

IN THE SUPREME COURT OF THE STATE OF DELAWARE

H. DIANA KOPICKO,	§
	§
Appellant Below-	§ No. 458, 2003
Appellant,	§
	§
v.	§
	§ Court Below—Superior Court
STATE OF DELAWARE,	§ of the State of Delaware,
DEPARTMENT OF SERVICES	§ in and for Kent County
FOR CHILDREN, YOUTH AND	§ C.A. No. 02A-19-004
THEIR FAMILIES,	§
	§
Appellee Below-	§
Appellee.	§

Submitted: January 16, 2004

Decided: March 25, 2004

Before **BERGER**, **STEELE**, and **JACOBS**, Justices.

ORDER

This 25th day of March 2004, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The appellant, Diana Kopicko, filed this appeal from an order of the Superior Court dated August 15, 2003 affirming the Merit Employee Relations Board's denial of Kopicko's grievance regarding her termination from employment with the State of Delaware Department of Services for Children, Youth and their

Families (DSCYF).¹ We find no merit to Kopicko's appeal. Accordingly, we affirm the Superior Court's judgment.

(2) The record reflects that DSCYF hired Kopicko in July 1997 as a full time Senior Family Service Specialist. At that time, Kopicko began a six-month probationary period of employment as was then provided for in the Rules for the State of Delaware Merit System of Personnel Administration (Merit Rules).² Kopicko was required to undergo mandatory training, which was conducted by Roxanne Ford. During the six-week training period, Ford communicated with Kopicko's immediate supervisor, Rick Thomas, about Kopicko's resistance to training, her insensitivity to others, her inattentiveness during training, and her obtuse comments. Thomas followed up with Kopicko about Ford's concerns over Kopicko's attitude.

(3) In September 1997, after completing the training program, Kopicko received a performance plan, which she signed, outlining the responsibilities of her position and the bases upon which she would later be evaluated. Evidence presented at the MERB hearing reflected the on-going concerns expressed by

¹ Kopicko has another appeal pending, No. 521, 2000, which this Court stayed in order to give Kopicko the opportunity to pursue her administrative remedies under the Merit System of Personnel Administration. *See Kopicko v. State*, 805 A.2d 877 (Del. 2002). Having opted to pursue her claims administratively, it appears that the appeal in No. 521, 2000 is now moot. The Clerk of the Court will issue a notice to Kopicko to show cause why that appeal should not be dismissed on the ground that it is moot.

² *See* DEL. CODE ANN. tit. 29, § 5922; Merit Rule 11.0200.

Kopicko's superiors about Kopicko's attitude and the quality of her work. In October 1997, she received a performance review reflecting that her job performance needed improvement. In November 1997, Thomas wrote to his supervisors documenting his concerns about Kopicko with regard to her inadequate documentation, poor risk assessment, resistance to supervision, and failure to meet deadlines. Kopicko was informed that she had failed to successfully complete her probationary term of employment. She was terminated from employment in December 1997.

(4) In her appeal to the MERB, Kopicko asserted that her termination was the result of discrimination based on non-merit factors. According to Kopicko her efficiency and competency as a case-worker was a "threat to the status quo" in the agency. After a two-day hearing, the MERB concluded that Kopicko had not established by a preponderance of the evidence that her termination was based on impermissible non-merit factors. The MERB found clear and convincing evidence that DSCYF's decision not to retain Kopicko was for valid, merit-based reasons.

(5) In her appeal to the Superior Court, Kopicko argued that the MERB's decision should be reversed for the following reasons: (a) the MERB relied on perjured testimony; (b) the MERB abused its discretion by denying Kopicko's request to recall a DSCYF witness during the second day of the hearing after the witness had been excused following her testimony on the first day of the hearing;

(c) there was a possible conflict of interest created by permitting one deputy attorney general to represent DSCYF and another deputy attorney general to advise the MERB; and (d) the MERB abused its discretion by refusing to reopen the record to allow Kopicko to submit additional documentation after the hearing was completed but before the MERB issued its written decision.

(6) The Superior Court conducted a thorough review of the MERB record and concluded that there was substantial evidence to support the MERB's factual findings. The Superior Court also concluded that the MERB did not err or abuse its discretion in refusing to postpone the second day of the hearing to allow Kopicko to recall a witness whom she had the opportunity to cross-examine on the first day of the hearing or in refusing to accept additional documentation from Kopicko after the hearing was concluded. Finally, the Superior Court rejected Kopicko's assertion of a "possible" conflict of interest as grounds for reversal because Kopicko had failed to assert any facts to support a claim that an actual conflict existed.

(7) On appeal, this Court's standard of review is the same as the Superior Court. We must determine whether the MERB's decision is supported by substantial evidence and free from legal error.³ Having carefully considered the parties' briefs and the record below, we conclude that the MERB's decision is

³ *Stoltz Mgmt. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).

supported by substantial evidence and is free from legal error. We find it manifest that the judgment of the Superior Court should be affirmed on the basis of, and for the reasons set forth in, the Superior Court's well-reasoned decision dated August 15, 2003.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Justice