

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	MERB DOCKET 21-05-803
v.)	
)	DECISION AND ORDER
DELAWARE DEPARTMENT OF NATURAL)	OF DISMISSAL
RESOURCES AND ENVIRONMENTAL CONTROL,)	
)	[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 9:00 a.m. on June 16, 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, and Victoria D. Cairns, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Allison J. McCowan
Department of Justice
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Kate Butler
Kate Butler Law LLC
on behalf of Employee/Grievant

Devera Scott
Deputy Attorney General
on behalf of DNREC

BACKGROUND AND BRIEF SUMMARY OF THE EVIDENCE

The Department of Natural Resources and Environmental Control (“DNREC”) offered twenty-two (22) documents into evidence of which the Board admitted seventeen (17), marked as Agency Exhibits A - E, H - M, and O - T.

The Grievant offered seventeen (17) exhibits into evidence of which the Board admitted ten (10), marked as Grievant Exhibits 1, 3, 4, 7-8, and 13-18.

Five witnesses testified on behalf of DNREC: Susan Staats, Regional Park Administrator; Grant Melville, Parks Operations Section Manager; Tonya Brady, HR representative; Sharae Goff, Human Resources Associate with Department of Human Resources (“DHR”); and Theresa Williams, receptionist with DHR.

Two witnesses testified on behalf of the Grievant: David Koller, Esq., Koller Law Firm; and Paul Kenton, Esq.

Prior to the merits hearing, on November 24, 2021, DNREC filed a motion to dismiss the grievance for lack of jurisdiction due to the timeliness of the appeal. Following a hearing on DNREC’s motion, the Board denied the motion without prejudice to DNREC to reassert the motion at a later date. *See Fasano v. Delaware Department of Natural Resources and Environmental Control*, MERB Docket No. 21-05-803 (Feb. 28, 2022). In its decision, the Board reasoned that DNREC failed to establish a sufficient evidentiary basis as to the date the termination notice was received by the Grievant and the date the grievance was received by DHR and/or the Board. *Id.* Further, the Board’s decision articulated that if DNREC met its evidentiary burden regarding these two points, the Grievant could rebut the facts with sufficient evidence to demonstrate the date and method of mailing by his former counsel. *Id.*

Following presentation of its case in chief, the Agency renewed its motion to dismiss the grievance for lack of jurisdiction due to the timeliness of the appeal. The Board heard testimony

from the Grievant's former counsel, David Koller, Esq. and Paul Kenton, Esq. The MERB also heard legal argument on the Agency's motion.

FINDINGS OF FACT

The Grievant was employed by DNREC as a Park Superintendent and was terminated from his position on April 8, 2021. *Agency Ex. R.* DNREC sent the Grievant notice of his termination via email to his personal Gmail address on April 8, 2021. *Agency Ex. R.* Prior to sending the notice of termination via email, DNREC used the Grievant's personal Gmail address to communicate with him on no less than three occasions. *See Agency Exhibits O, P, and Q.* The Grievant received the notice of his termination on April 8, 2021. Sometime after he received the notice of termination, he mailed¹, through his attorneys, a dual appeal to the Secretary of DHR and to the Board pursuant to Merit Rule 12.9. *See generally Trans. 223:18-231:1.*

On May 11, 2021, DHR received the Grievant's dual appeal. *Agency Exhibits S and T.* The Board did not receive this grievance until May 26, 2021. The grievance was filed thirty three (33) days after the Grievant received notice of his termination.

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:

¹ There is no dispute that the Grievant's appeal was properly addressed with postage prepaid.

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

Under the Merit Rules, a grievant's obligation to file a timely appeal to the Board "is jurisdictional." *DeWitt v. Office of the State Treasurer*, MERB 19-10-738 (Feb. 19, 2020) (citing *Cunningham v. DHSS*, C.A. No. 95A-10-003, 1996 WL 190757, at *2 (Del. Super. Mar. 27, 1996) (Ridgely, Pres. J.), *aff'd*, 679 A.2d 469 (Del. 1996)). Where the deadline has "passed, the Board had no jurisdiction to hear Appellant's grievance." *Cunningham*, 1996 WL 190757, at *2.

In order to calculate the 30-day appeal period, the Board must fix the start and end dates. As articulated in the Board's earlier decision on DNREC's Motion to Dismiss, 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 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.

Under the statute, DNREC 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 During the hearing, DNREC carried its burden under §115(b)(1) and demonstrated that the Grievant designated his personal Gmail account as a means to send and receive electronic information. *See Agency Exhibits O, P, and Q.*

Further, as evidenced by the correspondence between DNREC and the Grievant on his

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).

personal Gmail account, it is clear that DNREC carried its burden of demonstrating that the April 8, 2021 notice of termination was capable of being processed by his personal Gmail account. *See Id.* Moreover, the Grievant did not dispute or offer any evidence to the contrary. As DNREC has carried its burden to prove the elements of 6 *Del. C.* §115(b)(1) and (2), there is a rebuttable presumption that an email was received even if the individual does not open and read the email. The Grievant did not offer any evidence to rebut the presumption. Thus, the Board finds the Grievant received the notice of his termination on April 8, 2021.

DNREC further proved that neither DHR nor the Board received the grievance appealing his termination until May 11, 2021 at the earliest. The Board heard testimony from two DHR employees who testified to processing this grievance in a timely and prompt manner when it was received on May 11, 2021. The Grievant did not offer any evidence to contradict that testimony.

Instead, the Grievant sought to rely on the testimony of his former counsel, Mr. Koller and Mr. Kenton, to establish that the common law “mailbox rule” controlled. “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.’” *Lupyan v. Corinthian Colleges, Inc.*, 761 F.3d 314 (3rd Cir. 2014) (quoting *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884)). The mailbox rule creates 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.’” *Id.* The Board heard testimony from Mr. Koller and Mr. Kenton but neither had direct knowledge of mailing this grievance. *See generally Trans.* 214:8-231:1. The Grievant failed to provide any evidence as to the date and method of mailing his grievance. Thus, the Board finds that the common law mailbox rule does not apply.

The Board concludes as a matter of law that the Grievant received the notice terminating his employment with DNREC on April 8, 2021 and did not file his grievance challenging his

termination until May 11, 2021, thirty three (33) days after his termination. The Board concludes as a matter of law that it does not have jurisdiction over this grievance because it was not timely filed within thirty days of his notice of termination. Merit Rule 12.9. As a result, the grievance is void. Merit Rule 18.4.

ORDER

By a unanimous vote of 3-0, it is this 26th day of July, 2022, the Decision and Order of the Board to grant DNREC's motion to dismiss and to dismiss the grievance for lack of jurisdiction.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



VICTORIA D. CAIRNS, MERB Member