BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

BEFORE THE STATE OF DELAWARE

COPY

IN THE MATTER OF DAVID B. CASTO	)	
Grievant,	)	**DOCKET NO. 98-10-130**
v.	)	**DECISION ON MOTION TO DISMISS**
DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH, AND THEIR FAMILIES	)	
Agency.	)	

BEFORE Susan L. Parker, Esquire, Chairperson; Dallas Green, and John W. Pitts, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. § 5908(a).

BACKGROUND

In April of 1997 the Department of Services for Children, Youth and Their Families ("DSCYF" or "Department") received a maintenance review request on behalf of Mr. Casto for the classification of Residential Treatment Center Administrator. The Department did not send the request forward to the State Personnel Office and this caused Mr. Casto to file a grievance which ultimately resulted in a 4th Step Grievance decision dated September 16, 1997 denying his grievance.

After the 4th step hearing, by letter filed on October 10, 1997, Mr. Casto appealed to the Merit Employee Relations Board ("MERB" or "Board") complaining of the "Arbitrary and capricious action of the agency and failure to complete a requested maintenance review of the class of positions

here involved".

Mr. Casto alleged that Merit Rule 3.0800 was violated in that significant changes had been made in the duties and responsibilities of his position creating error in the classification of the position which was not reported to the State Personnel Director as required. He further asserted in his appeal to the MERB that his position was substantially changed by the addition of duties previously performed by another position and that despite the Department's knowledge of this fact the Department did not report it to the Director of State Personnel nor would the Department forward his reclassification request to the Office of State Personnel.

On February 10, 1998, Mr. Casto, through legal counsel, filed with the Board a copy of a MERB Employee Appeal Form for a classification maintenance review pursuant to 29 Del. C. § 5915 and a request that a MERB Independent Reviewer be appointed to review the maintenance review classification appeal. In an April 29, 1998 letter to the Board's counsel, Mr. Casto's attorney sought to clarify the confusion that apparently existed concerning the nature of the appeal of Mr. Casto. In his letter, Mr. Casto's counsel stated that subsequent to the filing of the grievance with the MERB, the Agency did forward the maintenance review classification to the State Personnel Office with a result that was not satisfactory to Mr. Casto and therefore a maintenance review classification appeal form was filed with MERB. Mr. Casto's counsel indicated that it was his intention to dismiss the original employee grievance once the Independent Reviewer had acted on the maintenance classification review appeal.

By letter dated May 6, 1998, counsel for the DSCYF moved to dismiss the appeal on the basis that the Department, at the request of the Hearing Examiner, did forward Mr. Casto's maintenance review request to the State Personnel Office. The Department contended that the original grievance appealed to the MERB was therefore moot. The Department also asserted that

no maintenance review classification was ever performed for the position occupied by Mr. Casto and therefore there was no basis for an appeal under 29 Del. C. § 5915. The Department appended to its motion a letter to Roy S. Shiels, Esquire in his capacity as counsel for David Casto from Linda K. McCloskey the Manager of Classification for the State Personnel Office. In her letter Ms. McCloskey related that on August 15, 1997, her office received a request from DSCYF to perform a maintenance review of the classification of Residential Treatment Center Administrator which was the position held by Mr. Casto. In her letter to Mr. Shiels, Ms. McCloskey stated that her office reviewed the classification to determine whether significant changes in duties and responsibilities and knowledge, skills and abilities had occurred to warrant a maintenance review of the class. Ms. McCloskey's letter concluded by stating that this class should not be included on the maintenance review schedule since there was no significant higher level duties and responsibilities assigned to the class and that the knowledge, skills and abilities in the current class specification were adequate. The Department contends that no Maintenance review of the classification of Residential Treatment Center Administrator classification was performed.

This matter was scheduled for a hearing on the Department's motion to dismiss on September 17, 1998. This is the Board's decision on the motion after considering the submissions and arguments of the parties.

SUMMARY OF THE EVIDENCE

Mr. Casto's position as Residential Treatment Center Administrator was affected by a reorganization of positions which allegedly resulted in a significant increase in the volume of his work and changes in his job responsibilities. Mr. Casto sought to have a maintenance review performed by the State Personnel Office on the classification of Residential Treatment Care Administrator. DSCYF, after its review, determined that there was no basis for such a maintenance

review and declined to send such a request forward to the State Personnel Office prompting Mr. Casto to file a merit system grievance concerning such refusal to process his request. The State Personnel Office also failed to grant the grievant's request for a maintenance review, and his appeal became one against the Office.

The grievant's position is that the statute, § 5915(c) gives him a right to appeal any maintenance review classification determination to the Merit Employee Relations Board. The parties do not dispute this right, as such, but they differ on what constitutes a determination. The grievant argues that any decision regarding a maintenance review, even a decision not to recommend one or perform one, is appealable. The agency argues that the agency's exercising its discretion or the Personnel Office's exercising its discretion is not a determination that entitles the grievant to an appeal.

FINDINGS OF FACT

1. It is clear that despite the efforts of Mr. Casto, and the eventual accession to his request by DSCYF to forward the request to the State Personnel Office, there was no maintenance review determination of the position of Residential Treatment Center Administrator classification. Therefore, there is no basis for a maintenance review classification appeal. Simply stated, there is nothing for a MERB Independent Reviewer to review and nothing from which Mr. Casto can appeal under 29 Del. C. § 5915.

2. Mr. Casto's original grievance, the one decided against him after the 4th Step grievance hearing, concerned the refusal by DSCYF to forward the request for a maintenance classification review to the State Personnel Office. The Hearing Officer found that DSCYF is vested with the responsibility for determining which request meet the criteria for a maintenance review and is not obligated to forward every request to the State Personnel Office and denied the grievance.

THE LAW

29 Del. C. § 5915. Classification, uniformity; appeal of classification.

(a) The rules shall provide for the preparation, maintenance and revision of a position classification plan for all positions in the classified service and all merit comparable positions, based upon similarity of duties performed and responsibilities assumed so that uniform qualifications and pay ranges shall apply to all positions in the same classification.

(b) After approval of such maintenance review classifications determination by the Director, State Budget Director and Controller General, the Director shall notify the agency and employee of the results. The maintenance review classification determination shall become effective on the following July 1.

(c) Any maintenance review classification determination may be appealed to the Merit Employee Relations Board by any affected employee or agency within 30 calendar days of notification.

Merit Rule No. 3.0800 on Reclassification of Positions provides:

Whenever a significant change is made in the duties and responsibilities of a position involving either the addition of new assignments or the taking away or modification of existing assignments, such changes shall be reported by the appointing authority concerned in such a manner as the Director shall prescribe.

Merit Rule No. 3.0810 provides:

The Director, upon his/her own initiative or at the request of an appointing authority, shall investigate alleged error in the classification or reclassification of a position and, if found to be justified, shall reclassify the position to the appropriate class, consistent with the requirements of the Budget Act.

Merit Rule No. 3.1000 Maintenance of the Classification Plan:

The Director shall establish a system and schedule for, and conduct a continuous review of, the classification plan which will assure the coverage of all positions in the classified service.

Merit Rule No. 3.1010 provides:

The Director shall establish procedures for the classification maintenance review process. Such procedures shall provide for a

> meeting at the beginning of the review process, with the agency head, personnel administrator and applicable division directors of the agency with positions under review. The procedures shall also require a meeting with incumbents in positions under review to provide an explanation of the purpose of the review, the importance of the Position Classification Questionnaire (PCQ) completed by the incumbent, and the possible results of a reclassification. The procedures shall also require that, prior to classification decisions being finalized by the State Personnel Office, the State Personnel Office shall respond to agency comments regarding the initial classification recommendations and draft class specifications either by (1) written memorandum to the agency accepting their suggested changes, or (2) meeting with the agency head, applicable division directors and agency personnel administrator to discuss the comments.

DECISION

The Merit Rules provide that the Director upon his or her own initiative or at the request of an appointing authority is charged with the ongoing responsibility to continually monitor the classification system and is to investigate alleged errors which arise from the addition or deletion of responsibilities where there is a significant change. (Emphasis added) Merit Rule 3.0800. The scheduling and conduct of maintenance review reclassifications is an action which is placed within the discretion of the Director of the Office of State Personnel and is coordinated with the maintenance review schedule. See Merit Rule 3.1000. What Mr. Casto seeks is the functional equivalent of a writ of mandamus from the MERB directing that there be a maintenance review of the classification of Residential Treatment Center Administrator conducted by the Office of State Personnel. Without an initial review, the function of an independent reviewer is problematic. However, a Writ of Mandamus is not an appropriate remedy to compel the performance of a discretionary act. See Blades Fire Company, Inc. v. State Fire Prevention Commission, Del. Super., C.A. No. 97M-07-006, Graves J. (1998).

Mr. Casto's original grievance concerned the failure or refusal of the Agency to send his

request for a maintenance review classification forward to the Office of State Personnel. That Grievance is moot.

The "review" by the Office of State Personnel did not constitute a maintenance review classification determination from which Mr. Casto has a right of appeal under the provisions of 29 Del. C. § 5915. Rather, the State Personnel Office concluded, as had the agency, that there was no basis for a maintenance classification review at this time. There is a right to appeal to MERB from a maintenance review classification determination done by the Office of State Personnel by statute, however, there is no right to appeal the determination not to perform a maintenance review of any particular classification.

The Board recognizes that the literal language of § 5915(c) give the right of appeal if there is a determination. The Board finds, however, that a determination results from the performance of a maintenance review and not in the absence of a maintenance review.

ORDER

The above-captioned grievance filed by David Casto is moot as to the Department, and the determination by the Office of State personnel not to conduct a maintenance review classification is a discretionary matter not subject to appeal. The Department's Motion to Dismiss is **GRANTED**.

BY ORDER OF THE BOARD this 8th day of October, 1998.

Susan L. Parker

Susan L. Parker, Esquire, Chairperson

Dallas Green

Dallas Green, Member

Voting Against the Above Decision

John W. Pitts

John W. Pitts, Member

APPEAL RIGHTS

29 Del. C. § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the request of whether the appointing agency acted in accordance with the 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 with thirty (30) days of the employee being notified of the final action of the Board.

29 Del . C. § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings n the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: October 9, 1998

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Merit Employee Relations Board
Susan L. Parker, Esquire, Chairperson
Dallas Green, Member
John W. Pitts Member

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