BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
MICHAEL ROLSAL,	)	**DOCKET NO. 05-10-343**
	)	
Grievant,	)	
	)	
v.	)	
	)	**ORDER**
DEPARTMENT OF CORRECTIONS,	)	
	)	
	)	
Employer.	)	

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

APPEARANCES:

For the Grievant:
Michael Rolsal, pro se

For the Employer:
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 3 decision, docket number 05-10-343, dated October 4, 2005. The Step 3 decision denied the grievance of the Appellant finding that the duties which are the subject of the grievance did not violate any of the work-place policies, orders or employment classification descriptions related to the position held by Appellant as a security officer in the Maximum Security Unit of the Department of Corrections ("the Department" or "DCC").

In his grievance Mr. Rolsal alleged that he was required to perform duties outside of his class in violation of Merit Rule 3.2 by being required to provide meals to inmates, a duty for which he has no specific certification or training. The Department contends the Appellant was only required to provide meals to the inmates in lock-down as part of a standing post order for the maximum security unit in which he is employed. He is only required to deliver trays of food prepared by Food Service to inmates who are in maximum security. The Department maintains that the Appellant was not working outside of his classification and, therefore, no violation of Merit Rule 3.2 exists.

This is the Decision and Order of the Board which, for the reasons stated below, denies the grievance and dismisses the appeal.

PRELIMINARY MATTERS

As a preliminary matter the Board heard argument from Mr. Rolsal and from the Department in regard to Mr. Rolsal's contention that he filed his appeal as a class action on behalf of the union and the officers, sergeants, corporals and CO's at DCC. The record establishes that Mr. Rolsal did write "Filed Class Action" on his grievance form in the space provided for "Signature of the Grievant" and signed his name in the space provided for the "Signature of the Representative." However, Mr. Rolsal cannot create an action that does not exist in the Merit Rules simply by writing class action on the forms. There is no provision in the Merit Rules for a class action grievance. The only individual who signed the grievance in any capacity was Mr. Rolsal. He was unable to present any documentation that he had authority to represent the union or any union member other than himself in these proceedings. Moreover, it is clear from the letter from Ms.

Whitehead as counsel for the Correctional Officers Association of Delaware ("COAD") that the union had determined not to provide support for Mr. Rolsal's grievance.

Finally, the State introduced as State's Exhibit 1, over Mr. Rolsal's objection, a copy of an e-mail from the Step 3 hearing officer representing that Bill Wharton, the authorized representative for COAD at the Step 2 and Step 3 levels, had acknowledged that Mr. Rolsal's grievance was not a "class action" grievance. Although hearsay, the e-mail was corroborated by the fact that the Step 3 grievance proceeded as to Mr. Rolsal's individual claim only. The Step 3 decision indicates that Mr. Wharton was present for the Step 3 hearing.

The Board, therefore, ruled that the matter before it was not a class action and allowed Mr. Rolsal to proceed in his individual capacity.

SUMMARY OF THE EVIDENCE

As a preliminary matter Mr. Rolsal introduced the following exhibits:

Appellant's Exhibit 1: COAD Official Grievance Form and attachments dated July 13, 2005.
Appellant's Exhibit 2: State of Delaware Correctional Center Post Order Number B128 effective June 15, 2005, pages 1 and 5.
Appellant's Exhibit 3: State Of Delaware Employee Performance Plan for the position of Correctional Officer/ Food Service Specialist; job Posting No. 06-CC3RR for the position of Correctional Officer/Youth Rehab Food Service Specialist 1; and, job Posting No. 06-CC1R for the position of Correctional Officer.

The Department submitted a binder of Exhibits that was marked collectively as State's Exhibit 2, Tabs A through I.

Michael Rolsal was sworn and referred the Board to Appellant's Exhibit 1 referencing Merit Rule 3.0, Classification of Positions. He stated that the Units 17, 18,

19, and 21 are working outside of their classification by being made to feed inmates. Specifically, he argued that the uniform classes listed in Article 3.1 are identified by the specialty they hold for which they may receive additional compensation. The listed specialty is in addition to being a correctional officer. For example, Correctional Officer/Food Service Specialists I, II, and III have a specialty in food service. He submitted that the first three uniforms on the list - Correctional Officer, Correctional Corporal and Correctional Sergeant – have no specialty designation and, therefore, cannot do what is needed to be a Food Service Specialist or any of the other areas of specialty on list.

Mr. Rolsal submitted that Article 4 lends itself to the same kind of analysis based on the designation given to the specific institution. Specifically, Food Service has its own designation as an institution. He argued that his job is at DCC and not at Food Service. In addition, people who apply to work in Food Service submit their applications directly to Food Service; they do not come under the Department of Corrections or any of the other institutions. The application is for Food Service and all of the responsibilities and qualifications are solely for that institution. He explained that he came in through DCC and did not get certified to work in Food Service. His certification is solely for the job duties of security operations at DCC. He argued that the institutions are totally different institutions and applicants go to an institution either for their specialty or for their job performance.

Mr. Rolsal presented his next argument based on the Appellant's Exhibit 3, the State of Delaware Employees Performance Plan for the Correctional Officer/Food Service Specialist 1. He argued that the performance plan for the Correctional Officer/

Food Service Specialist provides that they are responsible for "feeding of all of the inmates within the institution, while enforcing all Institution, Food Service, and Division of Public Health regulations, Policies, and Procedures." He testified that his job does not have the same requirements. He stated that he has "no clue" if he is violating a public policy or rule that is supposed to be enforced by Food Service. As a result, he is not only endangering himself but the people to whom he is delivering food placing them at risk of cross contamination resulting from coughing and sneezing that could occur in the food handling process. Mr. Rolsal argued that it is not in his job description or classification field to know the food handling guidelines that Food Service must abide by. He stated that he has no idea if what he is doing around the food is good or bad. He is simply following the directive in his chain of command to deliver the food. He added that his chain of command is to the warden, deputy warden, the security chief, his captain, staff lieutenant. He does not answer to anyone in Food Service. He submitted that no one from Food Service even checks to see if the policy is carried out correctly.

Mr. Rolsal highlighted additional responsibilities of the Correctional Officer/Food Service Specialist to train inmates to work in Food Service as outlined in item numbers 20, 21, and 22 of Appellant's Exhibit 3. He also identified the requirement to stay updated on all Foodservice-mandated certification as provided in item 29. In response to questioning from the Board, Mr. Rolsal agreed that he is not responsible for the preparation of the food.

Mr. Rolsal referred the Board to the job posting for a Correctional Officer/Food Service Specialist (Posting No. 06-CC3RR) and the posting for a Correctional Officer (Posting No. 06-CC1R). He emphasized that there is a big difference in the minimum

qualifications for a Correctional Officer/Food Service Specialist and a Correctional Officer. He argued that the additional responsibilities identified for the Correctional Officer/Food Service Specialist support his position that he is working outside of his classification.

Mr. Rolsal took exception to the finding in the Step 2 decision that his argument that a Correctional Officer should not be required to distribute food trays to inmates because they are not trained as Food Service Specialists, is as ridiculous as requiring a Untied Stated Postal Worker to deliver mail to inmates instead of Correctional Officers because they are not trained to deliver mail.

Mr. Rolsal testified that he is a Correctional Officer Sergeant and is a lead worker of the DCC Correctional Facility Security. He held the same title at the time he filed the grievance. He was promoted while the grievance was pending but his is still a Correctional Officer Sergeant. He will have been with the Department 25 years in April. Mr. Rolsal filed the grievance to dispute the order and directive of his lieutenant requiring him to do the job task of delivering food service trays to inmates. His position is that the delivery is part of what Food Service is responsible for and is not one of his initial functions as a Correctional Officer responsible for security. His job duties have nothing to do with Food Service. Mr. Rolsal stated that he performs the task of feeding the inmates because he is following an order from his chain of command and not because it is a job duty that he is responsible for.

Mr. Rolsal testified that there are 190 to 200 inmates in Building 21 to be fed when it is at full capacity. He stated that it involves more than just delivering trays. His position is that the "whole package" of cooking, feeding, temperatures and "all of that"

are the responsibility of Food Service. In addition, he stated that "And on top of that it's just me." He submitted that it has been going on too long and a review of the pays scales shows that the Correctional Officer/Food Service Specialist makes more than a Correctional Officer because of their specialty in food service.

Mr. Rolsal stated that the posting for the Correctional Officer (Posting No. 06-CC1R) shows the special requirements and then gives a breakdown of everything else required of a Correctional Officer. Post Order B128 (Appellant's Exhibit 2) shows what he is supposed to be doing in his class. Post Order B128 is for the area lieutenant. He stated paragraph I identifies the responsibilities and accountabilities for the buildings pertaining to the grievance. He has worked in all of the buildings (Buildings 17, 18, 19, 21, 22, and 23) at one point in time. His responsibilities and accountabilities as set forth in Post Order B128 included monitoring and recording "inmate activity for inmates assigned to the unit, including but not limited to feeding, showers, recreation, telephone calls, visits, commissary, medical, etc." He is also responsible for ensuring that tier doors remain locked and conducting security checks. He performed those functions as part of his responsibility as a Correctional Officer. He explained that when commissary comes down [to maximum security] he does not do commissary. The same is true for medical. He is there to monitor and make sure security is done while they are there.

In response to further questioning by the Board, Mr. Rolsal reiterated that delivering a tray and the food on the tray is the responsibility of Food Service. It is not his responsibility to give food that may be spoiled or contaminated to an inmate to eat. Although Mr. Rolsal agreed that he is not responsible for the preparation of the food, he does not believe that he should be responsible for it "period." It is the responsibility of

the Food Service crew. In his opinion, the Food Service Correctional Officers are no different than anyone else who has a specialty that goes along with their job description and they are responsible for all of the food activities including delivery of the food.

On cross-examination, Mr. Rolsal agreed that the units he worked in (17, 18, 19, and 21) were all maximum security units. At the time he filed his grievance, he was a sergeant and could have been working in any one of the units depending on staffing and assignments. He was promoted to a sergeant in 2005. When he was promoted to Sergeant he moved to unit 21 which was still a maximum security unit. Correctional Officers have been feeding inmates in those units ever since he has been there. Mr. Rolsal described maximum security as full function, except rather than moving from their unit to the compound for services, the services come to the building in which the inmates are restricted. He agreed that that although some of the maximum security units have designated eating areas they do not have a cafeteria where food is prepared, cooked and served. The food has to be brought to them.

On further examination, Mr. Rolsal agreed that Post Order B127 (State's Exhibit 1, Tab G) also applies to him and that item 2.c. requires him to feed inmates as directed by his Area Lieutenant or other higher authority. Item 2.e. requires him to provide linen and clothing exchange as directed by the Area Lieutenant or higher authority and item 2.g. requires him to maintain high standards of cell/tier cleanliness at all times. Finally, item 2.ff. requires him to perform any other tasks as required or directed by higher authority.

Mr. Rolsal identified his signature on a copy of the employee plan for Correctional Officers dated January 9, 2004.[1] He agreed that he is subject to the following performance standards:

1. Monitor and direct inmate activity during your assigned shift, report behavior and correct when necessary.
2. Maintain appropriate level of security by performing head count census, security check shakedowns, window door, fence checks and other security checks in accordance with established procedures and post orders.
3. Respond to emergency and/or critical situations as directed.
4. Be present for duty when scheduled for such. Attendance, reliability, punctuality are essential in a prison.
5. Prepare clear and concise daily logs and reports of activities and incidents on assigned shift.
6. Follow all established department policies and institution/facility procedures, post orders and emergency response plans.
7. Interact effectively with inmates, coworkers, supervisors and the public.
8. Communicate verbally and in writing in a clear and professional manner.
9. Ensure safety of staff, inmates and public by practicing and promoting safety.
10. Accurately and completely accomplish all other tasks as assigned.

Referring to the employee performance plan for the Correctional Officer/ Food Service Specialist outlined in Appellant's Exhibit 3, Mr. Rolsal agreed the he does not:

1. Demonstrate any knowledge in the set up, operation and shut down of kitchen equipment in his job.
2. Instruct inmate workers in the operation of various large scale kitchen equipment.
3. Operate the food service vehicle in accordance with established policies and procedures.
4. Maintain control of kitchen utensils, tools, sharps and equipment using established procedures.
5. Conduct kitchen shakedowns and inmate searches according to established policy and procedure except that he might be called on to do so with other Correctional Officers as well.
6. Ensure appropriate food use and portion control through department master menu.
7. Know and apply food service principles, practices and methods governing food preparation and related activities except that he maintains that he participates in the related activity of having to deliver the tray to the cell with the food.

[1] The State was permitted to cross-examine Mr. Rolsal on his performance plan over his objection.

Mr. Rolsal agreed that he has never applied for a Food Service Specialist position. He believes that the Food Service Specialists should be the ones to bring the food to the unit and serve the trays. As a Correctional Officer he should not be delivering the trays. His job is to monitor security. He agreed with the estimate that Food Service probably serves an inmate population of somewhere around 2400 outside of his unit but added that they have inmate help.

On final examination by the Board, Mr. Rolsal testified that maximum security has paid inmate help to do cleaning duties within the unit. The inmates always have to have someone with them. If the Food Service people delivered the food, he would have to be there monitoring, providing security and dropping the flap so the trays can enter the cells. He submitted that he is required to do more than just drop the flap and deliver a tray of food. He sometimes has to add milk cartons or juices and determine what goes with the dietary trays. The trays are wrapped up when they come to the unit.

RELEVANT MERIT RULE

The merit rule applicable to this grievance is Merit Rule 3.2 which provides:

> **Merit Rule 3.2** Employees may be required to perform any of the duties described in the class specification, any other duties of a similar kind and difficulty, and any duties of similar or lower classes. Employees may be required to serve in a higher position; however, if such service continues beyond 30 calendar days, the Rules for promotion or temporary promotion shall apply, and they shall be compensated appropriately from the first day of service in the higher position.

FINDINGS AND DISCUSSION

The exhibits introduced into evidence were made part of the record and considered by the Board in making its decision. At the conclusion of Mr. Rolsal's direct

case the Department moved for a dismissal/directed verdict arguing that Mr. Rolsal has failed to meet his burden of establishing a prima facie case that he was required to perform duties in a higher classification during the time period relevant to his grievance. The Department submits that Merit Rule 3.2 requires Mr. Rolsal to demonstrate that the duty of delivering food trays was not similar to other job duties, that the duty was more difficult than his other job duties and that he actually performed the higher duty for more than 30 days. The Department argues that Mr. Rolsal has failed to meet his burden of establishing a violation of Merit Rule 3.2. The Board agrees.

Mr. Rolsal contends he was required to perform the duties of a Correctional Officer/Food Service Specialist in that he was required to deliver trays of food to inmates in the maximum security unit where he worked. He asserts that the activity of delivering the trays is the exclusive responsibility of the Correctional Officer/Food Service personnel. He does not believe that he should have to do anything related to the activity of food service.

Mr. Rolsal does not prepare the food, he simply delivers what he is given to provide to the inmates including wrapped trays of food, milk cartons and juices. As argued by the Department, that delivery function is not unlike his duty to deliver linens or to deliver mail to inmates in the maximum security unit. Posting No. 06-CC1R (Appellant's Exhibit 3) provides that one of the essential functions of the Correctional Officer position is to perform related work as required. In addition, Mr. Rolsal agreed that he is subject to the provisions of Post Order B127 (State's Exhibit 2, Tab G) which requires him to feed inmates as directed by his Area Lieutenant or other higher authority, provide linen and clothing exchange as directed by the Area Lieutenant or higher

authority, to maintain high standards of cell/tier cleanliness at all times and to perform any other tasks as required or directed by higher authority.

Mr. Rolsal is clearly not performing the essence of the job of the Correctional Officer/Food Service Specialist as outlined in Posting No.06-CC3RR (Appellant's Exhibit 3) nor is he expected to do anything other than delivery. When specifically asked whether he performed each of the functions outlined in the posting he agreed that he did not with the one exception related to delivery the trays of food. The Board finds that the activity of delivering food trays does not require the special food service knowledge and expertise of a Correctional Officer/ Food Service Specialist. The Board expressly rejects Mr. Rolsal's argument that performing any related activity throws him into the higher Food Service classification.

In addition, Mr. Rolsal acknowledged in response to questions about his own signed performance plan that he is required to follow all established department policies and institution/facility procedures and post orders. Post Order B127 specifically provides that one of the duties and responsibilities of a Correctional Officer in maximum security is to feed inmates as directed by Area Lieutenant or higher authority.

Based on the foregoing, the Board finds that Mr. Rolsal has failed to demonstrate a violation of Merit Rule 3.2. The Department's Motion to Dismiss/ Motion for Directed Verdict is granted.

ORDER

The grievance appeal of Michael Rolsal is denied and his appeal is dismissed.

BY ORDER OF THE BOARD:

Brenda Phillips, Chairperson

John F. Schmutz, Member

Joseph D. 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.

Feb 23, 2007

Mailing Date:

Distribution:
Original: File
Copies: Grievant
Agency's Representative
Board Counsel