

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

EDWARD WASHINGTON,)	
)	
Employee/Grievant,)	
)	<u>MERB Docket No. 21-06-807</u>
v.)	
)	
DELAWARE DEPARTMENT OF SERVICES FOR)	DECISION AND ORDER
CHILDREN, YOUTH AND THEIR FAMILIES,)	ON MOTION TO DISMISS
DIVISION OF YOUTH REHABILITATIVE SERVICES.)	
)	
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 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

Donna Thompson
Deputy Attorney General
on behalf of DSCYF

BRIEF SUMMARY OF THE EVIDENCE

A hearing was convened by the Merit Employee Relations Board (“MERB”) on Thursday, February 3, 2022, to consider a motion to dismiss the grievance of Edward Washington against the Department of Services for Children, Youth and Their Families (“DSCYF”) for lack of jurisdiction. The employee/grievant, Edward Washington, did not file written opposition to the motion. He did not appear in person or telephonically at the hearing, nor was he represented by counsel.

BACKGROUND

Mr. Washington is employed as a Youth Rehabilitation Counselor II by DSCYF, Division of Youth Rehabilitative Services (“DYRS”). His position is included in the bargaining unit of non-supervisory DYRS employees represented by Local 2004 of the American Federation of State, County, and Municipal Employees, AFL-CIO Council 81 (the “Union”) for purposes of collective bargaining pursuant to 19 *Del. C.* Chapter 13.

The State and the Union are parties to a collective bargaining agreement¹ which establishes the terms and conditions of employment for Youth Rehabilitative Counselors. Article 7 of the Agreement states:

7.1 A grievance is defined as a dispute limited to the application or interpretation of this Agreement, except that complaints which allege a violation of State Merit Rules may be processed under this procedure through Step 4...²

On June 28, 2021, Mr. Washington filed a grievance directly with the MERB alleging that DYRS has violated Merit Rule 5.7 and 5.7.1 by denying him leave under the Family and Medical

¹ Agency Motion to Dismiss, Exhibit A.

² *Supra.*, Art. 7 § 7.1 at page 5.

Leave Act (“FMLA”) and not permitting him to use accrued sick leave due to a medical condition covered under FMLA and Americans with Disabilities Act (“ADA”).³

On December 6, 2021, the Board scheduled a hearing on the Agency’s motion to dismiss for January 6, 2022. By email sent on January 4, 2022, the hearing was postponed by MERB due to COVID protocols, and the parties were advised the hearing was rescheduled for Thursday, February 3, 2022. Mr. Washington acknowledged receipt of the rescheduling email in a January 9, 2022 email to the MERB Administrator, which stated, “RECEIVED”.

CONCLUSIONS OF LAW

The Agency moved to dismiss the grievance asserting the Board lacks jurisdiction to hear it because the negotiated grievance procedure requires that a complaint which alleges a violation of the State Merit Rules is to be processed through Step 4 of the contractual grievance procedure.

Section 5938 of Delaware Merit System of Personnel Administration, 29 Del. C. Chapter 29, limits the Board’s jurisdiction over grievances where the subject is covered in whole or in part by a collective bargaining agreement. The Merit Rules provide further guidance as follows:

Merit Rule 1.3

If a subject is covered in whole or in part by a collective bargaining agreement, 29 Del. C. §5938(d) provides that the Merit Rules shall not apply to such subject matters. These Rules govern in matters of: classification, uniform pay (except in the case of collective bargaining agreements reached pursuant to §1311A of Title 19), and benefits,

³ 5.7 Family and Medical Leave Act (FMLA). FMLA eligible employees will be provided with FMLA leave in accordance with the Family and Medical Leave Act of 1993. Employees shall be required to use available accrued annual leave and sick leave while on FMLA with the exception of one work week of annual leave and one work week of sick leave, which they may elect to retain for use upon return to work. Usage of accrued sick leave shall only be in accordance with M.R. 5.3. Employees on approved Military Serious Illness/Injury leave shall be eligible for wages under Military Serious Illness/Injury leave only see M.R. 5.5.1.6.

5.7.1 FMLA leave shall not be charged to an employee for time missed from work as a result of illness or injury covered by workers’ compensation, unless requested by the employee.

examination, screening and ranking, rejection of candidates, appointment, paid leave, promotional requirements and standards, and veteran's preference. Collective bargaining agreements may govern matters of bargaining unit-specific pay and benefits, probation, emergency employment, transfer and promotional selection processes, reinstatement, performance records, layoff, fines, discipline up to and including dismissal, grievances, work schedules and working conditions.

Merit Rule 18.3

An employee who is in a bargaining unit covered by a collective bargaining agreement shall process any grievance through the grievance procedure outlined in the collective bargaining agreement. However, if the subject of the grievance is nonnegotiable pursuant to 29 *Del. C.* §5938, it shall be processed according to this Chapter.

The Board concludes as a matter of law that it does not have jurisdiction to hear Mr. Washington's grievance because the collective bargaining agreement between the State and the American Federation of State, County, and Municipal Employees, AFL-CIO Council 81, Local 2004 and 117 establishes the process to be followed for a merit rule complaint. It is undisputed that Grievant holds a bargaining unit position covered by the collective bargaining agreement. The collective bargaining agreement between the State and the Union governs the procedure by which a Union member may grieve an alleged violation of the State Merit Rules. It requires bargaining unit members to follow a four-step process before filing a grievance with the MERB. If the grievance is not resolved in the four-steps of the grievance procedure, it may be appealed to the DHR Secretary and then to the MERB.⁴

Mr. Washington's recourse, if any, was to initiate an alleged violation of the Merit Rules through that negotiated grievance procedure. He is foreclosed from directly filing a merit system grievance with the MERB. *Merit Rule 18.3*. Consequently, the Board does not have jurisdiction to hear this grievance.

⁴ §7.8, Exhibit A to the Agency's Motion to Dismiss, at page 8.

ORDER

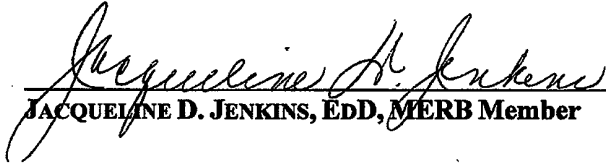
It is this **16th** day of **February, 2022**, by a vote of 4-0, the Decision and Order of the Board to grant the Agency's Motion and to dismiss the grievance for lack of jurisdiction.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member