BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

WARREN CARTER, Appellant, vs. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	Case No. RULE-04-0022 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 GERALD L. MORGEN, Member, for consideration on November 8, 2004, to hear oral argument on Respondent's Motion for Summary Judgment. The hearing was held at the Personnel Appeals Board, 2828 Capitol Boulevard, Olympia, Washington.

1.2 **Representation.** Appellant Warren Carter appeared *pro se*. Respondent Department of Social and Health Services was represented by Arturo Haro, Human Resource Consultant.

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

- Respondent's Motion for Summary Judgment, with attachments, filed October 18, 2004,
- Appellant's Response to Respondent's Motion for Summary Judgment, with attachments, filed October 29, 2004, and
- Respondent's Response, with attachments, filed November 2, 2004.

II. BACKGROUND AND FACTS

2.1 Appellant Warren Carter became employed with the state of Washington on June 24, 2002. On December 18, 2002, Appellant requested five-year veterans military credit under WAC 356-05-465. The department denied his request; however, on August 5, 2003, Appellant was notified that his request had been granted and he was granted five-years of service credit based on his military service. On July 18, 2004, Appellant received notification from Sherer Murtiashaw, Director of the DSHS Human Resources Division, that she was withdrawing approval the five-year service credit and his seniority date would be adjusted accordingly.

2.2 On August 16, 2004, Appellant filed a rule violation appeal against the Department of Social and Health Services alleging a violation of WAC 356-05-465. In his appeal letter, Appellant claimed DSHS violated the rule by failing to grant his request that five-years of veterans seniority credit be permanently added to his employment seniority date. Appellant claimed he was entitled to the service credit because he had been "involuntarily" retired from the U.S. Navy after 24-years time in service due to "High Year Tenure."

2.3 WAC 356-05-465 reads as follows:

> For the purpose of determining seniority, as defined in WAC 356-05-390, for granting preference <u>during layoffs and subsequent reemployment</u>, any person who has one or more years of active military service in any branch of the armed forces of the United States or who has less than one year's service and is discharged with a disability incurred in the line of duty or is discharged at the convenience of the government and who, upon termination of such service, has received an honorable discharge, a discharge for physical reasons with an honorable record, or a release from active military service with evidence of service other than that for which an undesirable, bad conduct, or dishonorable discharge is given: Provided, That for the purposes of this section "veteran" does not include any person who has:
>
> (1) Twenty or more years active military service, and whose retirement is designated by the armed forces of the United States as "voluntary" as evidenced by the DD Form 214 or other official military records; and

> (2) Whose military retirement pay is in excess of five hundred dollars per month.

(emphasis added).

2.4 Appellant has not been the subject of a layoff or subsequent reemployment.

III. ARGUMENT OF THE PARTIES

3.1 Respondent argues the appeal should be dismissed because there is no basis for an appeal. Respondent asserts Appellant must first be a subject of a layoff before his seniority can be determined. Respondent asserts that Appellant has not been the subject of a layoff, there is no layoff in question and the board lacks jurisdiction to hear and rule on the issue.

3.2 Appellant does not dispute that he has not been laid off; however, he contends that in the recent past, his position has been considered as a potential RIF option from full-time to part-time because he was the least senior secretary in Thurston County. Appellant contends the same possibility could exist in the new biennium. Appellant contends the practice at DSHS has been to gather military service information upon employment to determine retirement benefits and, if the employee is eligible, adjust the seniority date on their Personnel/Payroll Action Form, and giving up to five years credit on their seniority date.

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 Appellant has failed to set forth any specific facts to show a genuine dispute of material fact exists. The issue of whether Appellant should receive credit for military service is not properly before us at this time; therefore, we make no determination in this regard. Rather, we limit our review to whether Appellant has standing to bring forward an appeal alleging a violation of WAC 356-05-465 when he has not been the subject of a layoff. Because the WAC requires an agency to consider military service only when determining seniority for purposes of granting preferences during layoffs and any subsequent reemployment, we conclude that Appellant's appeal asserting a violation of WAC 356-05-465 is premature. 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:

V. 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

_____

Gerald L. Morgen, Member