

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

DAVID P. WARD, :  
 : C.A. No. 08A-07-011 WLW  
Appellant, :  
 :  
v. :  
 :  
THE DEPARTMENT OF ELECTIONS, :  
a State Agency, and THE MERIT :  
EMPLOYEES RELATIONS BOARD, :  
 :  
Appellees. :

Submitted: December 3, 2008  
Decided: February 9, 2009

**ORDER**

Upon a Appeal of the Decision of the  
Merit Employees Relations Board.  
*Affirmed.*

Roy S. Shiels, Esquire of Brown Shiels & O'Brien, LLC, Dover, Delaware; attorneys  
for the Appellant.

Kevin R. Slattery, Esquire, Department of Justice, Wilmington, Delaware; attorneys  
for the Appellees.

WITHAM, R.J.

## **FACTS**

David P. Ward (“Ward”), Appellant, was hired by the Department of Elections (“the DOE”) on August 10, 2004 as an Accounting Specialist. This position was posted as a “limited term” position. At the time Ward applied for the position, he had never been an employee of the State of Delaware, and was therefore not a Merit employee. Ward worked in this limited term position until he was terminated on September 14, 2007.

On or about September 24, 2007, Ward filed a merit system appeal with the Director of Human Resource Management (“HRM”), grieving his termination. The HRM concluded that a non-Merit employee hired into a limited term position does not accrue full Merit status. Ward appealed the HRM’s decision to the Merit Employee Relations Board (“the MERB”) on December 26, 2007. On June 19, 2008, the MERB issued its written decision, denying Ward’s appeal.

Ward filed his opening brief in this appeal on October 14, 2007. The DOE filed its answering brief on November 6, 2008; and Ward filed his reply brief on December 3, 2008.

## **DECISION OF THE MERB**

The MERB interpreted Merit Rule 10.1.1 as follows:

When an agency makes a limited term appointment to a Merit position vacancy, during the term of appointment the employee enjoys certain benefits of Merit status, including vacation and sick time and credited time in service. When the limited term expires, however, the employee

is protected by the Merit rules only to the extent that he or she was a Merit employee prior to the limited term appointment.<sup>1</sup>

The MERB concluded that when the DOE terminated Ward on September 14, 2007, his limited term appointment ended and he was no longer a Merit employee.

The Board concludes as a matter of law that Ward has failed to state a claim for a violation of Merit Rules 11 or 12,<sup>2</sup> which protect only Merit employees, because when the Department terminated him he no longer enjoyed Merit status. Under Merit Rule 10.1.1, only “Merit employees who accept limited term appointments shall be placed in a vacant position comparable to their former class in the present agency at the end of the limited term appointment.” Ward was not a Merit employee of the Department when he accepted his limited term appointment to the Accounting Specialist position.<sup>3</sup>

### **STANDARD OF REVIEW**

The review of an administrative board decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists

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<sup>1</sup> MERB Decision and Order at 3.

<sup>2</sup> Merit Rule 11 addresses layoff procedures and Merit Rule 12 addresses employee accountability and dismissal, suspension, fines, and demotion action procedures.

<sup>3</sup> *Id.* at 4-5

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to support the Board's finding of fact and conclusions of law.<sup>4</sup> Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>5</sup> This Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.<sup>6</sup>

Where an agency has interpreted its governing statute, the Court exercises *de novo* review.<sup>7</sup> However, "[j]udicial discretion is usually given to an administrative agency's construction of its own rules in recognition of its expertise in a given field."<sup>8</sup> Therefore, an appellate court will only reverse an agency's interpretation of its own rules if the interpretation is "clearly wrong."<sup>9</sup> In the case *sub judice*, the MERB's conclusions of law were limited to the interpretation of its Merit Rules.<sup>10</sup> As a result, the Court will review the decision for clear error.

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<sup>4</sup> *Histed v. E.I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

<sup>5</sup> *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Federal Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

<sup>6</sup> *Collins v. Giant Food, Inc.*, 1999 Del. Super. LEXIS 590 (quoting *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

<sup>7</sup> *Kearney v. Coastal Zone Indus. Control Bd.*, 2005 WL 3844219, at \*4 (Del. Super. Mar. 18, 2005).

<sup>8</sup> *Am. Fed'n of State County & Mun. Employees Council 81 v. State*, 2008 WL 43488884, at \*3 (Del. Super. Sep. 24, 2008).

<sup>9</sup> *Id.*

<sup>10</sup> In its briefs, Appellant engages in a lengthy interpretation of the language of 29 *Del. C.* § 5903, but since the MERB decision only interpreted the language of Merit Rule 10.1.1, the Court declines to engage in a *de novo* review the statutory language.

## DISCUSSION

### *I. Whether the MERB Erred When it Denied Ward Merit Status.*

The State of Delaware Merit Rules were adopted by the MERB, pursuant to the statutory authority provided by 29 *Del. C.* § 5914. Merit Rule 10.1. provides:

10.1. Limited Term Appointment. Limited term appointments are permitted when a Merit vacancy exists that is not of a continuing nature, but is projected to exceed 90 days. Such vacancies may be filled for a period of up to one year. The Director may approve a longer time period. Established selection procedures shall be followed for filling the vacancy.

10.1.1 Merit employees who accept limited term appointments shall be placed in a vacant position comparable to their former class in the present agency at the end of the limited term appointment. If agencies demonstrate that no comparable vacant position exists, employees shall be given hiring preference.

The MERB interprets Merit Rule 10.1.1 to mean that only those who are Merit employees at the time they accept a limited term appointment enjoy Merit status at the end of their limited term employment. Those who are not Merit employees at the time they accept a limited term appointment are therefore not protected by the Merit rules at the end of the limited term appointment. The Court finds this to be an acceptable interpretation of Merit Rule 10.1.1, and finding no clear error, affirms the findings of the MERB.

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## **CONCLUSION**

For the foregoing reasons, the decision of the Merit Employee Relations Board is AFFIRMED.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution