

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF BEN MATWEY)

Grievant,)

v.)

**DEPARTMENT OF ADMINISTRATIVE)
SERVICES,**)

Agency.)

DOCKET NO. 98-10-166

**FINDINGS, CONCLUSION
AND ORDER**

COPY

BEFORE Dallas Green, John F. Schmutz, Esquire, and John W. Pitts, constituting a quorum
of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES

For the Appellant: Roy S. Shiels, Esquire
Brown Shiels Chasanov & Beauregard
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Dover, Delaware 19903

For the Agency: Illona Kirshon, Deputy Attorney General
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NATURE AND STAGE OF THE PROCEEDINGS

Grievant, Ben Matwey ("Matwey") seeks review of an adverse decision of September 18, 1998 denying Matwey's grievance of his December 1997 "needs improvement" evaluation by his employer, the Department of Administrative Services ("DAS"). The basis for the adverse decision

was that the hearing officer had no jurisdiction under Merit Rule 21.0121 to grant relief since Matwey was a probationary employee under the provisions of 29 Del. C. § 5922. Under § 5922, an appointing authority may terminate a probationary employee and the determination of the appointing authority "shall be final and conclusive." 29 Del. C. § 5922.

Matwey has alleged discrimination as a basis for his evaluation and dismissal and has also argued that he has successfully served his probationary period and was dismissed subsequent to the one year probationary period. However, those claims, as will be discussed below, were not properly plead and, although argued before the Board, do not affect the procedural status of the case which presents only the issue of Matwey's right to seek review of a "needs improvement" evaluation as a probationary employee.

This case is currently before the Board on DAS' motion to dismiss the grievance for lack of jurisdiction.

SUMMARY OF THE EVIDENCE

The relevant chronology of this case is as follows:

June 1, 1997	Matwey began his 1 year probationary employment with DAS.
December 23, 1997	Matwey received needs improvement review for the period 6-97 through 12-97.
January 8, 1998	Matwey met with DAS supervisor to review an improvement plan for his work.
March 24, 1998	Matwey filed his grievance from the needs improvement performance evaluation.
April 28, 1998	Matwey received a second performance review for the period June 3, 1997 through April 28, 1998 rating his performance as "Unsatisfactory."
April 28, 1998	Matwey's attorney requested a grievance meeting relating to the December 1997 needs improvement evaluation. On the same date

April 30, 1998	Matwey was informed by letter that his supervisor was going to recommend Matwey's termination by DAS.
May 18, 1998	DAS secretary Meconi informed Matwey that he had not satisfactorily completed his probationary period and would be terminated effective Friday, May 29, 1998.
May 27, 1998	An informal hearing was conducted before Patrick T. Coates, Sr. Matwey's grievance was denied. (Decision rendered June 4, 1998)
June 12, 1998	DAS secretary Meconi notified Matwey that he could remain in his current position until a reassessment was conducted.
July 2, 1998	Matwey appealed the informal hearing decision rendered on June 4, 1998 to DAS secretary Meconi.
September 18, 1998	DAS secretary Meconi advised Matwey that he had not satisfactorily completed his probationary period and that he was to be placed in a vacant position in Food Distribution Section in the Division of Purchasing.
	The hearing officer's decision denying Matwey's grievance was released.

While Matwey and DAS do not essentially dispute the factual development of the case, they disagree significantly on the context in which the Board can consider the case. DAS points out that the only issue before the Board is Matwey's grievance relating to the needs improvement evaluation rendered in December 1997. That grievance did not include any allegations of discrimination, dismissal for cause or arbitrary or capricious treatment by DAS. DAS correctly points out that Matwey has never filed a grievance concerning the April 1998 unsatisfactory evaluation or the Secretary's letters of April 30, 1998, May 27, 1998 and July 2, 1998. On the other hand, while Matwey agrees that he did grieve the needs improvement evaluation, he argues that he was frustrated in his effort to grieve the unsatisfactory performance in April 1998 because DAS was unresponsive to an e-mail he sent to Kay Warren on May 4, 1998 requesting guidance on the appeal. Notable, except for a very small window of time, Matwey had been represented by at least three attorneys as part of this process. While Ms. Warren was not directly responsive to Mr. Matwey's e-mail, she did, on May 5, 1998, refer him in writing to secretary Meconi's letter of April 30, 1998.

Matwey further attempts to bring his grievance on the needs improvement evaluation within the merit rules on two bases: (1) by alleging discriminatory practice in violation of Rule 21.0112 even though there has never been a written allegation of a discrimination as part of this grievance, and (2) by arguing that the April 30, 1998 letter was rescinded by the Secretary's letter of May 27, 1998 and that the final letter of July 2, 1998 came outside the one year probationary period. Matwey argues that, since there was no dismissal prior to June 1, 1998, he could not be dismissed as a probationary employee but would have to be considered a permanent employee dismissible only "for cause."

FINDINGS OF FACT

The Board finds, as a matter of fact, that Matwey did not grieve the unsatisfactory performance of April 1998 nor his dismissal arising from the letters of April 30, 1998, May 27, 1998 and July 2, 1998. The only matter upon which a grievance was filed was the needs improvement evaluation of December 27, 1997. The Board further finds that Matwey's grievance of March 24, 1998 was limited to his request for a new evaluation and clarification of his job responsibilities. That grievance was never amended to reflect claims of discrimination or other improper conduct by DAS. The Board further finds that Matwey's request for information concerning his rights following the unsatisfactory evaluation in April 1998 did not constitute a grievance or the filing of a grievance. At all times relevant to the issues before the Board, Matwey was a probationary employee and that his status as a probationary employee did not change on June 1, 1998 because he had been notified in writing, prior to the end of his probationary term that he would not be given permanent status in the position he then occupied.

CONCLUSIONS OF LAW

The case under consideration is subject to the agency's motion to dismiss for lack of jurisdiction. Because Matwey argued that the consequences of certain acts which occurred during the time period December 1997 through July 1998 support this theory of the case, the Board will address each such issue as it relates to the motion.

I. Matwey's right to MERB review.

Although Matwey attempted to seek step 3 and 4 hearings on the needs improvement evaluation of December 1997, DAS consistently refused to acknowledge that such hearings were permissible under the merit rules even though it granted such hearings apparently as a matter of fairness. 29 Del. C. § 5922 is dispositive. Under that statute, a probationary employee may be discharged or reduced in class or rank by the (Division) Director. The probationary employee is entitled to receive a report of poor performance. If the probationary employee's services were unsatisfactory, that employee may be dropped from the payroll and the determination of the appointing authority in that case shall be "final and conclusive." *Id.* Matwey was informed that he would not be granted permanent status in the position for which he was hired as a probationary employee well within the one year probationary period. The secretary's letter of April 27 remained in full force and effect and the clear import of the Secretary's May 27, 1998 letter was directed to the reassignment issue only and not to the issue of Matwey's termination in the position for which he was hired. Under Merit Rule 13.0121 the appointing authority's decision concerning permanent appointment is not subject to appeal. Under Merit Rule 11.0500 a probationary employee may not appeal a decision of the appointing authority not to retain his or her services on the basis of non-merit factors except for certain cases of discrimination which are not applicable in this case because

Matway never filed any claim or grievance that he was the subject to the type of discrimination that would give him a right of appeal.

II. The right to appeal a needs improvement performance evaluation.

The December 1997 evaluation resulted in a "needs improvement" evaluation. Mr. Matway was not given a unsatisfactory evaluation. Under Merit Rules 20.0340 and 21.0121, he may only appeal his evaluation if it was unsatisfactory or directly led to the denial of a pay increase. Since the results of the needs improvement evaluation did neither, Matway has no right of appeal to the Board of his December 1997 evaluation. Although he argued that his grievance went beyond performance evaluation and raised "environment" issues, the hearing officer correctly concluded that there were no differences between the work environment issues and the performance issues. The hearing officer correctly concluded that he had no jurisdiction over performance issues in the absence of Matway's inability to meet the requirements of Merit Rule 20.0340 and 21.0121.

III. Appeal of the unsatisfactory performance evaluation.

Although Matway received an unsatisfactory rating in April 1998, and although he corresponded with a supervisor concerning the procedures relating to a grievance of that rating, Matway never took the necessary minimum steps to effectuate or file an actual grievance with the agency. Although not determinative, the Board notes that Matway had been represented by counsel and had at least one prior experience of filing a grievance with the Department. Irrespective of whether Matway believed his unsatisfactory rating to be the subject of performance issues or discrimination issues, Merit Rules 20.0310 and 21.0112 are clear that an employee has a maximum of 10 working days from the date of the events constituting the grievance to file a grievance with the Department. *Maxwell v. Vetter*, Del.Supr. 311A.2d 864 (1973) *Cunningham v. State of Delaware*

Department of Health and Social Services. Del. Super., C.A. 95A-10-003, Ridgely, P.J. (March 27, 1996) (Order). His failure to make such a filing bars any consideration of a grievance arising from the April 30, 1998 unsatisfactory performance evaluation.

IV. The discrimination claim.

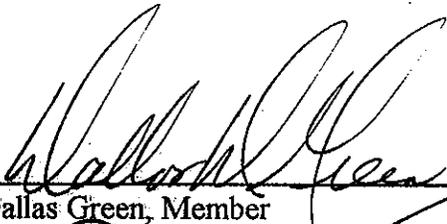
Matwey argues that there were discriminatory factors at play in the needs improvement evaluation rendered in December 1997 which relieve him of the standard contained in Merit Rule 11.0500 prohibiting a probationary employee's right to appeal except in some cases of discrimination. When he filed his grievance from the needs improvement evaluation, he made no claim of discrimination. He claimed that he had never received a performance plan or back-up documentation and that he should have in fact received a meets expectations as opposed to a needs improvement rating. It was only after he appealed to the State Personal Office that his claim was transformed into one of discrimination based on unsupported allegations relating to the relationships between and among himself and his supervisors. Because issues of discrimination were never presented as part of his initial grievance and only surfaced after he was notified that he would be terminated in the position for which he was originally hired, his attempt to allege discrimination is a collateral attack on the April 1998 evaluation and the April 30, 1998 letter of dismissal rather than related to the merits of his grievance following the December 1997 needs improvement evaluation. Working from the statutory provision that an appointing authority's decision to terminate a probationary employee is final and conclusive, it follows that Matwey has no right of appeal with respect to the merits of a performance evaluation or the decision to terminate his probationary employment. Under that analysis, the Board would have no ability to consider procedural challenges to the performance evaluation or to use that as a device to question the Secretary's final and conclusive decision granted

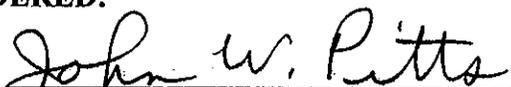
under circumstances where no allegation of discrimination was properly or timely filed under the applicable statutes or merit rules.

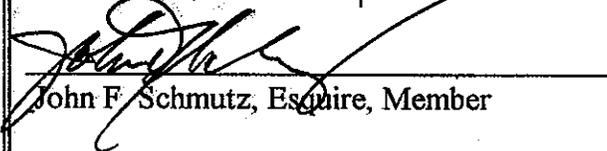
ORDER

Based on the findings of fact and conclusions of law stated above, the Department of Administrative Services' motion to dismiss Matwey's grievance for lack of jurisdiction shall be and is hereby granted and that the grievance under docket No. 98-10-166 is hereby **DISMISSED**.

IT IS SO ORDERED:


Dallas Green, Member


John W. Pitts, Member


John F. Schmutz, Esquire, 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.

29 Del. C. § 10142 provides that any party against whom a case decision has been decided may appeal such decision to the Court.

Mailing Date: November 8, 1999
Distribution: jt

Original: File
Copies: Grievant's Representative
Agency's Representative
Merit Employee Relations Board

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