

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	<u>DOCKET No. 20-12-795</u>
v.)	
)	
DELAWARE DEPARTMENT OF HEALTH AND SOCIAL)	DECISION AND ORDER
SERVICES, DIVISION OF DEVELOPMENTAL)	
DISABILITIES SERVICES,)	[Public, redacted]
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board at 9:00 a.m. on August 5, 2021, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 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 R. Houck and Victoria D. Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Ilona Kirshon
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Employee/Grievant, *Pro Se*

Victoria Sweeney
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services, Division of Developmental Disabilities Services (“DHSS/DDDS” or “Agency”) offered nine (9) documents into evidence of which the Board admitted seven (7), marked as Agency Exhibits A – C, E – G, and I.

The Employee/Grievant (“Grievant”) offered thirteen (13) documents into evidence of which twelve (12) were admitted and marked as Grievant Exhibits 1, 3 - 13.

Three witnesses testified on behalf of the Agency: Stacey Watkins, Social Services Senior Administrator, DHSS/DDDS; Casey Triolo, DHR Human Resources Specialist, DHSS; and John Brady, DHR Regulatory Specialist, DHSS.

One witness testified on behalf of the Grievant: Kelly Wickes, former Senior Social Worker/Case Manager, DHSS/DDDs. The Grievant also testified.

Prior to the hearing, the Agency filed a motion to dismiss the grievance for lack of jurisdiction and for failing to state a claim upon which relief could be granted. The Board denied the motion and proceeded to hear the case on its merits.

FINDINGS OF FACT

The Grievant was employed by DHSS as a Senior Social Worker/Case Manager in the Division of Developmental Disabilities Services (“DDDS”). On July 31, 2019 she was involved in a motor vehicle accident while on the job. As a result of the accident, the Grievant sustained injuries and was placed on Workers Compensation. Unfortunately, the accident resulted in several permanent injuries.

On May 5, 2020 the Grievant applied for Short Term Disability (“STD”) benefits through the State’s disability insurance carrier, The Hartford. Based on the medical document supplied by her physician, she was approved for and received STD benefits from April 6, 2020 to May 31,

2020.

The Grievant did not return to work after May 31, 2020. On or about June 30, 2020, the Agency sent a certified letter directing her to return to work no later than July 6, 2020; she did not return to work. On July 13, 2020 the Agency notified the Grievant of its intent to terminate her employment due to her unauthorized absence and unavailability to work.¹ At the Grievant's request, a pretermination hearing was conducted on July 30, 2020.

Thereafter the Grievant returned to work on a part-time basis from August 10, 2020 to September 18, 2020. Consequently, the proposed termination of July 13, 2020 was not finalized.

On September 21, 2020, Grievant provided a doctor's note to the Agency stating she would be unable to work until October 18, 2020. The Grievant did not return to work after September 21, 2020. The Agency, believing that the Grievant had not been approved for additional STD benefits, terminated her employment on November 18, 2020 due to her unauthorized absence and unavailability to work.²

On Monday, December 28, 2020, the Agency was notified by The Hartford that the Grievant's short-term disability benefits had been retroactively approved through October 4, 2020. A retroactive STD benefit payment was issued to the Grievant on or about January 21, 2021.³

As of October 4, 2020, the Grievant had received the full 182 calendar days of STD benefits for which she was eligible. Section 5953(c) of Title 29 of the Delaware Code states that upon the exhaustion of the maximum short-term disability benefit period, the individual "shall no longer be an employee of the State..."

¹ Referred to in Grievant Exhibit 3, page 3, and Exhibit 4, page 1.

² Grievant Exhibit 3.

³ Grievant Exhibit 1.

By letter dated February 4, 2021, the Agency advised the Grievant that she was retroactively separated from State service by operation of law effective October 5, 2020. The letter further stated, “The termination action issued by letter dated November 18, 2020, has been rescinded and removed from your record.”⁴

Grievant is currently receiving Long Term Disability benefits.⁵

CONCLUSIONS OF LAW

The Agency issued a letter of termination to the Grievant dated November 18, 2020. The Grievant filed her grievance contesting her dismissal on December 21, 2020.

That termination was later rescinded and removed from the Grievant’s employment records when the Agency was notified that she had been eligible for benefits through October 4, 2020. As of that point, the Grievant had exhausted the maximum 182 calendar days of STD benefits for which she was eligible.

Upon the exhaustion of the maximum short-term disability benefit period, the Grievant was no longer eligible to be an employee of the State.⁶ She was retroactively separated from state service by operation of law. The disciplinary termination was rescinded and removed from her record. Once that occurred, there is nothing that remains for the Grievant to grieve under Merit Rule 12.9.⁷

⁴ Grievant Exhibit 1.

⁵ Agency witnesses testified during the hearing that the Grievant, at such time as she is able to return to State service, can work with the Department of Human Resources Return to Work Coordinator to seek re-employment with the State.

⁶ 29 Del. C. §5353(c)(5).

⁷ Merit Rule 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

This Board has previously held that a separation from service under the State’s Disability Insurance Program “... does not fall under the Merit Rules as a grievance or within the jurisdiction of the Board.”⁸

The Disability Insurance Program is a comprehensive remedial scheme governing disability benefits to participating employees. Absent a clear statutory provision to the contrary, the Board does not believe that it has jurisdiction to hear an appeal of a termination based on disability because such appeals are the exclusive provenance of the State Employee Benefits Committee.⁹

For these reasons, the grievance is denied and dismissed.

ORDER

It is this **24th** day of **August, 2021**, by a unanimous vote of 3-0, the Decision and Order of the Board to dismiss the grievance.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



VICTORIA D. CAIRNS, MERB Member

the MERB.

⁸ *Helper v. Department of Correction*, MERB 07-02-381 at p. 6 (Aug. 30, 2007).

⁹ *LaSorte v. DNREC*, MERB No. 10-09-481, at p. 2 (Dec. 6, 2010) (quoting *Benson v. Department of Transportation*, MERB No. 07-12-407, at p.5 (June 19, 2008)).