BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

DALE VANESSA HOLIDAY, Appellant, vs. DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT, Respondent.	Case No. RULE-04-0025 ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

1.1 **Consideration of Motion.** This matter came before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and BUSSE NUTLEY, Vice-Chair, for consideration on January 10, 2005, to hear oral argument on Respondent's Motion to Dismiss. The hearing was held at the Personnel Appeals Board, 2828 Capitol Boulevard, Olympia, Washington.

1.2 **Representation.** Appellant Dr. Dale Vanessa Holiday appeared *pro se*. Respondent Community, Trade and Economic Development (CTED) was represented by Laura Wulf, Assistant Attorney General.

1.3 **Documents Considered.** The Board considered the files and documents in this matter, including:

- Respondent's Motion to Dismiss, with attachments, filed December 15, 2004,
- Appellant's Written Argument Against the Motion to Dismiss, with attachments, filed December 23, 2004, and
- Respondent's Reply Brief, with attachments, filed January 3, 2005.

II. BACKGROUND AND FACTS

2.1 Appellant Dr. Holiday received a trial service appointment to the position of Project Coordinator 2 with the Housing Improvements and Preservation Unit, Housing Services Division, with CTED effective March 22, 2004. On August 2, 2004, Appellant received a letter from Stephen Buxbaum, Assistant Director for the Housing Services Division, informing her that her trial service was terminated effective at the end of her work shift on August 6, 2004, and that she would be reverted to her prior position as a Research Investigator I in the Safe and Drug Free Communities Unit at CTED. On August 3, 2004, Appellant requested a voluntary reversion to her previous position of Research Investigator I with Safe and Drug Free Communities.

2.2 On August 20, 2004, Appellant filed a rule violation appeal against CTED alleging violations of WACs 356-30-270 and 356-30-300. In her appeal letter, Appellant claimed CTED violated the rule by failing to provide clear reasons for the termination of her trial service, failing to provide Appellant the opportunity to demonstrate improvement, and failing to provide her with five days written notice of her dismissal.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues the appeal should be dismissed because WAC 356-30-270(2) applies to probationary employees, not trial service employees, and therefore cannot be a basis for Appellant's rule violation claim. Respondent also asserts that WAC 356-30-320(5) clearly states that employees who are reverted do not have the right of appeal. With regard to Appellant's assertion that WAC 356-30-300 was violated, Respondent argues that Appellant was in fact counseled on several occasions, and was formally counseled in writing. Respondent asserts Appellant requested and was granted a voluntary reversion, and was allowed to reactivate her promotional score for the class from which she reverted, whereas if she had been involuntarily reverted to a former class, her examination grades for the class from which she reverted would have been nullified.

3.2 Appellant does not dispute that she did request and receive a voluntary reversion; however, she contends that pursuant to WAC 356-30-270, she should have received five working days notice of the agency's decision to revert her from her trial service position and she now asks for five days pay as a remedy.

IV. DISCUSSION

4.1 The Board may decide an appeal by motion if the documents on file, depositions and affidavits show there is no genuine issue as to any material fact and the appeal should be dismissed as a matter of law. WAC 358-30-060(1). All facts and reasonable inferences therefrom are to be determined in favor of the nonmoving party. See Hall v. University of Washington, PAB No. 3863-V2 (1995).

4.2 In order to preclude summary judgment, the non-moving party must set forth specific facts by affidavit or otherwise show a genuine dispute of material fact. A material fact is one upon which the outcome of the litigation depends. Hudeman v. Foley, 73 Wn.2d 880, 886, 441 P.2d 532 (1968).

4.3 The issue of whether Appellant should have received five business days notice of her reversion, and should now receive her requested remedy of five days pay, pursuant to WAC 356-30-270, is not properly before us. The provisions of WAC 356-30-270 apply only to employees serving a probationary period, whereas Appellant was employed in a trial service period. WAC 356-05-310 defines a probationary period as: "the trial period of employment following certification and appointment to, or reemployment in, the classified service and continuing for 6 to 12 months as determined under the provisions of WAC 356-30-260." A trial service period is defined in WAC as, "a six-month trial period of employment of a permanent employee beginning with the effective date of appointment from a voluntary demotion register to a class which the employee has not

previously held permanent status or from a promotional register." As a matter of law, we may not issue a ruling on the alleged violation of WAC 356-30-270.

4.4 Therefore, we limit our review to whether Appellant has standing to bring forward an appeal alleging a violation of WAC 356-30-300. Between receiving notice of Respondent's intent to revert Appellant to her previous position, and the effective date of the reversion, Appellant voluntarily reverted to her previously held position. In this particular case, we conclude that Appellant's voluntary reversion renders the alleged violation of WAC 356-30-300 moot.

Therefore, Respondent's Motion to Dismiss should be granted.

Having reviewed the file and record in this matter and being fully advised in the premises, the Board enters the following:

VI. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Respondent's Motion to Dismiss is granted.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Busse Nutley, Vice Chair