# BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

# OF THE STATE OF DELAWARE

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| **JUDY JARDINE**, | ) | |
| | ) | |
| Employee/Grievant, | ) | |
| | ) | **DOCKET No. 11-08-517** |
| v. | ) | |
| | ) | |
| **FAMILY COURT OF THE STATE OF DELAWARE**, | ) | **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 January 25, 2012 at the Public Service Commission, Cannon Building, 861 Silverlake Boulevard, Dover, DE 19904.

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

**APPEARANCES**

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

Deborah L. Murray-Sheppard
Board Administrator

Roy S. Shiels, Esquire
on behalf of Employee/Grievant
Judy Jardine

Kevin R. Slattery
Deputy Attorney General
on behalf of the Family Court of
the State of Delaware

## BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument from the parties on the motion by the Family Court of the State of Delaware (Family Court) to dismiss the appeal of the employee/grievant, Judy Jardine (Jardine), for lack of jurisdiction. The Family Court attached to its motion as Exhibit "J" an Agreement between the State of Delaware, Delaware Family Court and the United Food and Commercial Workers Union, Local 27 (for the period June 5, 2007 – June 4, 2010) (the Agreement).

## FINDINGS OF FACT

The jurisdictional facts are not in dispute.

The Family Court hired Jardine on March 15, 2010 as a probationary mediator. The Family Court terminated Jardine on October 15, 2010 before she completed her nine-month probationary period.

Article 2.3 of the Agreement provides that it "shall apply only to the following employees: . . . . Mediation/Arbitration Officers, . . . ." Jardine does not dispute that as a Family Court mediator she was included in the collective bargaining unit.

Article 5.2 of the Agreement provides: "Probationary employees shall not pay dues/service fees until completion of their probationary period. Probationary employees may be terminated with or without cause, without recourse through the Union. The Union shall have no duty to represent a probationary employee."

## CONCLUSIONS OF LAW

Merit Rule 1.3 provides:

**If a subject is covered in whole or in part**

> **by a collective bargaining agreement, 29 Del. C. §5938(d) provides that the Merit Rules shall not apply to such subject matters. . . . Collective bargaining agreements may govern matters of bargaining unit-specific pay and benefits, probation, . . . .**

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.**

Merit Rule 2.1 provides:

> **Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factor is prohibited.**

The Board concludes as a matter of law that it does not have jurisdiction to hear Jardine's appeal because her termination was a subject covered in whole or in part by the collective bargaining agreement.

Jardine argued that the subject matter of her grievance – her termination – is not covered in whole or in part by the Agreement because the Agreement does not afford her a grievance process. According to Jardine, to "cover" must mean to supplant the Merit Rule grievance process with a contractual grievance process.

The Board does not agree. The Agreement covers Jardine's termination because it provides that probationary employees can be terminated with or without cause. Just because Jardine cannot grieve under the Agreement does not mean that she must be able to grieve under the Merit Rules.

Jardine relies on *State Personnel Commission v. Howard*, 420 A.2d 139 (Del. 1980), but that decision is inapposite. In *Howard* two State employees applied for the position of Counselor Supervisor at Sussex Correctional Institution: Paul Howard, a Counselor within the collective bargaining unit; and James Caudill, a Counselor Supervisor outside the collective bargaining unit. Although both applicants were qualified, the Department of Correction selected Howard because it believed the collective bargaining agreement required the Department to give preference to Howard as a member of the collective bargaining unit.

The Delaware Supreme Court affirmed the decision of the State Personnel Commission in favor of Caudill. "[The collective bargaining agreement] certainly is not intended to extend to a case of an employee like Mr. Caudill who was not a member of the bargaining unit and consequently had no chance to assent, or even participate by discussion and voting, in a contract between the Department of Correction and Local 1726." 420 A.2d at 142. "[T]he collective bargaining agreement could not affect the transfer rights of an employee not within a bargaining unit" and "the Merit Rules govern such an interdepartmental situation." *Id.* at 140 (footnote omitted).

Unlike James Caudill, Jardine was a member of the collective bargaining unit. The collective bargaining agreement provided that as a probationary employee she could be terminated with or without cause. The Agreement governs her termination, not the Merit Rules.

The Board concludes as a matter of law that it does not have jurisdiction to hear Johnson's appeal because her termination was covered in whole or in part by the collective bargaining agreement. The Board therefore does not have to address the Family Court's other grounds for dismissal. [1]

[1] The Board notes that under Merit Rule 9.2 Jardine's only right of appeal to the Board was

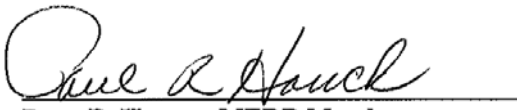
## DECISION AND ORDER

It is this **8th** day of February, 2012, by a unanimous vote of 5-0, the Decision and Order of the Board to dismiss Jardine's appeal for lack of jurisdiction.

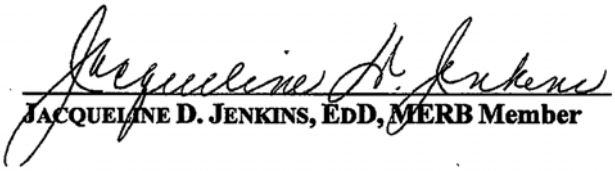
**MARTHA K. AUSTIN, MERB Chairwoman**

**VICTORIA D. CAIRNS, MERB Member**

**JOHN F. SCHMUTZ, MERB Member**



**PAUL R. HOUCK, MERB Member**



**JACQUELINE D. JENKINS, EDD, MERB Member**

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for discrimination because she was a probationary employee. Jardine does not allege discrimination. She cites Merit Rule 5.7 alleging that the Family Court violated her rights under the Family Medical Leave Act (FMLA). The Board does not believe that Merit Rule 5.7 expands on the narrow grounds for appeal by a probationary employee under Merit Rule 9.2.

## 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: **February 8, 2012**

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Board Counsel
HRM/OMB

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