

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

TAMMY JACKSON,)	
)	
Employee/Grievant,)	
)	<u>DOCKET No. 22-02-822</u>
v.)	
)	
DEPARTMENT OF CORRECTION, DIVISION OF PROBATION AND PAROLE,)	DECISION AND ORDER ON MOTION TO 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 May 5, 2022, at the Delaware Public Service Commission, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair; Victoria D. Cairns, and Sheldon N. Sandler, Esq., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Ilona Kirshon
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Anthony Delcollo, Esq.
Attorney for Tammy Jackson

Stacey Bonvetti
Deputy Attorney General
on behalf of the Department of Correction

BACKGROUND

The Board considered the motion to dismiss the appeal of the employee/grievant, Tammy Jackson (“Jackson”), for lack of jurisdiction filed by the Department of Correction (“Agency”). Jackson filed a written response to the motion. The Board heard legal argument from both parties.

The facts are undisputed. Ms. Jackson was promoted to Probation and Parole Supervisor on September 12, 2021. She filed a Step 1 grievance on October 13, 2021 asserting she had not been properly paid in her new position. On October 27, 2021, the Director of Probation and Parole issued a Step 1 grievance decision in which she concluded, “The Agency is not in the position to resolve the grievance matter at Step 1.”¹

The Grievant filed a timely appeal to Step 2 and a hearing was held on November 12, 2021. On December 7, 2021, the Bureau Chief issued her decision in which she stated,

This Hearing Officer consulted with Human Resources to confirm pay rates and calculations... When calculating Tammy Jackson’s pay rate as a Supervisor, DOC Human Resources subtracted the \$4,620 that was negotiated into the SPO² base pay rate giving Tammy Jackson a new base SPO salary of \$59,420. As a P&P Supervisor, Tammy Jackson’s base pay is \$64,408.69. When the \$4,620 Hazardous Duty Pay is added, Ms. Jackson [*sic*] pay is \$69,028.69.

...Based on the human resources procedures and guidance provided, this grievance is denied.

Moving forward, it is recommended that the hiring agency and employee discuss starting salary before the position is accepted. If the offered salary is not acceptable, the employee would be able to request an advanced salary according to Merit Rule 4.12.³

On December 14, 2021, Grievant filed a timely Step 3 appeal⁴ with the Department of

¹ Agency Motion to Dismiss, Exhibit B.

² SPO = Senior Probation Officer

³ Agency Motion to Dismiss, Exhibit C.

⁴ Agency Motion to Dismiss, Exhibit D.

Human Resources (“DHR”) pursuant to Merit Rule 18.8. DHR, however, failed to schedule a Step 3 hearing. On February 16, 2022, Grievant filed her grievance with the MERB, although she had not yet received a Step 3 decision.

In accordance with MERB procedures, a prehearing teleconference was convened by the Board’s counsel on April 19, 2022. The Prehearing Order was issued over the Chair’s signature on April 22, 2022, which identified witnesses and pre-admitted exhibits for the May 5, 2022 scheduled hearing on the merits. By letter dated April 25, 2022, the Board Chair requested that counsel be prepared to address, as a preliminary matter at the start of the hearing on May 5, 2022, the following issue:

Whether the Board has jurisdiction to hear this appeal even if the Department of Human Resources (DHR) did not schedule a Step 3 hearing and issue a decision within 45 days as required by Merit Rule 18.9?

On April 29, 2022, the Agency filed a motion to dismiss the underlying grievance and asserted that the appeal to Step 3 was “inadvertently not processed and it was an unintentional oversight” by DHR. The Grievant filed a response to the Agency’s motion on May 4, 2022.

CONCLUSIONS OF LAW

In considering a motion to dismiss, the Board must accept all “well-pleaded factual allegations in the complaint” and grant the motion only if employee/grievant could not recover under any reasonably conceivable circumstances. *Carta v. Danberg*, 2012 WL 1537167, at 1 (Del. Super., Apr. 30, 2012), *aff’d*, 70 A.3d 205 (Del. 2012).

Merit Rule 18 states, in relevant part:

18.8 Step 3: Any appeal shall be filed in writing to the DHR Secretary within 14 calendar days of receipt of the Step 2 reply. This appeal shall include copies of the written grievance and responses from the previous steps. The parties and the DHR Secretary (or designee) may agree to meet and attempt an informal resolution of the grievance,

and/or the DHR Secretary (or designee) shall hear the grievance and issue a written decision within 45 calendar days of the appeal's receipt. The Step 3 decision is final and binding upon agency management.

18.9 If the grievance has not been settled, 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.

Merit Rule 18.9 requires a grievant to file an appeal to the Board "within 20 calendar days of receipt of the Step 3 decision". The Board has determined, and both the Delaware Superior and Supreme Courts have affirmed, that it does not have jurisdiction to process an appeal from a Step 3 decision unless such appeal is timely filed, and has specifically rejected appeals which were filed prior to the issuance of the Step 3 decision by DHR. See *Banner v. DHSS*, MERB No. 12-07-551 (2013); *aff'd* N13A-04-013 (Del.Super. 2014); *aff'd* 123 A.3d 472 (Del. 2015).

The Board held in *Pinkett v. DHSS* (MERB 08-02-415 (May 21, 2009)):

The Board concludes as a matter of law that it cannot exercise jurisdiction over Pinkett's February 28, 2007 appeal to the Board. Rule 18.8 provides that HRM "shall" issue a decision within forty-five days of the receipt of the Step 3 appeal. If HRM does not (as is the case here), the Board does not believe that HRM is divested of jurisdiction so as to allow the grievant to appeal to the Board. @ p. 3-4.

...As a general rule, where a statute which imposes upon a public officer the duty of performing some act relating to the interests of the public and which fixes a time for the doing of such act, the requirement of time will be construed as directory rather than mandatory, and not as a limitation on the exercise of the power," *Pitts v. White*, 111 A.2d 217, 218-19 (Del. 1955). [S]uch an act will be construed as merely a guide for the officers in the conduct of the public business so as to insure the orderly and prompt performance of public duties." *Id.* at 219.

Although Ms. Jackson filed a timely Step 3 appeal with DHR, a Step 3 hearing was not scheduled or conducted; consequently, there has been no Step 3 decision issued. As a result, the instant appeal to the MERB is premature and the Board is without jurisdiction to consider the

merits of this grievance.

ORDER

It is this 13th day of May, 2022, by a vote of 3-0, the Decision and Order of the Board to grant the Agency's Motion to Dismiss and to remand Ms. Jackson's grievance to DHR for it to schedule a Step 3 hearing and render a written decision on or before June 3, 2022. Upon receipt of the Step 3 decision, the employee/grievant will have to re-file her appeal to the Board in compliance with Merit Rule 18.9.



W. MICHAEL TUPMAN, MERB CHAIR



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER