BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

JOYCE PINKETT, Employee/Grievant, v. DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Employer/Respondent.	))))))))))	**DOCKET No. 08-02-415** **DECISION AND ORDER**

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 December 18, 2008 at the Margaret M. O'Neill Building, Suite 213, 410 Federal Street, Dover, DE 19901 and continued on April 22, 2009.

BEFORE Brenda C. Phillips, Chair, John F. Schmutz, Joseph D. Dillon, and Martha K. Austin, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Joyce Pinkett
Employee/Grievant *pro se*

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Department of Health and Social Services

SUMMARY OF THE EVIDENCE

The Department of Health and Social Services ("DHSS") called one witness at the hearing on December 18, 2008: Jean Lee Turner, the Board Administrator. Ms. Turner testified that she had searched her files, including her e-mails, and did not have any record of receiving Pinkett's appeal of the March 25, 2008 Step 3 decision.

The Board admitted into evidence without objection two exhibits offered by the employee/grievant, Joyce Pinkett ("Pinkett"): e-mail dated April 16, 2008 from Pinkett to Ms. Turner (A-1); and composite e-mails (A-2).

FINDINGS OF FACT

The jurisdictional facts are not in dispute.

Pinkett claims that since July 1, 2007 she has been working out of class in violation of Merit Rule 3.2 and should be promoted to the position of Social Services Senior Administrator.

Pinkett filed a Step 1 grievance on November 1, 2007. Her supervisor denied the grievance on November 15, 2007. Pinkett appealed the Step 1 decision to the Labor Relations office at DHSS on November 21, 2007. When the Step 2 hearing was not immediately scheduled, Pinkett filed a Step 3 appeal to Human Resource Management ("HRM") on December 30, 2007. The Step 3 hearing was on February 5, 2007. Pinkett filed her first appeal to the Board on February 28, 2008.

The HRM hearing officer issued the Step 3 decision on March 25, 2008. Pinkett received a copy of that decision on March 27, 2008. Pinkett claims she filed another appeal to the Board by e-mail on April 16, 2008.

CONCLUSIONS OF LAW

Merit Rule 18.8 provides: "Step 3. Any appeal shall be filed in writing to the Director within 14 calendar days of receipt of the Step 2 reply. This appeal shall include copies of the written grievance and responses from the previous steps. The parties and the Director (or designee) may agree to meet and attempt an informal resolution of the grievance, and/or the Director (or designee) shall hear the grievance and issue a written decision within 45 calendar days of the appeal's receipt. The Step 3 decision is final and binding upon agency management."

Merit Rule 18.9 provides: "If the grievance has not been settled, the grievant may present, within 20 calendar days of receipt of the Step 3 decision or of the date of the informal meeting, whichever is later, a written appeal to the Merit Employee Relations Board (MERB) for final disposition according to 29 Del. C. §5931 and the MERB procedures."

The timeline of Pinkett's appeal to the Board is not disputed. Pinkett filed a timely Step 3 appeal to HRM on December 30, 2007. The hearing was on February 5, 2008. When Pinkett did not receive a decision within forty-give days after she filed her Step 3 appeal, she filed an appeal to the Board on February 28, 2007.

The Board, however, could not exercise jurisdiction over that appeal because Pinkett had not yet received the Step 3 decision. HRM did not issue a Step 3 decision until March 25, 2008, e-mailed to Pinkett on March 27, 2008. Pinkett claims she e-mailed a second appeal to the Board's Administrator on April 16, 2008, within the twenty days required by Merit Rule 18.9.

The Board concludes as a matter of law that it cannot exercise jurisdiction over Pinkett's February 28, 2007 appeal to the Board. Merit Rule 18.8 provides that HRM "shall" issue a decision within forty-five days of the receipt of the Step 3 appeal. If HRM does not (as is the case

here), the Board does not believe that HRM is divested of jurisdiction so as to allow the grievant to appeal to the Board.

"As a general rule, where a statute which imposes upon a public officer the duty of performing some act relating to the interests of the public and which fixes a time for the doing of such act, the requirement of time will be construed as directory rather than mandatory, and not as a limitation on the exercise of the power, ..." *Pitts v. White*, 111 A.2d 217, 218-19 (Del. 1955). "[S]uch an act will be construed as merely a guide for the officers in the conduct of the public business so as to insure the orderly and prompt performance of public duties." *Id.* at 219.

Merit Rule 18.8 directs HRM to issue a Step 3 decision within forty-five days of receipt of the appeal. If it does not, that is not a limitation on the exercise of the power to issue the decision. Merit Rules 18.6 and 18.7 provide that if the agency does not act within the required time, the appeal is "green lighted" to the next step. In contrast, to appeal to the Board under Merit Rule 18.9 the grievant must be in "receipt of the Step 3 decision." Pinkett did not receive her Step 3 decision until March 27, 2008.

Pinkett claims that she filed a second appeal to the Board on April 16, 2008. At the first hearing, Pinkett introduced into evidence an e-mail dated April 16, 2008 to the Board's Administrator attaching a copy of an appeal to the Board from the March 25, 2008 Step 3 decision. That e-mail, however, does not prove whether or not the Administrator in fact received the e-mail.

Pinkett represented to the Board at the first hearing that she had evidence on her computer at work or home that she sent the April 16, 2008 e-mail certified and received a confirmation of receipt. The Board continued the hearing to allow Pinkett an opportunity to provide that evidence

to the Board and DHSS by January 5, 2009.

On January 5, 2008, Pinkett faxed to the Board Administrator ten pages of computer screens (many of which are illegible) and some e-mails. The Administrator asked Pinkett several times to provide originals of those documents but she did not. At the continuation of the hearing on April 22, 2009, the Board concluded as a matter of law that Pinkett had failed to meet her burden to prove that she filed a timely appeal from the Step 3 decision. The documents Pinkett provided the Board did not prove that her April 15, 2008 e-mail attaching her appeal was received by the Board Administrator. [1]

In the Delaware courts "the date of filing is the day the item is actually received by the Court's Prothonotary Office and not the date of mailing." *Church v. Ferguson*, Civ.A.No. 02A-10-010, 2003 WL 21537995, at p.1 n.4 (Del. Super., May 29, 2003) (Carpenter, J.). The same is true for an administrative body like the Board. An appeal is not perfected to the Board until the written appeal is actually received by the Board's Administrator.

The Board concludes as a matter of law that Pinkett failed to meet her burden to prove she filed a timely appeal to the Board from the Step 3 decision. If the Board had received her written appeal by April 16, 2009, then she would have filed a timely appeal within the twenty days required by Merit Rule 18.9. Pinkett, however, did not provide the Board with any evidence that the appeal was in fact received by the Board's Administrator.

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[1] The day before the April 22, 2009 hearing, Pinkett left a telephone message for the Board Administrator saying that she needed a continuance because she was caring for a sick child. The Board denied the request for a continuance. The Board did not believe that Pinkett's appearance was necessary because she had failed – despite every opportunity – to provide the Board with evidence that her she filed a timely appeal.

A grievant has several choices to file an appeal with the Board. Hand-delivery during regular business hours is the safest course because the written appeal can be date-stamped. Certified mail return receipt requested is another option but runs the risk of delay in the U.S. Postal Service. The vagaries of the State mail system pose the most risk of delay. Whatever manner of service, "[t]he party choosing to appeal bears the burden to ensure the receipt of the filing and those who wait until the last day foreclose opportunities to correct mistakes." *Gasper Township Board of Trustees v. Preble County Budget Commission*, 893 N.E.2d 136, 142 (Ohio 2008).

ORDER

It is this 21st day of May, 2009, by a unanimous vote of 4–0, the Decision and Order of the Board to deny Pinkett's appeal for lack of jurisdiction.

BRENDA C. PHILLIPS, MERB Chairwoman

JOHN F. SCHMUTZ, MERB Member

MARTHA AUSTIN, MERB Member

JOSEPH D. DILLON, 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's 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.
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> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
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> © 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.
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> (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: May 26, 2009

Distribution:
Original: File
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Agency's Representative
Board Counsel

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