BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

GENE DANNEMAN,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 09-04-446**
v.	)	
	)	
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,	)	**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") on August 26, 2009 at 9:45 a.m. in the Delaware Room at the Public Archives Building, 121 Duke of York Street, Dover, DE 19901.

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

APPEARANCES

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

Gene Danneman
Employee/Grievant *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The Board did not hear any evidence. The Board heard legal argument from the parties on the motion by the Department of Health and Social Services ("DHSS") to dismiss the appeal of the employee/grievant, Gene Danneman ("Danneman"), for lack of jurisdiction.

FINDINGS OF FACT

The jurisdictional facts are not in dispute.

Danneman filed a timely Step 3 decision with the Director of Human Resource Management at the Office of Management and Budget on January 27, 2009 within fourteen days of the Step 2 decision (issued January 14, 2009).

The Director designated a Hearing Officer (Thomas J. Smith) who scheduled a hearing for February 26, 2009. On the morning of the hearing, DHSS notified the Hearing Officer that Francine Lawrence, the DHSS Labor Relations staff member assigned to the case, was unexpectedly unable to attend. The Hearing Officer was unable to contact Danneman in time so she showed up for the hearing. Danneman said that she did not object to rescheduling the hearing until someone from DHSS could attend, but she did not have her calendar with her and did not know her availability the following week.

By e-mail dated March 14, 2009, Danneman wrote to the Hearing Officer: "I apologize for the delay in responding. Thank you very much for your kind offer to hear this step three grievance but I will respectfully decline."

On March 18, 2009, the Hearing Officer contacted Danneman to re-schedule the Step 3 hearing for March 30, 2009.

By letter dated March 29, 2009 to the Board, Danneman wrote: "I would like to appeal to the Merit Employee Relations Board my grievance originally filed August 19, 2008 for which the step three grievance hearing did not happen within the 45 calendar days of the appeal's receipt."

CONCLUSIONS OF LAW

Merit Rule 18.8 provides:

> **Step 3. Any appeal shall be filed in writing to the Director within 14 calendar days of receipt of the Step 2 reply. The appeal should include copies of the written grievance and responses from the previous steps. The parties and the Director (or designee) may agree to meet and attempt an informal resolution of the grievance, and/or the Director (or designee) shall hear the grievance and issue a written decision within 45 calendar days of the appeal's receipt. The Step 3 decision is final and binding upon agency management.**

Merit Rule 18.9 provides:

> **If the grievance has not been settled, the grievant may proceed, within 20 calendar days of receipt of the Step 3 decision or the date of the informal meeting, whichever is later, a written appeal to the Merit Employee Relations Board (MERB) for final disposition according to 29 Del. C. Section 5931 and MERB**

procedures.

Danneman contends that she was free to appeal to the Board because the Hearing Officer did not comply with Merit Rule 18.8 and "hear the grievance and issue a written decision within 45 calendar days of the appeal's receipt." The Director received Danneman's Step 3 appeal on January 27, 2009. Danneman notified the Hearing Officer by e-mail on March 14, 2009 (46 days later) that she did not wish to have her grievance heard as a Step 3 grievance. On March 29, 2009 Danneman filed her appeal to the Board. [1]

In order to perfect an appeal to the Board under Merit Rule 18.9, a grievant must be "in receipt of the Step 3 decision." Because Danneman has not received a Step 3 decision, the Board does not have jurisdiction to hear her appeal. *See Pinkett v. DHSS*, MERB Docket No. 08-02-415 (May 21, 2009).

Danneman still has a right to a Step 3 hearing under the Merit Rules. If she is not satisfied with the outcome after receiving her Step 3 decision, then she can appeal to the Board within twenty calendar days of receipt of that decision.

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[1] Even if the Merit Rules allowed Danneman to appeal to the Board if she did not receive a Step 3 decision within 45 days (by March 16, 2009), DHSS argued in the alternative that Danneman did not file an appeal to the Board until April 15, 2009, more than twenty calendar days later. Danneman produced a certified U.S. Postal receipt for her appeal addressed to the Board and signed on April 1, 2009 by Benjamin E. Harmon. The Board does not know who Mr. Harmon is and whether he was authorized to accept service of process on behalf of the Board. In any event, the Board does not have to resolve that issue because it concludes as a matter of law that Danneman's appeal to the Board was premature.

The Board concludes as a matter of law that it does not have jurisdiction to hear Danneman's appeal because she has not yet received a Step 3 decision.

DECISION AND ORDER

It is this 3rd day of September, 2009, by a unanimous vote of 3-0, the Decision and Order of the Board to deny Danneman's appeal.

Martha K. Austin
Chair

John F. Schmutz
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: September 4, 2009

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

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