

The Grievant failed to appear to be heard and to present evidence in support of her appeal. Consequently, this appeal is dismissed.

DECISION AND ORDER

It is this 20th day of August, 2014, by a unanimous vote of 3-0, it is the Decision and Order of the Board to dismiss the Grievant’s appeal for failure to appear and present evidence in

support thereof, and for abandoning the grievance.


MARTHA K. AUSTIN, MERB Chairwoman


JOHN F. SCHMUTZ, 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 20, 2014

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel
MERB Website