

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

GRIEVANT,)	
)	
v.)	DOCKET No. 15-01-619
)	
DEPARTMENT OF TECHNOLOGY AND INFORMATION,)	DECISION AND ORDER
)	
Employer/Respondent.)	<i>[Public (redacted) decision]</i> ¹

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 November 5, 2015 in the Delaware Public Service Commission Hearing Room, at the Cannon Building, located at 861 Silver Lake Blvd., Dover, DE 19904.

BEFORE Martha K. Austin, Chair, Jacqueline D. Jenkins, Ed.D and Victoria Cairns, 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
	Kevin R. Slattery Deputy Attorney General on behalf of the Department of Technology & Information

¹ This hearing on a disciplinary matter was closed to the public pursuant to 29 Del.C. §10004(b)(8).

BRIEF SUMMARY OF THE EVIDENCE

The Department of Technology and Information (“DTI”) offered and the Board admitted into evidence without objection twenty-two (22) exhibits marked for identification as A-V. DTI called one witness: Kim Thornton (“Thornton”), Human Resources Administrator, DTI.

The Grievant offered and the Board admitted into evidence without objection twenty-six (26) exhibits marked for identification as 3-13 and 16-30. Neither the Grievant nor her witnesses appeared for the hearing at the scheduled time. The Board waited for 15 minutes and attempted to contact the Grievant with no success, therefore the hearing was held *in absentia*.

FINDINGS OF FACT

Prior to her termination on December 8, 2014, the Grievant worked for the Department of Technology and Information (“DTI”) after transferring from the Delaware Department of Transportation (“DelDOT”) on February 3, 2014, as part of the consolidation of all information technology professionals working in State agencies.

Shortly after joining DTI, the Grievant went out for shoulder surgery and was absent from work from February 25, 2014 until April 8, 2014. During this period of time, the Grievant was on approved leave under the Family Medical Leave Act (FMLA).² The Grievant notified DTI on March 6, 2014 that her surgery was more involved than expected and that she would be out of work for three to six months for recovery.

The Grievant returned to work on June 18, 2014, after being released by her physician. At 3:11 p.m. that day, the Grievant sent an email to her supervisor stating she was extremely nauseous, with a pounding headache, and was leaving for the day. The Grievant left without

² DelDOT approved the FMLA leave from 2/25/14 – 4/8/14. DTI responded that same day that in order for the Grievant to utilize the full twelve week FMLA coverage (which extended her leave only until May 20, 2014) she must submit another doctor’s note as well as seek additional sources of leave.

prior supervisory approval. In her email, the Grievant also requested the use of a walled office in which the lights could be turned off for the following day in order to test whether the lights in and next to her cubicle were the cause of her nausea and headache.

The following day (June 19, 2014), Lisa Wragg, Sr. Application Manager, Yvonne Daubert, Human Resources Officer and Kim Thornton, Human Resources Administrator met with the Grievant to discuss her light sensitivity issue. The Grievant stated she was not looking for a permanent move, but would like to use a vacant office to test her light sensitivity theory. The Grievant stated that if this was the problem, she would then have her physician provide information for a permanent accommodation. In the interim, the Grievant requested the fluorescent lights be loosened/removed from the cubicle next to her cubicle and she stated she would work from home for the remainder of that day. She returned to work on June 20, 2014, and began working in a walled office without fluorescent lighting.

On June 27, 2014, DTI received an American Disabilities Act (ADA) Questionnaire on behalf of the Grievant that stated she was unable to efficiently perform her duties and needed to avoid direct fluorescent lights due to her photophobia. On June 30, 2014, DTI informed the Grievant that the requested lights had been removed from above her cubicle and the cubicle to the left, and that she could return to work in her cubicle. Upon questioning from her supervisor on June 30, 2014, as to why she had not returned to her cubicle, the Grievant replied that she had contacted her physician and would be staying in the office she had been working in until she heard from her physician.

On July 1, 2014, the Grievant's physician submitted a second ADA Questionnaire which stated she needed to avoid fluorescent lights entirely in order to perform her job successfully. In a July 6, 2014 email, the Grievant queried whether there were any updates about her accommodation and suggested either a walled office where fluorescent lights could be turned off

or working from home. DTI responded on July 7, 2014 that the original accommodation for the Grievant's cubicle remained in effect until they received clarification from her physician concerning the modified request. DTI notified the Grievant that if she felt she was unable to work in the accommodated conditions her physician originally provided, she needed to submit leave slips for the time she was not reporting into the office and/or receive approval to telecommute pursuant to the agency's policies. She was warned that failure to take this action would result in her time out of the office being treated as an unapproved leave of absence.

Upon speaking with the Grievant's physician, DTI learned the recommended avoidance of fluorescent light could be accommodated by the Grievant wearing sunglasses or a visor at her desk. By email dated July 8, 2014, at 8:18 a.m., the Grievant informed DTI she tried the sunglasses but had difficulty seeing her computer monitor and keyboard. She advised in a 9:03 a.m. email that day that she was leaving work to "try to find a visor." DTI informed the Grievant again on July 9, 2014, that if she felt that her physician's recommendations for accommodation were not working, she needed to speak to her physician and to submit a leave request for any hours she was not reporting to work.

The Grievant submitted a note from her physician, dated July 15, 2014, stating she would be out from work from July 8, 2014 through August 14, 2014 with a return to work date of August 15, 2014, without restrictions. DTI informed the Grievant on July 16, 2014 that she needed to contact the State's short-term disability administrator, The Hartford, because she would be out for over 30 days. The Grievant was also advised that as of that date, her accumulated leave balances were 15.75 hours sick leave and 247.0 hours annual leave.

On July 21, 2014 the Grievant requested a daily log of leave used for the time period of January 1, 2014 through July 21, 2014, asserting that some of her leave had been deducted and then reimbursed throughout short-term disability payments. On July 30, 2014, DTI provided

the Grievant with her leave totals through July 11, 2014. The Hartford approved the Grievant's short-term disability for the period of August 7, 2014 through August 15, 2014. DTI informed the Grievant leave slips for absences from August 7, 2014 through August 15, 2014 needed to be submitted to avoid disciplinary action and that she was expected to return to work on Monday, August 18, 2014.

On August 17, 2014, the Grievant forwarded another medical leave notice from her physician stating she would be out of work from August 15, 2014 through November 1, 2014. No reason was provided as to the necessity of the leave.

On September 5, 2014, DTI informed the Grievant that as of September 15, 2014 she would have exhausted all of her accrued vacation hours and would have sick leave balance of 0.25 accrued hours. She had exhausted her twelve-week FMLA leave earlier in the year and The Hartford had not notified DTI that her short-term disability claim had been extended beyond August 15, 2014 (the date on which her physician had stated she could return to work without restrictions). DTI warned the Grievant that if she did not return to work on September 15, 2014, and the Hartford did not extend her claim for benefits, her employment with DTI would end effective September 15, 2014 because she had no accrued leave time and could not perform the essential functions of her job.

On October 2, 2014, The Hartford notified DTI that the Grievant's claim for short-term disability had been denied because the information obtained did not support her claim of total disability from performing her occupation. The Grievant inquired as to whether she could obtain donated leave from other State employees. Pursuant to the Office of Management and Budget/Human Resources Management policy, however, donated leave may not be approved during an appeal for short-term disability benefits.

On October 8, 2014, a new physician for the Grievant forwarded a letter stating she could

return to work on November 3, 2014 with a walled-office restriction and personal control of lighting. DTI found an office for the Grievant in preparation for her return to work on November 3. On October 27, 2014, the Grievant forwarded a release from yet another physician stating she was scheduled for surgery on October 31, 2014 and would be unable to work for two to six weeks after the surgery. Upon receipt of this note, DTI recommended the Grievant for dismissal.

DTI attempted to work with the Grievant and her physician's recommendations for accommodation. DTI had difficulty contacting the Grievant by phone or email. Her extended unapproved absence directly impacted the workplace and her coworkers were required to bear her workload. The Grievant failed to request leave without pay until after the pre-decision meeting, she did not qualify for donated leave, she had exhausted her FMLA benefits, and her short-term disability benefits had terminated.

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 Board concludes as a matter of law that the Grievant committed the charged offense of failing to appear for work and failing to secure authorized leave for an extended period of time. DTI offered specified due process rights required under the Merit Rules and the penalty

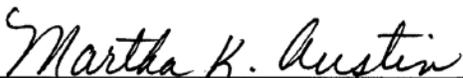
of termination was appropriate in this case.

The Board holds that DTI went above and beyond what was required to assist the Grievant in returning to work based on the accommodations her physician recommended she needed to perform her job functions. The Grievant continued to visit various physicians and receive medical leave notices each time she was scheduled to return to work. Often, these notices gave no reason as to why she was unable to work. In addition, the Grievant made it difficult for DTI to gain clarification of her physicians' recommendations by failing to respond to emails and phone calls on multiple occasions for her approval to release her medical record information.

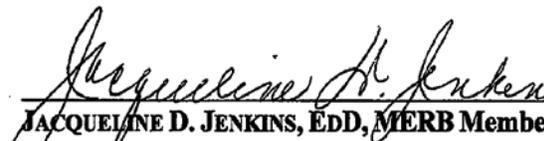
Therefore, the Board concludes as a matter of law that DTI had just cause to terminate the grievant.

ORDER

It is this 30th day of December, 2015, by a vote of 3-0, the Decision and Order of the Board to deny the Grievant's appeal. The Board finds DTI had just cause to terminate the grievant for being absent on extended unauthorized leave, in which she continually failed to appear for work or secure authorized leave after recommended accommodations had been implemented by her employer.



MARTHA K. AUSTIN, MERB Chairwoman



JACQUELINE D. JENKINS, EDD, 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: December 30, 2015

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel
MERB website