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CIVIL DIVISION
DEPARTMENT OF JUSTICE
DOVER, DELAWARE

BEFORE THE MERIT RELATIONS BOARD

OF THE STATE OF DELAWARE

THOMAS JENKINS, Employee/Grievant, v. DELAWARE DEPARTMENT OF HEALTH & SOCIAL SERVICES, Employer/Respondent.	))))))))))	**DOCKET No. 07-01-380** **DECISION AND ORDER**

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 May 1, 2008 at the Margaret M. O'Neill Building, 410 Federal Street, Suite 213, Dover, DE 19901

BEFORE Brenda C. Phillips, Chair, John F. Schmutz, and Martha K. Austin, Members, constituting a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

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

Jean Lee Turner
Administrative Assistant to the Board

Joseph M. Bernstein, Esquire
on behalf of Thomas Jenkins

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Division of Health and Social Services

SUMMARY OF THE EVIDENCE

The Board admitted into evidence without objection five composite exhibits offered by Thomas Jenkins ("Jenkins"): grievance documents (A-1-1); job description documents (A-1-2); documents relating to training duties (A-1-3); documents relating to CAPS policies and systems training (A-1-4); and awards (A-1-5). Jenkins testified on his own behalf.

The Board admitted into evidence without objection nine exhibits from the Department of Health and Social Services ("DHSS"): Merit Rules 3.2 and 3.3 (S-1A); Step One grievance (S-1B); Step 3 grievance decision dated December 19, 2006 (S-1C); Job Specifications – Senior Social Worker Class Series (S-1D); Jenkins' Performance Plan (S-1E); OMB Job Specifications – Trainer/Educator Class Series (S-1F); Performance Plan for Training Administrator I position (S-1G); Organization Chart for the Division of State Service Centers (S-1H); and *Beckel v. DHSS*, MERB (Jan. 4, 2005) (S-1I).

DHSS called two witnesses: Gloria Upshur, Director of the Division of State Service Centers ("DSSC"); and George Moody, DSSC Senior Administrator for Family Support Services.

FINDINGS OF FACT

Jenkins has worked as a Senior Social Worker/Case Manager ("SSW/CM") at DSSC for ten years. According to the job specifications, a "significant aspect of the work" of a SSW/CM "is to act as liaison between client, provider and agency to address and solve problems and issues and deal with possible emergency/crisis situations." As a supervisor, a SSW/CM also "[c]onducts ongoing monitoring and assessment of service delivery for optimum quality and efficiency, and authorizes and recommends changes and adjustments as needed."

In 2004, a Division of Social Services audit recommended that DSSC transition from a paper-based system for delivery of services to clients to a paperless computerized system. DSSC's Information Resource Management ("IRM") section worked with end-users to upgrade the Client Assistance Program System ("CAPS") to better meet the operating needs of the Family Support unit and integrate client and fiscal programs. The new computerized system went on-line in February 2005 but IRM continued to fine-tune the system for several months afterwards.

By e-mail dated October 20, 2005, Victor M. Santiago, the DSSC Training and Education Administrator, wrote: "The awaited training for the new CAPS is here and Tom Jenkins, Jacqueline Farr and I have been working to develop our staff training program. Training is scheduled at Milford 10/24-25 and 10/27-28. Training is scheduled at Northeast 11/7-10."

In a Bi-Weekly Report dated November 16, 2005, the Director of DSSC gave a team award to Jenkins and Farr for Employee-of-the-Quarter (July-September 2005). "Jacqueline Farr and Thomas Jenkins almost single-handedly developed the training module for the enhancements we did to our automated client service system (CAPS), conducted the training for all of the Family support staff and have been key to the statewide rollout. Ms. Farr and Mr. Jenkins did this while

still effectively handling their primary responsibilities."

The record shows that since January 2006, Jenkins and other SSW/CMs have provided CAPS training from time-to-time for new hires and refresher training. For example, in June 2006, DSSC held training for new hires and refresher courses for Administrators and Lead Workers.

By e-mail dated June 22, 2006 to Mr. Moody, Jenkins "officially request[ed] an upgrade, promotion and or re-classification of [my] position. . . . For the last 4 years I have been operating outside of my job function and classification in many ways. . . . I have been asked to train all staff administrators as well as senior management on our . . . CAPS programs. In other divisions, . . . this is done by a Trainer III, which is a paygrade 15, or training administrator which is a paygrade 17."

In response to Jenkins' request, Mr. Moody directed Jenkins not to perform any more training.

Jenkins gave conflicting testimony about how much of his time he spent on the CAPS upgrade. At first, he said it was 100% of his time. He later acknowledged that even with his CAPS-related work he was able to perform all of his duties as a SSW/CM like trouble-shooting, case management support, quality assurance, and crisis alleviation which took up 50% of his time. As Jenkins testified, "I had to do both." According to Ms. Upshur, CAPS training was part of the operational and quality assurance responsibilities of a SSW/CM in the Family Support unit, and other SSW/CMs in that unit also trained new hires and offered refresher training on an as-needed basis.

Jenkins was not able to pinpoint exactly when he felt he started working out of class at a higher position. The Board does not have to resolve that issue because the Board does not believe he is entitled to back pay under Merit Rule 3.2.

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 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."

"The burden of proof on any such appeal to the Board . . . is on the employee." 29 *Del. C.* §5949(b). "[T]he statutory plan places the burden upon an employee in an appeal to the [Board]. In other words, on such an appeal, an employee must present evidence sufficient to rebut the presumption that the [Board's action] was correct." *Hopson v. McGinnes*, 391 A.2d 187, 188 (Del. 1978).

"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 an incumbent. Rather, he is performing, for an extended period of time, the full range of duties enumerated in another class specification." *Ligon v. California State Personnel Board*, 123 Cal.App.3d 583, 586 (1981). Jenkins must prove that "there is another existing class with duties, responsibilities, and qualifications which is more consistent with what the employee actually does." *Prince George's County Health Department*

v. Briscoe, 556 A.2d 742, 750-51 (Md. App. 1989).

Jenkins claims that the higher position he served in during the CAPS upgrade was a Training/Education Administrator I. According to the Office of Management and Budget class specification for that position, "[a]s administrative management, the scope of work at this level is broader than at the lower levels in the training/education series. Specifically, positions are responsible for planning, developing, and implementing strategic policy at the facility, division, department or state level regarding training/education/organizational development."

The Board concludes as a matter of law that Jenkins did not meet his burden to prove that he performed the level of work of a Training/Education Administrator I. One of the key terms in the class specification for that position is "strategic policy." 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. His role in the CAPS upgrade was operational: to advise IRM on tailoring the system to better meet the needs of Family Support employees and to provide those employees with the training required to use the new computer system for delivery of services to clients.

In the Board's view, "strategic policy" means that a Training/Education Administrator I does more than provide hands-on training. The administrator researches, develops and makes policy recommendations on what kinds of training to provide to DSSC employees: initial orientation for new hires; continuing education and training of employees; speciality topics (like safety, diversity, and CPR/AED); and tracking and employee evaluation. After making recommendations to an administrative superior, the administrator must implement those strategic

policies within the confines of the agency's budget, which determines how much and how often and what kinds of training an agency can provide to its employees.

The Board concludes as a matter of law that 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. Most important, the Board does not believe that Jenkins exercised any responsibility for planning, developing, or implementing strategic policy regarding training or education.

The Board concludes as a matter of law that Jenkins has failed to meet his burden to prove that DHSS violated Merit Rule 3.2. The record shows that Jenkins did not serve in the higher position of Training/Education Administrator I. [1]

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[1] After the Board rendered its decision, Jenkins' counsel asked the Board to reconsider whether Jenkins may have worked out of class at a higher position but lower than a Training/Education Administrator I. The Board believes that request was untimely because the hearing was over, and the Board had already deliberated and decided the case based on evidence related to the Training/Education Administrator I position.

ORDER

It is this 15th day of May, 2008, by a unanimous vote of 3-0, the Decision and Order of the Board that the Grievant's appeal is denied.

Brenda C. Phillips
Chair

John F. Schmutz
Member

Martha K. Austin
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: May 21, 2008

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