

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

PHILLIP BINNS,)	
)	
Employee/Grievant,)	
)	<u>Docket 19-02-716</u>
v.)	
)	DECISION AND ORDER OF
DELAWARE TECHNICAL AND COMMUNITY COLLEGE,)	DISMISSAL
)	
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 21, 2019 at the Public Service Commission Conference Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair; Sheldon N. Sandler, Esq.; and Jacqueline D. Jenkins, Ed.D, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae Mims
Deputy Attorney
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Gary W. Aber, Esq.
on behalf of Phillip Binns,
Employee/Grievant

Elizabeth O. Groller, Esq.
Senior Legal Counsel
Delaware Technical and Community
College

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument on the motion by Delaware Technical and Community College (“DTCC”) to dismiss the grievance for lack of subject matter jurisdiction. The grievant, Phillip Binns (“Binns”), filed a response to the motion through his counsel. DTCC filed a reply to the Grievant’s response.

FINDINGS OF FACT

In 1966, the Delaware General Assembly amended Title 14 of the *Delaware Code* to enact a new Chapter 91 establishing the Delaware Institute of Technology. *55 Del.Laws*, ch 374.

In 1967, the General Assembly amended §5903 of Title 19 of the *Delaware Code* to add a new “subsection (19) reading as follows: Section 5903(19) All employees of the Delaware Institute of Technology.” *56 Del.Laws*, c. 184.

In 1971, the General Assembly changed the name of the Delaware Institute of Technology to Delaware Technical and Community College:

Chapter 91, Title 14, Delaware Code, is amended by striking out the words ‘Delaware Institute of Technology’ where they appear therein and inserting in lieu thereof the words, ‘Delaware Technical and Community College.’ *59 Del. Laws*, c.19, §1.

CONCLUSIONS OF LAW

Section 5903 of Title 29 of the *Delaware Code* provides in pertinent part:

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:

... (19) All employees of the Delaware Institute of Technology.

The Board concludes as a matter of law that Binns is not a State merit employee. The Board does not believe that the General Assembly intended to include employees of the Delaware Institute of Technology in the classified service when it changed the school's name to Delaware Technical and Community College in 1971.

The Board believes it is clear that the General Assembly committed a "scrivener's error" when it neglected to change the name of the school wherever it might appear in the *Delaware Code* outside of Title 14. If the legislature had intended to change the status of the school's employees, it would have done so directly by deleting subsection (19) of §5903.

"It is widely accepted that courts may correct legislative drafting mistakes, i.e., so called 'scrivener's errors'" if "such mistakes are 'absolutely clear.'"¹

[A] 'scrivener's error' is a case in which the words of the legislative text diverge from what the legislature *meant* to say. Such a case contrasts with one in which the legislature simply *should* have said something else... [A] scrivener's error is a 'mistake of expression,' as opposed to a lapse of 'legislative wisdom.'²

"[M]ost relevant to contemporary legislation" the scrivener's error doctrine may apply in "cases of 'incomplete amendment' – cases in which the author intends an amendment to have global effect but accidentally fails to implement the amendment someplace."³

[D]rafting mistakes are pervasive in American law... Today's statutes are enormous and complex, containing almost innumerable cross-references and interdependent provisions. So it is not perhaps unsurprising that alterations in one part of a statute often go unreflected in others, not by design but due to oversight.⁴

¹ R. Doerfler, *The Scrivener's Error*, 110 Northwestern U.L. Rev. 811 (2016).

² Doerfler, *supra* Note 1, at 817 (quoting A. Scalia, *Common Law Courts in a Civil Law System: The Role of the United State Courts in Interpreting the Constitution and Laws*, at 20 (1997)).

³ Doerfler, *supra* Note 1, at 821.

⁴ *Id.* At 815. "Given the size and complexity of contemporary statutes, it should come as no surprise that [the legislature] does not catch every error. The risk may be particularly high for errors that result in cases

In *United States v. Bhutani*,⁵ Congress amended the Food, Drug, and Cosmetic Act (“FDCA”) in 1962 to add a new §355(j) requiring drug manufacturers to maintain records. Failure to maintain records was subject to criminal penalties under §331(e) of the FDCA, which cross-referenced §355(j). In 1984, Congress amended §355 to replace subsection (j) with an abbreviated approval process for generic drugs, renumbering the original subsection (j) as subsection (k). Congress, however, neglected to amend §331(e) to reflect this renumbering. Congress corrected this drafting error in 1990.

The defendants moved to dismiss their criminal indictment for fraudulent misconduct that occurred in 1988 during the “gap between 1984 and 1990 where under the plain statutory language the failure to establish or maintain records under §355(k) was not subject to criminal penalties.”⁶ The defendants argued “that the plain language of the statute did not penalize their conduct.”⁷ The government argued “that the elimination of the penalty was a scrivener’s snafu.”⁸ The federal appeals court agreed with the government.

[S]trictly reading and applying the FDCA as it was at the time of the offense in question would put the plain language at odds with the statute’s purpose and intent. There is no indication in the legislative history that in amending the FDCA Congress intended to eliminate the penalties.⁹

There is no indication in the legislative history in this case, that in changing the name of the school from the Delaware Institute of Technology to Delaware Technical and Community

of incomplete amendment – that is, unintended mismatches between one provision and another.” *Id.* At 839 (footnote omitted).

⁵ 266 F.3d 661 (7th Cir., 2001).

⁶ *Id.* at 665-66.

⁷ *Id.* at 666.

⁸ *Id.*

⁹ *Id.* at 667.

College in 1971, the General Assembly intended to remove employees of the school from the list of State employees excluded from the classified service. The Board believes that the legislature's neglect in amending §5903(19) at the same time was a scrivener's error.

The Board is mindful that the scrivener's error doctrine must be cautiously applied.

[T]he meaning genuinely intended but inadequately expressed must be absolutely clear, otherwise we would be rewriting the statute rather than correcting a technical mistake.¹⁰

... If a statute cannot, as a textual matter, be read in two reasonable ways, it is not ambiguous in the sense that the words themselves are unclear ... It does, however, raise an inference that the legislative drafters failed to codify their true intent and license [a] search beyond the statutory text for evidence of what that intent was.¹¹

The grievant contends that when the General Assembly intends a global amendment it has done so expressly. For example, when the legislature changed the name of Delaware State College in 1993 it not only amended Title 14 of the *Delaware Code* but also deleted "the name of 'Delaware State College' wherever it appears in the Delaware Code and substituting in lieu thereof the words 'the Delaware State University.'" 69 *Del.Laws*, ch. 67, §2.

The Board believes it is equally plausible this shows that, when the General Assembly changes the name of an institution of higher learning, it intends to do so throughout the Code for consistency. The Board believes that it was a legislative oversight when the General Assembly neglected to change the name of the Delaware Institute of Technology in §5309(19) of Title 29 when it changed the name of the school to Delaware Technical and Community College in Title 14.

10 In re Last Will and Testament of Palecki, 920 A.2d 413, 424 n. 46 (Del.Ch., 2007) (Strine, V.C.) (quoting X-Citement Video, 513 US at 82 (Scalia, J., dissenting)).

11 Palecki, 920 A.2d at 424.

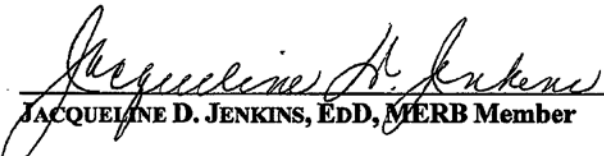
The Board concludes as a matter of law that there is no reasonable basis to infer that the General Assembly intended to repeal the exclusion of employees of the Delaware Institute of Technology from the classified service when the legislature changed the school's name in 1971. The Board concludes that employees of DTCC, like the grievant, are excluded for the State classified service under §5903(19) of Title 29.¹²

DECISION AND ORDER

It is this 27th day of March, 2019, by a vote of 3 - 0, the unanimous decision of the Board to grant Delaware Technical and Community College's motion to dismiss for lack of subject matter jurisdiction and to dismiss the grievance.



W. MICHAEL TUPMAN, MERB CHAIR



JACQUELINE D. JENKINS, EDD, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER

¹² It would behoove DTCC to petition the General Assembly for legislation to amend 29 Del.C. §5903(19) to change the reference to the "Delaware Institute of Technology" to the current title of the school, Delaware Technical and Community College.