

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

GRIEVANT)	
)	
Employee/Grievant,)	
)	DOCKET No. 12-08-554
v.)	
)	
DEPARTMENT OF HEALTH)	
AND SOCIAL SERVICES/DIVISION)	PUBLIC DECISION AND ORDER
OF PUBLIC HEALTH,)	(redacted)
)	
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 May 2, 2013 at the Commission on Veterans Affairs, Robbins Building, 802 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Dr. Jacqueline Jenkins, and Paul R. Houck, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Employee/Grievant, *pro se*

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services (DHSS) offered and the Board admitted into evidence without objection eleven documents marked for identification as Exhibits A-K.

DHSS called one witness: Alisa Jones, former Section Chief, Family Health Systems, Division of Public Health (DPH).

The employee/grievant (the Grievant), offered and the Board admitted into evidence one redacted document marked for identification as Exhibit 1.

The Grievant testified on her own behalf but did not call any other witnesses. In the Pre-Hearing Order (para. 4), the Board precluded the proposed testimony of the Grievant's husband "because he does not have any personal knowledge of the job performance issues which led to his wife's termination."

FINDINGS OF FACT

The Grievant worked as an Administrative Specialist II in the Family Health Systems section of the Division of Public Health (DPH) from 2003 until her termination on July 19, 2012.

The Grievant received an unsatisfactory performance review for the period August 31, 2010 to August 4, 2011. The performance review cited deficiencies in communication skills and completing tasks on time and accurately and several instances of inappropriate behavior.

On August 24, 2011, DPH put the Grievant on a performance improvement plan (PIP). The PIP required specific improvement: to eliminate inappropriate and unprofessional behavior; to communicate in writing and verbally in an appropriate and professional manner at all times; and to complete assignments on time and accurately. To help achieve those goals, the PIP

required bi-weekly meetings between the Grievant and her supervisor.

The Grievant received an unsatisfactory performance review for the period August 24, 2011 to February 2, 2012. The performance review cited deficiencies in completing tasks accurately, inappropriate behaviors and communications, and tardiness.

DPH placed the Grievant on a performance improvement plan in March 2012.¹ The PIP required specific improvement: to complete assignments as instructed by the due dates; to improve accuracy and attention to detail; to maintain professional behavior at all times; and to arrive at work on time. To help achieve those goals, the PIP required bi-weekly meetings between the Grievant and her supervisor.

The bi-weekly PIP meeting notes for February-April 2012 show that, while the Grievant improved in some areas, her job performance remained unsatisfactory for accuracy and attention to detail, and needed improvement for professional behavior.

Alisa Jones, who attended the bi-weekly PIP meetings, provided the Grievant with copies of her meeting notes after each meeting. According to Jones, the Grievant did not comment on any of the meeting notes, and during the meetings the Grievant was “not open to the feedback.” According to Jones, when she suggested that the Grievant be re-trained on the First State Financial system (a source of many of the Grievant’s problems), the Grievant responded that it would be a “waste of time.”

By letter dated June 20, 2012, Alisa Jones notified the Grievant of her proposed termination for job performance deficiencies. The letter also cited the Grievant’s disciplinary

¹ The copy of the March 2012 PIP provided to the Board (Exhibit D) was undated and only had the first page. DHSS represented that it could not find the other pages.

record (one-day, three-day, and five-day suspensions for unprofessional conduct).

The Grievant requested a pre-termination meeting which was held on July 16, 2012. By letter dated July 19, 2012, the Secretary of DHSS (Rita M. Landgraf) notified the Grievant, “I find that your dismissal is appropriate and is effective as of the date of this letter.”

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 has decided that unsatisfactory job performance may be just cause for termination. *See Stanford v. DHSS*, No. 09-12-461 (Nov. 29, 2010) (numerous and repeated errors in processing child support checks), *aff’d*, 44 A.3d 923 (Del., May 1, 2012) (TABLE); *McKinley v. Office of Management and Budget*, No. 11-04-511 (Feb. 21, 2012) (failure to timely negotiate and award contracts and secure performance bonds); *Picconi v. DHSS*, No. 11-06-516 (Apr. 24, 2012) (welfare fraud errors).

The Board concludes as a matter of law that DHSS had just cause to terminate the Grievant for unsatisfactory job performance.²

² In the pre-termination letter, DHSS also cited the Grievant’s prior disciplinary record (a one-day, three-day, and five-day suspension for unprofessional conduct). At the hearing, DHSS represented that it was basing the decision to terminate solely on the Grievant’s unsatisfactory job performance, not on her prior disciplinary record. The Board notes that the Grievant’s five-day suspension was on appeal at the time of the pre-termination letter, and that in a Decision and Order dated

The Grievant received two back-to-back unsatisfactory performance evaluations for the period August 31, 2010 to February 2, 2012. During that seventeen-month period, her job performance did not improve significantly. DPH placed the Grievant on two successive performance improvement plans, identifying the areas in which she needed to improve and requiring bi-weekly meetings with her supervisor to offer continuing feedback (positive and negative) and coaching to help her improve her performance. Yet the same performance deficiencies persisted, in particular her accuracy and attention to detail.

The Grievant took issue with many of the deficiencies cited in her performance review for the period August 24, 2011 to February 2, 2012. She felt that point one under the heading Completing Tasks Accurately was a minor incident which did not warrant a reprimand. But DPH did not reprimand the Grievant for the incident, and brought it to her attention the same day it happened (rather than waiting months later to bring it up in her performance review). Taken in isolation, some of the deficiencies in the performance review may not have warranted an unsatisfactory rating. But taken together, and in light of the Grievant's prior job performance, they did warrant an unsatisfactory review.³

The Grievant testified that she felt "on the chopping block" and the performance review plans and bi-weekly meetings with her supervisor only made her job more stressful and prone to errors. But how else was the agency to help the Grievant improve her job performance? The Board believes that DPH made every effort to help the Grievant succeed by identifying the

March 6, 2013, the Board reduced the five-day suspension to three days.

³ In addition to the Grievant's unsatisfactory performance reviews in August 2011 and March 2012, the Grievant received an unsatisfactory performance review in June 2008 and a needs improvement review in April 2010.

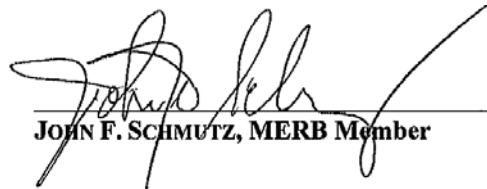
problem areas, suggesting ways that she could improve, and giving her positive feedback when she did improve. Nothing seemed to work, and the Board believes that DPH was well within its rights to finally decide that the Grievant just could not do the job.

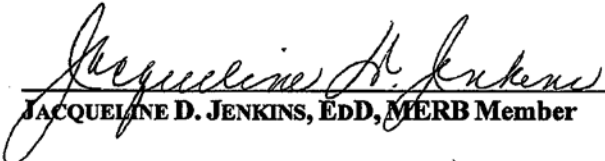
The Board concludes as a matter of law the DPH had just cause to terminate the Grievant for continued and prolonged unsatisfactory job performance.

DECISION AND ORDER

It is this 6th day of May, 2013, by a unanimous vote of 4-0, the Decision and Order of the Board to deny the Grievant's appeal.


MARTHA K. AUSTIN, MERB Chairwoman


JOHN F. SCHMUTZ, MERB Member


JACQUELINE D. JENKINS, EDD, MERB Member


PAUL R. HOUCK, 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: **May 6**, 2013

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel