

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

<b>GRIEVANT,</b>	)	
	)	
Employee/Grievant,	)	
	)	<b>DOCKET No. 20-09-784</b>
v.	)	
	)	
<b>DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF CHILD SUPPORT SERVICES,</b>	)	<b>DECISION AND ORDER ON MOTION TO DISMISS</b>
	)	
	)	<b>[Public, redacted]</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 10:45 a.m. on May 6, 2021, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904. The hearing was closed to the public pursuant to 29 *Del. C.* §10004(b)(8). Pursuant to Governor John Carney’s 27<sup>th</sup> 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, Jacqueline D. Jenkins, and Sheldon N. Sandler, Esq., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

Ilona Kirshon (*by teleconference*)  
Deputy State Solicitor  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Employee/Grievant, *pro se*

Victoria Sweeney  
Deputy Attorney General  
on behalf of the Department of Health and  
Social Services, Division of Child Support  
Services

## **BACKGROUND**

By Prehearing Order dated April 28, 2021, the Board admitted into evidence one document offered by the Grievant and eleven documents offered by the Agency, the Department of Health and Social Services.

Just prior to the prehearing teleconference, the Agency filed a Motion to Dismiss on April 23, 2021, asserting the Board lacks jurisdiction to hear the grievance. The Board heard the Motion as a preliminary matter at the May 6 hearing. It did not hear any witness testimony. It did receive legal argument from both parties on the motion.

## **FINDINGS OF FACT**

The Grievant is employed by the Department of Health and Social Services, Division of Child Support Services as a Child Support Specialist III.

On April 20, 2020, DHSS hand-delivered a letter to the Grievant, advising her that she was to serve a one-day suspension on April 22, 2020.

On May 5, 2020, the Grievant filed a Step 1 grievance which was subsequently heard at Step 1, Step 2 and Step 3. The initial grievance was filed fifteen days after the Grievant received the notice of suspension.

A request for a Step 4 hearing before the Merit Employee Relations Board was received on September 30, 2020.

## **CONCLUSIONS OF LAW**

Merit Rule 18 states, in relevant part:

**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.**

The Agency moved to dismiss the grievance because it was not timely filed at the first step. 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). 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.<sup>1</sup>

The Grievant argues that timeliness of the initial grievance was not raised at any point in the prior grievance proceedings and that the State has thereby waived its right to raise it for the first time before MERB. “A challenge to subject matter jurisdiction must be heard at any time it is raised; it is not subject to waiver.”<sup>2</sup> ““Subject matter jurisdiction is non-waivable [and] courts have an independent obligation to satisfy themselves of jurisdiction if it is in doubt.””<sup>3</sup>

The Board’s jurisdiction is limited to considering timely grievances. The fourteen day period for filing a Step 1 grievance began to run on Monday, April 20, 2020, and closed on Monday, May 4, 2020. Because the Grievant failed to comply with the deadline set forth in Merit Rule 18.6 by waiting

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<sup>1</sup> Merit Rule 18.4 provides, in relevant part, that “Failure of the grievant to comply with time limits shall void the grievance.”

<sup>2</sup> *Family Court v. Terri Tucker and MERB*, C.A. No. N13A-10-007 (Del. Super., Sept. 25, 2014) at p. 10.

<sup>3</sup> *Id* at p. 7 (quoting *Appriva Shareholder Litig. Co. v. EV3, Inc.*, 937 A.2d 1275, 1284 (Del. 2007) (internal citations omitted).)

to file it until fifteen days after receipt of the letter of suspension, the grievance is void. The Board does not have jurisdiction to hear her grievance and it must be dismissed.

**DECISION AND ORDER**

It is this **15<sup>th</sup>** day of **June, 2021**, by a vote of 3-2, the Decision and Order of the Board to grant DHSS's Motion to Dismiss the grievance because it was not timely filed and therefore the Board does not have subject matter jurisdiction to hear the grievance appeal.

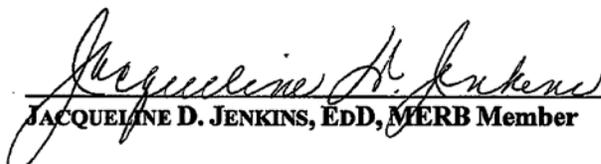
  
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W. MICHAEL TUPMAN, MERB CHAIR

  
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VICTORIA D. CAIRNS, MERB Member

  
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SHELDON N. SANDLER, ESQ., MEMBER

We respectfully dissent from the Board majority, as a matter of principle. While the Agency and the DHR may have engaged in efforts to resolve the grievance at the earlier steps of the process by considering its merits, they should have made the Grievant aware that her grievance had not been timely filed under Merit Rule 18.6. If the grievance had been granted at Step 3, it would have been binding on the Agency regardless of whether it was timely filed at Step 1.

  
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PAUL R. HOUCK, MERB Member

  
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JACQUELINE D. JENKINS, EDD, MERB Member