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BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

DAVID B. WARD,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 07-12-409**
v.	)	
	)	
DEPARTMENT OF ELECTIONS,	)	
	)	**DECISION AND ORDER**
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board ("the Board") at 9:00 a.m. on May 28, 2008 at the Margaret M. O'Neill Building, 410 Federal Street, Suite 213, Dover, DE 19901.

BEFORE Brenda J. Phillips, Chair, John F. Schmutz, and Martha K. Austin, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman, Esquire
Deputy Attorney General
Counsel to the Board

Jean Lee Turner
Administrative Assistant to the Board

Roy S. Shiels, Esquire
on behalf of David B. Ward

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Department of Elections

SUMMARY OF THE EVIDENCE

The Board did not take any testimony from witnesses but heard legal argument from counsel on the motion by David B. Ward ("Ward") for summary judgment as a matter of law.

FINDINGS OF FACT

The basic jurisdictional facts are not in dispute. The Department of Elections ("the Department") appointed Ward for a limited term as an Accounting Specialist on August 10, 2004. Prior to that limited term appointment, Ward was not a merit employee.

The job posting for the Accounting Specialist position stated that it was a limited term (two-year) position. The position was created by the Clearinghouse Committee and funded by a non-specific federal grant under the Help America Vote Act.

On September 14, 2007, the Department terminated Ward.

CONCLUSIONS OF LAW

Merit Rule 1.1 provides that "these Rules apply to initial probationary, Merit and limited term employees, except as otherwise specified, ..."

Merit Rule 10.1 provides: "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 a period of up to 1 year. The Director may approve a longer term period. Established selection procedures shall be followed for filling the vacancy."

Merit Rule 10.1.1 provides: "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."

Ward claims the Department violated Merit Rule 12 by not providing him with a hearing prior to his termination. Even if his termination was not a disciplinary measure requiring just cause, Ward claims the Department violated the layoff procedures specified by Merit Rule 11.

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 the limited term appointment. *See* Merit Rule 10.1.1.

In *Showell v. Department of Corrections,* 534 A.2d 657, 1987 WL 4691 (Del., Nov. 5, 1987), the Department of Corrections temporarily appointed Showell to the position of acting superintendent of a juvenile detention center. The Merit Rules at the time provided for a temporary appointment to a Merit position for up to six months. Showell remained in the acting superintendent position for 1 ½ years. When the Department of Corrections filled the position with another applicant as permanent superintendent, Showell claimed the Department demoted him without just cause and a hearing in violation of the Merit Rules.

The Delaware Supreme Court rejected the State Personnel Commission's "ripening theory" that Showell's temporary appointment became a permanent position after six months.

> Merit Rule 13.0120 (now Merit Rule 13.0130) contains neither an express nor an implied requirement that a temporary employee who holds a position for more than six months be granted permanent status or equivalent compensation.

> Imposing such a penalty would create an unreasonable burden and force the Department to accept a temporary employee as permanent, regardless of qualifications, simply because a better qualified applicant had not been selected within the six-month time period. An extended search for applicants to fill job vacancies is necessary in certain situations and, in general, promotes the salutary goal of securing the best qualified employee for the position.

1987 WL 4691, at p.2.

"At all times during his tenure as acting superintendent, Showell remained a temporary employee." *Id.* "Therefore, Merit Rule 13.0310 dealing with the demotion of permanent employees is not applicable." *Id.*

Since *Showell*, the Board has revised the Merit Rules, replacing the term "temporary employee" with "limited term appointment" and extending the period for filling Merit position vacancies from six months to "up to 1 year" (though the "Director may approve a longer time period"). Merit Rule 10.1. The Supreme Court's holding in *Showell,* however, still applies to Ward. His limited term appointment lasted more than a year beyond the original two-year term, but that did not convert him into a Merit employee. When the Department terminated him on September 14, 2007, his limited term appointment ended and he was no longer a Merit employee.

"An employee who is serving a term appointment . . . may be separated at the expiration of that appointment if he is not reappointed." *Berger v. Department of Commerce*, 3 M.S.P.R. 198, 199 (Merit Systems Protection Board, Sept. 25, 1980). "[A]s a basic condition of employment, the employee's separation on the expiration date simply carries out the terms of the appointment." *Id.*

The Board concludes as a matter of law that Ward has failed to state a claim for a violation

of Merit Rules 11 or 12, which protect only Merit employees, because when the Department terminated him he no longer enjoyed Merit status. Under Merit Rule 10.1.1, only "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." Ward was not a Merit employee of the Department when he accepted his limited term appointment to the Accounting Specialist position.

DECISION AND ORDER

It is this 18th day of June, 2008, by a unanimous vote of 3-0, the Decision and Order of the Board that the Grievant's appeal is denied.

Brenda J. Phillips
Chair

Martha K. Austin
Member

John F. Schmutz
Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee's being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

> (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
>
> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
>
> (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
>
> (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: June 26, 2008

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