BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF **KATHY ZACHMANN,** **Grievant,** **v.** **DIVISION OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES,** **Employer.**	)	**DOCKET NO. 97-04-117**
IN THE MATTER OF **KATHY COVELLI-REYES,** **Grievant,** **v.** **DIVISION OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES,** **Employer.**	)	**DOCKET NO. 97-04-119**

DECISION AND ORDER

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

APPEARANCES

For the Grievants: Kathryn B. Lunger, Esquire
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For the Employer: Janice R. Tigani, Deputy Attorney General
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NATURE AND STAGE OF THE PROCEEDINGS

These two grievances are before the Merit Employee Relations Board ("MERB" or "Board") after a decision at the 4th step level in the grievance process which was unsatisfactory to the Grievants by denying the claims of both Grievants for hazardous duty pay at Exposure Level A. (*See* Merit Rule No. 21.0120).

While these are two separate grievances, both Ms. Zachmann and Ms. Covelli-Reyes are employees at the New Castle County Detention Center, and their grievances were consolidated for hearing purposes. This is the written decision and order of the Board granting the Employer's motion to dismiss at the conclusion of the Grievants' evidentiary presentation.

SUMMARY OF THE EVIDENCE

The following brief summary of the evidence is provided pursuant to 29 *Del. C.* § 101128(b)(1):

Kathy Covelli-Reyes, being sworn, testified that she is a Family Services Specialist Supervisor working out of the New Castle County Detention Center. She has received hazardous duty pay supplement at Level B since her date of hire while two of the workers in her unit have always received hazardous duty pay supplement at the higher Level A. Ms. Covelli-Reyes testified that she interviews the majority, if not all, of the youths who come into the Detention Center. The interviews are conducted in a number of locations within the facility, including the administration area and the

nursing area, which are areas not normally covered by Youth Rehabilitation Counselors or "guards." Ms. Covelli-Reyes took the position that she is continually exposed to hazard by virtue of being in the Detention Center and having her duties with respect to interviewing and working with the youths who are sent to that facility. She could not be specific as to the number of hours she worked with children each day or week as it varied. Some days, she spends no time with the children at the facility and works on her other responsibilities, while on other days she spends eight hours with a single child. She testified that she was given passive restraint training so that she could escort students on trips.

On cross-examination, Ms. Covelli-Reyes testified that one-half or more of her time is spent in contact with clients, but she could not specifically detail the number of hours. She also testified that, as a part of her job responsibilities, she was not required to respond to disturbances and that she has never had to intervene in a situation to control a disturbance. Ms. Covelli-Reyes testified that although her job description does not require it, she feels she has some responsibilities to herself and to the child in the event of a disturbance. She told the Board that there is not sufficient staff for Youth Rehabilitation Counselors to always be available during client interviews.

Kathy Zachmann, being sworn, testified that she works in the New Castle County Detention Center as a Family Crisis Therapist. She works on cases assigned by her supervisor, Kathy Covelli-Reyes. Ms. Zachmann receives the most difficult cases often involving children with severe mental and emotional problems. Ms. Zachmann testified that at a prior hearing in the grievance process, she had testified that 40% of her time was spent in close proximity to juveniles and that, by that statement, she meant that amount of her work time was spent in one-to-one contact with juveniles. She related that she has to deal with the hazards of working with these children but that it is not a direct function of her job description. She has, on one occasion since her employment in 1994, had to intervene between two students and knows of other employees who have done the same.

Timothy J. Brandau, Ph.D. testified under oath that he is the Chief of Community Services and the supervisor of Ms. Covelli-Reyes' supervisor. Dr. Brandau described the New Castle County Detention Center. He stated that the building originally designed to have 48 children, now has over 115 and that the children are everywhere. Many of them are explosive so the people who work in the facility are continually exposed to hazards. As to Ms. Zachmann and Ms. Covelli-Reyes, Dr. Brandau testified that they are not the "SWAT team" but that they are called when children are acting out or upset or about to "go off." In his view, that constituted exposure to hazards. He felt that it was a mistake that these people were not given Level A hazardous duty pay supplement.

On cross-examination, Dr. Brandau testified that he had read the Merit Rule regarding entitlement to hazardous duty pay supplements and that for Level A the requirements were continuous exposure to the hazard and that response to deal with the hazard be a part of the job description. He testified that neither Grievant was required as a part of their job description to respond to hazards.

Rick Shaw, being sworn, testified that he is the immediate supervisor for Ms. Covelli-Reyes and, as her supervisor, believes that she is continually exposed to hazards working in the New Castle County Detention Center and that if a hazard (disturbance) occurred both Grievants would do what they needed to protect themselves and their fellow workers. He noted that the Grievants deflect a lot of potential hazards because of their verbal and counseling skills. They go into the program area or bring juveniles up to their offices when the children are upset.

On cross-examination, Mr. Shaw explained the bail hearing process and testified that the Grievants do not have the same job descriptions as the Youth Rehabilitation Counselors concerning the obligation to respond to situations. The Grievants both currently receive hazardous duty pay

supplement at the lower Level B rate in recognition of their proximate exposure to hazardous duty where it is not the employees' stipulated job duty to deal with the hazard.

Karen Golden, being sworn, testified that she worked as a Senior Family Services Specialist at the New Castle County Detention Center and received Level A hazardous duty pay; she was reduced down to Level B and was reinstated into Level A. She stated that her job responsibilities and those of the Grievants were essentially the same.

Joseph Conaway, being sworn, testified that Level A pay was briefly taken away from two employees which his union represents, and that situation was corrected by the State Personnel Office. He related that teachers would not take training in handling hazardous situations and walked out of such training, yet they still receive hazardous duty pay at the higher Level A. He noted that the Personnel Office had written the job descriptions for the Grievants and that the existing situation was fundamentally unfair and inequitable.

The Board sustained the Employer's motion that the testimony of Mr. Conaway and Ms. Golden as to the entitlement of other individuals in the Division to Level A hazardous duty pay was not relevant to the determination of the pending grievances. The Grievants rested their evidentiary presentation, and the Employer moved the Board to dismiss the grievances on the basis that the entitlement to receive hazardous duty pay at Level A had not been established.

THE LAW

29 *Del. C.* § 5916. Uniform pay plan; hazardous duty pay.

(a) The rules shall provide for a pay plan for all employees in the classified service, after consultation with state officers and after a public hearing held by the Board. Such pay plan shall become effective only after it has been approved by the Governor after submission to the Governor by the Board and after adequate appropriations to put such plan into effect have been received. Amendments to the pay plan may be made in the same manner. Nothing shall be contained in the pay plan except the salary and wage schedule and each employee in the classified service shall be paid at the rate set forth in the pay plan for the position classification.

(b) No employee of any department or agency shall receive hazardous duty pay, except those specifically included in the following paragraphs:

(1) Employees, otherwise qualified, who are employed by the Department of Corrections (or its successor agency).

(2) Employees, otherwise qualified, who are employed by the Delaware Psychiatric Center (or its successor agency) and who are assigned to programs for the criminally insane.

(3) Employees, otherwise qualified, who are employed by the Division of Youth Rehabilitation (or its successor agency) and Division of Administration--Education (or its successor agency) who are assigned to work in the Division of Youth Rehabilitation Services facilities.

(c) Nothing in this section shall be construed or interpreted by the Merit Employee Relations Board or by the State Personnel Director to include hazardous duty pay as coming within the definition of fringe benefits.

MERIT RULE 5.1450 Hazardous Duty

Pay supplements for hazardous duty will be paid only to those employees authorized to receive such pay supplement pursuant to 29 *Del. C.* § 5916(b) and otherwise qualified.

5.1451

Hazardous duty shall be defined as exposure to hazards. The hazards must be uncontrollable circumstances that involve an unusual risk of serious physical injury, impairment to health or death resulting from accidental, negligent or intentional causes. Except as noted, the exposure be proximate, continuing and not incidental to the job duties or infrequent in nature. The exposure may be occasional if the employee's assigned job duties are to deal with the hazards. Two degrees of exposure are recognized.

5.1452

Two exposure levels of hazardous duty shall be defined as follows:

Exposure Level A: Continuing exposure to hazards where the employee's responsibility is to deal with the hazard as a function of assigned job duties.

Exposure Level B: Proximate exposure to hazards where it is not the employee's stipulated job duty to deal with the hazard, or occasional exposure to hazards where the employee's responsibility is to deal with the hazard as a function of assigned job duties.

5.1453

An employee who is determined to be qualified to receive hazardous duty pay will be compensated, in addition to his/her regular salary/wage, at the rate of $100.00 per month for Exposure Level A or $50.00 per month for Exposure Level B.

5.1457

The following terms and definitions shall be used to determine eligibility for hazardous duty pay for employees identified by 29 *Del. C.* § 5916(b):

Continuing: frequency of exposure to the hazard is normally more than 50% of the employee's working time.

Occasional: frequency of exposure to the hazard is normally more than 5% but less than 50% of the employee's working time.

Uncontrollable: precautions, such as safety and life support equipment are either impractical to be used continually by the incumbent or are insufficient to assure reasonable safety.

Proximate: the location of employee's work site precludes evacuation as a means of avoiding exposure to serious physical injury, impairment to health, or death resulting from accidental, negligent or intentional cause.

DISCUSSION, FINDINGS AND ORDER

The decision of the Board concerning these two grievances is governed by the application of the above cited provisions of the Merit Rules. There is no equitable entitlement to a specific level of hazardous duty pay. Each of the Grievants, and several of their witnesses, candidly testified that it is not a requirement of the positions held by the Grievants that they deal with the hazard as a function of the assigned job duties.

Both Grievants clearly have difficult responsibilities in an area where they are exposed to hazards and both are receiving pay supplements for such hazardous duty at Level B which provides, among other things, for such additional compensation to those with proximate exposure to hazards where it is not the employees' stipulated job duty to deal with the hazard. The entitlement to a pay supplement for hazardous duty at Level A is controlled by the Merit Rules and turns on the presence of two factors: to-wit, continuing exposure to hazards <u>and</u> the presence of the employee's responsibility to deal with the hazard as a function of assigned job duties.

The testimony clearly supports and compels the conclusion that the Grievants are not required to deal with the hazard as a function of the assigned job duties in contrast to, for example, the Youth Rehabilitation Counselors, who throughout the hearing were consistently referred to as having a "guard" responsibility in addition to other duties. The Board does not

therefore need to reach the issue of whether or not each of the individuals has the requisite degree of exposure to the hazardous duty to constitute "continuing exposure." The Grievants have not established an entitlement under the Merit Rules to Level A compensation for hazardous duty, and the Employer's motion to dismiss the grievances must be granted. By the unanimous vote of the undersigned, it is so ordered.

APPEAL RIGHTS

Pursuant to 29 *Del. C.* § 10142, the Grievants may appeal the decision of the Board to the Superior Court. The burden of proof in any such appeal to the Superior Court is on the Appellant. All appeals to the Superior Court are to be filed within thirty (30) days of the date the notice of the final decision of the Board was mailed.

BY ORDER OF THE BOARD:

Katy K. Woo, Chairperson

Robert Burns, Vice-Chairperson

Dallas Green, Member

John W. Pitts, Member

Mailing Date: 4/23/98

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