IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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CIVIL DIVISION

THOMAS JENKINS, Employee/Grievant Below, Appellant,	)	
v.	)	C.A. No.: 08A-10-002 FSS
STATE OF DELAWARE, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Employer Below, And MERIT EMPLOYEE RELATIONS BOARD, Appellees.	)	

Submitted: October 13, 2009
Decided: January 29, 2010

MEMORANDUM OPINION AND ORDER

Upon Employee's Appeal From the Merit Employee Relations Board of the State of Delaware – *AFFIRMED*

SILVERMAN, J.

The issue in this appeal is whether the Merit Employee Relations Board abused its discretion by refusing to consider new arguments offered by employee's counsel after the Board had deliberated and announced its decision. Specifically, after the Board formally considered and rejected employee's argument, counsel asked the Board to consider a fallback position. Having already decided the case presented, the Board refused.

I.

Thomas Jenkins was employed by the Division of State Service Centers of the Department of Health and Social Services for approximately ten years as a Senior Social Worker/Case Manager. According to Jenkins, he "was involved exclusively in providing services to the clients of the Agency, both as a supervisor of other Case Workers, and, as a direct provider of services to clients in complex cases and emergency/crisis situations."

Beginning in 2004, the Division of State Service Centers began the transition from a paper-based delivery system for client services to a computer-based system, known as Client Assistance Program System ("CAPS"). Jenkins played a role in CAPS's design and implementation, including "develop[ing] a training manual for using CAPS" and involvement "in policy decisions concerning how the CAPS program was to be implemented."

Jenkins was nominated as an "Employee of the Quarter" for July to

December 2005. When he was nominated, the Director of the Division of State Service Centers stated: "Jacqueline Farr and Thomas Jenkins almost single-handedly developed the training module for the enhancements we did [to CAPS], conducted the training for all of the Family Support Staff and have been key to the statewide rollout." The senior administrator for the Office of Family Support, also Jenkins's supervisor, stated that "[i]n many other divisions within the Department, similar duties and tasks are assigned to administrators." Another senior administrator stated:

> [He] actively participated in the d esign, development, testing and training associated with CAPS devoting countless hours and becoming the recognized subject matter expert[] in this area . . . . [His] dedication to service and professional demeanor resulted in the flawless scheduling and training of Family Support line staff. In many other divisions within the Department, similar duties and tasks are assigned to administrators.

On June 22, 2006, Jenkins requested a promotion or re-classification of his position. In response, Jenkins's supervisor directed him to stop performing training. Not long after, in August 2006, Jenkins filed a formal grievance under the merit system rules, claiming that "for the past 3 years, I have been working outside of my job classification." Accordingly, Jenkins sought additional compensation or a higher job classification 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.

A grievance proceeding was held on December 19, 2006, where a hearing officer concluded that Jenkins had not performed duties outside of his job specification. Accordingly, his grievance was denied. Jenkins filed a timely appeal, and a hearing before the Board was held on May 1, 2008. In its September 3, 2008 decision, the Board denied Jenkins's grievance. Jenkins filed this appeal on October 2, 2008.

II.

Throughout the May 1, 2008 hearing, Jenkins's counsel repeatedly referred to the higher classification of "Training/Education Administrator I." He advocated that "[Jenkins] was a Training/Education Administrator. He was functioning as that. The only problem was he wasn't getting paid for it. That's why we're here." Jenkins's counsel did not refer to the lower positions–Trainer Educator I, II, or III–but was consistent and emphatic that "why we're here" was to consider Jenkins's entitlement to the higher position.

At most, while moving an exhibit into evidence, Jenkins's counsel mentioned, in passing: "[t]hat particular document . . . describes all the jobs in that particular job classification. But we're zeroing in on the Training/Education

Administrator I because we believe that that most clearly closely fits what Mr. Jenkins has been doing for the last three years."

Before Jenkins's counsel decided to broach his fallback position, the Board stated: "[w]e've completed our deliberation stage. We're now going to return to the record to render our decision. . . . The ayes have it with a unanimous vote. . . . I will draft the required summary of the evidence, findings of fact and conclusions of law for the Board's [decision]." Only then, after the Board announced its decision rejecting Jenkins's claim as presented, did Jenkins's counsel state: "I think even if I agree with your decision that he did not meet the burden of proof for Training Administrator I as you viewed it, I think you have to consider the other lower positions as well." The Board declined to do so.

In its written decision denying Jenkins's grievance, the Board found that "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 . . . which took up 50% of his time." The Board further observed that "Jenkins was not able to pinpoint exactly when he felt he started working out of class at a higher position."

The Board held that "Jenkins did not meet his burden to prove that he performed the level of work of a Training/Education Administration I." As the Board

observed, the Office of Management and Budget specifies that "[a]s administrative management, the scope of work [at the Training/Education Administration I] 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 concluded:

> Without question, Jenkins did an outstanding job helping to develop the training module for the CAPS upgrade and conducting training sessions statewide[.] . . . 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 [Information Resource Management] 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.

Additionally, the Board noted Jenkins's fallback argument:

> 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 the evidence related to the Training/Education Administrator I position.

The record is silent as to whether the Board had logistical reasons for not

reopening the hearing, aside from the fact that the hearing concluded at 4:44 p.m. That sort of detail can be useful. Even so, as discussed below, the Board's finding of untimeliness is supported by the record.

III.

When analyzing an appeal from the Board, "the function of the Superior Court is to determine whether the Board's decision is supported by substantial evidence and free from legal error."[1] The court "does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[2] Instead, the court only "determines if the evidence is legally adequate to support the Board's factual findings."[3]

When reviewing a procedural decision of the Board, as opposed to a factual decision, the court "must consider whether [the Board] abused its discretion in rendering its decision."[4] An administrative agency's procedural decision "is not an abuse of discretion 'unless it is based on clearly unreasonable or capricious

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[1] *Weiss v. Del. Dep't of Health & Soc. Servs.*, 2003 WL 21769007, at *3 (Del. Super. July 30, 2003); *see also Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994) ("'Substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

[2] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[3] *Weiss*, 2003 WL 21769007, at *3.

[4] *Hartman v. Unemployment Ins. Appeal Bd.*, 2004 WL 772067, at *2 (Del. Super. Apr. 5, 2004) (citing *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991)); *see also Sheppard v. GPM Invs., LLC*, 2008 WL 193317, at *1 (Del. Super. Jan. 23, 2008).

grounds' or 'the Board exceeds the bounds of reason in view of the circumstances and ha[s] ignored recognized rules of law or practice so as to produce injustice.'"[5] "Absent an abuse of discretion, the Court must affirm the judgment of the [Board]."[6]

IV.

Jenkins contends "that the Board's refusal to consider all of the relevant 'higher' job classifications that encompassed the duties that Jenkins had been assigned to perform was an abuse of discretion." Jenkins requests that the case be remanded for the Board "to make additional findings whether Jenkins had proved that he was working in a 'higher position' and was entitled to additional compensation, even if it was not the 'highest position.'"

The Board's decision was not capricious or unreasonable. While Jenkins submitted a six page description of six employment positions, Jenkins's presentation expressly focused on Training/Education Administrator I. The Board could have concluded that Jenkins made a tactical decision to present his case piecemeal, perhaps in the hope of increasing the chance of a take-it-all decision. In any event, Jenkins has presented no authority establishing that the Board, on its own initiative and without the benefit of specific testimony or evidence, had to consider every possible

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[5] *Hartman*, 2004 WL 772067, at *2.

[6] *Id.*

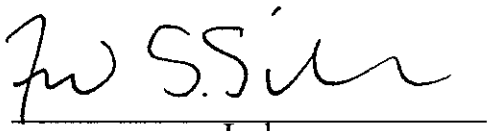
position for which an employee might qualify. This, despite the employee's argument that he was before the Board seeking a specific classification. Otherwise, the Board acted within its discretion when it declined to re-open the case to consider Jenkins's fallback position after it had deliberated and announced its decision.

Finally, it still appears that Jenkins is keeping his cards close to his vest. He does not argue here that the evidence presented clearly established his entitlement to a specific, alternate classification. Instead, he is asking for remand for the Board to make "additional findings" regarding the several "Trainer Educator" positions. In any event, Jenkins has not shown prejudice here. Thus, the Board's decision to not take further testimony or hear new argument, under the circumstances, was not abusive.

V.

For the foregoing reasons, the Board's decision is **AFFIRMED.**

IT IS SO ORDERED.



Judge

cc: Prothonotary (civil)
Joseph M. Bernstein, Esquire
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