

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

IN THE MATTER OF:)	
GEORGE W. TANKARD,)	DOCKET NO. 00-05-206
WILLIAM I. BRIGHT, and)	DOCKET NO. 00-05-207
NATHANIEL FRAZIER;)	DOCKET NO. 00-05-208
)	
Grievants,)	
)	
v.)	
)	ORDER GRANTING
DEPARTMENT OF NATURAL)	MOTION TO DISMISS
RESOURCES AND)	
ENVIRONMENTAL CONTROL,)	
)	
Agency.)	

BEFORE John F. Schmutz, John W. Pitts, and Paul R. Houck, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES:

For the Grievant(s):
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For the Agency:
Ilona M. Kirshon, Esquire
Deputy Attorney General
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PROCEDURAL HISTORY

These three grievance appeals were filed with the Merit Employee Relations Board ("MERB" or "Board") on July 16, 1999 after a Step Three grievance decision dated May 8, 1999 which sustained in part and denied in part the grievances. (See Merit Rule No. 20.9)

COPY

At the time of the grievance George W. Tankard, William I. Bright, and Nathaniel Frazier ("Grievants") were classified as Conservation Technician IVs employed by the Department of Natural Resources and Environmental Control ("DNREC" or "Department") as dredge operators. Grievants have alleged DNREC has discriminated against them on the basis of race by:

- a. Denying them shift differential pay from 1970 to 1985;
- b. Denying them hazardous duty pay from 1970 to the present time;
- c. Not giving them a higher pay grade/ classification;
- d. Eliminating a Dredge Master Position and replacing it with a Dredge Captain Position;
- e. Requiring dredge crews to report to a floating job site; and,
- f. Not hiring and promoting more African-Americans.

By motion dated November 10, 2000, DNREC moved the Board to dismiss the grievances for lack of jurisdiction; lack of standing, and failure to state a claim for which relief could be granted.

The Board was scheduled to hear argument on the Motion to Dismiss on November 29, 2000. The Grievants appeared for the argument at the November 29th session and requested a continuance to retain counsel. The continuance request was approved and the matter ultimately was rescheduled for argument on the Motion to Dismiss on July 25, 2001. By unanimous vote of the members hearing the argument, the Board has determined to grant the Motion to Dismiss the appeal but to recommend that the classification section of the Office of State Personnel review the correctness of the classification of Conservation Technician IV as it applies to these Grievants.

DISCUSSION

In determining the Department's Motion to Dismiss, it is fundamental that the Merit Employee Relations Board can only hear and consider appeals which are timely and properly filed under the Merit Rules and applicable statutes. *Maxwell v. Vetter*, Del. Supr., 311 A.2d 864 (1973),

Cunningham v. State of Delaware, Department of Health and Social Services, Del. Super., C.A. 95A-10-003, Ridgely, P.J. (March 27, 1996) (ORDER).

DNREC asserts several grounds for dismissal of these grievance appeal(s).

SHIFT DIFFERENTIAL PAY

The Department asserts that the Grievants' claim for shift differential pay for the period between 1970 and 1985, is time barred. The Grievants argue that they complained about the lack of shift differential pay prior to 1985, which is the reason the Department changed its position and began shift differential pay for the Grievants in 1985. The Grievants assert that the Department is therefore estopped to deny them these payments for which the State Personnel Office in the Step 3 decision found they were eligible. The Department contends that the Grievant's claim for pay pre-1985 is now time barred and the Board concludes that the Department's contention is correct. Merit Rule No. 20.6 provides that grievants shall file a written complaint within 14 calendar days of the date of the grievance matter or the date they could reasonably be expected to have knowledge of the grievance matter. These claims, filed 14 to 29 years after the grievance event, are not timely. As noted by the Department they would be barred by the applicable statute of limitations even without the limitation contained in the Merit Rules. The Grievants have each been receiving shift differential pay since 1985 and any claim that the Department is estopped from asserting untimeliness for pre-1985 shift differential pay is misplaced.

HAZARDOUS DUTY PAY

Grievants' claim to hazardous duty is opposed by the Department on the basis that there is no statutory entitlement to it. This assertion is correct under the statute. Not every employee of the

State of Delaware who works in hazardous conditions is entitled to hazardous duty pay. Such entitlement is controlled by statute, 29 *Del. C.* §5916 which provides in pertinent part: "No employee of any department or agency shall receive hazardous duty pay, except those specifically included in the following paragraphs:" None of the listed paragraphs include these Grievants and therefore, they have no entitlement to hazardous duty pay. At oral argument, Grievant's counsel conceded the correctness of the Department's position on this issue. Any redress of this claim must rest with the General Assembly and an expansion of the entitlement to hazardous duty pay.

PAY GRADES

Grievants note that their positions were reclassified effective July 1, 1999 to Conservation Technician IV positions. They were dissatisfied with and seek to appeal their reclassifications. They assert that they qualified for classification as Conservation Technician V with the commensurately higher pay grades. The State Personnel Office conducted a Maintenance Review of the dredge operator positions in Fiscal Year 1999 with the result that Grievants were upgraded from Dredge Operators II (pay grade 8) to the classification of Conservation Technician IV (pay grade 9) effective July 1, 1999. Grievants did not appeal their Maintenance Classification Review under 29 *Del. C.* §5915. They did file a grievance in July of 1999, a portion of which they argue related to their paygrade/reclassification. With or without such an appeal it is well settled that pay grade determinations are not appealable to MERB. *Young, et al. v. DOC*, Del Super., CA. No. 99A-06-010FSS, Silverman, J. (May 25, 2000) 2000 WL 973318. The Grievants argue that they were not represented by legal counsel when they filed their grievance and intended to appeal, among other things, the results of their Maintenance Review Reclassifications. The provisions of 29 *Del. C.* §5915

concerning the appeals of Maintenance Reclassifications were in effect when the Grievants filed their grievance and require an appeal to the Merit Employee Relations Board. This the Grievants did not do. Their assertion that they filed a grievance with the Department and that they attempted to assert that they had reason to believe they should have been properly classified as Conservation Technician V is compelling. However, they did not follow the statutory requirements for properly appealing their reclassifications. While the Board can not appoint an Independent Reviewer at this point in time to entertain an untimely Maintenance Reclassification appeal, there may possibly be merit to the argument that these individuals met the supervisor qualifications for Conservation Technician V. Therefore, while it is not required, the Board requests the State Personnel Director to have the classification section review the propriety of the determinations that Conservation Technician IV was the appropriate classification for these Grievants.

ELIMINATION OF POSITIONS

Grievants allege that the elimination of the position of Dredge Manager and its replacement with two Dredge Captain positions was motivated by race-based discrimination within DNREC. At the time of the grievance, none of these Grievants had even applied for any of these positions although one of them presently occupies one of the Dredge Captain positions. Therefore, pursuant to statute, (29 Del. C. §5943(a)) none of these specific Grievants have standing to grieve the reorganization of either of these positions. Specifically, the Statute provides that in order to have standing to grieve the alleged wrong must be one which affects the grievant's status in his or her current position. That is not the case with respect to these Grievants and they have no standing to

grieve and assert a violation of the Merit Rules with respect to the creation of the positions or the elimination of positions which they neither occupied nor had applied for.

FLOATING JOB SITE

Grievants, as members of dredge crews, were previously required to report to a floating job site wherever the dredge was located. They assert that this requirement was premised upon racial discrimination although the Department asserts that historically all employees in the unit, regardless of race, have historically reported to the dredge location. Effective January 24, 2000, DNREC established a new transportation policy for dredge crews which provides that dredge personnel will be provided with transportation to and from job sites by way of car pooling in state vehicles from designated meeting sites. The Department contends that under the circumstances, the Grievants' concern about reporting to a floating job site is now moot. The Grievants contend that the relief is only partial and they seek to "finish where they start" and assert that the policy of the Department is discriminatory because the jobs are filled predominantly by minority employees. There is no contention that this policy is applied only to minority employees. While individual members of the Board may question the wisdom of such a policy from the standpoint of fair and efficient management, this evenly applied substantive policy is within the reasonable prerogatives of management and not the proper subject of a grievance under the Merit Rules.

GENERAL DISCRIMINATION CLAIM

Finally, Grievants assert a generic complaint that they are seeking relief from all past and present discrimination on the subject of job promotions. The Department has moved to dismiss this aspect of the grievance appeal on several grounds including that the Grievants have failed to assert

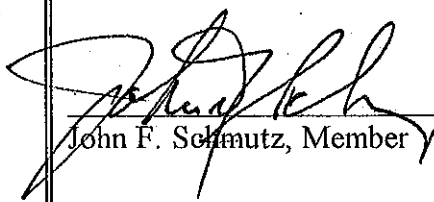
that any of them have either applied for or have been denied promotion on the basis of their race or that they have suffered any adverse employment action on such basis.

In short, DNREC asserts that Grievants have not alleged that they have suffered a wrong which the Board is empowered to address. The Board agrees with this conclusion. As noted above, Under the Merit System Grievants have no standing to bring generic grievances. Not all agency shortcomings are grievable. While DNREC other agencies might be more racially diverse, the Grievants, in order to have standing to grieve under the Merit Rules must recount an alleged wrong that affects their status in his present position.

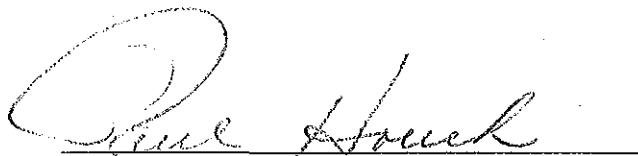
ORDER

For the reasons set forth above and in the Department's Motion to Dismiss, the motion is granted and the appeal is dismissed. As noted above, the Board does request the State Personnel Director to ask the classification section to review the propriety of the determinations that Conservation Technician IV was the appropriate classification for these Grievants.

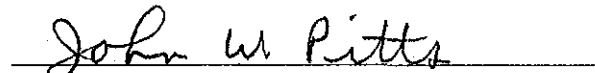
BY ORDER OF THE BOARD:



John F. Schmutz, Member



Paul R. Houck, Member



John W. Pitts, 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: _____

9/7/01 

Distribution:

Original: File

Copies: Grievant's Representative
Agency's Representative
Director, Office of State Personnel
Board counsel