BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF	)	
PERRY D. SMYTH,	)	
Grievant,	)	**DOCKET NO. 97-12-111**
	)	
v.	)	
	)	**ORDER ON MOTION**
DEPARTMENT OF TRANSPORTATION,	)	**TO DISMISS**
	)	
Agency.	)	

Perry D. Smyth, a State employee, unsuccessfully sought a critical reclassification of position No. 9808 with the Department of Transportation from Civil Engineer IV to Civil Engineer V. The critical reclassification was ultimately denied by the State Personnel Office on January 3, 1996 after a determination by that office that the position was properly classified as a Civil Engineer IV. On November 27, 1996, after an October 30, 1996 fourth step grievance decision adverse to him, Mr. Smyth filed an appeal with the Board pursuant to Merit Rule No. 21.0120.

On April 9, 1997, the Department, through its counsel, Deputy Attorney General Elizabeth Daniello Maron, filed a motion with the Board to dismiss the grievance for lack of jurisdiction. The employee, through his counsel, Christine Whitehead-Capone, Esquire, filed his written response on May 9, 1997, and the Department filed its written response on May 14, 1997. The Board heard oral argument on the Motion to Dismiss on May 15, 1997. On May 19, 1997, Mr. Smyth, through counsel, filed an additional written memorandum in support of his position that the Board has jurisdiction to hear and consider appeals from critical reclassifications.

This is the decision of the Board on the Motion to Dismiss which, for the reasons stated below, is granted.

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The issue the Board must decide is not one of "fairness" but whether it has jurisdiction to hear a grievance involving a critical reclassification or whether the Board is now statutorily limited to hearing appeals from maintenance review classifications.

For purposes of this decision, the Board defines a critical reclassification as one performed under Merit Rule Nos. 3.0800 and 3.0810 where the Director of State Personnel is required to investigate an alleged error in the classification or reclassification of a position. A maintenance review classification is defined as one accomplished under the procedures set out in Merit Rule Nos. 3.1000 and 3.1010.

It is the opinion of the Board, that under the presently effective version of 29 *Del. C.* § 5915, it does not have the jurisdiction to hear this appeal from the denial of a critical reclassification.

This statute (29 *Del. C.* § 5915) which forms the basis for jurisdiction in the Board to hear classification appeals,[1] was significantly amended on July 19, 1995 with an effective date of October 19, 1995. 70 *Del. Laws*, c 271. This grievance, filed with the Board on November 27, 1996, is after the effective date of the most recent change to this statute as was the denial of the critical reclassification request which occurred January 3, 1996.

The former version of the statute provided in pertinent part: "Any classification may be appealed to the Commission in writing by any employee or agency within such reasonable time as may be prescribed in the regulations." (Emphasis added).

The present statute which replaced the prior enactment is more limited and in pertinent part provides: "Any maintenance review classification determination may be appealed to the Merit

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[1] See *Pitcavage v. State Personnel Commission*, Del. Super., 1993 WL 93458, (Jacobs, Vice Chancellor), citing *Sheiker v. State Personnel Commission*, Del. Super., No. 89A-JA-2, Steele, J. (July 10, 1989).

Employee Relations Board by any affected employee or agency within 30 calendar days of notification." (Emphasis added).

This language change from "any classification" to the limitation of "maintenance review classifications" cannot be viewed as a meaningless legislative act in terms of the ability to appeal position reclassifications. One effect of this statutory change is to expressly make maintenance review classification determinations subject to appeal to the Merit Employee Relations Board and to provide a specific procedure for the Board to use in its consideration of such appeals.

Another effect of the limitation of appeals to maintenance review classifications is that critical reclassifications, as distinguished from maintenance reviews, are, after October 19, 1995, no longer appealable to the Board, and the decision of the State Personnel Office on such critical reclassification determinations is in effect final. This result flows directly from the limitation of the right of appeal to the Board to maintenance review classifications as opposed to any reclassifications. The Merit Employee Relations Board, like all state agencies, is a creature of statute and has only those powers and responsibilities given by the legislature. Its power and authority are derived exclusively from the statute, and its power therefore extends only to those cases which are properly before it in compliance with the statutory law. *Maxwell v. Vetter*, Del. Supr., 311 A. 2d 864 (1973); *Cunningham v. Department of Health & Social Services*, Del. Super., C.A. No. 95A-10-003-HDR (Mar. 27, 1996) (Ridgely, P. J.).

The legislature is aware of a difference between a critical reclassification and a maintenance review classification. The Budget Bill (70 *Del. L.* ch 425), formerly Senate Bill No. 460, on page 61 specifically discusses maintenance classification reviews separately from critical reclassifications distinguishing between the two types of reclassifications.

Where, as in 29 *Del. C.* § 5915 as amended, the legislature has specifically acted to restrict the statute granting the Board jurisdiction over reclassifications to maintenance review reclassifications, that legislative determination must be viewed by the Board as controlling and, without further statutory change, the Board concludes it has no jurisdiction to hear appeals from any reclassifications other than maintenance review reclassifications.

Therefore, this critical reclassification decision made by the State Personnel Office on January 3, 1996 should be viewed as final and not appealable to the Merit Employee Relations Board, and the Motion to Dismiss is granted by the affirmative vote of Katy K. Woo, Chairperson; Robert Burns, Vice-Chairperson; and Dallas Green, Member with Walter Bowers, who was not present for the oral argument, abstaining.

IT IS SO ORDERED this 19th day of June, 1997.

Katy K. Woo, Chairperson

Walter Bowers, Member (not voting)

Robert Burns, Vice-Chairperson

Dallas Green, Member

Mailing Date: 7/25/97

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