

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

|   |   |                           |
|---|---|---------------------------|
| <b>LAURA RAUSCH,</b>                      | ) |                           |
|   | ) |                           |
| Employee/Grievant,                        | ) |                           |
|   | ) | <b>DOCKET 18-01-681</b>   |
| <b>v.</b>                                 | ) |                           |
|   | ) |                           |
| <b>DEPARTMENT OF HEALTH AND SOCIAL</b>    | ) | <b>DECISION AND ORDER</b> |
| <b>SERVICES, DIVISION OF SERVICES FOR</b> | ) |                           |
| <b>AGING AND ADULTS WITH PHYSICAL</b>     | ) |                           |
| <b>DISABILITIES,</b>                      | ) |                           |
|   | ) |                           |
| 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 April 19, 2018 at the Public Service Commission Conference Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

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

**APPEARANCES**

Stacey Cohee  
Deputy Attorney General  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Laura Rausch  
Employee/Grievant *pro se*

Kevin Slattery  
Deputy Attorney General  
on behalf of the Department of  
Health and Social Services

## **BRIEF SUMMARY OF THE EVIDENCE**

The Board heard legal argument on the motion by the Department of Health and Social Services/Division of Services for Aging and Adults with Physical Disabilities (“the Agency”) to dismiss the grievance for lack of jurisdiction. The grievant, Laura Rausch (“Rausch”), filed a response to the motion.

The Agency attached seven exhibits to its motion to dismiss. Rausch attached five exhibits to her response. Both parties included a copy of the Agreement between the State of Delaware and Merit Employee Bargaining Unit #6 for the period July 1, 2016 – June 30, 2017 (“the Collective Bargaining Agreement”). The Board did not hear testimony from any witnesses.

## **FINDINGS OF FACT**

Rausch is employed by the Governor Bacon Health Center (“GCHC”) as a Registered Nurse. On May 22, 2017, the Agency notified her that it had erroneously promoted her to Registered Nurse III, rather than Registered Nurse II, Level II (the career ladder position for which she had applied). The Agency informed Rausch that it would retroactively modify her promotion to Registered Nurse II, Level II and recoup ten months’ overpayment of wages.

Rausch holds a bargaining unit position in Merit Employee Bargaining Unit #6, and is represented by AFSCME Local 516. Section 5.1 of the Unit #6 Collective Bargaining Agreement provides: “Any disciplinary action up to and including dismissal shall be taken only for just cause.” On June 1, 2017, Rausch filed a grievance through the procedure outlined in Article 6 of the Collective Bargaining Agreement alleging that the Agency demoted her without just cause.

The grievance proceeded through the first two steps of the grievance procedure defined by the Collective Bargaining Agreement. At Step 3 (the DHSS Secretary level), after a hearing on October 24, 2017, the designated hearing officer (Theodore G. Mermigos) issued a written decision

on October 25, 2017:

After review of the testimony presented and review of the documentation provided, I agree with the decision at step one, that there is no violation of Article 6.1 of the collective bargaining agreement and funds paid to you in error should be paid back to the state in accordance with Delaware State Code Title 29 §5943 Enforcement of Chapter by Legal Action.

On December 5, 2017, Rausch filed a Merit Rule Appeal to the Department of Human Resources (“DHR”). By e-mail dated December 20, 2017, DHR advised Rausch that “both Merit Rule 18.8 and the CBA §8.10 require an appeal to the State’s Labor Relations Division be filed within . . . 10 working days from the Division Director’s decision, . . . We did not receive your appeal until 12/05/17, almost a month after the expiration of the appeal date. Accordingly, we cannot proceed given that your appeal was not timely filed.”

Rausch filed a Merit Rule Appeal to the Board dated January 3, 2018.

According to the Agency, the Step 3 hearing officer sent a copy of his decision by certified e-mail on October 25, 2017 to Rausch and her union shop steward (Joseph Flegal). The e-mail indicates it was “delivered” on that date, but that Flegal did not “read” the e-mail until October 30. The e-mail does not indicate that Rausch ever “read” it.

According to Rausch, she did not receive a copy of the Step 3 decision by e-mail until November 15, 2017. When she was unable to contact her union representative, she filed an appeal to the Board, but was advised by the Board Administrator that she would have to file first with the Director of Labor Relations as provided in Section 6.7 of the Collective Bargaining Agreement.

### **CONCLUSIONS OF LAW**

Section 5938(d) of the Merit Statutes provides in pertinent part:

**The rules adopted or amended by the Board under the following sections shall not apply to any employee in the classified service**

**represented by an exclusive bargaining representative to the extent the subject matter is covered in whole or part by a collective bargaining agreement . . . .**

29 *Del. C.* §5938(d).

The Board concludes as a matter of law that the subject matter of Rausch's grievance is controlled in whole or part by the Collective Bargaining Agreement. "Where a valid collective bargaining agreement is in effect, it takes precedence over contrary provisions in the Merit System Rules."<sup>1</sup>

Section 6.7 of the Collective Bargaining Agreement provides: "Notice of any appeal to Pre-Arbitration [Step 4] shall be filed in writing with the State's [Director of Labor Relations] within 10 days from the date of the Step 3 decision."

The Step 3 hearing officer e-mailed his decision to the parties on October 25, 2017. The Board accepts Rausch's testimony that she did not receive it until November 15, 2017 and will use that date as the baseline for computing the time lines under the Collective Bargaining Agreement.

Section 6.7 required Rausch to file an appeal from the Step 3 decision to the Director of Labor Relations within ten days. Rausch did not file that appeal until December 6, 2017, eleven days late. Even if Rausch was having difficulty communicating with her union, and then unsuccessfully tried to appeal directly to the Board, the Board does not believe that excused her from timely following the procedure set forth in the Collective Bargaining Agreement.

Article 6.2 of the Collective Bargaining Agreement provides: "Time limits set forth herein may be extended, in writing, by mutual agreement." However, "[i]f no extension is requested by the relevant Union Coalition member, the grievance will be considered settled on the basis of the State's position."

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<sup>1</sup> *Department of Correction v. Correctional Officer Supervisors*, 514 A.2d 405, 406 (Del. 1986).

While the Board is sympathetic to Rausch's uncertainty about which way to proceed after she received the Step 3 decision, the Board believes that the time limits for the grievance procedure under the Collective Bargaining Agreement are sufficiently clear even for a lay person. Pursuant to Article 6.2 of the Collective Bargaining Agreement, the Board concludes as a matter of law that the grievance was settled at Step 3 on the basis of the Agency's decision. Therefore, the Board concludes as a matter of law that it does not have jurisdiction to hear Rausch's grievance.

**DECISION AND ORDER**

It is this 8<sup>th</sup> day of June, 2018, by a vote of 5-0, the Decision and Order of the Board to dismiss Rausch's appeal because a timely appeal was not made of the Step 3 decision; consequently, the Board is without jurisdiction to consider the appeal.



**W. MICHAEL TUPMAN, MERB CHAIR**



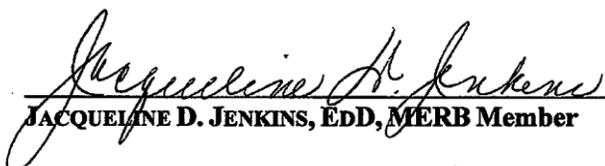
**PAUL R. HOUCK, MERB Member**



**SHELDON N. SANDLER, ESQ., MEMBER**



**VICTORIA D. CAIRNS, MERB Member**



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