

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

<b>ESTHER FULLER,</b>	)	
	)	
Employee/Grievant,	)	
	)	<b>DOCKET No. 16-04-650</b>
v.	)	
	)	<b>DECISION AND ORDER OF</b>
<b>DEPARTMENT OF TRANSPORTATION,</b>	)	<b>DISMISSAL</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 at the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Suite 100, Dover, DE 19904.

**BEFORE** W. Michael Tupman, Chair; Paul R. Houck, Jacqueline D. Jenkins, EdD, and Sheldon N. Sandler, Esq., Members; a quorum of the Board pursuant to 29 *Del. C.* §5908(a).

**APPEARANCES**

Rae 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 Transportation

## **BRIEF SUMMARY OF THE EVIDENCE**

The Board did not hear any witness testimony but heard the recitation of case processing from its Administrator. The employee/grievant, Esther Fuller (Fuller), did not appear for the hearing.

## **FINDINGS OF FACT**

Fuller is employed by the Department of Transportation in the Division of Motor Vehicle Services as a Driver Improvement Officer. In late 2016, she unsuccessfully applied for a promotion to the position of Driver Improvement Assistant Hearing Officer. She was notified on December 9, 2016 that she had not been selected for the position.

Fuller filed a timely grievance pursuant to Merit Rule 18.6. The grievance proceeded through the steps of the grievance process and a Step 3 decision was issued by a Human Resource Management Hearing Officer on or about April 14, 2016. Fuller filed a timely appeal to MERB on April 28, 2016. In response to the receipt and docketing of her appeal, MERB provided Fuller with a copy of its Operating Procedures.

By letter dated June 2, 2016, the parties were notified the MERB hearing had been scheduled for August 18, 2016, and that exhibits and witness list were required to be submitted on or before August 5, 2016. The letter stated, "At the hearing, Ms. Fuller has the right to be represented by counsel (should she choose to engage counsel), to present evidence and to cross examine witnesses."<sup>1</sup> Both parties submitted proposed exhibits and witness lists as required by MERB Operating Procedure 13.

Pursuant to MERB's Operating Procedure 13, a prehearing conference was scheduled and

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<sup>1</sup> Fuller had advised the Board that she intended to testify but did not intend to call any other witnesses.

convened by the Board's counsel on August 9, 2016. During the course of the prehearing teleconference an issue arose concerning Fuller's desire to have individuals who were neither lawyers nor union representatives represent her before the MERB. The prehearing was suspended in order to allow Fuller to decide whether she wished to engage counsel or to represent herself before the Board. Fuller was again provided with a copy of the Board's Operating Procedures and specifically requested to advise the MERB Administrator on or before the close of business on August 10 as to her intention so that the prehearing could be completed.

By email addressed to the MERB Administrator (and subsequently forwarded to all parties), Fuller requested to postpone the hearing scheduled for August 18 to allow time to "identify the proper legal avenue to pursue with regards to this matter." The hearing was formally postponed on August 11 and Fuller was requested to advise the Board as soon as possible so that the hearing could be rescheduled.

By letter dated September 29, 2016, the Board again requested Fuller advise as to whether she would be retaining counsel or proceeding *pro se*. The Board requested a response on or before October 17, 2016. Fuller did not file a timely response. The Board Administrator spoke with Fuller by telephone on October 25, 2016. Fuller stated she would advise the Board Administrator by the end of the week if she wished to proceed with the grievance. Again, Fuller did not provide the promised response by November 1, 2016.

The MERB hearing was rescheduled for January 5, 2017. The parties were notified by letter dated December 5, 2016, a copy of which was sent to Fuller both by electronic mail at her State email address and by certified U.S. mail. The letter advised that the Board would move to dismiss the grievance at the hearing, but also directed Fuller that if it was not her intent to abandon this grievance, to contact the Board Administrator immediately. Fuller did not respond to this

correspondence and she did not appear for the January 5, 2017 hearing.

**CONCLUSIONS OF LAW**

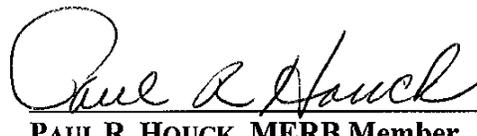
The Board concludes as a matter of law that Fuller has failed to appear and provide her proofs in support of her grievance appeal. Wherefore, the appeal is dismissed with prejudice and the Step 3 decision resolves this matter.

**DECISION AND ORDER**

It is this **31<sup>st</sup>** day of **January** 2017, by a unanimous vote of 4-0, the Decision and Order of the Board to dismiss Fuller's appeal for failure to appear and to advance her appeal.



**W. MICHAEL TUPMAN, MERB CHAIR**



**PAUL R. HOUCK, MERB Member**



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



**SHELDON N. SANDLER, ESQ., 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: **February 1, 2017**

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

MERB Website