BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

CYNTHIA SCUSE-BROWN,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 13-09-594**
v.	)	
	)	**DECISION AND ORDER**
DEPARTMENT OF CORRECTION,	)	
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) on October 30, 2013 at 9:45 a.m. at the Public Service Commission, Cannon 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

Deborah L. Murray-Sheppard
Board Administrator

Cynthia Scuse-Brown
Employee/Grievant *pro se*

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

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument from the parties on the motion by the Department of Correction (DOC) to dismiss the appeal of the employee/grievant, Cynthia Scuse-Brown (Scuse-Brown), on the grounds of: (1) *res judicata* and (2) timeliness. Scuse-Brown did not file a written response to the motion to dismiss.

FINDINGS OF FACT

Scuse-Brown is a Social Service Specialist II at DOC. In 2004, Scuse-Brown filed a grievance alleging she was working out of class in the higher position of Probation Officer (PO).

In a Step 3 decision dated March 14, 2005, the hearing officer denied the grievance. The hearing officer found that Scuse-Brown "is working well within the SSS II job classification and not as a PO. The Grievant correctly points out that her duties are substantially similar to other employees in the PO classification. However, she is not performing the specific principal accountabilities of the PO classification but rather duties already incorporated in the SSS II classification."

Scuse-Brown did not appeal the Step 3 decision to the Board.

On March 25, 2013, Scuse-Brown filed another grievance alleging she was working out of class in the higher position of Senior Probation Officer. According to Scuse-Brown, she was prompted to file a second grievance after receiving "an e-mail of a job posting in New Castle County for Sr Probation Officer I or II. I am a Social Service Specialist II in Kent County doing the same job."

In a Step 3 decision dated September 3, 2013, the hearing officer denied the grievance.

> [T]he grievant failed to cite any new event, some compelling change in circumstances, or any new impact on her position and duties that would justify the claim of a new grievable matter between 2004 and today. The posting and filing of the NCC PO vacancy in March of 2013 did not change any relevant circumstance or create any new cause of action because there was no actual change in duties or responsibilities between the previous NCC PO incumbent and the new PO. Accordingly, not only are the Grievant's claims untimely, they are also moot and have been long settled on the basis of the 2004 grievance process, which did not sustain her claims.

On September 20, 2013, Scuse-Brown filed a timely appeal to the Board.

CONCLUSIONS OF LAW

1. *Res Judicata*

"After judgment has been entered in a suit, the doctrine of *res judicata* prohibits a party to that action from bringing a second suit based upon the same cause of action against the same parties." *Shively v. Allied Systems, Inc.*, C.A. No. 09A-05-008-PLA, 2010 WL 537734, at p.9 (Del. Super., Feb. 9, 2010) (footnote omitted). "*Res judicata* will bar an administrative agency from 'reconsidering conclusions of law previously adjudicated' . . . ." 2010 WL 537734, at p.9 (quoting *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000)).

"Normally, under principles of *res judicata*, a Board cannot change its decision once it is made, but a Board can consider a new application for similar relief if there has been a substantial change in circumstances . . . ." *Kirkwood Motors, Inc. v. Board of Adjustment of New Castle County*, C.A. No. 99A-12-009-WTQ, 2000 WL 710085, at p.4 (Del. Super., May 16, 2000).

In *Hodgson v. Royal Crown Bottling Co.*, 465 F.2d 473 (5th Cir. 1972) (*per curiam*), the

Secretary of Labor sought an injunction in 1961 to compel Royal Crown to pay drivers' helpers minimum wage. The district court dismissed the suit because the drivers' helpers were not employees of the company covered by the Fair Labor Standards Act (FLSA). The Secretary of Labor did not appeal the decision.

Ten years later, the Secretary of Labor again sued Royal Crown for violating the FLSA. The prior judgment did not bar the second action under the doctrine of *res judicata* "because there is a significant factual situation existing in the case *sub judice* than that which existed in the former litigation." 465 F.2d at 475. "[T]he manner of operation of the employer has changed substantially" and "substantial changes had similarly occurred" in the job responsibilities of the drivers' helpers. *Id.* at 475 n.1. "Accordingly, the situation of the drivers' helpers presently employed is substantially different from that of the single assistant picked up along the way involved in the 1961 litigation, ..." *Id.* at 475 n.1.

Scuse-Brown has the burden "to demonstrate that a change in circumstances has occurred." *Shively*, 2010 WL 537734, at p.10. The Step 3 hearing officer decided that Scuse-Brown did not meet her burden to prove "some compelling change in circumstances." However, because appeals to the Board are *de novo*, the Board believes that Scuse-Brown should have the opportunity to present her evidence of changed circumstances to the Board for a decision on the merits. Nearly ten years have passed since the original Step 3 decision. Her job responsibilities as a Social Service Specialist II or the job specifications of a Probation Officer may have changed over the last nine years.

2. Timeliness

Merit Rule 18.6 provides:

> Step 1. Grievants shall file, within 14 calendar days of the date of the grievance matter or the date they could have reasonably be expected to have knowledge of the grievance matter, a written grievance which details the complaint and relief sought with their immediate supervisor.

Scuse-Brown claims she has been working out of class in the higher position of Probation Officer since 2004. If so, then each paycheck she received after the first Step 3 decision in 2005 was a new grievance matter which she had to grieve within fourteen calendar days of that paycheck. Scuse-Brown filed her second grievance under Merit Rule 3.2 on March 25, 2012. Any claim for back pay based on a paycheck she received prior to March 11, 2013 is time-barred.

In *Knight v. City of Columbus*, 19 F.3d 579 (11th Cir. 1994), firefighters sued for overtime pay under the Fair Labor Standards Act (FLSA) claiming that the city had misclassified them as exempt executive or administrative employees. The FLSA has a two-year statute of limitations. The city argued that the firefighters' overtime claims were time-barred because it classified them more than three years before they filed suit.

> The City's argument fails because, if the officer plaintiffs are not subject to the exemption, the FLSA has been violated each time the City issued an officer plaintiff a paycheck that failed to include payment for overtime hours actually worked.

19 F.3d at 581. "Each failure to pay overtime constitutes a *new* violation of the FLSA." *Id.* However, the firefighters were only entitled to recover for overtime pay for the two years preceding the date of their claim. [1]

[1] Such claims are often called "continuing violation" claims but that is a misnomer. "The term 'continuing violation implies that there is but one incessant violation and that the plaintiffs should be able

In *Willis v. City of Atlanta*, 595 S.E.2d 339 (Ga. App. 2004), plaintiff sued the city in 1997 claiming that since 1992 he had been assigned to a higher classified position. The city code provided: "Upon an employee being required to perform the duties of a higher classified position for a period of time in excess of 30 work days, such employee shall be given an emergency appointment to the higher classified position and shall receive the appropriate salary or wages of the higher classification." There was a two-year statute of limitations for recovery of wages.

The court held that the plaintiff could recover for lost wages from 1995 to 1997 but could not use a continuing violation theory to resurrect his claims accruing before 1995. "'Where a continuing violation is found, the plaintiffs can recover for any violations for which the statute of limitations has not expired.'" 595 S.E.2d at 342 (quoting *Knight*. 19 F.3d at 581).

"We are persuaded that the continuing violation doctrine in *Knight* applies equally to" a claim for working in a higher classification. *Willis*, 595 S.E.2d at 343.

> [T]he city argues in this case that Willis' reclassification in 1992 started the running of the two-year statute of limitation, such that he is forever barred from recovering any wages allegedly due him after December 1995. We too, disagree. If the city failed to pay Willis in accordance with municipal ordinance from December 1995 until his re-assignment in March 1998, and we express no opinion on that issue, each paycheck constituted a new violation for which Willis can seek recovery. *Id.*

If Scuse-Brown can prove that she was working out of class in a higher position, then

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to recover for the entire duration of the violation, without regard to the fact that it began outside the statute of limitations window." *Knight*, 19 F.3d at 582. "That is not the case. Instead of one on-going violation, this case involves a series of repeated violations of an identical nature. Because each violation gives rise to a new cause of action, each failure to pay overtime begins a new statute of limitations period as to that particular event." *Id.*

each paycheck she received since the first Step 3 decision was a new violation of Merit Rule 3.2. However, the fourteen-day time limitation in Merit Rule 18.6 applies to each paycheck. Scuse-Brown did not file a second grievance until March 25, 2012. Any claim for wages prior to the date of the last paycheck she received before filing her second grievance is time-barred.

The Board believes that this interpretation of Merit Rule 18.6 is consistent with Merit Rule 18.10 which provides: "Retroactive remedies shall apply to the grievant only and, for a continuing claim, be limited to 30 calendar days prior to the grievance filing date." A new claim of working out of class accrues with each paycheck if the grievant files a timely Step 1 grievance within fourteen days. If the grievant files a timely Step 1 grievance, Merit Rule 18.10 limits the recovery of back pay even if there is a continuing violation.

The Board is sensitive that this decision could be misinterpreted to invite grievants who believe they have a continuing violation claim to flood the Board's docket with new grievances after each paycheck. But that is when the Board will not hesitate to apply the doctrine of *res judicata*. To withstand a motion to dismiss on the ground of *res judicata*, the grievant would have to prove that there was a substantial change in circumstances after only a short period of time. In contrast, the Board believes that, after nine years, Scuse-Brown should have an opportunity to prove to the Board that she is, today at least, performing all of the job specifications of a Probation Officer.

DECISION AND ORDER

It is this **13th** day of November, 2013, by a vote of 2-1, the Decision and Order of the Board to deny DOC's motion to dismiss and to hear Scuse-Brown's appeal on the merits.

JOHN F. SCHMUTZ, MERB Member

PAUL R. HOUCK, MERB Member

I respectfully dissent. I believe that the doctrine of *res judicata* applies because the grievant did not make any showing of substantially changed circumstances.

MARTHA K. AUSTIN, MERB Chairwoman

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