

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

THERESA DORN,)
)
 Appellant,)
)
 v.)
)
 DEPARTMENT OF FINANCE/)
 STATE LOTTERY OFFICE)
)
 &)
)
 MERIT EMPLOYEE RELATIONS)
 BOARD,)
)
 Appellees.)

C.A. No. N16A-09-010 DCS

Submitted: September 18, 2017
Decided: December 28, 2017

On Appeal from the Merit Employee Relations Board –
AFFIRMED.

Introduction

Appellant Theresa Dorn (“Appellant”) has appealed the Merit Employee Relations Board’s (the “Board”) decision dismissing her Merit Rule 3.2 claim that she was working in a higher class as an Auditor V instead of her listed Auditor IV position. On appeal, Appellant claims that the Board erred when it applied a “totality of the circumstances approach”¹ utilizing a “mechanical process based on the number or percentage of the job specifications performed, or the percentage of time spent on each one” to determine whether she was working out of her class.

For the reasons set forth below, the Board’s decision is **AFFIRMED**.

Factual and Procedural Background

In 2009, the Department of Finance State Lottery Office (“Lottery”) hired Spectrum Gaming Group (“Spectrum”) to implement compliance procedures for Lottery’s new table games. That same year, Spectrum created an Implementation and Regulations of Table Gaming Strategic Plan² (“Strategic Plan”) that recommended regulation compliance and enforcement methods to Lottery. Spectrum trained all Lottery employees who worked the table games, including Lottery auditors.

¹ *Dorn v. Dep’t of Fin., State Lottery Office*, MERB Docket No. 16-01-646, at *6 (August 25, 2016).

² R. at 121-29.

On May 3, 2010, Lottery hired Appellant as an Internal Auditor IV, Revenue Compliance Audit Supervisor.³ Pursuant to the State of Delaware's Description of Occupational Work ("Job Description"), the duties of an Auditor IV are as follows:

The Internal Auditor IV

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.⁴

³ R. at 338. Appellant is currently employed by Lottery as an Auditor IV.

⁴ R. at 021-22.

On January 22, 2016, Appellant filed an appeal⁵ to the Board and alleged that she was working in a higher class as an Internal Auditor V. Pursuant to the Job Description, the duties of an Auditor V are as follows:⁶

Internal Auditor V

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.

On July 21, 2016, the Board held an evidentiary hearing. The Board heard testimony from Appellant. She also called former gaming inspection manager Timothy Winstead; Auditor staff member Tracey Weaver; lottery gaming inspector Cheryl McCarty; and former Spectrum employee Richard Carretta to testify. Lottery presented Director of Lottery Vernon Kirk and Jane Donnelly as witnesses.

⁵ R. at 001.

⁶ R. at 022.

Appellant requested “backpay and, as long as she continues performing her present job, that she continues to be paid as an Auditor [V].”⁷ The Board also considered the exhibits that both Parties entered into evidence, including the Strategic Plan, the Job Description, and Appellant’s State of Delaware Performance Plan (“Performance Plan”).⁸

Appellant testified that she reported to Rick McDonald, the Assistant Director of Table Games, who was an administrative superior as opposed to a technical supervisor⁹ and that that she is the only person at Lottery “that is requested to explain how the regulations should be applied . . .”¹⁰ She also testified that she developed a strategic plan, “I took [the Strategic Plan] and built my own strategic plan how to (sic) develop the framework to set up the audit unit and followed it.”¹¹

Appellant further testified that she supervised three “professional staff” in her unit but none of them supervises anyone else.¹² In response to inquiries by Board members concerning budgets, Appellant testified that “[b]udgeting for an auditing function entails tracking auditing hours of each unit”¹³ but she never had to “on a year-to-year basis, coincident with the State fiscal year, have to sit down at a

⁷ R. at 139.

⁸ R. at 029. The Performance Plan appears to list the duties that Appellant is obliged to perform.

⁹ R. at 158.

¹⁰ R. at 163.

¹¹ R. at 167.

¹² R. at 165. All staff members who work under Appellant are classified as Auditor IIIs. R. at 315.

¹³ R. at 182.

computer with a spreadsheet . . .”¹⁴ Appellant also testified that Rick McDonald approved Appellant’s performance plan.¹⁵

Timothy Winstead testified that Lottery inspectors “relied on [Appellant] and her team had primary responsibility related to the monetary aspects of the gaming regulations.”¹⁶ Winstead, however, further testified that Rick McDonald had the final say on the interpretation of monetary regulations.¹⁷

Tracey Weaver testified that Lottery inspectors and inspector supervisors only consulted Appellant and her staff for guidance on the interpretation of monetary regulations¹⁸ but conceded that she (Weaver) does not write up an inspector for non-compliance. Weaver stated: “I wouldn’t -- see, that’s more of a supervisor writing people up.”¹⁹ Weaver further testified that she (Weaver) did not personally write the performance plans or the performance reviews of Lottery inspectors.²⁰ Instead, Weaver supervises inspectors “as to the application of monitoring and governmental rules and regulations.”²¹

¹⁴ R. at 183.

¹⁵ R. at 42.

¹⁶ R. at 191.

¹⁷ R. at 194.

¹⁸ R. at 240.

¹⁹ R. at 245.

²⁰ R. at 246.

²¹ R. at 244.

Cheryl McCarty testified that her gaming inspector supervisor instructs her to consult Appellant and her staff when a violation occurs in the count room.²² She also testified that once an auditor makes a determination about a violation, the inspector must follow that determination.²³ McCarty further testified that gaming inspector supervisors prepare her performance plan and performance reviews, approve her schedule, and approve her leave time.²⁴

Richard Carretta, co-author of the Strategic Plan, testified that the Strategic Plan “was put together in order to lay out a framework for the audits, for the audit department”²⁵ but Appellant was involved in the implementation of the Strategic Plan, “under the authority of Lottery. The Lottery entrusted [Appellant] to do the job.”²⁶

Vernon Kirk, the Director of the Delaware Lottery, testified for Lottery. He said that Appellant does not supervise other supervisors, she is not involved in strategic planning for the office, and she does not administer the budget.²⁷ Kirk further testified that he does the budgeting for Lottery, the budget had not changed since he started working for Lottery,²⁸ and that there is no budget for the auditing

²² R. at 251.

²³ R. at 252.

²⁴ R. at 254.

²⁵ R. at 259.

²⁶ R. at 271.

²⁷ R. at 295-96.

²⁸ R. at 296. Kirk started working at Lottery in 1975. R. at 293.

function.²⁹ Kirk added that the strategic plan “was an implementation plan. And once table games were implemented, there was no further strategic plan.”³⁰ Kirk also said that Appellant was never a part of the original strategic planning or creation of the Strategic Plan and that the Strategic Plan had not changed since it was developed by others.³¹ Jane Donnelly was called to authenticate two of Lottery’s exhibits.³²

On August 25, 2016, the Board issued a unanimous decision and dismissed Appellant’s working out of class claim. Although the Board found that Appellant was performing some of the specifications of an Auditor V (because some of those specifications were also listed as duties under Appellant’s Performance Plan³³), the Board also found that Appellant did not perform the Auditor V specification of creating a budget for the audit unit³⁴ or supervise “through subordinate supervisors a group of professional staff”³⁵ pursuant to the Auditor V section of the Job Description. The Board concluded that the Director of Lottery crafted the budget for the State Lottery Office (which included the audit unit).³⁶

²⁹ R. at 310.

³⁰ R. at 299.

³¹ R. at 299.

³² R. at 316.

³³ R. at 355.

³⁴ R. at 355.

³⁵ R. at 354.

³⁶ R. at 355.

Parties' Contentions

The Board decided that Appellant was not administering Lottery's Budget or supervising other supervisors. As such, "[Appellant] was not working outside of her class specification nor significantly performing the responsibilities of the Internal Auditor V position."³⁷

Appellant asserts that the Board's decision was contrary to the Board's finding that Appellant performed "all management functions, which are incompatible with an Auditor IV class."³⁸ An Auditor IV does not perform managerial tasks, does not establish long term goals, nor does an Auditor represent management at meetings/hearings, all of which functions [Appellant] perform."³⁹

Appellant further asserts that the Board erred by applying a "totality of the circumstances approach" and that it should have instead determined "whether or not [Appellant] had established that there was another existing job class, Auditor V, with duties and responsibilities which were more consistent with what she was actually doing."⁴⁰ Appellant contends that the Board's approach ignored the fact that

³⁷ R. at 356.

³⁸ For the first time on appeal to this Court, Appellant asserts that the "Board ignored and did not consider the job description for [Appellant's] position [] as drawn up by Thomas J. Cook, Secretary of Finance." Op. Br. at 10. Because Appellant did not raise the claim below, this Court will not address it. Sup. Ct. Rule 72(g) provides: "Appeals shall be heard and determined by the Superior Court from the record of proceedings below, except as may be otherwise expressly provided by statute."

³⁹ Op. Br. at 11.

⁴⁰ Op. Br. at 12.

“[Appellant’s] work duties were ‘more consistent’ with the manager’s duties of an Auditor V rather than the technical nature of an Auditor IV.”⁴¹

Appellee argues that the Board conducted the proper analysis, the Board’s conclusion was supported by substantial evidence, and that the Board’s decision was free of legal error. Appellee further contends that Appellant does not supervise “through subordinate supervisors a group of professional staff”⁴² and that Appellant “was not involved in the Lottery’s budgeting process.”⁴³

Standard or Review

This Court has jurisdiction over appeals from administrative agencies which includes appeals from the Board.⁴⁴ In reviewing an appeal of a Merit Employee Relations Board decision, the Court determines whether the Board “acted within its statutory authority, whether it properly interpreted and applied the applicable law, whether it conducted a fair hearing, and whether its decision is based on sufficient substantial evidence and is not arbitrary.”⁴⁵ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁴⁶

⁴¹ Op. Br. at 12.

⁴² Ans. Br. at 10.

⁴³ Ans. Br. at 12.

⁴⁴ 29 Del. C. § 10142(a).

⁴⁵ *Avallone v. Del. Dep’t of Health & Soc. Servs.*, 14 A.3d 566, 570 (Del. 2011) (internal quotation marks omitted) (quoting *Hopson v. McGinnes*, 391 A.2d 187, 189 (Del. 1978)). See also *Christman v. Del. Dep’t of Health & Soc. Servs.*, 2014 WL 3724215, *2 (Del. July 25, 2014).

⁴⁶ *Sweeney v. Del. Dep’t of Transp.*, 55 A.3d 337, 341 (Del. 2012).

The Court does not “reweigh the evidence, determine issues of credibility, or draw [its] own factual conclusions.”⁴⁷ Questions of law and statutory interpretation are reviewed *de novo*.⁴⁸ A Board decision that is supported by substantial evidence and is free from legal error will be affirmed unless the Court finds that the Board has abused its discretion.⁴⁹ An abuse of discretion occurs “where [the Board’s] decision has exceeded the bounds of reason under the circumstances.”⁵⁰

Discussion

Appellant brings her working out of class claim under Merit Rule 3.2 which states:

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.⁵¹

⁴⁷ *Norcisa v. Dep’t of Health & Soc. Servs.*, 2014 WL 1258304, at *3 (Del. Mar. 25, 2014).

⁴⁸ *Sweeney*, 55 A.3d at 342.

⁴⁹ *Id.* at 341-42. See also *Banner v. State of Del. Emp. Relations Bd.*, 2015 WL 5073740, at *1 (Del. Aug. 26, 2015).

⁵⁰ *Sweeney v. Del. Dep’t of Transp.*, 55 A.3d at 342.

⁵¹ State of Delaware Merit Rule 3.2.

Appellant asserts, in her Opening Brief, that the Board erred by applying a “totality of circumstances approach”⁵² and that “whether or not [Appellant] had established that there was another existing job class, Auditor V, with duties and responsibilities which were more consistent with what she was actually doing”⁵³ should have been determinative instead. Appellant cites *Jenkins v. Delaware Dep’t of Health and Soc. Servs.* to support her position.⁵⁴

Appellant further argues that the totality of the circumstances approach that the Board used is “misplaced” and that it “ignored the fact that [Appellant’s] duties were managerial in nature, that the entire Gaming Department of the Lottery relied on [Appellant] as the only person knowledgeable in the rules and regulation, (sic) no other person, including the Director of the Lottery could answer the rules and regulation inquiries [Appellant] provided.”⁵⁵

Nevertheless, Appellant’s Reply Brief criticized the holding in *Jenkins* and declares, without authority, “[a]ny reliance upon *Jenkins* is misplaced since its

⁵² R. at 341.

⁵³ Op. Br. at 12; Op. Br. at 11 (“Rather than base its decision on its own cited authority, *Jenkins v. Delaware Department of Health and Social Services*, supra., the Board chose to view the situation under a standard it created for this case, a “totality of the circumstances approach”).

⁵⁴ *Jenkins v. Delaware Dep’t of Health and Soc. Servs.* MERB Docket No. 07-01-380, at *5 (May 15, 2008) (concluding that a DHSS employee was not working out of his class because “Jenkins has not met his burden to prove that he performed the full range of duties set forth in the class specification for the position of Training/Education Administrator I).

⁵⁵ Op. Br. at 12.

holding is not founded on Delaware Law but California Law,⁵⁶ which that State's Court deemed to be invalid."⁵⁷

The Court finds that *Jenkins* is applicable to Appellant's claim. *Jenkins* held that a grievant is working out of her class if she is performing "the *full* range of duties enumerated in another class specification."⁵⁸

In *Jenkins*, the Board addressed a Merit Rule 3.2 claim where the Board found that the grievant was performing some, but not all, duties of a higher class position.⁵⁹ Specifically, the *Jenkins* Board found that Jenkins was not performing one of the "key terms in the class specification" of the higher class position.⁶⁰ A review of the record in this case reflects that the Board considered and applied *Jenkins* to Appellant's Merit Rule 3.2 claim.⁶¹ Specifically, the Board wrote:

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 *5.⁶²

⁵⁶ See generally *Ligon v. State Pers. Bd.*, 123 Cal. App. 3d 583, 586 (Ct. App. 1981).

⁵⁷ Reply Br. at 2.

⁵⁸ *Jenkins*, MERB Docket No. 07-01-380, at *5 (May 15, 2008).

⁵⁹ See *Jenkins*, MERB Docket No. 07-01-380 at *6 ("Without question, Jenkins did an outstanding job helping to develop the training module for the CAPS upgrade and conducting training sessions statewide, for which he received an award. But there is no evidence showing that Jenkins planned, developed, or implemented any strategic policy in that regard").

⁶⁰ *Id.*

⁶¹ See *Dorn v. Dep't of Fin., State Lottery Office*, MERB Docket No. 16-01-646 (August 25, 2016); R. at 340.

⁶² R. at 354.

The Board also wrote that:

In order to prevail, [Appellant] must establish that “there is another existing class with duties, responsibilities, and qualifications which is more consistent with what the employee actually does.”⁶³

This Court does not have the authority to reweigh evidence before the Board. In the instant case, the Board concluded that Appellant was not working outside of her class. The Board’s decision was based on its finding that Appellant was “working in a gray area between an Internal Auditor IV and an Internal Auditor V.”⁶⁴ Testimony explained that the duties of an Auditor V include administering a budget for auditing function and supervising other supervisors.⁶⁵

There is substantial evidence in the record supporting the Board’s decision that Appellant never performed either of those duties. Vernon Kirk testified that he administers Lottery’s budget and that the budget had not changed since Appellant was hired.⁶⁶ Furthermore, the evidence shows that the three auditors that Appellant supervised were not the supervisors of inspectors.

Additionally, Inspector McCarty, Appellant’s own witness, testified that gaming inspector supervisors prepared her (McCarty’s) performance plan and

⁶³ R. at 354.

⁶⁴ R. at 354.

⁶⁵ R. at 022.

⁶⁶ R. at 296; R. at 293.

reviews – not Appellant’s staff.⁶⁷ Also, Tracey Weaver did not write the performance plans or the performance reviews of Lottery inspectors.⁶⁸ Furthermore, Appellant did not have any input into the creation of the Strategic Plan because the Strategic Plan was fully drafted the year before Appellant was hired by Lottery.⁶⁹

Appellant essentially contends that the Board ignored the managerial nature of Appellant’s duties. However, the record is clear that the Board’s findings of fact did acknowledge the managerial nature of Appellant’s duties and found that the “Level V duties in [Appellant’s] performance plan establish she is completing some of the [Auditor V] specifications . . .”⁷⁰ The performance plan duties included providing guidance on strategic planning and representing management at meetings.⁷¹ However, the Board found – as it did in *Jenkins* – that Appellant was not performing the full and key duties and specifications of an Auditor V because the staff that she supervised did not supervise anyone else and because Appellant does not create Lottery’s budget.⁷² The Board exercised its lawful authority in

⁶⁷ R. at 254.

⁶⁸ R. at 246.

⁶⁹ R. at 118; R. at 299.

⁷⁰ R. at 341 (“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 Court notes that the first three duties in Appellant’s Performance Plan are also duties that an Auditor V performs under the Job Description.

⁷¹ R. at 029.

⁷² See generally *Prince George’s Cty. Health Dept. v. Briscoe*, 556 A.2d 742, 751 (Md. App. 1989) (“Accordingly, only an employee whose position involves sufficiently similar job qualifications

emphasizing Appellant's lack of budget administration and supervisory performance over her managerial performance. Any findings that the Board made about Appellant's managerial performance was not determinative.⁷³

While it is understandable that Appellant would like to be upgraded, the Board's decision on Appellant's claim is consistent with *Jenkins*. In *Jenkins*, the Board found that "there is no evidence showing that Jenkins planned, developed or implemented any strategic policy"⁷⁴ and that Jenkins therefore "has not met his burden to prove that he performed the full range of duties set forth in the class specification for the position of Training/Education Administrator I."⁷⁵ In the instant case, Appellant has not shown that she performs the full range of duties set forth in the class specification.

Accordingly, the Board's decision is supported by substantial evidence and free of legal error.

and duties as those within an established classification is entitled to have his or her job reclassified").

⁷³ The Board concluded that Lottery was not organized to support an Internal Auditor V. R. at 355. There was not an Internal Auditor V position within Lottery at the time of the hearing, and Vernon Kirk testified that budgeting for the auditing function – one of the specifications listed under the Auditor V position – did not exist. R. at 310.

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⁷⁴ *Jenkins*, MERB Docket No. 07-01-380 at *6.

⁷⁵ *Id.* at 7.

Conclusion

NOW, THEREFORE, the August 25th, 2016 Board Decision is hereby

AFFIRMED.

IT IS SO ORDERED.



Diane Clarke Streett, Judge

Original to Prothonotary

cc: Gary W. Aber, Esquire
Kevin Slattery, Esquire, Deputy Attorney General
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