

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

TONYA ROBINSON,

Employee/Grievant,

v.

DEPARTMENT OF STATE,

Employer/Respondent.

DOCKET No. 20-01-748

**DECISION AND ORDER
ON MOTION TO DISMISS**

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 July 16, 2020, in the Delaware Office of Veterans’ Services hearing room, Robbins Building, 802 Silver Lake Boulevard, Dover, DE 19904.

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

APPEARANCES

Carla A. K. Jarosz
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Tonya Robinson
Employee/Grievant, *pro se*

Allison J. McCowan
Deputy Attorney General
on behalf of the Department of State of
Delaware

BACKGROUND

The Board considered the Department of State's ("DOS") motion to dismiss the appeal of the employee/grievant, Tonya Robinson ("Robinson"), for lack of jurisdiction. Robinson did not file a written response to the motion. The Board heard legal argument from both the parties.

In considering a motion to dismiss, the Board must accept all "well-pleaded factual allegations in the complaint" and grant the motion only if employee/grievant could not recover under any reasonably conceivable circumstances. *Carta v. Danberg*, 2012 WL 1537167, at 1 (Del. Super., Apr. 30, 2012), *aff'd*, 70 A.3d 205 (Del. 2012).

The facts are undisputed. On November 4, 2019, DOS hired Robinson as a full-time Administrative Specialist. On December 6, 2019, DOS terminated Robinson's employment. DOS hand-delivered Robinson the termination letter on December 6, 2019. Robinson was on notice of the termination of her employment as of December 6, 2019.

On January 14, 2020, Robinson mailed a dually filed grievance to the Board and the Delaware Department of Human Resources ("DHR"). On January 15, 2020, the Board received Robinson's grievance. DHR considered Robinson's dual-filed grievance and, on January 22, 2020, dismissed Robinson's grievance as untimely because it was not received by DHR within the 30 days as required by Merit Rule 12.9.

Robinson admitted that the reason she did not file a timely appeal was because she had to deal with two deaths in her family and had to move her residence during the time required to file her appeal.

CONCLUSIONS OF LAW

Merit Rule 12.9 provides:

**Employees who have been dismissed, demoted or suspended
may file an appeal directly with the Director or the MERB**

within 30 days of such action. Alternatively, such employees may simultaneously file directly with the Director, who must hear the appeal within 30 days. If the employee is not satisfied with the outcome at the Director's level, then the appeal shall continue at the MERB.

DOS argued Robinson's appeal should be dismissed because it is untimely under Merit Rules 12.9 and 18.6.¹

Robinson argued that since her untimeliness was because of the death of two family members and moving residences, she should be allowed to proceed with her appeal. Although the Board is sympathetic, the timeframe for filing an appeal under Merit Rule 12.9 is a jurisdictional requirement that cannot be waived. The Delaware Supreme Court affirmed a Delaware Superior Court decision that held that Board lacks jurisdiction to hear an untimely appeal under the Merit Rules. *Banner v. Merit Employee Relations. Bd.*, 123 A.3d 472 (Del. 2015). The defendant, "Banner argued that the dismissal of the appeal was arbitrary and capricious because the Board had the discretion to consider an appeal processed by its Administrator [T]he Superior Court rejected Banner's arguments and affirmed the Board's decision that it was without jurisdiction to consider the appeal." *Id.*

The Board's jurisdiction is limited to considering timely grievances. In this case, the letter provided to Robinson on December 6, 2019 was sufficient to place her on notice that the time to file a timely grievance had been triggered. Robinson's failure to submit a timely grievance eliminates the Board's jurisdiction over her case.

¹ Merit Rule 12.9 applies only to dismissals, demotions or suspensions. Employees may grieve any matter under Merit Rule 18.6 including dismissals, demotions or suspensions, but since Merit Rule 18.6 requires a grievance to be filed within 14 calendar days whereas Merit Rule 12.9 allows an appeal to the Board to be filed within 30 days, if a grievant fails to file their appeal to the Board within the 30 day timeframe of Merit Rule 12.9, they also have not met the 14 day timeline of Merit Rule 18.6.

ORDER

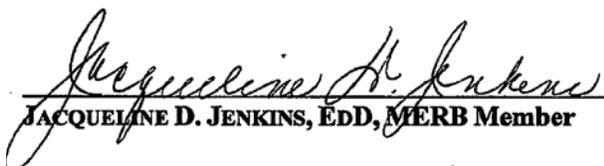
It is this **4th** day of **August, 2020**, by a vote of 5-0, the Decision and Order of the Board to grant DOS's Motion to Dismiss at this time, with prejudice.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER