**BEFORE THE MERIT EMPLOYEE RELATIONS**

**BOARD OF THE STATE OF DELAWARE**

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| **WILLIAM FASANO,** | ) | |
| | ) | |
| Employee/Grievant, | ) | |
| | ) | **MERB DOCKET 21-05-803** |
| **v.** | ) | |
| | ) | **INTERIM DECISION DENYING** |
| **DELAWARE DEPARTMENT OF NATURAL** | ) | **PRELIMINARY MOTION TO** |
| **RESOURCES AND ENVIRONMENTAL CONTROL,** | ) | **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 3, 2022, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904.

**BEFORE** W. Michael Tupman, Chair; Paul R. Houck, Victoria D. Cairns, and Jacqueline Jenkins, 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

William Fasano, *pro se*
*(via teleconference)*

Devera Scott
Deputy Attorney General
on behalf of DNREC

## BRIEF SUMMARY OF THE EVIDENCE

The Board did not hold an evidentiary hearing but heard legal argument by the parties on the motion of the Department of Natural Resources and Environmental Control ("the Agency") to dismiss the appeal of William Fasano ("the Grievant") for lack of jurisdiction.

The Agency attached several documents to the motion to dismiss: email dated Thursday, April 8, 2021 from Carlina Nickerson to the Grievant referencing "the attached termination memo"; photocopy of the memo; photocopy of an envelope addressed to the Secretary of the Department of Human Resources, Haslet Armory 2nd floor, 122 Martin Luther King, Jr. Blvd. S., Dover, DE 19901 and a forever stamp (not postmarked); and photocopy of a typewritten letter dated May 6, 2021 from the Grievant's attorney to the Secretary enclosing "Mr. Fasano's appeal of his April 8, 2021 dismissal from his position as Park Superintendent at Bellevue State Park." The address line of the attorney's letter indicates it was sent "Via First Class Mail."

The Grievant attached to his Merit Appeal Form several documents including: letter dated March 18, 2021 from Carlina Nickerson addressed to the Grievant at 1016 B Philadelphia Pike, Wilmington DE 19809 notifying him that he was suspended effective March 16, 2021 and of his right to a pre-termination meeting; and letter dated April 1, 2021 from Raymond Bivens, Director of the Division of Parks and Recreation, to the Grievant (no address specified) notifying him of the outcome of the pre-decision meeting.

Fasano filed a written response to the motion to dismiss.

The April 8, 2021 email attached to the motion to dismiss did not show the email address the Agency used to send the termination letter to the Grievant. According to an email from Carlina Nickerson to the Agency's counsel, she sent the email to Mr. Fasano's personal Gmail address.

## PRELIMINARY FINDINGS OF FACT

As the hearing unfolded, it became apparent that the Board might need a more complete factual record to decide whether, as a matter of law, the Board has jurisdiction over the Grievant's appeal. Based on the submissions of the parties, however, the following jurisdictional facts do not appear to be in dispute.

On April 8, 2021, the Agency sent an email to the Grievant's personal Gmail address attaching a copy of the termination letter. At the time, the Grievant did not have access to his State email account because he was suspended. The Grievant did not dispute that is his personal email address, and he did not claim that it was not functional or accessible to him at the time. He claims he did not receive the email and did not see the termination letter until April 14, 2021, when the Agency hand-delivered a notice of eviction with a hard copy of the termination letter.

Pursuant to Merit Rule 12.9, the Grievant filed a dual appeal to the Secretary of the Department of Human Resources ("DHR") and to the Board. He prepared a Merit Appeal Form, one for DHR and one for the Board, each signed on April 14, 2021 and, according to the Grievant, sent them to his attorney the next day.

The Grievant's attorney sent a letter dated May 6, 2021 to the DHR Secretary enclosing the Grievant's Merit Appeal Form. The Agency does not dispute whether the letter was properly addressed or postage prepaid. On the front of the envelope is a date stamp "Received May 11, 2021." The postal stamp on the envelope is not postmarked by the U.S. Postal Service so it is not clear when and where the Grievant's attorney placed the letter into the postal system.

## CONCLUSIONS OF LAW

Merit Rule 12.9 provides:

> **Employees who have been dismissed, demoted or suspended may file an appeal directly with the DHR Secretary or the MERB within 30 days of such action. Alternatively, such employees may simultaneously file directly with the DHR Secretary, who must hear the appeal within 30 days. If the employee is not satisfied with the outcome at the DHR Secretary's level, then the appeal shall continue at the MERB**.

Merit Rule 18.4 provides in pertinent part:

> **Failure of the grievant to comply with the time limits shall void the grievance.**

Merit Rule 12.9 does not prescribe how a grievant must file an appeal or when an appeal is deemed filed. [1] Nor is the Board aware of any written rule, regulation or policy issued by DHR which prescribes when an appeal is deemed filed.

In order to calculate the 30-day appeal period, the Board must fix the start and end dates. The Board believes the start date is when the Grievant received notice of dismissal. The Agency claims the date was April 8, 2021 when it emailed a PDF copy of the termination letter to the Grievant's personal email address. The Grievant claims he did not receive notice until April 14, 2021 when the Agency hand-delivered a hard copy of the termination letter to his State Park residence with a notice of eviction.

The Delaware Uniform Electronic Transactions Act, 6 *Del. C.* Chapter 12A, §115 provides:

> (b) Unless otherwise agreed between a sender and a 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

[1] Merit Rule 19.0 does not define "file" or "filing" and the Merit statute is also silent on that score.

> processed by that system.
> . . .
> (e) An electronic record is received under subsection (b) of this section even if no individual is aware of its receipt.

If the sender can prove each of the elements of subsection (b), there is a rebuttable presumption that an email was received even if the individual does not open and read the email.

In *Vorous v. Department of Correction*, MERB Docket No. 20-07-773 (June 15, 2021), the Board relied on this statute to decide that the grievant received notice when the Step 3 decision was emailed to her on June 17, 2020 using the State electronic email system.

*Vorous* is distinguishable for two reasons. First, in *Vorous*, the grievant did not dispute whether she received the Step 3 decision, only when she read it. "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." Decision at p.4. Here, the Grievant claims he never received the email attaching the termination letter. According to the Grievant, when he became aware of the termination letter on April 14, 2021, he ran several word search patterns on his personal email system but could not find the April 8, 2021 email.

Second, in *Vorous* the grievant was still on the State email system. "[A]n electronic record is received once it enters the electronic processing system, i.e., when it is sent in the State electronic mail system when the recipient is also in the same email system." Decision at p.4. In this case the Grievant no longer had access to the State email system because he was suspended.

If the Agency had hand-delivered the termination letter to the Grievant, or had used the Outlook option to add a delivery receipt, then it would have evidence of actual receipt by the Grievant. It did not, and so relies on constructive receipt under the electronic transactions statute. Under that statue, the Agency has the burden to show: (1) the Grievant designated or used his personal email address "for the purpose of receiving electronic records or information of the type

sent"; and (2) whether the April 8, 2021 email was "in a form capable of being processed by that system." 6 *Del. C.* §115(b). [2]

Based on the limited record before the Board, the Board cannot determine whether the Grievant designated or used his personal email address to receive notice from the Agency about significant employment actions like termination, or whether the email was in a form capable of being processed through his personal email address. To make that determination, the Board would need evidence of any other communications between the Agency and the Grievant while he was suspended and did not have access to his State email account. [3]

Even assuming, for the sake of argument, that the Grievant received notice of termination when the Agency emailed the termination letter on April 8, 2021 to his personal email address, the question still remains whether the Grievant met the 30-day time period under Merit Rule 12.9.

According to the Agency, the thirtieth day was May 8, 2021, a Saturday, so the time rolled over to the next business day, Monday, May 10, 2020. According to the Agency, DHR did not receive the Grievant's appeal by mail until the next day, May 11, 2021, as indicated by the date-stamp on the front of the envelope.

The Board does not believe that the date-stamp is conclusive evidence, particularly during the COVID-19 pandemic which has disrupted not only U.S. Postal Service but government agency operations. [4] The Board would need to hear evidence from DHR regarding its mail room protocols,

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[2] "Whether a person has so designated an information processing system" may be determined "from the context and surrounding circumstances, including the parties' conduct." 8 *Del. C.* §116(a)(3).

[3] The Board is aware of several communications between the parties while he was suspended, *e.g.*, letter dated March 18, 2021 from the Agency notifying the Grievant of his suspension; memorandum dated March 25, 2021 from the Grievant to the Agency disputing the basis for the suspension; and letter dated April 1, 2021 from the Agency notifying the Grievant of the outcome of the pre-termination meeting. These communications, however, do not indicate how they were sent (hand-delivery, by regular mail, or by email).

[4] *See Roeder v. Florida Department of Environmental Protection*, 303 So.2d 979 (Fla. App. 2020) ("A time stamp can establish a presumption, but the presumption can be challenged where an error with the

e.g., whether mail is received directly from the U. S. Postal Service, or picked up at the post office; how often the mail is delivered/picked up; who is responsible for date-stamping incoming mail; how often that is done; and whether the DHR mail room was operating at normal operating efficiency in early May 2021. [5]

The Board is hampered by the lack of a postmark on the envelope received by DHR from the Grievant's attorney. "[A] postmark indicates the location and date the Postal Service accepted custody of a mailpiece, and it cancels affixed postage." [6] However, "Postmarks are not required for mailings bearing a permit, meter, or precanceled stamp for postage, nor to pieces with an indicia applied by various postage evidencing systems." [7]

In the absence of a postmark, the Board, like the courts, will follow the common law "mailbox rule" which equates the time of filing with the time of mailing.

"Under the mailbox rule, if a letter 'properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed that it reached its destination at the regular time, and was received by the person to whom it was addressed.'" [8] The mailbox rule "'is not a conclusive presumption of law . . . Rather, it is a rebuttable 'inference of fact founded on the probability that the officers of the government will do their duty and the usual course of business.'" [9]

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time stamp has occurred.").

[5] In *Pinkett v. Department of Health & Social Services*, MERB Docket No. 08-02-418 (May 21, 2009), the Board looked to extrinsic evidence to decide if the grievant filed a timely appeal to the Board. "[The Board Administrator] testified that she had searched her files, including her e-mails, and did not have any record of receiving [the grievant's] appeal of the March 23, 2008 Step 3 decision."

[6] U.S. Postal Service Handbook PO-408 – Area Mail Processing Guidelines §1-1-3 (2008).

[7] *Id.*

[8] *Lupyan v. Corinthian Colleges, Inc.*, 761 F.3d 314 (3rd Cir. 2014) (quoting *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884)).

[9] *Id.*

"If a document is properly mailed, the court will presume the United States Postal Service delivered the document to the addressee in the usual time. The Government then has the opportunity to rebut this presumption with evidence of untimely receipt." [10]

"When confronted with illegible or missing postmarks, [the courts] have considered various types of extrinsic evidence, including testimony from the person claiming to have mailed the envelope."[11] For example, an attorney may submit an affidavit attesting that the letter "was properly addressed, stamped and mailed in adequate time to reach [the addressee] in the normal course of post office business before the lapse of the . . . deadline." [12]

The Board concludes as a matter of law that the Agency did not meet its burden to prove receipt of the April 8, 2021 email by the Grievant under the Delaware Uniform Transactions Act. Even if the Agency had proved receipt on that date, the Agency did not rebut the presumption under the mailbox rule that the Grievant's appeal was timely mailed and therefore timely filed.

## ORDER

By a unanimous vote of 4-0, it is this 28th day of February, 2022 the decision of the Board to deny the Agency's motion to dismiss without prejudice. The Board will schedule a hearing on the merits at which time the parties may submit additional evidence regarding the application of

[10] *Philadelphia Marine Trade Ass'n v. Commissioner*, 523 F.3d 140, 147 (3rd Cir. 2008).

[11] *Seely v. Commissioner*, TC Memo. 2020-6 (Tax Court, Jan.13, 2020). In *Seely*, the taxpayers' attorney mailed a petition for redetermination of tax deficiency to the Tax Court on June 22, 2017, four days before the filing deadline. The Tax Court did not receive the petition until July 17, 2011. The envelope in which the petition was mailed was properly addressed to the Tax Court and appeared to have been delivered by the USPS because it bore U.S. postage stamps, but the envelope did not have a discernable postmark. The attorney submitted a sworn declaration in which he attested: "on June 22, 2017, he deposited in the [USPS] collection receptacle located at 690 Gage Blvd., Richland, Washington 9935, the tax court petition of Michael and Nancy Seely." The Tax Court held the petition was timely filed under the mailbox rule.

[12] *Anania v. McDonough*, 1 F.4th 1019 (Fed. Cir. 2021).

the Uniform Electronic Transactions Act and the mailbox rule and the Agency may renew its motion to dismiss.

W. MICHAEL TUPMAN, MERB CHAIR

PAUL R. HOUCK, MERB Member

JACQUELINE D. JENKINS, EDD, MERB Member

VICTORIA D. CAIRNS, MERB Member