

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	<u>DOCKET No. 21-07-808</u>
v.)	
DELAWARE DEPARTMENT OF FINANCE,)	DECISION AND ORDER
DELAWARE STATE LOTTERY,)	
)	[Public, redacted]
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the “Board”) at 9:10 a.m. on December 16, 2021, at the Delaware Public Service Commission, Cannon Bldg., 861 Silver Lake Boulevard, Dover, DE 19904. The hearing was closed to the public pursuant to 29 *Del. C.* §10004(b)(8).

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
Department of Justice
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Employee/Grievant, *pro se*

Julie Donoghue (*via teleconference*)
Deputy Attorney General
on behalf of the Department of Finance,
Delaware State Lottery

BRIEF SUMMARY OF THE EVIDENCE

The employee/grievant (“Grievant”) offered four (4) documents into evidence pre-marked for identification as Grievant Exhibits 1-4; all were admitted into evidence without objection. At the hearing it was determined that Grievant Exhibit 2 was missing page 2. Agency counsel scanned and sent page 2 to the Board during the hearing. Grievant Exhibit 2 was amended to include page 2.

The Department of Finance, Delaware State Lottery (“Agency”), offered seventeen (17) documents into evidence, of which fifteen (15) were admitted as Agency Exhibits A – J, M – Q.

The Agency called two witnesses: Christine Dunning, HR Manager, DHR/DOF and Helene Keeley, Deputy Director of the Lottery.

The Grievant also called Christine Dunning and testified on his own behalf.

FINDINGS OF FACT

The Grievant is employed as a Gaming Inspector II by the Delaware State Lottery and is assigned to the Harrington Casino Lottery office. In the Harrington Casino there is a small DOF/Lottery Office where the Gaming Inspectors work when they are not monitoring the gaming floor.

On March 12, 2020, Delaware Governor John Carney declared a State of Emergency (“SOE”) for the State of Delaware due to a Public Health Threat in response to the COVID-19 pandemic. The three casinos in Delaware, including the Harrington Casino, were ordered closed by the SOE.

A limited reopening of the casinos occurred in the fall of 2020. Following the procedures required by the modification to the SOE, the Gaming Inspectors were responsible “... to make sure

that employees that were entering the building, and even the patrons, had their temperature checked, that they were socially distanced, that they were wearing masks, [and] that the casino employees were wiping down the [video lottery terminals] once every two hours.”¹

On December 4, 2020 the Secretary of the Department of Finance (“DOF”) sent an email notifying all DOF employees and contractors working on-site in DOF offices that they were required to wear protective face coverings at all times under the Governor’s Universal Indoor Mask Mandate.²

On February 20, 2021, the Lottery Assistant Director for Table Games reported to the Lottery Deputy Director that a Gaming Inspector working at the Harrington Casino had tested positive for COVID-19. When asked, the Lottery Assistant Director for Table Games reported that the entire Harrington Casino Lottery staff had not followed the DOF Secretary’s December 4, 2020 mask directive when working inside the Gaming Inspectors Office.³

After conducting an investigation, DOF confirmed that masks were not being worn by Lottery employees when they were working in the Gaming Inspectors offices. As a result, on March 12, 2021, the Grievant was issued a written reprimand by the Deputy Director of the Lottery.⁴ He grieved the written reprimand on March 26, 2021.⁵ After meeting with the Grievant, his immediate supervisor upheld the grievance by email dated March 27, 2021, in which she stated: “I agree with his statement of relief sought of all reference documentation of this 2021 incident [be removed] from his personnel file.”⁶

¹ Testimony of Delaware Lottery Deputy Director, Transcript (“TR”) p. 20.

² Agency Exhibit B. The Governor’s Universal Mask Mandate was announced on December 3, 2020.

³ Agency Exhibit E

⁴ Agency Exhibit E

⁵ Agency Exhibit F

⁶ Agency Exhibit G

By email dated March 29, 2021, HR Manager Christine Dunning emailed the Grievant with available dates for a Step 2 grievance hearing.⁷ A Step 2 hearing was held on April 8, 2021 and in a written decision dated April 22, 2021 the grievance was denied.⁸

Thereafter, although questioning why he was required to do so when the Step 1 grievance had been in his favor, the Grievant appealed to the Department of Human Resources for a Step 3 grievance hearing.⁹ The Step 3 decision was issued on June 17, 2021, again denying the grievance. The Grievant filed this appeal to MERB on July 2, 2021, alleging the Agency was bound by the Step 1 decision in his favor.

CONCLUSIONS OF LAW

Merit Rule 18, Grievance Procedure, provides, 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.

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.

The Grievant filed a timely grievance with his immediate supervisor, who upheld his grievance. The Board concludes as a matter of law that it does not have jurisdiction to reach the

⁷ Grievant Exhibit 2

⁸ Agency Exhibit I

⁹ Grievant Exhibit 4

merits of the grievance¹⁰ because the Grievant prevailed at Step 1 of the grievance process and the Agency did not file a timely written appeal to Step 2 as required by MR 18.7. Therefore, the Step 1 decision is final and binding on the Agency.

This matter falls squarely within the Superior Court decision in *Chapman v. DHSS*.¹¹ 2009 WL 2386090 (Del.Super. July 31, 2009). In *Chapman*, the Assistant Director of the Delaware Psychiatric Center (“DPC”) rescinded the grievant’s promotion to Psychiatric Social Worker III (PSW III) for failure to follow directives for mandatory drug testing. The employee grieved the decision to rescind her promotion and met with her immediate supervisor to discuss that grievance. Thereafter, the immediate supervisor wrote that the grievant “provided a satisfactory drug test” and requested that the grievant “be reinstated to the PSW III position.” The agency did not file a written appeal “to the top agency personnel official or representative within seven (7) calendar days of receipt of the [Step 1 decision].” Merit Rule 18.7. The Superior Court reversed the Board’s decision in favor of the agency, holding that the agency’s failure to follow the time limits set forth in the MERB rules bound them to the decision made by the [grievant’s] immediate supervisor under Step 1 of the grievance procedure.

In the instant case, while the HR Manager communicated by email with the Grievant about available Step 2 hearing dates, and she represented to the Board that she is the top agency personnel representative, there is no evidence that the Agency complied with Merit Rule 18.7 by filing a written appeal within seven (7) calendar days of receipt of the Step 1 decision.¹² The Agency’s failure to do so bound them to the Step 1 decision made by the immediate supervisor.

¹⁰ This decision is based solely on the jurisdictional issue. It should not be read to infer that the Board condones failure or refusal by a State employee to comply with a public health mandate.

¹¹ C.A. No. 08A-04-009-WCC (Del. Super., Apr. 9, 2009), 2009 WL 2386090

¹² This procedure of filing a written appeal should have been followed even though the HR Manager communicated with the grievant about available Step 2 hearing dates.

The Board does not believe that the Grievant tacitly agreed to an extension of the time limits for Step 2. The Merit statute "requires a written agreement or a written affidavit by the grieving employee to delay the Step 2 process." 29 Del. C. Section 5931(b). At all times, the Grievant questioned why the grievance was moving forward since he prevailed at Step 1, and he continued to participate in the process out of an abundance of caution without waiving his jurisdictional argument. The Agency contended Christine Dunning, in effect, appealed the Step 1 decision by sounding out the Grievant about possible Step 2 hearing dates, and that it would not have made any sense for Merit Rule 18.7 to require her to file an appeal to herself as the Agency's top personnel official. The Merit Rules do not prescribe the precise form required of a Step 2 appeal, other than it be in writing. However, the Board believes that the Agency must give some notice in writing to the grievant that the Agency was pursuing an appeal to the next step.

DECISION AND ORDER

It is this 11th day of January 2022, by a vote of 4-0, the Decision and Order of the Board that it does not have jurisdiction to hear this grievance on its merits. The agency did not file a timely written appeal of the Grievant's immediate supervisor's written Step 1 answer as required by Merit Rule 18.7. Consequently, the Step 1 decision in the Grievant's favor is final and binding on the Agency. The written reprimand and all reference documentation to this incident are to be removed from the Grievant's personnel file.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER