

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

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| CORRECTIONAL OFFICERS ASSOCIATION OF |) | |
| DELAWARE AND DONALD RAWLEY, |) | |
| |) | |
| Grievants, |) | |
| |) | DOCKET No. 13-02-581 |
| v. |) | |
| |) | |
| DEPARTMENT OF CORRECTION, |) | DECISION AND ORDER |
| |) | |
| Employer. |) | |

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) on October 30, 2013 at 9:00 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 Paul R. Houck, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

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

Deborah L. Murray-Sheppard
Board Administrator

Lance Geren, Esquire
on behalf of COAD and
Donald Rawley

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

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument from the parties on the motion by the Department of Correction (DOC) to dismiss the appeal of the employee/grievant, Donald Rawley (Rawley), for lack of jurisdiction. Rawley filed an opposition to the motion to dismiss.

FINDINGS OF FACT

On October 17, 2012, the Correctional Officers Association of Delaware (COAD) filed a grievance alleging that DOC was in violation of Merit Rule 3.2 because Rawley was working out of class in a higher position. DOC denied the grievance on November 2, 2012. Rawley appealed that decision, and DOC denied his appeal on January 2, 2013.

On February 5, 2013, Rawley filed an appeal to the Board.

There is an Agreement between the State of Delaware Department of Correction and Merit Employee Compensation Unit 10 Bargaining Coalition (Correctional Officers Association of Delaware, and the American Federation of State, County and Municipal Employees, AFL-CIO, Council 81, Locals 247, 3384 and 2004), (July 1, 2012 – June 30, 2014) (“the CBA”).

Section 8.7 of the CBA provides:

Grievances alleging a violation of the Merit Rules may be initiated under this grievance procedure at Step 1 within 14 days of the event that gave rise to the grievance or 14 days from the date that the employee could reasonably be expected to have knowledge of the event giving rise to the grievance. If the employee is not satisfied with a Step 2 decision hereunder, the decision may be appealed within 10 days of the decision to Step 3 of the Merit Rule grievance procedure (with a copy to the Department’s Director of Human Resources and Development), and to the MERB thereafter.

CONCLUSIONS OF LAW

Merit Rule 18.4 provides in pertinent part:

Failure of the grievant to comply with time limits shall void the grievance. The parties may agree to extension of any time limits or to waive any grievance step.

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 (MERB) for final disposition.

The Board concludes as a matter of law that it does not have jurisdiction to hear Rawley's appeal because Rawley did not comply with the time limits for a Step 3 appeal to the Director of the Office of Management and Budget (OMB) and the parties did not waive that grievance step. Without a Step 3 decision, Rawley cannot appeal to the Board.

In the cover letter to his appeal to the Board, Rawley stated that the CBA provides "that issues related to the Merit Rules may be submitted at Step 3 to the Merit Employee Relations Board." That is not correct. Section 8.7 of the CBA provides for a Step 3 hearing under the "Merit Rule grievance procedure." Merit Rule 18.8 requires an appeal to "be filed in writing to the Director [of OMB] within 14 calendar days of receipt of the Step 2 reply. The parties did not agree to waive a Step 3 hearing with the Director and go directly to the MERB after Step 2.

Rawley received the Step 2 decision on January 2, 2013. He did not file an appeal to the Director of OMB within fourteen calendar days (by January 16, 2013). Rather, he tried to file an appeal to the Board on February 5, 2013.

At the hearing, Rawley's attorney said that he meant to file his February 5, 2013 letter with the OMB Director and not the MERB. Rawley acknowledges that "the Union may have committed a procedural error," however "the State has suffered no prejudice." According to Rawley, DOC was

aware that he had filed his appeal with the Board and not the OMB Director, yet did not file its motion to dismiss until eight months later.

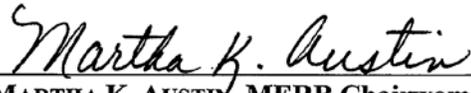
The Merit Rules do not prescribe a time limit for a party to file a motion to dismiss. Lack of subject matter jurisdiction can be raised at any time, even *sua sponte* by the Board at a hearing on the merits. Rawley acknowledged he had not been prejudiced by the passage of time. Absent detrimental reliance, DOC cannot be estopped from raising this jurisdictional issue.

In order to perfect an appeal to the Board, a grievant must file a written appeal “within 20 calendar days of receipt of the Step 3 decision.” The Board has previously decided that when the grievant “has not received a Step 3 decision, the Board does not have jurisdiction to hear her appeal.” *Danneman v. DHSS*, MERB Docket No. 09-04-446, at p. 4 (Sept. 4, 2009).

In the motion to dismiss DOC argued, in the alternative, that Rawley’s grievance was untimely because he did not file a Step 1 grievance within fourteen days after he knew or should have known about the subject matter of the grievance. According to Rawley, the parties were engaged in informal discussions as required by the CBA. When those discussions did not resolve the dispute, he filed a Step 1 grievance within the fourteen days required by Merit Rule 18.6. The Board does not have to resolve the timeliness issue because it lacks jurisdiction over Rawley’s appeal for the reasons stated earlier.

DECISION AND ORDER

It is this **5th** day of November, 2013, by a unanimous vote of 3-0, the Decision and Order of the Board to grant DOC's motion and dismiss Rawley's appeal for lack of jurisdiction.



MARTHA K. AUSTIN, MERB Chairwoman



PAUL R. HOUCK, MERB Member



JOHN F. SCHMUTZ, 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: **November 5, 2013**

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

MERB website

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