

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

GRACE NORCISA,)
)
 Employee/Grievant,)
)
)
)
)
 DEPARTMENT OF HEALTH AND)
 SOCIAL SERVICES,)
)
 Employer/Respondent.)

DOCKET No. 10-01-464

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 July 19, 2012 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Dr. Jacqueline Jenkins, Acting Chair, John F. Schmutz, 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 Health
and Social Services

Roy S. Shiels, Esquire
on behalf of the Employee/
Grievant Grace Norcisa

PROCEDURAL HISTORY

The Department of Health and Social Services (DHSS) terminated the employee/grievant, Grace Norcisa (Norcisa), on January 15, 2010.

Norcisa filed a dual appeal to Human Resource Management (HRM) and the Board on January 26, 2010. On April 21, 2010, HRM denied her grievance.

The Board scheduled a hearing for November 18, 2010. On November 8, 2010, DHSS asked for a continuance after receiving a request for documents from Norcisa on November 1, 2010. DHSS represented that many of the documents implicated the Health Insurance Portability and Accountability Act (HIPAA) and would require careful redaction to protect personal health information.

The Board granted the continuance and rescheduled the hearing for January 20, 2011. On January 10, 2011, Norcisa asked for a continuance because she had not received the documents requested from DHSS. The Board granted the continuance and rescheduled the hearing for April 27, 2011.

On April 15, 2011, the parties requested the hearing be cancelled because they had reached a settlement. In September and December 2011 the Board Administrator contacted counsel to check on the status of the settlement. Counsel advised that they were still working on the paperwork, and until the paperwork was completed Norcisa would not withdraw her appeal.

On June 14, 2012, Norcisa filed a motion to enforce the settlement agreement. On June 22, 2012, DHSS filed a cross-motion to enforce the settlement agreement. On July 17, 2012, Norcisa withdrew her motion to enforce the settlement agreement and asked the Board to schedule a hearing on the merits. On June 18, 2012, DHSS renewed its motion to enforce the settlement agreement.

In fact, the parties never executed a settlement agreement. There were protracted negotiations between counsel and at one point they believed they had reached an agreement in principle. However, a dispute then arose over a set-off in the amount of back pay for unemployment insurance benefits received by Norcisa.

CONCLUSIONS OF LAW

The Board concludes as a matter of law that it does not have jurisdiction to enforce the parties' unexecuted settlement agreement, much less to decide which party's interpretation of the agreement in principle is correct.

The Board has broad remedial powers "to grant back pay, restore any position, benefits or rights denied, place employees in position that they were wrongfully denied, or otherwise make employees whole, **under a misapplication of any provision of this chapter or the Merit Rules.**" 29 *Del. C.* §5931(a) (emphasis added).

The exercise of the Board's remedial powers is contingent on a determination by the Board that the employing agency misapplied a Merit statute or Merit Rule. The Board has not made such a determination in this case because there has not been a hearing to decide whether DHSS had just cause to terminate Norcisa.

There is no Merit statute or Merit Rule which requires that parties settle their dispute out of court. Settlement is purely a matter of private contract. If the parties can amicably resolve their dispute without recourse to the Board, that is to be encouraged. But if they cannot resolve their

dispute – for whatever reason – then the Board must hear the case on the merits.¹

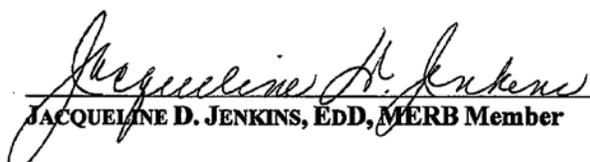
This is not a case like *Campbell v. Family Court*, MERB Docket No. 06-10-369 (Nov. 6, 2008). In *Campbell*, the employee appealed her termination to the Board. After a hearing, the Board decided that the Family Court did not have just cause to terminate Campbell. The Board decided not to reinstate Campbell but to award her back pay. Since the Board did not have the necessary information to calculate the amount of back pay, the Board instructed the parties to try to agree to a calculation of back pay. The Board retained jurisdiction in the event the parties were unable to agree on the amount of back pay.

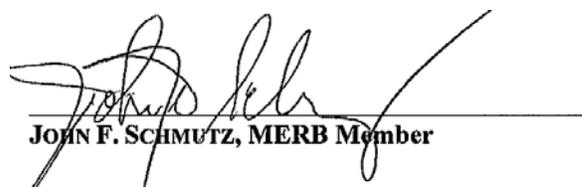
The parties were not able to agree on the amount of back pay. The Board held a second hearing on April 16, 2009 to take evidence, and agreed with the agency's calculation of back pay with a deduction for unemployment insurance benefits.

¹ The Board notes that under Delaware law “the parties must have reached agreement on all material terms before an ‘agreement to agree’ will be enforced.” *International Equity Capital Growth Fund, L.P. v. Clegg*, C.A. No. 14995, 1997 WL 208955, at p.8 n.3 (Del. Ch., Apr. 22, 1997). A deduction from back pay of unemployment benefits was a material term of any agreement between the parties.

DECISION AND ORDER

It is this **24th** day of July, 2012, by a unanimous vote of 4-0, the Decision and Order of the Board to deny the motion by DHSS to enforce a settlement agreement between the parties for lack of jurisdiction. The Board Administrator will schedule a hearing on the merits of Norcisa's appeal for the earliest possible date. Since 2 ½ years have passed since Norcisa's termination, the Board will not grant any further continuances except for the most compelling reason.


JACQUELINE D. JENKINS, EDD, MERB Member


JOHN F. SCHMUTZ, MERB Member


PAUL R. HOUCK, MERB Member


VICTORIA D. CAIRNS, MERB Member