

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

LAURA A. KEELEY,	:	
	:	
Grievant,	:	<u>MERB Docket 17-06-672</u>
	:	
v.	:	
	:	BOARD DECISION DENYING
DEPARTMENT OF TRANSPORTATION,	:	AGENCY MOTION FOR
	:	RECONSIDERATION
Employer.	:	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (“Board”) at 9:00 a.m. on June 7, 2018 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, and Victoria D. Cairns, 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

Laura Keeley
Employee/Grievant, *pro se*

Bradley Eaby
Deputy Attorney General
on behalf of the Department
of Transportation

On March 27, 2018, the Board issued a Decision and Order in this case directing the agency, the Department of Transportation, to pay the grievant, Laura Keeley, “an advance starting salary of 85% of midpoint of PG 17, retroactive to thirty (30) calendar days prior to the filing date of the grievance as a lump sum within ten (10) business days after [the agency] receives a copy of the Board’s Decision and Order.”¹

On April 12, 2018, the agency filed a motion for reconsideration and stay. On April 19, 2018, the grievant filed her response to the agency’s motion.

After a hearing on June 7, 2018, the Board unanimously denied the agency’s motion for reconsideration and for a stay.

The agency made two arguments, either: (1) to vacate Board’s initial Order for lack of subject matter jurisdiction; or (2) to modify the Board’s initial Order.

The agency contends that the Board lacks subject matter jurisdiction over the grievance and must dismiss the grievance in accordance with the Superior Court’s decision in *Chapman v. DHSS*.²

In *Chapman*, the Superior Court held that the Board lacked jurisdiction over an appeal *by the agency* when the *agency* fails to file a timely appeal from a Step 1 decision in favor of the grievant. “Since the agency failed to timely respond as required by the MERB rules, it lost the

¹ *Laura A. Keeley v. Department of Transportation*, MERB 17-06-672 (March 27, 2018), p. 10.

² C.A. No. 08A-04-009-WCC (Del. Super., July 31, 2009), 2009 WL 2366080. At the hearing on March 1, 2018, the agency’s counsel interrupted the Board during its off-the-record deliberations to argue that the Board must dismiss the grievance under *Chapman* for lack of subject matter jurisdiction. In its motion, the Board stated that it was only dismissing the grievance because “the Board finds, as a matter of fact and law, that there was a Step 1 grievance in the Grievant’s favor and the Agency did not file a timely appeal to Step 2 and, therefore, the grievance process stopped there in the Grievant’s favor.” Tr. at pp. 59-60. In its initial Decision, the Board stated that it only lacked subject matter jurisdiction “to decide the merits of Keeley’s advance starting salary claim” but had jurisdiction to review the grievance process and award her relief to make her whole. To clear up any confusion, the Board modifies its initial Decision to grant the grievance.

ability to appeal to the Board and the Court finds that Board was without jurisdiction to hear the appeal.”³

In *Chapman*, the Board ruled in favor of *the agency*, which the Superior Court held was reversible error.⁴ In contrast, in this case the Board ruled in favor of *the grievant*. She timely pursued her grievance at each step of the process under Merit Rule 18.0. The grievant had no choice but to continue with the grievance process even after the agency failed to file a timely appeal from the Step 1 decision, otherwise she could never come before the Board to seek relief.⁵

The Board has statutory authority “to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules.” 29 Del.C. §5931(a). The agency misapplied Merit Rule 18.7 by not filing a timely appeal from the Step 1 decision within seven days. Under *Chapman*, “the agency’s failure to follow the time limits set forth in the MERB rules bound them to the decision made by the [grievant’s] immediate supervisor under Step 1 of the grievance procedures.”⁶

The Delaware Administrative Procedures Act provides: “Every final order may be

³ Memorandum Opinion at p. 15 (footnote omitted).

⁴ Technically, the agency did not appeal to the Board in *Chapman*. The grievant appealed to the Board after the agency, outside the time limits of the grievance step process, rescinded her promotion for failure to undergo mandatory drug testing. Because the agency failed to comply with the time limits under the Merit Rules, the Superior Court held that the Board lacked subject matter jurisdiction to decide the case on the merits in favor of the agency. The Superior Court did not hold that the Board lacked subject matter jurisdiction over the grievance.

⁵ Indeed, it would be a perverse result to read Merit Rule 18.0 to require dismissal of a grievance for lack of subject matter jurisdiction when the agency – rather than the grievant – fails to comply with the time limits for an appeal to the next step of the grievance process.

⁶ Memorandum Opinion at p.12. “[T]his decision requires the agency to reinstate [Chapman’s] promotion.” *Id.* at 16.

amended or modified by the same procedure used for the initial adoption of the order.” 29 Del.C. §10128(e). The Board modifies its initial Decision and Order in this case to grant the grievance with the same relief awarded in the initial decision in order to make the grievant whole.⁷

As a fallback, the agency contends that the Board exceeded its authority in ordering an advance starting salary of 85 % of midpoint because the Board’s authority is limited to enforcing the Step 1 decision. The grievant’s immediate supervisor supported “Ms. Keeley’s request to submit the advance salary request to the Office of Management and Budget requesting 90% of midpoint.” The agency contended that compliance with the Step 1 decision only required the agency to submit an advance starting salary request to OMB, no more.

The grievant expressed concern that the agency might not pursue such a request with vigor, particularly since she was about to leave the agency for a federal position. The grievant also expressed concern that OMB had already decided in favor of the agency in its Step 3 decision based on the agency’s internal equity review.

In its motion for reconsideration, the agency acknowledges that the Board has “the ability to provide a party with broad equitable relief.”⁸ Further review by OMB would not serve any purpose.⁹ The agency only needs OMB’s approval to go above the 85% of midpoint authorized by Merit Rules 4.4.2 and 4.6. The grievant advised the Board that she was satisfied with the Board’s initial award of 85% of midpoint and would not be pursuing an appeal for more.

Finally, the Board denies the agency’s motion for a stay pending the outcome of the motion for reconsideration as moot. Though not yet requested by the agency, the Board will not issue a

⁷ The same three Board members who heard and made the initial Decision (Tupman, Houck, and Cairns) heard and ruled on the agency’s motion for reconsideration.

⁸ Citing *Avallone v. DHSS*, 14 A.3d 566 (Del. 2011).

⁹ The Board notes the irony in the agency’s newfound willingness to pursue an advance starting salary at 90% of midpoint, rather than accept the 85% ordered by the Board.

stay pending a possible appeal to the Superior Court.

ORDER

It is this **20th** day of **June**, 2018, by a unanimous vote of 3-0, the Decision and Order of the Board to enforce its March 27, 2018 Order to pay Keeley an advance starting salary of 85% of midpoint of PG 17, retroactive to thirty (30) calendar days prior to the filing date of the grievance, as a lump-sum. The Board modifies its order to make it payable within ten (10) business days after the Department of Transportation receives a copy of this modified Decision. The agency is directed to report back to the Board in writing within twenty (20) days of receipt of this modified Decision attesting to its compliance with the Board's Order.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



VICTORIA D. CAIRNS, MERB Member