

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

WARREN J. MORGAN,)
)
 Employee/Grievant,)
)
 v.)
)
 DEPARTMENT OF SERVICES FOR)
 CHILDREN, YOUTH AND THEIR)
 FAMILIES,)
)
 Employer/Respondent.)

DOCKET No. 10-10-485

DECISION AND ORDER

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 11:15 a.m. on January 6, 2011 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

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

APPEARANCES

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

Katherine R. Witherspoon, Esquire
on behalf of Warren J. Morgan

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Services for Children, Youth and
Their Families

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument from the parties on the motion by the Department of Services for Children, Youth and Their Families (DSCYF) to dismiss the appeal of the employee/grievant, Warren J. Morgan (Morgan), for lack of jurisdiction. The agency attached under Tab A to its motion to dismiss: Merit Rule Appeal to the MERB received by the Board on October 14, 2010; and Step Three Grievance Decision dated September 30, 2010.

Susan Jones testified on behalf of DSCYF. Morgan testified on his own behalf.

FINDINGS OF FACT

Morgan filed a timely Step 3 appeal decision to the Office of Management and Budget, Human Resource Management (HRM). The HRM Hearing Officer (Thomas J. Smith) held a hearing on August 20, 2010. Morgan appeared with a union representative, Patricia A. Bailey. The Hearing Officer issued the Step Three Grievance Decision on September 30, 2010. According to that decision:

As a preliminary issue, the Grievant claimed that the Department's Human Resources Representative (Susan Jones) should not be permitted to represent the Department at the Step 3 grievance hearing. The basis for the Grievant's request is that Jones served on the selection committee that decided not to interview him. However, the Grievant presented no reason why Jones' service on the selection committee should disqualify her from representing the Department in this proceeding. Moreover, it was undisputed that Jones represented the Department at the previous steps in the grievance procedure without

any objection from the Grievant.

Following the decision on this preliminary issue, the Grievant and his Union representative refused to participate in the Step 3 grievance hearing and departed. As there was no basis to support the Grievant's objection, or his refusal to participate in the Step 3 hearing, the hearing proceeded on the merits.

In paragraph 3 of the motion to dismiss, DSCYF alleged that "Morgan and his union representative left the Step 3 hearing following the discussion of a preliminary matter. They refused to participate in the hearing on the merits."

In paragraph 3 of Morgan's response to the motion to dismiss, he denied that allegation: "The union presented it's [sic] case at the Step 3 hearing and requested the record to reflect it's [sic] objection to a member of the interview panel of which was (the basis for the grievance) presenting managements [sic] case. [DSCYF] is under the assumption that a hearing was not held. The union departed after presenting its' [sic] case and prior to Ms. Susan Jones, a panelist on the interview board presented her [sic]."

The Board finds that Morgan and his union representative left the Step 3 hearing after the Hearing Officer overruled Morgan's preliminary objection and that Morgan did not present his case on the merits. The Hearing Officer decided to go forward and hear evidence from DSCYF and then issued a written decision denying Morgan's grievance.

On October 14, 2010, Morgan filed an appeal to the Board.

CONCLUSIONS OF LAW

Merit Rule 18.9 provides:

If the grievance has not been settled, the grievant may proceed, within 20 calendar

days of receipt of the Step 3 decision or the date of the informal meeting, whichever is later, a written appeal to the Merit Employee Relations Board (MERB) for final disposition according to 29 Del. C. Section 5931 and MERB procedures.

DSCYF argued that by walking out of the Step 3 hearing Morgan is trying to “bypass HRM and proceed directly to the MERB. . . He effectively abandoned his appeal at Step 3 by refusing to participate at the hearing and leaving the hearing. He cannot, therefore, pursue an appeal to the MERB.”

DSCYF cited *Danneman v. DHSS*, MERB Docket No. 09-04-446 (Sept. 3, 2009), for the proposition that when “a grievant does not properly follow the grievance procedure, by failing to utilize every stage in the process to resolve the dispute, the Board is without jurisdiction to hear the appeal.” In *Danneman*, however, the grievant would not commit to a date for the Step 3 hearing, and then notified the Hearing Officer: “Thank you very much for your kind offer to hear this step three grievance but I will respectfully decline.” Decision at p.2. *Danneman* then appealed to the Board.

In *Danneman*, the Hearing Officer did not hold a hearing so there was no Step 3 decision and the Board dismissed *Danneman*’s appeal for lack of jurisdiction. “In order to perfect an appeal to the Board under Merit Rule 18.9, a grievant must be ‘in receipt of the Step 3 decision.’ Because *Danneman* has not received a Step 3 decision, the Board does not have jurisdiction to hear her appeal.” Decision at p. 4 (citing *Pinkett v. DHSS*, MERB Docket No. 08-02-415 (May 21, 2009) at p.4).

In contrast, in this case the Hearing Officer went forward after Morgan and his union representative walked out and heard evidence from DSCYF before issuing a written decision. Unlike *Danneman*, Morgan received a Step 3 decision and filed an appeal to the Board within twenty

days as required by Merit Rule 18.9.

The Board believes that the Step 3 Hearing Officer could have dismissed Morgan's appeal for failure to participate. *See McCaskill v. District of Columbia Department of Employment Services*, 572 A.2d 443, 446 (D.C. 1990) ("a claimant's failure to appear at a hearing where he or she bears the burden of proof might lead to dismissal for failure to meet that burden").¹ However, "a failure to appear at a hearing where the opposing side bears the burden of proof is no different from appearing and declining to testify. The employer must still introduce evidence proving misconduct, and the examiner must make particular factual findings and legal conclusions on that evidence." *Id.* "Petitioner's failure to appear at the hearing may have waived his right to present testimony, but, given the fact that the burden was still on the employer to prove misconduct, it did not waive his right to his appeal." *Id.* at 446.

In an appeal to the Board, the ultimate burden of proof is always on the grievant. *See Administrative Procedures Act (APA)*, 29 *Del. C.* §10125 ("The burden of proof shall always be upon the applicant or proponent."). A Step 3 hearing may not be a case decision subject to the APA, and the Board is not sure how HRM allocates the burden of proof in its Step 3 hearings. It may be that the Hearing Officer placed the burden on DSCYF at least to go forward, which it did, to create a record for the Hearing Officer to "make particular factual findings and legal conclusions based on that evidence." *McCaskill*, 572 A.2d at 446.

In any event, the Hearing Officer did not deem Morgan's refusal to participate in the Step 3 hearing on the merits as an abandonment of his appeal which may have warranted dismissal. The Hearing Officer went ahead, heard the case from DSCYF, and issued a written decision, unlike in

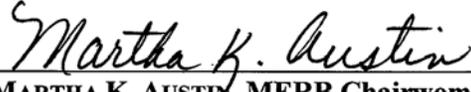
¹ The Board has some concerns that Morgan's union representative may have risked dismissal of his grievance by walking out of the Step 3 hearing. If Morgan had the burden of proof, then the Hearing Officer could have dismissed Morgan's appeal.

Danneman where there was no hearing or Step 3 decision.

The Board concludes as a matter of law that Warren filed a timely appeal to the Board within twenty days after he received the Step 3 decision in accordance with Merit Rule 18.9 and that the Board has jurisdiction to hear the merits of his appeal.

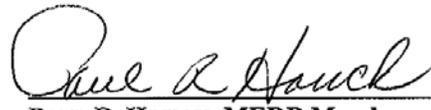
DECISION AND ORDER

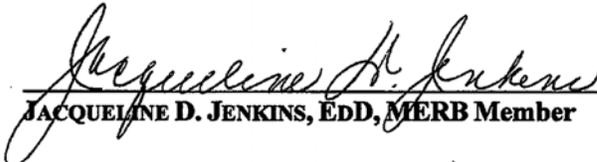
It is this 14th day of January, 2011, by a unanimous vote of 5-0, the Decision and Order of the Board to deny the agency's motion to dismiss.


MARTHA K. AUSTIN, MERB Chairwoman


VICTORIA D. CAIRNS, MERB Member


JOHN F. SCHMUTZ, MERB Member


PAUL R. HOUCK, MERB Member


JACQUELINE D. JENKINS, EDD, MERB Member