

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

PHYLLIS G. STALLARD,)	
)	
Employee/Grievant,)	
)	DOCKET No. 10-03-472
v.)	
)	DECISION AND ORDER
DEPARTMENT OF HEALTH AND SOCIAL)	
SERVICES,)	
)	
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 December 2, 2010 at the Delaware Commission of Veterans Affairs, Robbins Building, 802 Silver Lake Boulevard, Suite 100 Dover, DE 19904.

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

APPEARANCES

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

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

BRIEF SUMMARY OF THE EVIDENCE

The Board did not hear any witness testimony but heard legal argument by the Department of Health and Social Services (DHSS) on its motion to dismiss this appeal for lack of jurisdiction. DHSS attached two exhibits to its motion: Step Three Grievance Decision dated May 26, 2010 (Exh. A); and Merit Appeal Form for Employees Dismissed, Demoted or Suspended (Exh. B).

The employee/grievant, Phyllis G. Stallard (Stallard), did not file an opposition to the motion to dismiss and did not appear for the hearing.

FINDINGS OF FACT

DHSS terminated Stallard, a probationary employee, on March 23, 2010 for unsatisfactory job performance and poor attendance as a Nursing Supervisor.

On March 28, 2010, Stallard filed a direct appeal to the Board and Human Resource Management (HRM). Stallard did not allege discrimination in the Merit Appeal Form. In the Step Three Grievance Decision, the Hearing Officer noted: “The Grievant has not alleged she was dismissed because of discrimination.”

CONCLUSIONS OF LAW

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

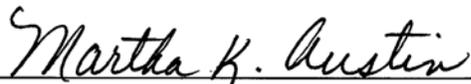
Merit Rule 9.2 provides: “Employees may be dismissed at any time during the initial probationary period. Except where a violation of Chapter 2 is alleged, probationary employees may not appeal the decision.”

“Under the Merit System, the employing agency may dismiss a probationary employee at any time during the probationary period for reasons of unsatisfactory service or conduct, and that determination is final and conclusive.” *Kopicko v. Department of Services for Children, Youth & Their Families*, 805 A.2d 877, 878 (Del. 2002) (footnotes omitted). “However, where the employee alleges the termination was not due to unsatisfactory service or conduct, but rather to discrimination on the basis of non-merit factors, the termination is appealable through the grievance process under [Merit Rule 2.1].” *Id.*

Stallard does not claim that DHSS discriminated against her on the basis of non-merit factors when the agency terminated her probationary employment. Accordingly, she cannot appeal her termination to the Board.

DECISION AND ORDER

It is this 6th day of **December**, 2010, by a unanimous vote of 5-0, the Decision and Order of the Board to dismiss Stallard’s appeal for lack of jurisdiction.



MARTHA K. AUSTIN, MERB Chairwoman



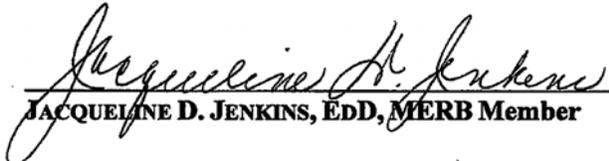
VICTORIA D. CAIRNS, MERB Member



JOHN F. SCHMUTZ, MERB Member



PAUL R. HOUCK, 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: **December 6**, 2010

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

OMB/HRM