BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

SONJA TAYLOR-BRAY, Employee/Grievant, v. DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES, Employer/Respondent.	)))))))))))	**DOCKET No. 09-08-454** **DECISION AND ORDER**

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on October 1, 2009 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, Joseph D. Dillon, Paul R. Houck, and Jacqueline Jenkins, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

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

Sonja Taylor-Bray
Employee/Grievant *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department
of Services for Children, Youth and
their Families

BRIEF SUMMARY OF THE EVIDENCE

The Board did not admit any exhibits into evidence or take witness testimony. The Board heard legal argument from the parties on the motion by the Department of Services for Children, Youth and their Families (DSCYF) to dismiss the appeal of the employee/grievant, Sonja Taylor-Bray (Taylor-Bray), for lack of jurisdiction.

FINDINGS OF FACT

Taylor-Bray appealed to the Board over her termination by DSCYF on July 22, 2009. The jurisdictional facts are not in dispute.

Attached as Exhibit B to DSCYF's motion to dismiss is a copy of a Collective Bargaining Agreement between DSCYF and Local 2004 Delaware Youth Rehabilitation Employees (the Agreement). Article 7 of the Agreement provides for a Grievance Procedure. Article 7.9 provides: "Appeals from dismissals, suspensions or unsatisfactory Employee Performance Evaluations may be initiated at Step 3 of the Grievance Procedure." Step 3 of the Grievance Procedure is an appeal to the Secretary of DSCYF. [1]

Article 7.6 of the Agreement provides for Step 4: Pre-Arbitration: "If the grievance is still not resolved, it may be appealed to the State Deputy Director for Employee Relations

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[1] Article 7.5 of the Agreement requires the Secretary to hold a Step 3 meeting "within 10 working days and shall give a decision in writing not later than 10 working days following the meeting." According to Taylor-Bray, the union filed her Step 3 appeal to the Secretary on August 3, 2009. The Board has some concerns that the Step 3 meeting did not take place until September 23, 2009 and a written decision is still pending.

(hereinafter 'Deputy Director'). Such appeal shall be made in writing within 15 days of the Step 3 response and a meeting shall be scheduled with the Union within 10 working days. If the grievance is not resolved at that meeting, the Union may request arbitration if the grievance involves a provision of the Agreement."

According to Taylor-Bray, she contacted her union after her termination on July 22, 2009 and the union filed a Step 3 appeal under the Agreement to the Secretary of DSCYF. According to DSCYF, there was a Step 3 meeting on September 23, 2009 before the Secretary's designee and a decision is still pending.

On August 14, 2009, Taylor-Bray appealed her termination to the Board.

CONCLUSIONS OF LAW

Section 5938(d) of the Merit Statutes provides:

> **The rules adopted or amended by the Board under the following sections shall not apply to an employee in the classified service represented by an exclusive bargaining representative to the extent the subject thereof is covered in whole or in part by a collective bargaining agreement under Chapter 13 of Title 19: §§ 5922 through 5925 of this title, except where transfer is between agencies or where change is made in classification or pay grade, §§ 5926 through 5928 of this title, except where an employee laid off by 1 agency is reemployed by another, §§ 5929 through 5932, 5934 and 5936 of this title.**

"Where a valid collective bargaining agreement is in effect, it takes precedence over contrary provisions in the Merit System Rules." *Department of Correction v. Correctional*

Officer Supervisors, 514 A.2d 405, 406 (Del. 1986 (citing 29 *Del. C.* §5938(d)).

Taylor-Bray's grievance over her termination is covered by the grievance procedures in Article 7 of the Agreement. "If a subject is covered in whole or in part by a collective bargaining agreement, 29 **Del. C.** s. 5938(d) provides that the Merit Rules shall not apply to such subject matters." Merit Rule 1.3. *See also* Merit Rule 18.3 ("An employee who is in a bargaining unit covered by a collective bargaining agreement shall process any grievance through the grievance procedure outlined in the collective bargaining agreement.").

When Taylor-Bray receives her Step 3 decision from the Secretary, she can appeal to the Office of Management and Budget for a pre-arbitration meeting. If her grievance is not resolved at that meeting, her union may request arbitration under the grievance procedures in the Agreement. Taylor-Bray must continue with the contractually negotiated grievance process already underway.

Because Taylor-Bray's termination by DSCYF is covered in whole or in part by the grievance procedures in Article 7 of the Agreement, the Board concludes as a matter of law that it does not have jurisdiction to hear her appeal.

ORDER

It is this 15th day of October, 2009, by a unanimous vote of 5-0, the Decision and Order of the Board to deny Taylor-Bray's appeal.

Martha K. Austin
Chair

Joseph D. Dillon
Member

John F. Schmutz
Member

Paul R. Houck
Member

Jacqueline Jenkins
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 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.
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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: October 16, 2009

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

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