

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

AMBER N. MOORE,)	
)	
Employee/Grievant,)	
)	DOCKET No. 08-05-419
v.)	
)	
DEPARTMENT OF NATURAL RESOURCES)	
AND ENVIRONMENTAL CONTROL,)	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 9:10 a.m. on June 18, 2009 at the Margaret M. O'Neill Building, 410 Federal Street, Suite 213, Dover, DE 19901.

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

APPEARANCES

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

John M. LaRosa, Esquire
on behalf of Amber N. Moore

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Natural Resources and
Environmental Control

BRIEF SUMMARY OF THE EVIDENCE

The Board did not take any witness testimony but heard legal argument from counsel on the motion of the Department of Natural Resources and Environmental Control ("DNREC") to dismiss the appeal of the employee/grievant, Amber N. Moore ("Moore"), for lack of jurisdiction.

The Board admitted into evidence without objection two exhibits offered by Moore: e-mail string (last entry April 9, 2008 at 3:04 p.m.) from Mary B. Parker to Moore; and e-mail string (last entry April 18, 2008 at 10:29 a.m.) from Mary B. Parker to Moore.

FINDINGS OF FACT

Moore works for DNREC as an Environmental Scientist IV. In October 2007, DNREC posted the position of Engineer IV and Moore applied for the position. An interview panel interviewed Moore and two other candidates and listed Moore as the most qualified.

A subject matter expert, however, questioned Moore's qualifications for the position of Engineer IV. After reviewing Moore's qualifications, DNREC determined that she was not minimally qualified for the position. DNREC selected the interview panel's second choice, Joanna French ("French"), for the Engineer IV position.

On December 19, 2007, Moore grieved her non-selection. A Step 2 decision dated January 28, 2008 recommended that DNREC award Moore the position of Engineer IV. DNREC offered and Moore accepted that position on February 4, 2008.

On February 15, 2008, French grieved claiming that Moore was not minimally qualified for the position. As a result of French's grievance, DNREC determined that Moore was not minimally qualified and notified Moore by e-mail dated April 9, 2008 that she would be removed

from the position of Engineer IV effective April 13, 2008.

By letter dated April 10, 2008 to the Secretary of DNREC, Moore's attorney protested the rescission of her promotion. By letter dated April 16, 2008, DNREC's legal counsel responded on behalf of the Secretary advising Moore's attorney "that effective April 13, 2008, Ms. Moore has been returned to her former position and pay rate as an Environmental Scientist IV."

By letter dated May 5, 2008 Moore appealed to the Board under Merit Rule 18.9.

CONCLUSIONS OF LAW

Merit Rule 18.6 requires grievants to file a Step 1 grievance "within 14 calendar days of the date of the grievance matter or the date they could have reasonably be expected to have knowledge of the grievance matter."

Moore's grievance is over DNREC's rescission of her promotion to Engineer IV effective April 13, 2008. Merit Rule 18.6 required her to file a Step 1 grievance within fourteen days (by April 27, 2008). She did not.

Moore argued that after prevailing on her initial grievance at Step 2, "[t]he subsequent decision to remove her was reasonably construed as a Step 3 decision because she already won at Step 2 and the Department Director [Kevin Donnelly, Director of Water Resources] actively participated in the adverse decision as early as December 7, 2007." Moore contends that she filed a timely appeal to the Board because: (1) the April 16, 2008 letter from DNREC's legal counsel on behalf of the Secretary was a *de facto* Step 3 decision denying her grievance; and (2) she filed her appeal to the Board on May 5, 2008 within twenty days as required by Merit Rule 18.9.

The problem with Moore's argument is that under the Merit Rules a Step 3 appeal is to the Office of Management and Budget ("OMB"), not to the employing agency. Merit Rule 18.8 provides for a Step 3 appeal "to the Director within 14 calendar days of receipt of the Step 2 reply." The "Director" referred to in Merit Rule 18.8 is not a Division Director of the employing agency, but rather the OMB Director (or her designee). *See* Merit Rule 19.0 (defining "Director" as "the Director of the Office of Management and Budget, appointed pursuant to 29 Del. C. Chapter 59, or designee").

Merit Rule 18.2 defines a "grievance" as "an employee complaint about the application of the Rules or the Merit System law (29 Del. C. Chapter 59), which remains unresolved after informal efforts at resolution have been attempted." Moore's grievance of her non-selection for the Engineer IV position was resolved at the Step 2 level. After Moore's successful Step 2 grievance, that grievance process was over.

When DNREC rescinded her promotion two months later, she could not proceed to Step 3, even if she had filed the appeal with OMB. Moore's remedy was to start a new grievance process at Step 1. The Board does not agree with Moore that her initial non-selection and the subsequent rescission of her promotion were one and the same grievance. The Board concludes as a matter of law that they were separate and distinct grievances (albeit with common issues) which she had to grieve through the normal step process (Step 1, Step 2, Step 3) before appealing to the Board.

Moore also argued that Dana Jefferson at OMB was involved in the decision to rescind Moore's promotion and that satisfied the Step 3 requirement. The e-mails submitted by Moore do not support this argument. The e-mails show that DNREC was considering whether to waive

Steps 1 and 2 as authorized by the Merit Rules to allow Moore to proceed directly to Step 3 at OMB. There is no evidence that DNREC in fact agreed to do so. Moore acknowledged that OMB did not conduct a hearing and issue a written decision regarding Moore's grievance over the rescission of her promotion before she appealed to the Board.

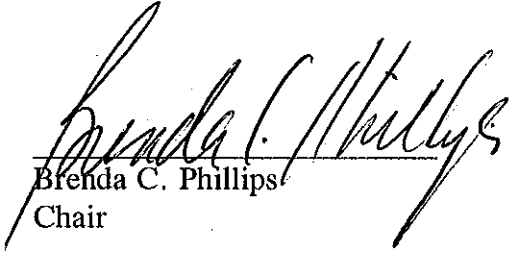
Merit Rule 18.4 provides: "Failure of the grievant to comply with time limits shall void the grievance." Under the Merit Rules, a grievant's obligation to file a timely appeal at each step of the grievance process "is jurisdictional." *Cunningham v. Department of Health & Social Services*, Civ.A. No. 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.*

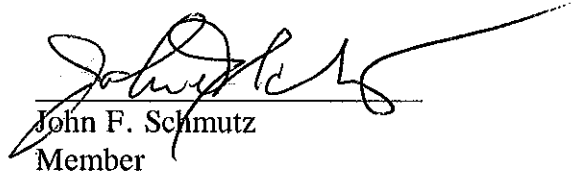
The Board concludes as a matter of law that it does not have jurisdiction to hear Moore's grievance over the rescission of her promotion to Engineer IV. ¹

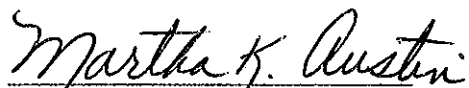
¹ Moore did not claim that Merit Rule 12.9 authorized her to appeal directly to the Board. The Board notes, however, that "when an employer rescinds a promotion because the promotional process was flawed, or the person was not qualified for the promotion, the employment action does not amount to a demotion" which a grievant can appeal directly to the Board. *Green v. Department of Services for Children, Youth & Their Families*, MERB Docket No. 07-03-385, at p. 4 (May 15, 2008).

ORDER

It is this 24th day of June, 2009, by a unanimous vote of 4-0, the Decision and Order of the Board to deny the Moore's appeal for lack of jurisdiction.


Brenda C. Phillips
Chair


John F. Schmutz
Member


Martha K. Austin
Member

Joseph D. Dillon
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 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: June 26, 2009 dlu

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel