

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	
v.)	DOCKET 18-08-694
)	AND 18-08-695
DEPARTMENT OF HEALTH AND SOCIAL)	
SERVICES, DIVISION OF MANAGEMENT)	Consolidated
SERVICES, INFORMATION RESOURCE)	DECISION AND ORDER
MANAGEMENT,)	
)	<i>Public Decision - redacted</i>
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 3, 2019 at the Public Service Commission Conference Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904. The hearing was closed to the public, pursuant to 29 Del.C. §10004(b)(8). The Board heard the grievances consecutively and is issuing a consolidated decision and order.

BEFORE W. Michael Tupman, Chair, Paul R. Houck, and Sheldon N. Sandler, Esq., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Grievant
Employee/Grievant *pro se*

Kevin Slattery
Deputy Attorney General
on behalf of the Department of
Health and Social Services

I. Grievance 18-08-394

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument on the motion by the Department of Health and Social Services/Division of Management Services, Information Resources Management (“the Agency”) to dismiss the grievance for lack of jurisdiction. The Grievant filed a response to the motion.

The Agency attached three exhibits to its motion to dismiss.¹ The Grievant did not attach any exhibits to his response. The Board heard limited testimony from both the Grievant and the Agency’s representative, William Clancy (DHSS Infrastructure Director), during its consideration of the arguments of the parties on the Agency’s motion.

FINDINGS OF FACT

The Grievant was employed by the Department of Health and Social Services, Division of Management Services, Office of Information Resources Management (IRM), as a Database Administrator II. By letter dated May 29, 2018, the IRM Director recommended the Grievant receive a 3-day suspension without pay for “... excessive absenteeism, poor attendance, abuse of leave, unavailability for work, failure to follow supervisory directives and misrepresentation of facts.” In this letter he was advised of his right to a pre-suspension meeting, upon written request.²

By email dated June 8, 2018, the Grievant advised his supervisors and the IRM Director, “I have decided to accept this 3-day suspension to move forward and show our IRM family why it is a good choice to have me here. I would like to move forward from this with a clean slate and work

¹ The Agency also filed a fourth exhibit, the Step 3 decision issued by the Department of Human Resources. Pursuant to the Prehearing Order in this matter and the Board’s decision in *Scuse-Brown v. Dept. of Correction*, MERB 13-09-594, at p. 4 (11/13/13), appeals to MERB following a Step 3 determination are *de novo*. Consequently, the Step 3 decision is not included in the record considered by the Board.

² Pursuant to Merit Rule 12.4

towards gaining my flex and telecommute privileges back. I will not be requesting a hearing for this as I rather *[sic]* just let this one sail off in the water and start fresh.”

The suspension was finalized by the IRM Director on June 11, 2018 and the Grievant served the 3-day suspension on June 13 - 15, 2018.

On August 2, 2018, the Grievant filed a dual appeal to this Board and the Secretary of the Department of Human Resources (DHR) of the 3-day suspension pursuant to Merit Rule 12.9.³ The grievance was heard by a DHR Hearing Officer, who dismissed the grievance because it was untimely.

The Grievant requested his grievance be scheduled for consideration by MERB as he was “not satisfied with the outcome at the DHR’s Secretary Level.” The MERB hearing was scheduled for January 3, 2019 and the parties were so advised on October 19, 2018.

The Agency filed a Motion to Dismiss this grievance on December 19, 2019. The Grievant responded by email on December 20, 2018, opposing the Agency’s Motion.

CONCLUSIONS OF LAW

A merit employee has two mechanisms by which to grieve a disciplinary suspension. The employee can file a grievance directly with the Board (or dually to the Board and DHR) within thirty (30) days of the suspension pursuant to Merit Rule 12.9. Alternatively, the employee can file a grievance at Step 1 of the grievance procedure “within 14 calendar days of the date of the grievance matter” pursuant to Merit Rule 18.6.⁴

³ “Employees who have been dismissed, demoted or suspended may file an appeal directly with the DHR Secretary or the MERB within 30 days of such action. Alternatively, such employees may simultaneously filed directly with the DHR Secretary, who must hear the appeal within 30 days. If the employee is not satisfied with the outcome at the DHR Secretary’s level, then the appeal shall continue at the MERB.”

⁴ “Step 1: Grievants shall file, within 14 calendar days of the date of the grievance matter or the date they could reasonably be expected to have knowledge of the grievance matter, a written grievance which details the complaint and relief sought with their immediate supervisor. The following shall occur within 14 calendar days of receipt of

The Board does not have jurisdiction to consider an untimely appeal.⁵ “Perfection of the review proceeding within the time limited by statute is jurisdictional.”⁶

The suspension was finalized on June 11, 2018, and served June 13 – 15, 2018. The Grievant did not file a grievance challenging the suspension until August 2, 2018, fifty-two (52) days after he was notified of the suspension. Consequently, the grievance is untimely and the Board is without jurisdiction to consider it.

II. Grievance 18-08-395

BRIEF SUMMARY OF THE EVIDENCE

The Grievant offered and the Board admitted into evidence one exhibit, pre-marked for identification as Grievant Exhibit 1. The Agency offered twenty-four exhibits into evidence and the Board admitted twenty-three exhibits, pre-marked for identification as Exhibits A – W.

The Grievant testified on his own behalf and also called one witness: Tanya Tucker, Information System Software Specialist, DHSS. The Agency called three witnesses: Tomi Helojocki, DHSS Manager of Base Technologies; Layla Marsden, Judicial Case Processor II, Justice of the Peace Court 20; and William Clancy, DHSS IRM Infrastructure Director.

FINDINGS OF FACT

On or about May 17, 2018, the Grievant had received an unsatisfactory performance review and was placed on a performance improvement plan following months of documented difficulties

the grievance: the parties shall meet and discuss the grievance and the Step 1 supervisor shall issue a written reply.”

⁵ *Tuesday Banner v. MERB and DHSS*, N13A-004-013 (Del. Super, Dec. 24, 2014); *aff’d* No. 28,2015 (Del., Aug. 26, 2015)

⁶ *Maxwell v. Vetter*, 311 A.2d 864, 865 (Del., 1973)

in meeting his work expectations. The performance review noted the following areas of performance deficiencies or unsatisfactory work:

[*The Grievant*] has underperformed in his position of Database Administrator II. [*The Grievant*] has not successfully managed the ability to work remotely via Telecommuting. He has been off line during working hours and unavailable via email or instant messaging contrary to the instructions in his performance plan. [*The Grievant*] has failed to notify management in a timely fashion on several occasions when he was going to be late or absent. [*The Grievant*] has failed to record his hours accurately and timely in Allotrac and in eStar in line with policy and procedure. [*The Grievant*] has been absent without leave on multiple days and has failed to follow several orders to report to his work location on the deadlines as directed. [*The Grievant*] missed multiple scheduled meetings with IRM management without a timely response concerning the reason for not attending.

The Grievant signed a copy of this evaluation along with his supervisor on May 17, 2018.

On the morning of May 29, 2018, the Grievant notified his supervisor by email that he was scheduled for Jury Duty at the Court House in Wilmington the next day. He stated he had received notice a month before but forgot to send the request sooner. *Agency Exhibit C*. His supervisor directed the Grievant to submit a leave request using the appropriate category for jury duty as soon as possible in order to secure approval. The eStar record reflects that the Grievant was granted approval for leave for jury duty for May 30, 2018. *Agency Exhibit D*.

By email dated 2:34 p.m. on Wednesday, May 30, the Grievant notified his supervisor:

I have finished at court today and will have to return tomorrow for a custody hearing for my children. I may not need the whole day as it usually takes 2-4 hours out of the day, but I will put a request for the day to be on the safe side and if you could approve it tomorrow that would be great. This is in case the whole day isn't needed. *Agency Exhibit J*.

The Grievant provided his cell phone number. The eStar record indicates the Grievant's supervisor approved 7.5 hours of annual leave for Thursday, May 31.

On or about June 1, the Grievant submitted documents on Justice of the Peace Court ("JP

Court”) #20 letterhead which state:

To Whom It May Concern:

Please be advised that [*The Grievant*] appeared in the above-referenced court on this date. She/he had a scheduled appearance.

If additional information is required, kindly contact this court at [*phone number provided*].

The Grievant submitted a copy of this form for both May 30 and May 31. *Agency Exhibit F*.

The Grievant testified he wrote both his name and the date on each of these forms. He also submitted a Superior Court Jury Summons which required him to appear on June 21, 2018. *Agency Exhibit E*. He testified he was not required to report for jury duty on any date except June 21, 2018.

IRM Manager Clancy met with the Grievant on June 8, 2018 to review the documents submitted on June 1. Clancy challenged the Grievant’s stated reason for his absence for jury duty on May 30 because it did not coincide with the documentation he submitted from JP Court #20 (JP Court does not convene juries). Clancy also questioned whether the JP Court #20 documentation which was submitted for May 31 was accurate, as the Grievant had notified his supervisor he had a child custody hearing (which are Family Court, not JP Court, proceedings).

Layla Marsden, a Judicial Case Processor II at JP Court #20, credibly testified that she did not provide either the May 30 or the May 31 excuses to the Grievant, although both bear her signature. She testified she does not provide blank forms to be filled in by individuals and that she did not write the Grievant’s name on either form. After being contacted by Clancy, she reviewed Court records and video. She notified Clancy that although the Grievant was not required to be at Court #20 on either May 30 or 31, video confirmed that the Grievant came to the court on May 31, 2018, with a defendant identified as the Grievant’s cousin. Marsden recalled that the Grievant

repeatedly approached the window in the courthouse to request an excusal form from her. Marsden repeatedly denied the Grievant's request because he did not have a case on the Court's docket.

By letter dated June 26, 2018, the Grievant was notified by the Director of the Division of Management Services that she was recommending his employment be terminated for falsifying official State documents. Her letter noted the Grievant's failure to be available for work and failure to follow procedures relating to the reporting of his work time. His failure to provide timely notification to his supervisors of absences and tardiness was also a contributing factor in her decision to recommend termination. *Agency Exhibit B.*

At the Grievant's request, a pre-termination meeting was scheduled and held on June 28, 2018.

Thereafter, on July 5, the Grievant provided a copy of an excuse on Family Court letterhead which stated he was in court on May 30, noting he arrived at 8:00 a.m. and departed at 4:30 p.m. *Agency Exhibit I.* This information directly contradicts his May 30 email to his supervisor at 2:34 p.m. in which he stated, "I have finished at court today..."

On July 12, the Grievant produced a second excuse on Family Court letterhead for Thursday, May 31 indicating he arrived at the court at 10:30 a.m. and departed at 4:30 p.m. *Agency Exhibit K.* This excuse is inconsistent with Marsden's credible testimony that he was at JP Court #20 at 11:00 a.m. on May 31. Family Court is located at 500 N. King Street in Wilmington, while JP Court #20 is located at 2 Penns Way, in New Castle, Delaware. It is physically impossible that the Grievant could have been at both locations simultaneously.

By letter dated July 26, 2018, the Grievant's employment was terminated by the DHSS Secretary. She concluded her letter:

When considering prior issues... and the current matter of your misrepresentation of facts, the issue of trust has been completely eroded.

Management can no longer rely on you being truthful and honest on any matter of communications, reports or documentation that you present. Therefore, I concur with the Director's recommendation. *Agency Exhibit A.*

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 Grievant was notified of the Agency's intent to terminate his employment on June 26, 2018, and a pre-termination meeting was held on June 28, 2018. Pursuant to Merit Rule 12.6, the Grievant was provided the opportunity at this meeting to respond to the proposed action, and offer any reasons why the proposed penalty may not be justified or is too severe. Thereafter, the termination letter was issued on July 26, 2018. The Board holds the Grievant was afforded the appropriate due process protections.

The Board concludes as a matter of law the Grievant knowingly submitted falsified documents concerning his whereabouts, while on paid leave, on May 30 and 31, 2018. These documents were intentionally deceptive, recklessly untrue and submitted with the intent to deceive his supervisors in order to be paid for those days. The falsification and/or submission of official Court documents which he knew were false is a very serious breach of DHSS Policy #27⁷ and reasonable expectations for employee conduct. His actions constitutes a terminable offense.

Considering all the circumstances in this case, including that the Agency had been working

⁷ *Agency Exhibit L.*

with the Grievant over the previous six months to assist him during a period of personal difficulties and that the Grievant was on notice that his attendance and time reporting were both unsatisfactory, the Board finds the penalty of termination is appropriate. The grievance is denied.

DECISION AND ORDER

It is this **25th** day of **January, 2019**, by a vote of 3 - 0, the Decision and Order of the Board to dismiss the grievance of the three day suspension (18-08-694) because the Board is without jurisdiction to consider a grievance which was not timely filed.

It is also the Decision and Order of the Board, by a vote of 3 – 0, to deny the grievance contesting the termination of the Grievant’s employment. The Board finds DHSS had a sufficient reason to impose accountability, that the Grievant was offered and received the due process protections provided in the merit statute, and that the penalty imposed was appropriate considering all the circumstances in this case.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER