BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

IN THE MATTER OF SIDNEY NASH, Grievant, v. STATE OF DELAWARE DEPARTMENT OF CORRECTION Agency	**DOCKET NO. 95-06-28** **OPINION AND ORDER**

BEFORE Woo, Chairperson, Bowers, Fullman and Green constituting a lawful quorum of the Board pursuant to 29 Del Code, Section 5908(a).

And now this 14th day of December, 1995, the above-referenced matter being before the Board on November 22, 1995, the Board makes the following Findings of Fact and Conclusions of Law; to wit:

SUMMARY OF EVIDENCE

1. Charles Kirmes was sworn and testified that he is the District 2 Grievance Representative. On March 31, 1994 Mr. Kirmes received the Step 3 decision via State Mail. On April 11, 1994, Mr. Kirmes made a copy of the grievance packet and asked Sue Joyce, President of DCOA to write the appeal notice and deliver it to the State Personnel Office in the Townsend Building, Dover.

2. Charles Kirmes testified that Miss Joyce told him that she delivered the notice to State Personnel on April 11, 1994.

3. Sue Joyce was sworn and testified that she is President of the Delaware Correctional Officers Association (DCOA) and that she delivered the packet to the State Personnel Office on April 11, 1994. She stated that her calendar indicated she was at the Townsend Building that day but the calendar was not with her at the time of the hearing.

Ms. Joyce testified further that she delivered the packet to the receptionist and that the receptionist accepted it.

4. Connie Stultz was sworn and testified that she had been with the State of Delaware for seventeen (17) years and in January 1994 she became the Executive Secretary to the Director of State Personnel, Dr. Harriet Smith. She testified further that as part of her job duties she maintains a 4-step grievance log and also the 5-step grievance log for cases that went formerly went to the State Personnel Commission. Miss Stultz further testified that it was her standard operating practice to write in the log the date that was stamped as the appeal date. Miss Stultz testified that the stamping is done in another office and she can't testify to the stamp-in date but that the papers, when they are delivered, are stamped in on the date of delivery. Ms. Stultz further testified that what was formerly called Step 5, the State Personnel Commission that a bill had been filed with the General Assembly to abolish it and to replace it with the now constituted Merit Employee Relations Board, but that there were no problems with Step 4 cases being handled. Miss Stultz testified that the official log book as maintained in her office showed the case being stamped in on April 19, 1994 and that was the date she typed on the summary of cases pending for Step 4 decision hearing dated September 15, 1994.

THE LAW

29 Del. C. § 5931. Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The director 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 this chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days. (29 Del. C. 1953, § 5931; 55 Del Laws, c. 443, §6, 69 Del. Laws, c. 436, §7.)" Effect of amendments -- 69 Del. Laws, c. 436, effective July 14, 1994, rewrote this section.

Merit Rule 20.0300 Grievance Procedures

The term "issue" or "reply" as used throughout this procedure shall mean (1) to place a writing in the U.S. mail addressed to the individual who is, in accordance with the rule, to receive such writing, or (2) to hand deliver a writing to an individual, or his/her office or office location. Accordingly, the term "issuance" shall mean placement in the mail or hand delivery.

Merit Rule 20.0340 Step 4

In the event that an acceptable solution is not reached at Step 3, the grievant may request a hearing with the State Personnel Director (or his/her designee), except in such cases of grievance of employee performance appraisal, where the decision of the agency head is final unless Merit Rule 21.0121 authorizes a further written review by the personnel Commission. This request, in writing and accompanied by copies of all relevant written materials from the previous steps in the grievance procedure, must be presented within ten (10) working days of the issuance of the decision at Step 3 by the agency head (or his/her designee) or of the expiration of the time limit for the issuance of such decision.

The Director shall notify the employee and other interested parties of the scheduled hearing date within thirty (30) calendar days of receipt of the grievance and of all relevant written materials from the previous steps in the grievance procedures. Such notification shall be followed by written confirmation.

Within ten (10) working days following the hearing, the Director (or his/her designee) shall issue a written decision to both parties.

If either party does not accept the findings of the Director (or his/her designee), either may present a written appeal, within fifteen (15) working days of receipt of the Director's decision, to the Personnel Commission in accordance with 21.0100, except in cases of a grievance following an examination or a rating of training and experience where the decision of the Director of Personnel is final. See 7.0500 and 8.0800. A correction in a rating shall not effect an appointment which may have already been made from the register.

Merit Rule 20.0350

It is within the spirit of this procedure that all parties will make every effort to expedite the processing of grievances. It is expected that all parties will observe the time limits specified above; however, when a grievance can be processed in less time than provided in the various steps, this should be arranged within the time limits, in which event the time limits may be extended by mutual agreement in writing, and such extension is not to exceed thirty days in any event. Failure of those in authority to make a timely response or request a delay will permit an employee to process the grievance to the next step of the procedure. Failure of an employee to observe the time limits will nullify the grievance (emphasis supplied)

FINDINGS OF FACT

1. The Step 3 hearing decision in this matter was dated March 21, 1994 and received by Mr. Kirmes, via State Mail, on March 31, 1994.
2. On April 11, 1994 Mr. Kirmes made a copy of the grievance packet and asked Sue Joyce, President of the Delaware Correctional Officers Association to write the appeal notice for Mr. Nash and to have it delivered and stamped in at the State Personnel Office, Townsend Building, Dover, Delaware.
3. On April 19, 1994 Sue Joyce hand-delivered the grievance to the office of State Personnel in Dover as evidenced by the stamped-in copies on file and the logs showing the stamped-in date.
4. This appeal was untimely. It was filed five (5) working days after the statutory period had expired.

CONCLUSION OF LAW

The grievance is denied due to a finding that the grievance was not timely filed pursuant to Merit Rule No. 20.0340 and Merit Rule No. 20.0350. Failure of an employee to observe the time limits will nullify the grievance. This is consistent with the ruling of the Supreme Court in Maxwell v. Vetter 311A.2d 864 (Del. Supr.) 1973 where the Supreme Court held that the power and authority of the State Personnel Commission are derived exclusively from statute and extend only to those cases which are properly before it in compliance with statutory law. In that case where discharged employee filed his appeal after the statutory period the Supreme Court found that the Commission did not have jurisdiction to hear the matter. Where in a case as that one the appeal to the Board was filed too late the Board has no jurisdiction to consider it and cannot reach the merits of the matter. Parties to litigation cannot confer subject matter jurisdiction upon the Board by agreement that the Board has jurisdiction.

ORDER

For the forgoing reasons, the Board dismisses the grievance of Sidney Nash as being untimely filed.

IT IS SO ORDERED

Katy K. Woo, Chairperson

Gary Fullman

Walter Bowers

Dallas Green

APPEAL RIGHTS

29 Del. C. § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing authority acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeal to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

Mailing Date: December 18, 1995

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