BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF DAVID WEISS, **Grievant,**	)	**DOCKET NO. 97-10-103**
v.	)	
THE FAMILY COURT OF THE STATE OF DELAWARE, **Agency.**	)	**FINDINGS, CONCLUSION AND ORDER**

BEFORE Katy K. Woo, Chairperson, Robert Burns, Vice-Chairperson, Walter Bowers, Gary Fullman, and Dallas Green, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES

For the Appellant: Perry F. Goldlust, Esquire
Heiman, Abner & Goldlust
600 First Federal Plaza
702 King Street, P. O. Box 1675
Wilmington, Delaware 19899-1675

For the Agency: Elizabeth Alice Saurman, Deputy Attorney General
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

COPY

NATURE AND STAGE OF THE PROCEEDINGS

This matter comes before the Board by virtue of a letter of grievance filed by David Weiss with the Board on October 9, 1996 wherein Mr. Weiss recited that he was filing a grievance directly with the Merit Employee Relations Board under Merit Rule No. 212.0112 (sic) [See Rule 21.0112] because he was suffering a pattern of discrimination as a result of his religion.

On November 4, 1996, the Family Court of the State of Delaware ("Agency") filed a Motion to Dismiss the grievance on a multiplicity of grounds including that the Grievant has improperly filed his complaint with the Board and a lack of specificity in his allegations of anti-Semitism.

By letter of November 12, 1996, the Grievant filed an amended grievance in response to the Family Court's Motion to Dismiss setting forth in greater detail the allegations of discrimination. The remedy sought was to have the Merit Employee Relations Board order the Court to cease and desist its discriminatory conduct toward a Merit System employee.

On December 3, 1996, the Agency filed a written reply to the amended grievance asserting, *inter alia*, that the Grievant admitted in his amended grievance that his status in his present position has not been affected and asserting that under 29 *Del. C.* § 5943 the Grievant does not have status to maintain a grievance and under 29 *Del. C.* § 5949 the Board does not have direct jurisdiction; that the grievance is not timely filed; that this Board lacks jurisdiction because Grievant has filed a complaint with the Department of Labor; and that the appeal should be dismissed as moot since the Grievant has voluntarily resigned from his position with Family Court effective December 13, 1996 and therefore any Order granting the relief sought would be ineffective.

On December 4, 1996, Grievant, through counsel, filed a written reply to the Agency Motion to Dismiss asserting, *inter alia*, a continuing violation of the Merit Rules against discrimination based

on race and religion; that the filing with the "EEOC" does not remove the matter from the independent jurisdiction of the Merit Employee Relations Board to enforce its own rules; and that the fact that the Grievant has left the Family Court for another job within the State of Delaware does not render the matter moot.

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 for an additional thirty (30) calendar days.

MERIT RULE 21.0112. Appeal from Discrimination

> Any applicant or employee who has reason to believe that he/she has been discriminated against because of an interpretation or application of the Merit Rules by the Director or any procedures or regulations established by the Director for the purpose of implementing the Merit Rules may appeal directly to the Merit Employee Relations Board within ten (10) working days of the date of the action being appealed. Such appeal must be based on discrimination due to religious or political opinions or affiliations, national origin, race or other non-merit factors. <u>Any employee who has reason to believe he/she has been discriminated against by action within an agency should initiate a grievance in accordance with the grievance procedures</u>. *See also* Rule 20.0300 (Emphasis added).

DISCUSSION AND FINDINGS

The Grievant is correct in that Merit Rule 19.0100 prohibits discrimination against any person in any aspect of personnel administration because of political or religious opinions or affiliations or because of race, national origin, age, sex, physical or mental disability, or other non-merit factors.

The Grievant is not, however, correct in filing a direct appeal with the Merit Employee Relations Board asserting a claim of discrimination by the Agency. Merit Rule No. 21.0112, under which Grievant filed his "grievance," provides for direct appeals only in the situation where there is an allegation that the individual has been discriminated against because of an interpretation or application of the Merit Rules by the Director or any procedures or regulations established by the Director for the purpose of implementing the Merit Rules. All other allegations of discrimination by action "within an agency" fall under the grievance procedure and are not the subject matter of direct appeals to the Board. This imminently sensible approach allows the agency to promptly address and hopefully to remedy at the lowest possible level any situations giving rise to allegations of prohibited discrimination.

CONCLUSIONS OF LAW

It is not all appeals from discrimination which are to be brought before the Merit Employee Relations Board by direct appeal. Where, as the Board finds to be the case here, the allegation is one of prohibited discrimination within an agency, the employee under the Merit Rules should have initiated a grievance in accordance with the grievance procedure. The Board would consider such matters, if necessary, upon a properly filed appeal after a fourth step grievance consideration under Merit Rule 20.034.

In the present situation, it is not necessary for the Board to address the multiplicity of reasons set forth by the Agency for the dismissal of this matter, since by the application of Merit Rule 21.0112, the matter is not eligible nor appropriate for direct appeal to the Board and therefore will be dismissed.

ORDER

NOW, THEREFORE, this 19th day of December, 1996, the direct appeal of David Weiss to the Merit Employee Relations Board in Docket No. 97-10-103 is dismissed.

BY ORDER OF THE BOARD:

Katy Woo

Katy K. Woo, Chairperson

Robert Burns, Vice-Chairperson

Walter Bowers, Member

Gary Fullman, Member

Dallas Green, Member

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 agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* § 10142 provides that any party against whom a case decision has been decided may appeal such decision to the Court.

Mailing Date: 12/30/96

MMT:bfo

Distribution:
Original: File
Copies: Grievant's Representative
Agency's Representative
Merit Employee Relations Board
Katy K. Woo, Chairperson
Robert Burns, Vice Chairperson
Walter Bowers, Member
Gary Fullman, Member
Dallas Green, Member