

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

WILLIAM A. ROBERT,)	
)	
Employee/Grievant,)	
)	DOCKET No. 12-06-548
v.)	
)	
DEPARTMENT OF TRANSPORTATION,)	DECISION AND ORDER
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 10:30 a.m. on December 6, 2011 at the Veterans Affairs Commission, Robbins Building, 802 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Dr. Jacqueline Jenkins, Acting Chair, John F. Schmutz, Paul R. Houck, and Victoria D. Cairns, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of Transportation

Jeffrey K. Martin, Esquire
on behalf of the Employee/
Grievant William A. Robert

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument on the motion by the Department of Transportation (DelDot) to dismiss the appeal for lack of jurisdiction. DelDot attached to its motion: Merit Appeal Form for Employees Dismissed, Demoted or Suspended (received by the Board on June 19, 2012) (Exh. A); Letter dated March 14, 2012 from Barry A. Benton to William Robert (Exh. B); and Agreement between the State of Delaware, Department of Transportation, Division of Maintenance and Operations and Council 81 of the American Federation of State, County and Municipal Employees, AFL-CIO, and its affiliated Local 879, 1036 and 1443 (Dec. 14, 2006 – Dec. 13, 2010) (Exh. C) (“the Collective Bargaining Agreement”).

The employee/grievant, William A. Robert, filed a response opposing the motion to dismiss.

FINDINGS OF FACT

The jurisdictional facts are not in dispute.

Robert worked at DelDot as a Facility Plant Maintenance Mechanic III. On December 28, 2011, DelDot recommended his termination.

On February 1, 2012, DelDot held a pre-termination meeting.

On February 9, 2012, DelDot terminated Robert. Robert filed a grievance under the Collective Bargaining Agreement.

On March 8, 2012, Barry A. Benton, Assistant Director of Bridges, held a Step 3 grievance hearing. On March 14, 2012, Benton issued a Step 3 decision denying Robert’s grievance.

On May 30, 2012, Human Resource Management held a pre-arbitration meeting. The parties were not able to resolve the grievance at pre-arbitration.

By letter dated June 4, 2012, Robert's union representative advised that the union intended to proceed to arbitration contingent upon a vote of the full membership. According to DelDot, the union membership voted not to proceed to arbitration.

The Board received Robert's appeal on June 19, 2012 more than four months after his termination on February 9, 2012.

Article 4 ("Employee Rights"), Section 1.(a) of the Collective Bargaining Agreement provides: "Any disciplinary action must be for just cause."

Article 5 of the Collective Bargaining Agreement provides for grievance and arbitration procedures. Step 4.(a) of the grievance procedure provides: "If the Step 3 decision is unsatisfactory, it may be appealed to Arbitration if the grievance concerns a subject covered by the Agreement. If the grievance concerns a subject covered by the Merit Rules and is appealed, it shall be appealed to the State Director of Human Resource Management and then the Merit Employee Relations Board (MERB)."

The Board finds as a matter of fact that Robert's grievance over his termination is covered in whole or in part by the Collective Bargaining Agreement.

CONCLUSIONS OF LAW

Section 5938(d) of the Merit Statutes provides: "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 in part by a collective bargaining agreement under Chapter 13 of Title 19: . . . §§5929 through 5932,” 29 *Del. C.* §5938(d).

Section 5930 of the Merit Statutes provides: “The rules shall provide for discharge or reduction in rank or grade for cause after the probationary period for appointment of promotion is completed. The person to be discharged or reduced in rank for cause shall have the right of appeal as set forth in this chapter.” *Id.* §5930.

Section 5931 of the Merit Statutes provides “for the establishment of a plan for resolving employee grievances and complaints” including a hearing “before the Board.” *Id.* §5931(a).

Robert’s grievance over his discharge is covered in whole or in part by Article 4 (discipline) and Article 5 (grievance and arbitration procedures) of the Collective Bargaining Agreement. The Board does not have jurisdiction over a grievance when “the grievance is controlled, in whole or in part, by [a Collective Bargaining Agreement].” *Morris v. Department of Correction*, Civ.A. No. 96A-07-004, 1998 WL 283478, at p.2 (Del. Super., Mar. 31, 1998), (the “grievance pertained to a ‘transfer’ which was addressed by the Agreement”).

The Merit Statutes requires a classified employee to file an appeal to the Board within thirty days of dismissal, demotion, or suspension. 29 *Del. C.* §5949(a). The statute also provides that whenever subsection (a) “conflicts with any collective bargaining agreement, or whenever any collective bargaining agreement is exclusive with respect to matters which are the subject thereof, the collective bargaining agreement shall apply and shall be followed.” *Id.*

Robert argued that, because the Collective Bargaining Agreement takes precedence, the Board has jurisdiction to hear his appeal by virtue of Article 5, Step 4.(a): “If the Step 3 decision is unsatisfactory, it may be appealed to Arbitration if the grievance concerns a subject

covered by the Agreement. If the grievance concerns a subject covered by the Merit Rules and is appealed, it shall be appealed to the State Director of Human Resource Management and then the Merit Employee Relations Board (MERB).”

In effect, what the parties have tried to do by private agreement is to vest concurrent jurisdiction in both an arbitrator and the Board over Robert’s grievance over his discharge and to waive the requirement of Section 5949(a) to appeal to the Board within thirty days of Robert’s dismissal.

The Board “is a creature of statute. 28 Del. C. Ch. 59 (1966). Its power and authority are derived exclusively from the statute, and its power therefore extends only to those cases which are properly before it in compliance with statutory law.” *Maxwell v. Vetter*, 311 A.2d 864, 865 (1973).

In *Maxwell*, a Merit Statute (29 Del. C. §5949(a)) required a State employee to appeal to the State Personnel Commission within thirty days after dismissal, demotion, or suspension. The statute provided that, in the event of any conflict between subsection (a) and a collective bargaining agreement, “the collective bargaining agreement shall apply and shall be followed.”

The employee argued that, because the collective bargaining agreement takes precedence, the parties could agree to extend the 30-day time to appeal to the Board. The Delaware Supreme Court held that the statute did not permit the parties to extend the 30-day appeal time because it was jurisdictional in nature.

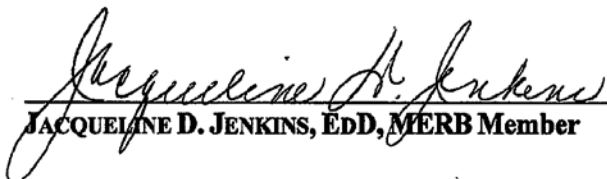
It is widely recognized that parties to litigation may not confer subject matter jurisdiction upon a Court by agreement. Likewise, parties may not confer subject matter jurisdiction on a quasi-judicial body by consent. The construction urged by [Maxwell] would permit the parties (a beneficiary of a collective bargaining

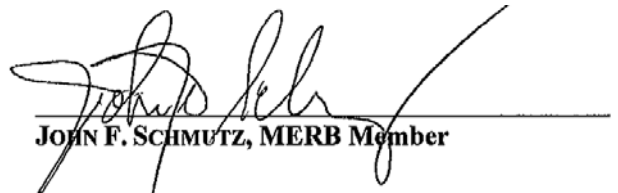
agreement and the State's negotiator) to do just that. We cannot assume that our Legislature sought to discard such a well-established principle of law in so indirect a manner. 311 A.2d at 866-67 (citations omitted).

The Board concludes as a matter of law that it does not have jurisdiction over Robert's appeal. Robert's union and DelDot cannot confer subject matter jurisdiction on the Board by agreement. Robert's "exclusive remedy is to pursue a grievance under Article [5] of the Collective Bargaining Agreement." *Masi v. Department of Labor*, MERB Docket No. 11-02-505, at p. 5 (July 19, 2011). "It does not make any difference that [his] union decided not to pursue [his] grievance to [arbitration]." *Id.*

ORDER

It is this **13th** of December, 2012, by a vote of 4-0, the Decision and Order of the Board to dismiss Robert's appeal for lack of jurisdiction.


JACQUELINE D. JENKINS, EDD, MERB Member


JOHN F. SCHMUTZ, MERB Member


VICTORIA D. CAIRNS, MERB Member


PAUL R. HOUCK, MERB Member