

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

<b>JENIFER VAUGHN,</b>	)	
	)	
Employee/Grievant,	)	<b>DOCKET No. 19-11-740</b>
<b>v.</b>	)	
	)	<b>DECISION DENYING AGENCY'S</b>
<b>DEPARTMENT OF INSURANCE,</b>	)	<b>MOTION TO DISMISS</b>
	)	
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 16, 2020, in the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

**BEFORE** W. Michael Tupman, Chair, Jacqueline D. Jenkins, Ed.D and Sheldon N. Sandler, 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

Jenifer Vaughn  
Employee/Grievant, *pro se*

Allison McCowan  
Deputy Attorney General  
on behalf of the Department of  
Insurance

## **BRIEF SUMMARY OF THE EVIDENCE**

The Board did not admit any exhibits into evidence or take any witness testimony. The Board heard legal argument from the parties on the motion by the Department of Insurance (“DOI”) to dismiss the appeal of the employee/grievant, Jenifer Vaughn (“Vaughn”) for lack of jurisdiction. Vaughn filed a written response to DOI’s motion to dismiss.

## **FINDINGS OF FACT**

Ms. Vaughn is and was at all times relevant to this grievance employed as the Controller for the Department of Insurance. On August 13, 2019, she was placed on administrative leave with pay, pending an investigation into an allegation that she had misused her First State Financials (“FSF”) log-in credentials. The memorandum she was provided when she met with the DOL Chief of Staff on August 13 noted that if the investigation substantiated the allegations, it “may result” in her being denied access to the FSF system, which would result in her being unable to perform her job functions. Ms. Vaughn was requested not to discuss the investigation with either current or former DOI employees.

Following a subsequent inquiry by Ms. Vaughn to DOI as to the status of the investigation and the continuing administrative leave, the Chief of Staff advised her on September 6, 2019, that, “... the matter is still actively under investigation and you will remain on your current administrative leave status pending completion of the investigation,” or until she was otherwise notified. Ms. Vaughn contacted multiple persons and agencies in an effort to have her FSF access restored and to return to work. Among others she contacted the Department of Human Resources who advised her via email to be patient and that restoration of her FSF status would require the approval of her employer. In late October, Ms. Vaughn was offered a promotional opportunity with another State agency, but she was unable to accept the position because her FSF access was

still suspended pending the completion of the DOI investigation.

On November 18, 2019, Ms. Vaughn filed a dual grievance with DHR and MERB, asserting DOI violated Merit Rule 12.4 when it failed to provide her with written notice of her entitlement to a pre-decision meeting before she was removed from duty on August 13, 2019.

On December 17, 2019, DOI filed a motion to dismiss the grievance. On January 6, 2020, Ms. Vaughn filed a response opposing DOI's motion. At the mutual request of the parties, the hearing was bifurcated. On January 16, 2020, the Board heard and considered DOI's motion to dismiss.

### **CONCLUSIONS OF LAW**

Merit Rule 12.9 provides:

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

DOI argued Ms. Vaughn's grievance should be dismissed because: 1) it is untimely as Ms. Vaughn knew she was being placed on administrative leave on August 13, 2019, but did not file a grievance until November 18, 2019; and 2) Merit Rule 12.4 does not apply because Ms. Vaughn has not been dismissed, demoted for cause, fined or suspended. It also argues due process concerns are not implicated when an employee is placed on paid administrative leave pending a workplace investigation.

Ms. Vaughn asserts she was not placed on administrative leave, but has been serving a paid suspension. Consequently, MR 12.4 is applicable because her FSF access was suspended, her key card access to her office building was deactivated, and her access to her State email and all

electronic and paper files was removed. She avers that she truthfully answered the Chief of Staff's questions on August 13, 2019 and that at no time since that date has she or the other employee involved in the incident(s) under investigation been contacted by DOI or any other State agency. Because she did not believe there was any factual basis for the allegations, Ms. Vaughn assumed on August 13, 2019 that the investigation would be promptly completed and she would be returned to work. As of the date of the MERB hearing, more than six months has elapsed and she has received no notification as to the status or outcome of the DOI investigation into alleged misuse of her FSF password. Ms. Vaughn asserts she has suffered adverse employment action as a result because she was unable to accept two promotional opportunities from another State agency until her FSF access is restored.

Ms. Vaughn promptly filed the grievance on November 18, 2019, just ten (10) days after being notified that a promotional job offer for a Controller position was being withdrawn solely for the reason that she did not have FSF access.

The Board's jurisdiction is limited to considering timely grievances. In this case, however, it is not clear that the letter provided to the grievant on August 13, 2019 was sufficient to place her on notice that the time to file a timely grievance had been triggered. There is a nexus between the jurisdictional facts and the merits of this grievance which requires the Board to receive and consider evidence before determining whether Ms. Vaughn's grievance was timely.

Consequently, the Board directs that a hearing be scheduled. At the conclusion of the evidentiary portion of that hearing, the Agency may renew its jurisdictional motion. The Board will then consider the motion in light of the evidence of the record.

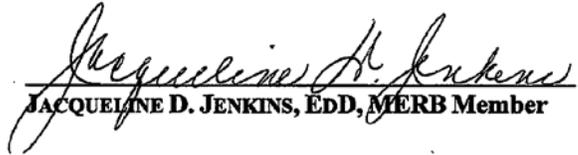
**ORDER**

It is this **19<sup>th</sup>** day of **February, 2020**, by a vote of 3-0, the Decision and Order of the Board to deny DOI's Motion to Dismiss at this time, without prejudice.

The merits of the grievance will be scheduled for hearing before the full Board.



**W. MICHAEL TUPMAN, MERB CHAIR**



**JACQUELINE D. JENKINS, EDD, MERB Member**



**SHELDON N. SANDLER, ESQ., MEMBER**

Distribution:

Original: File

Copies: Grievant  
Agency's Representative  
Board Counsel  
MERB website