

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

MICHELLE MILLIGAN,)	
)	
Employee/Grievant,)	
)	DOCKET No. 18-10-703
v.)	
)	DECISION AND ORDER
DEPARTMENT OF SERVICES FOR CHILDREN,)	OF DISMISSAL
YOUTH AND THEIR FAMILIES,)	
)	
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 August 1, 2019, at the Delaware Public Service Commission Hearing Room, Cannon Building, located at 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair; Jacqueline D. Jenkins, Ed.D, and Victoria D. Cairns, 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

*There was no one present for the
Grievant*

Kevin Slattery
Deputy Attorney General
on behalf of the Department
of Services for Children, Youth
and Their Families

PROCEDURAL BACKGROUND

On October 26, 2018, the Grievant, Michelle Milligan (“Grievant”), through her counsel, appealed her October 18, 2018 termination directly to the Board, pursuant to Merit Rule (MR) 12.9.¹ The Grievant alleged she had been terminated without just cause, in violation of MR 12.1.²

On November 19, 2018, counsel for the Grievant and counsel for the Department of Services for Children, Youth and Their Families (“Agency”) were advised the hearing on the merits was scheduled for the Board’s next available hearing date on February 7, 2019. The parties were advised to provide their proposed exhibits and witness lists on or before January 18, 2019.³

On January 17, 2019, the Agency requested a continuance of the hearing because it had been unable to provide copies of emails the Grievant had requested. The letter stated the Grievant did not object to the continuance and that “... neither party is in a position to go forward with this matter on February 7, 2019.” The letter requested the case be rescheduled for March 21, 2019.

¹ **12.9** 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 file 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.

² **12.1** 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.

³ MERB Operating Procedure 13, Pre-hearing Procedure

(B) Pre-Hearing Submissions

At least five (5) business days prior to the pre-hearing conference, the parties shall exchange their proposed exhibits and witness summaries with copies to the Referee and the Board Administrator, preferably in electronic form.

- (1) The grievant’s exhibits should be clearly marked in a numbered sequence (1, 2, 3) while the agency’s exhibits should be clearly marked in a lettered sequence (A, B, C).
- (2) Witness summaries should set forth a summary of the facts and opinions to which each witness is expected to testify.

There was no parallel request from the Grievant's counsel, but he was provided a copy of the Agency's letter.

On January 19, 2019, the Board notified the parties that the requested continuance was granted and the hearing was rescheduled for March 21, 2019. The proposed exhibits and witness lists were now due on or before March 8, 2019. The hearing was publicly noticed on February 7, 2019.

On March 6, 2019, a counsel for the Agency requested a second continuance of the hearing, again citing difficulties in providing documentation requested by the Grievant. Counsel also noted that the Agency's assigned counsel was out of the office due to a family health emergency. She pledged to work with the Grievant's counsel to "resolve all outstanding discovery issues prior to the next deadline for submission of exhibits."

By letter dated March 8, 2019, the Board again continued the hearing and it was rescheduled for June 20, 2019. The parties were advised that their proposed exhibits and witness lists were due on or before June 7, 2019.

On March 8, 2019, the Board also issued a *subpoena duces tecum* at the request of Grievant's counsel. The Agency was directed to provide the requested documents on or before March 22, 2019.

By email dated March 22, 2019, the Agency requested a two-week extension to the deadline to comply with the *subpoena duces tecum*, again noting issues with the production of requested e-mails.

By letter dated May 9, 2019, the Board provided notices of the June 20, 2019 hearing, reminding the parties that their proposed exhibits and witness lists were due on June 7, and offering dates for the prehearing teleconference. The parties were requested to provide their availability on the offered dates on or before May 17, 2019. Neither party responded.

On June 3, 2019, the Board Administrator again requested that the parties advise her as to their availability for the prehearing teleconference on either June 10 or June 12, as neither had responded by May 17, as requested. Agency counsel responded by email (on which the Grievant's counsel was copied):

At present I am working with my client to hopefully resolve this matter. [Grievant's counsel] is aware of this effort. I will not know the outcome for certain until the Secretary of the agency meets with their Human Resources people at 1:00 p.m. this afternoon. At that point, if everything goes as I would like, I will be in touch with [Grievant's counsel], and we can provide you with a plan to move forward.

I appreciate everyone's patience. Large agency bureaucracy tends to move slower than I would like.

Late on the afternoon of June 5, 2019, Agency counsel wrote to the Board Chair:

The above matter has been settled by the parties. We are in the process of working out the language and exact terms. The parties request that the matter be kept open in the event we require the Board to resolve any minor disputes that may arise, however, we anticipate the matter being wrapped up in 30 days' time.

In the meantime, we request that the hearing scheduled for June 20th be taken off the calendar and that all pre-hearing matters be discontinued.

Thank you for your consideration of this matter.

By letter dated June 6, 2019, the Board Chair responded,

The Chair has declined to cancel the MERB hearing scheduled for June 20 under the conditions set forth in [Agency counsel's] letter. If the case is settled, the grievant should withdraw the grievance.

The Board has no authority to retain jurisdiction for purposes of enforcing a settlement. June 20 represents the third time this case has been scheduled for hearing. The Board is very conscious that this case was a direct appeal which has now been sitting on its docket for eight months. The fact that it involves a termination makes the length of time the parties have needed to bring it to hearing even more concerning, as the Board is required to expedite the scheduling of termination matters.

Absent a notice of withdraw from Grievant's counsel, the Board has denied the parties' request to again postpone this hearing.

I trust that if this case has been resolved, Mr. Aber will provide a letter

of withdraw prior to the June 7 deadline for filing exhibits and witness statement.

By letter dated June 7, 2019, Agency counsel requested the Chair to reconsider the decision not to postpone the June 20 hearing, detailing the terms of the proposed settlement and stating: “I have advised my client to complete this reinstatement and restoration within thirty (30) days – the time frame routinely granted by the MERB for completion of a reinstatement.” The letter stated that the Grievant’s counsel joined in the request. Grievant’s counsel did not notify the Board of such joinder but did provide a list of proposed witnesses and a list of exhibits (although none of the documents were appended) to the Board by email dated June 7, 2019.

Thereafter, the Grievant’s counsel notified the Board that a Superior Court proceeding in which he was involved had been rescheduled for the week of June 17 and that he was now unavailable for the June 20 hearing. The Board Chair continued the hearing in light of this new information.

By letter dated June 28, 2018, the hearing in this matter was again rescheduled. The parties were notified the hearing would be convened on August 1, 2019 and that their proposed exhibits and witness lists were now due on or before July 19, 2019.

Neither party filed either exhibits or final witness lists by the July 19 deadline. By letter dated July 24, 2019, the Board Chair directed the parties to appear on August 1 to show cause as to why this matter has not proceeded to hearing in a timely manner. The letter noted:

In a letter dated June 5, 2019, the Agency advised the Board this grievance had been settled by the parties and requested thirty days to “resolve any minor disputes that may arise, however, we anticipate the matter being wrapped up in 30 days’ time.” By August 1, more than eight weeks will have elapsed since the June 5 letter. The Grievant has been out of work since October 17, 2018, nine and a half months. This was a direct appeal to the Board, and the grievance has been previously scheduled for hearing on three different dates, and each time continued at the request of one or both parties.

By email sent at 4:19 on the afternoon of July 31, 2019, Agency counsel wrote to the Board

Administrator, with a copy to the Grievant's counsel:

I am pleased to inform you that the Milligan matter is resolved and that Ms. Milligan will be dismissing her appeal. I am sending this on behalf of [Grievant's counsel] as he is presently mobile. He will respond to this e-mail in the affirmative.

May I assume that once [Grievant's counsel] responds to this email that the Rule to Show Cause will not be heard tomorrow and that I may call off my witnesses? Please let me know.

The Board Administrator was out of the office when this email was sent, but the Board's counsel forwarded it to the Chair. By email time stamped 5:05 p.m. that afternoon, Grievant's counsel simply responded, "Agreed". This email was not received by the Board until the morning of the August 1, 2019 hearing.

DISCUSSION

The Board makes every effort to expedite the scheduling of hearings concerning matters of suspensions and terminations in order to reduce the impact on the grievant and the workplace of prolonged periods prior to decision or resolution of a claim. The Board is particularly sensitive to cases in which the grievant has chosen to file her claim directly with the Board, as provided for in 29 Del.C. §5949:

(a) An employee in the classified service who has completed a probationary period of service may not, except for cause, be dismissed or demoted or suspended for more than 30 days in any 1 year. Within 30 days after any such dismissal, demotion or suspension, an employee may appeal to the Board for review thereof. Upon such review, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard publicly and to present evidentiary facts. At the hearing, technical rules of evidence shall not apply. The rules shall require that the Board take final action on an appeal within 90 calendar days of submission to the Board. Upon approval of all parties, the 90 days may be extended an additional 30 calendar days.

The Board has not and will not dismiss a grievance without the express agreement of the

grievant or her counsel, except in cases in which the Board does not have jurisdiction to consider the matter placed before it. A request for withdrawal of the grievance from the grievant and/or a stipulation of dismissal signed by the grievant have been accepted as a means to effectuate such dismissal of a grievance. Alternatively, the Board has also dismissed claims where the grievant has failed to respond to move the claim forward, after efforts by the Board to notify her that, absent affirmative action, the grievance will be dismissed.

In this case, until the email from the Grievant's counsel (which was received by the Board at the August 1 hearing), there had been no affirmative action indicating the Grievant agreed to the dismissal of her claim. Indeed, the Board provided a generous interpretation to Grievant's counsel's very late email which simply stated "Agreed". The Grievant's counsel may only have been agreeing to the request that the hearing on the rule to show cause be taken off the Board's calendar, not that there had been a global settlement of the grievance.

The Board scheduled this hearing four times, each time receiving a last minute request for continuance. When a continuance request is received less than a month prior to the scheduled hearing date, it not only effects the immediate matter, but also other cases which could have been scheduled for an earlier hearing, had the late continuance not been required. The Board is sensitive to the disruptive impact of open grievances in the workplace and also to the rights of merit employees to have their complaints heard and resolved in a timely manner. The Grievant in this case was terminated nearly ten months before the resolution of this case. The Board directed the parties to appear and show cause on August 1 as to the reason for this lengthy delay. It appears that but for that direction, the case might yet be in limbo.

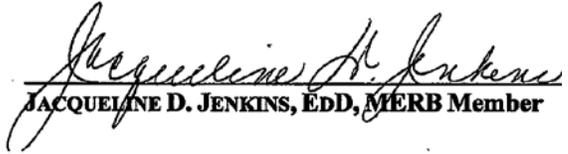
ORDER

It is this **3rd** day of **September**, 2019, by a unanimous vote of 3-0, the Decision and Order

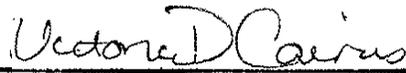
of the Board to dismiss this grievance based on the joint affirmation of counsel that the matter has been resolved, that the termination has been rescinded and the employee has been returned to duty.



W. MICHAEL TUPMAN, MERB CHAIR



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member