

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

ROBERT HENDERSON,)	
)	
Employee/Grievant,)	DOCKET No. 14-07-608
v.)	
)	DECISION AND ORDER
FAMILY COURT OF THE STATE)	
OF DELAWARE,)	
)	
Employer/Respondent.)	

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 2, 2014 in the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

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

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Robert Henderson, Grievant
Pro se

Kevin Slattery
Deputy Attorney General
on behalf of the Department of
Treasury

BRIEF SUMMARY OF THE EVIDENCE

The Board did not admit any exhibits into evidence or take any witness testimony. The Board heard legal argument from the parties on the motion by the Family Court of the State of Delaware (“Family Court”) to dismiss the appeal of the employee/grievant, Robert Henderson (“Henderson”) for lack of jurisdiction.

FINDINGS OF FACT

Henderson was employed by Family Court as a Judicial Assistant I for nine years, prior to being terminated on March 19, 2014. He appealed his termination to the Board. The jurisdictional facts are not in dispute.

Attached to Family Court’s Motion to Dismiss is a copy of a collective bargaining agreement between Family Court and the United Food and Commercial Workers Union, Local 27 Employees (“Agreement”). *Exhibit F*. Article 2.3 of the Agreement provides:

Bargaining Unit Inclusions: This Agreement shall apply only to the following employees: All regular full-time and part-time employees working as Accounting Specialist, Accounting Technicians, Administrative Specialists, Mediation/Arbitration Officers, Child Support Officers, Court Security Officers, Family Court Program Coordinators, Investigative Services Officers, Judicial Assistants, Judicial Case Managers, Judicial Case Processors, Management Analysts, Office Managers, Operations Support Specialists, Accountants, Social Service Specialists and all other employees not specifically excluded. [*emphasis added*]

Article 17.1 of the Agreement provides:

“Any disciplinary action must be for just cause.”

Article 17.6 of the Agreement provides:

“The Union recognizes its responsibility as the exclusive bargaining agent and agrees to represent all employees, except for probationary employees as provided for in Article 5.2 of this Agreement.”

Article 18.4 of the Agreement provides:

In the event that the grievance is of such a nature that the hearing officer at Steps 1 and 2 would not have the power to grant the requested action, the parties may mutually agree to waive the grievance to Step 3. The grievance procedure provides that if the Step 3 decision is unsatisfactory, it may be appealed to Step 4 if the grievance concerns a subject covered by the Agreement. If the grievance is still not resolved, Step 4 provides that it may be appealed to the State Labor Relations & Employment Executive.

Article 19.1 of the Agreement provides:

In the event the grievance is not resolved at Step 4, it may be appealed by the Union to Arbitration with the American Arbitration Association.

According to Henderson, he started work at Family Court in 2005 under the Merit System. In 2007, United Food and Commercial Workers Union, Local 27 (“UFCW Local 27”) was certified as the union representative of Family Court employees, but he did not want them to represent him. Henderson stated that employees were told that they could either join the union or pay a service fee. Henderson paid the service fee and did not consider himself a member of the bargaining unit.

Henderson filed a grievance of his termination on March 21, 2014. The grievance was heard initially at Step 3, at the request of a UFCW Local 27 representative. The hearing officer issued a decision on April 8, 2014. The matter proceeded to a pre-arbitration meeting with Rebecca Miller, a Labor Relations and Employment Practices Specialist. This meeting did not resolve the matter and Miller issued a letter on June 19, 2014 stating that Family Court and UFCW Local 27, on behalf of Henderson, were unable to resolve the grievance. On June 26, 2014, legal counsel for UFCW Local 27 notified Henderson that the union would not arbitrate his grievance. On July 14, 2014, Henderson appealed his termination to the Board.

CONCLUSIONS OF LAW

Merit Rule 1.3 provides:

If a subject is covered in whole or in part by a collective bargaining agreement, 20 Del. C. § 5938(d) provides that the Merit Rules shall not apply to such subject matters ... Collective bargaining agreements may govern matters of bargaining unit-specific pay and benefits, probation...

Merit Rule 18.3 provides:

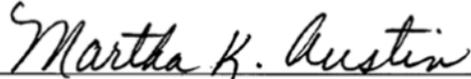
An employee who is in a bargaining unit covered by a collective bargaining agreement shall process any grievance through the grievance procedure outlined in the collective bargaining agreement. However, if the subject of the grievance is nonnegotiable pursuant to 29 Del. C. § 5938, it shall be processed according to this Chapter.

The Board concludes as a matter of law that it does not have jurisdiction to hear Henderson's appeal because his termination was covered in whole or in part by the Agreement.

Henderson argues that he was not a member of the union and he did not want them to represent him during the grievance process. Whether he is a member of the union or wishes to be represented is not dispositive of this matter. It is undisputed that his position is in the bargaining unit for which UFCW Local 27 is the exclusive bargaining representative. The collective bargaining agreement negotiated by UFCW Local 27, on behalf of bargaining unit positions, covers discipline and just cause. Consequently, Henderson's only recourse for grieving his termination is through that negotiated grievance procedure.

ORDER

It is this **21st** day of October, 2014, by a unanimous vote of 4-0, the Decision and Order of the Board to dismiss Henderson's appeal for lack of jurisdiction.


MARTHA K. AUSTIN, MERB Chairwoman


JOHN F. SCHMUTZ, MERB Member


VICTORIA D. CAIRNS, MERB Member


PAUL R. HOUCK, 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: October 21, 2014

Distribution:

Original: File

Copies: Grievant
 Agency's Representative
 Board Counsel
 MERB website