BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

ROBERT TUCKER, Employee/Grievant, v. FAMILY COURT OF THE STATE OF DELAWARE, Employer/Respondent.	))))))))))	**DOCKET No. 10-10-486** **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 11:50 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

Robert Tucker
Employee/Grievant *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Family Court
of the State of Delaware

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument from the parties on the motion by the Family Court of the State of Delaware (Family Court) to dismiss the appeal of the employee/grievant, Robert Tucker (Tucker), for lack of jurisdiction. The Family Court attached ten exhibits to its motion to dismiss, only two of which the Board found relevant for its decision: facsimile cover sheet dated September 29, 2010 with attached Step Three Grievance Decision (Exh. H); and Merit Rule Appeal to the MERB (Exh. I).

Sarah Evans, Director of Human Resources, testified on behalf of the Family Court. Tucker testified on his own behalf.

FINDINGS OF FACT

The jurisdictional facts are not in dispute.

The United Food and Commercial Workers, Local 27 filed two grievances against the Family Court on May 28 and June 11, 2010 on behalf of Tucker and other Judicial Assistants and Security Officers alleging violations of a collective bargaining agreement and Merit Rule 3.2.

The Office of Management and Budget, Human Resource Management (HRM), consolidated the two grievances for a pre-arbitration/Step 3 hearing on August 4, 2010. A union representative, Joseph Celli, appeared on behalf of the grievants. In an undated decision, the Hearing Officer (Thomas J. Smith) denied the grievances.

The Family Court introduced into evidence a copy of a handwritten facsimile cover sheet with the Hearing Officer's Step 3 decision attached. The fax cover sheet indicates "T.Smith" sent the decision to "Joe Celli" at 4:17 p.m. on September 29, 2010.

The Family Court did not present any evidence to prove when Celli received the fax. Tucker

testified that he did not receive a copy of the Step 3 decision from Celli until October 8, 2010 when Celli told Tucker that the union would not represent him in an appeal to the Board and Tucker would have to file the appeal. [1]

As confirmed by the "RECEIVED" date stamp, the Board received Tucker's appeal on October 25, 2010. Tucker stated in his appeal that he was the "designated member of the security unit and all others named herein agree to said appeal" and listed fourteen names with signatures.

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.**

To perfect an appeal to the Board under Merit Rule 18.9, a grievant must be "in receipt of the Step 3 decision."

The Family Court argued that Tucker received the Step 3 decision on September 29, 2010 when the Hearing Officer faxed the decision to Tucker's union representative. The Family Court argued that Tucker had twenty days from September 29, 2010 to appeal to the Board (until October 19, 2010) but he did not file his appeal until October 25, 2010, six days late.

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[1] According to Tucker, Celli told him on October 8, 2010 that Tucker had twenty days to file an appeal to the Board, so Tucker thought he had until October 28, 2010. The Board has some concerns that Celli did not advise Tucker immediately upon receipt of the Step 3 decision that the union would not be representing him in an appeal to the Board, and that Tucker relied on Celli's advice that Tucker still had twenty days to file his appeal.

When a grievant chooses to be represented by a union or attorney, the Board believes the union or attorney is acting as the agent for the grievant for purposes of notice. As such, the Board believes the Step 3 Hearing Officer can serve the Step 3 decision on the agent, and the Board will impute constructive receipt of the decision to the grievant for purposes of Merit Rule 18.9.

In *Gragg v. United States*, 717 F.2d 1343 (Fed. Cir. 1983), Gragg appealed his proposed termination to the Merit Systems Protection Board (MSPB) and designated the union as his representative. The MSPB sent a copy of its decision by certified mail to Gragg and his union representative. The union representative signed for the return receipt on September 20, 1982; Gragg signed for the return receipt on September 22, 1982. The cover letter enclosing the decision advised that Gragg had thirty days from date of receipt to seek judicial review. Gragg filed his appeal to the federal court on October 22, 1982. The court held that Gragg's appeal was untimely because "service upon [Gragg's] designated union representative was sufficient to start the running of the thirty-day period' for appeal. 717 F.2d at 1344. Under the "doctrine of constructive receipt," service "upon a litigant's agent authorized by appointment or by law . . . constitutes service upon a litigant that is legally equivalent to service upon the litigant himself." *Id.* at 1345.

The Board interprets Merit Rule 18.9 to provide for constructive receipt by a grievant of a Step 3 decision received by the grievant's union representative or attorney. However, when there is no proof as to when the grievant's agent received the decision, the Board interprets Merit Rule 18.9 to require actual receipt by the grievant. Tucker received the Step 3 decision from his union representative on October 8, 2010. Tucker filed his appeal to the Board on October 25, 2010 within the twenty days required by Merit Rule 18.9.

The Board understands that the employer agency does not have control over the Step 3 Hearing Officer's manner of service. But the agency did not provide the Board with any evidence to

verify the actual date of receipt of the Step 3 decision by Tucker's union representative, for example: a fax confirmation sheet, or the testimony of Tucker's union representative.

The Board has held grievants to their burden to prove actual receipt by the Board to perfect a timely appeal. In *Pinkett v. DHSS*, MERB Docket No. 08-02-415 (May 21, 2009), the grievant claimed she filed her appeal to the Board by e-mail on April 16, 2008 within the twenty days required by Merit Rule 18.9. "That e-mail, however, does not prove whether or not the Administrator in fact received the e-mail" because Pinkett did not receive "a confirmation of receipt." Decision at p.4. "The documents Pinkett provided the Board did not prove that her April 16, 2008 e-mail attaching her appeal was received by the Board Administrator" who "testified that she had searched her files, including her e-mails, and did not have any record of receiving Pinkett's appeal." *Id.* at pp.5, 2.

The Board believes it is only fair to hold the State to the same standard in proving the date of receipt of a Step 3 decision for purposes of Merit Rule 18.9.

The Board concludes as a matter of law that Tucker filed a timely appeal in accordance with Merit Rule 18.9 and that the Board has jurisdiction to hear the merits of his grievance, but only his individual grievance. The Board has previously decided that "it does not have legal authority to allow Tucker to pursue an appeal on behalf of other Family Court employees who have not filed their own grievances with the Board under the Merit Rules." *Tucker v. FamilyCourt*, MERB Docket No. 08-03-418 (Oct. 2, 2008), at p.6. [2]

[2] The Merit Rules do not provide '"for pretrial proceedings in which prompt and early determination of class membership may be made. Nor are there any provisions of notice to absent class members informing them that they are required to decide whether to remain members of the class represented by counsel for the named plaintiffs, whether to intervene through counsel of their own choosing, or whether to pursue independent remedies. Such pretrial proceedings are constitutionally required as a matter of due process when an adjudication is to be

DECISION AND ORDER

It is this **14th** day of **January**, 2011, by a vote of 4-0, the Decision and Order of the Board to deny the Family Court's motion to dismiss.

JACQUELINE D. JENKINS, EDD, MERB Member

VICTORIA D. CAIRNS, MERB Member

JOHN F. SCHMUTZ, MERB Member

PAUL R. HOUCK, MERB Member

MARTHA K. AUSTIN, MERB Chairwoman

I respectfully dissent because Tucker did not dispute that his appeal to the Board was untimely. As Tucker acknowledged in his response to the motion to dismiss: "The untimely filing of my appeal was 6 days past the time limit and in no way a willful act on my part to delay or impede the proceedings."

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made which will be binding upon the entire class.'" *Tucker*, at p.5 (quoting *Rose v. City of Hayward*, 126 Cal.App3d 926, 936 (1981)). But the "Board may, in appropriate circumstances 'consolidate individual cases and permit counsel to appear on behalf of all such similarly situated claimants where such procedure would best discharge the [Board's] function and remedy the grievance or grievances alleged.'" *Tucker*, at p.6 (quoting *State Employees' Association v. New Hampshire Personnel Commission*, 497 A.2d 860, 861 (N.H. 1985)).