

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

DEMETRA (GWEN) CROSS,)	
)	
Employee/Grievant,)	
)	DOCKET No. 20-11-793
v.)	
)	
DEPARTMENT OF LABOR,)	DECISION AND ORDER
)	ON MOTION TO DISMISS
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 February 4, 2021, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904. Pursuant to Governor John Carney’s 27th Modification of a State of Emergency Declaration, the Board also provided a teleconference line for participation.

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

APPEARANCES

Ilona Kirshon
Deputy State Solicitor
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Demetra (Gwen) Cross
Employee/Grievant, *pro se*

Victoria Sweeney
Deputy Attorney General
on behalf of the Department of Labor

BRIEF SUMMARY OF THE EVIDENCE

The Board did not hear any witness testimony or admit any documents into evidence. The Board heard legal argument (via teleconference) on the motion by the Department of Labor (“DOL”) to dismiss the appeal for lack of jurisdiction. The employee/grievant, Demetra (Gwen) Cross, filed written opposition to the motion.

BACKGROUND

Ms. Cross is employed by DOL as a Senior Fiscal Administrative Officer in the Department of Labor, Division of Employment and Training. In April 2020, she received an unsatisfactory performance review, accompanied by a performance improvement plan (“PIP”). She grieved both the performance review and implementation of the PIP, alleging that DOL had violated Merit Rule (“MR”) 2.0, Discrimination, and MR 12.0. Employee Accountability.

A Step 1 grievance decision was issued by a DOL Manager on September 29, 2020, which found there had been no violation of either MR 2.1 or MR 12.1.

On October 13, 2020, Ms. Cross emailed DOL Human Resources Manager¹ Tristan Press, stating she had cited the incorrect Merit Rules as the basis for her grievance. She stated she was revising her grievance and resubmitting it to now allege violations of MR 13.0, Performance Review, specifically MR 13.1, 13.2 and 13.3.

In a subsequent email with Ms. Press on October 20, 2020, Ms. Cross stated she wished to proceed to “Step 3 with the original violations.” She requested a Step 3 hearing on her grievance by email to the Department of Human Resources (“DHR”) on October 20, 2020.

By email dated November 9, 2020, DHR dismissed the grievance finding it was improperly

¹ Human Resource Managers are employees of the Department of Human Resources (DHR) who are assigned to work in and with executive branch agencies.

filed. Thereafter, Ms. Cross filed an appeal to this Board on November 30, 2020.

CONCLUSIONS OF LAW

Merit Rule 18 states, in relevant part:

- 18.4 Failure of the employing agency to comply with 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. The parties may agree to the extension of any time limits or to waive any grievance step. Grievances about demotions for just cause, suspensions or dismissals shall start at Step 2 within 14 calendar days in the manner set forth in 18.7.**

- 18.6 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. The following shall 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.**

- 18.7 Step 2: Any appeal shall be filed in writing to the top agency personnel official or representative within 7 calendar days of receipt of the reply. The following shall occur within 30 calendar days of the receipt of the appeal: the designated management official and the employee shall meet and discuss the grievance, and the designated management official shall issue a written response.**

- 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 with 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.**

The time limits of the grievance procedure are jurisdictional and when a deadline has “passed, the Board ha[s] no jurisdiction to hear [the employee’s] grievance.” *Cunningham v. DHSS*, 1996 WL 190757, at *2 (Del. Super., Mar. 27, 1996), *aff’d*, 679 A.2d 462 (TABLE), 1996 WL 313503 (Del., June 3, 1996). The Board does not have jurisdiction to consider an untimely appeal. *Banner v. MERB and DHSS*, N13A-04-013 (Del. Super. Dec. 24, 2014), *aff’d*, 123 A.3d 472 (2015). Further, “[the grievant’s] pro se status does not excuse a failure to timely comply with the jurisdictional requirements of [the Merit Rules].” *Echols v. DSCYF*, MERB Docket No. 09-10-456, at p. 4 (Apr. 5, 2010) (quoting *Pinkett v. DHSS*, MERB Docket No. 08-02-415, at p. 5 (May 21, 2009)).

When the grievant fails to comply with time limits the grievance is void. MR 18.4. The Step 1 decision was issued on September 29, 2020. MR 18.7 provides seven days in which to appeal a Step 1 decision to “the top agency personnel official or representative.” Ms. Cross never filed a Step 2 appeal nor did DOL agree to waive Step 2. Ms. Cross’ attempt to advance her grievance directly to Step 3 to be heard by DHR voided her grievance.

The Board’s jurisdiction is limited to considering timely grievances. In this case, because Ms. Cross failed to comply with the grievance process set forth in Merit Rule 18.0, the Board does not have jurisdiction to hear her grievance and it must be dismissed.

ORDER

It is this **30th** day of **March, 2021**, by a vote of 4-0, the Decision and Order of the Board to grant DOL’s Motion to Dismiss.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member


VICTORIA D. CAIRNS, MERB Member


SHELDON N. SANDLER, ESQ., MEMBER