

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

KATHLEEN DAVIES,)	
)	
Employee/Grievant,)	DOCKET NOS. 20-04-754
)	AND 23-06-878
v.)	
)	
OFFICE OF THE AUDITOR OF ACCOUNTS,)	DECISION AND ORDER
)	ON MOTIONS
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the “Board”) at 9:52 a.m. on December 6, 2023, at the Delaware Division of Professional Regulation Hearing Room A, Silver Lake Plaza, Cannon Bldg., 2nd Floor, 861 Silver Lake Boulevard, Dover, DE 19904. The hearing was open to the public.

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

APPEARANCES

Victoria R. Sweeney
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Alpa Bhatia, Esq.
Offit Kurman, P.A.
on behalf of the Grievant

Julie M. O’Dell, Esq. (*by telephone*)
Smith, Katzenstein & Jenkins, LLP
on behalf of the Office of the
Auditor of Accounts

PROCEDURAL BACKGROUND

A hearing was convened by the Merit Employee Relations Board (“MERB”) on Wednesday, December 6, 2023, to consider a motion to dismiss the pending grievances of Kathleen Davies (“Grievant”) against the Office of the Auditor of Accounts (“Agency” or “OAOA”). The Agency filed a Motion to Dismiss to both grievances (20-04-754 and 23-06-878) on July 24, 2023 asserting the Board lacked jurisdiction to hear the cases. The Grievant filed a Response to the Agency’s Motion to Dismiss on August 9, 2023.

The Grievant filed a Motion for Judgment on the Pleadings and a Motion for Attorney’s Fees on September 15, 2023. The Agency filed written responses to both motions on September 25, 2023.

The Motions and Responses and the underlying grievances were reviewed by the Board prior to the hearing. Counsel for the parties were provided the opportunity to summarize their arguments and to answer questions from the Board. This decision results from the Board’s consideration of the arguments of the parties.

BACKGROUND

The following facts are not in dispute.

The Agency employed the Grievant as the Chief Administrative Auditor beginning in January 2010.

On April 10, 2019, the Grievant filed a grievance alleging that the Agency violated Merit Rules (“MR”) 2.1 and 18.1 by failing to comply with the terms of this Board’s March 4, 2019 decision in which it found:

The OAOA is ordered to reinstate the Grievant to her previous position within thirty (30) days of the date of this Decision and Order. The Board directs OAOA to reduce the termination it imposed to a 60-day suspension, and to make the Grievant whole for any lost wages for the period following the 60-

day suspension until the date of her reinstatement, in the customary manner. OAOA is further directed to remove any references to the termination from the Grievant's employment records. The Grievant shall bear her own attorney's fees and costs.¹

The Grievant filed a second grievance on April 30, 2019, again alleging that the Agency violated MR 2.1 and 18.1. The grievance alleges the Agency significantly modified her job specifications, duties and performance plan, and retaliated against her because she filed grievances and a discrimination claim with the Department of Labor.

In the fall of 2019, the Grievant was awarded short-term disability benefits. As of March 10, 2020, the Grievant had exhausted the full 182 calendar days of short-term disability benefits for which she was eligible, and was administratively separated from State service.² The Grievant began receiving long-term disability benefits on March 28, 2022, which were retroactively applied to March 11, 2020.

On March 12, 2020, the Agency provided the Grievant with a hand-delivered letter in which it proposed to terminate her employment with the Agency. The letter notified the Grievant that she had a right to request a pre-decision meeting, in accordance with MR 12.4.³ The Agency conducted a pretermination hearing on April 9, 2020, in accordance with MR 12.5 and 12.6.⁴

¹ *Grievant v. OAOA*, MERB 17-12-680 (March 4, 2019).

² 29 *Del. C.* § 5253(c)(5).

³ MR 12.4 Employees shall receive written notice of their entitlement to a pre-decision meeting in dismissal, demotion for just cause, fines and suspension cases. If employees desire such a meeting, they shall submit a written request for a meeting to their Agency's designated personnel representative within 15 calendar days from the date of notice. Employees may be suspended without pay during this period provided that a management representative has first reviewed with the employee the basis for the action and provides an opportunity for response. Where employees' continued presence in the workplace would jeopardize others' safety, security, or the public confidence, they may be removed immediately from the workplace without loss of pay.

⁴ MR 12.5 The pre-decision meeting shall be held within a reasonable time not to exceed 15 calendar days after the employee has requested the meeting in compliance with 12.4.

MR 12.6 Pre-decision meetings shall be informal meetings to provide employees an opportunity to respond to the proposed action, and offer any reasons why the proposed penalty may not be justified or is too severe.

By letter dated April 10, 2020, the Agency notified the Grievant that it determined her termination was “justified” and stated, “Effective April 10, 2020, your [employment] status will be changed from termination/long-term disability to dismissed.” The letter further advised the Grievant she could appeal her dismissal pursuant to MR 12.9.⁵

On April 16, 2020, the Grievant filed a dual appeal to the Department of Human Resources (“DHR”) and this Board, pursuant to MR 12.9, alleging the Agency engaged in an *ex post facto* effort to terminate her, after she was administratively separated from employment on March 10, 2020. The Grievant also filed a second grievance alleging the Agency discriminated and retaliated against her, created a hostile work environment, and improperly charged her accrued leave balances.

On May 22, 2023, DHR issued a consolidated decision dismissing both the Grievant’s retaliation and termination claims. As the Grievant had filed a dual grievance contesting the termination (MERB 20-04-754), she requested the Board hear the grievance because she was not satisfied with the DHR decision. On June 9, 2023, the Grievant filed an appeal of the Step 3 dismissal of the April 10 and 30, 2019 grievances (MERB 23-06-878) which had also been dismissed in the DHR decision.

DISCUSSION

Preliminarily, grievances must be timely filed pursuant to MR 18 and 12.9. All of the grievances at issue here were timely filed. The parties do not dispute that the extraordinarily long period between the filing of the grievances in 2019 and 2020 and the DHR decision in May, 2023

⁵ MR 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.

resulted from the parties' agreement to extend the timelines while attempting to resolve the issues, as permitted under MR 18.4.⁶

AGENCY'S MOTION TO DISMISS

The Agency moved to dismiss both grievances, asserting the Board lacks subject matter jurisdiction because the Grievant does not have access to the State merit system for remediation of her asserted violations. The Agency asserts that the Grievant's access to the merit grievance process ended when she ceased to be an employee following the exhaustion of her short-term disability benefits as statutorily required by 29 *Del. C.* § 5253(c)(5):

Long-term disability benefits for participating employees shall commence upon the expiration of a 182-calendar-day waiting period. . . Upon the exhaustion of the maximum short-term disability benefit period, any employee, except those entitled to hazardous duty pay as defined in § 5933(c) of this title, shall no longer be an employee of the State or any of its political subdivisions provided the employee has exhausted their Family Medical Leave Act of 1993 (FMLA) [29 U.S.C. § 2601 *et seq.*] entitlement and/or is not FMLA eligible. Employees entitled to hazardous duty pay as defined in § 5933(c) of this title who exhaust the maximum short-term disability benefit period shall no longer be an employee of the State or any of its political subdivisions at the end of their entitlement to hazardous duty pay or parental leave provided the employee has exhausted their FMLA entitlement and/or is not FMLA eligible.

The Agency admitted that after the Grievant ceased to be a State employee on March 10, 2020, it subsequently terminated her on April 10, 2020, as evidenced by the termination letter that remains in the Grievant's personnel file.⁷ It is nonsensical that the Agency could terminate the Grievant after she no longer was employed by the Agency. It logically follows that the Grievant does not have access to the grievance procedure to challenge a fictitious termination.

For these reasons, the Agency's motion to dismiss the termination grievance (MERB 20-

⁶ MR 18.4 provides, in pertinent part, "The parties may agree to the extension of any time limits or to waive any grievance step."

⁷ The Agency also admits that it changed the Grievant's status in her employment records from "terminated/long-term disability" to "dismissed."

04-754) is granted. The Board also directs the Agency to remove any and all references in the Grievant's file relating to her fictitious termination.

Although the Grievant's employment terminated with the exhaustion of her short-term disability benefits, she had timely filed grievances before that date that were still pending. Both 29 *Del. C.* §5931 and MR 18.9 and 18.10 authorize the Board to provide retroactive remedies in order to make a former employee whole. For these reasons, the Agency's motion to dismiss the 2019 retaliation grievance (MERB 23-06-878) is denied.

GRIEVANT'S MOTION FOR JUDGEMENT ON THE PLEADINGS

An adjudicating body must accept all well-pled facts in the pleadings as true and construe all reasonable inferences in favor of the moving party in order to issue a judgment on the pleadings.⁸ The only pleadings contained in the record before the Board are the grievances. The Agency has not had the opportunity to be heard on the allegations made therein.

At this point in the proceedings, the Board is unable to determine the veracity of the Grievant's claims as it has not heard the Agency's response thereto. For this reason, the Board finds the Grievant's Motion for Judgment on the Pleadings is premature. A hearing will be promptly scheduled to hear the evidence and render a decision on the merits of the retaliation grievance, MERB 23-06-878.

GRIEVANT'S MOTION FOR ATTORNEY'S FEES

The Grievant asserts the Agency "engaged in manifestly bad faith conduct by communicating and behaving – through multiple hearings – as if Ms. Davies retained rights under the Merit System."⁹ The Agency notified the Grievant of her right to request a pre-decision

⁸ Super. Ct. Civ. R. 12(c).

⁹ See Gr. Motion for Attorney's Fees at p. 61 in the Record.

meeting, held that meeting, and then notified her of her right to grieve the April 10, 2020 termination. The Grievant asserts that the Agency's motion now to dismiss her termination grievance is a complete reversal of its earlier position and an attempt to further prolong or delay litigation. The Grievant requests the Board convene a hearing for a determination of whether the Agency has acted in bad faith.

The Board finds this motion to also be premature. The Grievant may raise her demand for attorney's fees following the hearing on the merits of her retaliation grievance. The parties are reminded that the Delaware Supreme Court has found that this Board has authority to award attorney's fees, and recognized that in limited circumstances, equity may require an assessment of attorney's fees for the prevailing party to be made whole.¹⁰ The purpose of the awarding of attorney's fees to a prevailing party, under the American Rule for the granting of equitable relief, is to "... deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process."¹¹

ORDER

It is this **26th** day of **February, 2024**, by a vote of 4-0, the Decision and Order of the Board to:

1) Grant-in-part and deny-in part the Agency's Motion to Dismiss. The Board grants the Agency's Motion to Dismiss the termination grievance (MERB Docket No. 20-04-754) which challenged the April 10, 2020 fictitious termination. The Board finds the Grievant's employment ceased when she was administratively separated following the exhaustion of her short-term disability benefits on March 10, 2020. The Board directs that any and all disciplinary

¹⁰ *Brice v. Dept. of Correction*, 704 A.2d 1176, 1179 (Del. 1988)(*en banc*) (quoting *Atlantis I Condominium Association v. Bryson*, 403 A.2d 711, 713 (Del. 1979)).

¹¹ *Supra.*, citing *Schlank v. Williams*, D.C.App., 572 A.2d 101, 108 (1990).

documentation and any reference to the termination of the Grievant's employment which was placed in her personnel file after March 10, 2020 be immediately and permanently removed.


The Board denies the Agency's Motion to Dismiss the retaliation grievance (MERB Docket No. 23-06-878) which claims the Agency modified her job specifications, duties and performance plan, and retaliated against her. The Board finds the grievance is timely and properly before the Board and directs that a hearing on the merits be promptly scheduled.

2) Deny the Grievant's Motion for Judgment on the Pleadings of the retaliation grievance (23-06-878) at this time and direct the matter be scheduled for a hearing on the merits.

3) Hold the Grievant's Motion for Attorney's Fees in abeyance pending a hearing and determination on the merits of the Grievant's remaining grievance.



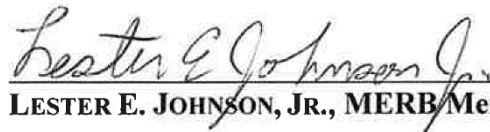
JENNIFER COHAN, MERB Chairperson



SHELDON N. SANDLER, ESQ., MEMBER



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



LESTER E. JOHNSON, JR., MERB Member