BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF DOUGLAS BOUNDS Grievant, v. STATE OF DELAWARE, DEPARTMENT OF CORRECTION Agency	**DOCKET NO. 96-01-70** **FINDINGS, OPINION AND ORDER OF THE BOARD**

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

AND NOW on this date, the 19th of September, 1996, the above-referenced matter having been before the Board for an evidentiary hearing on June 26, 1996, for the reasons set forth hereinafter, the Board makes the following findings and conclusions and enters the following Order:

APPEARANCES:

For the Grievant: Douglas B. Catts, Esquire
Schmittinger and Rodriguez
414 South State Street
PO Box 497
Dover, DE 19903

For the Department: Elizabeth D. Maron
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

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NATURE OF THE PROCEEDINGS

This is an appeal filed with the Board under the grievance process pursuant to 29 Del. C., Ch. 59 and the Merit Rules from a decision adverse to the Grievant at the fourth step grievance hearing held on June 29, 1995. (Merit Rule No. 20.034).

The Grievant is presently employed by the State of Delaware, Department of Correction as a Correctional Officer. Grievant originally submitted two grievances relating to the classification as unauthorized of his absences from work as an essential employee on December 29, 1994 and February 12 and 13, 1995 during the inclement weather and snow emergency. On the record at the Board hearing on this matter, the Grievant withdrew his grievance regarding the unauthorized absence on December 29, 1994.

MOTION TO DISMISS GRIEVANCE AS UNTIMELY FILED

By motion dated June 12, 1996, the Department sought dismissal of this grievance on the basis that it was not timely filed within the fifteen (15) working days permitted by Merit Rule 20.034. In addressing this motion to dismiss, the Grievant presented the sworn testimony of Correctional Officer Charles R. Wood, Vice-President of the Delaware Correctional Officers Association that on August 14, 1995 he wrote a letter to Wendy Donahue in the State Personnel Office observing that he had just received the decision in the case of Douglas Bounds and requesting in the future that state mail not be used to send decisions. Officer Wood testified that there was significant confusion during this period as to the method for properly filing matters with MERB and that the appeal was sent to Wendy Donahue at State Personnel because that was thought to be the proper thing to do, and Ms. Donahue told Wood that she would send it on to MERB. He did not know whether or not she did forward the filings to the Board.

In November, 1995, during another Board hearing, Officer Wood spoke about the Douglas Bounds grievances to John Brady, Esquire, who was then the Deputy Attorney General representing the Board. According to Wood, a determination was made at that time, after investigation by Mr. Brady, that the Bounds grievance had been located and had apparently been mailed, properly addressed to MERB at PO Box 1401 in Dover, Delaware, but had been returned erroneously by the State Mail Room as being insufficiently addressed.

John Brady, Esquire, with the concurrence of both parties, was sworn and testified by telephone that, in his capacity as Deputy Attorney General representing the Board, he had spoken to a Correctional Officers union representative, either Officer Morris or Wood,

concerning the status of the Bounds' grievance during another hearing in November. He was shown at the time and recalled an envelope which had been addressed to MERB at the correct mailing address but had been returned to the Delaware Correctional Officers Association as being insufficiently addressed. Mr. Brady stated that he reviewed the contents of the envelope and had, at the time, determined that the Bounds' grievance had been timely filed. He recalled the envelope, because he had made a photocopy of it to send to Administrative Services as an example of mistakes in transmitting material to MERB. After a search, he could not locate the original envelope. However, according to his recollection, the envelope was postmarked in September, 1995. As to the MERB date stamp of January 10, 1995 as the filed date, Brady stated that was the time when he gave the grievance to Jean Lee Turner, the Board's Administrative Assistant; that he may have put it in a box in his office prior to his vacation from December 19 through January 3, 1996; and that when given the grievance he had stated that he would take care of filing it and that, in his view, it was timely filed.

FINDINGS AND DECISION ON THE MOTION

The requirement for the submission of the appeal from an adverse fourth step grievance decision has been deemed jurisdictional, and the failure to timely file results in the absence of jurisdiction in this Board and in the nullification of the grievance. Maxwell v. Vetter, Del. Supr., 311 A.2d 864 (1973); Merit Rule 20.0350.

However, the Board finds, by analogy to the practice in the courts, that in limited situations the possibility exists that the harsh result of dismissal for an untimely filing may be avoided. See Cunningham v. State of Delaware, Del. Super., C. A. No. 95A-10-003HDR, Ridgely, P. J. (March 27, 1996) (ORDER); Wilson v. King, C. A. No. 95C-07-007, Terry, R. J. (January 26, 1996) (OPINION).

In the Cunningham decision, President Judge Ridgely noted that matters such as court personnel error or opponent misconduct could give rise to an extension of the filing deadline. In the Wilson case, Resident Judge Terry permitted a filing beyond the statute of limitations where government (court) employees failed to give the plaintiff complete and accurate information on how to accomplish the filing of her complaint. We find similar circumstances to have occurred in this instance. Furthermore, while not in itself dispositive, we have in this case the review and determination by the Board's legal counsel announced to the Grievant's representative that the matter was timely filed.

In the present case, the Grievant takes the position that the inability to timely file is the result of the fault not of the Grievant and/or his representatives, but rather was caused by the fact that there was no established method for perfecting a filing with the Board; that a good faith effort was made to timely file which the testimony establishes was thwarted by state employees by the non-delivery of the grievance in a properly-addressed envelope; and the erroneous advice given by state employees in regard to the filing of this matter with MERB. The Board recognizes that there was significant confusion until October 19, 1995 when a full time employee was retained for MERB and when an office location had been established in Tatnall Hall in Dover.

The Board, by the affirmative vote of all members participating in this matter,[1] determines that the filing of this grievance should be considered as timely as being within the recognized exceptions to the harsh result of dismissal.

SUMMARY OF EVIDENCE PRESENTED ON THE MERITS

The Grievant, Douglas Bounds, was sworn; stipulated that he was an essential employee; and testified that on February 12 and 13, 1995, he did not report for duty at the Delaware Correctional Center during the declared state of emergency resulting from the major snow and ice storm. Officer Bounds testified that he has been a Correctional Officer for approximately eight years and for that period has lived in a five (5) unit trailer park just off Route 13 below Seaford, Delaware. It takes him approximately one and one-half hours to get to work at the Delaware Correctional Center near Smyrna.

The mobile home park is located in an area with a lot of pine trees; has only one way in or out, and there is an approximate 45 degree grade up to the main highway. The Grievant testified that he doubted that he would have been able to get his car up the incline, but that never became a problem because, as a result of the frozen tree limbs in his driveway blocking his car, he was not able to get out of the parking area. On each day of his absence, he called in and sought annual leave status for the absence which request was denied because he was an essential employee. He did not report for work on either of the dates which are the subject of this grievance. He stated that in preparation for snow that winter, he had bought a snow shovel

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[1] Board member Walter Bowers was unavoidably absent and thus did not participate in this matter.

and rock salt. Officer Bounds also testified that he was unable to carpool into work on February 12-13, 1995, because the individual with whom he occasionally rides had called in as being sick.

Officer Bounds testified that he could not remember if he had called anyone else about getting to work but did recall calling in each day to ask for authorized absence treatment which he was denied. Officer Bounds stated that traffic was moving on Route 13 which is located within the length of the hearing room from the entrance to the trailer park. he testified that he spent the time he was absent from work on these two days trying to stay warm and cutting up the tons of tree limbs around his car and the one which had fallen on his trailer.

Officer Bounds testified that there is no public transportation nor taxi cabs in Seaford. He admitted that there is one Correctional Officer who lives south of the trailer park; who also works at the Delaware Correctional Center; and who did make it into work on the dates in question. Officer Bounds testified that he does not associate with other Correctional Officers and prefers to keep to himself.

Elizabeth Burris, Supervisor of Support Functions at the Delaware Correctional Center, was sworn and testified that among her many responsibilities is employee timekeeping. Ms. Burris' identified State's Exhibit 4 as a memorandum she wrote on February 28, 1994 to all Delaware Correctional Center staff setting out the policy for snow day leavekeeping which provided, among other things, that essential employees who were ordered to report to work and who did not will be marked "U/A" (unauthorized absence) and their pay will be docked accordingly.

Ms. Burris testified that there were some individuals who were absent on the same days as the Grievant who were not charged with unauthorized absences. Individuals who were absent submitted fact-finding packages of information concerning the basis for their absence, and each case was reviewed and considered by the Deputy Warden to determine if an unauthorized absence would be recorded. Included in the consideration was each individual's history of work absences. She stated that during this time there was a serious situation. Ms. Burris testified that public and institutional safety could be at risk in such situations since there is a limit on the amount of time Correctional Officers can be held over on duty. It was during this period that she instructed the shift commanders to accept no excuses, and she testified that she had personally called a captain and ordered him into work (while offering to watch his children). Ms. Burris testified that, while it was the responsibility of the essential employee to

find a way to get into work, the Department has sent vehicles out to get employees. There was no indication that the Grievant had asked for assistance in getting to work and, even if he had, Ms. Burris could not be sure if they would have been able to get him.

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.

Both the State and the Grievant concur that the grievance is governed by the terms of Merit Rule No. 6.0600 which in relevant part provides:

> Any absence from duty that is not in compliance with the rules governing the authorized leaves shall be considered an absence without leave and is cause for disciplinary action.
>
> No employee shall absent oneself from duty without authorization by the appointing authority, except in case of emergency illness, accident, or serious unforeseen circumstances. Such emergency conditions should be brought to the attention of the appointing authority as soon as practicable.

FINDING OF FACT

The Board finds:

1. That Douglas Bounds was employed as an essential State employee on February 12 and 13, 1995 and failed to report for work as a Correctional Officer at the Delaware Correctional Center as required.

2. That Douglas Bounds' vehicle was snowed-in and blocked by ice and fallen trees and tree limbs on February 12 and 13, 1995 in the mobile home park where he resides south of Seaford, Delaware during a declared state of emergency.

3. That the mobile home park is located a short distance from U.S. Route 13 which was open and carrying traffic on February 12 and 13, 1995.

4. That Douglas Bounds called in to work each day and sought authorized absence status which was refused.

5. That a correctional officer who lives further south than the Grievant was able to get to work each day at the same facility where the Grievant was to report for duty.

6. That Douglas Bounds cannot recall any prior preparation, beyond buying rock salt and a snow shovel, or other telephone calls to his employer or other individuals or further efforts, in an attempt to get to work on February 12 and 13, 1995.

7. That an individual with whom the Grievant occasionally rides to work had called in as sick on February 12 and 13, 1995.

8. That the Department, acting under Executive Order No. 36, reviewed the facts and circumstances of each absence during this period which was classified as unauthorized and based its final determination of authorized or unauthorized on the totality of the individual circumstances including the individuals' prior attendance patterns.

CONCLUSIONS OF LAW

Under the Merit Rule, as set forth above, an employee who does not report for work will not be charged with unauthorized absence in case of emergency illness, accident, or serious unforeseen circumstances. Such "emergency conditions" will necessarily be judged on the totality of the circumstances of each individual situation. The Grievant bears the burden of establishing, by a preponderance of the evidence, that his absence from his work place was the result of, in this case, serious unforeseen circumstances. As an essential employee of the State of Delaware Department of Correction, he has not met that burden under the circumstances here presented. Grievant, at most, has established inconvenience and not the level of effort reasonably expected from an essential state employee.

ORDER

The appeal of the grievance of Douglas Bounds, seeking to have his unauthorized absences of February 12 and 13, 1995 treated as authorized absences, is denied.

IT IS SO ORDERED

Katy K. Woo, Chairperson

Robert Burns, Vice Chairperson

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.

Mailing Date: September 24, 1996

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