

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

WARREN THOMPSON and)	
ROBERT McCABE,)	
)	
Employee/Grievants,)	
)	CONSOLIDATED DOCKET
v.)	Nos. 10-09-482 and 10-09-483
)	
FAMILY COURT OF THE STATE)	DECISION AND ORDER
OF DELAWARE,)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board at 10 a.m. on December 2, 2010 at the Delaware Commission of Veterans Affairs, 802 Silver Lake Boulevard, Suite 100, Dover, DE 19904 and continued at 10:45 a.m. on January 26, 2011 in the Delaware Room at the Public Archives Building, 102 Duke of York Street, Dover, DE 19901.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Paul R. Houck, and Victoria D. Cairns, a quorum of the Board under *29 Del. C. §5908(a)*.

APPEARANCES

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

Warren Thompson and Robert McCabe
Nelson Hill, UFCW Local 27

Kevin R. Slattery
Deputy Attorney General
on behalf of the Family Court

BRIEF SUMMARY OF THE EVIDENCE

Prior to the hearing on December 2, 2010, the Family Court moved to dismiss these consolidated grievances. The Board heard legal argument on the motion, and decided to take it under advisement and continue the case for further hearing on the merits.

The employee/grievants, Warren Thompson and Robert McCabe, offered and the Board admitted into evidence without objection seven exhibits marked for identification as Exhibits 1-7: Agreement between the State of Delaware, Delaware Family Court and the United Food and Commercial Workers Union Local 27 (effective June 5, 2007) (Exh. 1); Class Series Description – Court Security Officers (July 2007) (Exh. 2); spreadsheet of union member names and job titles (Exh. 3); Job Specifications for Judicial Assistant (Exh. 4); Job Specifications for Electronic Court Reporter (Exh. 5); Memorandum dated January 16, 2008 re Electronic Court Reporter (Exh. 6); and Job Specifications for the position of Court Security Officer I (Exh. 7).

The Family Court attached to its motion to dismiss eleven exhibits marked for identification as Exhibits A-K, only four of which the Board found relevant: Thompson’s Job Posting and Application (Exh. B); McCabe’s Job Posting and Application (Exh. C); Current Class Specifications for Court Security Officer (Exh. D); and Job Specifications for Judicial Assistant (Exh. E).

Thompson and McCabe testified on their own behalf and called two other witnesses: Charles Butcher, Judicial Assistant II in the New Castle County Family Court; and Scott Cook, Judicial Assistant I in the Kent County Family Court.¹

¹ At the grievants’ request, the Board issued subpoenas for two other witnesses: Catherine Moore, Judicial Assistant I for Sussex County Family Court; and Patricia Anderson, shop steward for Sussex County Family Court. On January 25, 2010, the Family Court moved to quash those subpoenas because “the subpoena requests for these two individuals constitutes an undue burden on the Family Court’s operations.” The Board stayed the two subpoenas to

At the close of the grievants' case, the Family Court renewed its motion to dismiss because the grievants had failed to state a claim upon which the Board can grant relief as a matter of law.

FINDINGS OF FACT

In 2008, the Office of Management and Budget conducted a statewide maintenance review and re-classified the position of Judicial Assistant (paygrade 8) in the Family Court to Court Security Officer I (paygrade 7). Under Merit Rule 4.12.1, the Judicial Assistants retained "their former pay as long as they remain in that position."

The Family Court hired Thompson as a Court Security Officer I on March 16, 2009 a year after the maintenance review. Thompson testified that when hired he knew the Judicial Assistant position had been eliminated and that the Judicial Assistants had been "grandfathered" for pay purposes. According to Thompson, as a Court Security Officer I he performs "all of the functions of a Judicial Assistant."

The Family Court hired McCabe as a Court Security Officer I in 2009 a year after the maintenance review. According to McCabe, he performs all of the job duties of a Judicial Assistant.

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The class specifications for the position of Court Security Officer I list seven essential functions. The old job specifications for the position of Judicial Assistant I listed seven principal

determine whether the testimony of those witnesses would be necessary. After hearing the testimony of the other witnesses, the Board determined that their additional testimony would just be cumulative.

² McCabe also claimed he performs all of the duties of an Electronic Court Reporter. Since that position is a pay grade 7 (like Court Security Officer I), the Board does not have to consider that claim because it is not a "higher position" for which Merit Rule 3.2 might require additional compensation.

accountabilities. In comparing the two, the Board finds as a matter of fact that the job specifications for Court Security Officer I and Judicial Assistant are substantially the same. Both Thompson and McCabe acknowledged that the job duties of a Judicial Assistant and Court Security Officer I are the same, the only difference being the title and paygrade. The one difference between the job specifications for the two positions is that a Judicial Assistant “[may] perform routine legal research for a judge or master.” However, the Judicial Assistants who testified said they had never done any legal research (assuming they even have the training to do so). McCabe claimed that he does legal research in conducting criminal background checks to see if there are outstanding warrants. The Board does not believe that constitutes legal research. Legal research involves accessing and distilling case law decisions through court reporters or electronic databases like WESTLAW or LEXIS.

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.

At the close of the grievants’ case, the Family Court renewed its motion to dismiss. The Board concludes as a matter of law that Thompson and McCabe failed to state a claim for relief under Merit Rule 3.2.

In order to state a claim for relief under Merit Rule 3.2, Thompson and McCabe must prove that they “substantially perform additional job duties required only by the higher classification.” *Hartzog v. Ohio State University*, 500 N.E.2d 362, 365 (Ohio App. 1985). For example, Court Security Officers II may perform all of the job duties of a Court Security Officer I, but in addition “perform as lead workers providing training, guidance, and assigning and reviewing work of lower level court security officer staff **OR** provide armed court security which includes carrying firearms and possessing the power of arrest.” If a Court Security Officer I exercised supervisory responsibilities over other security officer staff, then he might be performing additional job duties required only by the higher classification.

The Board concludes as a matter of law that the position of Judicial Assistant is not a “higher position” for purposes of Merit Rule 3.2 because it does not involve any additional job duties which are not performed by a Court Security Officer I. The job functions of the two positions are the same. Because of Merit Rule 4.12.1, Judicial Assistants retained their pay grade (8) after the maintenance review and re-classification in 2008 so long as they remain in that position. But a higher pay grade does not make the position of Judicial Assistant a “higher position” for purposes of Merit Rule 3.2.

The Board concludes as a matter of law that Thompson and McCabe did not prove that they are working in a “higher position” as the Board construes that term in Merit Rule 3.2. Their claim is not that they are working out of class, but rather than they are not receiving equal pay for equal work. While that may appear unfair to them, Merit Rule 3.2 does not provide a remedy.

DECISION AND ORDER

It is this 8th day of February, 2011, by a vote of 3-1, the Decision and Order of the Board to dismiss Thompson's and McCabe's appeals.


MARTHA K. AUSTIN, MERB Chairwoman


JOHN F. SCHMUTZ, MERB Member


VICTORIA D. CAIRNS, MERB Member


PAUL R. HOUCK, MERB Member

I respectfully dissent. I believe that it is unfair for employees doing the same job to be paid less money for the same work.

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.
- (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: **February 8, 2011**

Distribution:

Original: File

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Agency's Representative

Board Counsel

OMB/HRM