COPY

BEFORE THE MERIT RELATIONS BOARD

OF THE STATE OF DELAWARE

CATHERINE A. CHAPMAN, Employee/Grievant, v. DELAWARE DEPARTMENT OF HEALTH & SOCIAL SERVICES, Employer/Respondent.	))))))))))	**DOCKET No. 06-11-376** **DECISION AND ORDER**

After due notice of time and place, this grievance came to a hearing before the Merit Employee Relations Board ("the Board") on February 21, 2008 at 9:00 a.m. at the Margaret M. O'Neill Building, Suite 213, 410 Federal Street, Dover, DE 19901.

BEFORE Brenda C. Phillips, Chair, John F. Schmutz, Joseph D. Dillon, and Martha K. Austin, Members, a quorum of the Board pursuant to 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman, Esquire
Deputy Attorney General
Counsel to the Board

Jean Lee Turner
Administrative Assistant to the Board

David A. Felice, Esquire
on behalf of Catherine A. Chapman

Joseph C. Schoell, Esquire
on behalf of the Department of Health & Social Services

PRELIMINARY PROCEDURAL MATTERS

On February 19, 2008, the Department of Health & Social Services ("DHSS") filed a motion *in limine* to exclude the testimony of three of Ms. Chapman's proposed witnesses (Dr. Andrew Donahue, Phillip Thompson, Dr. Karen Kovacic) about her job performance and any "documentary exhibits concerning [Ms. Chapman's] job evaluations, letters of recommendation and other matters that relate to her job performance." DHSS contended this evidence was "irrelevant and immaterial" because Ms. Chapman's "job performance was not a factor in rescinding the conditional promotion and is not contested by [DHSS]."

At the hearing, Ms. Chapman argued this information was relevant if DHSS tried to show that she used illegal drugs. The Board took the motion *in limine* under advisement until DHSS presented its case in chief, at which time the Board would decide whether Ms. Chapman's job performance might be relevant for rebuttal purposes. Until then, the Board did not allow extended testimony about Ms. Chapman's job performance or admit exhibits regarding her job performance (A-1, A-2, A-15, A-16, A-17, A-18, A-19, and A-21)

The motion *in limine* became moot later in the hearing when counsel for the parties agreed to stipulate: "(1) Other than with respect to the drug screening requirement, Ms. Chapman met all requirements for promotion to the position of Psychiatric Social Worker III as of July 26, 2006; and (2) the Department has no evidence, and will not seek to offer evidence, that Ms. Chapman's work performance has been affected by the use or abuse of illegal substances."

By letter dated February 12, 2008, Ms. Chapman asked the Board to allow her personal physician, Dr. Alfred Fletcher, to testify by telephone. By letter dated February 13, 2008, DHSS did not object "to Dr. Fletcher['s] testifying by telephone. However, DHSS takes no position on

whether the Board should grant the request that he be permitted to do so."

The Chair granted the request for telephonic testimony. As a precaution, at the hearing the Board verified Dr. Fletcher's identity with his Delaware medical license number. The Board also did not allow Dr. Fletcher to review or refer to any documents which were not available to the Board in the hearing room.

SUMMARY OF THE EVIDENCE

Ms. Chapman called two witnesses: Alice Coleman, retired Director of Social Services at the Delaware Psychiatric Center ("DPC") and formerly Ms. Chapman's immediate supervisor; and Dr. Fletcher. Ms. Chapman also testified on her own behalf.

Ms. Chapman moved and the Board admitted into evidence without objection nine exhibits: Terms and Conditions of Employment signed by Ms. Chapman on July 26, 2006 (A-3); Verification of Mandatory Drug Testing dated July 26, 2006 (specimen ID #4411552) (A-4); DHSS salary and position form dated July 26, 2006 (A-5); letter dated August 30, 2006 from Susan Watson Robinson to Ms. Chapman (A-6); e-mail dated September 1, 2006 from Ms. Chapman to Roy Lawler (A-7); Handwritten note by Dr. Fletcher dated September 6, 2006 (A-8); LabCorp drug screening report dated September 7, 2006 (A-9); Letter dated November 17, 2006 from Susan Watson Robinson to Ms. Chapman (A-13); and *curriculum vitae* of Dr. Alfred Fletcher (A-20). The Board did not admit into evidence an exhibit proffered by Ms. Chapman (a certificate from the Secretary of State) because the Board deemed it irrelevant.

DHSS called three witnesses: Kathleen Greer, DHSS Human Resource Technician; Lisa Shields, Operations Manager of Compliance Oversight Solutions Ideal; and Susan Watson

Robinson, Assistant Facility Director of DPC.

DHSS moved and the Board admitted into evidence without objection twelve exhibits: Verification of Mandatory Drug Testing dated July 26, 2006 (specimen ID # 4411548) (RX-2); Verification of Mandatory Drug Testing dated July 31, 2006 (specimen ID #441153) (RX-5); July 31, 2006 chain of custody form signed by Ms. Chapman (RX-6); handwritten notes of Lisa Shields (RX-7); Incident Report dated July 31, 2006 (RX-8); Quest Diagnostics drug test report dated August 1, 2006 (RX-9); e-mail dated August 2, 2006 from Carl Wexler to Roy Lawler (RX-10); e-mail dated November 9, 2006 from Susan Watson Robinson to Marie Collins (RX-15); LabCorp Drug Testing Options Summary (RX-19); resume of Lisa Shields (RX-22); blank Forensic Drug Testing Custody and Control Form (RX-25); and sample collection kit used for urinalysis by Quest Diagnostics (RX-26).

The Board admitted two DHSS exhibits into evidence over Ms. Chapman' s relevance objections: U.S. Department of Transportation, *Urine Specimen Collection Guidelines* (RX-17); and excerpt from Code of Federal Regulations (Subpart I – Problems in Drug Tests) (RX-23).

FINDINGS OF FACT

DHSS hired Ms. Chapman as a Psychiatric Social Worker ("PSW") II in September 2000. In 2006, DHSS posted an available PSW III position. The principal difference between a PSW II and PSW III position (other than pay) is the III position involves supervisory responsibilities.

Ms. Chapman applied for the promotion and made the certification list. After competitive interviews, DHSS selected Ms. Chapman for the promotion contingent upon a mandatory drug test.

Delaware law requires mandatory drug testing for employees of facilities like DPC that are licensed under 16 *Delaware Code*, Chapter 11. *See* 16 *Delaware Code* §1142; C.D.R. § 40.000.001. The law applies to "[a]ll applicants hired after March 31, 1999, and all current employees who seek promotion." C.D.R. §40.000.001.14.

DHSS has contracted with Compliance Oversight Solutions Ideal ("COSI") to administer the Department's drug and alcohol testing programs. A private vendor, Quest Diagnostics, collects the urine samples following the *Urine Specimen Collection Guidelines* published by the U.S. Department of Transportation. Under those *Guidelines*,

> "[a]fter the employee gives the specimen to the collector, the collector must check the temperature of the specimen, check the specimen volume, and inspect the specimen for adulteration or substitution. The collector should check the temperature of the specimen as soon as the employee hands over the specimen, but not later than four minutes after the employee comes out of the restroom. The acceptable range is 32-38 [degrees centigrade]/ 90-100 [degrees fahrenheit]. Temperature is determined by reading the temperature strip originally affixed to or placed on the outside of the collection container. If the temperature is within the acceptable range, the "Yes" box is marked in Step 2 on the [Custody and Control Form] and the collector proceeds with the collection procedure. If the temperature is out of range, the

> collector marks the "No" box in Step 2 and initiates an observed collection.

According to Ms. Shields, COSI's Operations Manager, that temperature is important because it might indicate that the employee brought another person's urine into the collection site and substituted it for the employee's own urine. Urine brought into the collection site is likely to have cooled down to below 90 degrees fahrenheit, or been artificially warmed up using a heating device to above 100 degrees fahrenheit. The temperature strip on the specimen collection cup has six small round indicators which light up at 90.2.4.6.8.100. If the temperature strip lights up at 90, the temperature of the urine is less than 90 degrees fahrenheit; if it lights up at 100, the temperature is more than 100 degrees fahrenheit. If it lights up somewhere in between, the urine is within the acceptable temperature range. The temperature strip does not measure the exact temperature like a thermometer, but only shows whether the temperature of the urine is outside the acceptable range of 90-100 degrees fahrenheit.

On July 26, 2006, Ms. Chapman signed a Terms and Conditions of Employment form acknowledging that she would be promoted "conditionally" until DHSS received her "drug-testing results." On that same day, Ms. Chapman also signed a Verification of Mandatory Drug Testing form. The form stated: "Urinalysis must be completed within THREE (3) days of receipt of this form." Ms. Chapman initialed her receipt of that form on July 26, 2007.

On July 28, 2006 (Friday), Ms. Chapman went to Quest Diagnostics for her urine collection. According to Ms. Chapman, the technician told her there was insufficient urine in her sample for testing and asked her to stay to drink water and provide another sample. According to Kathleen Greer, Quest Diagnostics informed her that Ms. Chapman's urine sample was "hot,"

that is, above the temperature range of 90-100 degrees fahrenheit (that was the recollection of Ms. Shields as well). In either event, Ms. Chapman's urine specimen was not acceptable, and she did not stay to provide another urine specimen because she said she had to get back to DPC to prepare a patient to go on a pass.

When DHSS learned about Ms. Chapman's first visit to Quest Diagnostics, the Department authorized her to go back for a second urine collection on Saturday, July 29, 2007. Again, the urine tested above the acceptable temperature range of 90-100 degrees fahrenheit. The technician asked Ms. Chapman to stay to provide another sample. Ms. Chapman said she could not because she was on-call at DPC and the only social worker available at the site and she was concerned about two patients admitted the night before.

When DHSS learned about Ms. Chapman's second visit to Quest Diagnostics, the Department authorized her to go back for a third urine collection on Monday, July 31, 2006 but made it clear there would not be any further exceptions to the three-day rule. Quest Diagnostics collected a urine sample from Ms. Chapman on July 31, 2006. The technician wrote in the remarks section of the chain-of-custody form: "Temp was very hot + client refused to give another sample." Ms. Coleman testified she could not stay to give another urine sample because she had to return to DPC for a discharge.

Quest Diagnostics did not send Ms. Chapman's first two urine samples to a laboratory for testing because they were outside the acceptable temperature range. Quest did send out Ms. Chapman's third urine sample for testing which came back from the laboratory negative for illegal drugs. The test report, however, stated that the "temperature of the specimen at collection was outside of the range for a normal urine (32-38 C/90-100 F)." While the drug test was

negative, according to Ms. Shields there was no way of knowing whether it was Ms. Chapman's urine without an observed test. [1]

By letter dated August 30, 2006, Ms. Robinson informed Ms. Chapman "that you will not be returned to your position as a Psychiatric Social Worker III for failure to meet the terms and conditions of your promotion. . . . You were conditionally promoted on August 7, 2006, contingent upon a satisfactory drug test. However, you failed to provide an acceptable sample for testing. Therefore, your conditional promotion is rescinded." [2]

By e-mail dated September 1, 2006 to Roy Lawler, Ms. Chapman filed "an official grievance to the letter sent to me from Susan Watson Robinson, Assistant Facility Director, dated August 30, 2006."

Ms. Chapman consulted with her personal physician, Dr. Fletcher, who arranged for a drug screening at LabCorp. LabCorp took Ms. Chapman's urine sample on September 6, 2006. The report stated that Ms. Chapman's urine was 90 degrees and negative for illegal drugs. The comment section of the drug report, however, noted: "This assay provides a preliminary unconfirmed analytical test result that may be suitable for the clinical management of patients in

---

[1] According to Ms. Shields, on Ms. Chapman's third visit to Quest Diagnostics the technician should have observed the collection because of the temperature problem with her first two urine samples. Unfortunately, this was not done as it may have resolved this controversy long ago. The Board does not believe this oversight calls into question whether Ms. Chapman's unobserved samples were outside the normal temperature range according to the federal guidelines followed by DHSS.

[2] At the hearing, Ms. Chapman referred several times to the rescission of her promotion as a "demotion." The Board does not consider the action taken by Ms. Robinson to be a demotion. *See Appeal of Austerlitz*, 437 A.2d 804, 806 ("a person can be demoted only from a position to which he is entitled").

certain situations. . . . Screen only testing does not meet the College of American Psychologists Forensic Urine Drug Testing Program requirements as a forensic urine test for workplace testing. All clients must ensure that their testing conforms to applicable state and federal laws and employment agreements."

According to Ms. Shields, the LabCorp drug screen of Ms. Chapman did not satisfy the U.S. Department of Transportation guidelines for workplace drug testing as followed by DHSS. LabCorp conducted the drug screen six weeks after Ms. Chapman received her conditional promotion and, according to Ms. Shields, a urine sample might show positive only if illegal drugs were consumed within the previous 24-72 hours. According to Ms. Shields, a drug test based on a hair sample would have been the best barometer to reveal any illegal drug use by Ms. Chapman during the past three months.

Ms. Chapman met with her immediate supervisor, Ms. Coleman, on September 1 and 4, 2006 for a Step 1 grievance. Based on a note from Ms. Chapman's personal physician [3] and the LabCorp drug screen, Ms. Coleman sent an e-mail to Ms. Robinson and Mr. Lawler on September 8, 2006 concluding that Ms. Chapman "provided a satisfactory drug test. I am requesting that [she] be reinstated to the PSW III position." Ms. Coleman gave a hard copy of her e-mail to Ms. Chapman.

---

[3] In a note dated September 6, 2006, Dr. Fletcher wrote: "To whom it may concern, 96 [degrees] F is an acceptable urine temperature." Apparently Ms. Coleman told Dr. Fletcher that her urine temperature at one of her Quest Diagnostics collections was 96 degrees. The record shows that Ms. Chapman could not have known the exact temperature of her urine sample because the temperature strip on the collection cup does not provide an exact temperature like a thermometer. The temperature strip only indicates whether the temperature of the urine is above or below the normal range or 90-100 degrees fahrenheit. Dr. Fletcher's note therefore is based on unsubstantiated hearsay.

After learning about Ms. Coleman's recommendation, Ms. Robinson had a meeting with Ms. Coleman and Ms. Chapman. The exact date is not certain, but appears to have been towards the end of September 2006. Because of the problems with Ms. Chapman's urine samples, Ms. Robinson offered her the option of a drug test using a hair sample (as recommended by Ms. Shields of COSI). Ms. Chapman declined the offer because she felt she had already passed a drug test. Ms. Robinson said she would consult with the Human Relations office to see if there were any precedents which might allow Ms. Chapman to retain her promotion.

By letter to Ms. Chapman dated November 17, 2006, Ms. Robinson advised that she had checked "with Human Resources to determine whether any employee who failed to provide a satisfactory urine sample for a drug test was either hired or promoted. I have researched this issue extensively and have not found a single incident where a person failed to complete the drug testing process and was formally processed for hire." Consequently, "your grievance is denied in all respects."

CONCLUSIONS OF LAW

A. Jurisdiction

In her notice of appeal, Ms. Chapman contended that DHSS "waived any right to contest [her] reinstatement following Step 1." At the hearing, Ms. Chapman argued that, because DHSS did not appeal the Step 1 decision by her immediate supervisor, Ms. Coleman's decision to reinstate Ms. Chapman to the PSW III position is binding on the agency and the Board's jurisdiction is limited to the issue of remedies (reinstatement, back pay, and other ancillary equitable relief). [4]

The Board disagrees because Ms. Coleman did not have authority at the Step 1 level to reinstate Ms. Chapman to PSW III. Ms. Chapman's grievance had to proceed -- whether appealed by the agency or not – to a step level where the decision-maker had the authority to reinstate Ms. Chapman's promotion.

The rescission of Ms. Chapman's promotion "originated with someone higher in authority than [Ms. Coleman] who, under the circumstances, would not have had the authority to settle the Grievance at step one." *United States Postal Service v. National Association of Letter Carriers*, 847 F.2d 775, 776-77 (11th Cir. 1988). Merit Rule 18.6 only requires that the person "*discussing* the Step 1 grievance be the immediate supervisor. Higher-level concurrence is required before

---

[4] Ms. Chapman cited as legal authority *Cunningham v. Department of Health & Social Services*, Civ.A. No. 95A-10-003, 1996 WL 190757 (Del. Super., Mar. 27, 1996) (Ridgely, Pres. J.). *Cunningham* held that the grievant's obligation under the Merit Rules to file a timely appeal at each step of the grievance process is jurisdictional. *See* Merit Rule 18.4 ("Failure of the grievant to comply with time limits shall void the grievance."). *Cunningham* did not hold that, when an immediate supervisor sides with the grievant but does not have the authority to resolve a grievance at Step 1, the agency has to timely appeal to the next Step or is bound by the immediate supervisor's decision.

[reinstatement] can be imposed." 847 F.2d at 778.

In *Bureau of Maine State Police v. Pratt*, 568 A.2d 501 (Me. 1989), a collective bargaining agreement provided for a Step 1 grievance with the commanding officer (Lieutenant Holmes) who decided Pratt should be reinstated with backpay. Lt. Holmes later clarified his written decision as "my individual opinion only, and . . . does not represent the view or position of the Bureau of Maine State Police. . . I am not authorized to take such an action and my initial memo does not, in fact, order reinstatement. . . Since I do not have the authority to grant you the remedy you have requested, namely, reinstatement, you are therefore authorized to proceed to the next step without further delay." 568 A.2d at 503. The parties then "voluntarily bypassed the second step of the grievance process requiring review of the decision by the Chief of Police." *Id.* At the third step of the grievance process, the Office of Employee Relations affirmed the police chief's decision to terminate Pratt and the grievance then went to arbitration. [5]

Ms. Coleman understood that she did not have authority to reinstate Ms. Chapman's promotion and so in her Step 1 decision made a "request" to Ms. Robinson for reinstatement. *See Pratt,* 568 A.2d at 506 ("the actual response to Pratt's grievance, . . . could not be interpreted fairly to constitute a reinstatement. In the response, Lt. Holmes expressed his 'opinion' that

---

[5] In *Pratt*, the issue on appeal was whether the arbitrator exceeded his authority derived from a collective bargaining agreement to order reinstatement based on the initial Step 1 decision. The dissenting justices noted that the "result reached by the arbitrator is irrational. To interpret Step 1 of the grievance procedure . . . as to allow the commanding officer of a trooper dismissed by the Chief to reinstate that trooper with no appeal or other recourse by the Bureau, . . . constitutes an irrational construction of the contract." 569 A.2d at 506. Here, of course, the Board is interpreting its own Merit Rules not a contract. The Board concludes that under the Merit Rules an immediate supervisor like Ms. Coleman could not bind DHSS to reinstate Ms. Chapman's promotion because Ms. Coleman did not have the authority.

Pratt should be reinstated. Lt. Holmes testified that he deliberately chose the word 'opinion' because he did not believe that he had the authority to reinstate Pratt.").

Because Ms. Coleman did not have authority to reinstate Ms. Chapman to a PSW III position, the Board believes that Ms. Coleman's request to Ms. Robinson to reinstate Ms. Chapman's promotion took the grievance to Step 2. Pursuant to Merit Rule 18.7, Ms. Robinson met with Ms. Chapman and Ms. Coleman in the latter part of September 2006 to discuss the grievance. Ms. Robinson did not issue her written decision until November 17, 2006, but the Board believes that the parties tacitly agreed to extend the time for the Step 2 decision to allow Ms. Robinson the opportunity to check with the Human Resources office to see if there were any precedents for Ms. Chapman to retain her promotion notwithstanding the unsuccessful drug testing. *See* Merit Rule 18.4 ("The parties may agree to the extension of any time limits or to waive any grievance step.").

DHSS did not raise the issue, but the Board has concerns about its jurisdiction because Ms. Chapman did not timely appeal Ms. Robinson's November 17, 2006 decision to Step 3. [6] It also is not clear under what Merit Rule Ms. Chapman is grieving. [7] Nevertheless, out of an abundance

---

[6] Ms. Chapman's counsel wrote a letter on October 31, 2006 to Renata J. Henry, Director of the Division of Substance Abuse & Mental Health, "to serve as Ms. Chapman's initiation of the Step 3 process." Merit Rule 18.8, however, requires the Step 3 appeal to go "to the Director [of the Office of Human Resource Management] within 14 calendar days of receipt of the Step 2 reply." Ms. Chapman's counsel apparently thought Ms. Robinson's November 17, 2006 decision was at Step 3, and then filed an appeal to the Board within twenty days under Merit Rule 18.9

[7] Under Merit Rule 18.5, the Board has jurisdiction to review a promotional grievance where "the person who has been promoted does not meet the minimum qualifications." Ms. Chapman met the minimum qualifications for the PSW III position. Ms. Chapman does not allege any violation by the employer of the Merit Rules or the Merit System

of caution the Board will address the merits of Ms. Chapman's grievance to avoid the possibility of remand from a reviewing court.

The Board concludes as a matter of law that it has jurisdiction to decide whether Ms. Chapman should be reinstated to a PSW II position. Under the Merit Rules, DHSS did not waive its right to contest Ms. Coleman's Step 1 decision to request reinstatement of Ms. Chapman's promotion. Ms. Coleman's decision was not binding on the Department because she did not have authority to reinstate the promotion.

B. The Merits

"The burden of proof on any such appeal to the Board . . . is on the employee." 29 *Del. C.* §5949(b). "[T]he statutory plan places the burden upon an employee in an appeal to the [Board]. In other words, on such an appeal, an employee must present evidence sufficient to rebut the presumption that the [agency's action] was correct." *Hopson v. McGinnes*, 391 A.2d 187, 188 (Del.1978).

The Board concludes as a matter of law that Ms. Chapman did not meet her burden to prove that she complied with the condition of her promotion to successfully complete a mandatory drug test. The evidence shows that on three occasions (July 28, 29, and 31, 2006) Ms. Chapman submitted urine samples to Quest Diagnostics which were not acceptable under the testing protocols because the temperature exceeded 100 degrees fahrenheit or the sample was too small. Each time, Ms. Chapman did not remain at the testing facility to collect another sample because

---

law (29 *Delaware Code* Chapter 59).

she said she had patients to care for at DPC.

While the Board appreciates Ms. Chapman's dedication to her job, she knew that a successful drug test was a condition of her promotion. Ms. Chapman was not free to decide for herself that she had satisfied that condition after providing three urine samples to Quest Diagnostics. Nor was it acceptable for her to go to another facility (LabCorp) for a drug screening test six weeks after her conditional promotion.

The evidence proffered by Ms. Chapman fell well short of her burden of proof. The September 6, 2006 handwritten note from Dr. Fletcher (who acknowledged he was not a drug testing expert) assumed that the temperature of one of Ms. Chapman's urine samples provided to Quest Diagnostics was 96 degrees fahrenheit. The record shows that the technician did not measure the exact temperature of the urine but only determined it was outside the normal range of 90-100 degrees fahrenheit. LabCorp performed a drug screen on Ms. Chapman, not a drug test, which is not valid for a workplace drug screening program. The urine sample provided to Quest Diagnostics by Ms. Chapman on July 31, 2006 may have tested negative for illegal drugs, but the temperature was outside the normal range so there is no way of knowing if it was her own sample or a substitute.

DHSS promoted Ms. Chapman to PSW III on July 26, 2006 on the express condition of a mandatory drug test within three days. After an unsuccessful urine collection on July 28, 2006, DHSS authorized two further urine collections, and then gave Ms. Chapman the option to submit a hair sample for testing, which she declined. The Board believes that DHSS went the extra mile and gave Ms. Chapman more than adequate opportunity to satisfy mandatory drug testing to keep her promotion.

Based on the factual record, the Board concludes as a matter of law that Ms. Chapman did not meet her burden to prove that she met the condition of mandatory drug testing for her promotion to PSW III.

The Board's decision does not mean to suggest that Ms. Chapman has ever used illegal drugs (she vigorously denied it) or that she tried to cheat on her drug tests. However, the DHSS drug testing protocols (which for whatever reason she could not satisfy) serve important public policies. "The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger . . . the life of the citizenry outweigh the privacy interests of those who seek promotion to those positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions." *National Treasury Employees Union v. von Raab*, 498 U.S. 656, 679 (1989).

DECISION AND ORDER

It is this 26th day of March, 2008, by a unanimous vote of 4-0, the Decision and Order of the Board that Ms. Chapman's appeal is denied.

Brenda C. Phillips
Chair

John F. Schmutz
Member

Joseph D. Dillon
Member

Martha K. Austin
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 on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee's being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

> (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
>
> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
>
> (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
>
> (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: March 27, 2008

Distribution:
Original: File
Copies: Grievant
Agency's Representative
Board Counsel

I:\TUPMAN\FILES\MERB.chapman.DHSS.wpd