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BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
MARGARET L. MURPHY	)	
	)	
Grievant,	)	
	)	
v.	)	**Docket No. 99-03-178**
	)	**(Legal Hearing)**
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL	)	
	)	
Agency.	)	

FINDINGS, OPINION, AND ORDER OF THE BOARD ON AGENCY'S MOTION TO DISMISS

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

AND NOW, WHEREAS, the above-referenced matter came before the Board for legal hearings on November 18, 1999 and January 20, 2000, the Board hereby makes the following findings and conclusions and enters the following Order denying the Agency's Motion to Dismiss and upholding Margaret L. Murphy's grievance.

APPEARANCES:

For the Grievant:
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For the Agency:
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NATURE OF THE PROCEEDINGS

This is the second time the Board has considered issues arising from Margaret Murphy's employment with, and termination by, the Department of Natural Resources and Environmental Control ("the Department" or "DNREC"). On February 18, 1999, the Board entered an Order denying Murphy's promotional grievance brought under Merit Rules 13.01000 and 19.0100. See *Murphy v. DNREC* (Docket No. 98-01-143) (hereafter, "*Murphy I*"). Murphy filed the present grievance on March 26, 1999. It alleges that the Department terminated Murphy's employment without the just cause required by Merit Rule 15.0100 and without affording her the procedural protections of Merit Rule 20.0300.

The Department has moved to dismiss Murphy's grievance on the grounds that the Board lacks subject matter jurisdiction over it. On October 19, 1999, the parties filed a Stipulation of Facts and several supporting documents. They have also filed Memoranda in support of their respective positions on the Motion to Dismiss. In addition, the Board heard argument on the Motion during a legal hearing on November 18, 1999 and on appropriate remedies on January 20, 2000. This is the Board's decision denying the Agency's Motion and granting relief to the Grievant.

SUMMARY OF THE EVIDENCE

As noted, the parties have stipulated to the facts necessary to resolve the Motion to Dismiss. A copy of that Stipulation is attached as Exhibit "A." In addition, Murphy has submitted an affidavit from Rick Folmsbee, a former DNREC employee and supervisor. The affidavit explains that as a DNREC supervisor, Folmsbee hired employees for seasonal, temporary, permanent and other types of positions from among applicants provided him by the Department's personnel section. According to Folmsbee, he gave the same attention to the qualifications (knowledge, skills and abilities) of

applicants for seasonal positions as he did to applicants for permanent positions. He did not, on the other hand, apply the same scrutiny to applicants for temporary positions. Like applicants for permanent positions, applicants for seasonal positions were "informally evaluated" on applications and interviews, rather than through "formal" testing.

In response to Folmsbee's affidavit, the Department submitted an affidavit from Merrilyn E. Ramsey, its Human Resources Administrator. Ramsey explained that seasonal positions were never converted to permanent positions within the Department; instead, people holding seasonal positions were required to apply for any externally-posted "merit" position. In Ramsey's time with DNREC, several people holding seasonal positions successfully applied for permanent positions, largely because of the experience and work record they acquired as seasonal employees. Ramsey's affidavit also contradicted Folmsbee's assertion that he received applications for seasonal employment from the Human Resources section. Instead, according to Ramsey, the various Divisions within the Department generally advertised for seasonal help with little assistance from Human Resources. Finally, Ramsey's affidavit notes that analysis of an applicant's training and experience ("T&E") is considered a "test" by the State Personnel Office and by the Department's Human Relations section.

At the second legal hearing, and in light of the Board's earlier vote to deny DNREC's Motion to Dismiss, the parties agreed that Murphy would return to work on February 22, 2000 and that any compensatory award would be calculated through February 1, 2000. The Department also presented income information as detailed in the remedy section of this Order, without objection from Murphy. The Stipulation of Facts, the parties' oral stipulations, the Folmsbee and Ramsey affidavits, and the Department's income information constitute the factual record on which the Board relies in entering this Opinion and Order.

DISCUSSION AND FINDINGS

On January 3, 1994, Murphy began a seasonal appointment with DNREC as an Environmental Scientist II. (Stipulation of Facts at ¶4). This was not her first appointment with the Department. Murphy was originally hired in 1991 and served as an Environmental Scientist II in prior seasonal positions from then until her employment was finally terminated in 1997. (Stipulation of Facts at ¶1.) On at least one occasion the Department terminated her seasonal employment because she had already worked 129 days during that fiscal year. (Stipulation of Facts, Exhibit C.)

The Department's January 1994 offer of appointment explained to Murphy that her "continued employment as a seasonal employee is subject to the statutory 129 working day limitation on any specific appointment...." (Stipulation of Facts at Exhibit D). Nonetheless, Murphy's 1994 appointment continued until June 30, 1997 "without any suspension or interruption in service." (Stipulation of Facts at ¶8). DNREC terminated Murphy's employment on June 30, 1997. (Stipulation of Facts at ¶1). The Department concedes that it did not have just cause for the termination. (Stipulation of Facts at ¶12). Its letter ending Murphy's employment thanked her for her "hard work, dedication, attention to detail, and interest in serving our regulated public." (Stipulation of Facts at Exhibit A).

The jurisdictional issue presented is whether Murphy was in the "classified service" when the Department ended her employment in June 1997. If she was not, the Department's Motion to Dismiss should be granted. If she was in the "classified service," then she has standing to grieve her termination and the Board has the jurisdiction to hear her grievance. In this event, and given that DNREC agrees it lacked just cause for the termination, the only remaining issue for the Board would be the appropriate remedy.

1. The Department may challenge the Board's previous determination regarding Section 5903(17).

As a preliminary matter, Murphy argues that the Board answered the question of whether she was in the "classified service" in *Murphy I*; because the Department did not appeal that decision, it may not now collaterally attack the Board's jurisdiction. It is true that "[a]s a general rule, judgments rendered by a court having jurisdiction of the parties and subject matter may not be attacked as invalid in any collateral proceeding." *State v. Kamalski,* Del. Super., 429 A.2d 1315, 1320 (1981). The judgment entered in *Murphy I*, however, was that the Department had not discriminated against Murphy, nor grossly abused its discretion in the process it used to permanently fill the Environmental Scientist II position. The Department is not attacking that judgment in this proceeding. Rather, it questions the Board's legal interpretation that the definition of "classified service" in 29 *Del. C.* §5903(17) includes casual or seasonal employees who work more than 129 days in a fiscal year in the context of Murphy's new claim that she was terminated without just cause. As such, the Department's Motion to Dismiss is not a collateral attack on the judgment entered in *Murphy I*, but an effort to have the Board depart from the legal precedent created in that case.

In addition, the Board is not a judicial body and is not as inflexibly bound by its prior determinations. *See Eastern Shore Natural Gas Co. v. Delaware Public Serv. Comm'n*, Del.Supr., 637 A.2d 10, 18 (1994). The Board's regulatory functions necessitate that it have "the authority to address each matter before it freely, even if it involves issues identical to a previous case." *Lakehead Pipeline Company v. Illinois Commerce Commission*, 696 N.E.2d 345, 362 (Ill.App. 1998). An agency must explain why it is departing from prior determinations, but no explanation is necessary where the agency does not change its determination. *Chesapeake Utilities Corp. v. Delaware Public*

Serv. Comm'n, Del.Super., 705 A.2d 1059, 1075 (1997) (Commission appropriately considered and reached same result on an issue previously decided in an unappealed order entered against the same litigant). The Board's prior decision that it had jurisdiction over Murphy's Rule 13.0100 grievance is relevant to this proceeding, but not determinative. *Eastern Shore Natural Gas Co.*, 637 A.2d at 18. The importance of the issue presented by the Department's Motion to Dismiss--the breadth of the "classified service"-- convinces the Board that the Department should be permitted to challenge the legal conclusion about Section 5903(17) made in *Murphy I*.

2. Murphy was an employee in the "classified service" in June 1997 and is entitled to relief for her unjust termination.

The Department's Motion to Dismiss contends: (1) that the Board lacks subject matter jurisdiction over Murphy's grievance because, as a seasonal employee, she was not in the "classified service" when she was terminated from her job; (2) that Murphy lacks standing to grieve under the Merit Rules because she was not an "employee" as that term is defined in the Merit Rules; and (3) that the Board is unable to award relief because to do so would constitute an illegal appointment to the classified service. We disagree with each of these positions, and thus, deny the Motion to Dismiss.

Whether the Board has subject matter jurisdiction of this grievance depends on the meaning of "classified service" as defined and used in Chapter 59 of Title 29. Section 5949(a) provides that "[a]n employee in the classified service who has completed a probationary period of service may not, except for cause, be dismissed...." An employee may appeal his dismissal to the Board. *Id.* If the Board finds that the dismissal was without just cause, the employee "shall be reinstated to the former position or a position of like status and pay...." *Id* (emphasis added). Murphy's grievance alleges

that her employment with DNREC was terminated without just cause. The Department concedes this. Thus, the Board is left to decide whether Murphy was an "employee in the classified service who has completed a period of probationary service." *Id.* If she was, she has standing to appeal her termination, the Board has jurisdiction to hear her appeal, and the nature of the remedy is dictated by statute.

The starting point in determining the meaning of a statute is the language of the statute itself. "Where the language of the statute is unambiguous, no interpretation is required and the plain meaning of the words controls." *Ingram v. Thorpe*, Del.Supr., 747 A.2d 545, 547 (2000). During most of Murphy's employment with DNREC, Section 5903 provided that "[u]nless 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: . . . (17) Temporary, casual and seasonal employees employed for less than 130 working days in any fiscal year."[1] The scope of this definition is broad, including "all positions of state employment" except those specifically excluded. *Malinoski v. Kent Conservation District*, Del.Super., C.A.No. 94C-12-019, Terry, J. (July 15, 1998 (1998 WL 960757). Section 5903 defines "classified service" by declaring what the term "means" rather than declaring what it "includes." As a result, it is less "susceptible to extension of meaning by construction." *Coastal Barge Corp. v. Coastal Zone Indus. Control Board*, Del.Supr., 492 A.2d 1242, 1247 (1985). The Board believes that the language of Section 5903(17) is clear and unambiguous: all positions of state employment are included unless specifically excluded, and the

[1]Section 5903(17) was rewritten effective July 1, 1996 and no longer provides for a 130 day term. The Department does not contend that the amended statute should be applied to determine Murphy's status.

only temporary, casual and seasonal employees excluded are those who work less than 130 days in any fiscal year.

This understanding of Section 5903(17) is the better reading even assuming that the statute is susceptible of more than one interpretation. One of the maxims of statutory construction is that when "a statute establishes general rules and provides for exceptions in certain portions, Courts will not curtail the general rules or add to the exceptions by implication...." *Bryerton v. Matthews*, Del.Super., 188 A.2d 228, 232 (1963). This principle of interpretation--"expressio unius est exclusio alterius"-- acknowledges the strong inference that when the legislature expressly creates an exception to a general statute, it must have intended no other exclusions. *Id.* The contrast between what the statute exempts and what it omits from the exemption affirms that the latter is meant to be included in the general rule. *Id. See also In Re Downer's Estate*, 142 A. 78 (Vt.Supr. 1928). The general rule created in Section 5903 is that all positions of state employment are included in the classified service. The exemption in subsection (17) is for temporary, casual and seasonal employees who are employed for less than the prescribed number of days. The exception does not mention temporary, casual or seasonal employees who work more than 129 days. The omission of this "over 129" group from subsection (17) creates the legal presumption that these employees fall within the general rule, i.e., that they are <u>included</u> in the classified service.

In addition, where a statute is not clear, it should be read so as to promote its apparent purpose. *Eliason v. Englehart*, Del.Supr., 733 A.2d 944 (1999). The purpose of the laws creating the Merit System is to establish a merit based system of personnel administration for the State. 29 *Del.C.* §5902. The Department argues that the Board's ruling will defeat this goal by allowing some employees to enter the classified service without a competitive examination or a training and

experience rating and without being placed on an eligibility list. The Board's ruling *may* mean that some temporary, casual or seasonal employees become permanent employees without such assessments and competition. This risk is minimal, however, because a probationary period is required before the appointment to the classified service is complete. 29 *Del.C.* § 5922 and Merit Rule 11.000. Because probationary employees may be discharged without cause, the probationary period affords the appointing authority ample time to terminate any temporary, casual or seasonal employee it may have inadvertently employed for more than 129 days.

Nor is there any real danger that the appointing authority will be saddled with an unqualified employee, where, as here, a temporary, casual or seasonal employee satisfactorily performs her job duties during both her seasonal appointment and the probationary period for the position that she has filled.[2] The Merit System contemplates some flexibility in how merit is assessed and appointments made. Murphy's extended and admittedly satisfactory service performing as an Environmental Scientist II confirms she was qualified for that position. It also offers a practical answer to the Department's concern that a "holdover" employee may be unqualified for state service. To the extent that the Agency is concerned about intrusion on its appointment authority, it controls its own fate.

In any event, the minimal risk that an unqualified or unneeded holdover employee will become permanently appointed to the classified service is significantly outweighed by the danger of a contrary

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[2]The parties have stipulated that Murphy performed the duties of an Environmental Scientist II throughout her tenure with DNREC, that the probationary period for an Environmental Service period is 12 months, and that 129 working days from Murphy's appointment on January 3, 1994 would have ended on July 3, 1994. (Stipulation of Facts 4, 9 and 13). Because the Board has concluded that Murphy entered the classified service when her appointment as a seasonal employee exceeded 129 days, her one year probationary period began on approximately July 4, 1994 and her appointment was complete 12 months later, on approximately July 4, 1995. She worked nearly two more years in the position before she was terminated.

ruling. The Board's decision does not prevent successive seasonal appointments for legitimate seasonal needs. It does require appointing authorities to fairly and systematically assess their needs and to meet permanent needs on the basis of merit selection. The position urged by DNREC, on the other hand, would permit routine circumvention of the Merit System. This result is more clearly inconsistent with the purposes of Chapter 59. *See, In the Matter of Spielman*, Del.Super., 316 A.2d 226 (1974) (An interpretation of a Merit Rule which allows an appointing authority to force employees out of the classified service defeats the purpose of the classified service). The Department's proposed construction of Section 5903 would encourage agencies to use temporary, casual and seasonal positions to meet permanent, year-round labor needs. That result would threaten merit-based personnel administration more than an occasional seasonal employee entering the classified service without examination or placement on an eligibility list. We cannot conclude that the legislature intended such a result.

Nor does the 1996 amendment of Section 5903(17) change this conclusion. Subsection (17) now expressly authorizes the State to hire "casual seasonal" employees "on a temporary basis," under several circumstances, some of which are time limited. It also requires that the Budget Director, the State Personnel Director, and the Controller General review the agency's need for casual seasonal employment for any casual seasonal employee who completes one year of work. The amended statute does not address the effect of an agency maintaining a casual seasonal employee for more than one year without such review. The addition of the review process suggests that the legislature was concerned about the extended use of casual seasonal employees. As such, the amended statute is consistent with the Board's understanding of Section 5903(17) before its amendment.

The Department also argues that this case is controlled by *Showell v. Department of Corrections*, Del.Supr., No. 111, 1987, Walsh, J., (Nov. 5, 1987) (ORDER). As we pointed out in *Murphy I*, however, *Showell* does not address the question of whether a state employee is entitled to Merit System protections, an analysis necessarily turning on the definition of "classified service" in Section 5903. The employee in *Showell* was already in state service; the issue was whether the Merit Rules permitted the Board to penalize an agency for exceeding the temporary appointment time frames established in the Rules by making a temporary promotion permanent. Since neither the enabling statutes nor the Merit Rules "required that a temporary employee who holds a position for more than six months be granted permanent status of equivalent compensation," the Court concluded that the Board had exceeded its authority. *Id.* at ¶9.

Here, on the other hand, there is express statutory authority for the Board to act where an employee in the classified service (and beyond his probationary period) has been terminated without just cause. Indeed, Section 5949(d) *requires* that the Board reinstate such an employee to the classified service. Whether or not Murphy was in the classified service is determined by Section 5903 and does not depend on the "ripening theory" rejected in *Showell*. Rather than acting outside its legislative authority, the Board is carrying out an express legislative directive. The Merit Rules, of course, may not direct a result inconsistent with Sections 5903 and 5949.[3]

The Board is satisfied that it has subject matter jurisdiction over Murphy's grievance. However, the Department also contends that Murphy lacks standing to appeal because she was not

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[3]The Department cites several cases from other jurisdictions in support of its argument that a temporary employee's position may never evolve into a permanent appointment. Each of these cases, however, was decided under a different statutory scheme than the one presented here and are of limited use in deciding the question presented.

an "employee" as that term is defined in Merit Rule 2.0 (an employee is a person "legally holding a position in the classified service..."). Rather, says DNREC, Murphy became an "illegal holdover" when her 1994 appointment exceeded 129 working days; thus, she was not "legally" holding a position in the classified service; thus, she was not an "employee"; and thus, she lacks standing under Section 5949. The problem with this argument is that it depends on the interpretation of Section 5903(17) rejected above. Section 5903 does not prohibit temporary, casual or seasonal appointments for longer than 129 working days; it simply denies Merit System status to temporary, casual and seasonal employees who work less than that. The Department does not cite any other authority for concluding that temporary, casual or seasonal employees who work more than 129 days are "illegal holdovers." We decline to interpret Merit Rule 2.0 as DNREC urges because to do so would put the Rule at odds with Sections 5903 and 5949.

Finally, the Department contends that the Board lacks the authority to grant the relief Murphy seeks.[4] The Board would be creating a new, and unfunded, position, DNREC argues, if it appoints Murphy to the classified service after determining in *Murphy I* that she was not entitled to the Environmental Scientist position for which she had there applied--an opening created, we note, when the Department terminated Murphy's employment. (Stipulation of Facts at ¶10). This argument ignores the mandate in Section 5949(d) that wrongfully terminated employees must be reinstated "to the former position or a position of like status." It also fails to distinguish between an appointment and a remedy. The State Supreme Court has rejected the same argument in the context of a "reassignment" grievance:

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[4]Murphy's letter of appeal, filed March 26, 1999, asks for "restoration to the Environmental Scientist II position as a permanent merit employee, with all back pay and entitlements."

> "By ordering Grievants placed in the reclassified positions, the [Board] would not be infringing upon the statutorily authorized funding of the Department or the constitutional prohibition against spending public funds that have not been appropriated by the General Assembly. Del.Const. Art. VIII, § 6. Rather, the [Board] would be exercising its statutory authority to remedy wrongs arising out of a misapplication of the Merit Rules. By bumping those currently occupying the reclassified positions, no additional funding would be required. Similarly, the payment of back pay is a proper charge upon Department appropriations for personnel costs actually incurred."

State, Department of Correction v. Worsham, Del.Supr., 638 A.2d 1104, 1108 (1994). We see no reason to apply a different rule to Murphy, particularly given the additional protections Section 5949 affords wrongly terminated employees.

3. Murphy should be reinstated to the classified service as an Environmental Scientist II and awarded back pay based on that position.

The Board's remaining task is the nature of the remedy due Murphy. As noted, Section 5949(d) dictates that Murphy be reinstated to "the former position or a position of like status and pay without a loss of pay for the period of the suspension." Thus, the Board must decide: (1) the position to which Murphy should be reinstated; and (2) the amount of retroactive pay due her. On the first question, the Department contends that Murphy should be returned to a part-time, casual seasonal position, as described in current Section 1703(17)(a)(4). This, says DNREC, was her position at the time of her termination and any other result would place Murphy in a job she never held.

The Board disagrees and concludes that Murphy should be reinstated to an Environmental Scientist II position. This result is more consistent with the Board's conclusion that Murphy was

already a permanent employee in the classified service when she was terminated. It is undisputed that Murphy performed as an Environmental Scientist II throughout her employment. Murphy's termination opened a position within the Department as an Environmental Scientist II. (Stipulation of Facts at ¶10). DNREC has filled this position at least once since releasing Murphy. *Id.* All this strongly suggests that the position Murphy was actually filling at the time of her termination was an Environmental Scientist II. As a result, this is the position to which she should be returned.

Turning to the question of monetary compensation, the Department urges the Board to deny or reduce any award for loss of pay because of Murphy's failure to mitigate her damages through unemployment compensation or work commensurate with her abilities.[5] Merit Rule 20.0371 provides that "[a]ny financial settlement will be reduced by the amount of an employee's earnings during the period covered by the settlement regardless of source, excluding part-time income which was being received prior to separation." The parties stipulated that Murphy did not receive any unemployment compensation during her unlawful suspension.

Assuming without deciding that an employee wrongfully discharged from the Merit System has a duty to mitigate their wage losses, we are not prepared to say that Murphy has failed to do so. The records submitted by the Department show that Murphy had nearly $4,800 of income in 1998 from another employer (as well as a small income from service on a regulatory board); she had approximately the same income in 1999. Her DNREC salary for the six months she worked in 1997 was $9,561, or approximately $19,000 annually, assuming year long employment. In short, it is clear

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[5]Murphy contends that the Department waived this argument by not raising it until the second legal hearing. The Board disagrees, noting that the issue of an appropriate remedy was not reached at the first hearing and was specifically put over to the second. In any event, given the Board's holding on this issue, Murphy is not harmed by the Board considering it.

that Murphy sought and obtained work after her termination. The Department has made no showing that she could have obtained a more lucrative job. Nor will we impute to her the statutory maximum unemployment compensation, where there has been no showing that she would qualify for that level of benefit. Based on the record presented, the Board declines to reduce Murphy's lost pay award by more than her actual earnings.

The Department has documented that Murphy would have earned $63,146 had she been employed in an Environmental Scientist II position from June 20, 1997 (the effective date of her termination) through February 1, 2000.[6] It has also documented that Murphy's actual earnings during this period were $10,832. Murphy has not contested these figures (at least some of which she apparently provided to the Department) and agrees that Merit Rule 20.0371 requires an offset of her lost earnings by her actual earnings. Thus, the Board concludes that Murphy is entitled to $52,314 to compensate her for her loss of pay.

ORDER

For the foregoing reasons, the Board denies the Agency's Motion to Dismiss. The Board further orders that:

1. The Department of Natural Resources and Environmental Control reinstate Margaret L. Murphy to the classified service as a permanent employee, with all rights and benefits thereof, in the position of Environmental Scientist II.

2. The date of Margaret L. Murphy's permanent appointment to the classified service for purposes of calculating any benefits and entitlements accruing therefrom shall be July 4, 1995.

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[6]As previously noted, the parties stipulated to the end date of the lost wage calculation and the date that Murphy would return to work with the Department.

3. Margaret L. Murphy shall return to work on February 22, 2000, per the parties' stipulation; and

4. The Department of Natural Resources and Environmental Control pay Margaret L. Murphy the sum of $52,314 as compensation for her loss of income beginning June 20, 1997 and through February 1, 2000.

BY ORDER OF THE BOARD this 20th day of July, 2000.

Robert Burns, Vice-Chairperson

John W. Pitts, Member

John F. Schmutz, Esquire, Member
(DISSENTING FROM DENIAL OF MOTION TO DISMISS)

Dallas Green, Member

Mailing Date: July 20, 2000

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