



## FACTUAL BACKGROUND

The underlying appeal in this matter arises from a Step 3 decision adverse to Susan Craig, Cindy Jester, Patricia Twilley and Judy Zumbo (hereinafter "Grievants"). The Grievants are employed by the DHSS, Division of Public Health, as compliance nurse and are responsible for ensuring compliance with federal and state regulations for 13 different acute healthcare settings (agencies and facilities) including (1)hospitals, (2)home health care agencies, (3)free standing surgery centers/ambulatory surgical centers, (4) hospices, (5) prescribed pediatric extended care centers, (6) end stage renal dialysis facilities, (7) free standing emergency centers, (8) adult day care facilities, (10) outpatient physical therapy providers, (11) portable x-ray providers, (12) free standing birthing centers, and (13) managed care organizations [until 12.31.06].

The Grievants contend that they suffered a "de facto" demotion or reduction in rank when other nursing class titles were reclassified to a higher pay grade as the result of a maintenance review of the registered nursing classification series in 2002. At that time, the Grievants were re-classified to the position of registered nurse III—the highest, non-supervisory level in the series.

By Order dated April 18, 2005 the MERB rejected the findings of its independent reviewer and upheld the grievance after finding that the duties of the compliance nurse justified the reactivation of the class within the register nurse class series. The Order provided that "[t]o the extent that the reactivation of the "Compliance Nurse" classification effective July 1, 2002 should result in any change in the pay grade assigned to that classification that determination would not be subject to appeal to the Merit Employee Relations Board."

On July 5, 2005, the Office of Management and Budget ("OMB") reactivated the compliance nurse classification with no change in pay grade finding that there were no changes in the class specification's job accountabilities, duties, knowledge and skills.

On October 11th and 19th, 2005, the Grievants filed their respective grievances alleging violations of Merit Rules 10.5 ("Demotion"), 12.3 (written notification of demotion provision), and 3.1 ("Classification of Positions").

By decision dated February 27, 2006, the Step 3 Hearing Officer concluded that there was no Merit Rule entitling the Grievants to the relief they were seeking. Specifically, the Grievants sought to have the Compliance Nurse class title analyzed for appropriate placement within the Registered Nurse class series through a process performed by a committee composed of "at least three State managers, administrators, and/or supervisors...one of which must be the Director of the Office of Health Facilities Licensing and Certification."

### **ARGUMENT OF THE PARTIES**

The State argues three separate grounds for dismissal on behalf of the Employer. First, the State submits that the Grievants lack standing to bring their appeal before the Board because the Merit rules only all provide redress for alleged wrongs that affect an individual's status in his or her present position. In this case the State argues that the Grievants successfully appealed their classification following the 2002 maintenance review and Employer did what it was directed to do by reactivating the compliance nurse classification with the same duties and pay grade. Therefore, the State contends that there has been no change in Grievants' status and there is nothing to grieve.

Second, the State argues that the Board lacks jurisdiction to hear the appeal even if the Grievants have standing because there has been no demotion "de facto" or otherwise. The Grievants

have remained at a pay grade 15 throughout the maintenance review and have had no change in their duties. The State argues that even if the Board accepted the "de facto" demotion alleged by the Grievants, the Merit Rules do not provide a remedy because demotion is defined in the Merit Rules as the movement of an employee from a position in a class of a higher pay grade to a position in a class of a lower pay grade "through a process other than reclassification."

The State submits that the Board lacks jurisdiction to grant the relief requested by the Grievants to essentially order another maintenance review or to review a critical reclassification. The State argues that the Grievants' true objection is to the review of their classification is that HRM did not re-classify their positions to a classification with a higher pay grade.

Finally, the State argues that the Grievants' claims are res judicata and the Grievants are, therefore, precluded from raising the exact same arguments before the MERB in the present appeal that they raised at the previous hearing on April 7, 2005. Specifically, the State points to page 26 of the transcript of the 2005 hearing where the agency counsel, Ms. Kirshon, pointed out that the reclassification from compliance nurse to registered nurse III was not a demotion. The Grievants went from a pay grade 15 to a pay grade 15. The State notes that in response, the Grievants' chosen spokesperson, Ms. Zumbo, stated on page 30 of the transcript that they would be better off "if you just took us back out and made us compliance nurses and we went and grieved the fact that it was effectively a demotion...." On page 32, Ms. Zumbo went on to state: "I do believe I correctly describe it as the effect of a demotion ... I cannot laterally transfer back into what I was doing before [psychiatric nurse supervisor] ... [i]f I go back to the position I came from, I am promoted." (See Exhibit "E" attached to the State's Motion to Dismiss). The State argues that the Grievants are

essentially arguing that because other people were reclassified as part of the maintenance review to higher pay grades and they were not, they suffered a demotion because they cannot laterally transfer back into position they may have held at one point in time.

The State noted that when questioning the agency representative about re-activating the compliance nurse classification, one MERB member correctly pointed out that the analysis of the appropriate pay grade level for the re-activated class was not for the MERB to determine. (*See* Exhibit "F" attached to the State's Motion to Dismiss"). In addition, the MERB reiterated that fact in the last sentence of its Order when it stated: "[t]o the extent that the reactivation of the "Compliance Nurse" classification effective July 1, 2002 should result in any change in the pay grade assigned to that classification that determination would not be subject to appeal to the Merit Employee Relations Board."

In response to the State's arguments with regard to standing, the Grievants submitted that they are seeking the opportunity for a hearing to demonstrate to the Board that they have been impacted and demoted within a series. Their contention is that they have suffered a reduction in rank because their position within the class series is now lower than it was before.

With regard to the issue of jurisdiction, the Grievants submitted that they are not asking the Board to do an analysis and assign a pay grade. They believed that when Board directed State Personnel to reactivate their Compliance Nurse classification their initial flawed classification would be reviewed. However, they argue that no one ever really investigated their job prior to doing what they did the first time. They are not seeking a critical reclassification. They are requesting to have done what should have been done the first time when they were erroneously classified.

Finally, Grievants submit that the issue is not an attempt at a second bite of the apple on an issue that is res judicata. When they appeared before the Board in regard to their classification under the maintenance review they were asking the Board to determine what position they should be in. Grievants' acknowledge that they cannot grieve their pay grade. However, they contend that they have been demoted by being reduced in rank and that is the issue they are seeking to present to the Board. They were not given all of the advantages of their peers when those peers were recognized for their specialty and skill level.

### DISCUSSION

The Board heard argument from both parties. The Board is persuaded by the State's arguments in support of its motion to dismiss. The Board is a creature of statute, 29 Del. C. ch. 59 (1991). The Board's power and authority are derived exclusively from the statute, and its power, therefore, extends only to those cases which are properly before it in compliance with the statutory law. *Maxwell v. Vetter*, 311 A.2d 864 (Del.Supr. 1973).

The Grievants correctly acknowledge that there is no statutory provision or Merit Rule allowing for the appeal of an assignment of a pay grade to a particular classification. As such they, acknowledge that the Board has no standing to hear an appeal based on the assignment of a pay grade. Grievants contend that they are not appealing the pay grade assignment. Their appeal is based on their position that they have been reduced in rank and de facto demoted.

The Board is sympathetic to the Grievants' frustration stemming from their belief that their management has not thoroughly investigated their jobs to determine their appropriate level. However, in 2005 this Board granted the Grievants' appeal of their classification during the

maintenance review process and directed state personnel to reactivate the Compliance Nurse classification. The record reflects that the Grievants argued that they would be better off being made Compliance Nurses and then grieving that they were effectively demoted. This Board directed the reactivation of the Compliance Nurse classification but clearly advised the Grievants that "[t]o the extent that the reactivation of the "Compliance Nurse" classification effective July 1, 2002 should result in any change in the pay grade assigned to that classification that determination would not be subject to appeal to the Merit Employee Relations Board."

Grievants management reactivated the Compliance Nurse classification as directed but made no changes to the duties or pay grade. There was no change in the Grievants' status as required under the Merit Rules to support an appeal. Even, if the Board were to accept Grievants' argument that they suffered a de facto demotion, the Merit Rules do not provide a remedy because demotion is defined in the Merit Rules as the movement of an employee from a position in a class of a higher pay grade to a position in a class of a lower pay grade "through a process other than reclassification."

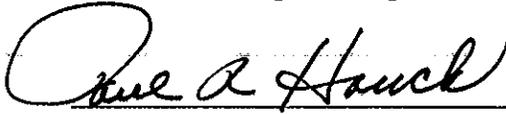
Grievants were not promoted as a result of the reclassification, however, that does not mean that they were demoted as defined in the Merit Rules. They asked to be removed from the class they now argue that their position is lower than. Contrary to the Grievants' arguments, the Board finds that the real issue in this appeal is based on the assignment of their pay grade. The Board is not saying that the Grievants' may not be entitled to a higher pay grade and the State is encouraged to look at their situation. However, the Board has no jurisdiction over pay grade, no jurisdiction to require another maintenance review and no jurisdiction to order a critical reclassification.

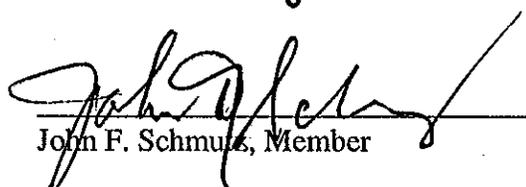
For the reasons stated above, the Board finds that Grievants' lack standing to pursue their appeal on the basis of demotion and further that this Board has no jurisdiction to consider the appeal.

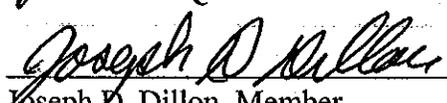
The State's Motion to Dismiss is, therefore, **GRANTED**.

IT IS SO ORDERED THIS 15 DAY OF February, 2007.

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Brenda C. Phillips, Chairperson

  
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Paul R. Houck, Member

  
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John F. Schmutz, Member

  
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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.

Mailing Date: Feb. 23, 2007 *JS*

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