

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD  
OF THE STATE OF DELAWARE**

ROBERT K. TUCKER,	)	
	)	
Employee/Grievant,	)	
	)	<b>DOCKET No. 10-10-486</b>
v.	)	
	)	
FAMILY COURT OF THE STATE	)	
OF DELAWARE,	)	<b>DECISION AND ORDER</b>
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on April 7, 2011 at the Public Service Commission Conference Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

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

**APPEARANCES**

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

Robert K. Tucker  
Employee/Grievant *pro se*

Kevin R. Slattery  
Deputy Attorney General  
on behalf of the Family Court  
of the State of Delaware

## **BRIEF SUMMARY OF THE EVIDENCE**

The Board heard legal argument on the motion of the Family Court of the State of Delaware (Family Court) to dismiss the appeal of the employee/grievant, Robert K. Tucker (Tucker), for lack of jurisdiction and failure to state a claim upon which relief can be granted. The Family Court attached to its motion to dismiss fifteen documents marked for identification as Exhibits A-O.

## **FINDINGS OF FACT**

By Order dated May 10, 2010, the Chief Judge of the Family Court (Chandlee Johnson Kuhn) designated Judicial Assistants and Court Security Officers as process servers. The Chief Judge based her Order on Family Court Civil Rule 4 which provides: “Service of process shall be made by the sheriff to whom the writ is directed, by a sheriff’s deputy, by a deputy designated by the Chief Judge or by some other person specially appointed by the Court for that purpose.”<sup>1</sup>

On June 16, 2010, the United Food and Commercial Workers, Local 27 filed a grievance on behalf of Tucker claiming the Chief Judge’s Order violated a collective bargaining agreement. After a pre-arbitration hearing on August 4, 2010, the hearing officer determined that the grievance was for working out of class and controlled by Merit Rule 3.2, not the collective bargaining agreement. The hearing officer determined “that the duties within the class specifications for the Security Staff reasonably encompass serving legal process in the manner described. Since serving process is a

---

<sup>1</sup> According to the Family Court, the May 10, 2010 Order reiterated an earlier November 2, 1989 directive from Chief Judge Robert O. Thompson outlining the job responsibilities of Judicial Assistants to include: “Execution of all lawful orders, warrants, and service of other process directed to him/her by a Judicial Officer of the Family Court of the State of Delaware.

similar duty, no violation of Merit Rule 3.2 has been established.”

As a result of negotiations between the Family Court and the union, the Family Court agreed that Judicial Assistants and Court Security Officers “will not be asked to serve outside the courthouse and its curtilage.”

On October 25, 2010, the Board received Tucker’s appeal. Tucker stated in his appeal that he was the “designated member of the security unit and all others named herein agree to said appeal” and listed fourteen names with signatures. Next to the question on the appeal form “Identify the Merit Rule(s) Alleged to have been Violated,” Tucker wrote “3.2.”

In a Decision and Order dated January 14, 2011, the Board decided that Tucker’s appeal was timely, but decided that the Board did not have “legal authority to allow Tucker to pursue an appeal on behalf of other Family Court employees who have not filed their own grievances with the Board under the Merit Rules.” Decision at p.5 (quoting *Tucker v. Family Court*, MERB Docket No. 08-03-418 (Oct. 2, 2008) at p.6)).<sup>2</sup>

On March 14, 2011, Tucker amended his grievance to assert a claim under Merit Rule 1.2 “which was committed by Chief Judge Chandlee Johnson Kuhn when she used Rule 4C to name Judicial Assistants & Court Security Officers Process Servers for the Court.”

At the hearing on April 7, 2011, Tucker acknowledged that since the Chief Judge issued her May 10, 2010 Order he has never served process on behalf of the Family Court.

### **CONCLUSIONS OF LAW**

---

<sup>2</sup> The other fourteen Family Court employees have since filed individual grievances with the Board.

Merit Rule 1.2 provides:

**In the event of a conflict with the Delaware Code, the Code governs. In the event of conflict with individual agency regulations, these rules take precedence. In the event of conflict with inter-governmental Merit System Standards, the Standards govern federally funded positions subject to the provisions of the Intergovernmental Personnel Act. Federal laws superseded any conflicting state laws.**

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 and 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.**

The Family Court moved to dismiss Tucker's Merit Rule 1.2 claim as untimely because he did not assert the claim in the Step 3 hearing so there is no Step 3 decision on that claim to appeal to the Board under Merit Rule 18.9.

The Board does not have to decide whether Tucker's Merit Rule 1.2 claim is timely because the Board concludes as a matter of law that Tucker failed to state a claim for which relief can be granted under Merit Rule 1.2.

To state a claim under Merit Rule 1.2, the grievant must allege there is an applicable state statute which is in conflict with an otherwise applicable Merit Rule so that the statute governs, not the Merit Rule. According to Tucker, sheriffs are required by statute to serve process on behalf of the courts (*see* 10 *Del. C.* §§ 2104, 2105). Tucker argued that Family Court Civil Rule 4 – which

authorizes the Chief Judge to appoint Judicial Assistants and Court Security Officers to serve process – conflicts with those statutes and under Merit Rule 1.2 the statute controls and only sheriffs can serve process on behalf of the Court. In other words, Tucker challenges the Chief Judge’s legal authority to issue her May 10, 2010 Order.

To state a claim under Merit Rule 1.2, however, Tucker must show that a statute conflicts with a **MERIT** Rule, not a Family Court Rule. The only other Merit Rule cited by Tucker is Merit Rule 3.2 but that has nothing to do with service of process. The Board concludes as a matter of law that Tucker failed to state a claim upon which relief can be granted under Merit Rule 1.2.

The Board also concludes as a matter of law that Tucker failed to state a claim for which relief can be granted under Merit Rule 3.2.

Tucker argued that serving process on behalf of the Family Court constitutes serving in a “higher position” because those duties are also performed by deputy sheriffs whose salaries are higher than the salary of a Judicial Assistant. The Family Court argued that a “higher position” must be another position within the classified service. According to the Family Court, deputy sheriffs are not merit or even state employees so Tucker cannot state a claim as a matter of law under Merit Rule 3.2 using the duties of a deputy sheriff as the “higher position.”<sup>3</sup>

Merit Rule 3.2 provides that an employee may be required: (1) “to perform any of the duties prescribed in the class specification”; (2) “any other duties of a similar kind and difficulty”; (3) “any

---

<sup>3</sup> Tucker argued that the Family Court has provided additional compensation under Merit Rule 3.2 to judicial case workers when they take on the responsibilities of a judicial secretary (who is not a merit employee) for more than thirty days, so it is appropriate to do the same when a Judicial Assistant takes on the responsibilities of a deputy sheriff. A judicial secretary, however, has a merit-comparable title and paygrade for salary purposes which a deputy sheriff does not.

duties of similar and lower classes”; or (4) “to serve in a higher position.” The term “higher position” is not qualified by the term “class specification” or “class.” The Board believes that each section of the rule should be construed *in pari materia* and the rule only makes sense if a “higher position” is a higher class or class specification within the Merit system. Merit Rule 19 defines “class” as “all Merit positions sufficiently similar in duties.” Merit Rule 19 defines “class specification” as a written description of the distinguishing characteristics of all positions in a class.” By those definitions, a “higher position” for purposes of Merit Rule 3.2 is a higher class within the Merit system or a Merit-comparable position.

Even if the Board considered a deputy sheriff as a higher position for purposes of Merit Rule 3.2, Tucker would have to show that he performs substantially all of the same duties as a deputy sheriff, not just service of process. By statute, another significant duty of sheriffs is the sale of property under execution of process. *See 10 Del. C. §2106.* Tucker would also have to show that serving process requires a significant percentage of his time. Tucker acknowledged that he has spent zero percent of his time serving process on behalf of the Family Court since the Chief Judge’s May 10, 2010 Order. And unlike deputy sheriffs – who may be called on to serve process throughout New Castle County – the Family Court may require a Judicial Assistant to serve process only within the courthouse or immediately outside.

For all these reasons, the Board concludes as a matter of law that Tucker failed to state a claim for which relief can be granted under Merit Rule 3.2.<sup>4</sup>

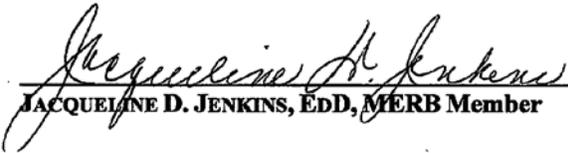
---

<sup>4</sup> The Board notes that Tucker is not without a remedy. If the Family Court agrees, the Court can ask the Office of Management and Budget for a critical reclassification of his position.

**DECISION AND ORDER**

It is this **13th** day of April, 2011, by a unanimous vote of 4-0, the Decision and Order of the Board to dismiss Tucker's appeal.

  
\_\_\_\_\_  
**MARTHA K. AUSTIN, MERB Chairwoman**

  
\_\_\_\_\_  
**JACQUELINE D. JENKINS, EDD, MERB Member**

  
\_\_\_\_\_  
**JOHN F. SCHMUTZ, MERB Member**

  
\_\_\_\_\_  
**PAUL R. HOUCK, MERB 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's 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: **April 13**, 2011

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

OMB/HRM