BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF PERRY SMYTH Grievant, v. STATE OF DELAWARE, DEPARTMENT OF TRANSPORTATION Agency	**DOCKET NO. 96-02-83** **FINDING OF FACT** **CONCLUSION OF LAW** **OPINION AND ORDER**

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, to-wit, on this 26th day of June, 1996, the above-referenced matter being before the Board on March 28, 1996, the Board makes the following findings and conclusions and enters the following Order:

SUMMARY OF EVIDENCE

Mr. Smyth testified that he received notification from Mr. LoFaro, dated July 14, 1995 regarding his grievance, and that he filed his appeal with the Merit Employee Relations Board on February 7, 1996, and that he knew his appeal was filed late.

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

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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. 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.

FINDING OF FACT

1. The grievant, Mr. Smyth, received notification from Thomas LoFaro on July 14, 1995 regarding his grievance.

2. The grievance was filed with the Merit Employee Relations Board on February 7, 1996.

3. Merit Rule 20.0340 requires that the appeal to the Board be filed within fifteen (15) working days.

4. Mr. Smyth testified that he knew he was filing his appeal late.

CONCLUSION OF LAW

The Board is without jurisdiction to consider an untimely filed appeal. Accord. Cunningham v. Department of Health & Social Services, CA No. 95A-10-003 HDR, Del.Super, Ridgely, P.J. (March 25, 1996) [Currently on appeal to the Delaware Supreme Court].

ORDER

This grievance of Perry L. Smyth is dismissed.

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.

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