

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

MICHAEL DOWNS,)	
)	
Employee/Grievant,)	
)	<u>DOCKET NO. 21-06-805</u>
v.)	
)	
DEPARTMENT OF SAFETY AND HOMELAND)	DECISION GRANTING
SECURITY, CAPITOL POLICE,)	MOTION TO COMPEL
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board at 9:50 a.m. on October 4, 2023, at the Delaware Division of Professional Regulation, Silver Lake Plaza, Cannon Bldg., Hearing Room A, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Sheldon N. Sandler, Esq., Acting Chair; Joseph A. Pika, III, Ph.D., and Lester Johnson, Jr., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Carla A. K. Jarosz
Deputy State Solicitor
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Stephani J. Ballard, Esq.
on behalf of the Employee/Grievant

Lisa Morris
Deputy Attorney General
on behalf of the Department of
Safety and Homeland Security

BRIEF SUMMARY OF THE EVIDENCE

The Grievant's (Michael Downs) employment with DSHS, Capitol Police (the Agency) was terminated on May 5, 2021. The Grievant filed a dual appeal pursuant to Merit Rule 12.9¹ on May 13, 2021. The Department of Human Resources issued its decision denying the grievance on August 19, 2021 and the Grievant requested his grievance be heard by the Merit Employee Relations Board (the Board). The full Board held an evidentiary hearing on January 4, 2023.² At the conclusion of the hearing, the Board granted the grievance finding the Agency did not have just cause to support the Grievant's termination. The Board directed the Agency to reinstate the Grievant and compensate him with backpay limited to the first five (5) months following his termination.

Thereafter, the Board issued its written Decision and Order on April 17, 2023.³

On July 5, 2023, the Grievant filed the instant motion requesting the Board compel the Agency to pay wages for the period between its decision at the January 4, 2023 hearing and the April 17, 2023 written decision. The Agency provided a written response to the Grievant's motion on July 24, 2023.

The Board reviewed the Grievant's motion and the Agency's response and heard legal argument from the parties at the October 4, 2023 hearing. This decision results from that hearing.

FINDINGS OF FACT

The following facts are set forth in the parties' submissions and are not disputed:

The five months of back pay which the Board directed to be paid for the first five

¹ 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 the MERB.

² The hearing before the Board was scheduled and then continued at the requests of the parties four times prior to convening on January 4, 2023.

³ *Grievant v. DSHS, Capitol Police*, MERB 21-06-805, Decision and Order (April 17, 2023).

months following the Grievant's termination on May 5, 2021 are not in dispute in this proceeding.

After the Board's written decision was issued on April 17, 2023, the Grievant was returned to work on May 8, 2023. His first paycheck covered the period of April 17 through April 22, 2023. He continued to work and to be paid his regular wages thereafter.

The issue in this case is limited to wages for the period of January 4 through April 16, 2023.

CONCLUSIONS OF LAW

The issue placed before the Board for resolution by the Grievant's motion is whether – in a reinstatement case – the grievant is entitled to the payment of regular wages from the date of the Board's evidentiary hearing, deliberations, decision and vote in the grievant's favor, or whether a reinstated grievant should be without pay for whatever period of time elapses between the Board's decision and its issuance of a written decision memorializing the decision made by the Board at its earlier hearing.⁴

Section 5931(a) of Title 29 of the Delaware Code provides, in pertinent part:

The Secretary and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of [Chapter 29] or the Merit Rules.

The sole question before the Board is when an order to reinstate a grievant is effective. It is contrary to the Board's broad discretion to order that a grievant be made whole and then leave that same grievant with a hole or gap in wages between the date of the Board's hearing and the date the Board's order is memorialized in writing.

At the conclusion of the Board's hearing on January 4, 2023, the Board voted on the record

⁴ Grievant's Motion to Compel Payment of Wages following January 4, 2023 Reinstatement Decision, ¶4.

to reinstate the Grievant and to compensate him with "... back pay limited to the first five (5) months following his termination, as he was able to find work at a commensurate salary after that point". The Agency asserts that the Board's order was clear and that it fully complied with the order to both reinstate the Grievant and to provide him with five months of back pay.


The Board finds that January 4, 2023 was the effective date of their decision in this matter and, absent clarification from the Board, the Agency should have moved to reinstate the Grievant and make him whole as of that date. This includes the obligation to pay the Grievant until his reinstatement was effectuated.⁵ The Agency's interpretation of the Board's order would not make the Grievant whole after the Board's finding that the Agency's decision to terminate the Grievant was without just cause.⁶

ORDER

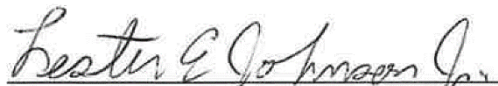
It is this **26th** day of **October, 2023**, by a vote of 3-0, the Decision and Order of the Board to grant the Grievant's Motion to Compel and to order the Agency to pay him his normal wages for the period of January 4, 2023 through April 16, 2023.



SHELDON N. SANDLER, ESQ., ACTING CHAIR



JOSEPH A. PIKA, III, PH.D., MEMBER



LESTER E. JOHNSON, JR., MERB/MEMBER

⁵ Merit Rule 18.10 states, in relevant part: "... Any financial settlement shall be reduced by the amount of the grievant's earnings during the period covered by the settlement regardless of source, excluding part-time income which was received prior to the separation." In this case, the Board was not aware until this hearing that the Grievant left his alternative work just prior to the January 4, 2023 hearing on the merits.

⁶ Merit Rule 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.