BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

IN THE MATTER OF GLEN SHERWOOD, Grievant, v. STATE OF DELAWARE DEPARTMENT OF CORRECTION Agency	**DOCKET NO. 95-06-30** **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 was the District grievance chairman for the Delaware Correctional Officers Association and he received the 3rd step decision for Glen Sherwood on May 25, 1994. On May 26, 1994 he prepared the appeal packet for Mr. Sherwood and gave it to Ms. Sue Joyce to be filed.

2. Sue Joyce was sworn and testified that she was the President of the Delaware Correctional Officers Association, and that Mr. Kirmes gave her the appeal packet to be filed. Ms. Joyce testified that she went to the State Personnel Office in the Townsend Building in Dover to file the grievance, and that while she was standing at the receptionist's desk, Dr. Harriet Smith, the State Director of Personnel came in. Miss Joyce further testified that she accompanied Dr. Smith to her office and that she presented the appeal packet to Dr. Smith and Dr. Smith gave it to her assistant. Miss Joyce testified that she made a notation of this date on her calendar but that she did not bring her calendar with her to the hearing this date but, to the best of her recollection, this occurred on May 31, 1994.

3. Charles Wood was sworn and testified that he is Vice President of Delaware Correctional Officers Association and that on July 28, 1994 he received a phone call from Bernadette DiFrancesco from the State Personnel Office in Wilmington. Mr. Wood testified that she requested information from him on several cases, including the above-cited grievance. Mr. Wood testified that Miss DiFrancesco stated that she needed this information because the files were not sent from the Dover State Personnel Office during the scheduled transfer of files from Dover to Wilmington. She also stated that this information was needed before a hearing date could be scheduled. Mr. Wood testified that he provided the information along with a cover sheet he said dated 5/26/94 and forwarded to the State Personnel Office.

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. As part of her job duties she maintains a 4-step grievance log and also a grievance log for cases that went to the State Personnel Commission. Miss Stultz testified that the above-referenced grievance was stamped in at the Office of State Personnel on July 29, 1994 and that was the date stamped as indicated on the appeal paperwork. She testified that she had witnessed the conversation between Dr. Harriet Smith and Sue Joyce, President of DCOA, when Miss Joyce left a packet of grievances with Dr. Smith. She did not stamp in that date as that is not her responsibility, however, the grievances were stamped in on the date they were presented to Dr. Smith. Miss Stultz further testified that when the State Personnel Commission was abolished and MERB was created that it caused no problem with Step 4 grievances as they were unaffected by that statutory change and that it was her practice to record the stamped-in date when she received the grievance in her office.

5. Charles Wood was recalled and testified on redirect that Paul Walker was not a member of DCOA and that he was a member of another union and that when he spoke to Miss DiFrancesco she complained about Miss Stultz saying that Miss Stultz was not sending up the copies that were received in the Dover office.

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)

FINDING OF FACT (Majority Opinion)

1. The decision from the Step 3 hearing was received on behalf of Delaware Corrections Officers Association via State Mail by Charles Kirmes, District 2 Grievance Representative on May 25, 1994.
2. On May 26, 1994 Charles Kirmes wrote out the appeal notice for Mr. Sherwood to appeal the Step 3 decision to Step 4, State Personnel Director's level and made a copy of the grievant package.
3. On May 26, 1994 Charles Kirmes gave the Step 4 appeal notice packet to Sue Joyce and asked Sue Joyce, President of DCOA, to have the appeal filed.
4. The appeal was received by the office of State Personnel in Dover on July 29, 1994 as evidenced by the clocked-in date stamp on the appeal packet, the same day that Miss Joyce delivered the packet to State Personnel Director, Harriet Smith.
5. The appeal was not timely filed.

CONCLUSION OF LAW

The grievance is denied due to a finding that the appeal 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

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. The motion to dismiss by the State that the Board has no jurisdiction to hear this case must be granted.

ORDER

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

IT IS SO ORDERED

Walter Bowers

Gary Fullman

Dallas Green

DISSENT

I write separately because I find, by a preponderance of the evidence, that the appeal was timely filed on May 31, 1994 and that the Board should have denied the State's motion and allowed the case to proceed on its merits. I respectfully dissent from the opinion of the Board in this case.

Katy K. Woo, Chairperson

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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