

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

COPY

KARL D. HAZZARD,
Grievant,

v.

DEPARTMENT OF CORRECTIONS
Agency.

MERB DOCKET NO. 98-01-142

**DECISION ON MOTION
TO DISMISS**

BACKGROUND

This grievance appeal was filed with the Merit Employee Relations Board ("MERB" or "Board") on January 20, 1998 by Correctional Officer Karl D. Hazzard and arises out of his employment with the Department of Correction ("DOC").

The appeal concerns Officer Hazzard's claim that he was improperly discriminated against in an unsuccessful attempt to be promoted to the position of Correctional Lieutenant. Officer Hazzard asserts that his non-selection for the position was based upon his appearance during the interview and that this violates Merit Rule 13.0100 and Merit Rule 19.0100.

By motion dated February 24, 1998, the Department of Corrections ("DOC" or "Department"), seeks to have the Board dismiss Officer Hazzard's appeal on several grounds, including that Officer Hazzard did not properly follow the grievance process in that he failed to utilize every stage in the process to resolve this dispute and as a result the Board is without jurisdiction to hear the appeal. The relevant facts upon which the Department bases its motion are that on November 26, 1997 Officer Hazzard filed a grievance with the DOC alleging violations of Merit Rules 13.0100 and 19.0100; that on January 9, 1998, following a Step Two hearing, Officer

Hazzard's grievance was denied; that on January 20, 1998, the grievant filed his request for a hearing with the MERB; and finally, that a Step Four hearing is scheduled pursuant to Hazzard's request on March 20, 1998.

It would appear that the Step Four hearing was scheduled for March 20, 1998 at Officer Hazzard's request but that the hearing officer declined to issue a decision on the grievance because of the filing of the grievance at the Board.

DISCUSSION

The Department's Motion contends that Officer Hazzard's complaint is not properly before the Board because it was not filed as a direct appeal to MERB within ten (10) working days of the action being complained about as required by Merit Rule 21.0112. DOC contends that it is therefore a grievance which must proceed through the steps of the grievance procedure before it can be properly appealed to the MERB. The Department is correct in its observation that this is not a direct appeal pursuant to Merit Rule No. 21.0112. If Officer Hazzard is to have his appeal heard by the Board it must be filed within fifteen (15) working days after the 4th step decision or after the ten (10) working day time limit for such a decision has passed after the hearing. See Merit Rule Nos. 20.0340 and 21.120.

In this instance, Officer Hazzard has not completed or had waived the required steps of the grievance process. He filed his appeal with the Board on January 20, 1998 after he had received the written decision of Paul W. Howard, Chief of the Bureau of Prisons which was dated January 9, 1998 after a hearing held on December 17, 1997. The parties cannot agree to confer jurisdiction on the Board for an appeal that is not timely filed. The January 20, 1998 appeal to MERB was improper and untimely and the Board is without jurisdiction to consider it. *Cunningham v. State of Delaware*,

Del.Super., CA No. 95-10-003 HOR, Ridgely, P.J. (March 27, 1996) (Order). Affirmed without opinion, Del.Supr., 679 A.2d 469 (1996).

ORDER

The above-captioned appeal of Karl D. Hazzard is not timely filed and the Board is without jurisdiction to consider it. Therefore the Motion to Dismiss is **GRANTED** and the appeal is dismissed.

BY ORDER OF THE BOARD this 18th day of February, 1999.

Susan L. Parker, Chairperson*

Robert Burns, Vice-Chairperson

Dallas Green, Member

John F. Schmutz, Esquire, Member

John W. Pitts, Member

*Recused - conflict with pending litigation against DOC within her law firm.

APPEAL RIGHTS

29 Del. C. § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the request of whether the appointing agency acted in accordance with the 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.

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 thirty (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: Set. 22, 1999

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Agency's Representative

Merit Employee Relations Board

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