COPY

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
GARY P. COOKE,	)	**DOCKET NO. 04-08-311**
	)	
Grievant,	)	
	)	
v.	)	
STATE OF DELAWARE	)	**ORDER**
DEPARTMENT OF HEALTH AND	)	
HUMAN SERVICES (DHSS)	)	
	)	
Agency.	)	

BEFORE Brenda Phillips, Chairperson, and Board members, John F. Schmutz, Paul Houck, Bernice Edwards and Joseph Dillon constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* §5908(a).

APPEARANCES:

For the Grievant:
Gary P. Cooke, pro se

For the Agency:
Kevin Slattery
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

PROCEDURAL HISTORY

This is a timely filed appeal from a Step III decision, docket number 04-08-311, dated July 23, 2004. The Step III decision denied the grievance of the Appellant finding that the duties which are the subject of the grievance were within the principal accountabilities and related to the position held by the Appellant with the Department of Health and Social Services ("DHSS") as an investigator. In his grievance Mr. Cooke alleged that he was required to perform duties outside of his class in violation of Merit

Rule 3.0410.[1]. This is the Decision and Order of the Board after hearing opening statements from the parties and limited testimony from Mr. Cooke which, for the reasons stated below, denies the grievance and dismisses the appeal.

SUMMARY OF THE EVIDENCE

As a preliminary matter the affidavit of Dennis F. Mehrenberg was introduced as Appellant's Exhibit 1 without objection. State's Exhibit 1, Tabs A through J was also admitted without objection.

Gary P. Cooke testified that he is an employee with the Division of Audit Recovery Management Services. In August of 2003 he was informed that he would be doing overpayments. He submitted that he did not believe that he had the experience required to perform the duties. Mr. Cooke stated that he has refused to perform the work he considered to be auditor's work and the agency has not been asking him to do it. His requested relief is to not be forced to perform overpayments and calculate overpayments. He stated that he was not seeking additional compensation and understood that the Board could not promote him to an auditor.

Mr. Cooke stated that he was looking for a stop to some of the harassment for refusing to do something he did not feel he should be doing.

FINDINGS AND DISCUSSION

The Step 3 grievance decision describes the nature of the dispute giving rise to the grievance in the following language: "The Grievant alleges that his duties have been significantly changed and that he is being required to perform the duties of an Auditor without additional compensation. This contention is based on the Grievant being required

[1] Since the filing of the appeal the Merit Rules have been amended and the correct reference to the rule in dispute is now Rule 3.2.

to gather evidence beyond what he currently gathers, assemble additional cases for referral, and calculate overpayments." The relief sought by the Grievant as reflected in the Step III decision was to receive compensation equal to an Investigative Auditor (PG 11) or to have the additional job duties removed.

On the face of the documentation giving rise to this appeal, the Appellant appeared to have an arguable claim. However, after hearing opening statements from the parties and brief testimony from the Appellant as to the relief sought, it is clear that he has failed to state a claim upon which this Board can grant relief. Specifically, the Appellant testified that he was never actually required to perform the duties about which he is complaining and no adverse employment action has been taken against him as the result of his refusal to perform the additional duties.

Although the Appellant testified that he has been harassed as a result of his refusal to perform the duties that issue is not before the Board in this appeal. The limited focus is whether he was being required to perform duties outside of his classification in violation on the Merit Rules, and if so, the relief to be granted.

Therefore, the Board finds on the record before it that there is no factual basis to support Mr. Cooke's grievance and finds that there is no relief which can be granted.

The Board's authority extends only to matters which are properly before it in compliance with the applicable Merit Rules and Statutes, and therefore, Mr. Cooke's grievance appeal is denied and his grievance is dismissed.

ORDER

The grievance appeal of Gary P. Cooke is denied and his appeal is dismissed.

BY ORDER OF THE BOARD:

Brenda Phillips, Chairperson

John F. Schmutz, Member

Paul Houck, Member

Bernice Edwards, Member

Joseph Dillon, 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.

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.

February 21, 2006
Mailing Date

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Agency's Representative
Board Counsel