IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CATHERINE A. CHAPMAN, Grievant-below, Appellant, v. DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES Respondent-below, Appellee.	)))))))))))	C.A. No. 08A-04-009 WCC

Submitted: April 9, 2009
Decided: July 31, 2009

MEMORANDUM OPINION

Upon Appeal from the Merit Employee Relations Board. REVERSED.

David A. Felice, Esquire, Cozen O'Connor, 1201 N. Market Street, Suite 1400, Wilmington, DE 19801. Counsel for Appellant.

Kevin R. Slattery, Esquire, Department of Justice, 820 N. French Street, Wilmington, DE 19801. Counsel for the Department of Health and Social Services.

CARPENTER, J.

Introduction

Before the Court is Catherine Chapman's (the "Appellant") appeal from the Merit Employee Relations Board (the "Board" or "MERB"), which denied her grievance. Upon review of the record in this matter, the Court finds there is insufficient evidence to support the Board's decision and therefore, the Board's decision is REVERSED.

Facts[1]

The Appellant is an employee of the Department of Health and Social Services ("DHSS") and works as a psychiatric social worker at the Delaware Psychiatric Center ("DPC" or the "Center"). In September of 2006, DHSS posted a job listing for a PSW III (a psychiatric social worker at the level above the Appellant's current position as a PSW II). The Appellant applied for the PSW III position and was chosen to proceed through the interview process. After the Appellant interviewed for the position, DHSS selected her to fill the PSW III position, contingent upon her satisfying a drug test.

The Appellant received official written notice of her promotion to the PSW III position on July 26, 2006. This notice informed her of the drug test condition and also

[1]The facts recited herein are drawn largely from the MERB's Opinion and the testimony presented during the MERB hearing.

notified her that she had to satisfy the drug test within three days of receiving the notice. On July 28, 2006, the Appellant went to Quest Diagnostics ("Quest"), the State-approved testing facility, to provide a urine sample to be used for the drug test. The Appellant testified that the lab technician told her that she had not provided a sufficient amount of urine for the test and asked that she stay to provide an additional sample.[2] However, because the Appellant was preparing a difficult patient for a pass and his first meeting with his case worker, she felt that she needed to return to work and told the technician she would return the next day.

The Appellant returned to Quest for a second time on July 29, 2006. The technician again asked the Appellant to stay to provide another sample because the one she provided was too hot.[3] The Appellant was again unable to stay as she was on-call at work and felt she needed to return to attend to some patients who had been admitted to the Center the night before.

DHSS authorized the Appellant to return to Quest a third time, but explained that this would be the final opportunity for her to satisfy the drug test. On July 31, 2006, the Appellant returned to Quest and provided a third urine sample. According

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[2]According to Kathleen Greer, DHSS's Human Resources Technician, Quest informed her that the sample was too hot to be tested.

[3]Quest collects urine samples in accordance with the *Urine Specimen Collection Guidelines* published by the U.S. Department of Transportation. MERB Op. at 5. Those guidelines state: "The acceptable [temperature] range is 32-38 [degrees centigrade]/90-100 [degrees Fahrenheit]." *Id.* Temperature is an important aspect of a urine sample because it may indicate that the sample was brought into the test site from the outside and is not the individual's own urine. *Id.*

to the lab technician's notes on the chain-of-custody form, the sample was "very hot" and the Appellant "refused to give another sample." The Appellant testified that she did not remain at Quest that day because she had to discharge a patient at the Center.

Quest did not send the Appellant's first two urine samples to the lab to be tested because both were outside the acceptable temperature range. However, Quest did send the third urine sample to the lab, which reported that it tested negative for illegal drugs. The test report stated that the "temperature of the specimen at collection was outside of the range for a normal urine [sample] (32-38 C/90-100 F)."

On August 30, 2006, the Appellant received a letter from Susan Watson Robinson, the Assistant Director of the DPC, rescinding the Appellant's promotion to the PSW III position "for failure to meet the terms and conditions of [the] promotion" because she failed to satisfy a drug test. On September 1, 2006, the Appellant sent an e-mail to Roy Lawler, the Director of Human Resources of DPC, and copied her supervisor, Alice Coleman, the Director of Social Services for DPC, on it. The e-mail expressed the Appellant's desire to institute an "official . . . grievance to the letter sent me from Susan Watson Robinson, Assistant Facility Director, dated August 30, 2006."

Sometime thereafter, the Appellant visited her personal physician, Dr. Alfred Fletcher, to arrange another drug test. The Appellant provided a urine sample to LabCorp on September 6, 2006. The test report indicated that the sample was 90 degrees and had tested negative for illegal drugs. However, the report also stated the following:

> This assay provides a preliminary unconfirmed analytical test result that may be suitable for the clinical management of patients in certain situations. For workplace drug testing programs, preliminary positive findings should always be confirmed by an alternative method. Some over-the-counter medications, as well as adulterants, may cause inaccurate results. Screen only testing does not meet the College of American Pathologists Forensic Urine Drug Testing Program requirements as a forensic urine drug test for workplace testing. All clients must ensure that their testing program conforms to applicable state and federal laws and employment agreements.

According to Lisa Shields, the Compliance Manager for Compliance Oversight Solutions Idea ("COSI"),[4] the LabCorp test was not acceptable for DHSS's purposes because DHSS follows the U.S. Department of Transportation's guidelines for workplace testing and the LabCorp test did not adhere to their requirements.

On September 1 and 4, 2006, the Appellant met with Ms. Coleman, her immediate supervisor, to discuss her grievance. Following the meeting, Ms. Coleman sent an e-mail on September 8, 2006 to Ms. Robinson and Mr. Lawler concluding that

[4]COSI is a third-party administrator that facilitates workplace drug testing programs for private employers, municipalities, State and federal agencies.

the Appellant "provided a satisfactory drug test" and "requesting that [the Appellant] be reinstated to the PSW III position."[5] Ms. Coleman based her conclusion on the negative LabCorp drug test as well as on a hand-written note from Dr. Fletcher, the Appellant's personal physician, stating that "96 degrees is an acceptable urine temperature." Ms. Coleman also delivered a hard copy of the e-mail to the Appellant.

Towards the end of September, Ms. Robinson met with Ms. Coleman and the Appellant regarding the decision. At this meeting, Ms. Robinson offered the Appellant the opportunity to provide a hair sample to be tested for drugs. However, the Appellant declined, as she felt the LabCorp test was sufficient, and Ms. Robinson agreed to see if there was any way that the Appellant could retain her promotion despite her failure to comply with DHSS's drug testing requirements.

On October 12, 2006, David Felice, the Appellant's attorney, sent a letter to Ms. Robinson, Mr. Lawler, Ms. Coleman, and Dianne Bingham at DHSS, advising them of his representation of the Appellant, and asserting that Ms. Coleman's e-mail requesting that the Appellant's promotion be reinstated completed Step 1 of the grievance procedure under MERB Rule 18.6. Mr. Felice further asserted that the Appellant had complied with the drug testing requirement by providing three urine samples for testing at Quest as well as another sample at LabCorp. This letter, as well

[5]E-mail from Catherine Chapman, Psychiatric Social Worker, Delaware Psychiatric Center, to Roy Lawler, Director of Human Resources, Delaware Psychiatric Center (Sept. 1, 2006, 09:59 EST), R. at 00370.

as subsequent phone calls to the agency went unanswered, and Mr. Felice sent another letter dated October 31, 2006, to Renata Henry, the Director of the Division of Substance Abuse & Mental Health at DHSS. This letter explained that no one from DHSS had responded to the October 12th letter, nor had anyone responded to Mr. Felice's voicemails which he left with the recipients of the October 12th letter. While Mr. Felice asserted in his letter that he believed the agency was bound by the decision of Ms. Coleman, in an abundance of caution, he indicated that the October 31st letter was intended as the Appellant's institution of Step 3[6] of the grievance process under MERB Rule 18.8.[7] In a letter dated November 17, 2006, Ms. Robinson informed the Appellant that she had investigated "whether any employee who failed to provide a satisfactory urine sample for a drug test was either hired or promoted" and explained that she did not find "a single incident where a person failed to complete the drug testing process and was formally processed for hire." Due to this, Ms. Robinson denied the Appellant's grievance.

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[6]Under MERB Rule 18.8, Step 3 requires that the appeal be "filed in writing to the Director." 29 *Del. C.* § 5901(a)(5) defines "Director" as "the Director of the Office of Management and Budget." To advance to Step 3, Mr. Felice's letter should have been sent to the Director of the Office of Management and Budget, as opposed to the Director of Substance Abuse and Mental Health.

[7]Although the Board did not include a discussion of either letter in its factual findings, they were part of the record before the Board.

The Appellant filed an appeal with the Board on December 7, 2006, and an evidentiary hearing was held to determine whether the Appellant's promotion should be reinstated. The Board concluded that Ms. Coleman's e-mail requesting that the Appellant's promotion be reinstated was not binding on DHSS because Ms. Coleman did not have authority to make this decision. Instead, the Board determined that Ms. Coleman's request advanced the grievance to Step 2 of the grievance procedure under MERB Rule 18.7. Furthermore, the Board decided that the parties had "tacitly agreed to extend the time for the Step 2 decision to allow Ms. Robinson the opportunity to check with the Human Resources office to see if there were any precedents for Ms. Chapman to retain her promotion notwithstanding the unsuccessful drug testing" and that this explained why Ms. Robinson did not issue an opinion until November 17, 2006. In addition, the Board concluded that the Appellant had not proven that she had satisfied a drug test, which was a condition of her promotion. The Appellant now appeals the Board's decision.

Standard of Review

This Court's role in reviewing an appeal from an administrative agency is limited.[8] The Court will only evaluate the record, in a light most favorable to the prevailing party below, to determine if substantial evidence existed to reasonably

[8] *Zicarelli v. Boscov's Dep't Store, LLC*, 2008 WL 3486207, at *2 (Del. Super. June 5, 2008).

support the Board's conclusion and to ensure that it is free from legal error.[9] "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[10] Thus, the Court does not address issues of credibility, nor does it independently weigh the evidence presented to the Board.[11] If the record supports the Board's findings, the Court must accept those findings even if the Court might have reached a different conclusion based on the facts presented.[12]

The questions before the Court are: (1) whether the Board had jurisdiction to hear the Appellant's appeal; and (2) if so, whether the Board had substantial evidence to find that the Appellant did not satisfy a drug test as a condition of her promotion.

Discussion

Before proceeding to the merits of this appeal, the Court feels compelled to comment upon the actions of the parties to this litigation. It is unfortunate that they were unable to take reasonable and common sense steps to resolve this dispute long

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[9]*Id.*

[10]*Del. Alcoholic Beverage Control Comm'n v. Newsome*, 690 A.2d 906, 910 (Del. 1996) (citing *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994)).

[11]*Michael A. Sinclair, Inc. v. Riley*, 2004 WL 1731140, at *2 (Del. Super. July 30, 2004) (citing *Unemployment Ins. App. Bd. v. Div. of Unemployment Ins.*, 803 A.2d 937 (Del. 2002)).

[12]*Anderson v. Comfort Suites*, 2004 WL 304359, at * 2 (Del. Super. Feb. 12, 2004) (explaining that "[a]bsent an abuse of discretion, this Court must uphold the Board's decision.") (citing *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994)).

before it deteriorated to the point where the Court had to become involved. This is particularly true since the record before the Board appears to reflect a general acknowledgment that the Appellant was a good worker who had never exhibited any behavior or conduct that would indicate drug use. Unfortunately, the process was hampered by what appeared to be a dysfunctional organizational structure within the DPC. It appears that no one appreciated the importance of the MERB process or took responsibility to ensure that it was properly managed by the agency.

As outrageous as the conduct of the agency was in handling this matter, the Appellant's actions are even more bizarre and inappropriate. This was an important promotion for the Appellant, and common sense would have dictated that she stay at the drug testing center until they had obtained a sample which was satisfactory for their testing. In addition, a person who had nothing to hide would have clearly accepted the agency's offer to take a hair sample to perform the drug test in place of the urine testing. While she may have been frustrated by the process, her failure to take reasonable steps to comply with the drug testing was illogical, counterproductive and only made matters worse by arousing a level of suspicion of drug use regardless of the merits of her claim.

Unfortunately, instead of taking the reasonable course of action and coming to some middle ground that would resolve the litigation, the parties have become

entrenched in their positions, refusing to this day to resolve the case despite the Court's encouragement that they do so. From the Court's view, that is very unfortunate, as the cost, both financially and emotionally, to the Appellant and the State to get to this point was clearly unwarranted and unnecessary. No one will win at the end of this litigation as the agency's view of the Appellant as a good employee will be forever affected. The agency has spent time and money defending its conduct that it could have spent on the mental health needs of those in our community. Since the parties are unwilling to resolve the dispute themselves, the Court must do so.

The Delaware Code provides for the creation of a merit system, as well as for rules governing the submission of grievances.[13] Those rules include a three-step

[13]29 *Del. C.* § 5931(a) (2009); *see also* MERB R. 18.0. The three-step grievance procedure is as follows:

> 18.6 Step 1: Grievants shall file, within 14 calendar days of the date of the grievance matter or the date they could reasonably be expected to have knowledge of the grievance matter, a written grievance which details the complaint and relief sought with their immediate supervisor. The following shall occur within 14 calendar days of receipt of the grievance: the parties shall meet and discuss the grievance and the Step 1 supervisor shall issue a written reply.
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> 18.7 Step 2: Any appeal shall be filed in writing to the top agency personnel official or representative within 7 calendar days of receipt of the reply. The following shall occur within 30 calendar days of the receipt of the appeal: the designated management official and the employee shall meet and discuss the grievance, and the designated management official shall issue a written response.
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> 18.8 Step 3: Any appeal shall be filed in writing to the Director within 14 calendar days of receipt of the Step 2 reply. This appeal shall include copies of the written grievance and responses from the previous steps. The parties and the Director (or designee) may agree to meet and attempt an informal resolution of the grievance, and/or the Director (or designee) shall hear the grievance and issue a written decision with 45 calendar days of the appeal's receipt. The Step 3 decision is final and binding upon agency management.

grievance process that must be adhered to before seeking review by the Board.[14] The purpose of the grievance procedure is to "promote positive working relationships and better communications", as well as to provide an informal means of resolving disputes.[15] The rules make clear that should the agency fail to comply with the deadlines required by any of the steps, such a failure "shall automatically move the grievance to the next step unless the parties have a written agreement to delay."[16] The Court finds that the agency's failure to follow the time limits set forth in the MERB rules bound them to the decision made by the Appellant's immediate supervisor under Step 1 of the grievance procedures. The Court also concludes that the Board lacked jurisdiction to review the Appellant's grievance.

On August 30, 2006, Ms. Robinson, the Assistant Director of DPC, notified the Appellant that her conditional promotion was being rescinded for failure to provide an acceptable sample for drug testing. Under the MERB rules, the Appellant had 14 days to file a grievance of that decision. On September 1, 2006, the Appellant sent an e-mail to Mr. Lawler notifying him that she was officially grieving Ms. Robinson's decision. Upon receipt of this document, the rules require that the grieving party and

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[14]29 *Del. C.* § 5931(c)(3); *see also* MERB R. 18.9.

[15]MERB R. 18.1.

[16]MERB R. 18.4.

the agency meet to discuss the grievance and after this meeting a written reply by the "Step 1 supervisor" must be issued. While who is a Step 1 supervisor is not defined, it can be fair inferred from the language of the rules that it is meant to be the grieving party's immediate supervisor. This would be the individual who logically would have made the management decision or at least be responsible for communicating and discussing the management's position regarding the employment action taken over a person under their immediate supervision. This step was actually complied with because Ms. Coleman, the Appellant's immediate supervisor, sent an e-mail on September 8, 2006 to Ms. Robinson and Mr. Lawler which began with the statement, "The data below is in compliance with 18.6 Step 1: Grievants . . . Step 1 supervisor shall issue a written reply."

After outlining her discussion with Ms. Chapman, the "decision" of her immediate supervisor was to reinstate the Appellant to her promotion. While the Court agrees that it is a very rare and unusual occasion that a supervisor takes a position contrary to the agency's decision, the rules do not prohibit such action nor do the rules distinguish the course of action required when the decision is adverse to the agency versus the employee. In fact, it is clear that the MERB rules are structured to first attempt to resolve the dispute by the informal meeting and discuss it with the employee's immediate supervisor and not elevate it to higher levels in the bureaucracy

until the need arises. If the agency continues to believe its decision was correct in spite of the immediate supervisor's opinion, its recourse is to appeal that decision to the Step 2 grievance procedure. The appeal is to be made to the agency's "top personnel official" and is required to be filed in writing within 7 days. There is no dispute that such action was never taken by DHSS and the deadline for filing the appeal would have been September 15, 2006, 7 days from the e-mail sent by Ms. Coleman.

The Board found that since Ms. Coleman did not have the authority to reinstate Ms. Chapman, her decision of September 8, 2006 moved the grievance to Step 2. While the Court agrees that the agency's inaction here moved the grievance to Step 2, it can find no support in the rules that this occurred because of Ms. Coleman's inferior management position within the agency. The Court acknowledges that the rules are generally written to deal with the normal progress of an employee appealing the agency's decision through the step grievance procedures and Ms. Coleman's decision does not fit within the "norm." However, that does not allow the Board to create a procedure not articulated in the rules. Fortunately in this case, this decision by the Board has no effect on the outcome of the litigation.

As previously indicated, when an agency fails to comply with the time limits under the MERB rules, the dispute automatically moves to the next grievance level.

So as of September 15, 2006, and with no appeal appropriately filed by the agency, the appeal time would again begin to run and the agency would have 14 days to initiate a Level 3 proceeding.[17] At Level 3, the rules require the "Director" to hear the appeal, including meeting with the aggrieved employee to attempt to informally resolve the matter. If this meeting is unsuccessful, however, a written decision within 45 days is required. Therefore, to meet this deadline the Director's decision needed to be issued on or before November 13, 2006. Again, here, the agency took no action to initiate a review of the grievance and therefore no decision was rendered.

The only agency response occurred on November 17, 2006, when the Appellant was notified that her grievance and request for reinstatement was denied. The Court, however, finds that this letter of November 17, 2006, is outside the time limits established under the rules and once the deadline passed, the agency was bound by the only timely decision that was made in this matter which was that of Ms. Coleman which occurred on September 8, 2006. Since the agency failed to timely respond as required by the MERB rules, it lost the ability to appeal to the Board and the Court finds the Board was without jurisdiction to hear the appeal.[18]

The Board's decision attempts to excuse the agency's inaction by finding that the parties tacitly agreed to an extension of the Step 2 decision. While it is perhaps a fair inference from the record that Ms. Robinson intended to check if the promotion

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[17] The deadline for this appeal would be September 29, 2006.

[18] Having made this decision, the other arguments made by the parties become moot.

could proceed without drug testing being completed, it is totally devoid of any indication that Ms. Chapman agreed to waive the time limits set forth in the rules. There clearly was no written agreement to delay a grievance step as required under Rule 18.4. In addition, if there was such an impression by the agency, it would have been totally contradicted by the letters from Ms. Chapman's counsel. The Court finds that the Board's finding of a tacit agreement is not supported by the record and is legal error, as 29 *Del. C.* § 5931(b) requires a written agreement or a written affirmation by the grieving employee to delay the Step 2 process.[19]

While the Court is confident with the jurisdictional decision it has made here, it is concerned that the Appellant will view it as a "victory" that affirms the merits of her position regarding the drug testing. Nothing could be further from the truth. While this decision requires the agency to reinstate her promotion, the Appellant's conduct in handling this dispute would justify, assuming it is not in violation of some collective bargaining agreement or other rule or statute, the agency to require subsequent drug testing to continue in that position. The Court clearly is not

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[19] *See* 29, *Del. C.* § 5931(b):

> Should the plan required by subsection (a) of this section provide for various stages, phases or steps to be followed, the failure of the employing department or agency to respond or consider the grievance or complaint within the time required by the rules shall automatically result in the grievance or complaint moving to the next stage, phase or step unless the delay results from an agreement in writing between the employing department or agency and the employee who filed the grievance or complaint, or the employee has indicated in writing to the personnel office of the department or agency his or her opposition to the automatic movement to the next stage, phase or step.

mandating or suggesting that such testing is required, but simply asks that the Appellant recognize that she too was part of the problem here and if she makes unreasonable demands regarding the remedies which she believes are warranted now, the agency should be able to take appropriate action to ensure that the suspicions brought on by the Appellant's conduct are removed.

Conclusion

For the foregoing reasons, the decision of the Board is REVERSED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.