

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

HEERAK C. KIM,)	
)	
Employee/Grievant,)	DOCKET No. 14-07-610
v.)	
)	DECISION AND ORDER
DEPARTMENT OF HEALTH AND)	
SOCIAL SERVICES,)	
GOVERNOR BACON HEALTH CENTER)	
)	
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 November 6, 2014 in the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, Jacqueline Jenkins, and Victoria Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Heerak C. Kim
Employee/Grievant, pro se

Kevin Slattery
Deputy Attorney General
on behalf of the Department of
Health and Social Services/Governor
Bacon Health Center

BRIEF SUMMARY OF THE EVIDENCE

The Board did not admit any exhibits into evidence or take any witness testimony. The Board heard legal argument from the parties on the motion by the Governor Bacon Health Center (“Governor Bacon”) to dismiss the appeal of the employee/grievant, Heerak Kim (“Kim”) for lack of jurisdiction.

FINDINGS OF FACT

Kim appealed to the Board his termination by Governor Bacon on July 24, 2014, after serving as a Certified Nursing Assistant since May 19, 2014. Due to Kim’s hire date, he was still in his probationary period when he was terminated. The jurisdictional facts are not in dispute.

Attached as Exhibit D to Governor Bacon’s Motion to Dismiss, is a copy of a Collective Bargaining Agreement between Governor Bacon Health Center and the American Federation of State, County and Municipal Employees AFL-CIO, Council 81, Local 516 (“Agreement”). Article 2.2 of the Agreement provides:

The term ‘employee’ as used herein shall include all full time and part time non-supervisory employees of the Governor Bacon Health Center who during the term of this Agreement occupy positions in the following classifications: Operations Support Specialist; Supply, Storage and Distribution Technician I; Telephone Operator Supervisor; Licensed Practical Nurse I, II, III; Laundry Worker; Supply, Storage and Distribution Clerk I; Custodial Worker; Food Service Worker; Cook; Nursing Assistant; Certified Nursing Assistant; Physical Therapy Aide; Activity Aide I; Groundskeeper; Physical Plant Maintenance Mechanic I, II, III; Security Officer and Adaptive Equipment Technician.

Article 10.1 of the Agreement provides: “Employees shall serve a probationary period of 90 calendar days upon initial employment, during which time they may be dismissed without recourse to the grievance procedure.” Article 10.3 of the Agreement provides: “It is understood

that during the initial probationary period probationary employees do not have any rights under this Agreement.”

CONCLUSIONS OF LAW

Merit Rule 1.3 provides:

If a subject is covered in whole or in part by a collective bargaining agreement, 29 Del. C. § 5938(d) provides that the Merit Rules shall not apply to such subject matters ... Collective bargaining agreements may govern matters of bargaining unit-specific pay and benefits, probation...

Merit Rule 9.2 provides:

Employees may be dismissed at any time during the initial probationary period. Except where a violation of Chapter 2 is alleged, probationary employees may not appeal the decision.

Merit Rule 2.1 provides:

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

The Board concludes as a matter of law that it does not have jurisdiction to hear Kim’s appeal because his termination was covered in whole or in part by the Agreement.

Kim argues he was never made aware of the Agreement by Human Resources, several charge nurses told him his performance review would be in December and his work was satisfactory, and the termination was retaliation for him filing several reports of elder abuse. However, the Agreement covers Kim’s position and discusses probationary status and the lack of rights available to employees under that status.

As the Board held in *Jardine v. Family Court of the State of Delaware* (Docket No. 11-08-517), “just because Jardine cannot grieve under the Agreement does not mean that she must be able to grieve under the Merit Rules.” Similar to *Jardine*, Kim’s position was covered

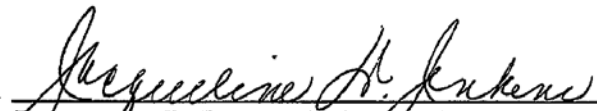
by a collective bargaining agreement that allows Governor Bacon to terminate employees, without recourse to the grievance procedure, during the 90 day probationary period. Kim's ignorance of the Agreement is not an excuse and cannot be allowed when it is counter to the law. In addition, as a probationary employee Kim also has no rights under the Merit Rules as he is not considered a Merit employee when on probation, per Merit Rule 9.2.

ORDER

It is this **19th** day of **November**, 2014, by a unanimous vote of 3-0, the Decision and Order of the Board to dismiss Kim's appeal for lack of jurisdiction.



MARTHA K. AUSTIN, MERB Chairwoman



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member