BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

REGINA JOHNSON,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 09-02-443**
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") on August 26, 2009 at 9:00 a.m. in the Delaware Room at the Public Archives Building, 121 Duke of York Street, Dover, DE 19901.

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

APPEARANCES

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

Regina Johnson
Employee/Grievant *pro se*

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

Under the Merit Rules, a grievant's obligation to file a timely appeal to the Board "is jurisdictional." *Cunningham v. DHSS*, Civ.A.No. 95A-10-003, 1996 WL 190757, at p.2 (Del. Super., Mar. 27, 1996) (Ridgely, Pres. J.). Where the deadline has "passed, the Board had no jurisdiction to hear Appellant's grievance." *Id.* ""[A]ppellant's pro se status does not excuse a failure to timely comply with the jurisdictional requirements of [the Merit Rules].'" *Id.* (quoting *Gibson v. State*, No. 354, 1994, ORDER (Del. 1994)).

Johnson received a copy of the Step 3 decision on January 21, 2009. Merit Rule 18.9 required her to appeal to the Board within twenty calendar days (by February 10, 2009). She did not file her appeal to the Board until February 18, 2009.

The Board concludes as a matter of law that it does not have jurisdiction to hear Johnson's appeal because she filed her appeal to the Board eight days late.

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.
>
> (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: September 4, 2009

Distribution:
Original: File
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Agency's Representative
Board Counsel

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