

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

FRED WAY, III,)	
)	
Employee/Grievant,)	DOCKET No. 15-09-635
v.)	
)	DECISION AND ORDER
DEPARTMENT OF CORRECTION,)	
)	
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 August 17, 2017 at the Delaware Public Service Commission, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Paul R. Houck, Jacqueline 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

Gaber W. Aber, Esq.
on behalf of the employee/grievant,
Fred Way, III

Kevin Slattery
Deputy Attorney General
on behalf of the Department of
Correction

BRIEF SUMMARY OF THE EVIDENCE

The Department of Correction (“DOC”) offered twelve documents, and the Board admitted into evidence eleven documents marked for identification as Exhibits A – L (exhibit H was excluded at prehearing). DOC called one witness, Jennifer Biddle (“Biddle”), Chief, Bureau of Administrative Services and prior Director, Human Resources, DOC.

The Employee/grievant, Fred Way, III, (“Way”), offered, and the Board admitted into evidence nine documents marked for identification as Exhibits 1 - 9. The Grievant called one witness, Britta Strop, Human Resources Specialist II, DOC. Way testified on his own behalf.

On August 14, 2017, Way filed a legal memorandum asserting DOC unilaterally exercised and improperly usurped the grievant’s rights under the merit rules when it expeditiously scheduled and conducted a pre-termination hearing in a manner which foreclosed his opportunity to adequately prepare. As a result, he was terminated prior to his planned retirement and therefore was denied his right to be paid for his accumulated sick leave as provided for in Merit Rule 5.3.4. Additionally, Grievant asserted numerous due process violations were committed by DOC as part of its investigation, his removal from the workplace and pre-termination hearing processes. DOC filed a response on August 16 after the Board granted both parties permission to submit written memoranda on August 15, 2017.

As a preliminary matter, the Board *sua sponte* made a Motion in Limine to exclude any evidence or argument concerning due process violations related to the Grievant’s termination because the Board specifically limited the appeal in its decision denying DOC’s Motion to Dismiss (dated February 13, 2017) to whether the grievant is entitled to accrued sick leave pursuant to Merit Rule 5.3.4.1. Further, the Grievant explicitly stated during the prior MERB hearing (and at Step 3 of the grievance procedure) that he does not dispute that DOC had just cause to terminate him based on his criminal convictions. The Board unanimously approved the motion to so limit

the scope of this hearing.

FINDINGS OF FACT

On June 19, 2015, Way was removed from his workplace at the Baylor Correctional Institution (where he was employed as the Security Superintendent) with pay, pending completion of an investigation by DOC. On July 6, 2016, Way's status was converted to a suspension without pay, based on DOC's determination that he posed an immediate safety/security risk or jeopardized public confidence, per Department Policy 9.22.

On July 22, 2015, Way contacted DOC Human Resources Specialist I, Britta Strop ("Strop"), to initiate the process to retire from State service. After a telephone conversation, Strop contacted Way via email to inform him she had filed his application for retirement, to be effective November 1, 2015. Way responded to Strop later that same day, relating that he had contacted the State Office of Pensions and had been informed that he could pick his effective date of retirement. He further stated he had been advised that he did not need to wait a full 90 days to retire, nor was November 1, 2015 the first date on which he could effectively retire. Way requested Strop change his effective retirement date to September 1, 2015. On July 24, 2015, Strop informed Way she had requested the change and would forward a confirmation email once the Office of Pensions updated his application. By letter dated September 16, 2015, the Office of Pensions sent an acknowledgement letter to Way indicating a retirement date effective September 1, 2015.

On August 17, 2015, DOC advised Way of its intent to terminate his employment for violations of DOC and Bureau of Prisons policies, as well as violations of Baylor Women's Correctional Institution procedures. Way was advised in the letter that a pre-decision meeting had been scheduled for August 24, 2015, at which time he could present reasons why he felt dismissal was not appropriate.

DOC terminated Way's employment on August 25, 2015.

On or about August 31, 2015, Way signed an Application for Pension, certifying his agreement with the Office of Pensions' calculation of his creditable service, as included therein. The document states, "I hereby apply for a Reduced/Service Pension under the State Employees' Pension Plan effective 09/01/2015."

In mid- to late-September 2015, Way received his final pay check from DOC which included a final pay-out for his accumulated annual leave, consistent with Merit Rule 5.2.8.¹ DOC's then Director of Human Resources, Jennifer Biddle, testified Way did not receive a pay-out for accumulated sick leave because State employees are not entitled to such accumulated leave when they are terminated or resign. Way was terminated prior to the effective date of his service pension. DOC certified Way was entitled to a service pension based on his total creditable service of twenty-seven years, four months and eighteen days; that service pension became effective on September 1, 2015.

CONCLUSIONS OF LAW

Merit Rule 5.3.4 provides (in relevant part):

Employees shall be paid for accumulated sick leave at their current salary, excluding all supplemental and premium pays, under the following conditions:

5.3.4.1 At retirement under the State Pension Law, upon commencement of long-term disability [29 Del. Code '5253 (c) (5)], or if laid off without prejudice for lack of work at the rate of 1 hour's pay for each 2 hours of sick leave. The maximum payment is 337.5 hours (37.5 hour weekly schedule) or 360 hours (40 hour weekly

¹ Merit Rule 5.2.8 states, "If an employee resigns or is terminated for any reason including dismissal, or dies with unused annual leave credit, the employee or his/her estate as applicable, shall be paid in cash for any unused annual leave."

schedule)...

29 *Del. C.* § 5522(b) provides:

A former employee with a vested right to a service pension shall become eligible to receive such pension, computed in accordance with this chapter beginning with the first month after his or her attainment of: (1) Age 60 if credited service is equal to or greater than 20 years and includes service prior to July 1, 1976; or (2) Age 62 if credited service is equal to or greater than five years.

The Board holds as a matter of law Way was entitled to receive a service pension based on his creditable service with the State. Concerning Way's eligibility to receive a pay-out of accumulated sick leave, the Board found no evidence that Way communicated to DOC his intention to retire prior to September 1, 2015. The Office of Pensions application was signed and certified on August 31, 2015, and Way requested Strop make his effective retirement date September 1, 2015 in his July 22, 2015 email, in which he wrote:

I spoke to the pension office again and they told me I could pick the date of my retirement and it doesn't have to be November 1st. They said all they needed was for you to submit a statement stating I am requesting the following date of September 1st as my requested retirement date...

DOC terminated Way on August 25, 2015, seven days prior to the effective date of his retirement. The Board finds no evidence there was any misrepresentation or failure of a fiduciary duty by anyone to inform Way of an option to retire on August 1, 2015, nor does the record establish that Way requested to retire effective August 1, rather than September 1.

Under §10125(c) of the Delaware Administrative Procedures Act, in any proceeding which results in a case decision conducted by a covered agency², the burden of proof "... is always upon

² The Merit Employee Relations Board is specifically included in the list of State agencies covered by the APA. 29 *Del.C.* §10161(a)(12).

the applicant or proponent” (i.e., the grievant in this matter). A majority of the quorum of the Board was unable to conclude that Way provided sufficient evidence that DOC violated Merit Rule 5.3.4. A majority of the Board was not convinced that Way was retired before he was terminated, the only circumstance under which he would have been entitled to a pay-out of his accumulated sick leave. Consequently, he did not meet his burden to establish by a preponderance of the evidence that the agency violated the Merit Rules as alleged.

ORDER

It is this 25th day of October, 2017, by a vote of 2-2, determined that a majority of the quorum of the Board present was unable to conclude the employer violated Merit Rule 5.3.4 when it did not pay the grievant for his accumulated sick leave after he was terminated from State service, seven days prior to the effective date of his service pension. Consequently, the grievance is denied.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member