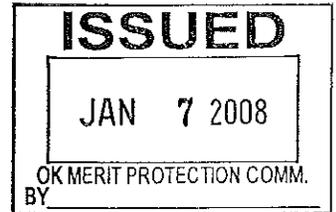


BEFORE THE MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

KENNETH L. SIMMINGTON,
APPELLANT,

v.

MPC-07-118



DEPARTMENT OF REHABILITATION
APPELLEE.

DECISION REGARDING APPELLEE'S MOTION TO DISMISS

Appellant was a classified employee working for Appellee when he was involuntarily demoted from the position of Program Manager II to Program Manager I pursuant to an order issued by the Office of Personnel Management.

Appellant appealed that demotion to the Merit Protection Commission on March 13, 2007 and a Prehearing was held on May 16, 2007.

On July 12, 2007, Appellee filed a Motion to Dismiss because Appellant had retired from employment with Appellee and taken a job in another state. Also, since Appellant's rate of pay was not cut when he was demoted, and there was no issue of "back pay", Appellee maintained the appeal was moot and moved for dismissal.

Appellant objected to Appellee's Motion and the parties gave oral arguments on September 21, 2007. On October 30, 2007, Appellee filed a letter with MPC which stated Appellee would "completely remove the demotion from Appellants file so his personnel record will indicate that when he left the DRS he was a Programs Manager II which was the position he held prior to his demotion to Programs Manager I."

The undersigned hereby grants Appellee's Motion to Dismiss.

455:10-3-13. **Dismissal of appeals** states in pertinent part:

- (a) a petition for appeal, or an issue in a petition for appeal, may be dismissed if:
- (1) it is moot or the appellant has not provided evidence to support the allegations;
 - (2) the appellant fails or refuses to appear for a scheduled meeting;
 - (3) the appellant refuses to accept a settlement offer which affords the relief he or she could reasonably expect if he or she prevailed in the appeal; or
 - (4) it is not timely filed or is not within the Commission's jurisdiction or authority.

Title 74 O.S. Section 840-6.5 C, states that if an Appellant is sustained on appeal, the remedy is reinstatement to the class previously held with full rights and without loss of pay or other benefits. In his Prehearing Conference Statement filed May 16, 2007, Appellant requested the remedies of restoration to Program Manager II with all back pay and benefits, purging of his personnel file of any reference to demotion, and attorney fees and costs. Appellant requested the same remedies available under the statutes plus purging his personnel file and attorney fees and costs.¹

Appellant retired from his job as Program Manager in June, 2007. He is therefore no longer eligible for "reinstatement" to the class previously held. Appellant never received a reduction in pay or benefits so there is "no loss of pay or other benefits" to be addressed. Appellee will completely remove the demotion from Appellant's file so his personnel record will indicate that when he left the DRS he was a Programs Manager II - the position he held prior to his demotion to Programs Manager I. This action will

¹ The request for attorney fees and costs must be made according to the procedures set forth by State Statute and Merit Rules. It is a remedy which can be requested and granted only after the case has concluded and the prevailing party makes a written request for attorney fees.

purge Appellant's personnel file. Appellant's request for attorney fees and costs is premature and therefore cannot be ruled on at this time.

Appellee's argument that this appeal is moot is persuasive. Appellant has been given the relief which he requested in his Appeal Petition and in his Prehearing Conference statement. In addition, it is the relief Appellant could expect if he prevailed in the appeal.

Lastly, Appellant, in his objection to Appellee's Motion, has attempted to raise new issues not contained in his appeal petition or his Prehearing conference statement. This attempt will be briefly addressed at this time:

1. Appellant states he is being prevented from obtaining relief for violation of his rights under 74 O.S. Section 840-6.6.

Section 840-6.6 Violation of employee rights – Appeals – Investigations – Reports – Hearings – Alternative Dispute Resolution – Closing of Record states in pertinent part:

A. Any person who believes that his or her rights under the Oklahoma Personnel Act, Section 840-1.1 et seq. of this title, have been violated may appeal to the Oklahoma Merit Protection Commission for corrective action.

B. Excluding the procedures set forth in Section 840-6.5 of this title, the Executive Director shall conduct preliminary investigations of possible violations of the Oklahoma Personnel Act. The Executive Director shall prepare a report of each such investigation stating the issues and findings of fact. If it is the determination of the Executive Director that a violation of the Oklahoma Personnel Act or the Merit System of Personnel Administration Rules may have occurred, the Executive Director shall, within ten (10) calendar days after the date of the report, appoint an administrative hearing officer to hear the case or refer the case to the Alternative Dispute Resolution Program, as appropriate and provided for by law

Appellant's appeal falls under 74 O.S. section 840-6.5, not section 840-6.6. Appellant has steadfastly maintained that section 840-6.5 is the controlling statute. None of the procedures under 840-6.6 were initiated. No preliminary investigation of possible violations of the Oklahoma Personnel Act was made. The Executive Director of MPC did not prepare a report of such investigation. There was no determination of the Executive Director that a violation of the Oklahoma Personnel Act or the Merit System of Personnel Administration Rules may have occurred. Appellant did not assume the burden of proof in the case.

74 O.S. Section 840-6.6 is simple not applicable in this case.

2. Appellant asserts the MPC is being prevented from exercising its powers under state law and merit rule including taking possible action under the "whistleblower" statutes in 74 O.S. 840-2.5 et seq. No where in the Petition for Appeal or Appellant's Statement of the Case has the issue of "whistleblower" been raised.

3. Appellant has attempted what can only be categorized as a preemptive penalty by stating that the Appellee should be punished for its actions toward Appellant pursuant to 74 O.S. 840-6.9. Section 840-6.9 states in pertinent part:

The Oklahoma Merit Protection Commission ... may levy an administrative fine not to exceed Five Thousand Dollars (\$5,000.00) against any person ... who after proper notice fails or refuses, within a reasonable period of time, to implement a written order of the Oklahoma Merit Protection Commission ...

This argument has no merit because there are no written orders of MPC which are pending or which have not been implemented by Appellee.

Accordingly, after a review of all pleadings, motions, and responses filed and considering all oral arguments heard, the undersigned Administrative Law Judge does hereby **GRANT** Appellee's Motion to Dismiss. Appellee is to completely remove all information and reference to the demotion from Appellant's file so his personnel record will indicate that when he left the DRS he was a Programs Manager II which was the position he held prior to his demotion to Programs Manager I.

Dated this 7th day of January, 2008

A handwritten signature in cursive script, appearing to read "P. Kay Floyd".

P. Kay Floyd, OBA 10300
Administrative Law Judge
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Oklahoma City, Oklahoma 73112
405-525-9144