

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

JILL RESH,)	
)	
Employee/Grievant,)	
)	DOCKET No. 12-01-533
v.)	
)	
DEPARTMENT OF JUSTICE,)	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 March 28, 2012 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Dr. Jacqueline Jenkins, Victoria D. Cairns, and Paul R. Houck, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of Justice

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument on the motion by the Department of Justice (DOJ) to dismiss the appeal of the employee/grievant, Jill Resh (Resh), for lack of jurisdiction. DOJ attached to its motion four documents: 11 *Delaware Code* §9205 (Tab “A”); Letter dated May 10, 2010 from Diane L. Haase to Resh (Tab “B”); *Truitt v. MERB*, C.A. No. 07A-08-009-RBY (Del. Super., Apr. 30, 2008), *aff’d*, No. 248, 2008, 957 A.2d 2, 2008 WL 4107984 (Del., Sept. 5, 2008) (Tab “C”); and e-mails dated August 5 and 8, 2011 from Lisa Ogden re Jill Resh (Tab “D”).

Neither Resh nor her attorney, Jeffrey K. Martin, Esquire, appeared for the hearing.

FINDINGS OF FACT

Prior to Resh’s termination on August 3, 2011, she worked at the DOJ as a Support Services Administrator in the Victims’ Compensation Assistance Program (VCAP). The predecessor of the VCAP was the Violent Crimes Compensation Board (VCCB) which was under the administrative control of the Administrative Office of the Courts. VCCB employees were classified employees under the Merit system.

Effective July 1, 2009, the General Assembly transferred “the Executive Director and staff of the Violent Crimes Compensation Board to the Department of Justice for budgetary and administrative purposes. Such employees shall be deemed to be employees of the Department of Justice with all benefits they may have accrued in the classified service as of July 1, 2009.” 29 *Del. C.* §9025(a). VCCB employees who were classified employees as of July 1, 2009 retained their merit status.

The DOJ hired Resh as a Support Services Administrator in the VCAP on May 17, 2010. At the time, the DOJ advised Resh that her position was non-merit.

The DOJ terminated Resh on August 3, 2011. On August 5, 2011, Resh filed a Step One grievance. The DOJ denied the grievance because Resh was not a classified employee. After an exchange of letters between the parties over Resh's classified status, Resh filed an appeal to the Board on January 18, 2012. The DOJ does not contend that Resh's appeal was untimely.¹

CONCLUSIONS OF LAW

The Merit statutes provide: "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: . . . (7) Assistant Public Defenders, Deputy Attorneys General, and state detectives appointed by the State Attorney General . . . (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."

The Board concludes as a matter of law that it does not have jurisdiction over Resh's appeal because she was not a member of the classified service.

In *DNREC v. Murphy*, C.A. No. 00A-08-004-JEB, 2001 WL 282817 (Del. Super., Mar. 19, 2001), DNREC terminated a seasonal employee (Margaret Murphy) who grieved under the Merit Rules. The Superior Court held that as a temporary or seasonal employee Murphy was not a classified employee and did not have standing to grieve under the Merit Rules. "[T]he protections of Chapter 59 [of Title 29 of the *Delaware Code*] are available only to employees in the classified

¹ The Board notes that Merit Rule 12.9 requires an employee to file a direct appeal to the Board within thirty days of dismissal, demotion or suspension. The DOJ dismissed Resh on August 3, 2011 but she did not file her appeal to the Board until January 18, 2012. Resh pursued her other option to grieve through the Merit Rule step process. In light of the back-and-forth correspondence between the parties (which is not in the record before the Board), the Board will infer that the parties agreed to waive the remaining grievance steps pursuant to Merit Rule 18.4 and that Resh filed a timely appeal to the Board.

service.” 2001 WL 282817, at p.4 (Del. Super. Mar. 19, 2001.) In *Truitt v. MERB*, C.A. No. 07A-08-009-RBY (Del. Super., Apr. 30, 2008), *aff’d*, No. 248, 2008, 957 A.2d 2, 2008 WL 4107984 (Del., Sept. 3, 2008), Robert Truitt worked as an Investigator in the Office of the Public Defender (OPD). The Merit statutes exclude the Public Defender and Assistant Public Defenders from the classified service, *see* 29 *Del. C.* §5903(a)(4), (7), but does not mention OPD investigators or other support staff.

The Superior Court held that Truitt “was not a classified employee while he was employed by the OPD.” Opinion and Order at p.3. “The OPD is exempt from classified service by the enabling statute.” *Id.* at p.4 (citing 29 *Del. C.* §4603).

The OPD is afforded a different system of personnel administration. The Public Defender has the power of selection over potential employees and the power to set the compensation of those hired. The authority is not enjoyed by heads of other agencies that are part of the classified service. The OPD enabling statute subject matter overlaps with the subject matter of the Merit system statutes. The Merit system is a default provision. Here, the OPD enabling statute applies.

Opinion and Order at p.5 (citing 29 *Del. C.* §4603).

“Because the OPD enabling statute is more specific than the Merit system statutes, the Court finds the legislature intended for the OPD enabling statute to take precedence.” Opinion and Order at p.4.

“The Merit statute states that all state employees are part of the classified service unless excluded by the statute or otherwise required by law. While Assistant Public Defenders are expressly excluded, other members of the OPD are not mentioned specifically. [Truitt] would have the Court find this evidence to show a legislative intent to include all non-attorneys working for the OPD in

classified service. Such result is not justified.” *Id.* at p.5.

“The OPD enabling statute . . . shows the legislative intent to exclude the OPD from the Merit System. That is underscored each year in the epilogue language to the budget bill which reaffirms the exempt status of all positions which were exempt before July 1, 1987. Positions can be excluded through such epilogue language.” *Id.* at pp. 6-7 (citing 29 *Del. C.* §5903(23)).

The Merit statutes exclude from the classified service the Attorney General, the Chief Deputy Attorney General, and Deputy Attorneys General. *See* 29 *Del. C.* §5903(a)(4), (5), (7). It does not mention other DOJ employees. But like the OPD enabling statute, the Attorney General’s enabling statute provides for a different system of personnel administration. Like the Public Defender, the Attorney General has the authority to hire employees and set their compensation. *See* 29 *Del. C.* §§ 2505, 2506.

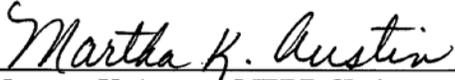
The Attorney General’s enabling statute shows the legislative intent to exempt the DOJ from the Merit system since its enactment in 1967 (56 Delaware Laws ch. 326). This exemption is underscored each year in the budget bill. *See* 2010 Delaware Laws, 145th General Assembly, 2nd Sess., ch. 327 (S.B. 310), Appropriations – Fiscal Year 2011 (“all exempt positions authorized by 29 *Del. C.* § 5903, prior to July 7, 1987, shall remain exempt for the fiscal year, except otherwise specified in this Act”).

The Board concludes as a matter of law that Resh was an exempt employee of the DOJ. Because she was not a classified employee, the Board does not have jurisdiction over the appeal of her termination.

DECISION AND ORDER

It is this **12th** day of April, 2012, by a unanimous vote of 5-0, the Decision and Order of the

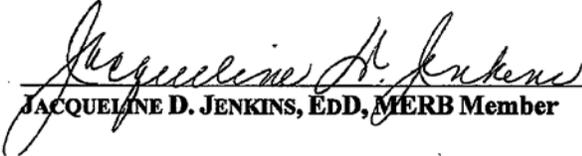
Board to dismiss Resh's appeal for lack of jurisdiction.


MARTHA K. AUSTIN, MERB Chairwoman


VICTORIA D. CAIRNS, MERB Member


JOHN F. SCHMUTZ, MERB Member


PAUL R. HOUCK, MERB Member


JACQUELINE D. JENKINS, EDD, MERB 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 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: **April 12,** 2012

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

OMB/HRM