

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

DANIEL E. KLINE,)
)
 Employee/Grievant,)
)
 v.)
)
 DEPARTMENT OF SAFETY AND)
 HOMELAND SECURITY,)
)
 Employer/Respondent.)

DOCKET No. 08-12-435

DECISION AND ORDER

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 18, 2010 at the Delaware Public Service Commission, Silver Lake Plaza, Canon Building, 861 Silver Lake Boulevard, Dover DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, 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

Daniel E. Kline
Employee/Grievant *pro se*

Thomas H. Ellis
Deputy Attorney General
on behalf of the Department of
Safety and Homeland Security

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument on the motion by the Department of Safety and Homeland Security (DSHS) to dismiss the appeal for lack of jurisdiction. DSHS attached five exhibits to its motion to dismiss: Letter dated May 4, 2007 from Daniel E. Kline to the Secretary of DSHS, David B. Mitchell (A-1); Letter dated October 27, 2008 from Secretary Mitchell to Kline (A-2); Letter dated November 6, 2008 from Adam Balick, Esquire to Jennifer W. Davis and Secretary Mitchell (A-3); Letter dated November 25, 2008 from Michael Jackson, Acting Director of the Office of Management and Budget (OMB), to Adam Balick (A-4); and Letter dated November 25, 2008 from Adam Balick to the OMB Director of Human Resource Management and the Board (A-5).

The employee/grievant, Daniel E. Kline (Kline), offered and the Board admitted into evidence without objection one exhibit: e-mail dated May 30, 2007 from Joseph Swiski to Kline.

FINDINGS OF FACT

The jurisdictional facts are not in dispute.

Prior to May 2007, Kline was one of two regional supervisors in the DSHS Division of Alcohol and Tobacco Enforcement (DATE), a classified service position. By letter dated May 4, 2007 to Secretary Mitchell, Kline accepted the appointment as Director of DATE. Kline acknowledged in his letter that the “Director position is defined in 29 Del. C. 5903(4) as a ‘non-classified position.’” OMB approved Kline’s leave of absence to accept that exempt position.

By letter dated October 27, 2008, Secretary Mitchell terminated Kline for “administrative misconduct.”

By certified letter dated November 6, 2008 to the OMB Director and Secretary Mitchell, Kline’s attorney asked for Kline’s return to a classified position in accordance with 29 *Del. C.*

§5903 (23).

By letter dated November 25, 2008, the Acting Director of OMB informed Kline's attorney:

As you know, Mr. Kline's employment was terminated for just cause by [DSHS]. Under these circumstances, the provisions of 29 *Del. C.* §5903 relating to the return to classified service are not applicable to Mr. Kline's case because he failed to complete his appointment as required by statute. Indeed, I am not aware of any case where an exempt employee who has been terminated for cause has been returned to the classified service under the provisions of §5903. Further, as Acting Director of [OMB], I do not have the authority to substitute my judgment for that of Secretary Mitchell as to whether just cause exists to terminate Mr. Kline's appointment to Director of [DATE] within [DSHS]. Accordingly, Mr. Kline will not be reinstated to the classified service under the return to service provisions of §5903.

CONCLUSIONS OF LAW

Section 5903(23) of Title 29 of the *Delaware Code* provides:

Any classified employee leaving the classified service to accept a position under subdivision (4), (5), (6) or (23) of this section shall automatically be granted an extended leave of absence. Upon completion of such appointment, the Director of the Office of Management and Budget shall place the employee in a classified position for which the employee meets minimum qualifications in the same or a lower pay grade as the position that the employee held when leaving the classified service.

Merit Rule 5.9 provides:

The Director may grant an agency requesting an 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.

A. Timeliness

DSHS contends that Kline did not file a timely appeal to the Board. According to DSHS, the relevant date for computing the 30-day time for a direct appeal to the Board under Merit Rule 12.9 is October 27, 2008, the date of Secretary Mitchell's termination letter. The Board received Kline's appeal on December 1, 2008.

The Board believes that the relevant date for Kline's appeal to the Board is November 25, 2008, the date the Acting Director of OMB decided not to reinstate Kline to a classified position. Based on that date, the Board concludes as a matter of law that Kline filed a timely appeal to the Board.¹

B. Standing

DSHS contends that Kline does not have standing to appeal his termination by Secretary Mitchell to the Board. The Board agrees. At the time of his termination, Kline was an exempt employee and not covered by the Merit Rules, in particular Merit Rule 12 which requires just cause for termination and a pre-decision meeting.

¹ The Board does not have jurisdiction to hear the merits of Kline's termination. Because this is not a Merit Rule 12 just cause termination case, the 30-day time period for filing a direct appeal to the Board is not applicable. Merit Rule 5.9 does not provide a time limit to appeal a decision by the Director not to reinstate an employee to the Classified Service. By analogy, the Board will apply Merit Rule 18.9 which provides for twenty days to appeal to the Board after receipt of a Step 3 decision by the Director.

In Kline's cover letter to his appeal to the Board, he stated: "[W]e are appealing the decision of David Mitchell, Secretary of [DSHS], to deny Mr. Kline's right to return to the Classified Service position that he left in order to become Director of [DATE]." The Board concludes as a matter of law that Kline does not have standing to appeal against DSHS because only the Director of OMB has the authority to place Kline back into a classified position after his termination as Director of DATE.

The Board, however, concludes as a matter of law that Kline has standing under Merit Rule 5.9 to appeal the decision by the OMB Acting Director not to return Kline to the classified service within sixty days of his termination by Secretary Mitchell. Kline did not name OMB as the respondent in his appeal to the Board, but the Board believes it has the authority to substitute OMB for DSHS as the proper party respondent.

Under the Administrative Procedures Act, the Board has wide authority to control the conduct of its proceedings. *See 29 Del. C. §10125*. In exercising that authority, the Board will follow Rule 15 of the Superior Court Rules of Civil Procedure to amend Kline's appeal to substitute OMB as the proper party respondent and relate the amendment back to the date Kline filed his appeal with the Board (December 1, 2008).

In *Hernandez v. Pride Court Apartments*, Civ.A.No. 04C-12-053, 2005 WL 1950797 (Del. Super., July 29, 2005), a tenant (Hernandez) sued Pride Court Apartments and Westminster Management Corporation for personal injuries for a slip and fall. The defendants moved to dismiss because the owner of the apartment building was Westminster Management LLC. The Superior Court allowed Hernandez to amend her complaint to substitute Westminster Management LLC as the defendant because it was the real party in interest.

“Under court rules, a party may amend a pleading if the Court so orders in the interest of justice.” 2005 WL 1950797, at p.2. The amendment relates back to the date of the original pleading when: the substituted party “will not be prejudiced in maintaining a defense on the merits; and knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against the party.” *Id.* (quoting Super.Ct.Civ.R. 15).

The Court held that Hernandez “has satisfied the mistake in identity requirement of Rule 15 and may amend the complaint. The mistake in identity of the proper party requirement of [Rule 15] undoubtedly applies in instances where there has been a misnomer or misidentification of a party and a plaintiff seeks to substitute a real party in interest.” 2005 WL 1950797, at p.2.

The Board believes that OMB knew or should have known that, but for Kline’s mistake in naming the wrong respondent, he was appealing OMB’s decision not to place him back in a classified position. *See* Letter dated November 25, 2008 from Kline’s attorney to the Board and the Director of Human Resource Management, Office of Management and Budget.

The Board also believes that OMB would not be prejudiced if substituted as the real party in interest in this case. The only matter that remains for the Board to decide is the proper statutory construction of a Merit statute (29 *Del. C.* §5903(23)) and Merit Rule 5.9 to determine whether Kline completed his appointment as Director of DATE and had a right to revert to a classified position. OMB is in the best position to explain why it did not believe Kline had a right to revert to a classified position. *See* Letter dated November 25, 2008 from the OMB Acting Director to Kline’s attorney.

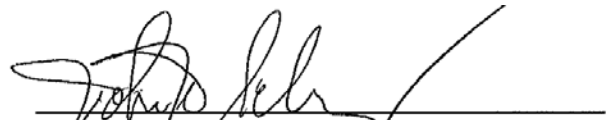
The Board concludes as a matter of law that DSHS is not the proper party respondent in Kline’s appeal. The Board dismisses the appeal against DSHS, and substitutes OMB as the proper party respondent.

DECISION AND ORDER

It is this 30th day of March, 2010, by a unanimous vote of 3-0, the Decision and Order of the Board: (1) to grant the motion to dismiss Kline's appeal against DSHS; (2) to substitute OMB as the proper party respondent and to relate the substitution back to the date Kline filed his appeal to the Board (December 1, 2008); and (3) to schedule another hearing after receiving written legal submissions from Kline and OMB. The parties are to file simultaneous written legal submissions ten (10) days prior to the hearing date. The parties should limit their submissions to the proper statutory construction of the terms "completion of such appointment" in 29 *Del. C.* §5903(23) and "end of that appointment" in Merit Rule 5.9.



Martha K. Austin, MERB Chair



JOHN F. SCHMUTZ, MERB Member



PAUL R. HOUCK, MERB Member