

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

<b>MAJOR DAVID HUNT,</b>	)	
	)	
Employee/Grievant,	)	
	)	<b>DOCKET No. 19-10-737</b>
v.	)	
	)	<b>DECISION AND ORDER</b>
<b>DELAWARE DEPARTMENT OF SAFETY AND</b>	)	<b>OF DISMISSAL</b>
<b>HOMELAND SECURITY, DIVISION OF</b>	)	
<b>CAPITOL POLICE,</b>	)	
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:10 a.m. on February 6, 2020 at the Delaware Public Service Commission, 861 Silver Lake Boulevard, Dover, DE 19904.

**BEFORE** W. Michael Tupman, Chair; Paul R. Houck, Jacqueline D. Jenkins, Ed.D, Victoria D. Cairns, and Sheldon N. Sandler, Esq., 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

Major David Hunt  
Employee/Grievant, *pro se*

Allison McCowan  
Deputy Attorney General  
on behalf of the Department of Safety  
and Homeland Security

## **BRIEF SUMMARY OF THE EVIDENCE**

The parties submitted a joint Stipulation of Facts and the Department of Safety and Homeland Security, Division of Capitol Police (“Agency”) submitted two (2) exhibits which were preadmitted following the prehearing teleconference and resulting Prehearing Order.

The Board heard, as a preliminary matter, legal argument on the Agency’s motion to dismiss the grievance for lack of jurisdiction. The Grievant, Major David Hunt (“Major Hunt”), provided a written response to the Agency’s motion.

Both parties were afforded the opportunity to summarize their positions and to respond to the Board’s questions during the hearing.

## **FINDINGS OF FACT**

The Grievant, Major David Hunt, is employed by the Delaware Department of Safety and Homeland Security as a Major with the Capitol Police Department.

On January 16, 2019, following a reclassification of his position from Captain to Major, Hunt was promoted from paygrade 15 to paygrade 16.

On April 5, 2019, Major Hunt submitted a request for an advanced starting salary, which he updated on April 8, 2019. The Agency submitted Major Hunt’s request for an advanced starting salary to DHR on April 9, 2019. On April 15, 2019, the Agency rescinded its request for an advanced starting salary for Major Hunt. On or about April 16, 2019, the Agency spoke with Major Hunt by telephone to deny his request for an advanced starting salary. It confirmed its denial of the request by letter later that day, because Major Hunt had requested an advanced starting salary of more than 120% of the published midpoint rate<sup>1</sup>, which it concluded would violate Merit Rule (“MR”) 4.1.<sup>2</sup>

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<sup>1</sup> Pay ranges for State merit employees are established annually in the State Budget Act in Section 8 of the Budget Epilogue. The published pay range for each pay grade establishes “80% of Midpoint”, “100% of Midpoint” and “120% of midpoint”. 80% is the bottom of each pay range.

<sup>2</sup> 4.1 Uniform pay schedules based on current legislation will be issued by the DHR Secretary. Each position

Major Hunt filed a Step 1 grievance on April 18, 2019 with his immediate supervisor, pursuant to MR 18.6. The grievance alleged violations of MR 4.6 and 4.12.<sup>3</sup> The grievance was denied in a written decision dated May 21, 2019. Major Hunt then submitted a timely Step 2 decision on May 22, 2019, in accordance with MR 18.7. The Step 2 decision denying his grievance was issued on June 24, 2019.

On July 5, 2019, Major Hunt hand delivered a timely Step 3 decision to DHR in accordance with MR 18.8. On August 21, 2019, a designee of the DHR Secretary heard the grievance.

On October 3, 2019, ninety (90) days after the Step 3 appeal was filed, Major Hunt filed a request that the Merit Employee Relations Board hear his grievance. At that time, he had not received a Step 3 decision and he alleged that DHR had violated MR. 18.8<sup>4</sup> by not providing the decision “within 45 calendar days of the appeal’s receipt”.

By letter dated October 30, 2019, the Board scheduled a hearing for December 19, 2019.<sup>5</sup>

On November 7, 2019, DHR issued the Step 3 decision denying the grievance, 125 days after the appeal had been filed with DHR.

The Agency filed a motion to dismiss the appeal to MERB on December 2, 2019. The motion

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classification shall have assigned to it a paygrade for pay purposes. The pay of employees occupying positions in the Classified Service shall follow the published rates set for the assigned paygrades.

<sup>3</sup> **4.6 Promotion.** Upon promotion, employees shall receive either the minimum salary of the higher paygrade or an increase of 5%, whichever is greater. Agencies may grant a greater increase not to exceed the 85th percentile under the criteria in 4.4.2. The DHR Secretary may approve a greater increase that exceeds the 85th percentile under the criteria in 4.4.2.

#### **4.12 Pay Rates After Reclassification Or Grade Change**

**4.12.1** Any employee movement to a higher paygrade is a promotion. Any employee movement to a class of the same paygrade shall be treated in accordance with 4.5. Employees moving to a lower class and/or paygrade shall retain their former pay as long as they remain in that position.

<sup>4</sup> **18.8 Step 3:** Any appeal shall be filed in writing to the DHR Secretary within 14 calendar days of receipt of the Step 2 reply. This appeal shall include copies of the written grievance and responses from the previous steps. The parties and the DHR Secretary (or designee) may agree to meet and attempt an informal resolution of the grievance, and/or the DHR Secretary (or designee) shall hear the grievance and issue a written decision within 45 calendar days of the appeal’s receipt. The Step 3 decision is final and binding upon agency management.

<sup>5</sup> The hearing was later rescheduled for February 6, 2020 due to the unavailability of witnesses.

was forwarded to Major Hunt, who responded on December 3, 2019 and also on January 22, 2020.

### **CONCLUSIONS OF LAW**

Merit Rule 18 states, in relevant part:

**18.8** Step 3: Any appeal shall be filed in writing to the DHR Secretary within 14 calendar days of receipt of the Step 2 reply. This appeal shall include copies of the written grievance and responses from the previous steps. The parties and the DHR Secretary (or designee) may agree to meet and attempt an informal resolution of the grievance, and/or the DHR Secretary (or designee) shall hear the grievance and issue a written decision within 45 calendar days of the appeal's receipt. The Step 3 decision is final and binding upon agency management.

**18.9** If the grievance has not been settled, the grievant may present, within 20 calendar days of receipt of the Step 3 decision or of 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. §5931 and MERB procedures.

A grievant's obligation to file a timely appeal to the Board is jurisdictional. Where a filing deadline has passed, the Board has no jurisdiction to hear the Appellant's grievance. *Cunningham v. DHSS*.<sup>6</sup>

Merit Rule 18.9 requires a grievant to file an appeal to the Board "within 20 calendar days of receipt of the Step 3 decision." The Board has determined, and both the Delaware Superior and Supreme Courts have affirmed, it does not have jurisdiction to process an appeal from a Step 3 decision unless such appeal is timely filed, and has specifically rejected appeals which were filed prior to the issuance of the Step 3 decision by DHR. See *Banner v. DHSS*, MERB No. 12-07-551 (2013); aff'd N13A-04-013 (Del.Super. 2014); aff'd 123 A.3d 472 (Del. 2015). The Board held in *Pinkett v. DHSS*

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<sup>6</sup> Civ.A. No. 95A-10-003, 1996 WL 19057 at p. 2 (Del. Super., 1996), *aff'd* 679 A.2d 469 (1996)

(MERB 08-02-415 (May 26, 2009)):

... The Board concludes as a matter of law that it cannot exercise jurisdiction over Pinkett's February 28, 2007 appeal to the Board. Rule 18.8 provides that HRM "shall" issue a decision within forty-five days of the receipt of the Step 3 appeal. If HRM does not (as is the case here), the Board does not believe that HRM is divested of jurisdiction so as to allow the grievant to appeal to the Board. @ p. 3-4.

Major Hunt prematurely filed an appeal to the Board on October 3, 2019. He then received the Step 3 decision on November 7, 2019, but did not perfect his appeal by refiling with MERB within 20 calendar days as required by MR 18.9. Consequently, the Board is without authority to consider the merits of this grievance.

**ORDER**

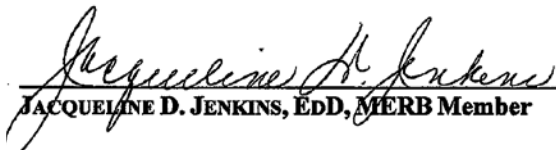
It is this **19<sup>th</sup>** day of **February**, 2020, by a vote of 3-2, the Decision and Order of the Board to grant the Agency's Motion to Dismiss and to dismiss Major Hunt's appeal for lack of jurisdiction.

  
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W. MICHAEL TUPMAN, MERB CHAIR

  
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PAUL R. HOUCK, MERB Member

  
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SHELDON N. SANDLER, ESQ., MEMBER

We respectfully dissent from the decision of the majority.

  
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JACQUELINE D. JENKINS, EDD, MERB Member

  
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VICTORIA D. CAIRNS, MERB Member