

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

**IN THE MATTER OF:
COLLEEN B. DEVOL,**

Appellant,

v.

**DEPARTMENT OF HEALTH AND
SOCIAL SERVICES,**

Agency.

DOCKET NO. 97-08-127

**DECISION ON MOTION TO
DISMISS**

COPY

BEFORE Robert Burns, Vice-Chairperson; Dallas Green and John W. Pitts, Members,
constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES:

For the Appellant: Roy S. Shiels, Esquire
Brown, Shiels, Beauregard & Chasanov
108 East Water Street
P. O. Drawer F
Dover DE 19903

For the Department: A. Ann Woolfolk
Deputy Attorney General
Carvel State Building
820 N. French Street
Wilmington, DE 19801

BACKGROUND AND FACTUAL SETTING

The essential facts concerning this Motion to Dismiss are not in dispute. In January of 1996, Colleen B. Devol became absent from her employment as a Psychiatric Social Worker II at the Kent/Sussex Community Mental Health Center. Ms. Devol remained absent from work for an extended period. She was advised by letter dated May 12, 1997 that she was being proposed for termination from her position for unauthorized absence and continued unavailability for work.

In a letter dated June 16, 1997, the Secretary of Delaware Health and Social Services, Carmen Nazario, terminated Ms. Devol's employment with the Department effective immediately. On June

26, 1997, this notice of termination of employment was mailed by certified mail from Delaware Health and Social Services to Ms. Devol at 3307 Mahan Road Marydel, Delaware 19964.

The envelope in which the letter of termination was mailed was returned unopened to the Labor Relations office of the Division of Management Services of the Department of Health and Social Services on July 21, 1997 showing that it had been unclaimed and that the 1st notice of the certified mail was given on June 27, 1997, and the 2nd notice on July 3, 1997, with the return of the letter to the agency noted as being on July 12, 1997.

In a letter filing what is referred to as a "termination grievance" with the Merit Employee Relations Board ("MERB" or "Board"), counsel for Ms. Devol complained of the termination of employment of Colleen Devol, an employee of Health and Social Services, by letter dated June 16, 1997 delivered by regular mail service on July 22, 1997. The appeal, which was received by the Board on August 6, 1997, asserted that grievant took a leave of absence in January, 1996 and that when she requested an extension, the extension was denied. The grievance appeal also asserted that when grievant requested an accommodation, the accommodation was denied based on a report from an Industrial Accident Board hearing, when in fact the State Doctor stated she could return to work; however, not in that position.

On May 12, 1998, the Department of Health and Social Services filed with the Board a motion to dismiss the grievance. The grounds for the motion were that the matter was not properly before MERB because it should have been pursued as a discrimination grievance through the steps of the grievance procedure (Count 1); that the matter should be dismissed as the grievant was terminated by letter received July 22, 1997 and appealed to MERB on August 6, 1997, and under Merit Rule 21.0112 or Merit Rule 20.0310 Ms. Devol had only ten (10) working days to file an appeal (Count 2); and finally, that the grievant had not stated a claim for which relief could be granted since the transfer of the grievant to a vacant position within DHSS would violate merit rules requiring competitive examinations for transfers and laws prohibiting discrimination, including the Americans with Disabilities Act, 42 USC §§12101-12113 do not require an employer to transfer a disabled person to a vacant position in violation of civil service rules since such a transfer would constitute an undue hardship for the employer.

On May 12, 1998, two days before the matter was set for argument before the Board, the Department filed an Amended Motion to Dismiss, asserting that the appeal to the Board was untimely even as a direct appeal to MERB since the termination notice to Ms. Devol from Secretary Nazario had been sent by Certified Mail on June 26, 1997. The amended motion also stated that Ms. Devol was given notice of the certified mail on June 27, 1997 and again on July 3, 1997, but failed to pick up the certified mail which was returned by the United States Post Office to the Department on July 12, 1997. The Department, through the affidavit of Martha Austin, Labor Relations Manager for the Department of Health and Social Services, asserted that it re-mailed the termination letter using regular first-class mail on July 21, 1997 which was not returned. The Department included with the amended motion a copy of the termination letter from Secretary Nazario which, among other things, recited that Ms. Devol was given notice of the proposal to terminate her employment by letter dated May 12, 1997. The termination letter noted that Ms. Devol did not receive the May 12, 1997 proposal to terminate letter until May 28, 1997 and therefore she was given 15 days from that latter date to request a pre-decision meeting. No pre-decision meeting was requested and on June 16, 1997 Secretary Nazario issued her termination letter.

Upon receipt of the Amended Motion to Dismiss, Counsel for Ms. Devol requested a continuance to prepare a written response. The written response on behalf of Ms. Devol was filed on July 14, 1998 and purported to respond to both the original and the amended motion to dismiss. The response asserted, among other things, that by re-mailing the notice of termination to Ms. Devol the Department had waived the argument that the grievance was untimely filed since upon the remailing, the statutory period for appeal of the termination started to run anew. After numerous attempts to schedule this matter for argument before the Board, Ms. Devol, with new legal counsel, appeared for argument on June 17, 1999. This is the Board decision on the Department's motion to dismiss as amended.

DISCUSSION

The Merit Employee Relations Board can only hear and consider appeals which are timely filed under the Merit Rules and applicable statutes. The Board's power and authority are derived

exclusively from statute, and its jurisdiction extends only to those cases which are properly before it in compliance with the statutes and Merit Rules. *Maxwell v. Vetter*, Del. Supr., 311 A.2d 864 (1973), *Cunningham v. State of Delaware, Department of Health and Social Services*, Del. Super., C.A. 95A-10-003, Ridgely, P.J. (March 27, 1996) (ORDER).

Ms. Devol was dismissed from a merit system position. As a dismissed employee she has the right to appeal that termination within thirty (30) days directly to the Merit Employee Relations Board under both 29 *Del. C.* § 5949 and Merit Rule No. 21.0111. In her appeal letter to the Board she cites a violation of Merit Rule No. 21.0112 which is the section on appeals from discrimination.

The Department, among other things, argues that this citation restricts her to a 10 working day appeal period and contends that as an appeal from a discriminatory action within an agency Ms. Devol is required to proceed through the Steps of the grievance process before filing an appeal with the Board. However, it is not necessary for the Board to characterize this appeal as either a "discrimination" appeal under Merit Rule No. 21.0112 or as a direct appeal from a dismissal under Merit Rule No. 21.0111 and 29 *Del. C.* § 5949, because under either the 10 working day standard for an appeal under Merit Rule 21.0112 or the 30 day period allowed for appeals of dismissal under 29 *Del. C.* § 5949 and Merit Rule No. 21.0111, the filing is untimely. For purpose of discussion the Board will consider the longer appeal period of 30 days as controlling.

In order to answer the question of whether or not Ms. Devol has timely filed her appeal, the Board must determine when the 30 day appeal period begins to run. The statute (29 *Del. C.* §5949) provides, in pertinent part, "(a) An employee in the classified service . . . may not, except for cause, be dismissed, or demoted or suspended for more than 30 days in any 1 year. Within 30 days after any such dismissal . . . an employee may appeal to the Board for review thereof." A literal reading of this statutory provision would begin the appeal period with the effective date of the dismissal and if the appeal is not filed within 30 days the Board can not hear it. See *Maxwell v. Vetter*, supra.

The legislature was aware of the distinction between an event such as dismissal and notice of an event since in subsection (b) of the same statute dealing with appeals to the Superior Court it provides for the filing of a notice of appeal with the Court within 30 days of the employee being notified of the final action of the Board. The issue for the Board, assuming that Ms. Devol has 30

days from her dismissal to appeal, is to determine when Ms. Devol was "dismissed" because it is that date under the statute from which the appeal period runs.

There are several possible dates for the beginning of the period within which Ms. Devol's appeal had to be filed with the Board. The first date is June 16, 1997 which is the date of the dismissal letter which stated that it was "effective immediately". A second possible date is the date of the mailing of the notice of termination by certified mail (June 26, 1997). A third possibility is the date of June 27, 1997 on which the 1st attempt was made to deliver the certified letter of termination mailed on the previous day. A fourth possible date is the admitted actual receipt of the notice of dismissal which was July 22, 1997. The Department argues that the dismissal was effective to start the running of the appeal period on July 27, 1999, which is the date of the first attempted delivery of the certified termination notice letter. Ms. Devol contends that the period for filing an appeal with the Board is 30 days in length and commenced on July 22, 1997, when she acknowledges she received actual notice of the termination by regular mail. Therefore, the issue is whether actual notice of the dismissal is required to begin the running of the period for filing an appeal or, as argued by the Department, the attempted delivery of notice of dismissal by certified mail, is sufficient to start the running of the appeal period.

If actual notice is required to begin the running of the appeal period then the present appeal is timely filed. However, if the dismissal was effective on June 16, 1997 and the appeal period began that day or if either the mailing or either attempted delivery of the certified letter of dismissal is sufficient to begin the running of the appeal period then the appeal, which was filed on August 6, 1997, is not timely and the appeal must be dismissed.

There is no issue that the notice mailed by certified mail on June 26, 1997 was mailed incorrectly or improperly addressed since the regular mail notice thereafter sent to the same address was admittedly received on July 22, 1997, one day after it was mailed. Ms. Devol had previously received notice of the intent of the Department to terminate her employment and of her entitlement

to a pre-dismissal hearing which she did not request. It is not unreasonable for her to expect and make arrangements for further correspondence from the Department.¹

The appellant has cited no authority for the proposition that the second mailing by regular mail served to begin anew the 30 day period for the filing of an appeal and the Board concludes that actual receipt of the notice of dismissal by Ms. Devol is not necessary to begin the running of the appeal period. To the extent that notice of the dismissal was required to commence the running of the period for filing an appeal, the Board unanimously agrees with the contention of the Department that the period began to run with the attempt to deliver the certified dismissal letter on June 27, 1997 and that the appeal filed on August 6, 1997 is untimely and the Board is therefore required to dismiss it.

ORDER

The above-captioned grievance appeal filed by Colleen Devol on August 6, 1997 is not timely filed, and the Motion of the Department of Health and Social Services to Dismiss, as amended, is **GRANTED**. The appeal **DISMISSED**.

BY ORDER OF THE BOARD this 25th day of August, 1999.


Robert Burns, Vice-Chairperson


John W. Pitts, Member


Dallas Green, 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 of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

¹At the argument before the Board, counsel for Ms Devol proffered that Ms. Devol was out of state visiting her sick mother during the time of the attempted delivery of notice by certified mail. Counsel for the Department objected to any evidentiary presentations during the argument and the Board did not hear testimony from Ms. Devol.

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:

Sept. 2, 1999

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Merit Employee Relations Board

Robert Burns, Vice Chairperson

Dallas Green, Member

John F. Schmutz, Esquire, Member

John W. Pitts, Member