ORIGINAL

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

DANIEL J. SCHUR,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 09-01-439**
v.	)	
	)	
DEPARTMENT OF TRANSPORTATION,	)	**DECISION AND ORDER**
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board ("the Board") at 11:00 a.m. on February 25, 2009 at the Margaret M. O'Neill Building, Suite 213, 410 Federal Street, Dover, DE 19901.

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

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Daniel J. Schur
Employee/Grievant *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of Transportation

BRIEF SUMMARY OF THE EVIDENCE

Neither party offered any exhibits into evidence or called any witnesses to testify. The Board heard legal argument on the motion of the Department of Transportation ("DelDot") to dismiss the appeal for lack of jurisdiction.

FINDINGS OF FACT

The jurisdictional facts are not in dispute. The employee/grievant, Daniel J. Schur, ("Schur") works for DelDot as an EPS (Engineering/Planning/Survey) Technician IV. In 2006, DelDot conducted a study to see why it was losing experienced EPS technicians and could not replace them. A survey of salaries of similarly experienced EPS technicians working for neighboring states or for private consultants showed that DelDot salaries for EPS Technicians IV and V were not competitive.

On January 31, 2006, DelDot asked the Office of Management and Budget ("OMB") to increase the minimum salaries for EPS Technicians IV and V. Effective March 4, 2007, OMB adjusted the salaries for all EPS Technicians IV and V. Those technicians earning less than the new salary were leveled up to the increased minimum salary.

Schur received a copy of the Engineering/Planning/Survey Technician Initiatives Salary and Training Program Development Study ("the Study") from his supervisor, Karl Zipf, on March 26, 2007. The Study set forth the new advanced salaries for EPS Technicians IV ($45,358, PG13) and V ($51,403, PG15) with the explanation: "All EPS Technician IV and V currently being paid below these salaries will receive a salary adjustment effective March 4, 2007 bringing their pay up to these newly approved advanced salaries. Although not everyone will receive an

increase, the majority of EPS Techs IV and V will receive some varying level of increase. We anticipate that the pay increases will be reflected in the 4/13/07 pay advices."

According to Schur, he received a pay increase of approximately $10 per paycheck starting in April 2007. Schur filed his Step 1 grievance on November 7, 2008. He claimed he did not file the grievance sooner because he did not realize that other EPS Technicians IV with less seniority received a larger pay increase than he did. Schur claimed he did not learn about the pay disparity until one week before he filed his grievance, during a conversation with a union official (John Thomas).

CONCLUSIONS OF LAW

Merit Rule 18.2 provides:

> **A "grievance" means an employee complaint about the application of the Rules of the Merit System law (29 Del. C., Chapter 59), which remains unresolved after informal efforts at resolution have been attempted. A grievance shall not deal with the substantive policies embodied in the Merit System 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 Board concludes as a matter of law that Schur did not file a timely Step 1 grievance with DelDot. The Board believes that the 14-day time period for filing a Step 1 grievance started to run on March 26, 2007 when Schur received a copy of the Study from his supervisor. Schur did not file his Step 1 grievance until November 7, 2008, more than a year-and-a-half later.

Schur contends he could not reasonably be expected to have knowledge of the grievance matter until approximately one week before he filed his Step 1 grievance when he learned, in a conversation with a union official, that other, less senior EPS Technician IVs had received larger salary increases than Schur. The Board believes that Schur had knowledge of a disparity in salary increases when he received a copy of the Study on March 26, 2007. The Study clearly stated that those technicians below the new minimum salary would be leveled up, while those technicians already at or above the new minimum would receive little or no increase. The Board does not believe Schur needed to know exactly how much salary increase each EPS Technician IV received in order to have knowledge of the grievance matter for purposes of Merit Rule 18.6.

The Board concludes as a matter of law that Schur did not file a timely Step 1 grievance within fourteen calendar days of the grievance matter. Under Merit Rule 18.4, "[fa]ilure of the

grievant to comply with time limits shall void the grievance." The Board does not have jurisdiction to hear Schur's untimely grievance.

Even if Schur's Step 1 grievance were timely, the Board concludes as a matter of law that he failed to state a claim for a violation of the Merit Rules or statutes. Merit Rule 18.2 defines a "grievance" as "an employee complaint about the application of the Rules or the Merit System law (29 Del. C., Chapter 59)" but a "grievance shall not deal with the substantive policies embodied in the Merit System law." Merit Rule 19 further provides that "[a] grievance may not deal with the content of the Rules or the Merit System statute."

The only Merit Rule cited by Schur is Rule 4.4.3. Schur, however, did not claim that DelDot violated Rule 4.4.3. He admitted in oral argument that this "Merit Rule itself was not violated." His claim is that DelDot should not have used Rule 4.4.3 as the basis for the salary increases for EPS Technicians IV because the result – according to Schur – was unfair to more senior technicians.

Schur's complaint deals with the substantive policies and content of Merit Rule 4.4.3 and therefore his complaint is not grievable. The Board concludes as matter of law that it does not have jurisdiction over Schur's appeal because he failed to state a claim for a violation of the Merit Rules or Merit statutes.

DECISION AND ORDER

It is this 19th day of March, 2009, by a unanimous vote of 4-0, the Decision and Order of the Board to dismiss Schur's appeal for lack of jurisdiction.

Brenda J. Phillips
Chair

Martha K. Austin
Member

Joseph D. Dillon
Member

John F. Schmutz
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.
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> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
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> (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.
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> (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 19, 2009 /kc

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Board Counsel

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