

CUNNINGHAM V. DEPARTMENT OF HEALTH & SOCIAL SERVICES

Superior Court of Delaware, Kent

February 15, 1996, Submitted ; March 27, 1996, Decided

C.A. No. 95A-10-003 HDR

Upon Appellee's Motion to Affirm GRANTED

Robert D. Cunningham, Jr., pro se.

Loretta G. LeBar, Esq., Department of Justice, Wilmington, Delaware, Attorney for Appellee.

RIDGELY, President Judge

ORDER

On this 27th day of March, 1996, it appears:

(1) The State of Delaware, Department of Health and Social Services ("DHSS") moves pursuant to Superior Court Civil Rule 72.1 to affirm the decision by the Merit Employee Relations Board ("Board")¹ which dismissed as untimely an appeal filed by Robert D. Cunningham, Jr. ("Appellant").

(2) Appellant claimed he had been discriminated against by DHSS in its hiring practices. The single claim which faced the Board at the time of Appellant's hearing was whether Appellant was discriminated against when DHSS filled the position of pediatrician in the Child Watch/Promising Futures program.

(3) Following a hearing before the Board on DHSS's motion to dismiss, the Board made the following findings of fact:

1. Robert D. Cunningham, Jr. (grievant) is not a state employee, nor did he apply for the position of Pediatrician in the Child Watch/Promising Futures program, the position that is the subject of his grievance, as alleged in the Motion to Dismiss filed by the Department of Health and Social Services (DHSS) and admitted by the grievant in his oral response to the motion.
2. The position was posted as required by state law and the applicable Merit Rules Chapter 7, as evidenced by the affidavit filed by DHSS and un rebutted by the grievant.

¹ The Board was previously known as the State Personnel Commission

3. A job award was made from a list of candidates that applies [sic] and were certified as minimally qualified, as evidenced by the affidavit filed by DHSS and unrebutted by the grievant.
4. No violation of Merit Rule 7.0100 is found in the recruitment, application or selection process.
5. With regard to the alleged violation of Merit Rule 21.0112, the rule requires that said appeal be made within ten working days of the date of the action being appealed. In his oral response to the motion, the grievant admitted that he found out on January 24, 1995 that a pediatrician had been selected, but he did not file the grievance until April 7, 1995 (date of receipt in State Personnel Office). Said filing was approximately 50 days after the deadline imposed by Rule 21.0112. Grievant acknowledged to the Board that he took a different course of action prior to filing his grievance.

Record of the Merit Employee Relations Board Docket # 95-03-18 at 100 (hereafter cited as "Record at __").

Appellant's Opening Brief in Support of his Appeal claims error by the Board in refusing to grant Appellant a full hearing, in finding the Appellant was not an applicant, in finding Appellant's grievance was not filed in a timely manner, in not replacing DHSS counsel due to conflict, in finding the pediatrician position was properly posted, in not making the current merit rules easily available to applicants, and by refusing to subpoena certain individuals for the hearing.

(4) The Superior Court may only grant a motion to affirm if "it is manifest on the face of appellant's brief that the appeal is without merit because . . . the issue on appeal . . . is factual, and clearly there is substantial evidence to support the findings of fact below . . ." *Super. Ct. Civ. R. 72.1(b)(iii)*; *Ramsey v. Whiteley*, Del. Super., C.A. No. 90A-DE-5, 1992 Del. Super. LEXIS 7, Steele, J. (Jan. 7, 1992) (Order). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994); *Battista v. Chrysler Corp.*, Del. Supr., 517 A.2d 295, 297 (1986), *appeal dismissed*, Del. Supr., 515 A.2d 397 (1986).

(5) Initially, this Court will address the timeliness issue concerning the Appellant's appeal for discrimination to the Board. As the Delaware Supreme Court had stated:

Although the question we now consider concerns the timeliness of an appeal to a quasi-judicial body rather than a court, we believe the same rules must apply. The State Personnel Commission [now Board] is a creature of statute. 29 *Del. C. Ch. 59* (1966). Its power and authority are derived exclusively from the statute, and its power therefore extends only to those cases which are properly before it in compliance with the statutory law.

Maxwell v. Vetter, Del. Supr., 311 A.2d 864, 865 (1973). The procedure under which to file a discrimination grievance is set forth clearly in Merit Rules 21.0112 and 20.0300, et seq.²

² Merit Rule 21.0112 states in pertinent part:

Any applicant or employee who has reason to believe that he/she has been discriminated against because of an interpretation or application of the Merit Rules by the Director or any procedures or regulations established by the Director for the purpose of implementing the Merit Rules may appeal directly to the State Personnel Commission within ten (10) working days of the date of the action being appealed. Any

Those rules provide ten working days for a grievant to file his/her appeal. The ten-working-day period begins to run either at the time the action being appealed occurs (Rule 21.0112) or in any event no later than the point at which the grievant could reasonably be expected to have knowledge of the circumstances leading to the grievance (Rule 20.0310).

In this case, by Appellant's own admission, he was aware the position had been filled by January 24, 1995. Further, Appellant's written grievance³ was filed with the Board on March 29, 1995 (received on April 7). At the hearing before the Board, Appellant stated that after learning the job was filled, he did not file a grievance immediately because he had a meeting scheduled with DHSS members in February and he felt he would simply raise the issues there instead. (Record at 87). Consequently, the record provides substantial evidence to support the Board's finding that Appellant's grievance was filed untimely. The date of the action being appealed notwithstanding, Appellant knew of the circumstances leading to his grievance no later than January 24, 1995. His April 7, 1995 filing is well beyond the ten day deadline.

(6) As a result, the dismissal must be affirmed. The ten day filing period is jurisdictional. That deadline having passed, the Board had no jurisdiction to hear Appellant's grievance.⁴ *See Riggs v. Riggs*, Del. Supr., 539 A.2d 163 (1988) (jurisdictional defect may not be excused absent unusual circumstances which are not attributable to the appellant); *Bailey v. McClough*, Del. Supr., No. 77, 1995, 1995 Del. LEXIS 181, Holland, J. (1995) (Order); *Gibson v. State*, Del. Supr., No. 354, 1994, 1994 Del. LEXIS 342, Veasey, C.J. (1994) (Order) ("appellant's pro se status does not excuse a failure to strictly comply [sic] with the jurisdictional requirements of Supreme Court Rule 6"). Hence, Appellant's numerous other claims of error are rendered moot.

(7) For the reasons discussed above, having found that the Board's factual findings are supported by substantial evidence, DHSS's Motion to Affirm is GRANTED.

Henry duPont Ridgely
President Judge

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employee who has reason to believe he/she has been discriminated against by action within an agency should initiate a grievance in accordance with the grievance procedure (20.02000). (Emphasis added).

³ Pursuant to Merit Rule 20.0310, a proper grievance must be in writing setting forth the details of the grievance and the relief sought.

⁴ Appellants sets forth no circumstances, such as court personnel error or opponent misconduct, due to which an extension of the deadline should be granted. *Cf. Shockley v. Dyer*, Del.Super., 456 A.2d 798 (1983). (statute of limitations suspended where there was fraudulent concealment of facts underlying a medical malpractice action); *Bey v. State*, Del.Super., 402 A.2d 362 (1979) (defendant prevented from perfecting his appeal by both action and inaction of state agencies); *Pettucelli v. McFarland*, Del.Super., 1989 WL 4170, Taylor, J. (March 20, 1989)(where defendant relied on an erroneous notification set to court personnel containing the wrong date for appeal).