BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF DICKERSON, ET AL Grievants, v. STATE OF DELAWARE DEPARTMENT OF CORRECTION Agency	**DOCKET NO. 96-11-68** **FINDING OF FACT** **CONCLUSION OF LAW** **OPINION AND ORDER**

COPY

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

AND NOW on this date, the 5th of September, 1996, the above-referenced matter being before the Board on June 26, 1996, the Board makes the following Finding of Fact and Conclusions of Law; to wit:

APPEARANCES:

For the Grievants:

Douglas B. Catts, Esquire
Schmittinger & Rodriguez
414 S. State Street
PO Box 497
Dover, Delaware 19903

For the Department:

Elizabeth D. Maron, Deputy Attorney General
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

NATURE AND STATE OF PROCEEDINGS

This matter came before the Board for evidentiary hearing on June 26, 1996 having been filed as a direct appeal pursuant to Merit Rule No. 21.0112 alleging a violation of Merit

Rule No. 19.0100 by the refusal of the Department of Corrections to allow shift trades and changes by Corrections Officers to enable them to attend the "Million Man March" held in Washington, DC on October 16, 1995 and seeking as a remedy the determination by the Board that the actions of the Department were discriminatory on the basis of race and that the employment of the Warden and Chief of Security Major Hawlk should be terminated.[1]

PRELIMINARY MATTERS AND MOTIONS

As a preliminary matter, at the time of the hearing, Counsel for the Department of Corrections moved to dismiss the appeal and requested the Board remand the matter back to the grievance procedure on the basis that, as filed, the appeal attempted to state a claim of racial discrimination against the Agency as a result of Agency action and, as such, was properly the subject of a grievance to the Agency and not the proper subject for a direct appeal to the Board.

Counsel for the Department of Corrections represented that if the matter were dismissed that it would promptly (within ten to thirty days) be heard as a timely filed grievance by the Director of the Department of Corrections.

Counsel for the Department further orally sought a determination by the Board that the relief requested was beyond the authority of the Board to grant. In view of the modification by the grievants' counsel of the requested relief and the order of the Board set forth hereinbelow, this second requested relief is 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

[1] Counsel for the grievants conceded on the record of this proceeding that the relief sought was not within the authority of the Board and modified the requested relief to seek a determination by the Board that the conduct in refusing the shift changes had been the result of racial discrimination and the changes had been the result of racial discrimination and the entry of a cease and desist directive by the M.E.R.B. to the Department with respect to such illegal discriminatory behavior.

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 No. 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 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. 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. (See also 20.0300.) (Emphasis added.)

DISCUSSION AND FINDINGS

It is not all appeals from discrimination which are to be brought before this Board by direct appeal. Where, as the Board finds to be the case here, the allegation is one of prohibited discriminatory action within an agency, the employee(s) under the Merit Rules, should have initiated a grievance in accordance with the grievance procedure. The Board should consider such matters, if necessary, upon a properly filed appeal from the fourth step under Merit Rule 20.0340.

This merit rule requirement, among other things, allows the Agency the opportunity to remedy a situation where it is possible to do so at the lowest possible level with, hopefully, the greatest speed and efficiency.

CONCLUSION OF LAW

The Board concludes that under Merit Rule 20.0112, this grievance is not properly before the Board as a direct appeal and will therefore be dismissed. Based upon the representations of the Department of Corrections, the matter will be sent back for consideration at the third step by the Commissioner of Corrections with thirty (30) days.

ORDER

Based upon the foregoing findings and conclusions, it is **ORDERED:**

1. That the direct appeal of this grievance is dismissed.
2. That consideration of this matter as a timely filed grievance by the Department of Corrections at the third step by the Commissioner of Corrections should occur within thirty (30) days in keeping with the Department's representations to the Board.

IT IS SO ORDERED

Katy K. Woo, Chairperson

Robert Burns, Vice Chairperson

Dallas Green, Member

Gary Fullman, 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.

Mailing Date: September 9, 1996

MMT:jlt

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