BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF ANTHONY MORABITO, **Grievant,**	)	**DOCKET NO. 97-12-108**
v.	)	
DEPARTMENT OF HEALTH AND SOCIAL SERVICES, **Agency.**	)	**OPINION AND ORDER ON DISMISSAL MOTION**

BEFORE Katy K. Woo, Chairperson, Robert Burns, Vice-Chairperson, Dallas Green, John F. Schmutz, Esquire, and John W. Pitts, Members, constituting a lawful quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

AND NOW, to-wit, this 11th day of June, 1998, the Board after hearing argument from the parties on May 21, 1998 hereby denies without prejudice the Motion to Dismiss filed by the Department on January 9, 1998 for the reasons set forth hereinafter.

BACKGROUND

This matter has its inception in a grievance filed by Mr. Morabito on March 5, 1992. In this grievance, Mr. Morabito sought to have his position upgraded or, in the alternative, to have the duties of the position reduced. Grievant did not receive the Step 1 grievance hearing, but a Step 2 hearing was conducted on March 12, 1992. The Deputy Director of Health Systems Protection, Richard M. Steiman, reviewed the grievance at the Step 2 level.

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The Department on January 9, 1998 moved to dismiss the grievance and, in its motion to dismiss, contends that the grievance was resolved at the meeting on the 2nd Step level when the Grievant agreed to resign in return for a consulting contract. This "agreement" or "deal" between the Department and Mr. Morabito was never confirmed in writing as a written Step 2 decision. However, the Grievant did resign his position as a Radiation Control Specialist on April 28, 1992 and did receive a consulting contract. In his letter of resignation to Richard M. Steiman, the Grievant stated in pertinent part:

> "I am writing this letter to inform you of my resignation as a Radiation Control Specialist in your section. I will be leaving my state merit position as of April 30, 1992. I regret the fact that I am unable to formally give you a two week notice. I have been anticipating the finalization of my grievance since before April 15, 1992. My contract with the Division of Public Health, which has resulted from my grievance will be beginning May 1, 1992. During the term of my contract I hope to assist you in the reclassification of my previous position.
>
> At the conclusion of my contract, I am looking forward to possibly continuing my Health Physics career, in a much greater capacity with your organization."

The Department contends that the Grievant did not pursue his grievance to Step 3 until, at the earliest, August, 1993, and thus, this grievance is nullified by his failure to timely pursue it. The matter was heard on April 14, 1996 and July 19, 1996 at a 4th Step grievance hearing, and the grievance was denied by written decision dated August 2, 1996 which decision the Grievant and his attorney each deny ever having received until November 15, 1996 when, at counsel's request, a partial copy of the written decision was forwarded by facsimile transmission to him. The Grievant then attempted to appeal from the 4th Step denial of his grievance by letter from his counsel received at the Board on December 9, 1996.

Grievant takes the position that he was awaiting a written decision from the 2nd Step hearing and never received one, so, slightly over a year later on March 31, 1993, he mailed a written request to Secretary Carmen Nazario asking for a resolution of the grievance at Step 3. This request was repeated in a letter dated August 5, 1993 from the Grievant's attorney. The Grievant asserts that his initial grievance sought to have his position reclassified or the duties reduced. The Department, according to the Grievant, suggested that he resign the position so that it could be upgraded; that he would be reinstated in the position after the necessary publication, etc. procedures; and that the Department indicated this was the only way it could get the position reclassified. The Grievant further contends that there was no agreement to drop or dismiss the grievance in the interim and that the Department was to put the agreement in writing but did not do so.

The Grievant's counsel, in a letter dated August 5, 1993 to Secretary Nazario, asserts that the Grievant was apparently informed that the only way the position he occupied could be upgraded would be for him to perform the duties of the position on a contract basis while the reclassification occurred. The letter complains that there has been no reclassification of the position and seeks the assistance of the Secretary in either moving the grievance along, so that if the position will not be reclassified, the work being done can be revised to match the job description.

Grievant takes the position that he can move forward with a grievance to the next step at any time he chooses without limit in the absence of a required written decision from the appropriate authority. Grievant also asserts that the fact that he is no longer an employee in classified service does not prevent him from pursuing a grievance which was duly instituted while he was so employed.

At oral argument, the Department disputes that such a "deal" or "agreement" was made with the Grievant and further contends that even if such a deal was made that it was outside the authority of the agency to make and that the State is not bound by any such agreement to reclassify the position

and rehire the Grievant in that position. The Grievant contends that such a deal was made, that the Grievant relied upon it, and that the State is bound by the principal of administrative estoppel and must honor its agreement and place the Grievant in the position as promised to him.

DISCUSSION

It is apparent that the present situation with Mr. Morabito is brought about because he does not feel he got what he bargained for from his initial grievance. The initial grievance appears to have been an attempt by Mr. Morabito to either have the position he occupied reclassified or to have the duties of the position reduced to a level Grievant deemed commensurate with the paygrade for the position.

At the 2nd Step in the grievance process, Mr. Richard M. Steiman, the Deputy Director of Health Systems Protection in the Division of Public Health, and the Grievant appear to have reached an understanding that the Grievant would resign his position to be employed as a contract employee with the Division of Public Health. The Grievant wished to work with Mr. Steiman on the reclassification of the position from which he resigned. The Grievant labored under an apparent expectation that he would then apply for and be selected to fill the position once it was reclassified.

The Grievant resigned the position by letter of April 28, 1992 and accepted a position with the Division of Public Health working under a consulting contract. The position was ultimately reclassified and was filled with an individual other than the Grievant. Mr. Morabito did not file a grievance after the filling of the position. In his letter filing the appeal with MERB, Grievant's counsel states that the nature of the act complained of is:

> "Failure of agency to follow Merit Rules applicable to the recruitment and application policies, regarding an Environmental Health Specialist III position dealing with radiation requirements and duties."

In the same letter, Grievant's counsel alleges the following violation of the Merit Rules:

> "Failure to follow posting and advertising requirements, including the giving of the radiation position to a person not then qualified to perform the duties, as well as failure to properly consider the qualifications of grievant, and discriminating against grievant on the basis of non-merit factors."

The Department takes the position that the original grievance by Mr. Morabito seeking the reclassification or a change in the duties of the position was resolved at the 2nd Step by the Grievant's resignation from the position and his acceptance of contract employment with the expectation that the position he was vacating would be reclassified, and he would apply for it.

The reclassification of the position did eventually occur. The position was vacant, and Mr. Morabito, according to his counsel, was an applicant for the vacant reclassified position. However, the agency selected someone other than the Grievant to fill the reclassified position, and the relief Grievant now seeks is to be placed in the reclassified position in accordance with the agreement he claims was made with the agency as a resolution of his original grievance concerning the position.

ORDER

The Board has heard oral argument on the motion to dismiss and has unanimously determined that there appears to be a material factual dispute concerning the extent and effect of any arrangement between the Department and Mr. Morabito concerning the reclassification of the position and his entitlement to be rehired in the position. Therefore, by vote of the undersigned, the motion to dismiss will be denied at this time without prejudice for an evidentiary hearing focusing on the understanding of the parties at the time Mr. Morabito resigned from the position on April 30, 1992.[1] Prior to such

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[1] The parties are encouraged to develop, to the extent possible, a stipulation of facts concerning the agreement reached between Mr. Steiman and Mr. Morabito to be filed with their briefs on the applicability of the principle of administrative estoppel. Such briefs shall be simultaneously filed on June 30, 1998.

hearing, the parties will simultaneously submit to the Board briefs on the applicability of the doctrine of administrative estoppel as it applies to this grievance and the ability of the State to contest the arrangement with the Grievant.

IT IS SO ORDERED:

Katy K. Woo, Chairperson

Robert Burns, Vice-Chairperson

Dallas Green, Member

John F. Schmutz, Esquire, Member

John W. Pitts, Member

APPEAL RIGHTS

The appeal rights of parties to a decision before the Merit Employee Relations Board are set forth in 29 *Del. C.* § 5949.

Mailing Date: June 12, 1998

Distribution:
Original: File
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