

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

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| <b>THERESA DORN,</b>                        | ) |                             |
|   | ) |                             |
| Employee/Grievant,                          | ) | <b>DOCKET No. 16-01-646</b> |
| <b>v.</b>                                   | ) |                             |
|   | ) | <b>DECISION AND ORDER</b>   |
| <b>DEPARTMENT OF FINANCE, STATE LOTTERY</b> | ) |                             |
| <b>OFFICE,</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 July 21, 2016 in the Delaware Department of Transportation Administration Building, Farmington/Felton Hearing Room, 800 S. Bay Road, Dover, DE 19901.

**BEFORE** W. Michael Tupman, Chair, Paul R. Houck, Victoria Cairns, and Sheldon Sandler, Esq., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

Rae M. Mims  
Deputy Attorney General  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Gary W. Aber, Esquire  
on behalf of employee/grievant  
Theresa Dorn

Kevin Slattery  
Deputy Attorney General  
on behalf of the Department of  
Finance

## **BRIEF SUMMARY OF THE EVIDENCE**

The employee/grievant, Theresa Dorn (“Dorn”), offered 22 documents into evidence, marked for identification as Exhibits 1 - 22. The Board admitted fourteen exhibits, including Exhibits 1 - 3, 9 - 12, 15, and 17 - 22. Dorn called four witnesses: Tim Winstead (“Winstead”), former Table Games Inspector Manager; Michelle McCarty (“McCarty”), Gaming Inspector, Dover Downs; Tracey Weaver (“Weaver”), Internal Auditor for the Revenue and Compliance Auditor; and Richard Correta (“Correta”), former employee of Spectrum Gaming, a consultant hired by the State to establish the audit procedures for the Delaware Lottery Table Games. Dorn testified on her own behalf.

The State Lottery Office, Department of Finance (“Lottery”), offered thirteen documents into evidence, marked for identification as Exhibits A-M. The Board admitted eight, including Exhibits A, B, D, E, and G - L. Lottery called two witnesses: Vernon Kirk (“Kirk”), Director, Delaware Lottery; and Mary Jane Donnelly (“Donnelly”), Human Resources Manager, Department of Finance. The Board excluded the testimony of a third witness Lisa Allison (“Allison”), statewide HR Administrator for Classification and Compensation, because she had no personal knowledge of the matter before the Board and expert testimony on the State’s reclassification process was not required to reach a determination as to whether Merit Rule 3.2 had been violated.

Upon the close of the Grievant’s case, Lottery moved for an involuntary dismissal of the grievance, asserting Dorn had failed to meet her burden to provide sufficient evidence to establish that a violation of Merit Rule 3.2 had occurred. The Board deliberated and denied Lottery’s motion for dismissal. Thereafter, the Board heard Lottery’s evidence and considered the evidence and argument of both parties in reaching this decision.

## FINDINGS OF FACT

Dorn was hired on May 3, 2010 into an Internal Auditor IV<sup>1</sup> position and continues to serve in that position. She was initially responsible for implementing the new table gaming initiative at the three casinos throughout Delaware. Lottery established the position to manage the revenue and compliance of each of the venues.

The Internal Auditor IV class specification states:

This is auditing work at the supervisory level directing and reviewing the work of subordinate auditors (per the Merit Rules). Positions at this level are responsible for supervising and implementing auditing policies and procedures. Positions report to a technical superior.

- Develops audit schedules, objectives, timeframes and scopes to ensure adequate audit coverage; plans, assigns, reviews and evaluates the work of a professional staff;
- Reviews and approves work papers, analysis summaries, findings/recommendations, correspondence, and audit reports to ensure the work of subordinates is performed in compliance with professional auditing standards;
- Evaluates subordinates, recommending training, promotion, and disciplinary actions;
- Supervises peer reviews for other state's like agency auditing units;
- Research current auditing procedures to develop and update intra-office procedural manuals and training guides;
- Provides technical guidance, direction and instruction to internal staff, agency officials/management regarding interpretation/application of auditing rules, regulations, policies, procedures and practices.

Lottery hired Spectrum Gaming Group ("Spectrum") to assist in the implementation and creation of a regulatory structure for table games. In 2009, Spectrum created an "Implementation and Regulations of Table Gaming Strategic Plan" for Lottery to initiate table gaming. Spectrum trained all employees associated with Table Gaming, including the auditors. As part of that training, Spectrum advised the audit section to prepare a strategic plan for each calendar

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<sup>1</sup> Dorn's official title with the State Lottery Office is Revenue Compliance Audit Supervisor while her class specification upon hire was an Internal Auditor IV.

year.

Dorn asserts the duties she was assigned by Lottery to perform are those of the Internal Auditor V class specification (a higher classification) which states:

Positions at this level are responsible for managing and implementing, through subordinate supervisory staff, a department's auditing and regulatory policies, procedures and functions. Positions report to an administrative superior.

- Supervises directly and through subordinate supervisors a group of professional staff;
- Provides technical guidance, direction and information to senior management as part of the strategic planning process;
- Administers budget for auditing function;
- Establishes long and short-term goals, objectives and priorities in accordance with the department's overall mission;
- Represents management at hearings/meetings. Advises agency management and others regarding auditing problems/issues, identifying and resolving problems/needs and ensuring goals and objectives are met.

Dorn reports to Richard MacDonald, Assistant Director of Lottery, and she oversees the audit unit. Dorn supervises three subordinate internal auditors who, as Auditor III's, do not have any supervisory responsibilities. In Dorn's most recent performance review for July 1, 2015 to June 30, 2016, bullets number two, four and five of the Internal Auditor V class specification are found in her duties. Dorn crafted a strategic plan pursuant to guidance from Spectrum and has continued to maintain and update the document. Neither Dorn's supervisor nor any other management at Lottery requested Dorn to create a strategic plan. Currently, there is no Internal Auditor Level V position within Lottery.

### **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 a similar or lower class. Employees may be required to serve in a higher position, however if such service continues beyond 30 days, the Rules for promotion or temporary promotion apply, and they shall be compensated appropriately from the first day of service in the higher position.**

“An employee is working out of class when the duties assigned him are not those specified in the specification for the class in which he is incumbent. Rather, he is performing, for an extended period of time, the full range of duties enumerated in another class specification.” *Jenkins v. Delaware Department of Health and Social Services*, MERB Docket No. 07-01-380 at \*5. In order to prevail, Dorn must establish that “there is another existing class with duties, responsibilities, and qualifications which is more consistent with what the employee actually does.” *Id.*

The Board concludes as a matter of law that Dorn is not working in the higher class position of Internal Auditor V for purposes of Merit Rule 3.2.<sup>2</sup> Because of the current management structure of the Lottery, Dorn unfortunately finds herself working in a gray area between an Internal Auditor IV and an Internal Auditor V. While she performs some of the job specifications of an Internal Auditor V, she does not perform others. Most notably, Dorn does not supervise "through subordinate supervisors a group of professional staff." Dorn also does not administer a "budget for auditing function" but rather conflates that job specification with the routine supervision of the auditors in her unit (ensuring adequate staffing during vacation and sick leaves) and periodic requests for office supplies.

In past cases, the Board has determined what it means "to serve in a higher position" for purposes of Merit Rule 3.2. by going through the essential job functions in the Office of

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<sup>2</sup> The Board rejects the Lottery's cramped interpretation of Merit Rule 3.2 to require a written directive from the agency for an employee "to serve in a higher position." The Board believes that the need to take on additional responsibilities may be a function of the exigencies of the job, and employees are to be commended for stepping up to the plate to do what is necessary to carry out an agency's mission.

Management and Budget job specifications one by one, comparing them to the evidence in the record. But the Board does not believe this should be a mechanical process based on the number or percentage of the job specifications performed, or the percentage of time spent on each one. Rather, the Board believes it more appropriate to take a "totality of the circumstances approach."

Based on the totality of circumstances presented by the evidence in the record, the Board concludes as a matter of law that Dorn did not meet her burden to prove that she is serving in a "higher position" for purposes of Merit Rule 3.2

It is undisputed that Dorn does not have a subordinate supervisory staff and that she provides direct supervision to the three subordinate auditors. The Board finds that although table gaming supervisors working in the casinos regularly seek guidance from Dorn regarding regulatory questions and issues, she does not supervise these employees. According to Dorn's performance plan, she provides technical guidance, direction and information to senior management as part of strategic planning, establishes goals, objectives and priorities, and represents management at meetings/hearings. The Board finds that these Level V duties in her performance plan establish she is completing some of the specifications as they allow Lottery to expect Dorn to complete them. Whether or not Lottery requests her to do them is irrelevant. In addition, the Board finds no evidence presented that Dorn creates a budget for the audit unit. Rather, the Board concludes that the Director of Lottery crafts a budget for the whole State Lottery Office, including the audit unit. It appears the audit unit within Lottery is not currently organized in a manner which supports an Internal Auditor V.

### **ORDER**

It is this 25<sup>th</sup> day of August, 2016, by a unanimous vote of 4-0, the Decision and Order

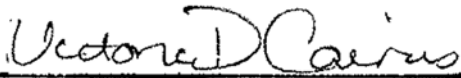
of the Board to dismiss Dorn's appeal. The Board finds Dorn was not working outside of her class specification nor significantly performing the responsibilities of the Internal Auditor V position; consequently, there is no violation Merit Rule 3.2.



**W. MICHAEL TUPMAN, MERB CHAIR**



**PAUL R. HOUCK, MERB Member**



**VICTORIA D. CAIRNS, MERB Member**



**SHELDON N. SANDLER, ESQ., 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.
- (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:            August 25, 2016

Distribution:

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              Agency's Representative  
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