

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

**IN THE MATTER OF
ELLEN H. WARREN,**

Appellant,

v.

**DEPARTMENT OF HEALTH AND
SOCIAL SERVICES,**

Agency.

DOCKET NO. 97-04-121

**ORDER ON
MOTION TO DISMISS**

BEFORE Katy K. Woo, Chairperson, Robert Burns, Vice-Chairperson, Walter Bowers, Dallas Green, and John F. Schmutz, Esquire, Members, constituting a quorum of the Merit Employee Relations Board (hereinafter "MERB" or "Board") pursuant to 29 *Del. C.* § 5908(a).

AND NOW, this 24th day of July, 1997, the Board, for the reasons set forth below hereby enters the following Order:

APPEARANCES

For the Appellant: Ellen H. Warren, *pro se*
 2588 Westville Road
 Marydel, Delaware 19964

For the Agency: Loretta G. LeBar, Deputy Attorney General
 Department of Justice
 Carvel State Office Building
 820 North French Street
 Wilmington, Delaware 19801

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NATURE AND STAGE OF THE PROCEEDINGS

This matter comes before the Board by virtue of direct appeal filed by Ellen H. Warren with the Board on April 15, 1997 as an appeal to the Board under Merit Rule No. 21.0112.

Ms. Warren in her appeal, which she styled as a grievance, asserted a violation of Merit Rule No. 13.0100 and contends that a position into which she unsuccessfully sought promotion was improperly filled for non-merit reasons and was not filled by the promotion of a merit system employee. She also asserts that the agency by its lack of responsiveness to her inquiries concerning the position has violated the Family Medical Leave Act.

On May 23, 1997, the Department of Health and Social Services filed a Motion to Dismiss the appeal for lack of jurisdiction. Ms. Warren filed a written response to the Motion on June 2, 1997. This matter was placed on the Board agenda on July 24, 1997 for consideration of the Motion to Dismiss for lack of jurisdiction. For the reasons stated hereinafter, the Motion is granted.

POSITIONS OF THE PARTIES

In the Motion to Dismiss for lack of jurisdiction, the Department alleges that the grievance or appeal is not timely filed. The Department asserts that Ellen Warren learned at a meeting she attended on November 22, 1996 that the position of Labor Relations Officer for which she had applied had been filled by another applicant. The Department also asserts that Ms. Warren commenced a leave under the Family Medical Leave Act on December 13, 1996 and that she appealed the grievance directly to MERB on April 15, 1997, over four (4) months after learning of the alleged grievance. The Department further contends that this appeal is untimely since Merit Rule No. 21.0112 grants ten (10) working days to file an appeal with MERB and Merit Rule No. 20.0310 grants a grievant ten (10) working days to present in writing a Step 1 grievance.

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 of 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 Rule 20.0300).

Merit Rule 13.0100 Promotion

Vacancies shall be filled by promotion where ever practical and in the best interest of the classified service.

Whenever a position is to be filled by promotion, the candidate shall meet the minimum requirements of the class specification. Consideration shall be given to qualifications, performance record, seniority, conduct and, where applicable, the results of competitive examinations.

No grievance may be maintained concerning a promotion except where:

- (1) the person who has been promoted does not meet the minimum qualifications;
- (2) there has been a violation of Merit Rule No. 19.0100 or any of the procedural requirements in the Merit Rules; or
- (3) there has been a gross abuse of discretion in the promotion.

Merit Rule 20.0310 Step 1.

The employee shall, within ten (10) working days of the date of the occurrence of events leading to the grievance or within ten (10) working days of the date an employee could reasonably be expected to have knowledge of the circumstances leading to the grievance, present the grievance in writing to his immediate supervisor setting forth the details of the grievance and relief sought. The supervisor, shall within five (5) working days of receipt of such grievance, meet and discuss the grievance with the employee and his/her representative, if any, and reply to the employee in writing within five (5) working days of said meeting.

Merit Rule 19.0100 Non-Discrimination Policy

Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline or any other 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 will be prohibited.

DISCUSSION, FINDINGS AND CONCLUSIONS

In her written response to the Department's Motion to Dismiss this appeal as untimely, Ms. Warren asserts that she became aware on December 11, 1996 of the official announcement that the Labor Relations Officer position which she sought had been filled. Ms. Warren also asserts that she was aware as early as November 22, 1996 that a tentative offer of employment had been made to another candidate for the position.

The records of MERB establish that Ms. Warren's "grievance pursuant to Merit Rule 21.0112" was filed on April 15, 1997 at 1:47 P.M. This is well beyond the ten (10) working days allowed for the filing of an appeal with the Board under Merit Rule No. 21.0112.

The Board finds no basis for tolling the mandatory filing period because the employee was on leave during the period. The term "working day" is used to calculate the time required within which a timely appeal must be filed. There is no requirement that the grievant or appellant must have been physically present at work on the days which are counted; rather, the term is a commonly used objective measure of working days, as opposed to holidays and weekends, rather than a subjective calculation of the days on which the individual was actually at work. (*See, e.g., 16 Del. C. § 5001(6)*). The fact that such leave was taken under the Family Medical Leave Act of 1993 (3 U.S.C.A. § 412) does not alter this conclusion.

In the view of the Board, this case is governed by *Maxwell v. Vetter*, Del. Supr., 311 A.2d 864 (1973), and the decision of Superior Court President Judge Ridgely in *Cunningham v. State of Delaware, Department of Health and Social Services*, Del. Super., CA95A-10-003HDR, Ridgely, P.J. (March 27, 1996) (ORDER). In those cases, the court has determined that the ten (10) day period is a matter of the Board's ability to hear the case. Any notion of a Contract Statute of

Limitations replacing the time limits of the Merit Rules is without foundation. The filing is untimely; that untimeliness is jurisdictional, and the Board is without jurisdiction.

The Appellant is also not correct in filing a direct appeal with MERB on this matter even if the filing were timely, which it is not.

Merit Rule No. 21.0112 under which Appellant filed her "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. Allegations of discrimination by action "within an agency" fall under the grievance procedure and are not the subject of direct appeals to the Board. This construction of Merit Rule 21.0112 is a sensible approach which allows the agency to promptly address, and hopefully to remedy, at the lowest possible level any situations giving rise to allegations of prohibited discrimination. The assertions that the Department was acting as the agent of the Director are not persuasive and if applied would frustrate the intent to have matters involving the actions of the agency considered first at the agency level. The Appellant returned to work on March 9, 1996 with knowledge that the posting she sought had been filled by a non-promotional candidate, and her appeal of that grievance was not received at the Board until April 15, 1997. This matter is therefore controlled by the *Cunningham* decision, and the Board is without jurisdiction.

ORDER

Based on the foregoing, the direct appeal of Ellen H. Warren to the Merit Employee Relations Board in Docket No. 97-04-121 is dismissed for lack of jurisdiction.

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IT IS SO ORDERED:



Katy K. Woo, Chairperson



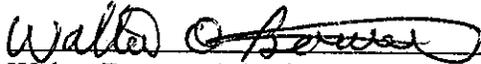
Dallas Green, Member



Robert Burns, Vice-Chairperson



John F. Schmutz, Esquire



Walter Bowers, Member

Mailing Date: August 20, 1997
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