**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD**

**OF THE STATE OF DELAWARE**

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| MICHAEL ROGERS and<br>JAMES D. DeCARLO, | ) | |
| Employee/Grievants, | ) | **Consolidated Docket Nos.**<br>**07-09-401 and 07-10-402** |
| v. | ) | **DECISION AND ORDER** |
| DEPARTMENT OF HEALTH AND<br>SOCIAL SERVICES, | ) | |
| Employer/Respondent. | ) | |

After due notice of time and place, these appeals came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on September 23, 2009 in the Delaware Room at the Public Archives Building, 102 Duke of York Street, Dover, DE 19901.

**BEFORE** Martha K. Austin, Chair, John F. Schmutz, Joseph D. Dillon, Paul R. Houck, and Jacqueline Jenkins, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Michael Rogers and James D. DeCarlo
Employee/Grievants *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Health and Social Services

## FINDINGS OF FACT

In November 2006, the Office of Management and Budget (OMB) conducted a maintenance review of investigator positions statewide. At the time, both the employee/grievants, Michael Rogers (Rogers) and James D. DeCarlo (DeCarlo), worked for Audit and Recovery Management Services (ARMS) in the Division of Management Services (DMS), Department of Health and Social Services (DHSS). Rogers was a paygrade 15.

As a result of the maintenance review, OMB created a Career Ladder for investigators: Investigator I (paygrade 10); Investigator II (paygrade 11); and Investigator III (paygrade 13). OMB classified both Rogers and DeCarlo as an Investigator I. Rogers retained his paygrade 15 salary (around $45,000 a year).

The promotional standards for the Investigative Series provide: "Employees may be promoted through the career ladder once minimum qualifications and promotional standards have been met." For promotion to Investigator II, the employee must successfully demonstrate: 1. One year experience as an Investigator I or comparable work experience; 2. proficiency in independently conducting investigations; 3. proficiency in completing complex investigations in accordance with applicable laws, rules and regulations by analyzing, planning, conducting, and making appropriate recommendations under the close supervision of a technical supervisor; 4. proficiency in writing investigative reports and ensuring reports are organized, clear, concise, complete and accurate; 5. proficiency in performing administrative and legal activities to recover benefits or payments; 6. Proficiency in making

determinations of the propriety of benefit payments and completing documents for overpayment claim establishment in accordance with federal and/or state laws, rules, regulations and policies; and 7. Successfully complete DELJIS Enforcer Training, LEISS Training/Report Writing, Reid Technique of Interview and Interrogation, and Fraud Investigation Techniques.

Rogers and DeCarlo claim they have performed all of the duties described in the class specification for Investigator II since their reclassification as Investigator I and are entitled to "be compensated appropriately from the first day of service in the higher position." Merit Rule 3.2. [1]

After unsuccessfully grieving the first three steps, DeCarlo appealed to the Board on September 27, 2007 under Merit Rule 3.2. After unsuccessfully grieving the first three steps, Rogers appealed to the Board on October 15, 2007 under Merit Rule 3.2.

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[1] In addition to compensation, Rogers and DeCarlo asked to be reclassified to Investigator II. Because they are in career ladder positions, "[m]ovement from one level to another within Approved Career Ladders is a promotion, not a reclassification." Merit Rule 3.3.3.

## CONCLUSIONS OF LAW

Merit Rule 3.2 provides:

> **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.**

Merit Rule 3.3.3 provides:

> **When a position is reclassified into a Career Ladder, placement of the position incumbent is based on promotional standards approved by the Director. Movement from one level to another within Approved Career Ladders is a promotion, not a reclassification.**

Merit Rule 19 defines "Career Ladder" as "a hierarchy of classes within a class series, established and approved by the Director, which permits employee movement along a career path without competition upon meeting all promotional standards."

DHSS argued that Rogers and DeCarlo should be estopped from appealing under Merit Rule 3.2 because they did not timely appeal their reclassification to Investigator I. The Board has some concerns about employees using Merit Rule 3.2 as a "back door" to appeal to the Board when their real claim is over their reclassification. However, the Board does not have to decide that issue because the Board concludes as a matter of law that Rogers and

DeCarlo fail to state a claim under Merit Rule 3.2.

The Board concludes as a matter of law that Merit Rule 3.2 does not apply to Career Ladder positions. In a Career Ladder position, the employee has the opportunity for a non-competitive promotion by satisfying all of the promotional standards for the next higher position. In order to do that, the employee must successfully perform the duties of the higher position.

Rogers and DeCarlo cannot have it both ways. They cannot enjoy the benefit of a non-competitive promotion to Investigator II by meeting the standards for promotion to that position, and at the same time claim compensation for working at a higher class under Merit Rule 3.2.

Both Rogers and DeCarlo acknowledged that they have never applied for a Career Ladder promotion to Investigator II. If they apply and DHSS does not promote them, then they may be able to grieve under the Merit Rules. Until then, the Board concludes as a matter of law that they have not stated a claim for a violation of the Merit Rules or statutes.

**ORDER**

It is this 15th day of October, 2009, by a unanimous vote of 5-0, the Decision and Order of the Board to deny Rogers' and DeCarlo's appeals.

Martha K. Austin
Chair

Joseph D. Dillon
Member

Paul R. Houck
Member

John C. Schmutz
Member

Jacqueline Jenkins
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 on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must 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.
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> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
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> (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.
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> (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 16, 2009

Distribution:
Original: File
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Agency's Representative
Board Counsel

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