



***Kopicko v. DSCYF***

**02A-10-004 HDR**

August 15, 2003

This is an appeal by Appellant H. Diana Kopicko from a decision of the Merit Employee Relations Board (“MERB”) which denied her grievance and upheld the action of the Department of Services for Children, Youth and their Families (“DSCYF”) in terminating her employment during her probationary period. Because the decision is supported by substantial evidence and is free of legal error, it must be affirmed.

**I. BACKGROUND**

In May 1997, Kopicko was hired by DSCYF as a casual seasonal worker. The following July, she commenced employment as a full time Senior Family Service Specialist, at which time a six-month probationary period began to run. Her responsibilities in that position were to investigate and document concerns of possible child abuse and neglect, to determine risk and to refer families to treatment services. Her supervisor was Ricky Thomas.

During her probationary period, she was required to receive mandatory training along with others who were recently hired. The training was for the following: impact of child abuse and neglect on child development, interviewing, domestic violence, drug and alcohol abuse, Family and Children Tracking System (“FACTS”) computer training, risk assessment and management, and separation and loss training as well as how to write, document and finalize investigative reports. The training was conducted by Roxanne Ford, a trainer in the Professional Development Unit at the Division of Family Services.

During the course of her employment, Kopicko’s supervisors and trainers

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expressed concern as to her attitude and performance. On October 27, 1997, Kopicko received a performance review, in accordance with Merit Rule requirements, which covered the period of July 16 through October 20, 1997. The review rated her as “Needs Improvement” and indicated specific areas of her performance that needed improvement, particularly her ability to function as part of the agency team and Kopicko’s unit feeling alienated from her as well as her failure to meet deadlines.

On November 13, 1997, Thomas sent an e-mail to those in his supervisory chain of command to explain Kopicko’s performance issues and, subsequently, met with supervisors and recommended that DSCYF not retain her as a permanent employee at the conclusion of the probationary period. On November 21, 1997, Kopicko received notice that she had failed to successfully complete her probationary period and that her supervisor was recommending that she be terminated from employment for failure to satisfactorily perform the critical functions of the job. In particular, she was notified of the following reasons for Thomas’ recommendation: inability to follow directions and resistance to supervision; inability to accurately assess safety and risk; and inability to meet deadlines.

Kopicko was notified on December 31, 1997 that she would not be retained in her employment as a probationary Senior Family Service Specialist with DSCYF. The letter from the Department Secretary that notified her of the ending of her employment also advised her that, because of her probationary status, she had no right to appeal the action. Thereafter, Kopicko filed a civil action alleging wrongful termination and on September 29, 2000, summary judgment was granted in favor of

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DSCYF and against Kopicko.<sup>1</sup> Kopicko appealed and the Supreme Court determined that the Secretary's letter notifying Kopicko of the conclusion of her employment inadequately notified her of her right to appeal. The Supreme Court concluded that she had been improperly denied an opportunity to seek redress on the basis of assertions of discrimination due to non-merit factors within the Merit System.<sup>2</sup>

The Supreme Court stayed further judicial proceedings in Kopicko's appeal to allow her the opportunity to exhaust her administrative options within the Merit System.<sup>3</sup> Kopicko then filed her appeal with the MERB on March 4, 2002. The Board determined that the appeal was not a case where "disciplinary" action was taken against Kopicko and, according to Merit Rule No. 21.0230, Kopicko was the moving party.<sup>4</sup> The evidentiary hearing commenced, but did not finish, on June 26, 2002 and was continued to and concluded on August 21, 2002. During the hearing, both sides presented testimony and admitted documents into evidence. Based on the testimony and evidence, the MERB concluded that "Kopicko failed to meet her burden to establish by a preponderance of the evidence that there was a violation of the Merit Rules by discrimination against her based upon the application of non-merit factors which resulted in her termination of employment within the probationary

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<sup>1</sup> See *H. Diana Kopicko v. State of Delaware, the Department of Services for Children, youth and Their Families*, 2000 WL 33108936 (Del. Super. Ct.).

<sup>2</sup> See *H. Diana Kopicko v. State of Delaware, the Department of Services for Children, youth and Their Families*, 805 A.2d 877 (Del. 2002).

<sup>3</sup> *Id.*

<sup>4</sup> *MERB Decision* at \*2.

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period,” and therefore, that “[t]he action of the appointing authority in terminating Kopicko’s probationary employment [was] upheld and her appeal [was] denied.”<sup>5</sup>

Following the MERB’s decision, Kopicko appealed to this Court.

## **II. STANDARD OF REVIEW FOR APPEALS FROM THE MERIT EMPLOYEE RELATIONS BOARD**

When reviewing a decision on appeal from the Merit Employee Relations Board, this Court determines whether the MERB’s factual findings are supported by substantial evidence and are free from legal error.<sup>6</sup> Substantial evidence is defined to mean such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>7</sup> It is “more than a scintilla of evidence, but less than a preponderance.”<sup>8</sup> When factual determinations are at issue, the Court shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted.<sup>9</sup> The Court does not stand as the trier of fact and will not weigh witness credibility, therefore it can not substitute its own opinion for that of the Board’s if there is sufficient evidence to

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<sup>5</sup> *Id.* at \*40.

<sup>6</sup> *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *Talmo v. New Castle County*, 444 A.2d 298, 299 (Del. 1982).

<sup>7</sup> *Oceanport Ind. V. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

<sup>8</sup> *Olney*, 425 A.2d at 614.

<sup>9</sup> 29 Del. C. §10142(d).

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support the Board's decision,<sup>10</sup> and the Board's ruling will stand if it is supported by substantial evidence.<sup>11</sup> The only function of the Court is to determine if there is substantial evidence to support the Board's decision and only where there is legal error can the decision of the Board be overturned.<sup>12</sup>

Where an administrative agency, such as the MERB, makes procedural decisions calling for the exercise of discretion, an abuse of discretion occurs when the judgment exercised by the trier of fact is manifestly unreasonable.<sup>13</sup> The essence of judicial discretion is the exercise of judgment directed by conscience and reason, as opposed to capricious or arbitrary action; and where a[n administrative board] has not exceeded the bounds of reason *in view of the circumstances*, and has not so ignored recognized rules of law or practice, so as to produce injustice, its legal discretion has not been abused.<sup>14</sup>

### **III. DISCUSSION**

Kopicko alleges that she was terminated because she questioned her superiors in DSCYF and was a threat to the status quo of the unit. She asserts that the MERB's decision should be reversed because: the MERB accepted testimony and evidence

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<sup>10</sup> *Olney*, 425 A.2d at 613; *Johnson v. Chrysler Corp.*, 213 A.2d 64 (Del. 1965).

<sup>11</sup> *Anchor Motor Freight*, 716 A.2d at 156.

<sup>12</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

<sup>13</sup> *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954); *General Motors Corporation v. Farmer*, 1990 WL 127815 (Del. Super. Ct.) at \*2.

<sup>14</sup> *Pitts*, 109 A.2d at 188 (*emphasis added*).

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that was distorted, false, and misleading; there is a possible conflict of interest in having one Deputy Attorney General represent a state agency before a state administrative board that has another Deputy Attorney General as its counsel; the MERB abused its discretion by excusing a subpoenaed witness from appearing and testifying; and the MERB abused its discretion by declining to re-open the record after the hearing but before a formal written decision was issued.

Kopicko's first argument essentially asserts that the MERB relied on faulty evidence and that substantial evidence did not exist to support the MERB's decision. She alleges that much of DSCYF's evidence and testimony on its behalf were "false and distorted." In her brief, she discusses the following evidentiary issues: a letter from Roxanne Ford to Ione Truesdale dated November 10, 1997; the testimony of Ricky Thomas; Thomas' alleged access to her computer password; Thomas' alleged instructions to alter her notes and/or reports; the supervisory meeting; the allegations as to her ability to be a "team player"; the testimony of Carla Benson-Green; and the definitions of "abridged" vs. "rejected" cases. She construes each of these to be specific and separate arguments. However, they all fall under the category of evidentiary matters and will be considered as such. In dealing with evidentiary matters on appeal, this Court does not stand as the trier of fact and will not weigh witness credibility and, therefore, it can not substitute its own opinion for that of the MERB's if there is sufficient evidence to support the MERB's decision<sup>15</sup>, and the

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<sup>15</sup> *Olney, supra.*; *Johnson v. Chrysler Corp., supra.*

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MERB's ruling will stand if it is supported by substantial evidence.<sup>16</sup>

Roxanne Ford testified on behalf of DSCYF. She was a trainer for DSCYF and trained new employees, including Kopicko. Ford testified as to Kopicko's behavior, demeanor, and performance during the training period. In particular, she offered testimony that Kopicko had been inattentive during training and was insensitive to the feelings and opinions of others. Furthermore, Ford testified that Kopicko was resistant to the mandatory training due to the fact that she believed that she had sufficient education and experience without the training from DSCYF.

Ricky Thomas, Kopicko's direct supervisor, also testified on behalf of DSCYF. Thomas testified as to Kopicko's behavior, attitude and performance during the course of her employment with DSCYF. Thomas testified that she had exhibited adversarial behavior to others in the unit and that her demeanor and attitude were often disruptive. Furthermore, Thomas testified that Kopicko's work performance was inadequate to meet expectations of DSCYF. Thomas stated that he had advised Kopicko of her perceived shortcomings and had tried to help her with improvement of those. In particular, Thomas noted that Kopicko had an inability to follow directions, resisted supervision, had an inability to accurately assess safety and risk, and had an inability to meet deadlines. Thomas further noted that Kopicko did not follow directions for improvement. The Board found that Kopicko "was given a level of counseling, training, and supervision sufficient to meet the expectations embodied

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<sup>16</sup> *Anchor Motor Freight, supra.*



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in the Merit Rules.”<sup>17</sup>

Kopicko characterized Thomas’ testimony as “false and misleading.” In particular, she asserted that her work list on her computer was accessed by Thomas and changes were made. However, there was testimony that, although Thomas could view her work list, her password was required to make changes to the list and, since Thomas did not have her password, he could not have made such changes. Kopicko also argues that the MERB accepted a “distortion” of her ability to assess risk and that allegations that she was not a “team player” were not true and, therefore, not a real reason for her termination. The testimony of Thomas as well as Ford contradicted these arguments and were accepted by the MERB.

Carla Benson-Green also testified on behalf of DSCYF. She was the Assistant Regional Administrator and Thomas’ supervisor. Benson-Green testified that she met with Thomas weekly to review his progress with Kopicko in an attempt to address her performance deficiencies. Her particular areas of concern were Kopicko’s lack of documentation in reports to support findings and her inability to process cases in a timely manner as well as poor risk assessment. As a result of these deficiencies, Benson-Green testified, the unit had a backlog of cases, leaving the agency in a vulnerable position. Because of this, Kopicko was removed from case assignment rotation. Benson-Green testified that Thomas recommended to her that Kopicko not continue with DSCYF after her probationary period and Benson-Green agreed and discussed this matter with her supervisor, Ione Truesdale. Kopicko alleges that

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<sup>17</sup> *MERB Decision* at \*39.

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Benson-Green's testimony was false and misleading, particularly as to the definitions of "accepted," "abridged," and "rejected" as those terms apply to particular cases. Specifically, Kopicko asserts that a particular case was not "rejected," but disappeared from her files on her computer after her investigation started. She had the opportunity to cross-examine Benson-Green on this matter before the MERB and the MERB did not feel that this was sufficient to make Kopicko's termination non-merit based.

Kopicko has alleged that she was not terminated due to performance deficiencies, but rather because she was critical of her supervisors and challenged instructions to make changes in her reports. However, the MERB did not find sufficient evidence in the record that would support a finding that she was discriminated against and terminated because of non-merit factors. The MERB determined that Kopicko did not successfully complete her probationary period and, therefore, found valid, merit-based reasons for her non-retention in the DSCYF. The Board made this determination after holding two days of hearings, having heard testimony from six witnesses and considered 32 documents that were entered into evidence. The MERB found DSCYF's witnesses to be credible and the evidence to be convincing. Kopicko claims that "the content, depth, weight, and seriousness [of the evidence] were not fully understood by the MERB."<sup>18</sup> However, I conclude that the testimony and evidence considered by the MERB in reaching its decision do constitute substantial evidence to sufficiently support the decision.

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<sup>18</sup> *Kopicko's Reply Brief* at \*9.

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Kopicko next argues that there is a “[p]ossible conflict of interest cited due to the reality that MERB attorney and defense attorney are both in the similar positions sharing the same title and role as Deputy Attorney General both under the auspice of and accountable to the Delaware’s Attorney General. MERB attorney guided Appellant during both MERB hearings.”<sup>19</sup> 29 *Del. C.* § 2504 provides that “[t]he State Department of Justice and the Attorney General shall have the following powers, duties and authority: . . . (2) Notwithstanding any other laws, to provide legal advice, counsel and services for administrative offices, agencies, departments, boards, commissions and officers of the state government concerning any matter arising in connection with the exercising of their official powers or duties. . . .”<sup>20</sup>

In *Withrow v. Larkin*<sup>21</sup>, the U.S. Supreme Court held that a party asserting unconstitutional bias because an administrative agency exercises both adjudicative and investigative duties must overcome a presumption of honesty and integrity in those serving as adjudicators.<sup>22</sup> The case at hand, however, like *Crocco*, does not deal with a Deputy Attorney General in an adjudicative capacity, but rather concerns a Deputy Attorney General in an advisory capacity as it relates to another Deputy

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<sup>19</sup> *Kopicko’s Opening Brief* at \*17; *Kopicko’s Reply Brief* at \*14 (*emphasis added*).

<sup>20</sup> 29 *Del. C.* § 2504(2).

<sup>21</sup> 421 U.S. 35 (1975).

<sup>22</sup> *Crocco v. Board of Medical Practice*, 1990 WL 105056 (Del. Super. Ct.) at \*4; *See also Blinder, Robinson & Co., Inc. v. Bruton*, 552 A.2d 466 (Del. 1989).

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Attorney General in a representative capacity.<sup>23</sup> This would carry the same presumption of honesty and integrity that must be overcome by Kopicko to show the presence of a conflict of interest and/or bias. In this case, Kopicko only asserts that there is *possibly* a conflict of interest, but does not assert any facts to support the claim. Therefore, the presumption of honesty and integrity of each Deputy Attorney General has not been overcome and Kopicko's argument fails.

Kopicko also argues a “[p]ossible bias in MERB decision due to professional continuing and ongoing involvement between MERB and DSCYF/DFS and *possible* perceptions based on partial knowledge stemming from personal variables and demographic similarities leading to decision.”<sup>24</sup> Here, as in her argument as to possible conflict of interest as to the Deputy Attorneys General, Kopicko only asserts that there is *possibly* a conflict of interest, but does not assert any facts to support such a claim. Therefore, as to the MERB, the presumption of honesty and integrity has not been overcome. Therefore, Kopicko's argument as to this point must also fail.

Kopicko next argues that the MERB abused its discretion by excusing a subpoenaed witness from appearing and testifying at the second day of the hearing and refusing to continue the hearing. Roxanne Ford was present for and testified at the first day of the hearing, June 26, 2002. During her testimony, she authenticated

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<sup>23</sup> *E.g. Crocco, supra*, at \*4.

<sup>24</sup> *Kopicko's Opening Brief* at \*17 (*emphasis added*); *See also Kopicko's Reply Brief* at \*20.

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a memo from herself to Regional Administrator Ione Truesdale, which pertained to her concerns about Kopicko's performance during the training period. That memo was admitted into evidence by DSCYF without objection by Kopicko. Kopicko had the opportunity to cross-examine Ford at that time and she did so. At the close of the first day of the hearing on June 26, 2002, the parties were informed that the second day of the hearing would be scheduled for August 21, 2002, almost two months later. In the interim between the first day and the second day of the hearing, Kopicko decided to challenge admission of the memo into evidence. In order to do so, she attempted to subpoena Ford to appear at the second day of the hearing, August 21, 2002. Kopicko caused a subpoena to issue to Ford on the afternoon of August 19, 2002, less than two days prior to the hearing date. Prior to that time, Ford had scheduled doctors' appointments for herself and her child on August 21, 2002 and had already been approved for medical leave for that day. As such, Ford could not attend the August 21, 2002 hearing date on such short notice. The MERB chose to proceed without Ford present. Kopicko indicated that she realized that she could ask the same questions of Truesdale, who was present, that she was seeking to ask of Ford. Despite this, she did not call Truesdale to the witness stand to challenge the evidence.

29 *Del. C.* § 10125(b) empowers an agency to issue subpoenas and also to exclude plainly irrelevant, immaterial, insubstantial, cumulative and privileged evidence as well as to limit unduly repetitive proof, rebuttal, and cross-examination. As a general rule, the decision to permit or deny cross-examination of a witness as to

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specific information is committed to the sound discretion of the adjudicating authority so long as the authority does not exercise such discretion so as to defeat a party's right to effective cross-examination.<sup>25</sup> In making such a determination, the adjudicating authority must consider: (1) whether the testimony of the witness is crucial; (2) the logical relevance of the specific evidence; (3) the danger of unfair prejudice, confusion of issues, and undue delay; and (4) whether the evidence is cumulative.<sup>26</sup>

Kopicko cross-examined Ford on June 26, 2002 as to the memo in question and did not object to its admission into evidence at that time. She has acknowledged that she could have cross-examined Truesdale as to the same information on August 21, 2002. Therefore, Ford's presence and testimony on cross-examination was not crucial on August 21, 2002. Had the MERB rescheduled the second day of the hearing at that time, it is likely that undue delay would have resulted. The parties knew since June 26, 2002 of the date for the second day of the hearing, which would be almost two months later, and any further delay could be undue. Also, it appears Ford had been cross-examined previously about the memo and the same information could have been elicited from Ione Truesdale.

The MERB found no valid basis to continue the hearing to a later date and

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<sup>25</sup> *Garden v. Sutton*, 683 A.2d 1041, 1043 (Del. 1996) (dealing with cross-examination of a witness concerning specific incidents of misconduct which bear on the witness' credibility or reputation for truthfulness); *See also Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

<sup>26</sup> *Garden*, 683 A.2d at 1043-1044, *citing Weber v. State*, 457 A.2d 674, 681 (Del. 1983) and *Snowden v. State*, 672 A.2d 1017 (Del. 1996).

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recall Ford. The testimony sought on cross-examination by Kopicko was available to her at the first day of the hearing and was also available to her from another source on the second day of the hearing. Under these facts, there was no abuse of discretion by the MERB and to deny the continuance.

Following the conclusion of the hearing before the MERB, but before issuance of a formal written decision, Kopicko provided the MERB with documents *ex parte* in support of her position. Kopicko asserted that she overlooked additional information during the hearing and that the MERB did not comprehend or grasp some facts and testimony. The MERB essentially treated the submission of additional materials as a Motion for Reargument on the merits of the case and declined to reopen the record or to conduct further hearings.

The only issue on a Motion for Reargument is whether the tribunal overlooked something that would have changed the outcome of the underlying decision.<sup>27</sup> It is not intended to rehash the arguments already decided by the tribunal.<sup>28</sup> On appeal to this Court, a board or agency's decision on a Motion for Reargument will be affirmed unless it involved an abuse of discretion.<sup>29</sup> In the case at hand, the MERB reviewed the material submitted by Kopicko and determined that there was no basis for reopening the record. This was a valid exercise of discretion and, under the facts presented, there was no abuse of discretion by the MERB. Therefore, the MERB's

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<sup>27</sup> *McElroy v. Shell Petroleum, Inc.*, 618 A.2d 91 (Del. 1992).

<sup>28</sup> *Id.*

<sup>29</sup> *Daniel D. Rappa, Inc. v. Hanson*, 209 A.2d 163 (Del. 1965).

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decision to decline to reopen the record must be affirmed.

#### **IV. CONCLUSION**

There is substantial evidence in the record to support the MERB's decision which is free of legal error. Therefore, the MERB's decision to uphold the action of DSCYF in terminating Kopicko's probationary employment and to deny her appeal is *AFFIRMED*.

**IT IS SO ORDERED.**

/s/ Henry duPont Ridgely  
President Judge

oc: Prothonotary  
xc: Order distribution