

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

CAROLE EVANS, )  
 )  
Employee/Grievant, )  
 )  
v. )                   **DOCKET No. 20-09-779**  
 )  
**DELAWARE 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 January 21, 2021 at the Delaware Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Suite 100, Dover, DE 19904. Pursuant to Governor John Carney’s 27<sup>th</sup> Amendment to a State of Emergency Declaration, the Board also provided a teleconference line for participation.

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

**APPEARANCES**

Anthony N. Delcollo, Esq.  
on behalf of Employee/Grievant  
Carole Evans

Deborah L. Murray-Sheppard  
Board Administrator

Victoria R. Sweeney  
Deputy Attorney General  
on behalf of Department of  
Correction

## **BRIEF SUMMARY OF THE EVIDENCE**

The Board did not hear any witness testimony or admit any documents into evidence. The Board heard legal argument by counsel (via teleconference) on the motion by the Department of Correction (“DOC”) to dismiss the appeal for lack of jurisdiction and failure to state a claim upon which relief can be granted (“MTD”). The employee/grievant, Carole Evans (“Evans”), filed written opposition to the motion.

## **FINDINGS OF FACT**

Evans was employed by the DOC as a Warden III, New Castle County Community Correction Center (“NC4”). On January 13, 2020, the DOC transferred her to Director of Community Health Services. Evans grieved the transfer under the Merit Rules. MTD, Exhibit A.

In a Step 3 decision dated August 17, 2020, the Department of Human Resources (“DHR”) hearing officer concluded that DOC violated Merit Rule 10.6 and granted the grievance.

While the Department may be adamant that it did not transfer the Grievant for performance and disciplinary reasons, no other conclusion is possible on the basis of the information presented in this case. The transfer has all the hallmarks of punitive or corrective action. The Department’s core rational for transferring the grievant was its belief that she could not effectively lead employees in her current position as Warden. This is a performance issue which is outside the purpose and intent of MR 10.6 in this case.

MTD, Exhibit B at pp. 4-5. As the remedy for this violation of the Merit Rules, the

hearing officer ordered: “Grievant shall be returned to her former position as Warden III at NC4.” *Id.* at p. 5.

On August 17, 2020, Dorene M. Fields, Warden of New Castle Community Corrections, sent an email to numerous DOC employees “to cut off any rumors that may be circulating throughout the NC4 facilities about the DHR decision regarding the previous Warden. Please disregard any information that may have been heard or will be generated in the next couple of days that surrounds this position.” MTD, Exhibit C.

On September 1, 2020, Evans filed an appeal to the Board alleging:

DOC has failed to reinstate employee back to Warden III at New Castle Community Correction Center per the Step 3 decision rendered 8/17/20. DOC released information about employees [sic] personnel matters and sent an email directly related to such. DOC moving grievant’s position was retaliation for complaint filed against her supervisor.

### **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 reasonably be expected to have knowledge of the grievance matter, a written grievance which details the complaint and relief sought with their immediate supervisor. . . .**

Merit Rule 18.8 provides in pertinent part:

**. . . The Step 3 decision is final and binding upon agency management.**

Merit Rule 18.9 provides:

**If the grievance has not been settled, the grievant may present, 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. § 5931 and MERB procedures.**

Merit Rule 19.25 defines:

**“Grievance”: Merit employee’s claim that these Rules or the Merit system statute has been violated. A grievance may not deal with the content of the Rules or the Merit system statute.**

29 *Delaware Code* § 5941 provides:

**All officers and employees of the State shall comply with and aid in all proper ways in carrying out this chapter and the rules, regulations and orders and rules thereunder. . . The Secretary, with the approval of the Board, may institute and maintain any action or proceeding at law or equity that the Secretary considers necessary or appropriate to secure compliance with this chapter and the rules, regulations and orders thereunder.**

The Board concludes as a matter of law that it does not have jurisdiction over Evans’ grievance that the DOC violated Merit Rule 16.1 by disclosing confidential information from her personnel file. The e-mail she complains about was sent on August 17, 2020; her attorney cited it the next day in an e-mail to DHR. Because this was a new grievance, Evans had to file a Step 1 grievance within fourteen days under Merit Rule 18.6. She could not file a grievance directly with the Board. The Board concludes as a matter of law that this grievance is time-barred.

The Board concludes as a matter of law that it does not have jurisdiction over Evans’ retaliation claim. Evans cites Section 5931 of the Merit statutes which prohibits retaliation for filing a grievance and establishes a mechanism to make a written complaint directly to DHR. Any recourse under Section 5931 for retaliation lies with DHR, not the Board. The

Board concludes as a matter of law that it does not have jurisdiction over this grievance.

According to the DOC, the Board does not have jurisdiction to enforce the Step 3 decision because “[u]nder Merit Rule 18.8, a Step 3 decision is final and binding.” MTD at p. 3. According to the DOC, “Because the very same issue complained of, which was a transfer of position, that issue, and whether or not it should have occurred, was resolved.” Tr. at p. 7.

“Final and binding” means the decision is final and binding on the agency and the agency cannot appeal to the Board. It does not follow that the *grievant* cannot appeal to the Board when the agency refuses to comply with the Step 3 decision. Merit Rule 18.8 expressly provides that the grievant can appeal to the Board if “**the grievance has not been settled.**”<sup>1</sup> Clearly, a grievance has not been “settled” when the agency refuses to comply with a Step 3 decision in favor of the grievant. Otherwise, any agency could nullify a Step 3 decision with impunity, an interpretation fraught with unreasonable results.

The DOC’s reliance on *Department of Transportation v. Keeley*, C.A. No. N18A-06-008-SKR, 2018 WL 6264708 (Del. Super., Nov. 30, 2018), is misplaced. In *Keeley*, the agency denied the grievant’s request for an advance starting salary at 90% of midpoint. She grieved, and at Step 1 her immediate supervisor recommended an advance starting salary at 90% of midpoint.<sup>2</sup> The agency did not file a timely appeal to Step 2, but later offered to have a Step 3 hearing. The Step 3 hearing officer ruled in favor of the agency, and the grievant appealed to the Board.

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<sup>1</sup> DOC always characterizes the transfer issue as “resolved” at Step 3. MTD at p. 2; Tr. at pp. 7,8. The transfer issue may have been resolved in Evans’ favor, but the grievance was not “settled” for purposes of Merit Rule 18.9.

<sup>2</sup> Under Merit Rule 4.4, an agency has discretion to grant an advance starting salary request up to 85% of midpoint, but the DHR Secretary must approve an advance starting salary higher than that.

The Board decided the Step 1 decision was binding on the agency. When the agency did not file a timely appeal to Step 2, the grievance stopped there.<sup>3</sup> The Superior Court held that the Board committed reversible error when it went further and modified the Step 1 decision to award the grievant an advance starting salary of 85% of midpoint.<sup>4</sup>

Unlike *Keeley*, this case involves the interpretation and application of Merit Rule 18.8 and 18.9. Under Merit Rule 18.8, a Step 3 decision in favor of a grievant is final and binding on the agency, therefore the agency cannot file an appeal to the Board. Under Merit Rule 18.9, a grievant can appeal a Step 3 decision if the grievance has not been “settled.” The Board concludes as a matter of law that a grievance is not settled when the agency refuses to comply with the Step 3 decision.

Under these circumstances, the scope of the Board’s jurisdiction over Evans’ grievance is limited. The Board cannot and will not review the merits of Evans’ transfer. DOC contends that there is nothing else the Board can do because the “Merit Rules confer no power or procedure that would permit the Board to enforce the Step 3 decision.” MTD at 3. The Board disagrees. The Board may not have statutory authority to impose fines or other civil coercive sanctions, but there are remedies available.

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Merit Rule 19.25 defines a “grievance” as a claim “that these Rules or the Merit system statute has been violated.” Section 5941 of the Merit statutes provides: “All officers and employees of the State shall comply with and aid in all proper ways in carrying out this

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<sup>3</sup> *Chapman v. Dept. of Health & Social Services*, C.A. No. 08A-04-009-WCC, 2009 WL 2386090 (Del. Super., July 31, 2009).

<sup>4</sup> The Court was troubled about Keeley’s wrong without a remedy. “Therefore, granting Keeley 86% midpoint of PG 17 is consistent with the Step 1 decision and is the appropriate remedy under the current circumstances.” *Op. at p. 11.*

chapter and the rules, regulations and orders thereunder . . . The Secretary, with the approval of the Board, may institute and maintain any action or proceeding at law or in equity which the Secretary considers necessary or appropriate to secure compliance with this chapter and the rules, regulations and orders thereunder.”

In the context of Evans’ appeal, the Board concludes as a matter of law that it has jurisdiction over a grievance that officers and employees of the DOC are in violation of Section 5941. The Board will hold a further hearing on that issue and to decide whether DOC has acted in bad faith to warrant an award of attorney’s fees and costs. *See Brice v. Department of Correction*, 704 A.2d 1176 (Del. Supr. 1998) (en banc).

### **ORDER**

It is this 1<sup>st</sup> day of February, 2021, by a unanimous vote of 5-0, the Decision and Order of the Board to grant the Department of Correction’s motion to dismiss in part and to deny the motion in part. The Board has jurisdiction to decide whether DOC failed to comply with the Step 3 reinstatement decision in violation of 29 *Delaware Code* § 5941 and, if so, to refer the matter to the DHR Secretary to take appropriate enforcement action in court.



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W. MICHAEL TUPMAN, MERB CHAIR



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PAUL R. HOUCK, MERB Member

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

*Victoria D. Cairns*  
VICTORIA D. CAIRNS, MERB Member

*Sheldon N. Sandler*  
SHELDON N. SANDLER, ESQ., MEMBER