

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

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| RONALD S. RINGER, |) | |
| |) | |
| Employee/Grievant, |) | |
| |) | DOCKET No. 09-07-453 |
| v. |) | |
| |) | DECISION AND ORDER |
| DEPARTMENT OF TRANSPORTATION, |) | |
| |) | |
| 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 March 4, 2010 at the Delaware Commission on Veteran’s Affairs, Robbins Building, Suite 100, 802 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Paul R. Houck, and Jacqueline Jenkins, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

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

Ronald S. Ringer
Employee/Grievant *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Transportation

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument on the motion by the Department of Transportation (DelDot) to dismiss the appeal for lack of jurisdiction. The jurisdictional facts are not in dispute.

FINDINGS OF FACT

The employee/grievant, Ronald S. Ringer (Ringer), works for DelDot as an Engineer IV. On March 19, 2009 Ringer applied for a promotion to the position of Civil Engineer Program Manager II – Group Engineer. On March 25, 2009 DelDot notified Ringer that he did not meet the requirements for the position.

On March 25, 2009 Ringer appealed to the Office of Management and Budget (OMB), Human Resource Management (HRM) under Merit Rule 7.7. On March 31, 2009 the HRM Director notified Ringer: “It has been determined that you do not possess the job requirement ‘Experience in staff supervision which includes planning, assigning, reviewing, and evaluating the work of others.’”

Ringer filed a Step 1 grievance with his immediate supervisor on March 30, 2009. According to Ringer he did not receive a Step 1 meeting. DelDot acknowledged it could not find a written Step 1 decision, so the Board will assume that Ringer could proceed to Step 2 under the Merit Rules.

On April 20, 2009 Ringer appealed to the DelDot Secretary. By e-mail dated April 24, 2009 DelDot advised Ringer that “Rob McLeary has been assigned the Hearing Officer for the Step 2 grievance.” DelDot asked Ringer about his availability for a hearing on three dates (April 30, May 1 and 4, 2009).

Despite several further attempts to schedule a Step 2 hearing Ringer refused to commit to any date because he objected to more than one management official attending the hearing. On May 26,

2009 Ringer sent an e-mail to the OMB Director requesting a Step 3 hearing. OMB did not accept the appeal and asked DelDot and Ringer to cooperate in scheduling a Step 2 hearing before proceeding to Step 3.

The Step 2 hearing officer gave Ringer four more dates in June 2009 for a hearing but Ringer refused to commit unless he and only one management official (the hearing officer) attended the meeting. The hearing officer scheduled the Step 2 hearing for July 16, 2009.

On July 24, 2009 the hearing officer issued his written decision:

You did not show up for your Step 2 Grievance Meeting scheduled for 9:00 a.m. on July 16, 2009 in the Magnolia Conference Room of the DelDot Administration Building. You were notified of this meeting via 4 different methods: First Class U.S. Mail, Certified U.S. Mail Return Receipt Requested, email, and hand delivery by Dennis O'Shea, Assistant Director of Design.

The July 16th meeting date was the fifth attempt to schedule your Step 2 Grievance meeting. . . . As of today, I believe I have made every reasonable attempt to schedule the Step 2 Grievance meeting you requested. For these reasons I can only conclude you have abandoned your grievance, and it is dismissed.

On July 31, 2009 Ringer appealed to the Board.

CONCLUSIONS OF LAW

Merit Rule 18.7 provides:

Step 2: Any appeal shall be filed in writing to the top agency personnel official or representative within 7 calendar days of receipt of the reply. The following shall occur within 30 calendar days of the receipt of the appeal: the designated management official and

the employee shall meet and discuss the grievance, and the management official shall issue a written response.

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 . . . a written appeal to the Merit Employee Relations Board (MERB) for final disposition according to 29 Del. C. 5931 and MERB procedures.

Ringer argued that Merit Rule 18.7 limits the persons who can attend a Step 2 meeting to one designated management official and the employee. According to Ringer, because the Step 2 hearing officer would not agree to limit the meeting to those two persons, Ringer did not receive a timely Step 2 meeting and the Merit Rules allowed him to bypass Step 2.

The Board disagrees for two reasons. First, the Board concludes as a matter of law that Merit Rule 18.7 only prescribes the persons who must attend a Step 2 meeting but not to the exclusion of others. Second, even if Ringer's interpretation of Merit Rule 18.7 were correct, he could only move to the next step of the grievance process (Step 3), not appeal to the Board.

Merit Rule 18.9 provides for an appeal to the Board "within 20 calendar days of receipt of the Step 3 decision." Since Ringer did not receive a Step 3 decision, he cannot appeal to the Board. *See Pinkett v. DHSS*, MERB Docket No. 08-02-415 (May 21, 2009).

In *Danneman v. DHSS*, MERB Docket No. 09-04-446 (Sept. 3, 2009), HRM tried to re-schedule a Step 3 hearing after the Labor Relations staff member assigned to the case unexpectedly could not attend on the first hearing date. The grievant did not cooperate with the hearing officer in scheduling a new hearing date and, after 45 days passed, appealed to the Board.

The grievant argued that the Board had jurisdiction to hear her appeal because the Step 3 hearing officer did not issue a written decision within 45 days as required by Merit Rule 18.8. The

Board concluded “as a matter of law that it does not have jurisdiction to hear Danneman’s appeal because she has not yet received a Step 3 decision.”

Merit Rule 18.4 provides: “Failure of the employing agency to comply with time limits shall automatically move the grievance to the next step unless the parties have a written agreement to delay, or grievants have opposed in writing moving the grievance automatically to the next step.”

The Board does not believe that a grievant can invoke the “green light” provisions of Merit Rule 18.4 to proceed to the next step by willfully refusing to cooperate in the scheduling of a timely Step meeting like Ringer did. *See Danneman v. DHSS, supra.* The Board does not believe that Ringer could rely on his own interpretation of Merit Rule 18.7 to refuse to attend his Step 2 meeting. Ringer’s remedy was to attend the Step 2 meeting, make his objection for the record, and then, if dissatisfied with the Step 2 decision, file a timely Step 3 appeal to the Director of OMB.

The Board concludes as a matter of law that it does not have jurisdiction to hear Ringer’s appeal.¹

¹ DelDot also argued that Ringer did not have standing to appeal to the Board because under Merit Rule 7.7 the decision by the HRM Director that he did not meet the requirements for promotion “shall be final.” The Board does not have to address this argument because the Board has decided on other grounds that it does not have jurisdiction to hear Ringer’s appeal.

DECISION AND ORDER

It is this **11th** day of **March**, 2010, by a unanimous vote of 4-0, the Decision and Order of the Board to deny Ringer's appeal.



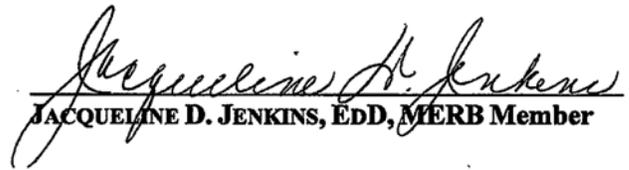
MARTHA AUSTIN, MERB Member



PAUL R. HOUCK, MERB Member



JOHN F. SCHMUTZ, MERB Member



JACQUELINE D. JENKINS, EDD, 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.
- (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: March 11, 2010

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

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