BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

IN THE MATTER OF DONNA SAPP Grievant, v. STATE OF DELAWARE, DEPARTMENT OF ADMINISTRATIVE SERVICES Agency	**DOCKET NO. 95-03-15** **OPINION AND ORDER**

BEFORE Woo, Chairperson, Burns, Vice-Chairperson, Bowers, Fullman and Green constituting a lawful quorum of the Board pursuant to 29 Del Code, Section 5908(a).

And now this 6th day of December, 1995, the above-referenced matter being before the Board on October 19, 1995, the Board makes the following Findings of Fact and Conclusions of Law; to wit:

SUMMARY OF EVIDENCE

1. William P. McDaniel II was sworn and testified that he is an Environmental Protection Officer (EPO) for the State of Delaware employed by the Department of Natural Resources and Environmental Control (DNREC). Officer McDaniel testified that DNREC handles the enforcement of asbestos regulations, both through the regulations promogulated by DNREC and licensing requirements that are handled through the Department of Administrative Services. Donna Sapp is the contact person at Administrative Services and Officer McDaniel testified that his contacts with Ms. Sapp primarily included checking into backgrounds and licenses of people that conduct asbestos work, both companies and individuals. Officer McDaniel testified that Ms. Sapp is the point person for contact from DNREC's EPO's and that she has extensive knowledge of the state and federal regulations with regard to asbestos abatement. Officer McDaniel further testified that in the environmental law enforcement field there are many gray areas and that the environmental protection officers use Ms. Sapp's familiarity with the program when they make a decision to either make an arrest or to give a warning with regard to someone who may have violated the licensing provisions of Delaware law regarding asbestos

abatement. Officer McDaniel further testified that this is more than what a clerk, typist or a secretary would do but more the equivalent of a program manager at DNREC.

2. Upon cross-examination Officer McDaniel testified that complaints come in from the public with regard to asbestos abatement and that an EPO is sent out to visit the work site. Officer McDaniel further testified that that EPO usually contacts Ms. Sapp to determine whether or not the subject is properly licensed and whether or not there have been any previous complaints against the subject.

3. On examination by the Board, Officer McDaniel said that of all the asbestos arrests that he made in the last year, numbering twenty-one (21), he only had to go to court one time to testify.

4. On redirect examination, Officer McDaniel testified that generally on the asbestos complaint, one of the main reasons for going in is the improper handling of asbestos and that he relies on Ms. Sapp for her historical knowledge about the actor or subject and to compare the violation that he is investigating at the present time with other previous complaints or violations that the subject or actor has committed in the past.

5. On recross examination, Office McDaniel testified that Ms. Sapp has never gone in the field with him and that he could contact Mr. Foster at the office if he had any questions about asbestos as well.

6. Ronald Steven Hercha was sworn and testified that he is the Vice President of Central Delaware Training Academy in Dover, Delaware, one of the three (3) agencies within the state of Delaware which is authorized to train asbestos workers to obtain their license and to retain their licenses. Mr. Hercha testified that he has regular contact with Ms. Sapp and that he has her come talk to each of the classes as she is recognized as the program manager for the licensing of all asbestos licensing in the state of Delaware. Mr. Hercha further testified that he contacts Ms. Sapp when a student has a question about the type of training he needs, whether it be recertification or a refresher course or would have to take the entire curriculum over again for having an elapsed license.

7. Mr. Hercha testified that he us familiar with the term "program manager" as he was employed by the State of Delaware, Department of Personnel to write and evaluate job classifications as part of the Hay Studies and that previously he was a program manager for the State of Delaware at Delaware Technical and Community College, Terry Campus in Dover. Mr. Hercha testified that one of the reasons he considers Ms. Sapp to be a program manager equivalent is the number of people who are licensed -- 3700 with an "A" license and 6700 with a "B" license as she is the person who updates and maintains the files on all license-holders for asbestos abatement in the state of Delaware. Mr. Hercha further testified that Ms. Sapp exercises a level of independent decision-making and judgment to the extent that she is working with other states in the region to set up a reciprocity program and has assisted in establishing the computerization of the asbestos office.

8. On cross-examination Mr. Hercha testified that an asbestos worker "A" is an asbestos professional, someone who makes his entire livelihood in the field of asbestos abatement and that a "B" worker is someone whose profession is other than asbestos abatement but within the normal course of his work he may come across asbestos and has to be licensed in order to be able to properly deal with it. An example of Class B workers are: people who do roofing, siding, and other similar type jobs. Mr. Hercha testified as to the types of work that Ms. Sapp performs and that her visits to the training class helps establish her as the focal point for asbestos licensing in the State. On examination from the Board, Mr. Hercha testified he could not recall any times he had to go to Ms. Sapp's supervisor to resolve a licensing problem

9. Doyle Tiller was sworn and testified that he is an industrial hygienist environmental health specialist within the Department of Administrative Services. Mr. Tiller testified that Ms. Sapp is basically the license coordinator for the asbestos program and that she handles all applications of the licensing from the private and commercial sector, both contractual and personnel. Mr. Tiller further testified that he has observed Ms. Sapp on a daily basis to make independent judgments or decisions that change from day-to-day and situation-to-situation and that he has been employed by the Department of Administrative Services for the last two (2) years. On cross-examination, Mr. Tiller testified that his job is mostly working on the asbestos program dealing with the technical industrial hygiene-type questions evolving around asbestos abatement; for example, hygiene facilities, respiratory protection and he also handles indoor air

quality programs. Mr. Tiller further testified to his knowledge of the AHERA and ASHARA programs and that the training that was designated under AHERA was made applicable to the commercial sector, both public and commercial under ASHARA. The ASHARA Program extended the training required to those areas while in Delaware, according to Mr. Tiller, it would also extend the training requirement as well. Upon cross-examination by the Board, Mr. Tiller further explained the requirements of the federal regulations under ASHARA. Initially, training was being required, but not necessarily licensing any additional people. Mr. Tiller further testified that, in the asbestos office, the way operations work is that he is the engineering and technical side and she is the licensing side, so he would consider the two positions equal. On re-direct, Mr. Tiller testified that he was familiar with some other Administrative I positions within the Department of Administrative Services but, to the extent that he was personally familiar, it did not appear that they had exercised the same degree of independent judgment-making and independent-thought that Ms. Sapp's position required her to do so. On re-direct, Mr. Tiller testified that there were five (5) people in office of asbestos administration and that each had a different job function and that on occasions they meet as a group to determine how to respond to new federal guidelines or federal regulations as they are issued.

10. Robert Foster was sworn and testified that he the administrator of the asbestos and underground storage tank programs for Department of Administrative Services and has been in the position for the past nine (9) years. Mr. Foster testified that the original starting date of the asbestos program was 1985 and the program grew with AHERA, the asbestos hazard abatement act of 1987 which required the inspection of asbestos in all public and private schools, the training for that program, the requirements of certification of contractors, supervisors and workers who work in the public and private schools. In 1994 the Asbestos Schools Hazardous Abatement Reauthorization Act (ASHARA) expanded ASHERA into the public building and the industrial sector, including commercial buildings. Mr. Foster testified that Delaware had its own toxic substance act in 1983 so Delaware was already doing some of this work when the federal law enacted but that Ms. Sapp is the primary person handling the licensing and he handles the inspections in the program. Mr. Foster testified that Ms. Sapp's duties include licensing and certification of contractors, supervisors and workers and working with training providers and that she is also working with Region 3, the states of Pennsylvania, Virginia, West Virginia, District of Columbia and Maryland to coordinate the training program and some

reciprocity. Mr. Foster testified that he believed that Ms. Sapp is doing work equivalent to a program manager as he used to be a program manager with the State prior to taking his current position. Mr. Foster testified to the job duties that show that Ms. Sapp uses independent judgment and determinations in that once an individual has completed the proper training required he brings the certificate of training to Ms. Sapp. She is required to check the dates, make sure that the training provider is current and is not suspended by another state or by Delaware. After checking the training credentials Ms. Sapp then checks the physical credentials, making sure that they are in order and that the applications and photos taken are proper to make the photo I.D. badges. Some of the problems that Ms. Sapp finds during this determination include where a person has "doctored" his training certificate by "whiting out" and running it through a copy machine or not having the proper physical or CPR certification. Mr. Foster testified that Ms. Sapp also goes out to the training providers to ensure that they are complying with State and federal law and that she instructs the training classes on the proper procedures to become certified in Delaware, including photographs and the I.D. badges. Mr. Foster states that he delegates all licensing responsibilities to Ms. Sapp and accepts her determination as appropriate. On cross-examination, Mr. Foster testified there has been a reduction of State and federal funds for the asbestos program since 1987 as the program now requires only that asbestos be removed when there is exposure to students, staff or the general public. For example, Mr. Foster testified that if there were asbestos in the attic or behind walls you leave it there and that's why he stated the funding for the program has decreased. Mr. Foster stated that Ms. Sapp has been with the program since he arrive and that her duties had expanded as the program had expanded. There are two (2) inspectors in the program and Mr. Foster and the two inspectors spend time on the road so he said someone had to do the training, certification and review of these applications and Ms. Sapp is doing that. In 1990 she became an Administrative Assistant I, after being promoted to Secretary in 1987 from Typist. Mr. Foster testified further that in 1990 he requested that the position be elevated to Program Manager but the Secretary of Administrative Services only authorized a change in the position to Administrative Assistant I. Mr. Foster testified as to the procedures that Ms. Sapp follows in reviewing an application for licensing. Upon examination from the Board, Mr. Foster testified that a typist is Pay Grade 5, secretary is Pay Grade 6, Administrative Assistant I is Pay Grade 7 and Administrative Assistant II is a Pay Grade 9. Mr. Foster testified further that the request in 1990 was for a program manager and the Secretary of Administrative Services would not

approve it for a position higher than Administrative Assistant I. Mr. Foster further testified that in 1986 there were approximately 1500 people licensed by the program and now, in 1995, they are approaching 4,000. Mr. Foster testified further that he knew Ms. Sapp was working outside of her functions as Administrative Assistant I by doing the work of a Program Manager or Administrative Assistant II, however, the work had to be done and there was no one else who could do that work. Mr. Foster testified with regard to the training providers that the federal regulations require certain areas must be taught and the lesson plans are reviewed to ensure that those areas are taught. On re-direct examination, Mr. Foster testified that the then Secretary, George Hale, decided that in 1990 that the position should be an Administrative Assistant I and it was approved for upgrade to that point and was approved by Department of Administrative Services and, since that time, there have been two (2) attempts to have the position upgraded to Program Manager and both were denied. Mr. Foster continued to testify that the last time it had been sent up, he had been told it was sent over to State Personnel while, in fact, it was denied in the Office of the Secretary from a recommendation from the Personnel Department of Administrative Services.

11. Ms. Sapp was sworn and testified that she had been employed by Administrative Services since September of 1985 and that she started as a Typist and in 1987 she was upgraded to Secretary and upgraded to Administrative Assistant I in January, 1991. Ms. Sapp testified that the program has dramatically expanded since she started working with it in 1985. There now total six (6) separate program areas where people get licensed, as opposed to the two (2) that were in place when the program began, and that both State and federal laws and State and federal regulations have been increased since 1985. Ms. Sapp testified that she attends all training courses offered in the State by the license training providers to give an orientation as to the requirements to be certified in the State and the proper paperwork procedures and what has to accompany the applications. Ms. Sapp testified that Mr. Foster has delegated the responsibility for maintaining the licensing program and to evaluating all applications and that she handles the fees and the processing for the applications from receipt until the issuing of the license. On cross-examination Ms. Sapp testified for licensing and application recertification that it takes about fifteen (15) minutes to review an individual's application. If it is a new application, it takes a little bit longer because she has to review all the documents to make sure that they are appropriate and are not being submitted fraudulently. Ms. Sapp cited an example

where approximately fifty percent (50%) of the applicants for certification have their physical done at Omega Medical Center in Newark. She calls them on the phone to verify that the person did come on the date indicated to have his medical performed and that she verifies the CPR training through the organization where they were taught and that approximately seventy-five percent (75%) of her overall time is spent on licensing, review and certification. Ms. Sapp stated that the other twenty-five percent (25%) of her time is spent on public information inquiries which include telephone calls regarding licensing requirements, regulations, proper renewal and the procedures followed in Delaware. Ms. Sapp stated that she checks the applications for fraud to make sure the applications are not fraudulently submitted. She verifies the medical form is current by comparing it to the previous year's medical form to make sure they are not identical. Ms. Sapp testified as to the procedure she follows for renewal and the procedures that are being proposed for Region 3, reciprocity between other states. On examination by the Board, Ms. Sapp testified to the different classifications between asbestos removers and that she had pursued the reclassification in 1994 through the proper channels but that it had been stopped in the Department of Administrative Services Personnel Office. Ms. Sapp also testified regarding the additional time she puts in to go to New Castle and Dover to attend the training classes to instruct the students on the application procedures for state of Delaware certification. On re-direct examination Ms. Sapp clarified that fifty percent (50%) of the seventy-five percent (75%) time is licensing and the remaining time is reviewing application procedure.

12. Michael Bundek was sworn and testified that he is the Deputy Director of Division of Facilities Management, Department of Administrative Services from 1991 and has been with the Department of Administrative Services since 1977 and was formerly the chief of the Capital Police Department. Mr. Bundek testified that the federal asbestos regulations established ASHERA and ADHERA for training and certification matters for the Delaware asbestos program and that Donna runs the certification program, collects fees, documents the deposits and is responsible for licensing all of the necessary people in the State. In his opinion, Mr. Bundek testified that there were little changes in the program by the last set of amendments. The only change to the duties was that it increased the number of people to be licensed. Mr. Bundek further testified that he originally did not know that Ms. Sapp was receiving information or tips about misconduct or violations and placing it into the licensee's file and that

he was concerned about providing memorandums to file without a law enforcement involvement that did not verify the matter and this was an enforcement activity that was outside of what the Department was supposed to be doing. Mr. Bundek also testified that Ms. Sapp, on occasion, was overlooking doctor notes that indicated a lack of fitness and was still issuing the license to the applicant. Mr. Bundek testified that Ms. Sapp does structure her vacations around the client base as there is no trained back-up to cover for her while she is out of the office.

13. On cross-examination Mr. Bundek testified that he started as Deputy Director of Facilities Management in 1991 and that Mr. Foster works more closely with the asbestos program. Mr. Bundek disagreed with the analysis that there was substantial change in Donna Sapp's responsibilities due to the last revisions of the federal regulations; that the program has changed but the impact on Ms. Sapp was minimal and that her responsibilities have not increased due to the 1994 amendments. Mr. Bundek stated that Ms. Sapp has a lot of knowledge about the program and is always able to answer questions and that he did hear Mr. Foster's testimony and that he would agree that Mr. Foster's testimony was correct as to the changes but would continue to disagree that it was an increased burden on Ms. Sapp. Mr. Bundek stated that with regard to the office manager position, the Division Director, Mr. Ignudo, did not agree with an officer manager because an office manager had been turned down by state personnel for another one of the programs in Administrative Services. Mr. Bundek testified that he did everything to support the position being moved up to Administrative Assistant II and did not know at the time that it had not been forwarded to State Personnel. Mr. Bundek testified that in late May of 1994, when the reclassification committee met, he assumed that all went forward, that there had been so many critical reclassifications that he understood a second meeting was required but that he had not heard anything about Miss Sapp's application not having gone to committee. On examination by the Board, Mr. Bundek testified that he would have forwarded it on and did approve this when it was forwarded on to the Secretary's office and he tried to keep Ms. Sapp and Mr. Foster informed to the best of his knowledge. Mr. Bundek further testified that it did double the amount of licenses to be issued but the '94 changes did not have any other impacts.

14. Gloria Homer was sworn and testified that she is the Director of Administration for the Department of Administrative Services and has worked fifteen (15) years for the State. In her current position she is responsible for personnel, budget, efficiency studies, administrative

procedures acts, boards and commissions and is involved in the reclassification process. Ms. Homer states that a November 30, 1992 policy memo dictates the procedure for reclassification and that the division directors must approve a reclassification proposal prior to being forwarded to the personnel administrator, Kay Warren. The reclassification proposal is then reviewed by herself and then forwarded to Secretary Vincent Meconi. Ms. Homer testified that the Office of State Personnel established requirements that when legislative or occupational job duties change that the different departments are to send what are believed to be valid reclassifications. Ms. Homer testified that, in this instance, after approximately a 30-45 minute discussion it was decided between Kay Warren and herself that this was not going to be sent to State Personnel and that a memorandum went to Division Director Paul Ignudo telling him on May 11, 1994 of the decision not to send this to State Personnel.

15. On cross-examination Ms. Homer testified that there was a discussion about the time and a position classification questionnaire (PCQ) and that she recalled what Kay Warren had spoken to her about but did not recall specific federal requirements being mentioned as the basis for the reclassification and that there was no discussion about reciprocity. Ms. Homer testified that there was no written decision as to why the PCQ was not forwarded except for the notation sent back to Director Ignudo. Ms. Homer testified at length as to the procedure followed in that Kay Warren gave the factual basis and reviewed the PCQ and the job descriptions for AAI or AAII but that Ms. Homer did not speak to anyone about the factual basis for the job and, if she had a question, she would question it because that is her job. Ms. Homer further testified that she recalled meeting with Ms. Sapp in July 1994 about the reclassification and, at the beginning of that meeting, she thought it had been forwarded to State Personnel. When Ms. Warren returned from vacation she realized that this was the one that was the one that had not been sent forward and that she notified Ms. Sapp of that in July of 1994. Ms. Homer testified that, generally speaking, rated PCQ's are forwarded to State Personnel and that since Mr. Bundek did submit it that it was her job, being the Director overseeing Personnel, to decide it. Ms. Homer further testified that she never told the employee that the PCQ never went to State Personnel and that she tries to maintain a high level of credibility with State Personnel and did not believe that this was a credible reclassification so she chose not to submit it. Ms. Homer stated her office is located on the 3rd floor of the O'Neill Building and that the Department of Administrative Services currently has 260 employees and that two (2) critical reclassifications were forwarded

to State Personnel in May of 1994. Ms Homer stated that she has obtained her experience on personnel matters from this and previous positions within the State and that she has performed several reclassifications in work with the Hay Committee and on an agency committee. Normally, PCQ's are reviewed with the supervisors and that, as Ms. Warren did more reclassifications, Ms. Warren would do more of the work. Ms. Homer testified as to the specific documents that are forwarded to the critical reclassification review committee, are first, the PCQ plus, second, a memo from the Secretary of the Department, indicating the basis for why the position needs to be reclassified.

16. On redirect, Ms. Homer testified that a PCQ outlines the general purpose and summarizes the job responsibilities and that page 5 of the PCQ is the job duties.

17. On examination by the Board, Ms. Homer testified that you cannot compare the forms between 1990 and 1994 as the forms were changed and that eighty-five percent (85%) of the critical reclassifications forwarded over have been successful and in 1991 twenty of them were forwarded to that committee but the average now is 5 - 10 per year.

18. Kay Warren was sworn and testified that she is the Personnel Administrator for the Department of Administrative Services. She has spent twenty-two (22) years with the State of Delaware, the last 20.5 years in personnel and that fourteen (14) of those years has been in management. Her duties as Personnel Administrator for the Department is to comply with all federal, State laws, policies and procedures. Ms. Warren testified as to her role in the reclassification procedure and that she reviewed in this matter Ms. Sapp's PCQ. In April 1994 she reviewed the federal register; she compared the PCQ with the 1991 PCQ and then compared with the job duties of AAI and AAII and it was her determination that Ms. Sapp was performing the same functions as 1991 albeit to a larger customer base. Ms. Warren stated that credit for supervision is only given to those employees who supervise two or more full-time employees and that Ms. Sapp was doing the same process that she had done throughout the years, just more customers. The customer base had increased from two thousand (2,000) in 1991 to thirty-seven hundred (3,700) in 1994. Ms. Warren testified as to other Administrative Assistant I positions in the Department of Administrative Services as nine (9) of them currently exist in the Division of Professional Regulations. Those nine Administrative Assistant I's

provide administrative support to thirty (30) licensing boards, eighteen hundred (1,800) license holders annually collect one million ($1,000,000) dollars of revenue per year. On an average, each AAI supports four thousand (4,000) license holders with approximately one hundred forty thousand ($140,000) dollars in annual revenues and an average of 3.5 boards per AAI as they provide support to multiple boards due to the staffing levels. Ms. Warren compared Ms. Sapp's duties to that of the AAI multiple board staff and concluded that, even after the 1994 federal changes, Ms. Sapp serves six (6) customer bases and that she collects less funds on an annual basis and serves less clients than the average AAI at the Department of Professional Regulations. On cross-examination, Ms. Warren testified that she did not ask any questions of Mr. Foster or Mr. Bundek and that she made her decision based on a paper review of the documents and the PCQ and that she personally knew little about the asbestos abatement program. She recalled that she met with Ms. Sapp and Mr. Foster on July 12, 1994. She apologized for the miscommunication; she did not remember using a 6/30/94 date for stating she would have an answer back and, if Mr. Bundek had asked her, she would have told him but it is not the policy to notify the deputy directors when a PCQ is not approved. Ms. Warren stated she based her comparison on the papers, discussed it with Gloria Homer and that she felt that the PCQ accurately reflected the duties of Ms. Sapp. If she had a question, she would have sought additional information and that this was the only PCQ that was not forwarded to State Personnel as it did not meet the test in comparison with other ones being forwarded and that this one only dealt with additional people being licensed. Ms. Warren did not note any knowledge of any personality conflict between Ms. Homer and Ms. Sapp.

THE LAW

29 Del. C. § 5931. Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The Director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of the chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended

an additional thirty (30) calendar days. (29 Del. C. 1953, § 5931; 55 Del Laws, c. 443, §6, 69 Del. Laws, c. 436, §7.)" Effect of amendments -- 69 Del. Laws, c. 436, effective July 14, 1994, rewrote this section.

Merit Rule 3.0800 Reclassification of Positions

Whenever a significant change is made in the duties and responsibilities of a position involving either the addition of new assignments or the taking away or modification of existing assignments, such changes shall be reported by the appointing authority concerned in such a manner as the Director shall prescribe.

3.0810

The Director, upon his/her own initiative or at the request of an appointing authority, shall investigate alleged error in the classification or reclassification of a position and, if found to be justified, shall reclassify the position to the appropriate class, consistent with the requirements of the Budget Act.

FINDINGS OF FACT

1. Donna Sapp completed a Position Classification Questionnaire (PCQ) to change the classification of her position from Administrative Assistant I to Administrative Assistant II.

2. The Review of Classification was approved by Paul Ignudo, the Director of the Division of Facilities Management, Department of Administrative Services.

3. The PCQ, along with the supporting documents was reviewed by Kay Warren, Personnel Administrator and Gloria Homer, Director of Administration of the Department of Administrative Services. Ms. Homer and Ms. Warren decided not to forward it to the Secretary of Administrative Services.

4. The grievant was not given due process in consideration of whether the position was appropriately classified because there was no evidence that the appropriate persons were contacted as part of the review. The uncontradicted testimony is only that a paper review was done of the PCQ.

CONCLUSION OF LAW

The grievance is upheld.

ORDER

The State Personnel Office is directed to perform a desk audit of Ms. Sapp's position to determine if the position should be reclassified.

IT IS SO ORDERED

Katy K. Woo, Chairperson

Robert Burns, Vice Chairperson

Walter Bowers, Board Member

Gary Fullman, Board Member

Dallas Green, Board Member

APPEAL RIGHTS

29 Del. C. § 5949 provides that the appointing authority shall have a right of appeal to the Superior Court on the question of whether the appointing authority acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the appointing authority. All appeal to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

Mailing Date: 12/7/95

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