

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

TUESDAY S. BANNER,)	
)	
Employee/Grievant,)	
)	DOCKET No. 12-07-551
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 March 7, 2013 at 9:15 a.m. at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

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

APPEARANCES

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

Deborah Murray-Sheppard
Board Administrator

Tuesday S. Banner
Employee/Grievant *pro se*

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE 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, Tuesday S. Banner (Banner), for lack of jurisdiction. Banner filed a written response to the motion to dismiss.

FINDINGS OF FACT

The jurisdictional facts are not in dispute.

By letter dated March 8, 2012, Banner's supervisor, Genelle Fletcher, notified Banner: "I am recommending that you serve a one (1) day suspension without pay" for being absent from work without leave. The letter advised Banner that she had a right to request a pre-suspension meeting within fifteen days of the date of the letter.

Banner did not request a pre-suspension meeting. On March 8, 2012, Banner e-mailed Fletcher: "I just wanted to let you know that I am just going to take tomorrow off per our conversation today. I made my phone call to reschedule and I am willing to just get it out of the way. So I am submitting to you a leave slip to reflect the time for tomorrow. Thanks."

By letter dated April 20, 2012,¹ Fletcher again notified Banner of her one-day suspension without pay. The April 20 letter is nearly identical to Fletcher's March 8 letter, except to say that "your Leave w/o pay request for March 9, 2012, will be converted to a suspension without pay and appropriately annotated in PHRST."

¹ The letter was dated April 20, 2012 and indicated "HAND DELIVERED." However, DHSS acknowledged that it did not present Banner with a copy of the letter until a meeting with Genelle Fletcher on April 26, 2012.

On May 10, 2012, Banner filed a Step 1 grievance over her one-day suspension. After a Step 1 hearing on May 21, 2012, the hearing officer denied Banner's grievance on the merits by letter dated May 30, 2012. The hearing officer "also noted that the date of filing surpassed the time period of 14 calendar days, which would have been May 5, 2012" [using April 20, 2012 as the baseline].

On July 11, 2012, the Secretary's designee held a Step 2 grievance hearing. By letter dated July 16, 2012, the hearing officer notified Banner that her grievance was denied as untimely. "Your grievance was not filed until May 10, 2012, sixty-three days after serving the suspension."²

On July 25, 2012, Banner filed an appeal to the Board over her one-day suspension. On the appeal form, she checked the box, "Heard only by the Merit Employee Relations Board (MERB)."

On August 8, 2012, Human Resource Management held a Step 3 hearing. In a decision dated September 21, 2012, the hearing officer decided that Banner's Step 1 grievance filed on May 10, 2012 was untimely. "This was 63 days after receiving notice of and consenting to the suspension on March 8, 2012; 62 days after serving a day of 'unpaid leave' on March 9th, and 20 days after receiving the April 20th letter which provided notice that her record was corrected to reflect a one-day suspension, rather than one day of unpaid leave."

In the alternative, the hearing officer decided that Banner "expressly waived her rights to challenge the discipline on March 8th by acknowledging the misconduct and stating that she was

² Neither party provided the Board with a copy of Banner's Step 2 grievance. DHSS did not contend that the Step 2 grievance was untimely, so the Board will assume that it was timely. For the same reason, the Board will assume that Banner's Step 3 grievance was timely absent any contention by the agency that it was not.

willing to get the suspension ‘out of the way,’ and serving the suspension the very next day – on her own volition.”

CONCLUSIONS OF LAW

Merit Rule 12.9 provides

Employees who have been dismissed, demoted or suspended may file an appeal directly with the Director or the MERB within 30 days of such action. . . .

Merit Rule 18.6 provides:

Step 1: Grievants shall file, within 14 calendar days of the date of the grievance matter . . . a written grievance which details the complaint and the relief sought with their immediate supervisor. . . .

Merit Rule 18.9 provides:

If the grievance has not been settled, the grievant may present, within 20 calendar days of receipt of the Step 3 decision . . . a written appeal to the Merit Employee Relations Board

Under the Merit Rules, a grievant’s obligation to file a timely appeal to the Board “is jurisdictional.” *Cunningham v. DHSS*, Civ.A. No. 95A-10-003, 1996 WL 190757, at p.2 (Del. Super., Mar. 27, 1996) (Ridgely, Pres. J.), *aff’d*, 679 A.2d 469 (Del., June 3, 1996) (TABLE). Where the deadline has “passed, the Board had no jurisdiction to hear Appellant’s grievance.” 1996 WL 190757, at p.2. “[A]ppellant’s pro se status does not excuse a failure to timely comply with the jurisdictional requirements of [the Merit Rules].” *Id.* (quoting *Gibson v. State*, No. 354, 1994, (Del. 1994) (ORDER)).

DHSS argued that, by not requesting a pre-suspension meeting and taking her one-day suspension on March 9, 2012, Banner waived her right to grieve the suspension. The Board does

not agree. For a variety of reasons, an employee may choose to serve a suspension, yet continue with the grievance process to contest the merits of the discipline. Even when an employee does not avail herself of her right to a pre-deprivation meeting under Merit Rule 12.4, she still has the right to file a timely Step 1 grievance under Merit Rule 18.6.

The Board concludes as a matter of law that Banner filed a timely Step 1 grievance on May 10, 2012. Merit Rule 18.6 requires an employee to file a Step 1 grievance within fourteen days of the “grievance matter.” The Board does not believe that the baseline for computing the time period is the March 8, 2012 notice of intent to suspend. The proper baseline is April 26, 2012, the day DHSS gave Banner a copy of a letter dated April 20, 2012 finalizing the one-day suspension.

“The day of the [agency’s] decision is not included in the computation of time.” *Rutledge v. S&L Contractors, Inc.*, Civ.A. No. 05-12-0032, 2007 WL 3231622, at p.1 (Del. Com. Pl., Oct. 15, 2007). The fourteen-day time period started to run on April 27, 2012. Banner filed her Step 1 grievance on May 10, 2012, the fourteenth day after the grievance matter. Banner filed a timely Step 1 grievance under Merit Rule 18.6.

Banner filed an appeal to the Board of her one-day suspension on July 25, 2012. To the extent Banner was trying to file a direct appeal to the Board under Merit Rule 12.9, the Board concludes as a matter of law that the appeal was untimely. Merit Rule 12.9 required her to file a direct appeal within thirty days of the date of her one-day suspension (within thirty days after April 26, 2012).³

The Board concludes as a matter of law that Banner did not file a timely appeal to the

³ The Board notes that Banner filed a second appeal to the Board on July 25, 2012 (Docket no. 12-07-552) of a three-day suspension. Apparently, Banner thought that by filing a direct appeal to the Board of her three-day suspension within the thirty days required by Merit Rule 12.9, she could also include her one-day suspension.

Board under Merit Rule 18.9. Merit Rule 18.9 requires a grievant to file an appeal to the Board “within 20 calendar days of receipt of the Step 3 decision.” Banner received the Step 3 decision on September 21, 2012. She did not file an appeal to the Board within twenty days after receiving the Step 3 decision.

The Board debated at length whether the appeal Banner filed with the Board on July 25, 2012 complied with Merit Rule 18.9 and protected her right to appeal a subsequent Step 3 decision. The Board does not believe that it did, based on the plain language of Merit Rule 18.9.

In *McDonald’s Corp. v. Zoning Board of Adjustment for the City of Wilmington*, C.A. No. 01A-05-011-CG, 2002 WL 241338 (Del. Super., Feb. 19, 2002), a statute provided for a right to appeal a decision of the zoning board within thirty days. On May 25, 2001, McDonald’s filed an appeal of the zoning board’s oral vote taken at an April 25, 2001 hearing denying a request for a zoning variance. The zoning board did not issue its written decision until July 25, 2001. McDonald’s did not re-file its appeal within thirty days following the issuance of the Board’s decision.

The Superior Court held that McDonald’s filed its appeal prematurely. Because McDonald’s did not re-file its appeal within thirty days after the board issued its decision, the court “had no jurisdiction to consider the merits of the appeal.” 2002 WL 241338, at p.1.

“[U]nless the untimely filing of the appeal can be attributed to ‘court-related personnel,’ not even excusable neglect on the part of a party can cure the jurisdictional defect created. McDonald’s premature appeal was not the result of court-related personnel.” 2002 WL 241338, at p.1 (footnote omitted). “McDonald’s could have re-filed its appeal upon learning of the Board’s written decision, thus curing the jurisdictional defect.” *Id.* at p.2 (footnote omitted).

Banner’s premature appeal was not the result of Board-related personnel. She apparently

assumed that when the Board Administrator docketed the appeal of her one-day suspension that perfected jurisdiction in the Board. The Board Administrator, however, must docket every appeal even if it is obvious on its face that it is untimely. Only the Board, after a hearing, can dismiss the appeal for lack of jurisdiction.

After Banner filed her appeal of the one-day suspension, the Board Administrator notified her by letter:

Because the grievance concerning a one-day suspension was filed under Merit Rule 18.0, an appeal cannot properly be filed with MERB until a Step 3 decision has been issued. Merit Rule 18.8. It is my understanding that you received your Step 2 answer on or about July 18, 2012, and that you plan to appeal that decision to HRM/OMB.

The appeal you filed with the MERB is premature and cannot be processed at this time. If the Step 3 answer does not resolve the grievance, you may re-file this appeal with the MERB.

Banner was on notice that the appeal of her one-day suspension was premature and she would have to re-file her appeal after receiving a Step 3 decision in accordance with Merit Rule 18.9. She did not, and has only herself to blame, not Board-related personnel.

The Board concludes as a matter of law that it does not have jurisdiction over Banner's appeal because she did not file a timely appeal to the Board under Merit Rule 18.9 within twenty days of her receipt of the Step 3 decision.

DECISION AND ORDER

It is this **12th** day of March, 2013, by a unanimous vote of 3-0, the Decision and Order of the Board to grant the agency's motion to dismiss and to dismiss Banner's appeal for lack of jurisdiction.

Martha K. Austin
MARTHA K. AUSTIN, MERB Chairwoman

John F. Schmutz
JOHN F. SCHMUTZ, MERB Member

Victoria D. Cairns
VICTORIA D. CAIRNS, 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 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 12, 2013**

Distribution:

Original: File

Copies: Grievant
 Agency's Representative
 Board Counsel
 HRM/OMB