BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

VIRGINIA PAYNTER, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	))))))))))	Case No. RIF-03-0004 Thurston County Cause No. 04-2-00393-5 ORDER OF THE PERSONNEL APPEALS BOARD FOLLOWING REMAND FROM SUPERIOR COURT

I. INTRODUCTION

1.1 This matter came before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; BUSSE NUTLEY, Vice Chair; and GERALD L. MORGEN, Member, on remand from the Thurston County Superior Court in Paynter v. Dep't. of Social and Health Services, Thurston County Cause No. 04-2-00393-5.

1.2 **Appearances.** Appellant Virginia Paynter was present and was represented by Robin W. Phillips, Attorney at Law. Laura Wulf, Assistant Attorney General, represented Respondent Department of Social and Health Services.

II. PROCEDURAL HISTORY AND BACKGROUND

2.1 Appellant filed a reduction in force appeal on February 21, 2003.

2.2 On October 3, 2003, Respondent filed a Motion to Dismiss, arguing that the undisputed facts supported that Appellant resigned her position and retired prior to the effective date of her RIF on February 3, 2003. In response, Appellant argued that genuine issues of material fact existed, including whether she resigned her position, whether the RIF was appropriately based on a lack of funds, whether she was the appropriate employee to be bumped, whether the appropriate job description was used in the RIF process and that a question existed as to what her job title was at the time of the RIF. Appellant asserted that if it had not been for the inappropriate bump and the inappropriate option she was offered, she never would have retired.

2.3 On January 30, 2004, the Board granted Respondent's Motion to Dismiss. The Board concluded there was no dispute that Appellant retired prior to the effective date of her RIF on February 3, and therefore no layoff action occurred.

2.4 On February 27, 2004, Appellant appealed the Personnel Appeals Board decision to the Thurston County Superior Court.

2.5 On February 9, 2005, Judge Gary Tabor remanded this matter to the Board by agreed order of the Parties because evidence regarding the correct effective date of Appellant's RIF from the Department of Social and Health Services was not provided to the PAB by either party and to give the PAB an opportunity to reconsider Respondent's Motion to Dismiss in light of omitted evidence.

2.6 The parties subsequently provided documentation showing the correct effective date of Appellant's RIF as the close of business on January 31, 2003.

2.7 On March 21, 2005, the Board listened to oral arguments from the parties on whether Respondent's Motion to Dismiss should still be granted in light of the new evidence.

III. FINDINGS ON REMAND

3.1 Appellant Virginia Paynter was employed by DSHS in a Washington Management Service (WMS) position as a Program Manager & Contracts Manager in the Economic Services Administration, Community Services Division.

3.2 By letter dated January 16, 2003, Greta Kaas-Lent, Regional Administrator of Region 4, notified Appellant that her position had been "bumped by a more senior employee." The letter indicated the effective date of the reduction in force (RIF) at the close of Appellant's work shift on February 3, 2003. The letter also notified Appellant that she did not have a WMS RIF option but that she was eligible for an option to a Washington General Service position as a Social and Health Program Manager.

3.3 Appellant subsequently requested, and Ms. Kass-Lent granted, a change of the effective date of her RIF from February 3, 2003, to January 31, 2003. Therefore, Appellant's RIF from employment with DSHS as a WMS Program Manager & Contracts Manager became effective at the close of her work shift on January 31, 2003.

3.4 Effective February 1, 2003, Appellant retired from state service.

3.5 Appellant filed a timely appeal with the Personnel Appeals Board February 21, 2003.

IV. ARGUMENTS OF THE PARTIES

4.1 Respondent argues that because Appellant's RIF was effective January 31 and her retirement was effective on February 1, Appellant suffered no adverse impact as a result of her RIF, and therefore there is no remedy the Board can grant. Respondent argues Appellant never suffered any lost wages and that she voluntarily retired even though she had an option to a different position. Respondent argues that if Appellant had concerns about the travel requirements of her RIF option, she should have accepted the job and asked for reasonable accommodation. Respondent contends that because there is no appropriate remedy that the Board can provide, the motion should be granted and the appeal dismissed.

4.2 Appellant argues that if the agency had processed her RIF appropriately, she would not have been bumped and she would still be employed. Appellant argues that she was forced to retire because the option she was afforded was an option that was not viable, because it required travel, a function she is medically unable to perform due to disability. Appellant argues that if the RIF had been processed correctly, another employee would have been chosen to be RIF'd, and she would still be employed because she would not have retired.

V. CONCLUSIONS ON REMAND

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

5.2 In order to preclude summary judgment, Appellant must set forth specific facts that show a genuine dispute of a material fact. A material fact is one upon which the outcome of the litigation depends. Stelter v. Department of Labor and Industries, 107 Wn. App. 477, 481, 27 P.3d 650, 651 (2001).

5.3 We have reviewed the new information provided by the parties regarding the effective date of Appellant's RIF, which supports that Appellant was still employed by the department when the position she held was selected by a more senior employee in lieu of layoff. Therefore, Appellant has established that genuine disputes of material fact exist, namely, whether she was the correct individual to be bumped by the employee who exercised his bumping option to her position and whether she received the appropriate layoff options.

5.4 However, past board precedent in Bielenberg v. Wash. State Univ., PAB RIF-00-0015 (2001), precludes a less senior "bumped" employee from challenging the basis of the layoff of a senior employee who chose to "bump" the less senior employee through the election of an option in lieu of layoff. Therefore, in keeping with Bielenberg, we conclude Appellant has standing to allege that she was adversely affected by a violation of the layoff rules (e.g. improper notice or improper bumping options), but she lacks standing to challenge the underlying basis of the more senior employee's layoff.

5.5 Therefore, Respondent's motion should be denied.

Having reviewed the files and records 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 denied.

IT IS FURTHER ORDERED that a hearing on Appellant's RIF appeal will be scheduled for the limited purpose of hearing evidence of whether Appellant was the appropriate employee to be bumped and whether she received the appropriate layoff options.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Busse Nutley, Vice Chair

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Gerald L. Morgen, Member