

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

JESSICA VOROUS,

Employee/Grievant,

v.

**DEPARTMENT OF CORRECTION, PROBATION
AND PAROLE,**

Employer/Respondent.

DOCKET No. 20-07-773

**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 May 20, 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

Deborah L. Murray-Sheppard
Board Administrator

Todd Mumford, FOP Lodge 10
on behalf of the Jessica Vorous,
Employee/Grievant

Victoria Sweeney
Deputy Attorney General
on behalf of the Department of Correction,
Probation and Parole

BRIEF SUMMARY OF THE EVIDENCE

The Board did not hear any witness testimony or admit any documents into evidence. The Board heard legal argument on the Department of Correction's ("DOC") motion to dismiss the grievance for lack of jurisdiction. The employee/grievant, Jessica Vorous, filed written opposition to the motion.

BACKGROUND

Officer Vorous is employed by the Department of Correction, Division of Probation and Parole, as a Senior Probation and Parole Officer. As part of her duties, she is required to be on stand-by duty every other week. She is on standby duty for one week of each two-week pay period. She asserts that for the period of approximately November 2018 through October 2019 (when the Step 1 decision in this case was filed) she was paid incorrectly for her standby hours, in violation of Merit Rule 4.17.1.¹

Having failed to resolve the grievance at the lower levels of the grievance procedure, a Step 3 hearing was convened on April 7, 2020 before a Department of Human Resources ("DHR") Hearing Officer, who issued her decision on June 17, 2020. The decision was forwarded to Officer Vorous' union representative by email at 10:00 a.m. on Wednesday, June 17.

The Board received the Grievant's appeal on July 10, 2020. In the appeal form, Officer Vorous states the "Step 3 decision was reviewed on 6/22/20." She acknowledged before the Board

¹ **Merit Rule 4.17 Stand-by Pay**

4.17.1 FLSA-covered employees assigned to critical public service approved by the DHR Secretary, and authorized by agencies to be on-call regularly for emergency services for an average of 64 off-duty hours or more per week, shall receive stand-by pay equal to 5% of their paygrade midpoint while so assigned. Such increased pay shall continue during absences only for paid holidays and sick leave of five successive work days or less occurring during the period of assignment. Any call-back work required during on-call periods shall also be compensated in accordance with 4.16.

that she did not recall when she opened the email forwarding the decision and that she was on vacation around the time the Step 3 decision was issued.

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.

18.9 If the grievance has not been settled [at Step 3], 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. DHSS*, N13A-04-013 (Del. Super., Dec. 24, 2014), *aff’d*, 123 A.3d 472 (2015). When the grievant fails to comply with time limits the grievance is void. MR 18.4.

It is undisputed that this grievance was processed through Steps 1, 2 and 3 in accordance with MR 18.6 – 18.8. The Step 3 decision was issued and provided to both Officer Vorous and her union representative² by email on June 17, 2020. MR 18.9 provides twenty (20) days in which to

² “When a grievant chooses to be represented by a union or attorney, the Board believes the union or attorney is acting as the agent for the grievant for purposes of notice. As such, the Board believes the Step 3 Hearing Officer can serve the Step 3 decision of the agent, and the Board will impute constructive receipt of the decision to the grievant for purposes of Merit Rule 18.9.” *Robert Tucker v. Family Court*, MERB Docket 10-10-486 (Jan. 14, 2011) at p. 4.

appeal a Step 3 decision to this Board. The grievance was not received by MERB until July 10, 2020, twenty-three days after the Step 3 decision was issued.

The Grievant, however, was not able to establish when she received the Step 3 decision on her end, or that there was any reason which would have made receipt on June 17 impossible. Even if she did not open and read the decision until a later date, that does not change the time constraint on filing a timely appeal to the Board.

The State's Uniform Electronics Transmission Act, 6 Del. C. Chapter 12 A, states (in relevant part) in §115:

- (b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when:
 - (1) It enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and
 - (2) It is in a form capable of being processed by that system.

Both Officer Vorous and her union representative have access to the State electronic mail system from which and by which the Step 3 decision was transmitted. While there is a mechanism by which the sender can request a delivery and/or "read" receipt, the Merit Rules do not require such system be used and these parties have not agreed to mandatory use of such system. The Board is bound by the statutory delineation that an electronic record is received once it enters the electronic processing system, i.e. when it is sent in the State electronic email system when the recipient is also in the same email system.

Consequently, the twenty day period for filing an appeal to MERB began to run on June 17, 2020, and closed on July 7, 2020. Because the Grievant failed to comply with the deadline set forth in Merit Rule 18.9 by waiting to file it until twenty-three days after receipt of the Step 3 decision, the grievance is void. The Board does not have jurisdiction to hear her grievance and it must be

dismissed.

ORDER

It is this **15th** day of **June, 2021**, by a vote of 4-0, the Decision and Order of the Board to grant the Department of Correction's Motion to Dismiss and dismiss the grievance.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER