

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

<b>FRED WAY, III,</b>	)	
	)	
v.	)	<b>DOCKET No. 15-09-635</b>
	)	
<b>DEPARTMENT OF CORRECTION,</b>	)	<b>DECISION DENYING AGENCY'S</b>
	)	<b>MOTION TO DISMISS</b>
	)	
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 January 5, 2017 in the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

**BEFORE** W. Michael Tupman, Chair, Paul R. Houck, Jacqueline Jenkins, Ed.D and Sheldon Sandler, 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

Gary W. Aber, Esq.  
on behalf of Employee/Grievant,  
Fred Way, III

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

## **BRIEF SUMMARY OF THE EVIDENCE**

The Board did not admit any exhibits into evidence or take any witness testimony. The Board heard legal argument from the parties on the motion by the Department of Correction (“DOC”) to dismiss the appeal of the employee/grievant, Fred Way, III (“Way”) for lack of jurisdiction. Way filed a written response to the motion to dismiss.

## **FINDINGS OF FACT**

Prior to being dismissed on August 25, 2015, Fred Way was employed by the DOC as the Security Superintendent at Baylor Women’s Correctional Institution (“BWCI”). The State of Delaware filed a criminal indictment on August 31, 2015 against Way for two counts of Sexual Relations in a Detention Facility and four counts of Official Misconduct. Way retired from State employment on September 1, 2015.

On September 22, 2015, Way filed a dual Human Resource Management (“HRM”)/MERB grievance pursuant to Merit Rule 12.9, contesting his termination. On October 2, 2015, HRM attempted to schedule the Step 3 Merit Grievance Hearing (“Step 3”). On October 5, 2015, Way requested the matter be stayed until his criminal case was resolved. On October 6, 2015, HRM granted the request to delay the Step 3 and asked Way to keep the office apprised of progress so they could resume the grievance process.

On January 11, 2016, Way pled guilty to four counts of Official Misconduct and the Court sentenced him on March 24, 2015, with a modification to his sentence issued on April 12, 2016. As a result of his criminal plea and sentence, Way no longer met the conditions necessary to continue his DOC employment, pursuant to DOC policy.

On September 9, 2016, Aaron Shapiro, Esq. (“Shapiro”), Labor Relations and Employment Practices Administrator, Office of Management and Budget, notified Way that since

the stay of the Step3 no communication had occurred even though Way's criminal matters had been completed months earlier. Shapiro asked Way whether he wanted to proceed or withdraw his grievance.

On September 15, 2016, Shapiro contacted Way's counsel, confirming their conversation by telephone on September 12, 2016 regarding Way's intent to continue his grievance for the limited purpose of securing the payment of accrued sick leave, and his intent to present this claim to the MERB. Shapiro confirmed that Way would not be challenging the substance of his termination, had withdrawn his request for a Step 3 Merit grievance hearing, and intended to proceed with his limited claim related to accrued sick leave to the MERB.

On October 25, 2016, the DOC filed a motion to dismiss for lack of jurisdiction with the MERB on the grounds that Way no longer contested his termination and his Step 3 grievance had been withdrawn. On December 29, 2016, Way filed a response to DOC's Motion and DOC filed a reply on January 4, 2016.

### **CONCLUSIONS OF LAW**

Merit Rule 12.9 provides:

**Employees who have been dismissed, demoted or suspended may file an appeal directly with the Director or the MERB within 30 days of such action. Alternatively, such employees may simultaneously file directly with the Director, who must hear the appeal within 30 days. If the employee is not satisfied with the outcome at the Director's level, then the appeal shall continue at the MERB.**

The Board directed the parties to present argument on two issues: (1) Did the September 9, 2016 HRM letter dismissing the Step 3 serve as an "outcome" for the purposes of Merit Rule

12.9; and, if so, (2) Does Way's limited claim concerning his entitlement to accumulated sick leave attach to the original grievance or constitute a new claim?

Neither the Merit statutes nor the Merit Rules define what is an "outcome" for purposes of Merit Rule 12.9, and the Board has not had previous occasion to construe that term.<sup>1</sup> As a case of first impression, the Board is hampered by the fuzzy record of what happened at the Step 3 level because of *ex parte* communications between the HRM hearing officer and the grievant's counsel. Nevertheless, the Board concludes as a matter of law that there was an "outcome" at Step 3 when the HRM hearing officer dismissed the grievance. At that point, there was nothing left to resolve at the Step 3 level and the grievance could proceed to the MERB.

According to DOC, the sick leave claim under Merit Rule 5.3.4.1 is separate and distinct from the grievant's termination claim and should have been pursued via the normal grievance step process starting with Merit Rule 18.6. According to DOC, the grievant did not file a timely Step 1 grievance under Merit Rule 18.6 within fourteen days of the grievance matter and the grievance therefore is time-barred.<sup>2</sup>

Again, the Board is hampered by the fuzzy record of exactly what transpired at the Step 3 level. However, the Board believes that the grievant's sick leave claim is more in the nature of a remedy for an alleged unlawful consequence of his termination, even if he is no longer contesting whether DOC had just cause to terminate him. The grievant's termination is still relevant -- not for just cause purposes -- but to determine whether the grievant is entitled to accrued sick leave for

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<sup>1</sup> Both parties relied on the Board's decision in *Danneman v. DHSS*, MERB Docket No. 09-04-446 (Sept. 3, 2009) which the Board believes is inapposite. *Danneman* was a Merit Rule 18.9 appeal which requires that the grievant be in "receipt" of the Step 3 decision. In *Danneman*, HRM had not relinquished jurisdiction over the grievance, it just had not issued a decision within the 45 days required by the Merit Rules.

<sup>2</sup> It is not clear to the Board on what date the grievance matter arose, or when the grievant "could reasonably be expected to have knowledge of the grievance matter." Merit Rule 18.6. The grievant received a payout for his vacation time on September 18, 2015, but claims he did not realize the agency was denying accrued sick time until some unspecified time later. The Board does not have to resolve that issue because it decides that the sick leave claim is encompassed by the termination claim and the grievant filed a timely dual appeal under Merit Rule 12.9.

purposes of Merit Rule 5.3.4.1. In other words, if DOC terminated him on August 25, 2015, could he still be retired under the State Pension Law on September 1, 2015?

The Board concludes as a matter of law that it has jurisdiction to hear the grievant's claim for accrued sick leave as part of his termination claim even if he does not dispute that DOC had just cause to terminate him for his criminal convictions.

**ORDER**

It is this **13<sup>th</sup>** day of **February, 2017**, by a vote of 4-0, the Decision and Order of the Board to deny DOC's Motion to Dismiss as the Board retains jurisdiction of the appeal.

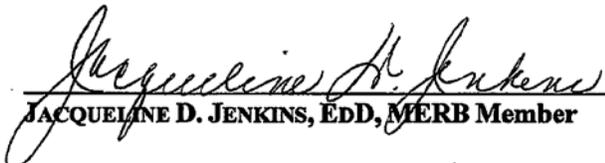
The merits of the grievance will be scheduled for hearing before the full Board.



**W. MICHAEL TUPMAN, MERB CHAIR**



**PAUL R. HOUCK, MERB Member**



**JACQUELINE D. JENKINS, EDD, MERB Member**



**SHELDON N. SANDLER, ESQ., MEMBER**

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