BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF BRIAN BURNS, **Grievant,**	)	**DOCKET NO. 96-10-64**
v.	)	
DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES, **Agency.**	)	**DECISION AND ORDER**

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

APPEARANCES

For the Grievant: Brian Burns, *pro se*
Patricia Bailey
AFSCME, Council 81
610 Basin Road - First Floor
New Castle, Delaware 19720-6412

For the Agency: Janice R. Tigani, Deputy Attorney General
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

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NATURE AND STAGE OF THE PROCEEDINGS

This matter came before the Merit Employee Relations Board for an evidentiary hearing on January 16, 1997 pursuant to Merit Rule No. 21.0120 after a fourth step grievance decision adverse to the Grievant.

Mr. Brian Burns alleged that the Division violated Merit Rule No. 3.0410 by virtue of his having worked as a Youth Rehabilitation Supervisor ("YRS") from December 1, 1994 through March 10, 1995 while he was classified as a Youth Rehabilitation Counselor III ("YRC III"). The Grievant seeks back pay in the amount of the difference between his pay as a YRC III and the pay of a YRS.

SUMMARY OF THE EVIDENCE

The Grievant, Brian Burns, was sworn and testified that he was employed at Ferris School in the capacity of a Youth Rehabilitation Counselor II in June of 1994 and served in that position until he applied for and was hired into the temporary position of YRS. He served in that capacity for ninety (90) days and was continued for another ninety (90) days as a YRS during the period from June 1, 1994 through November 30, 1994 when he was placed into the position of a YRC III for which he had previously applied.

Mr. Burns testified that he continued to perform similar duties he had been performing as a YRS after he learned of his reclassification as a YRC III in December of 1994 until he voluntarily terminated his employment with the State on March 10, 1995. As evidence of his performance of supervisory duties, Mr. Burns presented copies of documents where he claimed to have acted in or had been listed in a supervisory capacity. On January 4, 1995 (Grievant's Exhibit No. 1), he signed as supervisor on a leave application for an individual employed as a YRC III. Grievant's Exhibit No. 2 was introduced as a copy of a Disciplinary/Due Process Report dated February 27, 1995 where he

had signed as a supervisor authorizing a lockdown which Mr. Burns related was a punishment only supervisors could give. Grievant's Exhibit No. 3 consisted of additional disciplinary action forms where Mr. Burns signed as either the authorizing supervisor or the hearing officer during February, 1995. Grievant's Exhibit No. 4 consisted of two "Punch Detail Report" forms addressed to him by the Ferris timekeeper transmitting for his review the punch detail reports for staff members. Mr. Burns testified that this was a supervisory function. Grievant's Exhibit No. 5 was a copy of a Supervisor Daily Assignment sheet for January 24, 1995 showing Burns listed as having supervisory duty assignments.

Mr. Burns testified that he signed three employee performance evaluations ("EPPAs) as a supervisor with the initial coversheet signature on November 29, 1994, and the final evaluation being completed in January of 1995 when he was a YRC III.

On cross-examination, Mr. Burns acknowledged that the EPPAs were done for the period during which he was in the temporary position of YRS, and he was the only one who could have evaluated the performance of the individuals for the relevant period. He completed the process after his reclassification at the end of November was changed to YRC III which was a promotion for him from his original position of YRC II which he had occupied before he applied for and was selected as temporary YRS.

The Grievant testified that he met with Dianne Gadow, the Superintendent of Ferris School, about his situation after he discovered that his paycheck was reduced by virtue of his reclassification to YRC III, and Ms. Gadow asked him to stay on and continue to do the supervisory job after December 1, 1994. However, she said that she could not pay him for the supervisory position.

In response to questions from the Board members, Mr. Burns related that he did not file his grievance until he was reviewing the Merit Rules at the time he was leaving state service in March

of 1995 and was faced with the prospect of repaying educational assistance he had been given by the Department for which he had agreed to a two year employment period. At that time, he discovered Merit Rule No. 3.0410 and filed his grievance seeking pay as a YRS for December 1, 1994 through March 10, 1995.

Mr. Burns stated that it was explained to him that the reclassification to a YRC III was done to save his job since the period of time for which he could fill the temporary positions of YRS had expired, but he agreed to continue to work as a YRS even though he was classified and being paid as a YRC III. The positions of YRS were being eliminated in a workforce transition, and if he were to be placed in a YRS position on other than a temporary basis, he would have no seniority and would likely be one of the first laid off. However, the length of time he could fill the slot on a temporary basis had expired. Mr. Burns stated that he had been told and it was his expectation that he would continue to be a YRS until the spring of 1995, and therefore he was surprised when his December paycheck reflected his reclassification as a YRC III.

Mr. Burns testified that he did not go back into the unit as a YRC III after December but continued to function as a supervisor and did not tell the union about his situation since he was concerned about being classified as a YRC III which was represented by one union group but acting as a supervisor which had different union representation.

Dennis James Bassett was sworn and testified that he was a YRC II at Ferris and that Brian Burns had been his supervisor from January to March of 1995 and that he had not known that Mr. Burns was then a YRC III. According to Mr. Bassett, Burns had done an EPPA for him for a period during which Burns was his supervisor.

Carol Martin was sworn as the first witness for the Agency and testified that she is a Personnel Officer II in the Division. She stated that Brian Burns was promoted to a temporary YRS

position effective June, 1994 since a supervisor was out with an injury and a dual incumbency for the position had been authorized for just three months. All of this occurred during a period of upheaval in a workforce transition. In July, another supervisor position became open and was posted. It was another position that could be filled on a temporary basis, and after Mr. Burn's ninety days in the first temporary position, he was transferred into the second position on a temporary basis. The YRS position was a paygrade 13 and the YRC II position which Mr. Burns originally held was a paygrade 9.

Ms. Martin testified that things were very fluid during the workforce transition, and the original intent was to keep the supervisors in place until the spring of 1995, but that time table was moved up because most of the supervisors did not have degrees, and they needed supervisors with degrees as a part of the workforce transition.

Ms. Martin related that since Brian Burns had originally been hired from a "cert" list into the temporary position, it was possible to move him into the second temporary supervisor position for a total of 129 days. However, the six months during which he could occupy the position on a temporary basis were up on November 30, 1994, and there was a lot of concern and discussion in transition meetings about this situation since Brian Burns was a good employee, and it was the desire to make him a treatment supervisor. However, that position needed a college degree, and Mr. Burns, while in the process of getting his degree under the Ferris education funding program, did not at that time have the required degree. It was determined that to keep him on, he would be retained as a YRC III, a position for which he had made application. There was a concern that if Mr. Burns were placed in a YRS position without his degree, he would be in jeopardy of losing his position and would have had no "bumping" rights under the union agreement. There was, according to Ms. Martin, no idea that Mr. Burns would be voluntarily leaving state employment in March, 1995.

Ms. Martin testified that there is an overlap in the job descriptions for a YRS and a YRC III particularly with respect to performing supervisory functions on weekends when, by union contract, the YRSs were not on duty. According to Ms. Martin, under those circumstances, the lead YRC worker picked up a part of what normally would have been a supervisor's responsibilities as necessary.

On cross-examination, Ms. Martin stated that it was her understanding that Brian Burns was going to be performing YRC III duties after November 30, 1994, and she did not know what duties he actually performed at Ferris.

Dianne L. Gadow was sworn and testified that she was the Superintendent of Ferris since 1991. She stated that she had been aware of the situation with Brian Burns serving in a temporary supervisory position and that it was necessary to find another temporary position after the first ninety day period. She was also aware that there was a maximum of six months that he could serve in temporary positions. She stated that the workforce transition process was very involved. Burns was a good employee. He had stated that he wanted to stay with the institution during the transition, and there was an attempt to get him educated and thus qualified as a treatment specialist, and thus he was moved into the YRC III position.

Superintendent Gadow testified that Burns had come to see her in December, 1994 concerning his situation with the reclassification as a YRC III. She did not recall if he had asked her if he should report to the unit as a YRC III, but she did recall that she was very clear in telling him that she could not require him to perform supervisory responsibilities as a YRC III.

Ms. Gadow testified that there is an overlap in the job responsibilities of a YRC III and a YRS, and she felt there was a lot of flexibility in the manner in which the YRC III position was utilized. She stated that it was not unusual for personnel in the YRC III positions to hold disciplinary

hearings if no supervisor was available and that she did not believe it was prohibited by the policy then in effect which was rather vague. Under a new policy, there is a supervisor on duty for each shift, and treatment specialist supervisors conduct the hearings. She stated that she did not tell Brian Burns that he would continue to have supervisory responsibilities and that after Mr. Burns became a YRC III, he did not do performance plans and was not to discipline other employees.

In response to Board questions, Superintendent Gadow stated that normally YRC III personnel work in the unit, and the supervisory personnel work elsewhere and that after December 1, 1994 he did not return to the unit as a YRC III.

John J. Moore was sworn and testified that he is a School Administrator at Ferris since 1991 and from May of 1994 to the first week in January, 1995 was the supervisor of Brian Burns. He testified that Burns was a good employee, and they wanted to keep him and that was the topic of a number of meetings. Moore testified that he discussed the six month limitation on the temporary supervisor position with Brian Burns and encouraged him to apply for the YRC III position. Moore stated that Burns approached him concerning a discrepancy in Burns' December paycheck. Moore stated that he was surprised that the reclassification had been done so quickly as it was but that Burns would not be able to continue working as a supervisor, and he gave Burns the choice to return to the unit as a YRC III or continue outside the unit and help out. Burns came back to Moore and told him that he would continue to help outside the unit. Moore testified that he told Burns that he was no longer authorized to sign leave slips as a supervisor. Moore stated that he did ask Mr. Burns to continue to do disciplinary hearings where he was the only experienced one available. Moore stated that Burns was not the main hearing officer, and he was only to do hearings when supervisors were not available. Moore testified that he was not aware of anything that prevented a YRC III from conducting hearings and that the question of disciplining other employees did not come up as far as

he recalled. Moore testified that he did ask Burns to complete the EPPAs for those employees who he supervised during the time he was in the temporary supervisor position. Moore testified that he was not aware that Burns was signing leave forms for other employees and that he had been instructed not to do so. Moore also testified that he was not aware that Burns was signing punch detail reports and that the supervisor duties noted for Burns on the Supervisor's Assignment Sheet (Grievant's Exhibit No. 5) did not exceed the responsibilities for the job classification YRC III.

On cross-examination, Mr. Moore testified that his supervision of Mr. Burns terminated after the first week of January in 1995 and that he did not know what duties Burns was performing thereafter until he left state service on March 10, 1995. Moore stated that he was not aware of YRC IIIs conducting hearings but that the policy at the time did not prohibit it and that Burns was the most qualified to do hearings when no supervisor was available since he had done hearings as the temporary supervisor.

In response to Board questions, Mr. Moore testified that he gave Burns the choice to remain on as a lead worker as a YRC III and help out the organization or to return to the unit and believed that Burns had chosen to remain and not return to the unit.

Brian Burns was recalled in rebuttal and testified that he did not remember the policy about who could conduct disciplinary hearings and that he was asked by Dianne Gadow to stay on and continue working in a supervisory capacity. He related that he asked her "Do you want me to report back to the unit or to stay on and do what I am doing now?", and she said that she could not pay him as a YRS but wanted him to stay. Burns testified that thereafter he continued to attend the 1:00 P.M. supervisory staff meetings in Dianne Gadow's office each Wednesday where there were no YRC IIIs present. He also testified that he had made a disciplinary recommendation on another employee, and no one rescinded his disciplinary recommendation. He stated that he routinely did hearings at the rate

of one or two a week, and during his five years working at Ferris, he never saw disciplinary hearings done by someone who was not a supervisor. Mr. Burns testified that there was no animosity when he left the agency and that he was later hired back in a casual/seasonal capacity in another position in the agency. He stated that he was aware that he had a choice to go back to the unit as a YRC III and that he willingly decided not to go back to the unit. Burns indicated that Ms. Gadow had stated to him that she would like him to stay on in the same capacity, but she could not pay him as a supervisor.

THE LAW

29 *Del. C.* § 5931. Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The Director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this Chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days."

MERIT RULE NO. 3.0410

"Any employee may be required by competent authority to perform any of the duties described in the class specification, any other duties which are of a similar kind and difficulty, and any duties of lower classes in the same occupational series or in another series which have similar characteristics. Any employee may also be required to serve in a higher position in emergency, or in relief of another employee. However, if such higher service continues beyond 30 calendar days, the rules concerning promotion or temporary promotion shall apply. (Chapter 13). Under exceptional circumstances, an appointing authority may submit for the Director's approval, written substitution for this paragraph."

FINDINGS OF FACT

The parties do not dispute and the Board finds that Brian Burns was duly promoted, on a temporary basis, to the position of YRS at Ferris School for the maximum period of 129 days until

November 30, 1994. At that time, he was promoted from his original position of YRC II into the position of YRC III for which he had previously applied.

In December, 1994, Mr. Burns, who was then classified as a YRC III, contacted Superintendent Gadow about the change in his pay and was expressly told by her of his situation and that he could no longer be paid as a YRS, but he was told that he was a good employee, and she would like him to stay on and assist the unit. Mr. Burns was also given a choice by his immediate supervisor, Mr. Moore, of returning to the unit as a YRC III or remaining out of the unit and assisting the organization during the workforce transition. Brian Burns, who was being groomed for eventual promotion to a full supervisory position when he completed his degree program and who was then aware of his status as a YRC III, agreed to stay on and not return to the unit.

The Board finds that Mr. Burns continued to perform some but not all of the duties he had done as a YRS and attended the Wednesday supervisors' meetings in the Superintendent's office. He was not authorized nor permitted to function fully as a supervisor and was expressly told by Mr. Moore that he was not to sign leave slips as a supervisor.

The Board finds that there was an overlap in the responsibilities of a YRC III and a YRS and there were times when a YRC III was permitted and expected to step in and fulfill responsibilities which would normally be performed by a supervisor such as conducting student hearings when a supervisor was not available. Mr. Burns did conduct student disciplinary hearings during the period while he was employed as a YRC III at Ferris. However, there was no prohibition against having a YRC III perform that duty. Mr. Burns was also asked to complete the evaluations for individuals based on their performance during the time when he was fully and lawfully functioning as a YRS by virtue of his temporary job assignment which terminated at the end of November, 1994. This assignment was completed as a YRC III who had been a YRS during the relevant rating period.

Mr. Burns was asked to complete the punch reports and was included on the Supervisor Daily Assignment roster, but he was unable to establish that any of the duties and functions he was asked to perform were beyond the job description or authority of a YRC III.

DISCUSSION AND CONCLUSION

These events occurred during a period of significant workforce transition at the Ferris School with a major reduction in the number of supervisors taking place. This is the type of situation where it is not unexpected and within the purview of Merit Rule No. 3.0140 that, on occasion, an employee may be asked to fulfill or perform any other duties which are of a similar kind and difficulty.

The burden of convincing the Board to rule in his favor rests upon the Grievant, and the Board has unanimously determined that Mr. Burns has not met that burden. The Board also observes that Mr. Burns became aware of the situation which gave rise to this grievance in December of 1994 and did not file his grievance until March of 1995, about the time he was voluntarily terminating his employment and that Merit Rule No. 20.0310 provides for the filing of a grievance within ten (10) working days of the date an employee could reasonably be expected to have knowledge of the circumstances leading to the grievance.

ORDER

For the foregoing reasons, the grievance of Brian Burns is denied by unanimous vote of the undersigned members of the Merit Employee Relations Board.

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OF THE STATE OF DELAWARE

IN THE MATTER OF BRIAN BURNS, **Grievant,**	)	**DOCKET NO. 96-10-64**
v.	)	
DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES, **Agency.**	)	**DECISION AND ORDER**

IT IS SO ORDERED:

Katy K. Woo, Chairperson

Robert Burns, Vice-Chairperson

Walter Bowers, Member

Gary Fullman, Member

Dallas Green, Member

APPEAL RIGHTS

29 *Del. C.* § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof

of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

Mailing Date: January 24, 1997

MMT:bfo

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