

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

TUESDAY S. BANNER,)	
)	
Appellant,)	
)	
v.)	C.A. No. N14A-03-001 DCS
)	
MERIT EMPLOYEE RELATIONS)	
BOARD and DEPARTMENT OF)	
HEALTH AND SOCIAL SERVICES,)	
)	
Appellees.)	

ORDER

This 28th day of April, 2017, having considered Appellant’s Motion to Amend, the Appellee’s Answer, Appellant’s response, and the Record of this case, Appellant’s Motion is DENIED.

It appears that:

1. On October 20, 2016, Appellant filed the instant Motion to Amend the Court’s September 28, 2015 Order Reversing and Remanding the Merit Employee Relations Board’s (“MERB”) decision that dismissed Appellant’s appeal of her termination from employment with the State of Delaware Health and Social Services Division for the Visually Impaired (“DHSS/DVI”).

2. Thirteen months after the Court’s Order, Appellant seeks recovery of her filing costs and fees (\$185.00)¹ pursuant to Superior Court Civil Rule 3(g).² Appellant “seeks an Amended Order that will direct that Prothonotary to petition the MERB in accordance with Superior Court Civil Rule 3(g) in lieu of the fact that Appellant prevailed on her appeal to this Court on September 28, 2015.”³

3. MERB filed an Answer on November 2, 2016. MERB contends that the Court lacks jurisdiction, Appellant’s motion is governed by Superior Court Rule 60 (Relief from Judgment or Order), cannot be granted due to the doctrine of sovereign immunity, and that the Administrative Procedures Act (“APA”) provides “no mechanism [for recovery of] costs affiliated with appeal of MERB orders.

4. The Court will treat Appellant’s Motion to Amend as a motion to alter or amend a judgment pursuant to Superior Court Civil Rule 59(d).⁴

5. Appellant’s Motion to Amend is untimely and therefore this Court does not have jurisdiction to consider the merits. A Rule 59(d) motion must be

¹ The amount is not disputed.

² Del. Super. Ct. Civ. R. 3(g) states, in pertinent part:

In any proceeding in this Court in which a party has deposited money as a guarantee for the payment of fees and costs in the Prothonotary’s office, and it is in thereafter finally determined that said party is entitled to recover such costs, . . . the Prothonotary shall apply [costs received] to the extent necessary to pay any costs unpaid and remit the balance to the party who made the deposit.

³ Appellant’s Motion to Amend at ¶4.

⁴ Del. Super. Ct. Civ. R. 59(d) states: A motion to alter or amend the judgment shall be served and filed not later than *10 days after entry of the judgment*. (Emphasis added).

filed and served within ten days of the entry of the judgment. The ten-day rule is jurisdictional and the Court does not have discretion to extend the deadline.⁵ This Court entered judgment on September 28, 2015. Appellant filed her Motion to Amend on October 20, 2016, which is clearly more than ten days after the Court entered its Order. Consequently, Appellant's motion is untimely and her Motion is DENIED.

6. Furthermore, Appellant has failed to show that DHSS/DVI has waived its sovereign immunity⁶ or that there was a final determination of her case.⁷

⁵ *Lafferty-Eaton v. T.D. Bank NA*, 2014 WL 824294, at *2 (Del. Super. Feb. 20, 2014) (citing *Carriere v. Peninsula Indem. Co.*, 2000 WL 973134, at *2 (Del. Super. June 12, 2000) (internal citation omitted)).

⁶ It is well-settled Delaware law that state agencies (including MERB) are under the doctrine of sovereign immunity and there is no indication that the State has waived its immunity (including damages and costs). *Roofers, Inc. v. Del. Dep't of Labor*, 2014 WL 1228911, at *2 (Del. Super. Mar. 25, 2014) (citing 72 A.L.R. 2d 1379 (1960) (Cum. Supp.)). Moreover, although 29 *Del. C.* § 5949 provides statutory consent for the MERB's decision to be appealed to this Court, it does not expressly provide that the MERB waives its sovereign immunity and that statute makes no mention of the return of any filing fees or costs.

⁷ Appellant asserts that she is entitled to reimbursement because the Court's September 28, 2015 Order was a final determination where she "prevailed on appeal." Appellant's Resp. at 8-9. However, the Court reversed the MERB's dismissal and remanded the case back to the MERB "for further proceedings consistent with the opinion." *Banner v. Merit Emp. Relations Bd. and Dep't of Health & Soc. Servs.*, Order, Sept. 28, 2015, at 1 (the "Court's Order"). The Court reversed the MERB on procedural grounds – Appellant failed to receive proper notice.

The Court's Order did not address the merits of Appellant's dismissal from her employment (Appellant's second argument). The merits of Appellant's dismissal remain unresolved. An order of remand, other than remand for purely ministerial functions, is interlocutory. *Violent Crimes Comp. Bd. v. Linton*, 545 A.2d 624, 625 (Del. 1998) (citing *Taylor v. Collins & Ryan, Inc.*, 440 A.2d 990 (Del. 1981)). This was clear when DHSS/DVI applied for Certification of an Interlocutory Appeal and a Stay pursuant to Delaware Supreme Court Rule 32 and Appellant requested that the Court deny the request of certification of an interlocutory appeal "thereby allowing an expeditious resolution of her appeal to the MERB of her March 1, 2013 wrongful

7. Accordingly, Appellant's Motion to Amend is **DENIED**.

IT IS SO ORDERED.



Diane Clarke Streett, Judge

Original to Prothonotary

cc: Tuesday S. Banner, *Pro Se* Appellant (via First Class mail only)
Rae M. Mims, Deputy Attorney General
Kevin R. Slattery, Deputy Attorney General

termination" Appellant's Resp. to Appellee's Request for an Interloc. Appeal Cert. at 4 (emphasis added).