BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

DOUGLAS RODGERS,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 11-09-525**
v.	)	
	)	
DEPARTMENT OF CORRECTION,	)	
	)	**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 9:00 a.m. on December 15, 2011 at the Division of Professional Responsibility, Canon Building, 861 Silverlake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, and Dr. 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

Deborah L. Murray-Sheppard
Board Administrator

Douglas Rodgers
Employee/Grievant *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of Correction

BRIEF SUMMARY OF THE EVIDENCE

The Board did not hear testimony from any witnesses only legal argument by the parties on the motion by the Department of Correction (DOC) to dismiss the appeal of the employee/grievant, Douglas Rodgers (Rodgers), for lack of jurisdiction.

The DOC attached three documents to its motion to dismiss: Rodgers' Merit Appeal for Employees Dismissed, Demoted or Suspended received by the Board on September 23, 2011 (Exh. A); certified mail return receipt (Exh. B); and *Danneman v. DHSS*, MERB Docket No. 09-04-446 (Sept. 3, 2009). Rogers did not offer any documents into evidence.

FINDINGS OF FACT

The jurisdictional facts are not in dispute.

On August 16, 2011 the DOC gave Rodgers a three-day "paper" suspension. The DOC notified Rodgers of the suspension on August 19, 2011. On September 7, 2011 Rodgers filed a Step One grievance. On September 14, 2011 DOC denied the grievance as untimely. On September 23, 2011 the Board received Rodgers' direct appeal from his suspension (dual filed with Human Resource Management)

CONCLUSIONS OF LAW

Merit Rule 18.6 provides:

> **Step 1. Grievants shall file, within 14 calendar days of the date of the grievance matter or the date they could have reasonably be expected to have knowledge of the grievance matter which details the complaint and relief sought with their immediate supervisor. The following must occur**

> **within 14 calendar days of receipt of the grievance: the parties shall meet and discuss the grievance and the Step 1 supervisor shall issue a written reply.**

Merit Rule 18.4 provides:

> **A failure of the employing agency to comply with the time limits shall automatically move the grievance to the next step unless the parties have a written agreement to delay, or grievants have opposed in writing moving the grievance automatically to the next step. Failure of the grievant to comply with time limits shall void the grievance. . . .**

Rodgers received notice of his three-day suspension on August 19, 2011. He did not file a Step One grievance until September 7, 2011, nineteen days later. Because he did not file his grievance within the fourteen calendar days required by Merit Rule 18.6, by operation of law his failure "to comply with time limits shall void the grievance." Merit Rule 18.4.

According to Rodgers, he did not receive documents he requested from the DOC which he needed to process his grievance until August 30, 2011. According to Rodgers, he could not file his grievance until after that date because he did not know the offense he was charged with or how to respond. The Board believes that the employing agency should always provide the grievant with relevant documents in a timely fashion. If it does not, eventually the grievant will have recourse to the Board's subpoena power to compel the production of documents. However, that does not mean the mandatory time limits under the Merit Rules are tolled pending a request for production at an earlier stage of the grievance process. The grievant must still comply with the time limits for each step, but may not be held to as high a standard to detail the grounds for the grievance. In Rodgers' case, all he had to allege was that the DOC did not have just cause to discipline him.

The Board concludes as a matter of law that it does not have jurisdiction to hear Rodgers'

grievance because he failed to file a timely Step One grievance. The Board does not have to consider DOC's alternative grounds for dismissal. [1]

DECISION AND ORDER

It is this **20th** day of December, 2011, by a unanimous vote of 3-0, the Decision and Order of the Board to dismiss Rodgers' appeal for lack of jurisdiction.

Martha K. Austin
MARTHA K. AUSTIN, MERB Chairwoman

JOHN F. SCHMUTZ, MERB Member

Jacqueline D. Jenkins
JACQUELINE D. JENKINS, EDD, MERB Member

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[1] Even if Rodgers had filed a direct appeal to the Board under Merit Rule 12.9 rather than initially pursuing his grievance under Merit Rule 18.6, his appeal to the Board over his suspension would still be untimely. He filed his appeal with the Board on September 23, 2011, more than thirty days after he received notice of his suspension on August 19, 2011. *See* Merit Rule 12.9 (direct appeals must be filed within 30 days of dismissal, demotion, or suspension).