BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

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DEPARTMENT OF JUSTICE
DOVER, DELAWARE
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ROBERT TUCKER,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 08-03-418**
v.	)	
	)	
FAMILY COURT OF THE STATE OF DELAWARE,	)	**DECISION AND ORDER**
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board ("the Board") on September 24, 2008 at 10:00 a.m. at the Margaret M. O'Neill Building, 410 Federal Street, Suite 213, Dover, DE 19901.

BEFORE Brenda C. Phillips, Chair, John F. Schmutz, Joseph D. Dillon, and Paul Houck, Members, 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

Robert Tucker
Employee/Grievant *pro se*

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Family Court
of the State of Delaware

PRELIMINARY MATTERS

The Family Court of the State of Delaware ("Family Court") moved to dismiss the appeal of Robert Tucker ("Tucker") for lack of jurisdiction on two grounds: (1) the Merit statutes and Rules do not allow Tucker to bring a class action on behalf of other employees of the Family Court; and (2) any grievance must be pursued under a collective bargaining agreement.

FINDINGS OF FACT

This dispute arises out of a claim by Tucker for reimbursement for travel expenses to a training session on October 20, 2007. Tucker acknowledged at the hearing that the Family Court reimbursed him for his expenses, but he wants to pursue a "class action" on behalf of seventeen other Family Court employees whom he claims were denied reimbursement. Tucker claims that denial of reimbursement for those employees was discriminatory in violation of Merit Rule 2.1 because the Family Court's travel reimbursement policy treats judges and commissioners more favorably.

According to the Family Court, it has a collective bargaining agreement with the United Food and Commercial Workers Union, Local 27, effective June 5, 2007 to June 4, 2010. Article 8.5 of that agreement covers reimbursement for transportation costs to attend off-site training. Article 18 of the agreement sets forth a grievance procedure (Step 1 – Immediate Supervisor; Step 2 – Operations Manager; Step 3 – Chief Judge; Step 4 – State Labor Relations Executive). Article 19 of the agreement provides: "In the event the grievance is not resolved at Step 4, it may be appealed by the Union to arbitration with the American Arbitration Association." In a Step 4

grievance decision dated January 25, 2008, [1] the hearing officer denied Tucker's grievance.

CONCLUSIONS OF LAW

A. Class Action

Neither the Merit statutes nor the Merit Rules provide for a grievant to bring a class action on behalf of other persons. "[T]he right to assert class standing in an administrative proceeding should [not] be inferred in the absence of a statute or rule specifically conferring and defining such a right." *Sullivan v. Commonwealth of Pennsylvania Insurance Department*, 408 A.2d 1174, 1176 (Pa. Cmwlth. 1979). *Accord Medley Investors, Ltd. v. Lewis*, 465 So.2d 1305, 1306 (Fla. App. 1985) ("There is no express authority for a class action administrative hearing in . . . the Florida Administrative Code").

In *Stein v. Bureau of Workmen's Compensation*, 258 N.W.2d 179 (Mich. App. 1977), the claimant sought additional benefits for himself and "on behalf of all others similarly situated." 258 N.W.2d at 180. The Court of Appeals of Michigan held the workmen's compensation statute did not allow for a class action. The statute "requires that a hearing be scheduled for 'any action' of any 'party in interest' to that claim. The language is all singular and does not say that a hearing shall be scheduled on the claim of the filing party as well as all other claims similar to that of the filing party." *Id.* at 181.

In *Lyons v. Illinois Department of Revenue*, 452 N.E.2d 830 (Ill. App. 1983), the statute allowing for an appeal from the denial of property tax relief to senior citizens did not authorize

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[1] The Step 4 grievance decision is incorrectly titled a Step 3 decision.

a class action. The department "can only determine the substantive rights of a 'person' who has filed a 'timely claim.' Therefore, there is no implied authority for [the department] to create and adjudicate the rights of an alleged plaintiff class comprised of persons who have not filed timely claims." 452 N.E.2d at 834.

In *Massachusetts Electric Co. v. Massachusetts Commission Against Discrimination*, 375 N.E.2d 1192 (Mass. 1978), the Supreme Judicial Court of Massachusetts held that the commission did not have authority to allow class actions. "The commission has only the powers, duties, and obligations conferred on it by statute or reasonably necessary for its proper functioning." 375 N.E.2d at 1203. The commission's statute "does not authorize the maintenance of class actions before the commission." *Id.* The statute "does empower the commission to 'adopt, promulgate, and amend, and rescind rules and regulations suitable to carry out the provisions of this chapter, and the policies and practice of the commission in connection therewith.'" *Id.* (quoting Mass.Gen. Laws ch. 151B, s.3, cl.5). "However, no rule or regulation of the commission authorizes the maintenance of class actions." 375 N.E.2d at 1203.

The Board "is a creature of statute. 29 *Del. C.* Ch.59. Its power and authority are derived exclusively from the statute, and its power therefore extends only to those cases which are properly before it in compliance with the statutory law." *Cunningham v. Department of Health & Social Services*, Civ.A.No. 95A-10-003, 1996 WL 190757, at p.2 (Del. Super., Mar. 27, 1996) (Ridgely, Pres. J.) (citing *Maxwell v. Vetter*, 311 A.2d 864, 965 (Del. 1973)).

"The exclusive remedy available to a classified employee for the redress of an alleged wrong, arising from the misapplication of any provision of this chapter, the merit rules, or the Director's regulations adopted thereunder, is to file a grievance in accordance with the procedure

stated in the merit rules." 29 *Del. C.* §5943(a). Merit Rule 19.0 defines a "grievance" as a "Merit employee's claim that these Rules or the Merit system statute has been violated." The language in both the statute and the rule is singular and does not authorize the Board to hear a class action, only individual grievances.

Under the Administrative Procedures Act, 29 *Del. C.* Ch. 101 ("APA"), the Board has wide authority over the conduct of its hearings. But the APA "has no provisions for pretrial proceedings in which prompt and early determination of class membership may be made. Nor are there any provisions of notice to the absent class members informing them that they are required to decide whether to remain members of the class represented by counsel for the named plaintiffs, whether to intervene through counsel of their own choosing, or whether to pursue independent remedies. Such pretrial proceedings are constitutionally required as a matter of due process when an adjudication is to be made which will be binding upon the entire class." *Rose v. City of Hayward*, 126 Cal.App.3d 926, 936 (1981). "The due process requirements of notice to absent class members must not be left to the hearing officer's discretion. A hearing officer would violate both statutory and constitutional authority in opening his hearing room to a class action." *Id.* at 937.

The Board has not adopted a class action rule which would satisfy these due process requirements. Without such a rule, the Board cannot know if Tucker is an appropriate representative for a class of Family Court employees denied travel reimbursement, or whether those employees have been notified and had the opportunity to opt in or out of the class action. Significantly, Tucker did not present the Board with written consents from the seventeen members of the proposed class authorizing him to pursue a grievance on their behalf.

The Board may, in appropriate circumstances "consolidate individual cases and permit counsel to appear on behalf of all such similarly situated claimants where such a procedure would best discharge the [Board's] function and remedy the grievance or grievances alleged." *State Employees' Association of New Hampshire, Inc. v. New Hampshire Personnel Commission*, 497 A.2d 860, 861 (N.H. 1985). But the Board does not have legal authority to allow Tucker to pursue an appeal on behalf of other Family Court employees who have not filed their own grievances with the Board under the Merit Rules.

The Board concludes as a matter of law that it does not have jurisdiction to hear Tucker's class action appeal.

B. <u>Collective Bargaining Agreement</u>

"The rules adopted or amended by the Board under the following sections shall not apply to any employee in the classified service represented by an exclusive bargaining representative to the extent the subject thereof is covered in whole or in part by a collective bargaining agreement under Chapter 13 of Title: §§ 5922 through 5925 of this title, except when transfer is between agencies or where change is made in classification or pay grade, §§5926 through 5928 of this title, except where an employee laid off by 1 agency is reemployed by another, §§5929 through 5932, 5934 and 5936 of this title." 29 *Del. C.* §5938(d).

In *Morris v. Department of Correction*, Civ.A.No. 96A-07-004, 1998 WL 283478 (Del. Super., Mar. 31, 1998) (Ridgely, J.), the Superior Court affirmed the Board's decision that it did not have jurisdiction to hear the grievant's appeal over a transfer. "The Board recognized that it had jurisdiction to hear grievances filed by an employee covered by a collective bargaining

unit in certain limited circumstances," but "Morris' grievance was a dispute regarding work assignment which was covered by the [collective bargaining agreement]." 1998 WL 283478, at p.1. "This Court holds that the Board does lack jurisdiction because the grievance is controlled, in whole or in part, by the Agreement." *Id.* at p.2.

Tucker's dispute over travel reimbursement is covered in whole or in part by Article 8.5 of the collective bargaining agreement between the Family Court and Local 27. The Board therefore does not have jurisdiction to hear his appeal under the Merit Rules adopted by the Board under Section 5931 of Title 29 of the *Delaware Code* (Grievances). Tucker must pursue any grievance he may have about travel reimbursement using the collective bargaining agreement's grievance procedures.

Tucker argued that the collective bargaining agreement between the Family Court and Local 27 does not apply to him because he is not a member of the union. Even if Tucker is not a member of the union, he is covered by the collective bargaining agreement because he is a member of the bargaining unit. "Although not a member of the union, plaintiff was a member of the bargaining unit because his job position was covered by the collective bargaining agreement." *Davis v. American Building Maintenance Co.*, 2001 WL 764487, at p.2 (N.D. Cal., June 28, 2001). *Accord Cary v. Carmichael*, 908 F. Supp. 1334, 1337 (E.D. Va. 1995), *aff'd* 116 F.3d 472, 1997 WL 342592 (4th Cir., June 23, 1997) ("Although the plaintiff was not a member of the Union, he was a member of the bargaining unit represented by the Union and thus was covered by the collective bargaining agreement.").

The Board concludes as a matter of law that it does not have jurisdiction over Tucker's appeal because his job position is covered by the collective bargaining agreement between the

Family Court and Local 27 and his grievance over travel reimbursement is covered in whole or in part by that agreement.

DECISION AND ORDER

It is this 2nd day of October, 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

Joseph D. Dillon
Member

John F. Schmutz
Member

Paul Houck
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's 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.
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> (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: October 3, 2008

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