

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

DANIEL E. KLINE,	)	
	)	
Employee/Grievant,	)	
	)	<b>DOCKET No. 08-12-435</b>
v.	)	
	)	<b>DECISION AND ORDER</b>
OFFICE OF MANAGEMENT	)	
AND BUDGET,	)	
	)	
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 January 6, 2011 at the Public Service Commission, Canon Building, 861 Silver Lake Boulevard, Dover DE 19904.

**BEFORE** Martha K. Austin, Chair, John F. Schmutz, Paul R. Houck, Victoria D. Cairns, and Jacqueline Jenkins, 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*

Kevin R. Slattery  
Deputy Attorney General  
on behalf of the Office of  
Management and Budget

## **BRIEF SUMMARY OF THE EVIDENCE**

The employee/grievant, Daniel E. Kline (Kline), testified on his own behalf.

The Office of Management and Budget (OMB) called one witness: Linda K. McClosky, Human Resource Management Director. OMB offered and the Board admitted into evidence ten exhibits marked for identification as Exhibits A-J.

## **FINDINGS OF FACT**

The Board incorporates by reference the Findings of Fact in the Board's Decision and Order dated March 30, 2010.<sup>1</sup>

By letter dated September 9, 2010, the OMB Director notified Kline of an offer to return to "an enforcement position within the Department of Natural Resources and Environmental Control ('DNREC') at the same pay grade that you left the merit system." OMB confirmed that Kline "will receive back pay from the date you were terminated [October 28, 2008] as though you had been returned to the merit system in October 2008. In addition you will receive any vacation hours that would have been accrued had you not left State employment and receive any vacation hours that you lost as a result of the termination plus what would have been accrued had your employment not been terminated."

The Director advised Kline that this was OMB's final offer:

As outlined above, the State has met its obligations under the Delaware Code and Merit Rules in a fair and reasonable manner. As such, this will serve as

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<sup>1</sup> Board Members Jenkins and Cairns did not participate in the first hearing in this case, but the other three members who did – as a majority of the Board – can ratify their previous Findings of Fact.

notification that this is [OMB's] final unconditional offer to return you to the merit system. [OMB] must receive written confirmation by September 17, 2010 that you accept the return to merit placement as described and provide a starting date. Please be advised that if you decline the State's offer, [OMB] will consider our obligations under the Merit Statute and Merit Rules to have been fulfilled, and you will therefore relinquish any rights to return to a Merit position.

By e-mail dated October 12, 2010, Linda McCloskey advised Kline that "Your expected return date with DNREC is October 18, 2010. . . . In order to calculate the final back pay amount through October 17, 2010, you will need to submit the requested documents [Kline's W-2s for 2008 and 2009]."

Kline did not report for work on October 18, 2010. According to Kline, the reason why he did not report for work was because he felt the job position OMB offered was not satisfactory and he disputed the agency's calculation of back pay. According to Kline, he was apprehensive that if he reported to work he might waive any right to come back to the Board and have the Board decide those issues.

OMB provided the Board with its calculation of Kline's back pay from October 28, 2008 through October 17, 2010 totaling \$114,995.70. OMB factored into its calculation income that Kline earned working part-time for Colonial Metals, Inc. Prior to Kline's termination, the Department of Safety and Homeland Security (DSHS) had authorized Kline's secondary employment with Colonial Metals. OMB agreed at the hearing that it should not have taken Kline's part-time employment income into account and agreed to revise its calculation accordingly. With that change, the Board finds as a matter of fact that OMB's calculation of back pay is the correct amount.

Kline has been working for Colonial Metals full-time since April 1, 2009. Kline agreed to

authorize OMB to contact Colonial to verify his pay and benefits information, which might adjust the back pay calculation.

The position OMB offered Kline was Enforcement Officer V, paygrade 16. According to Linda McCloskey, DNREC had given up the position for “complement reduction” but OMB had “brought the position back” for Kline. According to McCloskey, OMB has not yet filled the position.

### **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.**

At the first hearing in this case, the agency (DSHS, before the Board substituted OMB as the

proper employer/respondent) argued that Kline did not have a right to return to the classified service because DSHS terminated Kline for cause from his exempt position as Director of the Division of Alcohol and Tobacco Enforcement (DATE). OMB did not dispute that Kline has a right to return to the classified service, so that legal issue is now moot.

Kline argued that OMB's job offer was unsatisfactory because: (1) he would not have a take-home vehicle; (2) the job responsibilities are administrative, not enforcement; and (3) the job is based in Dover which would require him to commute two hours every work day.

The Board concludes as a matter of law that the job position OMB offered Kline – Enforcement Officer V, paygrade 16 – meets the requirements of Section 5903(23) of the Merit Statutes and Merit Rule 5.9 because it is a position in the same paygrade as the position from which he left the classified service. Kline was free to try to negotiate with OMB over issues like a take-home vehicle and his place of work, but the Merit Statute and Rules did not require OMB to accept those demands.

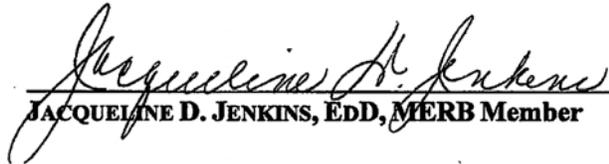
The Board believes that Kline had a reasonable apprehension that if he reported to work at DNREC on October 18, 2010 he might waive any right to come back to the Board to dispute the job position and the amount of his back pay because of language in the Director's September 9, 2010 letter ("final unconditional offer," "relinquish any rights to return to a Merit position"). According to OMB, it has not filled the position offered to Kline. According to Kline, by contract he must give his current employer (Colonial Metals) thirty-days notice of his resignation.

The Board will extend the time for Kline to report to work at DNREC in the position offered by OMB until Monday, February 7, 2011. However, the Board will cap Kline's back pay as of October 18, 2010 the date he was supposed to report to work at DNREC.

The Board warns Kline that this is the end of the line: if Kline does not report to work at DNREC on February 7, 2011, then he will not be able to come back to the Board on this grievance.

**DECISION AND ORDER**

It is this 24<sup>th</sup> day of January, 2011, by a vote of 4-0, the Decision and Order of the Board that OMB make February 7, 2011 Kline's return to work date at DNREC and recalculate the amount of his back pay (through October 18, 2010) in accordance with this Decision.

  
JACQUELINE D. JENKINS, EDD, MERB Member

  
VICTORIA D. CAIRNS, MERB Member

  
JOHN F. SCHMUTZ, MERB Member

  
PAUL R. HOUCK, MERB Member

  
MARTHA K. AUSTIN, MERB Chairwoman

I respectfully dissent. I believe that OMB satisfied its obligation under the Merit Statute and Merit Rules to offer to return Kline to the classified service at the same pay grade as the position he held when he left the classified service. By not reporting to work at DNREC on October 18, 2010, Kline waived any right to revert to the classified service.