

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

FLEUR MCKENDELL,)	
)	
Employee/Grievant,)	DOCKET 18-05-687
)	
v.)	
)	<u>DECISION AND ORDER OF DISMISSAL</u>
)	
DEPARTMENT OF HUMAN RESOURCES)	
AND OFFICE OF MANAGEMENT)	
AND BUDGET,)	
)	
Respondents.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) on October 4, 2018, at 9:00 a.m. at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Paul R. Houck, and Jacqueline D. Jenkins, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Stacey Cohee
Deputy Attorney General
Legal Counsel to the Board

Deborah Murray-Sheppard
Board Administrator

Fleur McKendell
Employee/Grievant, *pro se*

Kevin Slattery
Deputy Attorney General
on behalf of the Department of
Human Resources and Office of
Management and Budget

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument from the parties on the motion by the Department of Human Resources (“DHR”) and the Office of Management and Budget (“OMB”) to dismiss the appeal of the employee/grievant, Fleur McKendell (“McKendell”), for lack of jurisdiction.

PROCEDURAL BACKGROUND

On August 4, 2017, a Step 3 grievance hearing was convened by Paul Muller (“Muller”), a Senior Labor Relations and Employment Specialist who was the DHR Secretary’s designated hearing officer. Muller had scheduled the hearing to consider two grievances filed by McKendell against her employing agency, the Department of Insurance (“DOI”). The grievances alleged merit rule violations by both the DOI Commissioner and Assistant Commissioner.

On the day of the hearing, Muller initiated an attempt with the parties to mediate a resolution of the grievances before the hearing. McKendell objected to the mediation and asked for a continuance because her attorney was not able to attend. Muller did not grant the continuance and encouraged McKendell to continue to participate in the mediation effort. During the course of the mediation Amy Bonner (“Bonner”), Deputy Director of OMB became involved. At the conclusion of the mediation, a possible resolution was proposed, which was conditioned upon the parties (McKendell and DOI) having thirty days to review and accept it.

Following the August 4, 2017 hearing, McKendell filed the grievance at issue before this Board. The grievance alleges the respondents, the Department of Human Resources and the Office of Management and Budget, through their agents, Muller and Bonner, discriminated, harassed and retaliated against her in violation of MR 2.1. The grievance was initially heard at Step 3¹ by an outside hearing officer (private attorney) designated by the DHR Secretary, who

¹ Hearings were not convened at Step 1 or Step 2.

denied the grievance on May 7, 2018.

On May 22, 2018, McKendell filed an appeal of that decision with MERB, again asserting “discrimination, harassment, and retaliation by named respondents Amy Bonner and Paul Muller,” in the August 4, 2017 Step 3 hearing on the two underlying grievances against DOI. It is noted that McKendell voluntarily withdrew those grievances in December 2017, well before the Step 3 hearing officer’s decision was issued and before this appeal was filed.

FINDINGS OF FACT

The jurisdictional facts are not in dispute.

Fleur McKendell was and is employed by the Delaware Department of Insurance.

This grievance concerns a complaint by McKendell against representatives of the Department of Human Resources and the Office of Management and Budget. McKendell asserts that in the course of participating in a Step 3 grievance process, these individuals violated her rights under the merit system by attempting to mediate a resolution of two grievances she had filed against DOI.

McKendell has not been disciplined, demoted, transferred, or suffered any changes in her compensation, benefits and/or status in her current position as a result of the attempted mediation.

CONCLUSIONS OF LAW

The jurisdictional issue for resolution is whether McKendell’s complaint against DHR and OMB constitutes a grievance which is subject to resolution by MERB. 29 *Del. C.* §5943(a) defines standing to maintain a grievance as being “limited to an alleged wrong that affects [a Merit employee’s] status in his or her present position.” The Merit statute also establishes that the remedial powers of the Board may be invoked to correct a “... misapplication of any provision of the [*Merit statute*] or the Merit Rules.” 29 *Del.C.* §5931(a).

The Merit Rules define a grievance in Rule 18.2:

A “grievance” means 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. A grievance shall not deal with the substantive policies embodied in the Merit System law.

McKendell alleges she suffered discrimination, harassment, and retaliation during the Step 3 hearing from individuals involved in the process who are not in her supervisory chain of command and who do not interact with her during her work day. The Merit Rules prohibit discrimination in any human resource action (MR 2.1)

Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, gender identity, genetic information or other non-merit factors is prohibited.

The term “Human Resource Action” is defined in Merit Rule 19:

“Human Resource (HR) Action”: any employment action including, but not limited to the hiring process, discipline, promotion, compensation, classification, benefits, employee and labor relations.

The Board concludes as a matter of law that the effort to mediate the resolution of her grievances against DOI during the August 4, 2017 Step 3 hearing does not constitute a “human resource action.” The proposed settlement reached that day was conditional and included a 30-day review period for both sides. Neither Muller nor Bonner are employed by DOI and neither had authority over McKendell in her current position. McKendell has not alleged a wrong that affects her status in her present position.

McKendell also asserts that by mediating, rather than hearing her grievances, the Hearing Officer deprived her of due process rights. The remedy for a due process violation is to remand the matter to the offending authority with the direction to conduct the process again with the required due process protections. In this case, McKendell withdrew the two underlying grievances in December, 2017. Consequently, even if her complaint were found to be a viable merit grievance

within this Board's jurisdiction, there is no opportunity to remedy the alleged due process violations because she withdrew the grievances.

The Board concludes as a matter of law that it does not have statutory authority to address McKendell's complaint. There is no "grievance" within the meaning of MR 18.2 because McKendell's complaint does not state a claim for a violation of the Merit statute or Rules for which relief can be granted.

DECISION AND ORDER

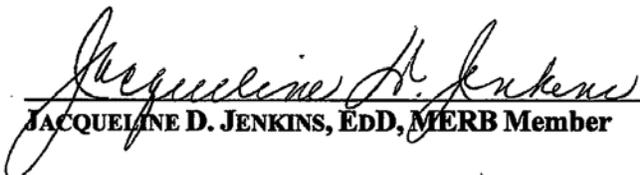
It is this **8th** day of **November, 2018**, by a unanimous vote of 3-0, the Decision and Order of the Board to grant the agency's motion to dismiss and to dismiss the grievance for lack of jurisdiction.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member