

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

EVELYN PINCKNEY,)	
)	
Employee/Grievant,)	
)	DOCKET No. 15-09-633
v.)	
)	DECISION AND ORDER OF
DEPARTMENT OF TRANSPORTATION,)	DISMISSAL
)	
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 5, 2017 at the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Suite 100, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair; Paul R. Houck, Jacqueline D. Jenkins, EdD, and Sheldon N. Sandler, Esq., Members; a quorum of the Board pursuant to 29 *Del. C.* §5908(a).

APPEARANCES

Rae Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

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

BRIEF SUMMARY OF THE EVIDENCE

The Board did not hear any witness testimony but heard legal argument by the Department of Transportation (DOT) on its motion to dismiss this appeal for lack of jurisdiction. The employee/grievant, Evelyn Pinckney (Pinckney), did not file any opposition to the motion to dismiss and did not appear for the hearing.

FINDINGS OF FACT¹

Pinckney is employed by DOT, Division of Motor Vehicles and assigned to the Biddle Toll Plaza as a Toll Sergeant. On or about March 19, 2015, Pinckney was issued a proposed suspension for workplace conduct violations involving a subordinate employee. Pinckney attended a pre-decision meeting on May 22, 2015; on June 12, 2015, she was issued a thirty (30) day suspension.

Pinckney filed a grievance pursuant to Merit Rule 18.9 on June 22, 2015. She waived her Step 1 hearing and a Step 2 grievance hearing was conducted on August 3, 2015, after which the hearing officer reduced the suspension to ten (10) days. The decision was mailed to Pinckney on August 14, 2015.

On September 8, 2015, Pinckney filed a “dual appeal” with the Merit Employee Relations Board (MERB) and the Director of Human Resource Management (HRM) pursuant to Merit Rule 12.9. Her appeal was docketed with MERB, which also forwarded it to HRM. MERB requested HRM to notify it when the hearing was conducted and/or a decision was issued in order that MERB might follow up with the grievant in order to determine whether the grievant was “satisfied with

¹ The facts set forth herein are derived from the Motion to Dismiss filed by DOT on October 27, 2016, and the Board’s records.

the decision at the Director's level.”

The appeal hearing was not immediately scheduled by HRM because Pinckney was out of work for an extended period of time on medical leave shortly after she filed the dual appeal.

By email dated July 6, 2016, HRM advised MERB that Pinckney had returned to work on April 18, 2016. Despite repeated efforts to schedule the Step 3 hearing on her grievance, HRM had received no response from Pinckney. HRM sent an email to Pinckney on July 6, 2016 notifying her that because no response had been received by the deadline HRM had set, HRM considered the grievance resolved at Step 2.

By letter dated September 29, 2016, MERB notified Pinckney that it had been advised that HRM had dismissed her Step 3 grievance and notified her that, pursuant to MR 12.9, it was her responsibility to inform MERB directly if she wished to have her grievance heard by MERB. By email dated October 14, 2016, Pinckney advised MERB she would like to continue her grievance.

The MERB hearing was scheduled for January 5, 2017. The parties were notified by letter dated October 25, 2016, a copy of which was sent to Pinckney both by electronic mail at her State email address and by certified U.S. mail. Receipt of this letter was acknowledged by signature of an individual at Pinckney's home address.

On October 27, 2016, DOT filed a motion to dismiss the grievance asserting MERB lacks jurisdiction to consider it. DOT's motion was forwarded to Pinckney by both electronic mail at her State email address and by certified U.S. mail. In the letter, Pinckney was advised both that she could provide a written response to the motion on or before November 21, 2016 and that the motion would be considered by the Board at the January 5, 2017 meeting. Pinckney did not respond by filing responsive argument and she did not appear for the January 5, 2017 hearing.

CONCLUSIONS OF LAW

Merit Rule 18, The Grievance Procedure, states in relevant part:

- 18.6 Step 1:** Grievants shall file, within 14 calendar days of the date of the grievance matter or the date they could reasonably be expected to have knowledge of the grievance matter, a written grievance which details the complaint and relief sought with their immediate supervisor. The following shall occur within 14 calendar days of receipt of the grievance: the parties shall meet and discuss the grievance and the Step 1 supervisor shall issue a written reply.
- 18.7 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 designated management official shall issue a written response.
- 18.8 Step 3:** Any appeal shall be filed in writing to the Director within 14 calendar days of receipt of the Step 2 reply. This appeal shall include copies of the written grievance and responses from the previous steps. The parties and the Director (or designee) may agree to meet and attempt an informal resolution of the grievance, and/or the Director (or designee) shall hear the grievance and issue a written decision with 45 calendar days of the appeal's receipt. The Step 3 decision is final and binding upon agency management.
- 18.9** If the grievance has not been settled, the grievant may present, within 20 calendar days of receipt of the Step 3 decision or of the date of the informal meeting, whichever is later, a written appeal to the Merit Employee Relations Board (MERB) for final disposition according to 29 Del.C. §5931 and MERB procedures.

Merit Rule 12.9 states:

Employees who have been dismissed, demoted or suspended may file an appeal directly with the Director or the MERB

within 30 days of such action. Alternatively, such employees may simultaneously file directly with the Director, who must hear the appeal within 30 days. If the employee is not satisfied with the outcome at the Director's level, then the appeal shall continue at the MERB.

Pinckney was notified of her suspension on June 12, 2015. She filed a timely grievance pursuant to Merit Rule 18.6 which was received by DOT on June 22, 2015. Her grievance was subsequently heard at Step 2 and a decision issued on August 14, 2015. Merit Rule 18.8 requires that any appeal of a Step 2 decision must be filed in writing to the Director within fourteen (14) calendar days of receipt of that decision. Such an appeal should have been timely filed on or before August 31, 2015.

On September 8, 2015, Pinckney filed a “dual appeal” of her suspension under Merit Rule 12.9, which requires that a dual appeal must be filed within thirty (30) days of notification of suspension. She was notified of her suspension on June 12, 2015; consequently, a timely “dual appeal” should have been filed by July 13, 2015.

The Board concludes as a matter of law that it does not have jurisdiction to hear Pinckney’s appeal because she failed to exhaust the grievance procedure at Step 3 by failing to file a timely appeal of the Step 2 decision pursuant to Merit Rule 18.8. Further, the dual appeal which was filed on September 8, 2015 was also untimely.

DECISION AND ORDER

It is this **31st** day of **January** 2017, by a unanimous vote of 4-0, the Decision and Order of the Board to dismiss Pinckney's appeal for lack of jurisdiction.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER