

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

TYNISHA N. WIDGEON,)	
)	
Employee/Grievant,)	
)	DOCKET No. 10-07-477
v.)	
)	DECISION AND ORDER
DEPARTMENT OF LABOR,)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 11:10 a.m. on December 2, 2010 at the Delaware Commission of Veterans Affairs, Robbins Building, 802 Silver Lake Boulevard, Suite 100 Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Paul R. Houck, Victoria D. Cairns, and Jacqueline Jenkins, a quorum of the Board pursuant to 29 *Del. C.* §5908(a).

APPEARANCES

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

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

BRIEF SUMMARY OF THE EVIDENCE

The Board did not hear any witness testimony but heard legal argument by the Department of Labor (DOL) on its motion to dismiss this appeal for lack of jurisdiction. The employee/grievant, Tynisha N. Widgeon (Widgeon), filed an opposition to the motion to dismiss but did not appear at the hearing.

Attached to the DOL's motion to dismiss were three exhibits: Letter dated June 17, 2010 from John J. McMahon, Jr., Secretary of Labor, to Tynisha Widgeon (Exh. A); Widgeon's Merit Rule Appeal to the Board (Exh. B); and Agreement between State of Delaware Department of Labor and American Federation of State, County and Municipal Employees, AFL-CIO, Council 81, Local 2038 2001-2004 (Exh. C).

FINDINGS OF FACT

By letter dated June 17, 2010, the Secretary of Labor terminated Widgeon, a probationary employee, for "failing to achieve satisfactory performance."

On June 25, 2010, Widgeon filed a direct appeal to the Board alleging a violation of Merit Rule 2.1 (discrimination).

Widgeon was covered by a collective bargaining agreement. Article 7.1 of that agreement provides: "The State shall not interfere with or discriminate with respect to any term or condition of employment against any employee covered by this Agreement." Article 6 of that agreement provides: "Any grievance or dispute which may arise between the parties to this Agreement concerning the application or interpretation shall be grieved in accordance with the procedure set forth below."

CONCLUSIONS OF LAW

Merit Rule 18.3 provides:

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. However, if the subject of the grievance is non-negotiable pursuant to 29 Del. C. §5938, it shall be processed according to this Chapter.

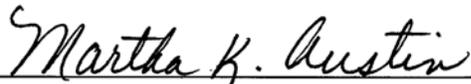
“The rules adopted or amended by the Board under the following sections shall not apply to any employee in the classified service represented by an exclusive bargaining representative to the extent the subject is covered in whole or in part by a collective bargaining agreement under Chapter 13 of Title 19:” 29 *Del. C.* §5938(d).

The Board concludes as a matter of law that it does not have jurisdiction to hear Widgeon’s appeal because the subject matter of her grievance – alleged discrimination – is covered in whole or part by a collective bargaining agreement. *See Tucker v. Family Court*, MERB Docket No. 08-03-418, at p.7 (Oct. 2, 2008) (“Tucker’s dispute over travel reimbursement is covered in whole or in part by Article 8.5 of the collective bargaining agreement between the Family Court and Local 27. The Board therefore does not have jurisdiction to hear his appeal under the Merit Rules adopted by the Board under Section 5931 of Title 29 of the *Delaware Code* (Grievances).”

Because Widgeon’s discrimination grievance is covered in whole or part by the collective bargaining agreement, she must process that grievance “through the grievance procedure outlined in the collective bargaining agreement.” Merit Rule 18.3.

DECISION AND ORDER

It is this **8th** day of **December**, 2010, by a unanimous vote of 5-0, the Decision and Order of the Board to dismiss Widgeon's appeal for lack of jurisdiction.



MARTHA K. AUSTIN, MERB Chairwoman



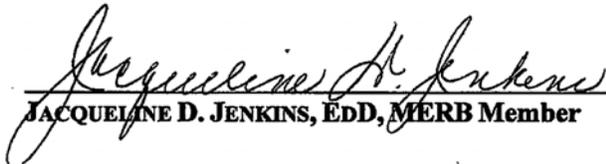
VICTORIA D. CAIRNS, MERB Member



JOHN F. SCHMUTZ, MERB Member



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB 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: **December 8, 2010**

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

OMB/HRM