

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

<b>YVETTE JOHNSON-DEEN,</b>	)	
	)	
Employee/Grievant,	)	<b>DOCKET No. 15-08-634</b>
<b>v.</b>	)	
	)	<b>DECISION AND ORDER</b>
<b>DEPARTMENT OF SERVICES FOR</b>	)	<b>OF DISMISSAL</b>
<b>CHILDREN, YOUTH AND</b>	)	
<b>THEIR FAMILIES (DSCYF),</b>	)	
	)	
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 November 19, 2015 in the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

**BEFORE** Martha K. Austin, Chair, Paul R. Houck, Jacqueline Jenkins, Ed.D 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

Patricia P. McGonigle, Esq.  
On behalf of Employee/Grievant  
Yvette Johnson-Deen

Kevin Slattery  
Deputy Attorney General  
on behalf of the Department of  
Services for Children, Youth and  
their Families

## **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 Department of Services for Children, Youth and their Families (“DSCYF”) to dismiss the appeal of the employee/grievant, Yvette Johnson-Deen (“Johnson-Deen”) for lack of jurisdiction. Johnson-Deen filed a written response to the motion to dismiss.

## **FINDINGS OF FACT**

Johnson-Deen directly appealed her termination by DSCYF from her position as a science teacher at the Ferris School to the Merit Employee Relations Board (“Board”). Johnson-Deen, employed since May 5, 2014, was terminated on August 11, 2015, within her two-year probationary period for failure to possess a certification to teach in the State of Delaware – a license necessary for her to perform the essential functions of her position. Johnson-Deen’s employment application stated she held a Certificate of Eligibility in Special Education and Elementary Education from the New Jersey Department of Education. She signed a letter of agreement where she agreed to obtain her science certification from the Delaware Department of Education within a two-year period of time. Johnson-Deen alleges DSCYF violated Merit Rule 2.0 (Non-Discrimination) and 6.0 (Recruitment and Application Policies) in its termination of her employment.

Johnson-Deen’s position falls within a collective bargaining unit represented by the Special Schools Education Association, DSEA/NEA (“SSEA”). There was a valid, collective bargaining agreement in place at the time of her hire and termination. Attached as Exhibit C to DSCYF’s Motion to Dismiss is a copy of Articles 1 – 7 of the 2003-2006 Collective Bargaining Agreement between the State of Delaware Department of Services for Children, Youth and their

Families and The Special Schools Education Association (“Agreement”).

Article 1.1 of the Agreement provides:

Included: All teachers; guidance counselors; librarians; instructors; teacher aides; teachers/special education IN; New Castle County Detention Center, Ferris School, Stevenson House; Terry Children’s Psychiatric Center; and Residential treatment centers.

Under Article 3 of the Agreement, the procedure for the grievance process provides four steps and then arbitration. Article 3.2 states, “Appeal from disciplinary action shall be initiated at Step 2 of the grievance procedure.” Article 3.7 defines a grievance to be:

... a dispute limited to the application or interpretation of this Agreement, except that complaints which allege a violation of the State Merit Rules may be processed under this procedure through Step 3.

Article 3.10, designated as Step 2, provides that the contractual grievance may be appealed to the Departmental Education Supervisor. Article 3.11, designated as Step 3, provides if the decision of the Education Supervisor is unsatisfactory, the employee may meet with the Cabinet Secretary.

Article 3.11.3 states:

Probationary employees shall have access to the grievance and arbitration provisions of this agreement for the sole purpose of grieving disciplinary actions (but not dismissal) that arise during the second half of their probationary periods.

Johnson-Deen filed a grievance of her termination directly to this Board on August 24, 2015. In order to preserve her rights, she also filed a grievance with DSCYF under the terms of the collective bargaining agreement; however, as of the date of this hearing no communication had been received from DSCYF concerning the grievance nor had any action been taken relative to the processing of the grievance.

## CONCLUSIONS OF LAW

**The rules adopted or amended by the Board under the following sections shall not apply to any employee in the classified service represented by an exclusive bargaining representative to the extent the subject thereof is covered in whole or in part by a collective bargaining agreement under Chapter 13 of Title 19: § 5922 Probation; § 5923 Emergency employment; § 5924 Department of Technology and Information's acceptable use policy; and § 5925 Transfers. 29 Del.C. § 5938(d).**

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.**

Merit Rule 9.2 provides:

**Employees may be dismissed at any time during the initial probationary period. Except, where a violation of Chapter 2 is alleged, probationary employees may not appeal the decision.**

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

Johnson-Deen argues the basis for the termination is not discipline as there was no misconduct during the course of her employment. Rather, DSCYF terminated her after more than a year for failing to obtain teaching certification in Delaware, although DSCYF knew at the time of her hire she did not possess the certification and had agreed to allow her two years to obtain it. Therefore, Johnson-Deen alleges this action is not covered by the negotiated Agreement, nor is it limited to the application or interpretation of that Agreement. She concludes this creates original jurisdiction in this Board to hear the complaint.

The Board finds no merit in this argument. First, employees come before this Board to

appeal an adverse employment action that has been taken against them. In this case, Johnson-Deen is grieving her termination. By definition, termination is the ultimate discipline an employer can bring against an employee, i.e., severing the employment relationship. To say that the underlying reason for the termination is not misconduct and therefore not discipline, is to interpret “discipline” too narrowly. The underlying reasons for Johnson-Deen’s termination do not change the act of termination or remove that termination from the coverage of the negotiated Agreement. Further, any dispute as to whether the Agreement applies to this action can and should be grieved pursuant to Article 3.7 of the Agreement.

Secondly, the Agreement establishes a grievance procedure which covers alleged violations of the Merit Rules up through Step 3. The Board finds Johnson-Deen is covered, in whole or in part, by a collective bargaining agreement, under which she has the ability to grieve disputes and complaints under it.<sup>1</sup>

Thirdly, under the Agreement, probationary employees may grieve disciplinary actions that arise during the second year of their probationary periods, except for dismissal. The prohibition on grieving dismissal does not, however, permit Johnson-Deen to grieve her dismissal before this Board. Pursuant to 29 *Del.C.* § 5938(d), the procedures adopted by this Board do not apply to those probationary employees covered by a collective bargaining agreement. Because an employee cannot grieve a matter under a collective bargaining agreement does not mean that he or she must be able to grieve it under the Merit Rules. *Jardine v. Family Court*, MERB 11-08-517 (2012). The Board concludes as a matter of law that it does not have jurisdiction to hear Johnson-Deen’s appeal because her termination was covered in whole or in

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<sup>1</sup> Merit Rule 9.2 allows for probationary employees (like Johnson-Deen) to be dismissed at any time during the initial probationary period except where a violation of Chapter 2, Discrimination, is alleged. The Agreement also includes a provision prohibiting discrimination; consequently, any claim of discrimination would also be processed under the contractual grievance procedure.

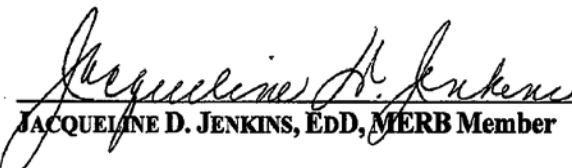
part by a collective bargaining agreement.

**ORDER**

It is this **4th** day of **February**, 2016, by a unanimous vote of 4-0, the Decision and Order of the Board to dismiss Johnson-Deen's appeal for lack of jurisdiction.

  
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MARTHA K. AUSTIN, MERB Chairwoman

  
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PAUL R. HOUCK, MERB Member

  
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JACQUELINE D. JENKINS, EDD, MERB Member

  
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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:           **February 4, 2016**

Distribution:

Original: File

Copies:   Grievant's Representative  
          Agency's Representative  
          Board Counsel  
          MERB website