

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

GRIEVANT,)	
)	
Employee/Grievant,)	DOCKET No. 17-07-674
v.)	
)	DECISION AND ORDER
DEPARTMENT OF INSURANCE,)	
)	(PUBLIC – 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 October 19, 2017 at the Public Service Commission Hearing Room, located in the Cannon Building, at 861 Silver Lake Boulevard, Dover, DE 19904. The hearing was closed to the public, pursuant to 29 Del.C. §10004(b)(8).

BEFORE W. Michael Tupman, Chair, Paul Houck, Jacqueline D. Jenkins, Ed.D, Victoria Cairns, and Sheldon Sandler, Esq., 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

Grievant
Employee/Grievant, *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Insurance

PRELIMINARY PROCEDURAL MATTER

As a preliminary matter, the Board unanimously denied the Motion to Dismiss filed by the Department of Insurance (“DOI”) on October 9, 2017, asserting the Board lacked jurisdiction to directly hear a grievance concerning a two-day suspension.

The Board addressed this issue thoroughly in its previous decisions in *Beverly A.Y. Carr v. Department of Health and Social Services*,¹ *Pritchett v. DHSS*,² and *Grievant v. OMB, Division of Facilities Management*,³ in which it held, “§5949(a) only requires that an employee have a right of appeal over a suspension of more than 30 days in any one year. It does not limit the Board’s authority to hear a direct appeal from a suspension of lesser duration.”

BRIEF SUMMARY OF THE EVIDENCE

The Department of Insurance (“DOI”) offered and the Board admitted into evidence (without objection) eighteen exhibits marked for identification as A-R. DOI called two witnesses: Jenifer Vaughn, (“Vaughn”) Controller/Human Resource Manager, DOI; and Stuart Snyder (“Snyder”), Chief of Staff, DOI.

The employee/grievant, (“Grievant”), offered twenty-six exhibits and the Board admitted into evidence (without objection) twenty-four exhibits marked for identification as 1 – 26 (Exhibits 7 and 25 were excluded at prehearing).⁴ The Grievant called Franklin Pyle, (“Pyle”), Insurance

¹ *Carr v. DHSS*, MERB Docket No. 09-01-438 (March 5, 2009).

² *Pritchett v. DHSS*, MERB Docket No. 13-09-593 (July 14, 2014).

³ *Grievant v. OMB, Division of Facilities Management*, MERB Docket No. 16-11-660 (August 29, 2017).

⁴ Following the prehearing conference, the Grievant also submitted two documents in response to an authenticity concern raised by DOI. The documents were identified as Chapter 11, “Travel Policy”, of the Office of Management and Budget’s Budget and Accounting Manual, and a 70-page Budget and Accounting Policy Manual Errata document entitled, “Changes to Budget and Accounting Policy Manual.” The second document summarizes changes made to the Manual between July 20, 2010 and July 1, 2017, including changes made to the Travel Policy found in Chapter 11. Both documents were admitted into evidence without objection from DOI.

Consumer Protection Enforcement Manager, DOI, as a witness and testified on her own behalf.

All witnesses were sequestered at the Grievant's request.

FINDINGS OF FACT

The Grievant is a 19-year DOI employee and currently is a Community Relations Officer. On or about March 3, 2017, she submitted an Authorized Travel Request to attend a National Council on Aging ("NCOA") sponsored conference in Washington, D.C., between April 17-20, 2017. The Grievant noted on the form, under "Funding Source", that the travel expenses would be "paid by the National Council on Aging." The Grievant estimated the total cost of the travel to be \$1,181.34, including costs for a State fleet vehicle, three nights in a hotel, four days per diem for meals, and parking. Although the Grievant travelled at least one to two times annually, all her prior travel expenses had been funded through her State budget (which included grant funding). This NCOA conference was her first experience in attending an event in which a third party (NCOA) was covering the conference expenses.

The Authorized Travel Request was approved by the Grievant's direct supervisor on March 6, 2017, by the DOI Chief of Staff (Snyder) and the Controller (Vaughn) on March 16, 2017.

Although the Grievant indicated in the Authorized Travel Request form that she planned to drive a State fleet vehicle to the conference, on the morning she left for the conference (April 17, 2017) she decided to use her personal vehicle to drive to Washington, D.C. after learning she would be travelling alone. She did not inform her supervisor of the change in her travel plans and, consequently, also did not receive approval to use her personal vehicle. The State Travel Policy requires prior approval to drive a personal vehicle and reimburses for mileage at a rate of \$0.40 per mile.

After returning from the conference, the Grievant completed an expense reimbursement form provided and prepopulated by NCOA, and submitted it directly to NCOA on April 24, 2017.

It included per diem meal expenses, lodging, parking, and travel expenses. NCOA had a reimbursement rate of \$0.535 per mile for mileage to and from the conference. The Grievant submitted the NCOA reimbursement form using her personal contact information and home address.

On April 25, 2017, the Grievant provided DOI Accounting Specialist Laura Bivins with a completed State of Delaware Personal Expense Reimbursement form and receipts for the NCOA conference, which totaled \$156.30. In the cover email, the Grievant stated, "Attached is the travel reimbursement and receipts for my most recent trip to Washington DC. The National Council on Aging (NCOA) paid for this trip. Once I receive my reimbursement within 30 days, I will forward the full amount of \$156.30 to you. Please let me know if you have any questions or concerns. Thank you." Ms. Bivins did not respond to this email.

On April 28, 2017, the Grievant was notified by NCOA (by email) that two ancillary parking expenses (totaling \$7.00) would not be reimbursed. The Grievant received a check from NCOA for \$304.50 and deposited the money into her personal account.

On May 10, 2017, the Grievant sent an email to Controller Vaughn requesting information concerning whether the two parking expenses not covered by NCOA could be submitted to the State for reimbursement. Her email stated:

As a follow-up to my conversation with you this morning, I need to pay DOI for my travel reimbursement for Washington DC. According to Laura's [Bivins] records, the reimbursement amount is \$158.70. On April 18 and 19th, I went to dinner and parked in a parking garage because there was no street parking available. Therefore, I have \$7 in parking receipts. All costs beyond the \$7 was covered by the National Council on Aging. Do I owe the \$7 or can the charges be paid by the MIPPA, SHIP travel line which has a balance of approximately \$1,654.26. Thank you for your assistance regarding this matter.

That evening (after normal State business hours), Vaughn replied to the Grievant's email:

I have a ton of questions regarding this issue. Did you use your own personal credit card or the state credit card for this travel? Did you

request reimbursement from the feds for this travel?

When traveling for the department you must use your state credit card for all purchases (that would include parking). If this was to be reimbursed by the feds, my division does the reimbursement – employees are not to ask any organization for reimbursement. Or are you saying the feds paid for your hotel and most of your food and this parking was the only thing that they did not cover?

Please let me know these few answers and then I will be more able to answer your question. I will talk with Laura again tomorrow and look at the documentation because currently I am confused about what transpired.

Vaughn questioned the Grievant the next day, and learned the Grievant had completed a reimbursement form and sent it to NCOA. The Grievant calculated she needed to reimburse DOI for \$156.30, based on the charges to her State credit card which include \$113.07 for food and \$45 for parking. Vaughn reviewed the Grievant's NCOA reimbursement form and found what she considered to be several discrepancies/inaccuracies. Vaughn noted the Grievant had claimed the allowable NCOA per diem for food (\$159.50) for meals although the Grievant only had credit card purchases totaling \$113.07; the travel mileage had been reimbursed at the NCOA rate of \$ 0.535 (\$ 0.135 above the State reimbursement rate); there were disallowed parking expenses; and a small difference in the number of miles driven (it was alleged that the Grievant had rounded the 97.8 miles calculated using a GPS system to 100 miles for the trip).

At some point prior to May 31, 2017, the Grievant provided DOI with a personal check in the amount of \$311.50 for the full amount of the NCOA reimbursement and the expenses on the State credit card. On June 19, 2017, Vaughn sent a letter to NCOA providing a refund in the amount of \$153.43 for moneys which NCOA reimbursed to the Grievant for which the DOI Financial Services group concluded she was not eligible under the DOI travel policy. DOI Financial Services is the unit that normally completes reimbursement forms for third party reimbursements.

On May 31, 2017, Vaughn issued a proposed disciplinary action recommending the Grievant be suspended for four days without pay, and recommending the Grievant be required to complete both an online training, “Ethics Orientation for State Employees,” and the State Ethical Conduct in Government training before the end of the calendar year.

On June 21, 2017, Chief of Staff Snyder conducted a pre-decision meeting to consider Vaughn’s determination that the Grievant had violated the travel policy by utilizing her personal vehicle without permission, failing to turn in all receipts for the conference to DOI Financial Services, filing directly with NCOA for reimbursement which was received at her home address, and depositing the NCOA reimbursement in her personal account. At this pre-decision meeting, the Grievant admitted to the offenses, explained that she had not been advised as to the policies, and objected to the proposed discipline asserting it was excessive. On June 30, 2017, Snyder issued his decision, reducing the suspension to two days, noting the Grievant was a “valued long term employee who has had no discipline issues in the past”. Snyder also required the Grievant to complete “... the online state provided Ethics Orientation for State Employees and the class led course Ethical Conduct in Government by the end of this calendar year.”

On August 1, 2017, Vaughn sent a memorandum notifying the Grievant her two-day suspension resulting from the pre-decision meeting with Snyder would be August 8 – 9, 2017 and directing her to complete the online Ethics Orientation class by August 18, 2017. The Grievant completed the online course on August 14, 2017.

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 admits she drove her personal vehicle to the NCOA conference without prior authorization, that she submitted her expenses directly to NCOA for reimbursement to her before she submitted anything to the State, and that the NCOA reimbursement rates for per diem expenses and mileage were higher than the State rates. It is also undisputed that she used a State credit card as required under the DOI travel policy.

The Grievant does not contend her due process rights (as specified in the Merit Rules) have been violated or denied during the investigation, assessment of discipline or the grievance process.

The Board concludes as a matter of law that the first two prongs of the just cause standard for discipline have been met. The remaining question for the Board's consideration is whether the two-day disciplinary suspension issued to the Grievant is appropriate under the circumstances presented in this case.

The Board finds the other DOI travel policy disciplinary comparators it reviewed during the hearing received either re-training/counseling or a written reprimand for repeated travel policy violations. The underlying incidents in those cases were similar in that they all constituted violations of the travel policy, e.g., failing to use a State credit card for travel related expenses, unapproved use of personal vehicles, and incurring additional unapproved expenses (excess baggage fees, room charges, flight change fees, purchases of personal items, etc.) which were submitted for reimbursement. In fact, it is undisputed that the Grievant is the only instance in which a DOI employee has been suspended for violating the travel policy.

The Board finds the Grievant's actions did not result in any cost to the State. In fact, DOI provided NCOA a refund based on its review of the Grievant's receipts, reimbursement requests

and credit card statements. When the Grievant received a reimbursement form from NCOA, however, she should have consulted with DOI as to the appropriate manner to handle the form, confirming who was responsible to fill it out and submit it.

The Board finds the Grievant's use of her personal vehicle did violate policy; however, other DOI employees who utilized their personal vehicles under similar circumstances were not disciplined. The Grievant received a mileage reimbursement from NCOA (which she would not have received had she driven a fleet vehicle) at a rate of \$0.535 per mile, which exceeded the State mileage reimbursement rate of \$0.40 per mile. It was her responsibility to notify DOI that her transportation plans had changed, to secure the appropriate approvals and to provide all her receipts to Financial Services upon her return from the conference.

The Board finds the penalty imposed by DOI to be inappropriate under the circumstances. The Grievant's spotless record, as well as her admission to the violations mitigate against a harsh penalty for a first offense. Although DOI's witnesses testified they believed the Grievant's actions were attempted theft, this conclusion was unsubstantiated. There was no cost or loss of funds to the State. The Grievant had no prior experience with third-party reimbursement for travel and DOI admittedly did not provide any training specific to travel in which costs were to be paid by an entity other than the State. It is noted that the Grievant directly provided to the State the full amount of the reimbursement she received from NCOA and that she immediately complied with DOI's directive to participate in State sponsored ethics training.

For these reasons, the majority of the Board finds the penalty of suspension to be inappropriate under these circumstances, and directs DOI to reduce the discipline to a written reprimand and counselling.

ORDER

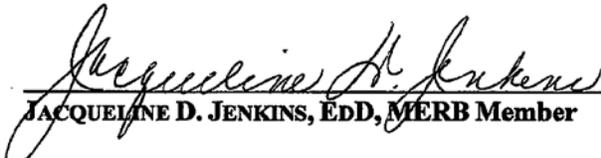
It is this **12th** day of **December**, 2017, by a vote of 4-1, the Decision and Order of the Board to grant the Grievant's appeal. The Board orders the Department of Insurance to reduce the two-day suspension it imposed to a written reprimand with counseling, and to make the Grievant whole for any lost wages related to the suspension. DOI is further directed to remove all references to the suspension from the Grievant's employment records.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER