BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF MARY GORTON, Appellant, v. DELAWARE DEPARTMENT OF TRANSPORTATION, Agency.	)	DOCKET NO. 98-12-136 DECISION ON MOTION TO DISMISS

COPY

BACKGROUND

This is a grievance appeal which the grievant, Ms. Gorton, originally filed with the Merit Employee Relations Board ("MERB" or "Board") on December 12, 1997, appealing the denial of her grievance at the third step level. On February 17, 1998, the Delaware Department of Transportation ("DelDot") filed a Motion to Dismiss Ms. Gorton's appeal asserting that it is outside of the jurisdiction of the MERB because of Ms. Gorton's failure to pursue her grievance through the required steps of the grievance process without any of those steps having been waived by the Agency under Merit Rule No. 20.0360. Ms. Gorton timely filed her written response to the Motion to Dismiss on March 18, 1998, and asserted that she had been guided through the appeal process by an individual in the DelDot Personnel Office who told her to file her appeal at the MERB.

At the argument on the Department's Motion to Dismiss held on June 11, 1998, the parties agreed to voluntarily submit this matter to the Office of State Personnel for possible resolution and the Board tabled for future consideration without further argument the ruling on the Department's Motion to Dismiss. Thereafter, the State Personnel Office treated the matter as though it were a duly filed fourth step grievance appeal and a hearing was held before Hearing Officer Monica J.

Washington, Esquire, on September 14, 1998, with a written decision dated September 28, 1998. The decision was adverse to Ms. Gorton and she has, by hand written letter received by the Board on October 5, 1998, requested a hearing before the Board. The Board deliberated on this matter on January 14, 1996 without further argument on the Motion to Dismiss.

DISCUSSION

As the Board noted in its original order on this matter, Ms. Gorton's appeal would initially appear to be governed by the proposition that failure of the employee to adhere to the time limits for processing a grievance through the required steps deprives the Board of jurisdiction to hear the case.

The Superior Court (and this Board) has recognized that there may be situations where the harsh result of dismissal for an untimely filing may be avoided. See *Cunningham v. State of Delaware*, Del. Super., C.A. No. 95-10-003HDR, Ridgely, P.J. (March 27, 1996) (Order); Affirmed without opinion, Del. Supr., 679 A.2d, 469 (1996). See also, *Wilson v. King*, C.A. No. 95-07-007, Terry, R.J. (January 26, 1996) (Opinion) and *Nickel v. DSCYF*, MERB decision, Docket No. 95-06-37, mailed September 24, 1996.

In the present case, Ms. Gorton has asserted in response to the Motion to Dismiss that she was guided through the appeal process by an individual in the DelDot personnel office who told her that the next step of the appeal process after Mr. Lutrzykowski (the 3rd step) was the MERB and that the MERB was the State Personnel Commission. This misdirection was indeed a part of Mr. Lutrzykowski's belated written decision after the third step hearing which advised Ms. Gorton to file any appeal in ten (10) days with the MERB. Pursuant to Merit Rule No. 20.0340 Ms. Gorton could have requested a Step 4 hearing with the State Personnel Director within ten (10) working days and after a Step 4 decision could have appealed to MERB within fifteen (15) working days of receipt of

the Director's decision. See Merit Rule No. 21.0120. Such confusion and uncertainty and obvious misdirection by agency personnel officials has previously been found to be sufficient for the Board (or for the Superior Court) to reach the merits of a grievance. See, *Wilson v. King*, C.A. No. 95-07-007, Terry, R.J. (January 26, 1996) (Opinion) and *Nickel v. DSCYF*, MERB decision, Docket No. 95-06-37, mailed September 24, 1996. The Board concludes it is sufficient in this situation as well and therefore the Motion to Dismiss is denied and the Board will consider the merits of the appeal.

ORDER

For the foregoing reasons by the unanimous vote of the undersigned members of the Board, the Motion to Dismiss is **DENIED** and this matter will be scheduled for hearing before the Board.

BY ORDER OF THE BOARD this 18th day of February, 1999.

Susan L. Parker, Esquire, Chairperson*

Robert Burns, Vice-Chairperson

Dallas Green, Member

John F. Schmutz, Esquire, Member

John W. Pitts, Member

*Unavoidably absent on January 14, 1999.

Mailing Date: Feb. 22, 1999

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