

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

COPY

IN THE MATTER OF:)
ANNETTE STEVENSON,)
Grievant,)
v.)
STATE OF DELAWARE)
DEPARTMENT OF HEALTH AND)
SOCIAL SERVICES,)
Agency.)

DOCKET NO. 99-09-189
ORDER DISMISSING
APPEAL

BEFORE Robert Burns, Vice-Chairman, Dallas Green, and John F. Schmutz, Esquire,
constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. § 5908(a).

APPEARANCES:

For the Grievant:
Roy S. Shiels, Esquire
Brown, Shiels, Beauregard & Chasanov
108 East Water Street
P. O. Drawer F
Dover, DE 19903

For the Agency:
Ilona M. Kirshon, Esquire
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

PROCEDURAL HISTORY

This is a grievance appeal by Annette Stevenson, an employee of the State Classified Service in the Audit and Recovery Management Services Division ("ARMS") of the Department of Health and Social Services ("DHSS").

On June 10, 1999, Ms. Stevenson filed a grievance asserting, among other things, that she had performed supervisory duties not included in her Senior Investigative Auditor job classification. The

relief sought was compensation for the supervisory duties she had performed beyond her job classification and the reclassification of her position from Senior Investigative Auditor to the position of Investigative Auditor Supervisor.

Steps 1 and 2 of the grievance process were waived by both parties and on August 9, 1999 the designee of the DHSS Secretary heard the matter at Step 3.

The Step 3 hearing officer found that the grievant had performed supervisory duties beyond the normal duties for her job classification from March 1996 until January 1999 and concluded that she should be compensated for such additional work. The hearing officer also determined that as of January 1999, the extra supervisory duties had been removed from Ms. Stevenson's position and that he did not have the authority to direct the reclassification of the grievant's position.

Thereafter, Ms. Stevenson appealed to Step 4 of the grievance process. By letter dated August 26, 1999, Thomas LoFaro, Deputy Director for Employee Relations, denied the appeal on the grounds that the agency decision refusing Ms. Stevenson's critical reclassification request was not subject to the grievance procedure under the Merit Rules and that denial of critical reclassification requests may not be appealed.

Ms. Stevenson filed her grievance appeal with the Merit Employee Relations Board on September 17, 1999 stating, among other things, that she did not believe that she was presently properly classified since she was presented to the community, ARMS and other agencies as a supervisor since December 1994.

On March 6, 2000, DHSS filed a motion to dismiss the appeal to the Merit Employee Relations Board for lack of jurisdiction on the same grounds that the Step 4 decision had denied the

appeal. The grievant filed a written response to the motion on March 16, 2000 and argument on the motion was heard by the Board on March 22, 2000.

After consideration of the written statement of the parties and giving full consideration to the arguments on the motion, the Board, after deliberation in open public session, determined unanimously to grant the motion to dismiss the appeal for lack of jurisdiction.

DISCUSSION

The jurisdiction of the Merit Employee Relations Board is not without limits. The power and authority of the Board are derived from statute and the Merit Rules, and the Board's jurisdiction extends only to those cases which are properly before it in compliance with the statutes and Merit Rules. *Maxwell v. Vetter*, Del. Supr., 311 A.2d 864 (1973), *Cunningham v. State of Delaware, Department of Health and Social Services*, Del. Super., C.A. 95A-10-003, Ridgely, P.J. (March 27, 1996) (ORDER).

From the information and arguments presented, the Board concludes that the present grievance appeal is grounded on Ms. Stevenson's determination that her position should be classified as Investigative Auditor Supervisor. The Step 3 hearing officer found that Ms. Stevenson performed supervisory duties from April 1996 to January 1999 while her actual position was classified as a Senior Investigative Auditor, a position which did not include the supervisory duties which she was performing. The parties agree that as of January 1999 the additional supervisory duties were taken from Ms. Stevenson's present position and assigned to her supervisor. They also agree that she has been compensated for having performed such additional supervisory duties by the payment of

additional compensation of \$10,201.72 which was paid to her in December of 1999 and that the amount of the compensation is not an issue in this appeal.

The removal of the supervisory duties was not a satisfactory resolution for Ms. Stevenson. She did not wish to have the additional duties removed, rather, she sought reclassification of her position to that of an Investigative Auditor Supervisor and prior to filing her grievance, Ms. Stevenson attempted to have the agency seek such a reclassification on a critical basis. She is dissatisfied with and has appealed the agency's consistent refusal to pursue such a critical reclassification for her position.

In responding to the Agency's Motion to Dismiss for lack of jurisdiction, Ms. Stevenson argues that if an employee has served in a higher position for more than 30 calendar days, as clearly occurred in her case, then the Agency is obligated to apply Merit Rule No. 13.0130 and fill the position through promotion.

It appears that the beginnings of the current situation go back to an earlier Maintenance Classification Review where Ms. Stevenson and several others had their positions reclassified to Senior Investigative Auditor positions. Thereafter, two of the reclassified Senior Investigative Auditor positions in New Castle County were again reclassified through critical reclassifications to Investigative Auditor Supervisor positions. Ms. Stevenson's Senior Investigative Auditor position in Kent And Sussex Counties was not so reclassified although Ms. Stevenson had performed supervisory duties for quite some time. Ms. Stevenson's request that her position be similarly reclassified through a critical reclassification and the Agency refusal to do so are at the heart of the present appeal to the Board.

In responding to the Motion to Dismiss, Ms. Stevenson argues that she is entitled to a remedy because the Agency failed to fill the positions in New Castle County by promotion and placed Senior Investigative Auditors into positions as Investigative Auditor Supervisors by Critical Reclassifications. She notes that Merit Rule No. 3.0410 permits an employee to be required to serve in a higher position in emergencies or in relief of another employee but provides that if such higher service continues beyond 30 calendar days the rules concerning promotion or temporary promotion (Chapter 13) shall apply. She argues to the Board that the Investigative Auditor Supervisor positions created in New Castle County through critical reclassifications should be vacated and filled through promotion to afford her an opportunity to compete for an Investigative Auditor Supervisor position.

The Board does not find this argument persuasive or compelling. While there is a preference for filling vacancies through promotion which is set out in Merit Rule Chapter 13, that preference does not obviate the use of critical reclassifications of positions particularly where there are no vacant positions. While in some cases it may be preferable for management to establish the need for a position and then to fill it through promotion, Ms. Stevenson's performance of extra supervisory duties for a protracted period does not vest in her any right or entitlement to either the creation of a new position or to the opportunity to compete for another position which has been established through a duly approved critical reclassification.

Throughout the steps of this appeal, Ms. Stevenson has grieved the refusal of the Agency to reclassify her position on a critical basis. Under the presently effective version of 29 *Del. C.* § 5915, the Board does not have the jurisdiction to hear appeals from the denial of a critical reclassification request. Furthermore, the fact that the individual employee serves in a position for a significant period of time beyond that authorized by the Merit Rules does not entitle the employee to the position

he or she filled on a temporary basis nor does such service create an entitlement to the reclassification of the employee's position to encompass the additional duties. There is no vesting or entitlement to a higher position which an employee may have filled on a temporary basis even if the time spent in such higher position exceeds the allowable time set forth in the Merit Rules. See, *Showell v. State of Delaware Department of Corrections*, Del. Supr., 534 A. 2d 657, 1987 WL 4691 (1987).

Not all classification grievances may be appealed to the Merit Employee Relations Board. The statute (29 Del. C. § 5915) which establishes the basis for jurisdiction in the Board to hear classification appeals¹, was significantly amended on July 19, 1995 with an effective date of October 19, 1995. 70 Del. Laws, c 271.

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 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

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).

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 General Assembly is clearly aware of a difference between a critical reclassification and a maintenance review classification. In the Budget Bill (70 Del. L. ch 425), formerly Senate Bill No. 460, on page 61 the legislature specifically discusses maintenance classification reviews separately from critical reclassifications thereby distinguishing between the two types of reclassifications. The FY 99 Budget act has also continued this discussion reaffirming that "Critical reclassification requests shall not be appealed to the Merit Employee Relations Board."

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

The essence of Ms. Stevenson's appeal is her dissatisfaction with the failure of the Department to reclassify the Senior Investigative Auditor position which she occupies to a position of Investigative Auditor Supervisor as has been done for two other Senior Investigative Auditor positions in New Castle County. However, the determination by the appointing authority and the State Personnel Office not to pursue a critical reclassification of the position occupied by Annette

Stevenson is final and not appealable to the Merit Employee Relations Board. Merit Rule No. 13.0130 does not require otherwise.

ORDER

The grievance appeal of Annette Stevenson is not within the jurisdiction of the Board. The motion of the Department of Health and Social Services to dismiss is granted and the appeal is dismissed. IT IS SO ORDERED.

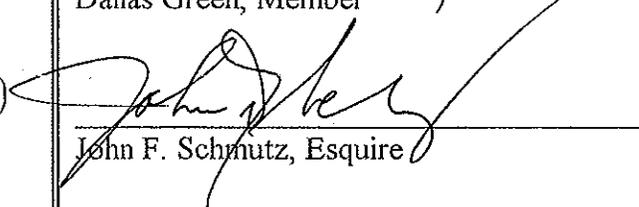
BY ORDER OF THE BOARD this 20th day of April, 2000.



Robert Burns, Vice-Chairman



Dallas Green, Member



John F. Schmutz, Esquire

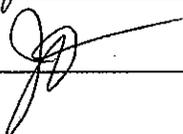
APPEAL RIGHTS

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 on 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: April 27, 2000

Mailed by: 

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Merit Employee Relations Board

Robert Burns, Vice-Chairman

Dallas Green, Member

John F. Schmutz, Esquire, Member