

MERIT EMPLOYEE RELATIONS BOARD

PRACTICE AND PROCEDURE MANUAL ©

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(2008-2013)

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INTRODUCTION

“In 1994, the Delaware General Assembly abolished the State Personnel Commission’s authority to hear Merit Rule Grievances. The [Merit Employee Relations Board] was established as the State Personnel Commission’s successor. The Synopsis to the House Bill enacting this change states that the revised statute ‘would grant explicit authority to the Director and the Board to make remedial awards for any wrong arising under a misapplication of any provision’ of the Merit Rules.”¹

This Practice and Procedure Manual is an extended annotation of Chapter 59 of Title 29 of the *Delaware Code* (the Merit Statutes) and the Merit Rules (adopted by the Board effective January 1, 2004, revised as of July 31, 2009). The Manual digests Delaware Court decisions involving the classified system and decisions issued by the Merit Employee Relations Board (“the Board”) from 2008-2013.²

The author hopes the Manual will provide a convenient desk-top reference guide for the members of the Board, the Courts, Deputy Attorneys General and private attorneys who practice before the Board, Human Resource Managers, and classified employees.

¹ *Brice v. Department of Correction*, 704 A.2d 1176, 1177 (Del. 1998) (en banc) (quoting 69 *Del. Laws* c. 436).

² Because of substantial amendments to the Merit Statutes and the Merit Rules over the years, many older decisions by the Board no longer hold any precedent and are not discussed or cited in this Manual.

At the end of the Manual is a Table of Citations with page numbers for easy reference to Court and MERB Decisions cited. The author hopes to update the Manual with bi-annual pocket parts.

On the MERB website (<http://merb.delaware.gov/>) you can download the Merit Rules, Merit Statutes, the MERB Operating Procedures, Appeal Forms, and MERB Decisions (1995-2013).

RULES GOVERNING PRACTICE AND PROCEDURE

The most significant recent change to the Board's Rules Governing Practice and Procedure was the amendment of Rule No. 13: Pre-Hearing Procedure by the Board (rev. Mar.1, 2012) formalizing existing practice since 2008.³

The Administrative Procedures Act ("APA") authorizes the Board to "[h]old pre-hearing conferences for the settlement or simplification of issues by consent, for the disposal of procedural requests or disputes and to regulate and expedite the course of the hearing."⁴

Rule 13 requires a pre-hearing conference in every case the Board will hear on the merits. The Board has designated its legal counsel as the Referee to hold pre-hearing conferences.

Before the pre-hearing conference, the parties must exchange their proposed exhibits and witness summaries. After the conference (conducted by telephone), the Referee makes recommendations to the Chair for review and approval. Approved recommendations are incorporated into a pre-hearing order signed by the Chair.

³ The Administrative Procedures Act does not require the Board to go through a formal rule-making process to amend the "Rules of practice and procedure used by the agency." 29 Del. C. §10113(2). See also *Council 81, American Federation of State, County & Municipal Employees v. State Personnel Commission*, C.A. No. 87C-AU-36, 1989 WL 100473, at pp.2, 3 (Del. Super., Aug. 3, 1989) (formal rule-making is not required to make changes to the Merit Rules which "were technical in nature" or which "merely make[] formal an existing practice").

⁴ 29 Del. C. §10125(6).

PROCEDURAL ISSUES

The Board is a “state agency” subject to the case decision requirements of the APA.⁵

A. Continuances

The Board may grant a continuance upon written request by a party, but only for good cause. Good cause may include ongoing good faith settlement negotiations by the parties,⁶ the grievant’s inability to obtain legal counsel, or the last-minute unforeseen unavailability of a party or counsel.⁷

Unavailability of a witness is usually not good cause. The Board could allow the witness to testify by telephone. Or the Board could hear all of the other witnesses and then decide the testimony of the unavailable witness was not necessary.

The Board has discretion to grant or deny a continuance. “Where an administrative agency, such as the MERB, makes procedural decisions calling for the exercise of discretion, an abuse of discretion occurs when the judgment exercised by

⁵ See 29 Del. C. §10161(a)(12).

⁶ *But see Reyes v. Department of Finance*, No. 12-09-559, at p.2 (Mar. 12, 2013) (“[The agency] moved to continue the hearing because the parties were engaged in ‘global settlement’ talks to resolve not only this grievance but other disputes. The Board denied the agency’s motion for a continuance. The Board is reluctant to keep cases on its docket indefinitely while the parties discuss, but may never reach, a potential settlement.”).

⁷ *But see Reyes, supra* Note 6, at p.2 (the grievant moved for a continuance “because of recent stormy weather in Sussex County. The Board denied her motion for a continuance because [she] did not cite a more specific reason why she could not travel to Dover.”).

the trier of fact is manifestly unreasonable.”⁸

B. Recusal

A motion to recuse is directed to a Board member who may have a conflict of interest.

On a motion to recuse, the Board member first “must subjectively determine that she can proceed to hear the case free of bias or prejudice. Second, if the [Board member] has determined subjectively that she has no bias, then she must determine objectively whether there is an appearance of bias sufficient to cause doubt about her impartiality. If an objective observer viewing the circumstances would conclude that a fair or impartial hearing is unlikely, recusal is appropriate.”⁹

⁸ *Kopicko v. DSCYF*, C.A. No. 02A-10-004-HDR, 2003 WL 21976409, at p.2 (Del. Super., Aug. 15, 2003) (footnote omitted), *aff’d*, 846 A.2d 238 (TABLE), 2004 WL 691901 (Del., Mar. 25, 2004)). In *Kopicko*, the Board did not abuse its discretion by denying the grievant’s request for a continuance to examine a witness who had already testified and been excused. “The testimony sought on cross-examination by Kopicko was available to her on the first day of the hearing and was also available to her from another source on the second day of the hearing. Under these facts, there was no abuse of discretion by the MERB to deny the continuance.” 2003 WL 21976409, at p.6.

But see Moss v. State Personnel Commission, 1987 WL 16715 (Del. Super., July 30, 1987) (the State Personnel Commission abused its discretion in denying a motion for a continuance when the grievant had just retained an attorney who needed more time to prepare for the hearing).

⁹ *Ebersole v. Evans Builders*, 15 A.3d 217 (TABLE), 2011 WL 379409, at p.2 (Del., Feb. 7, 2011).

In two cases, the grievants moved to recuse the Board Chair because of her prior employment with the agency, or her prior professional relationship with an agency official. In each case, the Board denied the motion.¹⁰

C. Telephonic Testimony

The Board disfavors telephonic testimony. It is difficult to judge the credibility of a witness over the phone, and a party may object on due process grounds that it does not have a meaningful opportunity to cross-examine.¹¹

The Board has discretion to allow telephonic testimony if the witness is unavailable. By unavailable, the Board means: (1) a witness cannot attend a hearing because of age, illness, or infirmity; and (2) the condition is likely to last beyond a reasonable time for a continuance. “Mere inconvenience or personal preference of the witness to testify by telephone will not suffice.”¹²

¹⁰ *Avallone v. DHSS*, No. 07-05-391 (July 17, 2008), *aff’d on other grounds*, 14 A.3d 566 (Del. 2011) (en banc); *Olsen v. DSCYF*, No. 11-09-522 (Oct. 11, 2012).

¹¹ The Sixth Amendment’s Confrontation Clause – the right to confront one’s accuser – only applies in criminal proceedings. In civil proceedings, a more flexible due process standard applies. See E. Croft, *Telephonic Testimony in Criminal and Civil Trials*, 14 *Hast. Comm./Ent. L. J.* 107, 110 n.12 (1991) (“Telephonic testimony is more readily accepted in quasi-judicial proceedings such as administrative hearings.”).

¹² *Avallone v. DHSS*, No. 07-05-391, at p.11. The Board’s criteria for witness unavailability parallel Rule 32(a)(3) of the Superior Court Rules of Civil Procedure (deposition testimony is admissible as evidence if “the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment”).

When the Board allows a witness to testify by telephone, it is the responsibility of the party calling the witness to make sure the witness is available at a pre-arranged time to testify by two-way speaker phone using a land-line telephone (not a cell phone). The party calling the witness must verify the identity of the witness for the record and provide the witness with copies of any hearing exhibits which might be referred to during the examination. The witness cannot consult or refer to any exhibits outside the record and must attest that there is no one else in the room who might coach or influence the testimony.

D. Open/Closed Meetings

The Board is a public body subject to the open meeting requirements of the Freedom of Information Act (“FOIA”). FOIA authorizes the Board to meet in private to discuss the “hearing of employee disciplinary or dismissal cases unless the employee requests a public hearing.”¹³

In an appeal to the Board over disciplinary action, the grievant has a right under FOIA to request a public hearing. Otherwise, disciplinary appeals are closed to the public. If the hearing is closed to the public, the Board makes a redacted copy of the Decision and Order publicly available by deleting the name of the grievant.

¹³ 29 *Del. C.* §10004(b)(8).

E. Sequestration of Witnesses

At the request of either party, the Board will sequester the fact witnesses until their turn to testify so they will not be influenced by the testimony of other witnesses. The grievant and the agency representative are not sequestered even if they will testify during the hearing because, under the APA, a party has a right “to appear personally or by agency representative.”¹⁴

F. Time Limits

The Board imposes time limits on each party to present its case. Typically, the time allotted for a termination case is 2 or 2 ½ hours for each party. The time includes opening and closing statements and direct and cross-examination of witnesses. The time does not include preliminary legal matters, or questions from the Board to witnesses or counsel.

As a quasi-judicial body, the Board has the authority to control its own docket by setting time limits for hearings. This authority derives from the APA which authorizes the Board to “[e]xclude plainly irrelevant, immaterial, insubstantial, cumulative and privileged evidence” and to “[l]imit unduly repetitive proof, rebuttal and cross-examination.”¹⁵

¹⁴ 29 *Del. C.* §10122(5).

¹⁵ 29 *Del. C.* §10125(3), (4).

The Board sets the time limits in the pre-hearing order so the parties can better prepare their case to fit within those limits (e.g., by calling fewer witnesses whose testimony may overlap). The time limits are determined on a case-by-case basis based on the proffers of proof by the parties at the pre-hearing conference. The Board uses a dual “chess clock” to monitor the parties’ block of time at the hearing. ¹⁶

The Board believes there is a strong public interest in the swift and efficient administration of justice. Allowing one grievant an undue amount of time to present a case delays the resolution of other grievants’ cases. The Board members believe “that it is they, rather than the attorneys, who have a more objective appreciation of the time a case requires when balancing its needs against the exigencies of the [Board’s] docket.” ¹⁷

¹⁶ If, near the end of the allotted time, the Board believes that it has not heard all the relevant evidence, then the Board may extend or waive the time limit. In practice, this rarely happens because most parties are able to present their case well within the time limits.

¹⁷ *United States v. Reaves*, 636 F. Supp. 1575, 1579 (E.D. Ky. 1986).

G. Rules of Civil Procedure

Where appropriate, the Board follows the Superior Court Civil Rules of Procedure.

1. Motion To Dismiss

The agency may move to dismiss the grievant's appeal for lack of jurisdiction (the equivalent of a Rule 12(b)(1) motion under the Rules of Civil Procedure). The two most common grounds for a motion to dismiss are: (1) the grievance is time-barred;¹⁸ and (2) the subject matter of the grievance is covered in whole or in part by a collective bargaining agreement.¹⁹

The agency may also move to dismiss for failure to state a claim upon which relief can be granted as a matter of law (the equivalent of a Rule 12(b)(6) motion under the Rules of Civil Procedure). The motion to dismiss for failure to state a claim is rarely successful, particularly if the grievant is *pro se* and should not be held to a strict pleading standard.

¹⁸ See, e.g., *Rogers v. Department of Correction*, No. 11-09-525 (Dec. 20, 2011); *Echols v. DSCYF*, No. 09-10-456 (Apr. 5, 2010); *Johnson v. DHSS*, No. 09-02-443 (Sept. 3, 2009); *Gibson v. Violent Crimes Compensation Board*, Nos. 07-11-404/410 (Mar. 26, 2008).

¹⁹ See, e.g., *Masi v. Department of Labor*, No. 11-02-505 (July 19, 2011); *Jardine v. Family Court*, No. 11-08-517 (Feb. 8, 2012); *Tucker v. Family Court*, No. 08-03-418 (Oct. 2, 2008); *Widgeon v. Department of Labor*, No. 10-07-477 (Dec. 8, 2010); *Taylor-Bray v. DSCYF*, No. 09-08-454 (Oct. 15, 2009).

“On a motion to dismiss for failure to state a claim upon which relief can be granted, the Board ‘must assume that all well pleaded facts in the complaint are true. A complaint will not be dismissed unless the [grievant] would not be entitled to recover under any reasonable set of circumstances susceptible of proof.’”²⁰

When the agency files a motion to dismiss, the Board holds a hearing for legal argument by the parties. The Board may have to take some testimony regarding jurisdictional facts. If the Board denies the motion, it will schedule another hearing on the merits. Where the jurisdictional facts are intertwined with the merits, the Board may join the jurisdictional issue to the merits for a single hearing.

The Board may *sua sponte* dismiss an appeal when the grievant fails to appear for a hearing or otherwise fails to pursue the appeal.

“When a party appeals to [the Board] but does not appear for the hearing, the [Board] may dismiss the appeal for failure to prosecute.”²¹ While the Board may

²⁰ *Cavanaugh/Hancock v. Office of Management and Budget*, Nos. 12-02-534/535, at p.2 (May 14, 2012) (quoting *Farmer v. Brasch*, C.A. No. 09C-10-135-JRS, 2010 WL 596956, at p.1 (Del. Super., Feb. 12, 2010) (footnotes omitted)). *Accord Echols v. DSCYF*, No. 09-10-456, at p.2 (Apr. 5, 2010) (“On a motion to dismiss, all well-pleaded factual allegations are accepted as true and the Board must draw all reasonable inferences in favor of the non-moving party.”) (quoting *Lynch v. Mandrin House of Delaware, LLC*, C.A. No. S09C-12-008-RFS, 2010 WL 780104, at p.2 (Del. Super., Mar. 9, 2010)).

²¹ *Ringer v. Department of Transportation*, Nos. 06-06-360/361, at p.3 (Sept. 24, 2008). “The Delaware courts have held that when a party appeals to an administrative board but does not appear for the hearing, the board may dismiss the appeal for failure to prosecute.” *Id.* (citing *Han v. Red Lobster*, C.A. No. 03A-04-015-FSS, 2004 WL 1427008, at p.1 (Del. Super., June 25, 2004)).

show “some degree of leniency to a *pro se* litigant, it cannot excuse a litigant for failure to appear without explanation” particularly when the Board granted previous continuances at the grievant’s request. ²²

The Board may dismiss an appeal as moot when the grievant has left the classified service and there is no longer an actual case or controversy.

“[A]ny remedy that [the grievant] might have been seeking from the Board is now moot because he has retired from [the agency].” ²³ “To conduct any further fact-finding in this case would serve no purpose other than to render an advisory opinion on events that occurred more than seven years ago. The Board declines to do so.” ²⁴

²² *Ringer, supra* Note 21, at p.3 (quoting *Robinson v. Visiting Nurse Association*, C.A. No. 99A-10-003-WTQ, 2000 WL 140785, at p.2 (Del. Super., Jan. 28, 2000). *See Stubbolo v. Department of Transportation*, No. 10-03-469, at p.3 (Mar. 4, 2011) (“The Grievant was not present when the hearing was convened at 9:07 a.m. on February 23, 2011. The Board waited until 9:25 a.m. The Grievant failed to appear to be heard and to present evidence in support of her appeal. Consequently, this appeal is dismissed.”).

²³ *Dodson v. Department of Correction*, No. 05-12-531, at p.3 (Sept. 24, 2012). In *Dodson*, the grievant was seeking a transfer to the agency’s Court and Transportation Unit.

²⁴ *Id.*

“A controversy must remain alive throughout the course of appellate review.”²⁵ An appeal of an unsatisfactory performance evaluation or written reprimand may become moot when the grievant voluntarily resigns from the classified service, unless the grievant can show that it might affect future employment prospects.” “The mere possibility that one might seek re-employment is not, however, sufficient to transform a non-justiciable controversy into a justiciable one.”²⁶

2. Involuntary Dismissal

After the grievant presents his or her case on the merits and rests, the agency may move for an involuntary dismissal (the equivalent of a Rule 41(b) motion under the Rules of Civil Procedure). “If a grievant presents all of his or her evidence, and the Board finds that no grievance is established, [there] is no rule or procedure which would prevent the Board from denying the grievance without hearing the agency’s evidence. . . . If at the conclusion of the grievant’s presentation of evidence, the Board concludes that upon the facts and the law the [grievant] has shown no right to relief it would be superfluous to make the opposing party present

²⁵ *Reyes v. Department of Finance*, No. 12-09-559, at p.4 (Mar. 12, 2013) (quoting *Grievance of Moriarty*, 588 A.2d 1063, 1064 (Vt. 1991)). “The Board notes that not every appeal pending before the Board becomes moot when the grievant voluntarily resigns from the agency. For example, there would still be an actual controversy if the grievance was over a suspension without pay.” *Reyes, supra*, at p.5 n.2.

²⁶ *Reyes, supra* Note 25, at p.4 (quoting *Grievance of Moriarty*, 588 A.2d at 1065).

evidence.”²⁷

3. Substitution of Parties

The Board has followed “Rule 15 of the Superior Court Rules of Civil Procedure to amend [the grievant’s] appeal to substitute [another agency] as the proper party respondent and relate the amendment back to the date [the grievant] filed his appeal with the Board.”²⁸

4. Class Actions

“Neither the Merit statutes nor the Merit Rules provide for a grievant to bring a class action on behalf of other persons.”²⁹ The APA does not have any “provisions for pretrial proceedings in which a prompt and early determination of class membership may be made. Nor are there any provisions for notice to the

²⁷ *Christman v. DHSS*, C.A. No. 08A-07-101-JTV, at p.5 n.4 (Del. Super., July 14, 2011).

²⁸ *Kline v. Department of Safety and Homeland Security*, No. 08-12-435, at p.5 (Mar. 30, 2010). In *Kline*, the grievant was serving a temporary appointment as the Director of Alcohol and Tobacco Enforcement, an exempt position. The Department of Safety and Homeland Security (DSHS) terminated him. He could not grieve his termination under the Merit Rules because he was not a member of the classified service at the time of his termination. However, under Merit Rule 10.1.1 he had a reversionary interest in his former merit position with the Department of Natural Resources and Environmental Control, so the Board substituted the Office of Management and Budget as the proper party respondent.

²⁹ *Tucker v. Family Court*, No. 08-03-418, at p.3 (Oct. 2, 2008). “The Board does not have the legal authority to allow [the grievant] to pursue an appeal on behalf of other Family Court employees who have not filed their own grievances with the Board under the Merit Rules.” *Id.*

absent class members informing them that they are required to decide whether to remain members of the class represented by counsel for the named plaintiffs, whether to intervene through counsel of their own choosing, or whether to pursue independent remedies. Such pretrial proceedings are constitutionally required as a matter of due process when an adjudication is to be made which will be binding upon the entire class.”³⁰

5. Consolidation

“The Board may, in appropriate circumstances, ‘consolidate individual cases and permit counsel to appear on behalf of all such similarly situated claimants where such a procedure would best discharge the [Board’s] function and remedy the grievances alleged.”³¹

³⁰ *Tucker, supra* Note 29, at p.5 (quoting *Rose v. City of Hayward*, 126 Cal.App.3d 926, 936 (1981)).

³¹ *Tucker, supra* Note 29, at p.6 (quoting *State Employees’ Association of New Hampshire, Inc. v. New Hampshire Personnel Commission*, 497 A.2d 860, 861 (N.H. 1985)). *See Bishop v. Family Court*, Nos. 11-01-491/thru 503 (July 19, 2011) (consolidating appeals of thirteen similarly situated Judicial Assistants claiming to be working out of class); *Burton v. Department of Correction*, No. 12-03-540 (Oct. 3, 2012) (consolidating appeals of eight Correctional Officers who competed for a promotion).

In *Department of Correction v. Correctional Officer Supervisors*, C.A. No. 83A-NO-2, 1985 WL 189022 (Del. Super., Aug. 1, 1985), *aff’d*, 514 A.2d 405 (Del. 1986) (TABLE), the Superior Court distinguished between the Board’s authority to allow the grievances to proceed as a class action, and the Board’s authority to allow “a representative to present testimony for all the [grievants]. This action was certainly within the authority of the [Board]. *See 29 Del. C. §10125* (the Board ‘may exclude cumulative evidence and limit unduly repetitive proof’).” 1985 WL 189022, at p.4.

6. Intervention

Neither the Merit Statutes nor the Merit Rules “provide for a right to notice and to intervene in another employee’s grievance process.”³² While the outcome of an employee’s grievance over a promotion may adversely affect another employee who was promoted, that does not give standing to the other employee to intervene.³³

H. Burden of Proof

“The burden of proof in employee dismissal proceedings is well established in Delaware. When the State terminates a person’s employment, the MERB presumes that the State did so properly.”³⁴

³² *Greene v. DSCYF*, No. 07-03-385, at p.9 (May 15, 2008), *aff’d on other grounds*, C.A. No. 08A-06-005-WLW (Del. Super., Nov. 24, 2009). *See Carter v. DNREC*, No. 01-03-771 (Feb. 15, 2010) (denying the motion by a successful candidate for promotion to intervene in the unsuccessful candidate’s appeal to the Board).

³³ *See Greene, supra* Note 32. In *Greene*, the agency promoted one candidate but the Step 3 hearing officer reversed and awarded the promotion to another candidate. “Even if the Board had jurisdiction to decide Greene’s constitutional [due process] claim, the Board notes that the overwhelming weight of legal authority holds that she did not have a protected property interest under the Due Process Clause in a promotion to which she was not entitled in the first place.” No. 07-03-385, at p.6 n.1.

³⁴ *Avallone v. DHSS*, 14 A.3d 566, 572 (Del. 2011) (en banc) (citing Section 10125(6) of the Administrative Procedures Act (“The burden of proof shall always be upon the applicant or proponent.”)).

“The discharged employee has the burden of proving that the termination was improper. Thus, [the grievant] is required to prove the absence of ‘just cause,’ as that term was defined in Merit Rule 12.1.”³⁵

Because grievants have the ultimate burden of proof, they present their case-in-chief first, followed by the agency. However, it is the practice of the Board in disciplinary appeals to have the agency go first because the agency has the burden of going forward.³⁶

I. Deliberations

After hearing the evidence and closing arguments,³⁷ the Board goes off the record to deliberate in the presence of the parties and counsel. After deliberating, the Board goes back on the record to entertain a motion to grant or deny the appeal. The individual members of the Board then vote on the record.

Once the Board votes, it is not required to consider further submissions from a party. “[T]he Board acted within its discretion when it declined to re-open the case to

³⁵ *Avallone*, 14 A.3d at 572 (citing 29 Del. C. §5949(b)).

³⁶ This practice promotes procedural efficiency. “First, the [agency] knows the reasons for its actions and is in the best position to present this information to the hearing officer. Second, the [agency] should have made a thorough investigation before deciding to terminate the employee and it should be little hardship for the [agency] to present the results of its labor to the hearing officer.” *Division of Developmental Disabilities v. Kinchen*, 886 P.2d 700, 708 (Colo. 1994).

³⁷ The Board sometimes dispenses with closing arguments when it believes they would not be helpful to reach a decision.

consider [the grievant's] fallback position after it had deliberated and announced its decision.”³⁸

It reaching a decision, a Board member may rely on “her understanding of existing operating procedures or rules, as distinguished from specific evidentiary facts bearing on the merits of the case. . . . This Court has previously approved a board member’s use of her expertise ‘as a tool for evaluating evidence,’ as the MERB chairwoman apparently did here.”³⁹

“Although it is generally desirable that the officer who makes the decision be present when evidence is taken, practical necessity may justify exceptions in some circumstances. For example, there may be changes in a board’s membership during the course of administrative proceedings.”⁴⁰ So long as a Board member has “an opportunity to read the transcript of the missed evidence,” that member can participate in the deliberations and decision of the Board.⁴¹

Most of the Board’s decisions are unanimous. An individual Board member may dissent with a brief reason, or concur in the decision for a different reason.

³⁸ *Jenkins v. DHSS*, C.A. No. 09A-10-002-FSS, 2010 WL 663966, at p.3 (Del. Super., Jan. 29, 2010).

³⁹ *Stanford v. DHSS*, 44 A.3d 923 (TABLE), 2012 WL 1549811, at p.4 (Del., May 1, 2012) (quoting *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1216 (Del. 1998)).

⁴⁰ *Warrington v. State Personnel Commission*, C.A. No. 93A-09-002, 1994 WL 7028, at p.2 (Del. Super., July 14, 1994).

⁴¹ *Id.*

I. Appeals

A grievant sometimes names the Board as an appellee along with the agency, but the Board is not a proper party to an appeal to the Superior Court. The Board “has no cognizable interest in seeking to have its rulings sustained.”⁴²

A classified employee must first exhaust the grievance procedures under the Merit Rules before going to court. “[T]he grievance procedure described in the rules is exclusive to the extent that it must be utilized and exhausted prior to the institution of a court action.”⁴³

When “the decision of the Board was evenly divided, there is no ruling which this Court can judicially review.”⁴⁴ “The appropriate remedy is either remand for further consideration or, alternatively, this Court may make its own findings based on the record before the Board.”⁴⁵

“All appeals to the Superior Court shall be by the filing of a notice of appeal with the Court within 30 days of the employee being notified of the final action of

⁴² *McIntyre v. Unemployment Insurance Appeal Board*, 962 A.2d 917 (TABLE), 2008 WL 4918217, at p.2 (Del., Nov. 18, 2008) (citing *Wilmington Trust Co. v. Barron*, 470 A.2d 257, 261 (Del. 1983)).

⁴³ *Husain v. Eichler*, C.A. No. 92C-06-238, 1993 WL 138992, at p.4 (Del. Super., Apr. 13, 1993).

⁴⁴ *Harrity v. DSCYF*, C.A. No. 96A-07-13-HLA, 1997 WL 27105, at p.2 (Del. Super., Jan. 10, 1997) (citing *Hopson v. McGinnes*, 391 A.2d 187, 189 (Del. 1978)), *aff’d*, 696 A.2d 398 (TABLE), 1997 WL 346209 (Del., June 11, 1997).

⁴⁵ *Harrity*, 1997 WL 27105, at p.2.

the Board.”⁴⁶ “The statute addresses the right to appeal a final action of MERB. It does not address the right to appeal an interlocutory order of MERB.”⁴⁷

“[I]t is manifest that the word ‘appeal’ in §5949(b) may not be construed to encompass a ‘cross-appeal.’ If a §5949(b) ‘appeal’ were held to include a ‘cross-appeal,’ the prevailing party would have to file a ‘cross-appeal’ in anticipation of a dissatisfied party’s appeal or risk having the cross-appeal effectively barred by the dissatisfied party’s filing of the appeal on the 30th day. We find no reasonable judicial or administrative purpose served by such construction.”⁴⁸

“[T]he Superior Court has held that it lacks jurisdiction over reclassification decisions of the [Board] since such decisions are not ‘case decisions’ from which the Superior Court may entertain appeals [under the APA].”⁴⁹ “Since reclassification determinations related solely to specific positions, and not to the right of a particular person to occupy a position, the Superior Court has viewed [the Board’s] reclassification rulings as not involving a ‘named party’ for purposes of qualifying as a

⁴⁶ 29 *Del. C.* §5949(b).

⁴⁷ *Department of Correction v. Bianco*, C.A. No. 96A-10-007-CG, 1997 WL 127006, at p. 1 (Del. Super., Jan. 30, 1997) (the Board voted 3-2 in favor of the grievant but had not yet issued its written decision). “It should be noted, however, the parties are not without a remedy; either party may bring an action in this Court for a writ of mandamus . . . to compel MERB to issue a final decision.” *Bianco*, 1997 WL 127006, at p.2.

⁴⁸ *Coffin v. DNREC*, 391 A.2d 193, 194-95 (Del. 1978).

⁴⁹ *Department of Correction v. Worsham*, 638 A.2d 1104, 1108 (Del. 1994) (footnote omitted).

‘case decision’ from which a right of appeal lies pursuant to the [APA].”⁵⁰

“Because a motion for reargument ‘destroys’ the finality of the judgment, it suspends the time for appeal until the [Board] decides the motion, rendering the appeal a ‘nullity.’”⁵¹ “The time to appeal begins to run when the order granting or denying the motion for reargument is entered.”⁵²

When the Board orders reinstatement of an employee and the agency appeals, the agency may move for a stay of the order pending appeal. The court may order a stay but “only if it finds, upon a preliminary hearing, that the issues and facts presented for review are substantial and the stay is required to prevent irreparable harm.”⁵³

“A stay may not be granted under [the APA] absent a reasonable probability of success on the merits. A party must do more than simply outline the issues before the Court on appeal to establish a reasonable probability of success.”⁵⁴

⁵⁰ *Worsham, supra* Note 49, at 1109 (citing 29 *Del. C.* §10142). In *Worsham*, the grievants had standing because “[t]his case involves a challenge to the reassignment rights of certain individuals to achieve a different employment status. A decision affecting such entitlement clearly involves a ‘named party’ and is therefore a ‘case decision’ from which a right of appeal exists in the Superior Court.” 638 A.2d at 1109.

⁵¹ *Family Court v. Reeves*, No. 97A-10-001-RCC, 1997 WL 89137, at p.3 (Del. Super., Nov. 21, 1997).

⁵² *Id.*

⁵³ 29 *Del. C.* §10144.

⁵⁴ *Keeler v. Department of Transportation*, C.A. No. 09A-09-003-WLW, 2010 WL 334920, at p.1 (Del. Super., Jan. 28, 2010).

“[T]he Court is not persuaded by [the agency’s] contention that a stay is required in almost all, if not all, cases resulting in an employee’s termination. [The agency] has cited no authority to support this assertion. The Court is therefore unwilling to arrive at such a broad conclusion. This is especially true given that the alleged harm is speculative.”⁵⁵

The courts “review decisions of the MERB ‘to determine whether [the Board] acted within its statutory authority, whether it properly interpreted and applied the applicable law, whether it conducted a fair hearing and whether the decision is based on sufficient substantial evidence and is not arbitrary.’”⁵⁶

“[I]t is solely the responsibility of the Board to determine the credibility of the witnesses, weigh their testimony and to make findings of fact.”⁵⁷

⁵⁵ *Keeler, supra* Note 54, at p.2.

⁵⁶ *Avallone v. DHSS*, 14 A.3d 566, 570 (Del. 2011) (en banc) (quoting *Hopson v. McGinnes*, 391 A.2d 187, 189 (Del. 1978)).

⁵⁷ *Weiss v. DHSS*, C.A. No. 02A-12-003-WCC, at p.4 (Del. Super., July 30, 2003).

MERIT STATUTES

“[Chapter 59 of Title 29 of the *Delaware Code*] creates the Merit System of Personnel Administration, which includes a Director of Personnel, the Merit Employee Relations Board, the merit rules, and a grievance system for redress of violations of the merit rules.”⁵⁸

“The General Assembly established this system to provide a ‘system of personnel administration based on merit principles and scientific methods governing the employees of the State in the classified service consistent with the right of public employees to organize under Chapter 13 of Title 19.’”⁵⁹

The Board “is a creature of statute . . . Its 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.”⁶⁰

However, “[i]t is well established in the jurisprudence of Delaware that ‘the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy.’”⁶¹

⁵⁸ *DNREC v. Murphy*, C.A. No. 00A-08-004-JEB, 2001 WL 282817, at p.3 (Del. Super., Mar. 18, 2001) (footnote omitted).

⁵⁹ *Id.*, at p.1 (quoting 29 *Del. C.* §5902).

⁶⁰ *Maxwell v. Vetter*, 311 A.2d 864, 865 (Del. 1973).

⁶¹ *Brice v. Department of Correction*, 704 A.2d 1176, 1179 (Del. 1998) (en banc) (quoting *Department of Correction v. Worsham*, 638 A.2d 1104, 1107 (Del. 1994)).

§ 5903. Classified service and exemptions

“Unless otherwise required by law, as used in this chapter, ‘classified service’_or ‘state service’ means all positions of state employment other than the following positions, which are excluded: . . .

(5) One principal assistant or deputy and 1 private secretary for each head of a state agency;

. . .

(7) Assistant Public Defenders, Deputy Attorneys General, and state detectives appointed by the State Attorney General; . . .

. . .

(17)a. Casual seasonal employees

. . .

(23) Positions designated as exempt by either the determination by the Director of the Office of Management and Budget and Controller General or via budget epilogue language.

“Section 5903 expressly applies to ‘all *positions* of state employment’ not the individual occupying that position. Thus, the fact that an individual occupies a position in the classified service does not automatically transform that individual into a Merit System employee.” ⁶²

“The statute does not unambiguously create a presumption that a seasonal/casual employee who works longer than the defined period is automatically included in the classified service. An equally viable reading is that the 129-day time frame simply defines a casual-seasonal employee and has no bearing on

⁶² *Ward v. Department of Elections*, 977 A.2d 900 (TABLE), 2009 WL 2244413, at p.3 (Del., July 27, 2009).

classification as a permanent employee.”⁶³

“While Assistant Public Defenders are expressly excluded, other members of the OPD [Office of the Public Defender] are not mentioned specifically. The [grievant] would have the Court find this silence to show a legislative intent to include all non-attorneys working for the OPD in the classified service. Such result is not justified.”⁶⁴

“The OPD is exempt from classified service by the enabling statute. Because the OPD enabling statute is more specific than the Merit system statutes, the court finds that the legislature intended for the OPD enabling statute to take precedence.”⁶⁵

Likewise, “[t]he Attorney General’s enabling statute shows the legislative intent to exempt the [Department of Justice] from the Merit system since its enactment in 1967 (56 Delaware Laws ch. 326).”⁶⁶

⁶³ *DNREC v. Murphy*, *supra* Note 58, at p.3. At the time, there was a statutory cap of 129 days for temporary, casual, and seasonal employees. Now, agencies can hire casual/seasonal workers for up to nine months. *See 29 Del. C. §5903(17)a.*

⁶⁴ *Truitt v. Merit Employee Relations Board*, C.A. No. 07A-08-009-RBY, at p.4 (Del. Super., Apr. 30, 2008) (investigators in the Office of the Public Defender are not employees in the classified service), *aff’d*, 957 A.2d 2 (TABLE), 2008 WL 4107984 (Del., Sept. 5, 2008).

⁶⁵ *Truitt*, *supra* Note 64, at p.4 (citing *29 Del. C. §4603*).

⁶⁶ *Resh v. Department of Justice*, No. 12-01-533, at p. 5 (Apr. 12, 2012) (Support Services Administrator in the Victims’ Compensation Assistance Program was not a Merit employee).

The “head of a state agency includes division director.”⁶⁷ “[T]he director of the [Delaware Emergency Management Agency] was and is authorized to have a principal assistant or deputy exempt from the merit system. That being so, the powers conferred upon the Department Secretary by 29 *Del. C.* §8203 enable him or her to request a change in the status of this position from merit to exempt.”⁶⁸

§5922(b)

If the probationary employee’s services were unsatisfactory, the probationary employee shall be dropped from the payroll, except in the case of promotional probation in which case the probationer shall be handled per applicable merit rules. If the probationary employee’s services were satisfactory or no action taken within the probationary period, the appointment shall be deemed permanent. The determination of the appointing authority shall be final and conclusive.

An agency promoted the grievant from a paygrade 17 to a paygrade 20 on November 12, 2006. On November 8, 2007, the agency notified the grievant of intent to demote him. The agency argued that it took “action” within the grievant’s one-year probationary period so that the just cause standard of Merit Rule 12.1 did not apply. However, the agency did not change the grievant’s pay grade

⁶⁷ *Foster v. Department of Public Safety*, C.A. No. 96A-04-002-JOH, 1997 WL 127002, at p.4 (Del. Super., Jan. 27, 1997), *aff’d*, 707 A.2d 766 (TABLE), 1998 WL 123207 (Del., Mar. 9, 1998).

⁶⁸ *Foster*, 1997 WL 127002, at p.4.

back to grade 17 until December 6, 2007. “The Board concludes as a matter of law that the action required by Section 5922(b) is a change in pay grade as reflected in the payroll records. . . . At that time, [the grievant] was more than three weeks past his one-year probationary period so, by statute, ‘the appointment shall be deemed permanent.’”⁶⁹

§5931(a) Grievances

. . . The Director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules.

In 1994, the General Assembly amended this statute to “expand on the holding of the [Superior] Court in *Worsham v. State*’ . . . [T]he *Worsham* court concluded that ‘where the State Personnel Commission finds a violation of the rights created by the Merit System, the Merit System statute and the Merit Rules indicate that necessary remedial powers should be implied in order to make the

⁶⁹ *Ward v. DHSS*, No. 08-09-427, at p.6 (Jan. 19, 2010) (quoting 29 *Del. C.* §5922(b)).

employee whole.”⁷⁰

“If the MERB could not modify a penalty imposed by an agency that is *inappropriate* to the circumstances, the misapplication of Merit Rule 12.1 would stand, contrary to the intent of the General Assembly. The broad remedial powers conferred by section 5931(a) necessarily include the MERB’s power to modify disciplinary measures imposed in violation of Merit Rule 12.1.”⁷¹

When the Board awards back pay, “unemployment compensation paid to [the grievant] should be offset against back pay under the principle that an employee cannot have a double recovery where both sources of recovery emanate from the same source, in this case, the State of Delaware.”⁷² An award of back pay must also be “reduced by an amount equal to any earnings or income from employment which [the grievant] has received since [termination] either in a self-employed capacity or as

⁷⁰ *Avallone*, 14 A.3d at 571 (quoting H.B. No. 518, 13th G.A. (1994) (Synopsis) and citing *Worsham v. State*, 1993 WL 390477 (Del. Super., Aug. 19, 1993), *aff’d*, 638 A.2d 1104 (1994)). By amending Section 5931, the General Assembly legislatively overruled *State v. Berenguer*, 321 A.2d 507, 510 (Del. 1974) (the State Personnel Commission did not have the “power to fix penalties on appeal from disciplinary actions and to substitute these for the penalties imposed by the appointing authority”).

In *Worsham*, the Supreme Court held that the grievants “are entitled to back pay as a result of the errors committed by the Department. Further, they are entitled to be re-assigned to the reclassified positions. Grievants were entitled to these positions from the outset and will not be made whole until they have been placed in the positions.” 638 A.2d at 1107-08.

⁷¹ *Avallone*, 14 A.3d at 572.

⁷² *Department of Transportation v. Deeney*, C.A. No. 04A-03-003-JTV, at pp.5-6 (Del. Super., June 23, 2005).

that of an employee.”⁷³

The authority to make an employee whole includes it the authority to award attorney’s fees. “An express grant of broad equitable jurisdiction to an administrative tribunal by the General Assembly also vests that tribunal with the ancillary ‘authority to do all that is reasonably necessary to execute that power.’”

⁷⁴ “This Court has recognized that in limited circumstances, equity may require an assessment of attorney’s fees for the prevailing party to be ‘made whole.’”⁷⁵

Section 5931(a) “is not a specific statutory authorization to award attorney’s fees to a successful litigant on a routine basis. . . . [T]he Board [may] award attorney’s fees to a successful litigant in extraordinary cases, pursuant to the common law bad faith exception to the American Rule.”⁷⁶

⁷³ *Office of the Auditor of Accounts v. Ford*, No. 2100287, 1987 WL 18111, at p.1 (Del. Super., Oct. 2, 1987). In *Ford*, the Superior Court further reduced the award of back pay “by that amount of pay reasonably attributable to the delay in the matter caused by [the grievant’s] changing attorneys during the course of the hearing of the appeal.” *Id.*

⁷⁴ *Brice v. Department of Correction*, 704 A.2d 1176, 1179 (Del. 1998) (en banc) (quoting *Atlantis I Condominium Association v. Bryson*, 403 A.2d 711, 713 (Del. 1979)).

⁷⁵ *Brice*, *supra* Note 74, at 1179 (quoting *Burge v. Fidelity Bond & Mortgage Co.*, 648 A.2d 414, 421 (Del. 1994)).

⁷⁶ *Brice*, *supra* Note 74 at 1179. “The record reflects that Brice presented such a case to the Board.” *Id.* Since *Brice*, no successful grievant has asked the Board to award attorney’s fees.

The Board does not have authority to award pre-judgment interest on back pay. “[A]n employee restored to a position of like status and pay is not entitled to receive interest on the pay due him for the period of suspension.”⁷⁷

After the Board deliberates and decides to reinstate the grievant, the parties are usually not prepared to present evidence on the issue of back pay and benefits. In that situation, the Board will direct the parties to exchange their calculations of the amount of back pay and benefits. The relevant time period for calculating an award of back pay begins with the date of termination (or suspension without pay) “until the date of the conclusion of the Board hearing” less “any wages or benefits from employment she received during that time (for example, unemployment compensation and short-term disability).”⁷⁸

The Board will retain jurisdiction over the case in the event the parties are unable to agree as to the amount of back pay. “[T]he Board’s decision and Order may not be final for purposes of appeal if the parties cannot agree on the

⁷⁷ *DHSS v. Crossan*, 424 A.2d 3, 5 (Del. 1980). “[T]he general rule is that a sovereign state is not obliged to pay interest on any award unless it has either expressly or by reasonable construction of a contract or statute placed itself in a position of liability to pay.” *Id.* at 4.

⁷⁸ *Campbell v. Family Court*, No. 06-10-369, at pp.12-13 (Nov. 6, 2008). In *Campbell*, the parties were not able to agree on the amount of benefits claimed by the grievant for accumulated annual leave, medical expenses, pension benefits, and life insurance so the Board held another evidentiary hearing. *See* No. 06-10-369 (Apr. 22, 2009).

amount of back pay.”⁷⁹

To make a grievant whole, the Board “has the authority to ‘bump’ those currently occupying the reclassified positions in order to place Grievants in such positions.”⁸⁰ Alternatively, the Board can order the agency to place the grievant in the next available position that comes open.⁸¹

The Board “may deny reinstatement when animosity between the parties makes such a remedy inappropriate.”⁸²

§5933(a)

No more than 1 period of supplemental pay shall be made under this subsection for any work injury, including any recurrence or aggravation of that work injury.

“The General Assembly amended Section 5933(a) effective July 1, 2005 to add the last sentence limiting supplemental pay to one period for any work injury.

⁷⁹ *Campbell, supra* Note 78, at p.13 (citing *Office of Auditor of Accounts v. Ford*, No. 2100287, 1997 WL 18111, at p.2 (the Board “must have anticipated further action since it did not have enough facts to reach a final order. The amount of back pay could not be determined without the information obtained in the hearing subsequent to the Opinion and Order.”).

⁸⁰ *Worsham v. Department of Correction*, 638 A.2d 1104, 1108 (Del. 1994).

⁸¹ *See Dodson v. Department of Correction*, No. 05-12-346, at p.11 (“The Board is not inclined to displace any of the three other candidates who received lateral transfers and have held these positions since 2005. The record reflects that they were qualified for the transfers they received.”).

⁸² *Campbell, supra* Note 78, at p.11 (Nov. 6, 2008) (quoting *Robinson v. Southeastern Pennsylvania Transportation Authority*, 982 F.2d 892, 899 (3rd Cir. 1993)).

. . . Under the current law, a State employee is entitled to only one period of supplemental pay for any work injury including any recurrence or aggravation of that work injury.”⁸³

§5938(d) Collective bargaining

The rules adopted or amended by the Board under the following sections shall not apply to any employee in the classified service represented by an exclusive bargaining representative to the extent the subject matter is covered in whole or in part by a collective bargaining agreement under Chapter 13 of Title 19: §§ 5922 through 5925 of this title, except where the transfer is between agencies or where the change is made in classification or pay grade, §§ 5926 through 5928 of this title, except where an employee is laid off by 1 agency is reemployed by another, §§ 5929 through 5932, 5934 and 5936 of this title.

“Where a valid collective bargaining agreement is in effect, it takes precedence over contrary provisions in the Merit System Rules.”⁸⁴

⁸³ *Reynolds v. DHSS*, No. 08-06-423, at p.5 (Dec. 17, 2009). “Under the previous law, as construed by the Delaware Supreme Court, a State employee was entitled to supplemental pay for up to three months each time he or she qualified for worker’s compensation.” *Id.* (citing *Moses v. Board of Education of New Castle County Vocational School District*, 601 A.2d 61, 64 (Del. 1991) (en banc)).

⁸⁴ *Department of Correction v. Correctional Officer Supervisors*, 514 A.2d 405, 406 (Del. 1986). *Accord Morris v. Department of Correction*, C.A. No. 96A-07-004-HDR, 1998 WL 283478. at p.2 (Del. Super., Mar. 31, 1998) (“Morris’ grievance pertained to a ‘transfer’ which was addressed by the Agreement.”).

But a union contract “is not intended to extend to a case of an employee like [the grievant] who was not a member of the bargaining unit and consequently had no chance to assent, or even participate in discussion and voting, in a contract between the Department of Correction and Local 1726.”⁸⁵

A collective bargaining agreement controls even if an employee is not a member of the union. “Although not a member of the union, [the grievant] was a member of the bargaining unit because his job position was covered by the collective bargaining agreement.”⁸⁶

The parties to a collective bargaining agreement cannot, by contract, vest jurisdiction in the Board over any matter covered in whole or part by the agreement. “[P]arties may not confer subject matter jurisdiction on a quasi-

⁸⁵ *State Personnel Commission v. Howard*, 420 A.2d 139, 142 (Del. 1980) (per curiam). In *Jardine v. Family Court*, No. 11-08-517, at p.4 (Feb. 8, 2012), the Board distinguished *Howard* because *Jardine* “was a member of the collective bargaining unit.”

In *Jardine*, the Board rejected the grievant’s argument “that the subject matter of her grievance – her termination – is not covered in whole or in part by the Agreement because the Agreement does not afford her a grievance process. . . . The Agreement covers [her] termination because it provides that probationary employees can be terminated with or without cause. Just because [she] cannot grieve under the Agreement does not mean that she must be able to grieve under the Merit Rules.” No. 11-08-517, at p.3.

⁸⁶ *Tucker v. Family Court*, No. 08-03-418, at p.7 (Dec. 2, 2008) (quoting *Davis v. American Building Maintenance Co.*, 2001 WL 764487, at p.2. (N.D. Cal., June 28, 2001)).

judicial body by consent.”⁸⁷

§5943. Enforcement of chapter by legal action

(a) The exclusive remedy available to a classified employee for the redress of an alleged wrong, arising under a misapplication of any provision of this chapter, the merit rules or the Director’s regulations adopted thereunder, is to file a grievance in accordance with the procedure stated in the merit rules. Standing of a classified employee to maintain a grievance shall be limited to an alleged wrong that affects his or her status in his or her present position.

In promotion cases, “it is reasonable to conclude that one’s ‘status’ in her ‘present position’ should be interpreted to be the ‘empty’ status of the position should the grievant receive the challenged promotion.”⁸⁸

The Board has declined to consider constitutional claims based on the Due Process Clause or the First Amendment of the U.S. Constitution because they do not involve a misapplication of the Merit Statutes or the Merit Rules. “Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and

⁸⁷ *Maxwell v. Vetter*, 311 A.2d 864, 866 (Del. 1973). See *Robert v. Department of Transportation*, No. 12-06-548, at p.5 (Dec. 13, 2012) (“In effect, what the parties have tried to do by private agreement is to vest concurrent jurisdiction in both an arbitrator and the Board over Robert’s grievance of his discharge and to waive the requirement of [Merit Statute] 5949(a) to appeal to the Board within thirty days of Robert’s dismissal.”).

⁸⁸ *Family Court v. Scaturro*, C.A. No. S10A-06-004-THG, at pp.6-7 (Del. Super., Feb. 28, 2011).

clearly inappropriate to an administrative board.”⁸⁹

A grievant does not have standing to appeal a meets expectations performance evaluation even if she believes she should have received exceeds expectations. A meets expectations rating “did not affect her status in her position of Administrative Specialist II. With that rating, she remained eligible for promotion and pay raises. Her performance review did not have any adverse effect on her position.”⁹⁰

A grievant does not have standing to appeal a needs improvement performance rating because it “did not have any adverse effect on her position as an [investigator]. She remained eligible for promotion and pay raises and in fact received the statewide 1% pay increase effective July 1, 2012.”⁹¹

The Board does not have jurisdiction over an appeal of a disability termination “because such jurisdiction is vested exclusively with the State

⁸⁹ *Greene v. DSCYF*, No. 07-03-385, at p.7 (May 15, 2008) (quoting *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973)), *aff’d*, C.A. No. 08A-06-005-WLW, at p.2 (Del. Super., Nov. 24, 2009) (“the Board was not required to directly address this constitutional challenge”). “The Board notes that there may be cases where a constitutional violation is also a violation of the Merit Rules. For example, a violation of the anti-discrimination provisions of Merit Rule 2.1 might also violate the Equal Protection Clause of the Fourteenth Amendment.” *Greene*, No. 07-03-385, at p.7 n.2.

⁹⁰ *Olsen v. DSCYF*, No. 11-04-518, at p.3 (Mar. 5, 2012).

⁹¹ *Bloom v. DHSS*, No. 12-02-537, at p.5 (July 24, 2012).

Employee Benefits Committee under the Disability Insurance Program [29 *Del.C. Ch. 52A*].”⁹² “The Disability Insurance Program is a comprehensive remedial scheme governing disability benefits to participating employees. Absent a clear statutory provision to the contrary, the Board does not believe that it has jurisdiction to hear an appeal of a termination based on disability because such appeals are the exclusive province of the State Employee Benefits Committee.”⁹³

“[T]he ‘exclusive remedy’ clause of §5943(b) extends to and bars suits in this Court by state employees against state supervisors, administrators or other state employees, individually, for statements or actions which are inextricably linked to a disciplinary proceeding covered by the merit rules.”⁹⁴

⁹² *LaSorte v. DNREC*, No. 10-09-481, at p.2 (Dec. 6, 2010) (quoting *Benson v. Department of Transportation*, No. 07-12-407, at p.5 (June 19, 2008)).

⁹³ *LaSorte*, *supra* Note 92, at p.3. *But see Avallone v. DHSS*, No. 07-05-391 (July 17, 2009) (the Board has concurrent jurisdiction with the Public Integrity Commission over a classified employee’s termination for violating the State Code of Conduct), *aff’d on other grounds*, 14 A.3d 566 (Del. 2011) (en banc).

⁹⁴ *Eastburn v. Department of Transportation*, C.A. No. 07C-02-031-JTV, 2009 WL 3290909, at p.4 (Del. Super., Sept. 21, 2009). In *Eastburn*, the agency fired seven employees for violating its acceptable use policy. The employees grieved and the Step 3 hearing officer reduced the penalty to a ten-day suspension because their e-mails were “in poor taste” but not pornographic. The grievants did not appeal to the Board. The Superior Court held that the grievants could not get around the exclusivity provision of Section 5943(a) by re-casting their complaint for defamation. *Accord Kopicko*, 2004 WL 1427077, at p.1 (“the critical issue that underlines [the grievant’s] breach of contract action in the Superior Court (the subject of her appeal) is the same fact issue that underlies her Merit System grievance, specifically, whether Kopicko was terminated for a performance or merits-based reason.”).

The Board “does not have jurisdiction to enforce the parties’ unexecuted settlement agreement, much less to decide which party’s interpretation of the agreement in principle is correct. . . . If the parties can amicably resolve their dispute without recourse to the Board, that is to be encouraged. But if they cannot resolve their dispute – for whatever reason – then the Board must hear the case on the merits.”

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However, the Board can construe a settlement agreement to preclude the agency from taking disciplinary action based on the same transaction or occurrence. “[W]hen an agency and an employee enter into a settlement agreement that purports to wipe clean the employee’s entire record, the agency is estopped from bringing later charges on matters it was aware of at the time of the settlement.”⁹⁶

§5944

The Board . . . shall have power to administer oaths, subpoena witnesses and compel the production of books and papers relevant to any investigation or hearing authorized by this chapter. Any person who

⁹⁵ *Norcisa v. DHSS*, No. 10-01-464, at pp. 3-4 (July 24, 2012). In *Norcisa*, the Board distinguished *Campbell v. Family Court*, No. 06-10-369 (Nov. 6, 2008), where the Board instructed the parties to try to agree on the amount of back pay and retained jurisdiction in the event the parties were unable to agree.

⁹⁶ *DHSS v. Weiss*, 1993 WL 19573, at p.6 (Del. Super., Jan. 15, 1993). “The [State Personnel] Commission’s decision does not suggest in any way that an agency which has settled certain disciplinary charges with an employee may not pursue further charges against that employee arising from separate conduct.” *Id.*

shall fail to appear in response to a subpoena or to answer any question or produce any books or papers relevant to any such investigation may be compelled to do so by order of the Superior Court.

If the Board issues a subpoena to a witness at the request of a party and the witness does not appear for the hearing, it is incumbent upon the party which requested the subpoena – not the Board – to petition the Superior Court for an order compelling compliance with the subpoena. ⁹⁷

§5949(a)

An employee in the classified service who has completed a probationary period of service may not, except for cause, be dismissed or demoted or suspended for more than 30 days in any 1 year. Within 30 days after any such dismissal, demotion or suspension, an employee may appeal to the Board for review thereof.

“[T]he grievant’s employment was voluntarily terminated by her election to apply for and receive a disability pension. Thus, the granting of the disability pension is not considered a layoff, dismissal or discharge for cause. Therefore,

⁹⁷ See *Hussain v. DNREC*, No. 06-02-349 (Aug. 9, 2007) (Petition for Order Compelling Compliance by Witness Barbara Erskine with Subpoena Issued by Merit Employee Relations Board).

See also 29 Del. C. §5945 (“If any employee in the state service shall wilfully refuse or fail to appear before any . . . board or body authorized to conduct any hearing . . . the employee shall forfeit the employee’s office or position and shall not be eligible thereafter for reappointment to any position in the state service.”).

the Merit Rules governing dismissed or laid off employees are not applicable to [the grievant's] circumstances.”⁹⁸

§5949(b)

. . . The burden of proof of any such appeal to the Board or Superior Court is on the employee.

“The burden of proof in employee dismissal proceedings is well established in Delaware. When the State terminates a person’s employment, the MERB presumes that the State did so properly.”⁹⁹

“The discharged employee has the burden of proving that the termination was improper. Thus, [the grievant] is required to prove the absence of ‘just cause,’ as that term was defined in Merit Rule 12.1.”¹⁰⁰

§5954(b)

No employee in the classified service shall engage in any political activity or solicit any political contribution, assessment or subscription during the employee’s hours of employ-

⁹⁸ *Schoen v. Office of the Treasurer*, C.A. No. 98A-02-004-HDR, 1999 WL 459252, at p.3 (Del. Super., Mar. 15, 1999).

⁹⁹ *Avallone v. DHSS*, 14 A.3d 566, 572 (Del. 2011) (en banc) (citing Section 10125(6) of the Administrative Procedures Act (“The burden of proof shall always be upon the applicant or proponent.”)).

¹⁰⁰ *Avallone*, 14 A.3d at 572 (citing 29 *Del. C.* §5949(b)).

ment or while engaged in the business of the State.

Merit Rule 15.3.2 has the same exact language.

Section 5954(b) is modeled on the federal Hatch Act, 5 U.S.C. §7324. In a case of first impression, the Delaware Supreme Court upheld the constitutionality of Section 5954(b) against a First Amendment challenge.¹⁰¹

“That statute is ‘viewpoint neutral,’ and does not regulate beyond [the grievant’s] political activities at work. It is settled law that the government’s interest in maintaining a nonpartisan civil service outweighs [the grievant’s] interest in making political postings while on government property.”¹⁰²

¹⁰¹ *Sweeney v. Department of Transportation*, 55 A.3d 337 (Del. 2012). The Supreme Court remanded to the Superior Court to consider: (1) what constitutes “political activity” under Section 5954(b); and (2) whether Section 5954(b) is unconstitutionally overbroad or vague.

¹⁰² *Sweeney*, 55 A.2d at 344 (citing *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 563-67 (1973)).

MERIT RULES

“[J]udicial deference is usually given to an administrative agency’s construction of its own rules in recognition of its expertise in a given field” and “an administrative agency’s interpretation of its own rules will not be reversed unless ‘clearly wrong.’”¹⁰³

In contrast, a Court “reviews questions of statutory interpretation *de novo*.”¹⁰⁴ In other words, the Courts will defer to the Board’s interpretation of its own Merit Rules, but not to the Board’s construction of the Merit Statutes.

MR 1.2

In the event of conflict with the Delaware Code, the Code governs. In the event of conflict with individual agency regulations, these rules take precedence. . . .

“To state a claim under Merit Rule 1.2, the grievant must allege that there is an applicable state statute which is in conflict with an otherwise applicable Merit Rule so that the statute governs, not the Merit Rule.”¹⁰⁵

¹⁰³ *Stanford v. DHSS*, 44 A.3d 923 (TABLE), 2012 WL 1549811, at p.3 (Del., May 1, 2012) (quoting *DHSS v. Burns*, 438 A.2d 1227, 1229 (Del. 1981)).

¹⁰⁴ *Avallone v. DHSS*, 14 A.3d 566, 570 (Del. 2011) (en banc).

¹⁰⁵ *Tucker v. Family Court*, No. 10-10-486, at p.4 (Apr. 13, 2011) (Merit Rule 1.2 did not apply to resolve a conflict between a State statute and a Family Court rule).

“Merit Rule 1.2 provides that in the event of a conflict, Section 5954(b) of the Delaware Code trumps the Merit Rule. The MERB therefore correctly evaluated [the grievant’s] conduct under Section 5954 [the state Hatch Act], rather than under the Merit Rules.” ¹⁰⁶

Section 5949(a) of the Merit Statutes provides for an appeal to the Board if an employee is “suspended for more than 30 days in any 1 year.” Merit Rule 12.9 provides for a right to appeal any suspension. The Board has decided that the statute and the rule are not in conflict. “The Board believes that another Merit statute, Section 5931(a), authorizes the Board to adopt rules ‘to resolve employment grievances and complaints’ . . . That is exactly what [Merit] Rule 12.9 accomplishes. . . by providing for a right of direct appeal for any suspension without pay.” ¹⁰⁷

MR 1.4

The State has the exclusive right to manage its operations and direct employees except as specifically modified by these Rules.

“[M]anagement enjoys broad discretion to determine the job duties assigned to employees. A restructuring of job duties may become reasonable

¹⁰⁶ *Sweeney v. Department of Transportation*, 55 A.2d 337, 342 (Del. 2012). Section 5949(d) of the Merit Statutes provides: “Any officer or employee in the classified service who violates any of the provisions of this section shall forfeit such office or position, and for 1 year shall be ineligible for any office or position in the state service.”

¹⁰⁷ *Carr v. DHSS*, No. 09-01-438, at p.5 (Mar 5, 2009).

and appropriate as various factors affect how job functions are performed and distributed within an organization.”¹⁰⁸

MR 2.1

Discrimination in any human resource action covered by these rules or the Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors is prohibited.

For urine tests, a Treatment Access Center requires male case managers to monitor male clients and female case managers to monitor female clients. A male employee claimed gender discrimination because female case managers did not have to monitor as many clients because the majority of clients were male. “Gender specific urine test monitoring is obviously a *bona fide* occupational qualification which is necessary to proper and efficient administration and therefore not in the category of prohibited discrimination.”¹⁰⁹

“The term ‘retaliation’ does not appear in Merit Rule 2.1, but the Board believes that for an employer to retaliate against an employee’s exercise of a

¹⁰⁸ *Christman v. DHSS*, C.A. No. 08A-07-010-JTV, at p.9 (Del. Super., July 14, 2011).

¹⁰⁹ *Young v. DHSS*, C.A. No. 98A-04-010-WTQ, 1999 WL 742969, at p.1 (Del. Super., July 6, 1999).

protected activity is discrimination based on a non-merit factor.”¹¹⁰

The Board uses the same burden-shifting analysis the courts use under the federal anti-discrimination laws.¹¹¹ “Merit Rule 2.1 mirrors Title VII of the Civil Rights Act. Like the Delaware courts, the Board will rely ‘on principles of federal law as the interpretative framework and guide for interpreting the counterpart Delaware statute.’”¹¹²

However, the Board has expressed reservations about its jurisdiction over a hostile work environment claim. “The Board is not convinced that Merit Rule 2.1 is co-extensive with Title VII so as to encompass a hostile work environment claim. Merit Rule 2.1 prohibits discrimination ‘in any human resource action.’ It

¹¹⁰ *Moison v. DHSS*, No. 07-09-400, at p.6 (June 18, 2009) (quoting *Hilferty v. Department of State*, No. 07-12-406, at p.10 (Aug. 27, 2008)).

¹¹¹ See, e.g., *Moison v. DHSS*, *supra* Note 110 (age discrimination); *Hilferty v. Department of State*, *supra* Note 110 (disability discrimination); *Pinkett v. DHSS*, No. 06-05-355 (Apr. 30, 2008) (age discrimination); *Demusz v. DHSS*, No. 08-02-413 (Sept. 24, 2008) (retaliation for exercise of First Amendment right to speak out about matters of public concern in the workplace).

¹¹² *Hilferty v. Department of State*, *supra* Note 110 (Aug. 7, 2008) (quoting *Thompson v. Dover Downs, Inc.*, 887 A.2d 458 461 (Del. 2005)).

is hard to see how a supervisor's gender-based hostility is a 'human resource action.'" ¹¹³

MR 3.1

The Director shall establish and maintain a method of classifying and reviewing all positions. Positions substantially alike in duties and responsibilities and requiring essentially the same knowledge, skills and abilities shall be grouped into the same class and pay grade.

"Once the Director establishes the class specifications, the employer has discretion which of those duties and responsibilities to assign to a particular employee under Merit Rule 1.4." ¹¹⁴

¹¹³ *Bloom v. DHSS*, No. 12-02-537, at p.7 n.3 (July 24, 2012). For a hostile work environment claim, the grievant must prove that the harassment was severe and pervasive. See *LeCompte v. DHSS*, No. 12-07-550, at p.10 (Feb. 15, 2013) ("For the most part, the incidents complained of amounted to 'mere offensive utterances,' which are not actionable under Title VII. While we do not wish to diminish the gravity of the situation, these incidents, as a matter of law, do not meet the severe or pervasive requirement for a hostile work environment.") (quoting *Clay v. United Parcel Service*, 501 F.3d 695, 706 (6th Cir. 2007)).

¹¹⁴ *Schuller v. DSCYF*, No. 08-11-431, at p.5 (Jan. 8, 2009) (the class specifications for a Senior Probation and Parole Officer included the power to arrest and carry a firearm, but the agency had management discretion to decide that the grievant did not need to carry a firearm in her particular line of work).

MR 3.2

Employees may be required to perform any of the duties described in the class specification, any other duties of a similar kind and difficulty, and any duties of similar or lower classes. Employees may be required to serve in a higher position; however, if such service continues beyond 30 calendar days, the Rules for promotion or temporary promotion shall apply, and they shall be compensated appropriately from the first day of service in the higher position.

The Board is wary “about employees using Merit Rule 3.2 as a ‘back door’ to appeal to the Board when their real claim is over their reclassification.”¹¹⁵

“An employee is working out of class when the duties assigned him are not those specified in the specifications for the class in which he is an incumbent. Rather, he is performing, for an extended period of time, the full range of duties enumerated in another class specification.”¹¹⁶

“Taken as a whole, [Merit Rule 3.2] only makes sense if a ‘higher position’ is a higher class or class specification within the Merit system . . . or a Merit-comparable position.”¹¹⁷

¹¹⁵ *Rogers/DeCarlo v. DHSS*, Nos. 07-09-401/402, at p.4 Oct. 15, 2009).

¹¹⁶ *Jenkins v. DHSS*, No. 07-01-380, at p.5 (May 15, 2008) (quoting *Ligon v. California State Personnel Board*, 123 Cal.App.3d 583, 586 (1981)), *aff’d*, C.A. No. 08A-10-002-FSS, 2010 WL 663966 (Del. Super., Jan. 29, 2010).

¹¹⁷ *Bishop v. Family Court*, Nos. 11-01-491/ thru 503, at p.4 (July 19, 2011) (Judicial Assistants failed to state a claim for working out of class by comparison to the duties of a Deputy Sheriff who was not a Merit employee).

The Board scrutinizes the Office of Management and Budget (OMB) job specifications to determine whether a grievant is working out of class.¹¹⁸ For example, the OMB “job specifications for Court Security Officer I and Judicial Assistant are substantially the same” even though the Judicial Assistants were at a higher paygrade.¹¹⁹

Merit Rule 3.2 does not apply to Career Ladder positions. In a Career Ladder position, the employee has the opportunity for a non-competitive promotion by satisfying all of the promotional standards for the next higher position. In order to do that, the employee must successfully perform the duties of the higher position. The [grievants] cannot have it both ways. They cannot enjoy the benefit of a non-competitive promotion to Investigator II by meeting the standards for promotion to that position, and at the same time claim

¹¹⁸ See, e.g., *Wissler v. Department of State*, No. 10-03-470 (Sept. 23, 2010) (grievant did not meet two of the six OMB job specifications). In *Jenkins v. DHSS*, supra Note 116, a social worker claimed he was working out of class performing all of the job functions of a trainer/ educator. The OMB job specifications for a trainer/educator included responsibility for planning, developing, and implementing strategic policy. ““But there is no evidence showing that [the grievant] planned, developed, or implemented any strategic policy in that regard. His role in the [computer] upgrade was operational: to advise [Information Resource Management] on tailoring the system to better meet the needs of Family Support employees and to provide those employees with the training required to use the new computer system for delivery of services to clients.”” 2010 WL 663966, at p.3 (quoting MERB No. 07-01-380, at p.6 (May 15, 2008)).

¹¹⁹ *Thompson/McCabe v. Family Court*, Nos. 10-09-482/483, at p.4 (Feb. 8, 2011) (“a higher pay grade does not make the position of Judicial Assistant a ‘higher position’ for purposes of Merit Rule 3.2.”).

compensation for working at a higher class under Merit Rule 3.2. ¹²⁰

MR 3.3

If a significant change is made in the duties and responsibilities of a position, or if there is an alleged position classification or reclassification error, the position shall be reviewed and be reclassified if justified, in accordance with procedures established by the Director consistent with the Budget Act.

“[T]he plain language of [Merit Rule 3.3] does not require an agency to obtain prior approval of the Office of Management and Budget before making significant changes in an employee’s duties and responsibilities. It implicitly recognizes an agency’s authority to make significant changes in an employee’s duties and responsibilities by the sentence’s first phrase, which contemplates that significant changes in duties and responsibilities is a first step, which may lead to further steps stated in the rule.” ¹²¹

“Reclassification only may occur through a Maintenance Review or through Critical Reclassification. A Maintenance Review is a general review of merit positions for reclassification, while a Critical Reclassification is the reclassification

¹²⁰ *Rogers/DeCarlo v. DHSS, supra* Note 115, at p.5.

¹²¹ *Christman v. DHSS*, C.A. No. 08A-07-101-JTV, at p.7 (Del. Super., July 14, 2011).

of a particular position.”¹²²

Since 1999, the “Delaware General Assembly has made it clear in the [Budget Act] that grievances involving critical reclassifications or the determination of paygrade are not within the jurisdiction of the [MERB].”¹²³

“Maintenance Classification Reviews are within the Board’s jurisdictionbut the determination of which classifications to select for Maintenance Classification Review is a matter within the discretion of the Director of State Personnel.”¹²⁴ “Absent a request by [the agency], there is no mandate for the Director of State Personnel to reclassify any [agency] employee. . . . There is no right to appeal the refusal to perform a Maintenance Review.”¹²⁵

“Even had a Maintenance Review occurred, there would be no right of appeal to this Court. The Superior Court has held repeatedly that it lacks jurisdiction over MERB reclassification decisions.”¹²⁶

¹²² *Parker v. Department of Correction*, C.A. No. 99A-06-010-FSS, 2000 WL 973318, at p.1 (Del. Super., May 25, 2000).

¹²³ *Id.*

¹²⁴ *Id.*, at p.2.

¹²⁵ *Id.*

¹²⁶ *Id.* (citing *Pitcavage v. State Personnel Commission*, C.A. No. 92A-07-06, 1993 WL 93458 (Del. Super., Mar. 25, 1993); *Gedney v. Ting*, C.A. No. 89A-MY-1, (Del. Super., Dec. 26, 1990); *Sheiker v. State Personnel Commission*, C.A. No. 89A-JA-2, 1989 WL 89609 (Del. Super., July 10, 1989)).

MR 4.4.2

Agencies may approve a starting rate up to 85% of the required midpoint where applicants' qualifications are clearly over and above the job requirements as stated in the class specification. Upon agency request, the Director may approve a starting rate higher than the 85th percentile if supported by documentation of the applicant's qualifications.

"An advance is a salary above the minimum of the range for the position. If there is no advance request, then the default salary upon promotion is a 5% increase from the previous salary or the minimum amount of the range for the new position, whichever is greater." ¹²⁷

"[T]he employing agency has discretion ('may') to approve an advanced starting salary 'if supported by documentation of the [employee's] qualifications.'" ¹²⁸ "[T]he agency has discretion to select the criteria to use to approve an advanced starting salary." ¹²⁹

The agency may exercise its discretion "by weighing the following factors: (1) existing conditions within the [agency]; (2) internal equity among employees;

¹²⁷ *DHSS v. Edwards*, C.A. No. 06A-11-006-1-CLS, at p.2 (Del. Super., Mar. 18, 2008) (footnotes omitted).

¹²⁸ *Wishowsky v. Department of Correction*, No. 09-04-448, at p.5 (Feb. 17, 2010) (quoting Merit Rule 4.4.2).

¹²⁹ *Wishowsky*, *supra* Note 128, at p.5. "The Board does not believe that the [agency] abused its discretion by selecting the criteria that it did: prior probation officer experience and a master's degree in criminal justice." *Id.*, at pp.5-6

(3) market factors; and (4) the state's financial situation.”¹³⁰

MR 4.4.3

Upon agency request, the Director may approve a starting rate above the minimum for the paygrade where a critical shortage of applicants exists. The Director and Controller General may provide that all lower paid, equally qualified employees in the same class within the same geographic area receiving a lower rate shall also have their pay rates set as stated above if their performance is satisfactory.

This is known as the “leveling up” rule. To state a claim for a violation of Merit Rule 4.4.3, the grievant must show: (1) there was a critical shortage; (2) OMB approved an advance starting rate; (3) OMB approved a “leveling up”; (4) the agency did not level up the grievant; (5) the grievant’s job performance was satisfactory; and (6) the grievant had equal or better education/experience as those within the same geographic area.¹³¹

¹³⁰ *DHSS v. Edwards*, C.A. No. 06A-11-006-CLS, at p.3 (Del. Super., Mar. 19, 2008).

¹³¹ *Cavanaugh/Hancock v. DHSS*, Nos. 12-02-534/535, at p.4 (May 14, 2012). “Because the Step 3 hearing officer did not have an opportunity to address this claim, the Board believes that it is appropriate to remand these grievances for further hearing at the Step 3 level before the Board can assert jurisdiction.” *Id.*, at pp.4-5.

“Merit Rule 19 provides that “[a] grievance may not deal with the content of the Rules or the Merit System statute.”¹³² The grievant’s “claim is that [the agency] should not have used Rule 4.3.3 as the basis for salary increases for EPS Technicians IV because the result – according to [the grievant] – was unfair to more senior technicians.”¹³³ [The grievant’s] complaint deals with the substantive policies and content of Merit Rule 4.4.3 and therefore his complaint is not grievable.”¹³⁴

MR 4.12.1

Any employee movement to a higher paygrade is a promotion. Any employee movement to a class of the same paygrade shall be treated in accordance with [MR] 4.5. Employees moving to a lower class and/or paygrade shall retain their former pay as long as they remain in that position.

When OMB re-classified the position of Judicial Assistant to Court Security Officer (paygrade 7), “[b]ecause of Merit Rule 4.12, Judicial Assistants retained their pay grade (8) after their maintenance review and re-classification in 2008 so long as they remain in the position.”¹³⁵

¹³² *Schur v. Department of Transportation*, No. 09-01-439, at p.5 (Mar. 19, 2009).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Thompson/McCabe v. Family Court*, Nos. 10-09-482/483, at p.4 (Feb. 8, 2011).

MR 5.3.2

Sick leave shall be requested in advance. In instances of unanticipated need to use sick leave, employees must notify their supervisor within the first hour of absence or as soon as practicable or as specified by the agency. Failure to do so or otherwise obtain approval shall result in denial. . . .

The exception for calling in sick – as soon as practicable – “might apply if the grievant were home alone, overslept through no fault of her own, and then called as soon as she woke up. Since her husband ‘forgot’ to call out on her behalf, she might never have called if [her supervisor] had not called her at home. The Board does not believe that [the grievant] called out as soon as practicable given the situation.”¹³⁶

MR 5.3.6

Upon supervisory approval, which shall not be unreasonably denied, employees may use paid sick leave for the following reasons:

“The Board does not believe that [the grievant’s] supervisor coerced her into taking two days of sick leave until her next doctor’s appointment. [Her supervisor] gave [the grievant] a choice: go home and change shoes, or take sick leave. [The grievant] may not have liked her choices, but she chose to take sick leave. She was not coerced.”¹³⁷

¹³⁶ *Olsen v. DSCYF*, No. 11-08-520, at p.6 (Aug. 24, 2012).

¹³⁷ *Danneman v. DHSS*, No. 08-10-429, at p.4 (Apr. 22, 2009).

MR 5.9

The Director may grant an agency requesting as extended leave of absence to a Classified employee to serve in any nonclassified position described in 29 Del. C. 5903(4), (5), (6) and (23). At the end of that appointment, employees shall be returned within 60 days to a position for which they are qualified in the Classified Service, provided that the position is the same paygrade or lower as the position from which they left the Classified Service. . . .

The Department of Natural Resources and Environmental Control requested a leave of absence for a Merit employee to serve in a non-classified position with the Department of Safety and Homeland Security (DSHS). DSHS terminated the employee for cause. The employee did not have standing to appeal his termination to the Board because at the time he was not a Merit employee. However, under Merit Rule 5.9, he still had “a right to return to the classified service.”¹³⁸

MR 6.2

Job Posting. When posting a vacant position, the appointing authority shall post at least seven (7) calendar days before the closing date for receipt

¹³⁸ *Kline v. Office of Management and Budget*, No. 08-12-435, at p.5 (Jan. 24, 2011). “The Board concludes as a matter of law that the job position OMB offered [the grievant] – Enforcement Officer V, paygrade 16 – meets the requirements of Section 5903(23) of the Merit Statutes and Merit Rule 5.9 because it is a position in the same paygrade as the position from which he left the classified service.” *Id.* The grievant “was free to try to negotiate with OMB over issues like a take-home vehicle and place of work, but the Merit Statute and Rules did not require OMB to accept those demands.” *Id.*

of applications. Job postings shall contain all pertinent information about the positions being filled.

“Merit Rule 6.2 requires that ‘Job postings shall contain all pertinent information about the positions being filled.’ The job posting . . . did not contain the pertinent information about [work experience] equivalency.”¹³⁹

MR 6.5

Notification of rejection. Whenever an application is rejected, notice of such rejection with statement of reason shall be promptly provided to the applicant. Rejected applicants may appeal to the Director within ten (10) days of the rejection. The decision of the Director shall be final.

“M.R. 6.5 clearly permits the applicant, and only the applicant, to challenge the *initial* rejection of his application. In other words, a successful challenge brought under M.R. 6.5 gets the applicant into the pool of potential candidates for the posted job opening.”¹⁴⁰

However, “an applicant who had initially been deemed unqualified and successfully challenged that determination under M.B. 6.5 could [not] be *immune*

¹³⁹ *Burton v. Department of Correction*, Consolidated No. 12-03-540, at p.7 (Oct. 3, 2012). The Board ordered the agency to re-post the position of Correctional Security Superintendent (CSS) within thirty days. “If the job posting provides for equivalent work experience, and Brennan applies for the position, then the [the agency] cannot take into account his experience as CSS in evaluating him as a candidate for the promotion because he was not qualified for the position in the first place.” *Id.*

¹⁴⁰ *Family Court v. Scaturro*, C.A. No. S10A-06-004-THG, at p.4 (Del. Super., Feb. 18, 2011).

from a later challenge by another party under M.R. 18.5. . . . The MERB’s interpretation of the interaction between M.R. 6.5 and M.R. 18.5 is not only not ‘clearly wrong,’ it makes perfect sense.”¹⁴¹

When an employee appeals to the Director under Merit Rule 6.5, the decision by the Director about her qualifications is final.¹⁴² But “the Director’s decision rendered pursuant to [Merit Rule] 6.5 was only final to the party involved in the case (in this case, Mattox) and not the persons who had no notice of Mattox’s challenge to his initial rejection.”¹⁴³

MR 8.2.1

Any candidate whose name appears on a referral list may be considered to fill the vacancy for which the list was requested. Should the list be unsatisfactory, it may be returned and subsequent lists may be requested, provided the reasons for rejection accompany the returned list.

¹⁴¹ *Scaturro, supra* Note 140, at pp.4-5.

¹⁴² *Cuccinello v. DNREC*, No. 10-06-475, at p.4 (Jan. 31, 2011). “The Board concludes as a matter of law that it does not have jurisdiction over Cuccinello’s appeal regarding her qualifications for the position of Engineer III.” *Id.* “The Board believes that Merit Rule 6.5 is the applicable rule, not Rule 7.7, which provides for an appeal to the Director by applicants ‘who have been screened and ranked by training and experience.’ Under either Merit Rule 6.5 or 7.7, the ‘decision of the Director shall be final.’” *Cuccinello, supra*, at p.4 n.2.

¹⁴³ *Scaturro, supra* Note 140, at p.3. “The Court notes that these persons may not even be aware of the party’s application in the first place at this stage of the proceedings.” *Id.*, at p.3 n.6.

“The Board does not interpret Merit Rule 8.2.1 to allow the Board to substitute its judgment for the agency’s in deciding whether the reason for returning a certification list is satisfactory. The rule only requires the agency to provide a reason why it believes the list is unsatisfactory, and [the agency] did that.”¹⁴⁴

“Merit Rule 8.2.3 provides that ‘[a]ny candidate whose name appears on a certified list be considered to fill the vacancy.’ An employer therefore may exercise ‘its sound discretion and experience in selecting and appointing suitable candidates from a properly certified list.’”¹⁴⁵

“In selecting from a certified list, an employer has broad discretion to select a candidate ‘in the best interests of the classified service’ giving consideration ‘to qualifications, performance record, seniority, conduct and, where applicable, the results of competitive examinations. Merit Rule 10.4.’”¹⁴⁶

¹⁴⁴ *Taylor v. DSCYF*, No. 08-01-411, at p.6 (May 21, 2009).

¹⁴⁵ *Soriano v. Department of Finance*, No. 06-10-370, at p.5 (June 5, 2008) (quoting *In re Holt*, 127 N.Y.S.2d 671, 677 (N.Y. Supr. 1953)).

¹⁴⁶ *Soriano*, *supra* Note 145, at p.5.

MR 9.2

Employees may be dismissed at any time during the initial probationary period. Except where a violation of Chapter 2 is alleged, probationary employees may not appeal the decision.

“Under the Merit System, the employing agency may dismiss a probationary employee at any time during the probationary period for reasons of unsatisfactory service or conduct, and that determination is final and conclusive. However, where the employee alleges the termination was not due to unsatisfactory service or conduct but rather to discrimination on the basis of non-merit factors, the termination is appealable through the grievance process under [Merit Rule 2.1].”¹⁴⁷

MR 10.1

Limited term appointments are permitted when a Merit vacancy exists that is not of a continuing nature, but is projected to exceed 90 days. Such vacancies may be filled for up to 1 year. The Director may approve a longer term period. Established selection procedures shall be followed for filling the vacancy.

¹⁴⁷ *Kopicko v. DSCYF*, 805 A.2d 877, 878 (Del. 2002) (footnotes omitted). See *Stallard v. DHSS*, No. 10-03-472, at p.3 (Dec. 6, 2010) (“the grievant does not claim that the agency discriminated against her on the basis of non-merit factors when the agency terminated her probationary employment. Accordingly, she cannot appeal her termination to the Board.”).

“Merit Rule 10.1 purports to allow the State Personnel Director to make limited term appointments to merit system positions when the position must be filled on a less-than-permanent basis.”¹⁴⁸

MR 10.1.1

Merit employees who accept limited term appointments shall be placed in a vacant position comparable to their former class in the present agency at the end of the limited term appointment. If agencies demonstrate that no comparable vacant position exists, employees shall be given hiring preference.

“When read together, Merit Rules 10.1 and 10.1.1 distinguish between a ‘position’ that falls within the Merit System and the individual who occupies that position.”¹⁴⁹

“When an agency makes a limited term appointment to a Merit position vacancy, during the term of the appointment the employee enjoys certain benefits of Merit status, including vacation and sick time and credited time in service. When the limited term appointment expires, however, the employee is protected by the Merit Rules only to the extent that he or she was a Merit employee prior to

¹⁴⁸ *Ward v. Department of Elections*, 977 A.3d 900 (TABLE), 2009 WL 2344413, at p.2 (Del., July 27, 2009).

¹⁴⁹ *Id.*

the limited term appointment.”¹⁵⁰ “Although permanent Merit employees who accept limited term appointments are entitled to certain preferences when their limited term expires, an employee does not become a permanent Merit employee by virtue of a limited term appointment.”¹⁵¹

If a limited term appointment continues beyond the term, it does not “ripen” into “permanent status or equivalent compensation. Imposing such a penalty would create an unreasonable burden and force the [agency] to accept a temporary employee as permanent, regardless of qualifications, simply because a better qualified applicant had not been selected within the [limited term appointment].”¹⁵²

MR. 10.4

Candidates selected for promotion shall meet the position’s job requirements. Vacancies shall be filled by promotion wherever practicable and in the best interest of the classified service. Consideration should be given to qualifications, performance record, seniority, conduct and, where applicable, the results of the screening and ranking process.

¹⁵⁰ *Ward*, supra Note 148, at p.2 (quoting MERB No. 07-12-409, at p.3 (June 18, 2008)).

¹⁵¹ *Ward*, 2009 WL 2244413, at p.3.

¹⁵² *Id.* (quoting *Showell v. Department of Corrections*, 534 A.2d 657 (TABLE), 1987 WL 4691, at p.2 (Del., Nov. 5, 1987)). “[The grievant] was aware of the temporary nature of the position when he applied for it. The fact that it extended past the initial two-year term did not transform the temporary appointment into a permanent position.” *Ward*, 2009 WL 2244413, at p.3.

“[S]eniority was only one of many factors in evaluation of the candidates’ entire application and experience. . . . [A]n applicant’s longer years of State service might be a tie-breaker but never a dispositive factor.” ¹⁵³

MR 10.9

To resolve litigation issues, grievances, or disputes between agencies about the placement of employees, the Director may move employees from one position to another position for which they qualify in the same or lower paygrade within the Merit System without competition.

When a Step 3 hearing officer decides that the agency should have awarded a promotion to the grievant, the hearing officer has the authority under Merit Rule 10.9 to move the person initially promoted to another position. ¹⁵⁴

¹⁵³ *Pinkett v. DHSS*, No. 06-05-355, at p.9 (Apr. 30, 2008).

¹⁵⁴ *Greene v. DSCYF*, C.A. No. 08A-06-005-WLW, at p. 11 (Del. Super., Nov. 24, 2009) (“the Hearing Officer had the authority to replace Greene with Travaglini” because “Travaglini was ‘wrongfully denied’ the promotion”) (quoting MERB No. 07-03-385, at p.9 (Sept. 29, 2006)).

MR 12.1

Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. “Just cause” means that management has sufficient reasons for imposing accountability. Just cause requires: showing that the employee has committed the charged offense; offering specified due process rights specified in this chapter, and imposing a penalty appropriate to the circumstances.

Merit Rule 12.1 applies only to “disciplinary measures.” An “unfavorable performance assessment and the reassignment of job duties [are] not disciplinary measures under Rule 12.1.”¹⁵⁵

Critical comments in a performance evaluation are not disciplinary measures. “[T]he performance appraisal purpose was to point out areas in which the employee needs improvement. Employee evaluations are a necessary place for candor between the employer and employee. The object is not to impose punishment, but to assist the employee in becoming a more productive worker. . . . If employers feared repercussions for giving negative feedback during evaluations, the evaluation process would be undermined.”¹⁵⁶

¹⁵⁵ *Christman v. DHSS*, C.A. No. 08A-07-010-JTV, at p.7 (Del. Super., July 14, 2011).

¹⁵⁶ *Id.* (quoting *Turrurici v. City of Redwood*, 190 Cal.App.4th 1447 1449 (1987)).

“[T]he Board does not have jurisdiction to decide a grievance over a verbal reprimand. The Board does not believe that a verbal reprimand amounts to a disciplinary measure under Merit Rule 12.1.”¹⁵⁷

A “letter of instruction was not a disciplinary measure and therefore the Board does not have jurisdiction over [the grievant’s] appeal. The letter of instruction (which was not placed in her personnel file) memorialized verbal counseling.”¹⁵⁸

“Merit Rule 19.0 defines a ‘demotion’ as ‘the movement of an employee from a position in a class of a higher paygrade to a position in a class of lower paygrade through a process other than re-classification.’ Whatever changes the [agency] made in [the grievant’s] job responsibilities, they did not entail moving her to a class of lower paygrade. Those changes were within the [agency’s] management

¹⁵⁷ *Danneman v. DHSS*, No. 08-10-429, at p.4 (Apr. 22, 2009) (quoting *Trader v. DHSS*, No. 07-01-379, at p.5 (May 15, 2008)). “There are sound public policy reasons for making this distinction between verbal and written reprimands. In the workplace, supervisors are called upon every day to assess the job performance of employees. Constructive criticism, in the form of verbal counseling or a verbal reprimand, is sometimes necessary to help the employee improve his or her job performance. If a verbal reprimand were subject to the Merit Rule grievance process, supervisors might hesitate to offer constructive criticism, to the detriment of the employee. Without ongoing verbal feedback from supervisors, an employee might face more serious consequences for shortcomings of which he or she is not aware. The Board believes that the Merit rules should encourage verbal interaction between supervisors and employees, not make every conversation possibly subject to an adversarial grievance process.” *Trader*, at pp. 4-5.

¹⁵⁸ *D’Souza v. DSCYF*, No. 12-06-547, at p.6 (Dec. 20, 2012). “Even though the letter of instruction was not a part of [the grievant’s] personnel file, the agency could cite it as a basis for a written reprimand one year later to show that [the grievant] was aware of the agency’s expectations for appropriate behavior in the workplace.” *Id.*

prerogatives under Merit Rule 1.4 ‘to manage its operations and direct employees except as specifically modified by these Rules.’”¹⁵⁹

“[W]hen an employer rescinds a promotion because the promotional process was flawed, or the person was not qualified for the promotion, the employment action does not amount to a demotion.”¹⁶⁰

The Board cannot hear an appeal of a grievant who voluntarily resigned his position, unless the grievant proves constructive discharge. “There are only two circumstances where a resignation is deemed involuntary: (1) when the employer forces the resignation or retirement by coercion or duress, or (2) when the employer obtains the resignation or retirement by deceiving or misrepresenting a material fact to the employee.”¹⁶¹

¹⁵⁹ *Christman v. DHSS*, No. 04-06-307, at p.7 (May 28, 2008), *aff’d*, C.A. No. 08A-07-110-JTV (Del. Super., July 14, 2011). “The Board does not believe it has jurisdiction to hear a grievance alleging a constructive or de facto demotion through the loss of significant job responsibilities which does not involve the employee’s moving to a lower paygrade.” *Christman*, MERB No. 04-06-307, at p.8. The Superior Court stopped short of agreeing with the Board “that a change in job duties cannot be a disciplinary measure unless it amounts to a demotion.” C.A. No. 08A-07-110-JTV, at p.9.

¹⁶⁰ *Greene v. DSCYF*, No. 07-03-385, at p.4 (May 15, 2008), *aff’d*, 08A-06-05-WLW (Del. Super., Nov. 24, 2009).

¹⁶¹ *Marshall v. DHSS*, No. 11-11-550, at p.6 (Jan. 29, 2013) (quoting *Lapinski v. Board of Education of the Brandywine School District*, 2004 WL 202900 (D. Del., Jan. 29, 2004)). “[The grievant] may have had a difficult choice to make: ‘[He] could stand pat and fight. [He] chose not to. Merely because [the grievant] was faced with an inherently unpleasant situation in that [his] choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of [his] resignation.’” *Marshall v. DHSS*, *supra*, at p.8 (quoting *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975)).

Just Cause – Termination

“Just cause” is “a legally sufficient reason supported by job-related factors that rationally and logically touch upon the employee’s competency and ability to perform his duties.”¹⁶²

The Board has found just cause to terminate for a variety of reasons:

Unable to work due to incarceration¹⁶³

Failure to report to work after an extended period of time following an automobile accident¹⁶⁴

Using a state computer to access pornographic websites¹⁶⁵

¹⁶² *Stanford v. DHSS*, 44 A.3d 923 (TABLE), 2012 WL 1549811, at p.3 (Del., May 1, 2012) (quoting *Vann v. Town of Cheswold*, 945 A.2d 1118, 1122 (Del. 2008)).

¹⁶³ *Carney v. DNREC*, No. 09-04-445, at p.7 (Dec. 3, 2009) (“Public policy of this State does not support the theory that an employee is available for work while incarcerated and that such a situation requires an employer to hold the job for someone who is indefinitely absent.”) (quoting *Mason v. Best Drywall*, C.A. No. 98A-07-005-RSG, 1999 WL 459303, at p.3 (Del. Super., Apr. 1, 1999)).

¹⁶⁴ *DeMarie v. Department of Transportation*, C.A. No. 00A-11-001-HDR, 2002 WL 1042088, at p.2 (Del. Super., May 24, 2002) (the agency “properly exercised its discretion when it decided not to grant extended personal leave to the [grievant]” after he would not commit to a return-to-work date).

¹⁶⁵ *Dowell v. DSCYF*, No. 08-11-432 (Sept. 17, 2009).

Unsatisfactory job performance ¹⁶⁶

Revocation of access privileges to the Delaware Criminal Justice Information System (DELJIS) ¹⁶⁷

Falsifying compassionate leave slips ¹⁶⁸

Numerous medication errors by a nurse, one of them life-threatening ¹⁶⁹

History of neglecting care of children and disrespectful language towards children, parents, and other staff members ¹⁷⁰

Neglect of duty (using a state vehicle to go home during the day to swim, hang Christmas lights, and work in his shop) ¹⁷¹

¹⁶⁶ *Stanford v. DHSS*, No. 09-12-461 (Nov. 29, 2010) (numerous and repeated errors in processing child support checks), *aff'd*, 44 A.3d 923 (Del., May 1, 2012) (TABLE); *McKinley v. Office of Management and Budget*, No. 11-04-511 (Feb. 21, 2012) (failure to timely negotiate and award contracts and secure performance bonds); *Picconi v. DHSS*, No. 11-06-516 (Apr. 24, 2012) (welfare fraud errors); *Hussain v. DNREC*, C.A. No. 08C-01-334-RCC, 2008 WL 4817083, at p.2 (Del. Super., Oct. 17, 2008) (the grievant's staff and supervisor "lost confidence and a sense of trust in [the grievant] that was critical to his role as a manager").

¹⁶⁷ *Walbert v. Justice of the Peace Courts*, No. 11-04-510 (Oct. 18, 2011).

¹⁶⁸ *McDonald v. Department of Safety and Homeland Security*, No. 11-03-506 (Sept. 19, 2011).

¹⁶⁹ *Harper v. Department of State*, No. 11-01-490 (Aug. 16, 2011).

¹⁷⁰ *Jones v. DSCYF*, No. 11-01-489 (July 19, 2011).

¹⁷¹ *Weiss v. DHSS*, C.A. No. 02A-12-003-WCC (Del. Super., July 30, 2003).

Criminal convictions for menacing, terroristic threatening, and criminal mischief ¹⁷²

Repeated use of profanity and derogatory and threatening comments towards co-workers ¹⁷³

Insubordination ¹⁷⁴

Jeopardizing the safety of a Violent Crimes Compensation Board client; jeopardizing the safety of attendees at a VCCB event ¹⁷⁵

Workplace violence ¹⁷⁶

Falsifying an employment application ¹⁷⁷

Ordering additional blood tests without a doctor's authorization ¹⁷⁸

¹⁷² *Bowen v. DSCYF*, No. 11-02-504 (Jan. 27, 2012).

¹⁷³ *Herreida v. DHSS*, No. 11-12-531 (Sept. 11, 2012).

¹⁷⁴ *Christman v. DHSS*, No. 12-01-532 (Sept. 27, 2012); *Olsen v. DSCYF*, No. 11-09-522 (Oct. 11, 2012).

¹⁷⁵ *Gibson v. Merit Employee Relations Board*, 16 A.3d 937 (TABLE), 2011 WL 1376278 (Del., Apr. 12, 2011).

¹⁷⁶ *Grievant v. DNREC*, No. 12-04-541 (Oct. 31, 2012).

¹⁷⁷ *Demusz v. DHSS*, No. 08-02-413 (Sept. 24, 2008).

¹⁷⁸ *Norcisa v. DHSS*, No. 10-01-464 (Feb. 11, 2013).

In the majority of termination cases where the Board reversed, it was because the evidence in the record did not support the charged offense. ¹⁷⁹

JUST CAUSE – Penalties

“Delaware courts have never proclaimed a set legal standard for determining whether a penalty is appropriate for the circumstances, and thus, the MERB’s decision regarding the proportionality of a penalty should be given deference unless the conclusion is clearly unreasonable.” ¹⁸⁰

¹⁷⁹ See *Keeler v. Department of Transportation*, No. 08-10-430, at p.6 (Aug. 10, 2009) (“[The agency] did not have just cause to terminate [the grievant] because she did not commit the charged offense: violating the [last chance agreement.]”); *Jabbar-Bey v. DSCYF*, No. 10-08-489, at pp.6-7 (Sept. 22, 2011) (“there is no evidence in the record to prove that she committed the charged offenses [misappropriation of Adopt-A-Family gift cards]”); *Jett v. DHSS*, No. 11-11-527, at p.9 (June 14, 2012) (insufficient evidence to prove that the grievant sexually harassed a client); *Stevens v. DHSS*, No. 08-11-433 (Sept. 23, 2009) (evidence did not prove the offenses of untimely reports, insubordination, and violation of DELJIS access).

In two other termination cases the Board found there was substantial evidence to support the charged offense, but decided that the penalty of termination was too harsh. See *Carty v. Justice of the Peace Courts*, No. 10-08-479 (Apr. 11, 2011), *rev’d*, C.A. No. N11A-04-016-CLS, 2012 WL 1409529 (Del. Super., Jan. 9, 2012); *Avallone v. DHSS*, No. 07-05-391 (July 17, 2008), *aff’d*, 14 A.3d 566 (Del. 2011) (en banc).

¹⁸⁰ *Avallone v. DHSS*, C.A. No. 08A-08-008-JRJ, 2011 WL 4391842, at p.3 (Del. Super., Aug. 17, 2011) (footnote omitted). “Substantial evidence exists to support the [Board’s] conclusion that [the grievant] never intended the State to pay for the video equipment, and [the grievant] ultimately paid for the equipment. Further, substantial evidence exists to conclude that, up until this incident, [the grievant’s] fifteen-year career with the State of Delaware was unvarnished.” *Id.*

In deciding whether a penalty was appropriate to the circumstances, the Board takes into account mitigating factors. “[The grievant] had an unblemished prior disciplinary record. She had genuine concerns about her personal safety working the midnight shift alone. There was no evidence in the record that her working at home ever compromised her job performance or resulted in a breach of [federal requirements].”¹⁸¹

At the same time, the Board takes into account aggravating factors like prior discipline for the same type of misconduct. “The [agency] repeatedly warned [the grievant] that she needed to correct her behavior. . . . The Board believes that [the agency] gave [her] every opportunity to correct her behavior through clear directives, verbal counseling, and progressive discipline [two written reprimands, three suspensions]. Nothing worked, and [the agency] did not have any reason to believe that another suspension would do the trick.”¹⁸²

“[P]rior misconduct can be taken into account for progressive discipline to determine the appropriate penalty.”¹⁸³ However, prior disciplinary actions cannot be “used to prove the existence of the conduct for which the employee is being removed” only “to show that the employee was on notice that such

¹⁸¹ *Scott-Jones v. DHSS*, No. 11-11-529, at p.7 (Aug. 13, 2012). The Board reduced the grievant’s three-day suspension to a written reprimand.

¹⁸² *Olsen v. DSCYF*, No. 11-09-522, at p.10 (Oct. 11, 2012).

¹⁸³ *Luis v. DHSS*, No. 12-06-546, at p.7 (Mar. 6, 2013).

behavior was unacceptable' or 'that the harsher discipline was required.'" ¹⁸⁴

Aggravating factors also include adverse effects of the employee's misconduct on the workplace. "The grievant's check processing] error rate had a substantial adverse impact on the agency: for example, custodial parents and children in need going without timely [child] support payments, which the agency had to reimburse out of its own funds." ¹⁸⁵

¹⁸⁴ *Luis, supra* Note 183, at p.7 (quoting *Steiner v. City of Akron*, 2000 WL 960858, at p.4 (Ohio App., July 12, 2000)).

¹⁸⁵ *Stanford v. DHSS*, No. 09-12-401, at p.9 (Nov. 29, 2010), *aff'd*, 44 A.3d 923 (May 1, 2012) (TABLE). "The Board does not believe that [the grievant's check processing] error rate had to result in the loss of federal funding before [the agency] had just cause to terminate her." *Stanford*, MERB No. 09-12-401, at p.9. See *McKinley v. Office of Management and Budget*, No. 11-04-511, at p.9 (Feb. 21, 2012) ("When State contracts are not bid, negotiated, and awarded in time, the taxpayers may have to pick up the tab when the State has to pay a premium to purchase goods and services in the open market without any negotiating leverage, or go without. When a contractor does not post a required performance bond, the State does not have the ability to go against the bond if the contractor defaults"); *Picconi v. DHSS*, No. 11-06-516, at p.6 (Apr. 24, 2012) ("Continued failure to comply with federal regulations could have resulted in the loss of federal funding, a possibility exacerbated by low employee morale due to [the grievant's] management style and the departure of experienced investigators who could not longer tolerate working under him."); *McDonald v. Department of Safety and Homeland Security*, No. 11-03-506, at p.6 ("[The grievant's] dishonesty limited the functions she could perform within the police department and therefore reduced her value to the Department as an employee."); *Jones v. DSCYF*, No. 11-01-489, at p.7 ("[The grievant's] history (going back to 2005) of neglecting the care of children, her rude and disrespectful language towards children, parents, and other staff members directly touched upon her competency and ability to perform her duties as a nurse"); *Herreida v. DHSS*, No. 11-12-531, at p.7 (Sept. 11, 2012) (the grievant's "behavior was disrupting the workplace and could no longer be tolerated").

Progressive discipline is not necessarily required or appropriate before termination. “The Board does not believe that progressive discipline has the usual application in the context of a zero-tolerance workplace violence policy. ‘It is well settled under Delaware law that even a single act of misconduct may constitute ‘just cause’ for terminating an employee. An employer is not obligated to withstand multiple acts of serious misconduct before termination is appropriate.’”¹⁸⁶

When the agency imposes a single penalty for multiple offenses, the Board may modify the penalty downwards if it finds that the evidence does not

¹⁸⁶ *Grievant v. DNREC*, No. 12-04-541, at p.8 (Oct. 31, 2012) (quoting *Green-Hayes v. Department of Labor*, C.A. No. N12A-02-011-PLA, 2012 WL 351822, at p.3 (Del. Super, Aug. 8, 2012)). See *Justice of the Peace Courts v. Carty*, C.A. No. N11A-04-016-CLS, 2012 WL 1409529, at p.9 (Del. Super., Jan. 9, 2012) (“JP Court was within their authority to discharge [the grievant] for this one incident.”).

In *Carty*, a court clerk released a defendant who had turned himself in on a capias. The grievant was not “authorized to take it upon herself to make a decision, whose power was vested in a judicial officer, to release a defendant.” 2012 WL 1409529, at p.4. “Carty used her power and position to get [the defendant] ‘out of the back door’ knowing full well of his prior capiases.” *Id.*, at p.3.

substantiate all of the charges.¹⁸⁷

MR 12.4

Employees shall receive written notice of their entitlement to a pre-decision meeting in dismissal, demotion for just cause, fines and suspension cases. If employees desire such a meeting, they shall submit a written request for a meeting to their Agency's designated personnel representative within 15 calendar days from the date of notice.

"Merit Rule 12.4 requires a hearing only "in dismissal, demotion for cause, fines and suspension cases. . . . Merit Rule 12.4 applies only to a dismissal for disciplinary reasons and not to a disability termination."¹⁸⁸

¹⁸⁷ See *Flaherty v. DHSS*, No. 10-07-476 (Aug. 11, 2011) (the agency terminated the grievant for three offenses; the evidence did not substantiate the most serious charge – disclosing confidential client information – so the Board reduced the penalties for the other two offenses to suspensions).

See also *Stevens v. DHSS*, No. 08-11-433 (Sept. 24, 2009). In *Stevens*, the agency terminated the grievant for four offenses. The Board found that the evidence substantiated only one of the offenses and ordered reinstatement. "There was no testimony that [the agency] would have terminated [the grievant] if that was the only charged offense." *Id.*, at pp.10-11.

¹⁸⁸ *Benson v. Department of Transportation*, No. 07-12-407, at p.6 (June 19, 2008).

MR 12.5

The pre-decision meeting shall be held within a reasonable time not to exceed 15 calendar days after the employee has requested the meeting in compliance with [Merit Rule] 12.4.

“While an agency should endeavor to hold a pre-decision meeting within fifteen days of the request, Merit Rule 12.5 does not provide that the agency cannot discipline an employee for misconduct if the pre-decision meeting is not held within fifteen days.”¹⁸⁹

“[Pre-decision] meetings must provide an employee with clear notice of the charges against him, a reasonable time to marshal facts and evidence, an explanation of the substance of the evidence supporting the charges, and an opportunity to present his side of the case in a manner such that the decision-maker can weigh both sides of the case.”¹⁹⁰

MR 12.6

Pre-decision meetings shall be informal meetings to provide employees an opportunity to respond to the proposed action, and offer any reasons why the proposed penalty may not be justified or too severe.

¹⁸⁹ *DeCarlo v. DHSS*, No. 09-10-455, at p.5 (May 12, 2011).

¹⁹⁰ *Department of Correction v. Nicholson*, 1985 WL 188999, at p.3 (Del. Super., May 7, 1985).

“[The grievants] were given pre-decision hearings, on or about April 14, at which they were represented by counsel and given an opportunity to present their defenses.”¹⁹¹ The grievants claimed that the agency was already determined to fire them before the pre-decision meetings and the reasons given for dismissal were pretextual. But that did not establish a violation of due process. “Due process requires an impartial decision-maker before any final deprivation of state employment, but it does not require an impartial decision-maker at pre-termination hearings. Final deprivation of state employment did not occur with the May 20 dismissal letters, because the May 20 dismissals were subject to the grievance process. The Step 3 hearing was held before a decision-maker who was impartial beyond any question of fact”¹⁹²

MR 12.8

Adverse documentation shall not be cited by agencies in any action involving a similar subsequent offense after 2 years, except if the employees raise their past work record as a defense or mitigating factor.

“[T]he Rule’s reference to ‘similar subsequent offense’ can be read to mean that Rule 12.8 is intended to prevent the use of documentation of

¹⁹¹ *Eastburn v. Department of Transportation*, C.A. No. 07C-02-031-JTV, 2009 WL 3290809, at p.5 (Del. Super., Sept. 21, 2009).

¹⁹² *Id.*

outdated disciplinary ‘offenses,’ but not the use of ‘old’ negative employment reviews in performance-based dismissals. We defer to the agency’s interpretation and conclude that the MERB’s holding on that point was not clearly wrong.”¹⁹³

MR 12.9

Employees who have been dismissed, demoted or suspended may file an appeal directly with the Director or the MERB within 30 days of such action. Alternatively, such employees may simultaneously file directly with the Director, who must hear the appeal within 30 days. If the employee is not satisfied with the outcome at the Director’s level, then the appeal shall continue at the MERB.

“‘[W]hen an employer rescinds a promotion because the promotional process was flawed, or the person was not qualified for the promotion, the employment action does not amount to a demotion which a grievant can appeal directly to the Board.’”¹⁹⁴

“Merit Rule 12.9 provides a more expeditious process for certain kinds of serious employment actions affecting the employee’s paycheck (dismissal, demotion, or suspension). For those grievances, the employee can file ‘directly

¹⁹³ *Stanford v. DHSS*, 44 A.3d 923 (TABLE), 2012 WL 1549811, at p.4 (Del., May 1, 2012).

¹⁹⁴ *Moore v. DNREC*, No. 08-05-419, at p.5 n.1 (June 24, 2009) (quoting *Greene v. DSCYF*, No. 07-03-385, at p.4 (May 15, 2008), *aff’d on other grounds*, C.A. No. 08A-06-005-WLW (Del. Super., Nov. 24, 2009)).

with the Director or the MERB within 30 days of such action.”¹⁹⁵

Merit Rule 12.9 provides that the Director must hear the appeal within 30 days. “If the Director does not, then the Board interprets its own rules to divest the Director of jurisdiction to hear the appeal so that the Board may hear it expeditiously.”¹⁹⁶

MR 13.3

Unsatisfactory Performance. When an employee’s work performance is considered unsatisfactory, the performance must be documented in writing, and the specific weaknesses must be made known to the employee. The employee must be given documented assistance to improve by the designated supervisor. An opportunity for re-evaluation will be provided within a period of 3 to 6 months.

Merit Rule 13.3 requires that an employee whose work performance is unsatisfactory shall have three to six months to improve before being re-evaluated. “[The agency] gave the [grievant] the minimum time required for improvement. Her first progress report was on May 12, 2010. Her last progress report was on August 13, 2010 three months (92) days later.”¹⁹⁷

¹⁹⁵ *Carr v. DHSS*, No. 09-01-438, at p.4 (Mar. 5, 2009).

¹⁹⁶ *Id.*, at p.6.

¹⁹⁷ *McKinley v. Office of Management and Budget*, No.11-04-511, at pp. 8-9 (Feb. 21, 2012).

MR 18.0 The Grievance Procedure

MR 18.1

. . . Merit employees have the right to use this grievance procedure free of threats, intimidation or retaliation, and may have union or other representation throughout the process.

A grievant claimed that a supervisor gave him a needs improvement performance evaluation in retaliation for filing previous grievances. This “claim of retaliation was really a ‘veiled attempt’ to re-litigate his time-barred appeal regarding reclassification and to appeal the performance rating of ‘needs improvement,’ which is not grievable.”¹⁹⁸

MR 18.2

A “grievance” means an employee complaint about the application of the Rules or the Merit System Law which remains unresolved after informal efforts at resolution have been attempted. A grievance shall not deal with the substantive policies embodied in the Merit System law.

“[The grievance] of her non-selection for the Engineer IV position was resolved at the Step 2 level. After [her] successful Step 2 grievance, that

¹⁹⁸ *Sullivan v. DHSS*, C.A. No. 00A-02-009-HLA, 2000 WL 1211239, at p.1 (Del. Super., Aug. 22, 2000). “It appears to the Court that the only proof of retaliation that is being offered by [the grievant] is the fact the ‘needs improvement’ rating was given subsequent to his filing a grievance regarding job reclassification.” *Id.*, at p.2.

grievance process was over. When [the agency] rescinded her promotion two months later, she could not proceed to step 3, even if she had filed the appeal to OMB. [Her] remedy was to start a new grievance at Step 1.”¹⁹⁹

Time Limits

The time limits for the grievance process are jurisdictional. Where the deadline has “passed, the Board had no jurisdiction to hear [the employee’s] grievance.”²⁰⁰ “[The grievant’s] pro se status does not excuse a failure to timely comply with the jurisdictional requirements of [the Merit Rules].”²⁰¹

“An appeal is not perfected to the Board until the written appeal is actually received by the Board’s Administrator.”²⁰²

“A grievant has several choices to file an appeal to the Board. Hand-delivery during regular business hours is the safest course because the written appeal can be date-stamped. Certified mail return receipt requested

¹⁹⁹ *Moore v. DNREC*, No. 08-05-419, at p.4 (June 24, 2009).

²⁰⁰ *Cunningham v. DHSS*, C.A. No. 95A-10-003-HDR, 1996 WL 190757, at p.2 (Del. Super., Mar. 27, 1996), *aff’d*, 679 A.2d 462 (TABLE), 1996 WL 313503 (Del., June 3, 1996)).

²⁰¹ *Cunningham*, *supra* Note 200, at p.2 (quoting *Gibson v. State*, No. 354, 1994 (Del. 1994) (ORDER)).

²⁰² *Echols v. DSCYF*, No. 09-10-456, at p.4 (Apr. 5, 2010) (quoting *Pinkett v. DHSS*, No. 08-02-415, at p.5 (May 21, 2009)). “[The grievant] does not have a fax confirmation sheet to show the date and time and fax number to which she sent her appeal, so there is no rebuttable presumption that the Board received her appeal.” *Echols*, *supra*, at p.6.

is another option but runs the risk of delay in the U.S. Postal Service. The vagaries of the State mail system pose the most risk of delay. Whatever manner of service, “[t]he party choosing to appeal bears the burden to ensure the receipt of the filing and those who wait until the last day foreclose opportunities to make mistakes.”²⁰³

“[T]he doctrine of equitable estoppel will operate to toll the running of the statute of limitations. Specifically, a claim will not be time-barred if the [agency] ‘took active steps to prevent the [grievant] from [appealing], as by promising not to plead the statute of limitation pending settlement talks or by concealing evidence from the [grievant] that he needed in order to determine that he had a claim.’”²⁰⁴

“[T]he mandatory time limits under the Merit Rules are [not] tolled pending a request for production at an earlier stage of the grievance process.”²⁰⁵

²⁰³ *Pinkett v. DHSS*, No. 08-02-415, at p.6 (May 21, 2009) (quoting *Gasper Township Board of Trustees v. Preble County Budget Commission*, 893 N.E.2d 136, 142 (Ohio 2008)).

²⁰⁴ *Tankard v. DNREC*, C.A. No. 01A-09-002-WLW, at p.4 (Del. Super., July 31, 2002) (quoting *Williamson v. New Castle County*, C.A. No. 190119-NC, 2002 WL 453926, at p.4 (Del. Ch., Mar. 13, 2002)). See *Kopicko v. DHSS*, 805 A.2d 877, 879 (Del. 2002) (agency estopped from asserting statute of limitations where the agency’s termination letter said the grievant had no right to appeal).

²⁰⁵ *Rogers v. Department of Correction*, No. 11-09-525, at p.3 (Dec. 20, 2011). “The Board believes that the employing agency should always provide the grievant with relevant documents in a timely fashion. If it does not, eventually the grievant will have recourse to the Board’s subpoena power to compel the production of documents.” *Id.*

The time limits apply not only to the grievant but to the agency. For example, if the Step 1 decision is favorable to the grievant, then the agency must file a timely written appeal to Step 2 within seven days. “[T]he agency’s failure to follow the time limit set forth in the MERB rules bound them to the decision made by the [grievant’s] immediate supervisor under Step 1 of the grievance procedures.”²⁰⁶

Merit Rule 18.4 provides that “[t]he parties may agree to the extension of any time limits or to waive any grievance step.” But there must be a “written agreement to delay a grievance step . . . as 29 *Del. C.* §5931(b) requires a written agreement or a written affirmation by the grieving employee to delay the Step 2 process.”²⁰⁷

“The Board does not believe that a grievant can invoke the ‘green light’ provisions of Merit Rule 18.4 to proceed to the next step by willfully refusing to

²⁰⁶ *Chapman v. DHSS*, C.A. No. 08A-04-009-WCC, 2009 WL 2386090, at p.4 (Del. Super., July 31, 2009). In *Chapman*, the agency rescinded the grievant’s promotion because she failed to satisfy a mandatory drug test by an independent laboratory. The grievant then filed a Step 1 grievance with her immediate supervisor who decided that the grievant had provided a satisfactory drug test from her personal physician. “While the Court agrees that it is a very rare and unusual occasion that a supervisor takes a position contrary to the agency’s decision, the rules do not prohibit such action nor do the rules distinguish between the course of action required when the decision is adverse to the agency versus the employee.” *Id.*, at p.5.

²⁰⁷ *Id.*, at p.6.

cooperate in the scheduling of a timely Step 3 meeting.”²⁰⁸

MR 18.6

Step 1. Grievants shall file, within 14 calendar days of the date of the grievance matter or the date they could have reasonably be expected to have knowledge of the grievance matter, . . .

“The time limits to pursue administrative remedies do “not permit the complainant to delay until he realizes or knows that the personnel action or event was discriminatory. Rather, the clock begins to run when the complainant knows or reasonably should have known of the ‘event’ or ‘personnel action’ which gave rise to the discrimination.”²⁰⁹

²⁰⁸ *Ringer v. Department of Transportation*, No. 09-07-453, at p.5 (Mar. 11, 2010) (citing *Danneman v. DHSS*, No. 09-04-446 (Sept. 3, 2009) (grievant did not cooperate with the Step 3 hearing officer to re-schedule the hearing).

But see Morgan v. DSCYF, No. 10-10-485 (Jan. 14, 2011) (distinguishing *Danneman*; even though the grievant and his union representative walked out of the Step 3 hearing, the hearing officer went forward and issued a decision on the merits).

²⁰⁹ *Gibson v. Violent Crimes Compensation Board*, No. 07-11-404, at p.4 (Mar. 26, 2008) (quoting *Roepsch v. Bentsen*, 846 F. Supp. 1363, 1369 (E.D. Wis. 1994)), *aff'd*, 16 A.3d 937 (TABLE) (Del., Apr. 12, 2011). *See also Cavanaugh/Hancock v. Office of Management and Budget*, Nos. 12-02-534/535, at p.3 (May 14, 2012) (the grievants waited over ten years to file their grievances because they claimed “they only discovered this salary disparity in 2011 when they accessed an on-line database which publishes the salaries of State employees”).

“The Board believes that [the grievant] had knowledge of the disparity in salary increases when he received a copy of the Study on March 27, 2007. The Study clearly stated that those technicians below the new minimum salary would be leveled up, . . . The Board does not believe [the grievant] needed to know exactly how much salary increase each [technician] received in order to have knowledge of the grievance matter for purposes of Merit Rule 18.6.”²¹⁰

MR 18.5

Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the job requirements; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements in the Merit rules; or (3) there has been a gross abuse of discretion in the promotion.

“There is perhaps no principle more settled in this area of the law that promotion and non-promotion of employees within a department or agency of Government is a matter of supervisory discretion.’ Accordingly, Merit Rule 18.5 only provides for grievances about promotions in three narrow categories, including ‘gross abuse of discretion.’”²¹¹

²¹⁰ *Schur v. Department of Transportation*, No. 09-01-439, at p.4 (Mar. 19, 2009).

²¹¹ *Soriano v. Department of Finance*, No. 06-10-370, at p.6 (June 5, 2008) (quoting *Crowley v. United States*, 527 F.2d 1176, 1184 (Ct. Cl. 1975)).

“[T]he gross abuse of discretion must occur in the actual choice of one candidate over another . . . [It] does not apply to an aspect of the promotion process as opposed to the actual promotion.” ²¹²

“In order to constitute an abuse of discretion by public officials, the record must demonstrate that the exercise was unreasonable, and that the ground upon which the decision was based or reason shown therefore was clearly untenable. When Delaware Courts have mentioned the phrase ‘gross abuse of discretion’ it has been in the same breath as the term ‘bad faith.’” ²¹³

A gross abuse of discretion may occur when the agency pre-selected a candidate who lacked the required supervisory experience. While that candidate “was an innocent party, he was improperly pre-selected for the position.” ²¹⁴ However, the grievant was not entitled to back pay because he

²¹² *Department of Correction v. Justice*, C.A. No. 06A-12-006-RBY, at p.7 (Del. Super., Aug. 23, 2007) (agency’s refusal to re-schedule a candidate’s interview was an aspect of the promotion process and not “the actual choice of one candidate over another”).

²¹³ *Id.*, at p.9 (footnotes omitted). “While the process may have been managed imperfectly, there is no evidence in the record that the [agency] acted beyond the bounds of reasonable judgment by not postponing the [grievant’s] interview or all the interviews.” *Id.*, at p.10.

²¹⁴ *McIlroy v. DHSS*, C.A. No. 99A-06-001-HDR, 2000 WL 703672, at p.2 (Del. Super., Apr. 18, 2000). *But see Raley v. Department of Transportation*, C.A. No. 99A-10-001-HDR, 2000 WL 973239, at p.7 (Del. Super., May 31, 2000) (an employee’s “transfer to a temporary position at [the agency] was motivated by the need to comply with these federal deadlines, and not by any desire to pre-select him for a permanent position”).

was not “entitled to the position, but rather he and others were denied a fair opportunity to compete for he position. [The grievant] is made whole by being given the fair opportunity to re-apply.”²¹⁵

“There is no evidence in the record of any bad faith [by the agency] in selecting [another candidate for promotion]. He met all of the job qualifications, scored well on the two rounds of interviews, and his most recent performance evaluation was exceeds expectations.”²¹⁶

Merit Rule 18.5 only applies to promotions, as distinct from lateral transfers. The distinction turns on “whether the changes in work environment, responsibility and supervision makes this matter a promotion in spite of the [grievant’s] lateral move due to his rank.”²¹⁷

In deciding whether the person promoted does not meet the job requirements, the Board scrutinizes the job specifications for the position published by the Office of Management and Budget as well as the OMB job

²¹⁵ *McIlroy v. DHSS, supra* Note 214, at p.3.

²¹⁶ *Kiliany v. DHSS*, No. 10-12-487, at p.6 (June 2, 2011).

²¹⁷ *Department of Correction v. Dodson*, C.A. No. 07A-03-013-WCC, 2007 WL 4248518, at p.5 (Del. Super., Nov. 30, 2007). In *Dodson*, the Superior Court remanded to the Board to make additional findings whether the employment action was a true promotion or a lateral transfer. On remand, the Board vacated its previous decision and dismissed the appeal as moot. No. 08-12-531 (Sept. 24, 2012).

posting.²¹⁸

MR 18.8

Step 3. Any appeal shall be filed in writing to the Director within 14 calendar days of receipt of the Step 2 reply. . . . [T]he Director (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.

“Merit Rule 18.8 directs [Human Resource Management] to issue a Step 3 decision within forty-five days of receipt of the appeal. If it does not, that is not a limitation on the exercise of the power to issue the decision. Merit Rules 18.6 and 18.7 provide that if the agency does not act within the required time, the appeal is ‘green lighted’ to the next step. In contrast, to appeal to the

²¹⁸ See *Scaturro v. Family Court*, No. 09-11-459 (May 26, 2010) (Judicial Assistant promoted to Judicial Operations Manager did not meet the job requirement of legal case flow management experience), *aff'd*, C.A. No. S10A-06-004-THG (Del. Super., Feb. 28, 2011); *Burton v. Department of Correction*, No. 12-03-540, at p.6 (Oct. 3, 2012) (the successful candidate for promotion “did not meet the job requirements for [Correctional Security Superintendent] because he did not have the required year of work experience in the position of Correctional Captain”).

But see Thomson v. Department of Transportation, 524 A.2d 1215 (TABLE), 1988 WL 61554 (Del., May 19, 1988) (“Because the Level V job description defined itself by an equivalency standard, it was not arbitrary to apply an equivalency interpretation in determining the requisite Level V experience necessary to meet Level VI’s minimum qualifications”).

Board under Merit Rule 18.9 the grievant must be ‘in receipt of the Step 3 decision.’” ²¹⁹

“Because appeals to the Board are *de novo*, the Board does not believe that the *ratio decidendi* (reasoning) of the Step 3 hearing officer is ever binding on the Board.” ²²⁰ “The Board concludes as a matter of law, based on its interpretation of its own rules, that the Step 3 hearing officer’s [decision] is at most *dicta* and is not final and binding on the agency.” ²²¹

MR 18.9

If the grievance has not been settled, the grievant may present, within 20 calendar days of receipt of the Step 3 decision . . . a written appeal to the Merit Employee Relations Board (MERB) for final disposition

²¹⁹ *Pinkett v. DHSS*, No. 08-02-415, at p.4 (May 21, 2009). *See Danneman v. DHSS*, No. 09-04-441, at p.4 (Sept. 3, 2009) (“Because [the grievant] has not received a Step 3 decision, the Board does not have jurisdiction to hear her appeal.”).

In contrast to Merit Rule 18.9, Merit Rule 12.9 does not require the grievant be “in receipt of the Step 3 decision” before appealing to the Board. The Step 3 hearing officer is not divested of jurisdiction if the decision is not issued within 45 days under Merit Rule 18.8. However, the Step 3 hearing officer is divested of jurisdiction if the decision is not issued within 30 days under Merit Rule 12.9. *See discussion supra* at pp. 75-76.

²²⁰ *Olsen v. DHSS*, No. 11-08-520, at p.3 (Aug. 24, 2012).

²²¹ *Id.* In *Olsen*, the grievant argued that the Step 3 hearing officer found in her favor with regard to one of the four incidents for which she was disciplined. However, “[t]he Step 3 decision did not grant the grievance in part even though the hearing officer felt the March 28th leave issue was an ‘unfortunate occasion of confusion by all parties.’” No. 11-08-520, at p.3.

The Board cannot exercise jurisdiction over an appeal filed before the receipt of the Step 3 decision. “[U]nless the untimely filing of the appeal can be attributed to ‘court-related’ personnel,’ even excusable neglect on the part of a party cannot cure the jurisdictional defect. [The grievant’s] premature appeal was not the result of court-related personnel.”²²²

MR 18.10

Retroactive remedies shall apply to the grievant only and, for a continuing claim, be limited to 30 calendar days prior to the grievance filing date.

Merit Rule 18.10 “limits back pay to a maximum of 30 days prior to the date the grievance was filed. In this case, [the grievant] filed a grievance on October 29, 1981; his recovery of back pay, therefore, can date from a time no earlier than September 29, 1981.”²²³

²²² *Banner v. DHSS*, No. 12-07-551, at p.7 (Mar. 12, 2013) (quoting *McDonald’s Corp. v. Zoning Board of Adjustment for the City of Wilmington*, C.A. No. 01A-05-011-CG. 2002 WL 241338, at p.1 (Del. Super., Feb. 19, 2002)). In *Banner*, the grievant filed an appeal to the Board after the Step 2 decision. The grievant “was on notice that the appeal of her one-day suspension was premature and she would have to re-file her appeal after receiving a Step 3 decision in accordance with Merit Rule 18.9. She did not, and has only herself to blame, not Board-related personnel.” *Banner, supra*, at p.8.

²²³ *Department of Correction v. Nicholson*, 1985 WL 18899, at p.4 (Del. Super., May 7, 1985).

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