BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF **ROBERT SISSON** **Grievant,**	)	
v.	)	**DOCKET NO. 96-11-66**
STATE OF DELAWARE **DEPARTMENT OF TRANSPORTATION** **Agency.**	)	**FINDINGS, OPINION AND ORDER**

BEFORE Katy K. Woo, Chairperson, Walter Bowers and Dallas Green, Members, constituting a quorum of the Merit Employee Relations Board ("Board") pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES

For the Grievant: Roy S. Shiels, Esquire
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For the Department: Frederick Schranck, Deputy Attorney General
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NATURE OF THE PROCEEDINGS

This grievance was filed with the Board on October 26, 1995 as an appeal pursuant to Merit Rule No. 20.0370 after a Step 4 grievance hearing was waived by letter of November 3, 1995 from Thomas LoFaro, Deputy Director for Employee Relations, to Robert Sisson. The matter came

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before the Board for evidentiary hearing on September 19, 1996 and was continued and concluded on October 23, 1996. The Agency presented three legal objections to the grievant's right to recovery. The Agency alleges that as a retired employee the Grievant has no right to grieve, the appeal is not timely, and the applicable period of limitations renders the grievance moot.

SUMMARY OF THE EVIDENCE

Wayne G. Spaulding was sworn and testified that he was the claimant's supervisor from 1989 to 1995. The Grievant in 1989 was an underfill in the position of Senior Planner. Around 1990, he pursued having the Grievant's position upgraded to a higher paygrade. The Grievant's position involved work at the paygrade 15 level. He communicated this to his supervisor, Mr. McNulty. He was not aware of Merit Rule 3.0720 or underfilling. At some point in time, the Grievant was asked to complete a PCQ. He wrote to McNulty in February, 1994 requesting that another way be found to have an upgrade. He did not receive a response from McNulty.

On cross-examination, Spaulding stated that he wrote a memorandum to Mr. McNulty in December, 1993 and attached to this document were procedures for further action. In February, 1994, he wrote another memorandum to Mr. McNulty but does not remember discussing it with him. There was a suggestion on April 21, 1994 to make the position a career ladder.

In redirect examination, Mr. Spaulding stated that the claimant meets the minimum qualifications for the position of Transportation Planner.

The Grievant was sworn and testified that in 1988 he was employed as a Transportation Planner at paygrade 12. He performed the work assigned to him and received yearly pay increases. He spoke to the Department's personnel office beginning in 1987. In November, 1990, he wrote a letter to McNulty requesting an upgrade. He tried again in 1993 by having Mr. Spaulding write a

memorandum to Mr. McNulty. He heard that he had to fill out a PCQ, and Mr. Spaulding wrote another memorandum to Mr. McNulty. The State Personnel Office wrote a letter to Secretary Canby, and he was upgraded in mid-July, 1995. A memorandum was sent to Secretary Canby about back pay. When he received a response from the Secretary, he filed a grievance.

On cross-examination, Mr. Sisson stated that he received notification in 1988 that he was to be paid at a paygrade 12. He received a letter on July 15, 1995 indicating that he was promoted to Senior Transportation Planner. He wrote a memorandum to Cheryl Dearing asking if there was a way to get around the PCQ. In further questioning, Mr. Sisson stated that he was a paygrade 12 from 1988 to 1995.

Wanda Pfieffer was sworn and testified that she is a personnel officer for the Department of Transportation in charge of personnel classification. She judges whether duties performed correspond to the job classification. In late 1993, she spoke with Mr. Sisson and Mr. McNulty about the classification of Mr. Sisson's position. Mr. McNulty wanted to know how to get Mr. Sisson to be a Senior Transportation Planner. She told him that Mr. Sisson had to fill out a PCQ. She was on leave from work until May, 1994. She spoke with Mr. Sisson again in 1995 when Mr. Sisson was moved to Planning. She reviewed Mr. Sisson's duties in the new position to determine whether they corresponded to Senior Transportation Planner. When a position gets a reclassification, the incumbent stays in the position.

On cross-examination, Ms. Pfieffer stated that in 1987 there was a change in the name of that position. The name of the position has not changed since 1987. Merit Rule 3.0720 applies to all non-career ladder underfills.

In further testimony, Ms. Pfieffer stated that she reviewed the position in 1995. The maintenance review process reclassified the Grievant's position to Senior Transportation Planner, and the Par I indicated that the Grievant was to underfill the position at paygrade 12.

Cheryl Dearing was sworn and testified that she spoke with the Grievant about a PCQ in early 1994.

Linda McCloskey was sworn and testified that she is the manager of the classification unit for the State Personnel Office. The appropriate action for the claimant if he were to seek an upgrade would be to complete a PCQ.

On cross-examination, Ms. McCloskey stated that a PCQ tells you the duties of a position. The PAR I in 1987 showed that the Grievant was underfilling a position. In order to be upgraded, the claimant had to be doing job duties of a Senior Planner.

Mark A. McNulty was sworn and testified that he was Executive Assistant to the Secretary of the Department of Transportation and Director of the Delaware Transportation Authority. He was approached by Mr. Spaulding concerning an upgrade of Mr. Sisson's position in December, 1993. He did not sign the cover letter and spoke with Mr. Spaulding about some of the statements in his memorandum. He spoke with Ms. Pfieffer abut the position being upgraded. She said that the Grievant should fill out a PCQ. Another request was received from Mr. Spaulding in February, 1994. In April, 1994, he sent a memorandum to the other administrators concerning a career ladder for the planner position. In June, 1995, he wrote a memorandum to Secretary Canby concerning the Grievant's situation.

On cross-examination, Mr. McNulty said that the planning office in the Department of Transportation was not useful to Transit, and the plan was to develop a Transit Planning Office in the Transportation Authority.

On October 23, 1996, Wayne Spaulding was recalled in rebuttal to the previous testimony of Mark McNulty. Spaulding related that his memos and statements concerning Robert Sisson's qualifications and performance were accurate and, while McNulty had perhaps a different view, Spaulding's description of Sisson's contributions was correct. Spaulding felt in 1993 and still feels today that Robert Sisson was the lead person in the 1989-1990 implementation phase of the Park and Ride Facility and performed at a pay grade 15 and perhaps a paygrade 17 level.

Mark McNulty was recalled and testified that Wayne Spaulding's statements had been pretty accurate but that recollections differed, and McNulty recalled that Sisson was involved with the contracting for the bus purchases, but that Ken Bock had developed the Park and Ride concept and was responsible for the route planning and that Ken Bock, according to McNulty's recollection, was the real impetus behind that project rather than Robert Sisson.

McNulty related that he had questions about the recommendation dated December 14, 1993 written by Wayne Spaulding concerning Robert Sisson and had intended to have a conversation with Spaulding about it but never did. McNulty did not recall whether he had ever conveyed his reservations about Spaulding's recommendation of Sisson to Spaulding.

In response to Board questions, McNulty explained that the position which Sisson occupied was budgeted and funded as a pay grade 15 but that from 1987 through 1995, Sisson was being paid as an underfill in the position at a pay grade 12, so there were excess funds available in the budget, but that this was not specifically in the budget for an upgrade for Sisson. McNulty stated that, in his view, Sisson's particular skill was in the contracting area, rather than the planning area, and that he had wanted to find a position for Sisson's particular talents but that the reorganization had not occurred.

McNulty explained that Delaware Transportation Authority (DTA) was unique in that it was started as a concept like a private business. Originally, most employees were not intended to be under the Merit System. However, it became a mix of Merit and non-Merit employees, and Sisson was hired under the Merit System.

McNulty testified that DTA had need of one or two high level planners because of inadequacies in the planning department of the Department of Transportation, so there was a desire to keep the position Sisson was filling as a pay grade 15 or 17 until it could be filled. Sisson was, according to McNulty, underfilling the Senior Planner position pending finding him a position which better suited his talents.

Thomas LoFaro, Deputy Director for Employee Relations, State Personnel Office, was sworn and testified that the Memorandum from State Personnel Director Smith to Secretary of Transportation Canby recommending the June, 1995 upgrade of Robert Sisson to a pay grade 15 in the Senior Planner position was premised on the 1994 Personnel Action Request for promotion of Robert Sisson which had been submitted by Mark McNulty. According to LoFaro, the State Personnel Office recommendation was based on its apparently erroneous belief that the document had been signed and submitted by Mark McNulty.

The Grievant introduced a 1988 Personnel Action Request form PAR 3 reflecting Sisson's underfilling of the Senior Transportation Planner position. (Grievant's Exhibit No. 7).

FINDINGS OF FACT

The Board finds that Robert Sisson's grievance relates to his claim for back pay for a period of three (3) years from the date of his filed grievance, October 3, 1995, which grievance was filed within ten days of the September 27, 1995 letter from Secretary Canby which denies retroactive pay

or additional compensation and that this filing is timely under Merit Rule 20.0310. It is timely because the event leading to the grievance was the Secretary's denial of his request for back pay. The fact that Robert Sisson had terminated his position as a state employee on October 1, 1995 does not preclude consideration of his timely filed grievance, because he had filed a grievance with the State Personnel Director who in turn had forwarded the grievance to Secretary Canby. If the Personnel Director had returned the grievance to allow the Grievant to file the grievance in accord with the Merit Rules, the Grievant could have received a more timely answer. Thus, the Grievant's filing of a grievance in October is not the result of his inaction. If a grievance is timely filed, a grievant need not be a State employee at the time of the grievance filing.

The Board further finds that since 1988 and for the three year period prior to October 3, 1995 for which he seeks back pay, Robert Sisson was underfilling the Senior Transportation Planner position which was rated and budgeted as a pay grade 15 position. His performance in the position was satisfactory and fully competent and reliable according to his 1992 performance evaluation signed by his immediate supervisor, and by his Reviewer, Mark McNulty. (Grievant's Exhibit No. 1). His supervisor, Wayne Spaulding, convincingly supported performance by Robert Sisson at a pay grade 15 to 17 level in the 1989-1990 time period.

The Department suggests that the July, 1995 promotion of Robert Sisson to the position of Senior Planner at pay grade 15 was accomplished only because of the assignment of additional duties to Mr. Sisson, and even then was questionable because the determination of the State Personnel Office was premised on an unsigned and thus unissued memorandum from Mark McNulty which was erroneously relied upon by Thomas LoFaro in making his favorable recommendation concerning the promotion of Mr. Sisson to pay grade 15 to the State Personnel Office Director Dr. Smith.

Therefore, the Department contends that Mr. Sisson is not entitled to any further consideration and to no back pay.

The Grievant contends that he occupied the position as an underfill since its creation and served credibly in the position for over seven years with satisfactory performance reviews and under a supervisor who worked diligently in attempting to have Mr. Sisson upgraded to pay grade 15 in the belief that Sisson was doing pay grade 15 to pay grade 17 work. Sisson contends that the position was budgeted and funded by the General Assembly as a pay grade 15 for the entire period and that he is entitled to be made whole in the form of back pay for the difference between the pay grade 12 he received and the pay grade 15 position which he satisfactorily filled for at least three years preceding his formal grievance in October, 1995.

The Board finds that the appropriate Merit Rule for application in this situation is Merit Rule 3.0911 in that Sisson was the incumbent in this position from its inception as an underfill. The position was initially established as a pay grade 15, but Sisson as its incumbent was rated at a pay grade 12 in July of 1987.

Merit Rule No. 3.0911 provides that should the incumbent not qualify for the position as reclassified, he shall be transferred to a vacant position for which he is qualified. This direction is mandatory. An exception is provided where the incumbent can be retained <u>for a reasonable period</u> in an underfill capacity pending qualification at the higher level or pending a transfer.

The Board finds that while Robert Sisson may not have done all he could have to establish his qualification for the pay grade 15, he did, with the support of his supervisor, periodically inquire as to how to go about getting full recognition as a pay grade 15. In 1993, Wanda Pfieffer told Sisson to fill out a position classification questionnaire (PCQ) so as to have the upgrade considered. He did not do so but rather inquired about other possible methods to accomplish the same result. He did so

without apparent response. The Department argues that the Board should infer that the reason why Sisson did not fill out the PCQ was because he was not in fact doing the level 15 work. The Board does not make this inference since the testimony of Mr. Sisson, his immediate supervisor, his performance evaluation signed by Mr. McNulty, and his approximate eight years of credible service run counter to such an inference and are sufficient to convince the Board that Mr. Sisson was fully performing in the position. The Department had eight years to transfer Mr. Sisson. It retained him for eight years pending qualification at the higher level or pending transfer. Under these circumstances, eight years is not a reasonable period of time, and Merit Rule 3.0911 was misapplied or violated by the Department.

The Department takes the position that this Board is limited in its ability to make a grievant whole by awarding back pay for a period beyond one year by virtue of the statute of limitations found at 10 *Del. C.* § 8111 and in 19 *Del. C.* Ch. 11. Neither of these limitations apply in this case.

The Board need not and does not decide at this time whether statutes of limitations such as those found at 10 *Del. C.* § 8111 and 10 *Del. C.* § 8106 apply to restrict or limit the Board's ability to redress grievances and to make an employee whole under a misapplication of the Merit System statutes or Rules. *See Kotler v. Board of Medical Practice*, Del. Supr., 630 A.2d 1102 (1993).

In the present case, even if statutes of limitations were to be applied, Grievant seeks back pay for three years prior to the institution of the grievance on October 3, 1995. Three years is the applicable period of limitations for an action predicated on a statute, and the Board finds that this period, which corresponds to the relief requested, is the appropriate period for this case. *See Vassallo v. Haber Electric Co.*, Del. Super., 435 A.2d 1046 (1981). The Board also finds that a remedy for the past three years, the period requested by the Grievant, is within the scope of the remedy allowed by 29 *Del. C.* § 5931. The Board also finds that the amount of back pay shall be

calculated by subtracting the Grievant's actual wages during the relevant period of time from the wages he would have received if promoted and paid in accordance with Merit Rule 13.0110.

ORDER

By the unanimous vote of Chairperson Woo and Board Members Bowers and Green, the grievance is upheld and Robert Sisson is awarded back pay in the amount of the difference in pay which he would have received had he been paid in pay grade 15 rather than the pay grade in which he actually was paid for the three years prior to October 3, 1995.

Katy Woo

Katy K. Woo, Chairperson

Walter O. Bowers

Walter Bowers, Member

Dallas Green

Dallas Green, Member

APPEAL RIGHTS

29 *Del. C.* § 5949 provides that the appointing authority shall have a right of appeal to the Superior Court on the question of whether the appointing authority acted in accordance with the law. The burden of proof of any such appeal to the Superior Court is on the appointing authority. All appeals to the Superior Court are to be filed within thirty (30) days of being notified of the final action of the Board.

Mailing Date: December 23, 1996

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