

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

GRIEVANT,)
)
 Employee/Grievant,)
)
 v.)
)
 DEPARTMENT OF SERVICES FOR)
 CHILDREN, YOUTH AND THEIR)
 FAMILIES,)
)
 Employer/Respondent.)

DOCKET No. 11-08-519

**PUBLIC DECISION
AND ORDER**
redacted

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 July 25, 2012 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Dr. Jacqueline Jenkins, Acting Chair, John F. Schmutz, Paul R. Houck, and Victoria D. Cairns, 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

Roy S. Shiels, Esquire
on behalf of Employee/Grievant

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of
Services for Children, Youth and
their Families

BRIEF SUMMARY OF THE EVIDENCE

The Department of Services for Children, Youth and their Families (DSCYF) offered and the Board admitted into evidence eight documents marked for identification as Exhibits A-H.

DSCYF called two witnesses: Debra O'Neal (O'Neal), Training/Education Administrator II; and Jeannette A. Hammon (Hammon), Human Resources Manager.

The employee/grievant, (Grievant), offered and the Board admitted into evidence eight documents marked for identification as Exhibits 1-8. The Grievant testified on her own behalf but did not call any other witnesses.

FINDINGS OF FACT

The Grievant works as an Administrative Specialist II in the Center for Professional Development which provides education and training for DSCYF employees.

On September 28, 2010, DSCYF gave the Grievant a written reprimand for "Unprofessional and Insubordinate Behavior." The Grievant did not grieve that reprimand.

On October 27, 2010, DSCYF gave the Grievant a written reprimand for "Unprofessional and Insubordinate Behavior." The Grievant did not grieve that reprimand.

On March 16, 2011, DSCYF suspended the Grievant for one day without pay for "unprofessional and insubordinate behavior." The Grievant grieved the one-day suspension. In a Decision and Order, MERB Docket No. 11-04-518 (Apr.12, 2012), the Board denied the Grievant's appeal.

On the morning of February 18, 2011, the Grievant met with her immediate supervisor, Debra O'Neal, and Robert Challenger to discuss the Grievant's performance review for the period

January 1 – December 31, 2010. The performance review noted that “[The Grievant’s] communication style has failed to develop effective communication to meet the needs of the job. [The Grievant] does not communicate well with her supervisor or manager.”

The Grievant’s supervisors put her on a ninety-day improvement plan. One of the areas for improvement was: “When communicating with supervisors and others within the Division or Department, avoids unnecessary and inappropriate confrontations.”

O’Neal and Hammon met with the Grievant a second time on February 18, 2011 at 3:00 p.m. This meeting was prompted by a series of e-mails over the course of February 9 - 18, 2011. The first e-mail string was about the Grievant’s monthly training report which O’Neal thought was missing an attachment. The second e-mail string was about the Grievant’s sick leave account balances for 2010.

The Grievant felt that her sick leave account balances were not accurate. When the Grievant reviewed her 2010 time card (prepared by Kimberly Williams, Senior Human Resource Technician), she wrote on the bottom: “This is not accurate as on some days I should not have been docked pay. I do not agree with these balances and am not kept [illegible] on monthly balances as requested.”

By e-mail dated February 16, 2011 (copied to O’Neal and Hammon), Kimberly Williams advised the Grievant:

You have stated on your 2010 leave record that “you do not agree with these balances.” Please provide specific dates and supporting documentation for any discrepancies no later than Friday February 18th, 2011. The information must be submitted through your supervisor. If you would like to meet with your supervisor and myself to discuss the discrepancies, I would be happy to do so. If I do not hear from you by Friday the 18th the end of the year 2010 leave balances for vacation and sick will stay as is.

By e-mail dated February 18, 2011 (10:03 a.m.), Hammon wrote to the Grievant:

Kim Williams informed me that you are disputing your 2010 leave balance but you have declined her offer to meet to review your record. We have reviewed everything on file and everything is captured on your leave record. If you are disputing your balance it is your responsibility to bring forth the information. Without this information we cannot make any changes. Your balance for 2010 will be finalized at the end of today, so I strongly encourage you to contact Kim if you have additional information that needs to be considered.

By e-mail dated February 18, 2011 (11:35 a.m.), the Grievant replied to Hammon:

I believe you are aware there are days docked without pay that should not truly have been charged against my leave balance in the manner in which they were. Unexcused absences, docking of pay, which are being disputed. One example: 2.0 hours leave on 10/27/10 is due to a work-related injury that stemmed from a project you had me do, and I am disputing being docked for it, etc. I can explain this to Kim but I am not sure she is authorized to change it.

Hammon asked the Grievant to schedule a meeting for the afternoon of February 18, 2011.

The witness accounts of that meeting diverge sharply. What Hammon, O'Neal, and the Grievant agree on is that: Hammon asked the Grievant to set up the meeting; the meeting took place in the afternoon in a conference room; the Grievant, Hammon, and O'Neal were present; Hammon started the meeting with the subject of the Grievant's 2010 sick leave balances; they never got to a discussion of the monthly training report; and the meeting ended abruptly and without resolution.

According to Debra O'Neal, when the subject of sick leave account balances came up the Grievant became "confrontational." The Grievant told Hammon, "Check your e-mail. I put it to you in an e-mail." According to O'Neal, when the meeting ended, O'Neal left the conference room followed by Hammon. Hammon stopped just outside the door in the hall to write some notes. O'Neal stopped outside the door to wait for Hammon in the hall. The Grievant then passed

by Hammon and O'Neal on the way to her cubicle down the hall. According to O'Neal, the Grievant then doubled back and said to Hammon, "Don't you come at me that way," "I'm going to call the police."

According to Hammon, when she raised the subject of the sick leave account balances the Grievant refused to discuss the matter and referred her to the Grievant's e-mail earlier that day. Hammon asked whether the Grievant had any documentation to contest her 2010 sick leave balances but the Grievant became confrontational. According to Hammon, the Grievant said, "If you think I am being so unprofessional, you can give me another written reprimand and I will grieve it." ¹

According to the Grievant, when she was walking out of the conference room she passed by Hammon who "got in my face." The Grievant acknowledged that she said to Hammon, "If you get in my face again like that, I will call the police." The Grievant denied that she was confrontational during the meeting. According to the Grievant she tried to do "anything I could to avoid" the meeting. According to the Grievant, she was concerned, because of prior incidents, that the meeting might become confrontational and she would be disciplined.

The Grievant explained her frustration. According to the Grievant, she has a medical condition (back problem) for which she receives treatment from her doctor in Smyrna (where she lives). Because of the pain and medication, she is sometimes unable to work. According to the

¹ There were some discrepancies between Hammon's and O'Neal's testimony about the order in which they left the conference room, and whether the Grievant had to walk between Hammon and O'Neal, or whether she just passed Hammon on the side. The Board notes that it was not ideal for Hammon and O'Neal to stop just outside the door of the conference room so that the Grievant had to walk by them after a confrontational situation. Hammon could have asked the Grievant to leave the conference room, or she and O'Neal could have continued on to one of their offices rather than risk further confrontation with the Grievant.

Grievant, DSCYF authorized intermittent leave under the Family Medical Leave Act (FMLA), and also made an accommodation to let her work out of an office in Dover, rather than in Wilmington, so she could minimize her FMLA leave for time spent traveling to her doctor's office.

Before the Board, the Grievant did not dispute that she took sick leave on the days indicated in her leave account balances for 2010. The gravamen of her complaint is that DSCYF revoked the accommodation to let her work out of Dover. As a result, she exhausted her accrued leave balances and had to go to a leave without pay status.

According to the Grievant, she had raised this issue many times before with her supervisors to no avail. That was why she felt so frustrated by the e-mail exchanges prior to the second meeting on February 18, 2011 asking for documentation to contest her sick leave account balances, and why she did not want to go to the meeting or discuss the matter further with Hammon. The Grievant felt that it would be fruitless to continue to contest her sick leave account balances because Hammon had made it clear that they "will be finalized at the end of today."

In her last e-mail to Hammon on February 18, 2011 (at 11:35 a.m.), however, the Grievant was clearly contesting her account balances ("unexcused absences, docking of pay"). The Grievant did not feel that she could resolve the matter with Kimberly Williams because "I am not sure she is authorized to change it." The Grievant did not give any indication that she did not want to go forward with the meeting with Hammon. The implication is that she wanted to have the meeting because Hammon had the authority to make any changes in her account balances.

The Grievant testified that she felt sand-bagged at the second meeting on February 28, 2011 because she thought the only topic of discussion would be her monthly training report, not her sick leave account balances, and she believed she had already resolved the report issue with O'Neal

earlier in the day. But in an e-mail dated February 18, 2011 (at 12:08 p.m.), Hammon asked the Grievant to set up a meeting “for this afternoon so I can address both of your e-mails,” referring back to the Grievant’s e-mails earlier that day regarding the monthly training report and her sick leave account balances. The Board finds that the Grievant was on notice that the meeting would address both the monthly training report and the sick leave account balance issues.

The Board finds as a matter of fact that the Grievant acted inappropriately at the second meeting on February 18, 2011. The Board believes that Hammon was trying to give the Grievant one last opportunity to state her case before her 2010 leave account balances became final. Rather than use the opportunity to present her case, the Grievant refused to answer questions or provide any documentation. The Grievant acknowledged that she does not keep any documentation on her own (like leave slips, doctor’s notes). The Board believes that if the Grievant is going to contest her leave account balances, it is incumbent upon her to have the necessary documentation.

After the meeting, the Grievant acknowledges that she said to Hammon in the hall, “If you get in my face again like that, I will call the police.” The Board believes that remark was completely out of line. Even by her own testimony, the Grievant did not present any evidence of criminal conduct by Hammon. Even though the Grievant did not follow through and call the police, such threatening behavior towards a supervisor is not acceptable workplace behavior.

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 DSCYF had just cause to suspend the Grievant for three days without pay for her conduct during and after the second meeting on February 18, 2011. What is not before the Board is the Grievant's claim – stated for the first time at the hearing – that DSCYF violated the Americans with Disabilities Act by revoking a reasonable accommodation to work in Dover rather than Wilmington, resulting in her having to use more FMLA leave. The only grievance before the Board is whether DSCYF had just cause to suspend the Grievant for three days for her unprofessional conduct at the second meeting on February 18, 2011.

The Board has made findings of fact that the Grievant's conduct during and after that meeting was unprofessional. The Board concludes as a matter of law that a three-day suspension without pay was an appropriate penalty under the circumstances in light of the Grievant's prior disciplinary record. DSCYF had already disciplined the Grievant three times for unprofessional conduct: on September 28, 2010 (written reprimand); October 27, 2010 (written reprimand); and March 16, 2011 (one-day suspension). The Board concludes as a matter of law that a three-day suspension for the Grievant's unprofessional conduct on February 18, 2011 was an appropriate penalty under the circumstances in light of her progressive discipline for the same type of misconduct.

DECISION AND ORDER

It is this **7th** day of August, 2012, by a vote of 3-1, the Decision and Order of the Board to
Deny the Grievant's appeal.


JACQUELINE D. JENKINS, EDD, MERB Member


JOHN F. SCHMUTZ, MERB Member


VICTORIA D. CAIRNS, MERB Member

I respectfully dissent.


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: August 7, 2012

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel