

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

JOSEPH O’NEAL,)	
)	
Employee/Grievant,)	<u>MERB Docket No. 23-05-875</u>
)	
v.)	
)	DECISION AND ORDER
DELAWARE DEPARTMENT OF TRANSPORTATION,)	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 November 1, 2023, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Jennifer Cohan, Chair; Sheldon N. Sandler, Esq., Joseph A. Pika, III, Ph.D., and Lester E. Johnson, Jr., Members; a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Deborah L. Murray-Sheppard
Board Administrator

Jason Chadick, President
AFSCME Local 837
on behalf of the Grievant

George T. Lees, III
Deputy Attorney General
on behalf of DOT

BRIEF SUMMARY OF THE EVIDENCE

A hearing was convened by the Merit Employee Relations Board (“MERB”) on Wednesday, November 1, 2023, to consider a motion to dismiss the grievance of Joseph O’Neal against the Department of Transportation (“Agency” or “DOT”) for lack of jurisdiction.

The Board reviewed the Agency’s motion and the Grievant’s response and heard legal argument from the parties at the hearing. This decision results therefrom.

BACKGROUND

Mr. O’Neal is employed as an Area Supervisor I, assigned to North District in Newark, Delaware. His position is included in the bargaining unit of DOT Division of Maintenance and Operations employees represented by Local 837 of the American Federation of State, County, and Municipal Employees, AFL-CIO Council 81 (“Union”) for purposes of collective bargaining, pursuant to 19 *Del. C.* Chapter 13.

DOT and the Union are parties to a current collective bargaining agreement¹ which establishes the terms and conditions of employment for bargaining unit employees. Article 4 of the Agreement states:

4.1 A grievance is defined as a dispute or difference between the parties, limited to the interpretation or application of the specific terms of this Agreement; provided, however, that grievances concerning Merit Rules shall be processed in accordance with the procedures provided herein up through Step 3...²

The collective bargaining agreement also states, “17.1 Any disciplinary action shall be for just cause.”³

¹ Agency Motion to Dismiss, Exhibit A. The collective bargaining agreement has a term of July 1, 2022 through June 30, 2025.

² *Supra.*, Art. 4, § 4.1 at page 3.

³ *Supr.*, Art. 17, §17.1, at page 13.

On or about September 12, 2022, Mr. O’Neal was issued a one-day disciplinary suspension. He filed a grievance which was processed through Step 3, when a decision upholding the discipline was issued by a hearing officer designated by the DOT Secretary on Tuesday, May 2, 2023.⁴ The grievance was then appealed to DHR for a Step 4 Pre-arbitration⁵ by email dated May 15, 2023.

On May 17, 2023, Mr. O’Neal also filed a Merit Rule (“MR”) 12.9 dual appeal⁶ with the Department of Human Resources (DHR) and the MERB. This grievance was forwarded to the Secretary of Human Resources for processing. By email dated June 2, 2023, the DHR Administrator of Employee and Labor Relations responded to the Grievant:

... Unfortunately, this case cannot be processed as an MR 12.9 appeal because it arises out of an alleged violation of the collective bargaining agreement (“CBA”) between the State of Delaware and Union Local 837 that has non-discrimination and grievance procedure provisions that govern discipline. In addition, there is no allegation that a MR was violated.

More importantly, you have already filed a Pre-Arbitration appeal on the same set of facts and circumstances giving rise to the 1-Day suspension and MR 1.3 dictates that when a Grievant is covered by a CBA requiring discipline for ‘just cause’ as does L837, such agreement supersedes the Merit Rules.

Accordingly, the Department of Human Resources has no jurisdiction to hear this case as a Merit grievance but will proceed with it as a contractual grievance and schedule a Pre-Arbitration Meeting for the parties.⁷

By email dated June 6, 2023, the Grievant (through his Union President, Jason Chadick)

⁴ Agency Motion to Dismiss, Exhibit B.

⁵ **Step 4 Pre-arbitration:** If the grievance is still not resolved, it may be appealed to the State’s Director for Labor Relations and Employment Practices (“LREP Director”). Such appeal shall be made in writing within 15 working days of the Step 3 response, and a meeting shall be scheduled with the Union within 20 working days. A written decision shall be provided to the Union within ten (10) working days of the meeting. In the absence of such notification, the decision reached at Step 3 shall prevail, subject to the right of the Union to appeal the decision to arbitration.

⁶ **Merit Rule 12.9:** 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.

⁷ Agency Motion to Dismiss, Exhibit C..

requested this grievance be heard by MERB.

CONCLUSIONS OF LAW

The Agency moved to dismiss the grievance asserting the Board lacks jurisdiction to hear a complaint which arises under the terms of a collective bargaining agreement. Both claims of discrimination and unjust discipline are covered by the terms of the agreement to which Mr. O'Neal is subject.

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 states:

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, 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 the 2022 – 2025 collective bargaining agreement between DOT and AFSCME Local 837 includes Non-Discrimination (Article 6) and Discipline (Article 17) provisions, as well as a negotiated grievance procedure which concludes with binding arbitration (Article 4).

The parties have agreed to resolve disputes and differences which arise under the terms of their agreement through their negotiated grievance procedure. Merit Rule 18.3 makes it clear that the statutory policy favors resolution of disputes through the grievance procedure negotiated by the parties.

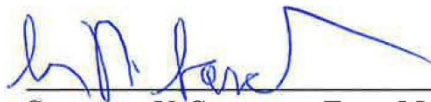
Mr. O’Neal, as a bargaining unit employee covered by a collective bargaining agreement, is foreclosed from filing a merit system grievance with the MERB which challenges discipline and/or alleged discrimination because both are covered by the applicable collective bargaining agreement. Consequently, the Board does not have jurisdiction to hear this grievance.

ORDER

It is this 3rd day of November, 2023, 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.



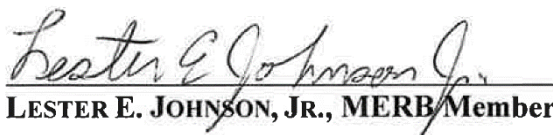
JENNIFER COHAN, MERB Chairperson



SHELDON N. SANDLER, ESQ., MEMBER



JOSEPH A. PIKA, III, PH.D., MEMBER



LESTER E. JOHNSON, JR., MERB Member