

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

MILLER, ET AL.,)
)
Grievants,)
)
v.)
)
DEPARTMENT OF SERVICES FOR)
CHILDREN, YOUTH AND THEIR)
FAMILIES,)
)
Employer.)

MERB Docket No. 05-06-332

ORDER GRANTING MOTION
TO DISMISS

ORDER

BEFORE Brenda Phillips, Chairperson, John F. Schmutz, Joseph D. Dillon, and Bernice Edwards, Members, constituting a quorum of the Merit Employee Relations Board (“MERB” or “Board”) pursuant to 29 Del. C. §5908(a).

APPEARANCES:

For the Appellant: Patricia Bailey
Local 3384, AFSCME
Council 81, AFL-CIO
296 Churchman's Road
New Castle, DE 19720

For the Department: Kevin Slattery, Deputy Attorney General
State Of Delaware
Department of Justice
Carvel State Building
820 N. French Street
Wilmington, DE 19801

FACTUAL BACKGROUND

This matter is before the MERB on a Motion to Dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted filed by the Department of Services for Children, Youth and their Families (hereinafter "DSCYF") on or about July 18, 2006. The MERB heard oral argument from the parties on August 3, 2006.

The Grievants, collectively, are employees of DSCYF and were unsuccessful applicants for a newly created Family Crisis Therapist Supervisor position in the Division of Youth Rehabilitative Services. The successful candidate was selected on December 2, 2004.

The Step 2 grievance hearing was conducted on or about January 11, 2005, followed by a Step 3 hearing on April 21, 2005 before a hearing officer with the Human Resource Management office of the Office of Management and Budget. The hearing officer issued her decision on May 12, 2005. The Grievants' copy of the Step 3 decision filed with the appeal indicates that the Step 3 decision was received by the Grievants' union representatives on May 31, 2005. The Grievants' appeal was filed 29 days later on June 29, 2005.

DISCUSSION

The Board is a creature of statute. 29 *Del. C.* ch. 59. The Board's power and authority are derived exclusively from the statute, and its power, therefore, extends only to those cases which are properly before it in compliance with the statutory law. *Maxwell v. Vetter*, 311 A.2d 864 (Del. Supr. 1973)

Pursuant to 29 *Del. C.* §5931 the Merit Rules “shall provide for the establishment of a plan for resolving employee grievances and complaints.” Merit Rule Chapter 18 provides the grievance procedure framework required by the *Delaware Code*. The present grievance relates to a failure to promote under Chapter 10 of the Merit Rules which, pursuant to Merit Rule 18.3, must be grieved through the Merit System grievance procedure provided for in the Merit Rules Chapter 18.

The timeframe for an appeal to the MERB is governed by Merit Rule 18.9 which provides that a written appeal shall be filed within 20 calendar days of receipt of the Step 3 decision. The Grievants’ appeal was filed nine days late. The Merit Rule appeal procedures set forth above were not complied with and Grievants’ appeal before the MERB is untimely. *See Cunningham v. Department of Health and Social Services*, 1996 WL 190757 (Del. Super. 1996).

The parties cannot agree to confer jurisdiction on the Board to hear the merits of an appeal that is not timely filed. *Maxwell v. Vetter, supra*. The Board is, therefore, without jurisdiction to hear this matter. *See Cunningham v. Department of Health and Social Services*, 1996 WL 190757 (Del. Super. 1996).

The documentation establishes that the Step 3 decision was received in Ms. Bailey’s office on May 31, 2005. Ms. Bailey was the union representative at the Step 3 hearing. The Board rejects Ms. Bailey’s argument that the service of the appeal was not effective until June 16, 2005 when her office sent it to the union president. Service was effective when it was received in Ms. Bailey’s office on May 31, 2005.

This appeal was not filed with the Board within the time prescribed for filing an appeal and therefore the Motion to Dismiss is granted.

IT IS SO ORDERED THIS 21st DAY OF Sept., 2006


Brenda Phillips, Chairperson


John F. Schmutz, Member

Bernice Edwards, Member


Joseph Dillon, Member