

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

<b>DONALD FINNEY,</b>	)	
	)	
v.	)	<b>DOCKET No. 19-11-741</b>
	)	
<b>DEPARTMENT OF TRANSPORTATION,</b>	)	<b>DECISION DENYING GRIEVANT'S</b>
	)	<b>MOTION TO AMEND</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 9:00 a.m. on March 5, 2020, in the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

**BEFORE** W. Michael Tupman, Chair, Paul R. Houck, Jacqueline D. Jenkins, Ed.D and Sheldon N. Sandler, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

Rae M. Mims  
Carla Jarosz  
Deputy Attorneys General  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Anthony N. Delcollo, Esq.  
Offit Kurman  
on behalf of the Employee/Grievant

Allison McCowan  
Deputy Attorney General  
on behalf of the Department of  
Transportation

## **BRIEF SUMMARY OF THE EVIDENCE**

The Board did not admit any exhibits into evidence or take any witness testimony. The Board heard legal argument from the parties on the Grievant's motion to amend the appeal filed on November 20, 2019, to add alleged violations of Merit Rules 7.1 and 18.1.

Prior to this hearing, the parties were provided an opportunity, at the Chair's direction, to file written argument concerning the application of Superior Court Rule 15 regarding amendment of pleadings and relation back to the date of the original filing; Merit Rule 7.1; the relationship between Merit Rule 18.1 and Merit Rule 2.1; whether the grievant's retaliation claim arises out of the same transaction or occurrence as his promotion claim; and the Superior Court's decision in *DOC v. Justice* (CA 06A-12-006, 2007).

In response to the Chair's request, written argument was simultaneously submitted by counsel for the Grievant and the Department of Transportation ("Agency") on February 26, 2020, and responsive argument was submitted on March 2, 2020.

## **FINDINGS OF FACT**

The Grievant applied for a promotion within the Department of Transportation. He was unsuccessful in his effort and another individual was promoted. He filed a grievance which advanced through Step 3 of the Merit Grievance procedure. Merit Rule 18. The Step 3 hearing was convened by the Secretary of the Department of Human Resources' designee on August 1, 2019, and the decision was issued on November 1, 2019.

On November 20, 2019, the Grievant filed a request for MERB to hear his grievance, as provided in Merit Rule 18.9, in which he alleged violations of Merit Rules 18.5 and 2.1. On December 13, 2019, MERB scheduled a hearing on the merits of his grievance for Thursday, March 5, 2020.

On February 6, 2020, counsel for the Grievant filed “Grievant’s Motion to Amend MERB Appeal”. On or about February 17, 2020, counsel for the Agency filed its opposition to the motion. The March 5, 2020 hearing was limited to the Board’s consideration of the Grievant’s Motion to Amend.

### **CONCLUSIONS OF LAW**

The Agency contends that the Board does not have authority to permit amendment of a grievance after filing with the Board to add claims for violations of Merit Rules other than those named in the appeal because the Board does not have a specific practice or procedure rule regarding motions to amend. According to the Agency, the strict timelines of Merit Rule 18 must control. The Grievant’s remedy when he discovered facts previously unknown to him at the Step 3 hearing was to file a new Step 1 grievance under Merit Rule 18.6 within fourteen days of that date. He did not, and therefore his new claims under Merit Rule 7.1.1 and Merit Rule 18.1 are time-barred.

The Board has previously looked to the Superior Court Rules of Civil Procedure for guidance when there is no specific Board rule. In *Kline v. Department of Safety & Homeland Security*, MERB Docket No. 08-12-435 (Mar. 30, 2010), the Board followed “Rule 15 of the Superior Court Civil Rules to amend Kline’s appeal to substitute [the Office of Management and Budget] as the proper party respondent and relate the amendment back to the date Kline filed his appeal to the Board (December 1, 2008).” *Id.* at p.5. <sup>1</sup>

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<sup>1</sup> The Board notes that the Superior Court refers to its own Rules of Civil Procedure when there is no specific Board rule. See *Department of Transportation v. Keeley*, C.A. No. N18A-06-008-SKR, at p.4 (Sept. 11, 2018) (“the Merit Rules do not provide for motions for reconsideration. Therefore, the Court will apply, by analogy, Superior Court Civil Rule 59(d) to decide the issue of the timeliness of DOT’s Motion for Reconsideration.”) (footnotes omitted). By the Agency’s logic in the present case, the Board would not have the authority to entertain a motion for reconsideration tolling the 30-day period for filing an appeal to the Superior Court because the Board does not have a specific rule allowing for such a

The Board will assume for the sake of argument that it has the authority to grant a motion to amend and to relate the amendment back to the date of the original appeal. In the exercise of its discretion, however, the Board declines to do so. While any prejudice to the Agency may be minimal,<sup>2</sup> the Board believes that the equities weigh against the Grievant. According to the Grievant, he discovered facts supporting additional claims under Merit Rules 7.1.1 and 18.1 at the Step 3 hearing on August 1, 2019 and was further on notice when the Step 3 hearing officer issued his decision on November 1, 2019. But when the Grievant filed his appeal to the Board on November 20, 2019, he did not assert any claim under Merit Rule 7.1.1 or Merit Rule 18.1. He waited until February 6, 2020 to file a motion to amend, while offering little if any good cause for the delay.

For these reasons, the Board denies the Grievant's motion to amend his grievance, without prejudice to his offering evidence at the hearing on the merits of: (1) retaliation for filing a previous grievance in violation of Merit Rule 18.5(2); and (2) or a gross abuse of discretion in the promotion in violation of Merit Rule 18.5(3).<sup>3</sup>

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motion.

<sup>2</sup> At the hearing, the Agency withdrew its objection to the Grievant's claim under Merit Rule 18.1 for retaliation for filing a previous grievance. In his appeal form, the grievant listed Merit Rule 18.5; subsection 2 allows for a grievance over a promotion for a violation of Merit Rule 2.1. "The term 'retaliation' does not appear in Merit Rule 2.1, but the Board believes that for an employer to retaliate against an employee's exercise of a protected activity is discrimination based on a non-merit factor." *Moison v. DHSS*, MERB Docket No. 07-09-400, at p.6 (June 18, 2009) (quoting *Hilferty v. Department of State*, MERB Docket No. 07-12-406, at p.10 (Aug. 27, 2008)).

<sup>3</sup> Merit Rule 18.5(3) applies "only to a gross abuse of discretion in the promotion, *i.e.*, the actual selection decision, not to other decisions that might require consideration of other points in the process which results in the ultimate promotion . . . Merit Rule 18.5(2) can be the only provision enabling an employee to file a grievance for a deficiency in the promotion process." *Department of Correction v. Justice*, C.A. No. 06A-12-006-RBY, at p.8 (Del. Super., Aug. 23, 2007) (agency did not re-schedule oral interviews at the grievant's request).

**ORDER**

It is this **20<sup>th</sup>** day of **March, 2020**, by a vote of 4-0, the Decision and Order of the Board to deny the Grievant's Motion to Amend his appeal.

The merits hearing scheduled for April 16, 2020 has been postponed due to the current public health emergency. The parties will be notified of the new hearing date when the Board is able to resume normal operations.



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W. MICHAEL TUPMAN, MERB Chair



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PAUL R. HOUCK, MERB Member



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JACQUELINE D. JENKINS, EDD, MERB Member



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SHELDON N. SANDLER, ESQ., MERB Member