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BEFORE THE MERIT RELATIONS BOARD

OF THE STATE OF DELAWARE

CHRISTOPHER G. GIBSON, Employee/Grievant, v. VIOLENT CRIMES COMPENSATION BOARD, Employer/Respondent.	))))))))))	**DOCKET No. 07-11-404** **DECISION AND ORDER**

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board ("the Board") on February 27, 2008 at 9:00 a.m. at the Margaret M. O'Neill Building, Suite 213, 410 Federal Street, Dover, DE 19901.

BEFORE John F. Schmutz, Substitute Chair, 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

Christopher G. Gibson *pro se*

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Violent Crimes Compensation Board

SUMMARY OF THE EVIDENCE

The grievant, Christopher G. Gibson, did not offer any exhibits into evidence and did not call any witnesses. He argued on his own behalf in opposition to the employer's motion to dismiss.

The Violent Crimes Compensation Board ("VCCB") did not call any witnesses but relied on oral argument of counsel. The VCCB attached four exhibits to its motion to dismiss: Letter to Mr. Gibson dated April 25, 2005 from Betsy Cole, Human Resources Specialist (Tab A); Mr. Gibson's Merit Grievance form dated August 9, 2007 (Tab B); Step Three Grievance Decision dated September 26, 2007 (Tab C); and Mr. Gibson's notice of appeal to the Board dated November 8, 2007 (Tab D).

FINDINGS OF FACT

The VCCB hired Mr. Gibson as a Crime Compensation Claims Investigator on May 2, 2005 at an annual salary of $30,769. Mr. Gibson testified that a week or so after starting work he asked Gertrude Burke, the VCCB Executive Director, for an Advanced Starting Salary but Ms. Burke told him that every new employee is hired at the minimum salary.

According to Mr. Gibson, in August 2007 he learned that two female investigators were being paid more than he was. He alleges the VCCB violated Merit Rule 2.1 by discriminating against him on the basis of gender.

CONCLUSIONS OF LAW

Merit Rule 18.6 provides:

> **Step 1. Grievants shall file, within 14 calendar days of the date of the grievance matter or the date they could reasonably be expected to have knowledge of the grievance matter, a written grievance which details the complaint and relief sought with their immediate supervisor.**

Merit Rule 18.4 provides:

> **Failure of the grievant to comply with time limits shall void the grievance.**

Under the Merit Rules, a grievant's obligation to file a timely appeal at each step of the grievance process "is jurisdictional." *Cunningham v. Department of Health & Social Services*, Civ.A. No. 95A-10-003, 1996 WL 190757, at p.2 (Del. Super., Mar. 27, 1996) (Ridgely, Pres. J.). Where the deadline has "passed, the Board had no jurisdiction to hear Appellant's grievance." *Id.* "'[A]ppellant's pro se status does not excuse a failure to strictly comply with the jurisdictional requirements of [the Merit Rules].'" *Id.* (quoting *Gibson v. State*, No. 354, 1994, ORDER (Del. 1994)).

"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 Mr. Gibson failed to meet his burden to prove that he filed a timely Step 1 grievance with his employer. Ms. Burke denied his request for an

Advanced Starting Salary in May 2005. He did not file his Step 1 grievance until August 9, 2007, more than two years later.

Mr. Gibson cannot resurrect his untimely grievance by claiming he did not realize he was discriminated against until August 2007. The time limits to pursue administrative remedies do "not permit the complainant to delay until he realizes or knows that the personnel action or event was discriminatory. Rather, the clock begins to run when the complainant knows or reasonably should have known of the 'event' or 'personnel action' which gave rise to the discrimination." *Roepsch v. Bentsen*, 846 F. Supp. 1363, 1369 (E.D. Wis. 1994).

The personnel action which is the subject of Mr. Gibson's grievance was the denial of his request for an Advanced Starting Salary in 2005. Mr. Gibson tries to make an end-run around the fourteen-day time limit in Merit Rule 18.6 by alleging that he did not discover until August 1, 2007 that his employer discriminated against him. "This argument fails because, . . . '[t]he limitations period begins to run from the effective date of the allegedly discriminatory personnel action'" not "his discovery of the alleged discrimination." *Lorenzo v. Rumsfeld*, 456 F. Supp.2d 731, 735 (E.D. Va. 2006) (quoting *Jakubiak v. Perry*, 101 F.3d 23, 26-27 (4th Cir. 1996)).

The Board believes that the time period to file a Step 1 grievance under the Merit Rules "begins to run from the date of the discrete employment action alleged to be discriminatory, not from the date of discovery of improper motivation." *Fausto v. Reno*, 955 F. Supp. 286, 292 (S.D.N.Y 1997). The discrete employment action which Mr. Gibson complains about was the denial of his request for an Advanced Starting Salary. This is clear from the relief sought in his grievance: to "[r]e-open negotiation for salary." The time period to grieve that personnel action began to run in May 2005 when the VCCB denied his request for an Advanced Starting Salary,

not in August 2007 when he believes he discovered evidence of disparate treatment. "To allow [grievants] to raise employment discrimination claims whenever they begin to suspect that their employers had illicit motives would effectively eviscerate the time limits prescribed for filing such complaints." *Pacheco v. Rice*, 966 F.2d 904, 906 (5th Cir. 1992).

Even if Mr. Gibson's grievance were timely, the Board concludes as a matter of law that he fails to state claim upon which relief can be granted. Mr. Gibson's two alleged comparators were not similarly situated. For example, the VCCB promoted one of the comparators on May 14, 2007 to an Investigator II (the same position Mr. Gibson holds) and she received the customary minimum 5% pay increase as provided in Merit Rule 4.6, resulting in a higher salary than Mr. Gibson's.

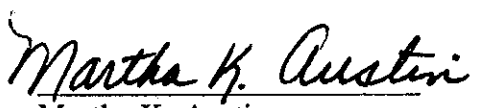
The Board concludes as a matter of law that Mr. Gibson did not file a timely Step 1 grievance within fourteen calendar days of the grievance matter: his request in May 2005 for an Advanced Starting Salary. Under Merit Rule 18.4, "[fa]ilure of the grievant to comply with time limits shall void the grievance." Therefore, the Board does not have jurisdiction to hear Mr. Gibson's appeal.

In the alternative, the Board concludes as a matter of law that Mr. Gibson's grievance fails to state a claim upon which relief can be granted.

DECISION AND ORDER

It is this 26th day of March, 2008, by a unanimous vote of 3-0, the Decision and Order of the Board that the Grievant's appeal is denied.

John F. Schmutz
Substitute Chair



Martha K. Austin
Member

Joseph D. Dillon
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

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