BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

ORIGINAL

BEVERLY A. Y. CARR,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 09-01-438**
v.	)	
	)	
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,	)	**DECISION AND ORDER**
	)	
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 February 25, 2009 at the Margaret M. O'Neill Building, Suite 213, 410 Federal Street, Dover, DE 19901.

BEFORE Brenda J. 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

Beverly A. Y. Carr
Employee/Grievant *pro se*

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

BRIEF SUMMARY OF THE EVIDENCE

Neither party called any witnesses to testify. The Board heard legal argument on the motion of the Department of Health and Social Services ("DHSS") to dismiss the appeal for lack of jurisdiction. DHSS attached to its motion to dismiss four exhibits: Letter dated November 7, 2008 from Roberta Lee to Beverly Carr (Tab A); Letter dated November 24, 2008 from Roberta Lee to Beverly Carr (Tab B); Letter dated December 2, 2008 from Roberta Lee to Beverly Carr (Tab C); and Merit Appeal Form for Employees Dismissed, Demoted or Suspended received by the Board on January 15, 2008.

FINDINGS OF FACT

The jurisdictional facts are not in dispute. The employee/grievant, Beverly A.Y. Carr ("Carr"), works for the Division of Public Health at DHSS. On November 7, 2008, Carr's supervisor, Roberta Lee, suspended Carr for three days without pay for inappropriate conduct. Carr was originally scheduled to serve her suspension on December 1-3, 2008. By letter dated December 2, 2008, Ms. Lee re-scheduled the suspension for December 22-24, 2008 because Carr was on medical leave November 25-December 9, 2008.

Pursuant to Merit Rule 12.9, on January 15, 2009 Carr filed a simultaneous appeal to the Board and Human Resource Management ("HRM") at the Office of Budget and Management. [1]

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[1] During the hearing, the Board *sua sponte* raised the jurisdictional issue whether Carr's timely filed her direct appeal. She received notice of her re-scheduled three-day suspension on December 2, 2008, but did not file her direct appeal until January 15, 2009, beyond the thirty days required by Merit Rule 12.9. Carr explained that her supervisor told her she could not file an appeal until after she served her suspension. Because this issue came up for the first time at the hearing and DHSS did not have an opportunity to present rebuttal

According to Carr, HRM never acknowledged her appeal or scheduled it for a hearing.

CONCLUSIONS OF LAW

Section 5949(a) of Title 29 of the *Delaware Code* provides:

> **An employee in the classified service who has completed a probationary period of service may not, except for cause, be dismissed or demoted or suspended for more than 30 days in one year. Within 30 days after any such dismissal, demotion or suspension, an employee may appeal to the Board for review thereof.**

Section 5931(a) of Title 29 of the *Delaware Code* provides:

> **The rules shall provide for the establishment of a plan for resolving employment grievances and complaints. The final two steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, ...**

Merit Rule 12.9 provides:

> **Employees who have been dismissed, demoted or suspended may file an appeal directly with the Director or the MERB within 30 days of such action. Alternatively, such employees may simultaneously file directly with the Director, who must hear the appeal within 30 days. If the employee is not satisfied with the outcome of the Director's level, then the appeal shall continue at the MERB.**

DHSS contends that Section 5949(a) of the Merit statute only allows for a direct appeal to the Board over a suspension of more than 30 days, or over suspensions within any one year totalling more than 30 days. DHSS construes the word "such" in the second sentence of the statute to modify "suspension," referring back to suspensions of more than 30 days in the first

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testimony, the Board decided not to address the timeliness issue.

sentence. According to the agency's statutory construction, an employee only has a right to directly appeal to the Board a suspension "for more than 30 days in one year." According to the agency's statutory construction, any suspension for less than 30 days must be grieved through the step process under Merit Rule 18, not on direct appeal under Merit Rule 12.9.

DHSS contends that Merit Rule 12.9 – by affording a right of direct appeal to the Board for suspensions less than 30 days -- conflicts with a Merit statute (Section 5949(a)). Merit Rule 1.2 provides: "In the event of conflict with the Delaware Code, the Code governs." DHSS contends that because the Merit statute and the Merit Rule conflict, the statute supersedes the rule and must control.

The Board disagrees. The Board does not believe that the legislature intended Section 5949(a) as the exclusive means for direct appeals to the Board. Section 5931(a) of the Merit statutes authorizes the Board to adopt rules "for resolving employee grievances and complaints. The final 2 steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, ..."

The Merit Rules adopted by the Board provide for two avenues to resolve grievances. One avenue is Merit Rule 18: Step 1, Step 2, Step 3 (the Director or the Director's designee), and then appeal to the Board. Merit Rule 12.9 provides a more expeditious process for certain kinds of serious employment actions affecting the employee's paycheck (dismissal, demotion, or suspension). For those grievances, the employee can file "directly with the Director of the MERB within 30 days of such action."

It is true, as DHSS argues, that the Board is a creature of statute and can only hear grievances in compliance with the statutory law. The Board, however, does not construe Section

5949(a) – as DHSS does – to limit which kinds of grievances the Board can hear on direct appeal. Section 5949(a) only requires that the Board hear certain kinds of grievances on direct appeal, including suspensions of more than 30 days in any one year. The Board believes that another Merit statute, Section 5931(a), authorizes the Board to adopt rules "to resolve employment grievances and complaints" so long as they "provide for hearings before the Director's or the Director's designee and before the Board, respectively, ..." That is exactly what Rule 12.9 accomplishes: the employee can file a direct appeal with the Director and the Board, to be heard by the Director within 30 days and then by the Board.

The Board does not believe that Merit Rule 12.9 conflicts with Section 5949(a) of the Merit statutes, but rather complements the purpose of Section 5949(a) by providing a right of direct appeal for any suspension without pay. Under Section 5931(a) of the Merit statutes, the Board had express authority to adopt Merit Rule 12.9, which does not conflict with the mandate of Section 5949(a). Section 5949(a) only requires that an employee have a right of direct appeal over a suspension of more than 30 days in any one year. It does not limit the Board's authority – under Section 5931(a) – to hear direct a direct appeal from a suspension of lesser duration.

In arriving at this statutory construction, the Board is guided by historical practice in the State. The Board (and its predecessor the State Personnel Commission) have historically heard direct appeals of suspensions less than 30 days. Indeed, the State's official direct appeal form, "Merit Appeal Form for Employee's Dismissed, Demoted or Suspended" does not qualify the term of the suspension or otherwise advise the employee using that form that no direct appeal can lie if the appeal is less than 30 days. It would be manifestly unfair for the State to publish and require employees to use this form, and then argue *ex post facto* that the Board lacked jurisdiction

to hear the grievance when the time for pursuing the grievance under Merit Rule 18 had long since passed.

DHSS also contended (and the dissenting member of the Board agreed) that the Board has the option to remand this case to HRM for a hearing. The majority of the Board, however, concludes as a matter of law that HRM was divested of jurisdiction over Carr's appeal because it did not hear the appeal within thirty days after Carr filed with HRM on January 15, 2008.

Merit Rule 12.9 provides that in the event a dual filing, the Director "must hear the appeal within 30 days." "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 of the exercise of the power, unless by reason of the act to be performed, or the manner of its performance, will have an adverse effect upon some public interest or private right." *Pitts v. White*, 111 A.2d 217, 218-19 (Del. 1955).

The Board interprets the plain language of its own rule ("must") to mandate the Director to hear a direct appeal within thirty days. If the Director does not, then the Board interprets its own rules to divest the Director of jurisdiction to hear the appeal so that the Board may hear it expeditiously. The requirement that the Director hear a direct appeal within thirty days is mandatory rather than directory because a failure to hear a significant employment decision like termination, demotion, or suspension "will have an adverse effect upon some public interest or private right." *Pitts*, 111 A.2d at 219.

DHSS contended that the 30-day time period in Merit Rule 12.9 for the Director to hear a direct appeal does not mean that the Director is divested of jurisdiction if the case is not heard

within thirty days because the rule does not specify the "consequences for the failure" to hear the appeal within thirty days. *Brock v. Pierce County*, 476 U.S. 253, 264 (1986).

The Board disagrees. Rule 12.9 specifies the consequences for the failure of the Director to hear the appeal within thirty days: "If the employee is not satisfied with the outcome at the Director's level, then the appeal shall continue at the MERB." Obviously, an employee is not satisfied with the outcome at the Director's level if her appeal is not heard in a timely fashion. Carr's appeal therefore must continue before the Board, divesting HRM of jurisdiction to hear her appeal.

The Board concludes as a matter of law that HRM was divested of jurisdiction to hear Carr's direct appeal when HRM did not hear the case within 30 days after she filed her appeal on January 15, 2009. The Board concludes as a matter of law that it has jurisdiction to hear Carr's appeal pursuant to Merit Rule 12.9.

DECISION AND ORDER

It is this 5th day of March, 2009, by a majority vote of 3-1, the Decision and Order of the Board to deny the motion by DHSS to dismiss Carr's appeal.

Brenda J. Phillips
Chair

Martha K. Austin
Member

Joseph D. Dillon
Member

John F. Schmutz
Member

I respectfully dissent. I believe the Board should remand the grievance to Human Resource Management for a hearing so that the Board would have the benefit of HRM's ruling on the legal issue of first impression raised by this appeal.

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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> (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.
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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: March 5, 2009

Distribution:
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