BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
STEVE WALLS,	)	
Grievant,	)	**DOCKET NO. 95-06-34**
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
DEPARTMENT OF CORRECTION,	)	
Agency.	)	
	)	

This Order sets out the determination of the Merit Employee Relations Board announced at its meeting of May 22, 1996 which has heretofore not been reduced to writing and formally issued as an Order of the Board.

BACKGROUND

On May 8, 1995, the Delaware Correctional Officers Association ("DCOA") Vice-President Charles Wood submitted, on a DCOA form, an appeal on behalf of Steve Walls asserting that the time limits had expired for a written response to a Step 4 grievance (see Merit Rule No. 20.0350). The appeal was premised on an alleged violation by the Department of Correction of Merit Rule No. 19.0100 which provides:

> "Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline or any other aspect of personnel administration because of political or religious opinions or affiliations or because of race, national origin, age, sex, physical or mental disability or other non-merit factors will be prohibited."

This grievance was before the Board for an evidentiary hearing on October 11, 1995, and a question of law arose upon the Department's Motion to Dismiss after seven (7) hours of testimony

COPY

had taken place. The Board, in a written opinion mailed to the parties on November 30, 1995 (a copy of which is attached as Exhibit No. 1 to this Order for the convenience of the parties) determined, among other things, that the substantive basis of the grievance was an alleged discriminatory practice of retaining certain female correction officers in prior non-housing positions when they are awarded housing assignments and that the claim of discrimination under Merit Rule No. 19.0100 was within the jurisdiction of the Board.

On December 4, 1995, the Department of Correction filed with the Board a Motion to Dismiss the grievance for lack of jurisdiction. A copy of this Motion is attached to this Order as Exhibit No. 2.

On April 19, 1996, the Grievant, through counsel, filed the "Grievant's Response to Department of Corrections Motion to Dismiss", a copy of which is attached to this Order as Exhibit No. 3. In the response, the Grievant alleged, among other things, that a *prima facie* case had been made showing that there is sexual discrimination against men and in favor of women assigned to housing, inasmuch as the men assigned to housing are not moved to the more desirable jobs, but the women are moved despite having a primary assignment in housing.

On April 25, 1996, the Board voted that the discrimination was the claim being adjudicated and not a transfer claim and that the matter was within the jurisdiction of the Board. No written Order was issued concerning this deliberation and vote. The transcript of the Board's deliberation is attached as Exhibit No. 4.[1]

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[1] The cover sheet indicates the matter was considered on May 25, 1996. The Statement of Chairperson Woo on page two identifies the date as April 25, 1996.

On May 22, 1996, this matter came back before the Board for further evidentiary hearing. At that hearing, John F. Brady, the Deputy Attorney General representing the Board, announced to the Board that he had recently become aware of the decision of the Delaware Supreme Court in the case of *Sullivan v. Department of Corrections*, Del. Super., 464 A.2d 899 (1983) and, after having considered that decision, he had revised his opinion and now was of the opinion that the Board did not have jurisdiction to determine any claim related to transfer of correctional personnel even when an allegation of discrimination is made.

The parties were afforded the opportunity to respond to this position at the hearing. The transcript of the hearing is attached to this Order as Exhibit No. 5.

The Deputy Attorney General representing the Department took the position that the *Sullivan* case supported its Motion to Dismiss and that there was another forum for the grievance which was about a subject covered by the Collective Bargaining Agreement. Counsel for the Grievant asserted that the Grievant was not transferred and was not grieving a transfer but rather the discrimination which resulted in him getting less desirable posts while women were getting desirable posts because they are women. Grievant asserted the Board had already ruled on this issue and that the *Sullivan* case was not dispositive because the Grievant in that case was transferred and Walls was not transferred. Grievant further asserted that an allegation of discrimination was not covered by the Collective Bargaining Agreement but was within the jurisdiction of the Board. The Department claims that this is a transfer or "movement" issue or a "non-movement" issue governed by the Collective Bargaining Agreement and outside the jurisdiction of the Board. Grievant contends that it is a "discrimination" issue and within the Board's jurisdiction.

ORDER

The Board having again considered the issue of its jurisdiction to hear this matter and, upon the advice and recommendation of Deputy Attorney General John F. Brady, by unanimous vote of Chairperson Woo, Vice-Chairperson Burns, and Members Bowers, Green and Fullman[2], finds and determines that the Motion to Dismiss should be granted since this matter is governed by the decision of the Delaware Supreme Court in *Sullivan v. Department of Corrections, supra.* This grievance involves the potential for transfer of employees among posts, and the Grievant's dissatisfaction with his ability to secure a more desirable posting because of the assignment of female correctional officers to posts other than their primary assignment which is governed by the determination of the Supreme Court in *Sullivan, supra.* As explained by the Court, such matters are within the Collective Bargaining Agreement and thus not within the purview of the Merit Rules or the jurisdiction of the Board. The grievance is therefore dismissed.

IT IS SO ORDERED.

Katy K. Woo, Chairperson

Robert Burns, Vice-Chairperson

Walter Bowers, Member

Dallas Green, Member

[2] Board Member Gary Fullman resigned his position as a Member of the Board on February 15, 1997 to begin full-time State employment.

EXHIBIT No. 1
TO MERB ORDER OF
DISMISSAL

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

Steven Walls Grievant	)	
	)	Docket Number 95-06-34
v. Department of Correction	)	ORDER ON QUESTION OF LAW AND SCHEDULING ORDER

Before Woo, Chair, Burns, Bowers and Fullman, constituting a quorum of the Board pursuant to 29 Del. Code Section 5908(a).

And now, this 30th day of November, 1995, it appearing to the Board that on October 11, 1995 that this matter came before the Board for a hearing on a grievance filed pursuant to a claim of discrimination, a question of law arose upon the Department's motion to dismiss after seven hours of testimony had been taken; the Board makes the following finding of fact and conclusions of law; to wit:

1. The Merit Employee Relations Board is a creation of statute, Title 29, Delaware Code Chapter 59, as amended by 69 Del. Laws Chapter 436, effective July 14, 1994, replacing the State Personnel Commission.

2. The question for consideration was if the Merit Employee Relations Board had jurisdiction to hear a case based upon alleged discrimination when the alleged discrimination was based on a subject that was covered wholly or in part by a collective bargaining agreement (Merit Rule 1.0100).

3. The Grievant has responded that the department has waived any jurisdictional defect by not raising this issue in the hearings below.
This argument fails because since this matter comes before the Board de novo, it is not necessary to raise the matter below. In addition, jurisdiction can not be established except when so defined by the enabling law, and this is the appropriate forum for such an issue to be raised. Maxwell v. Vetter, Del. Supr., 311 A.2d 864(1973).

4. In order to resolve the pending motion, the Board is required to make a finding of fact as to initially what is the basis for the grievance in order to determine whether the Board has jurisdiction to hear the case.

FINDING OF FACT

5. The Board finds that the substantive basis of the grievance to be an alleged discriminatory practice of retaining certain female correction officers in prior non-housing positions when they are awarded housing assignments based upon a review grievant's sworn testimony on the record in this matter.

6. The Board finds that the claim of discrimination under Rule 19.0100 as alleged in this case is not limited to the contractual remedy contained in the Interim DCOA agreement but is within the jurisdiction of the Board to hear and adjudicate.

CONCLUSION OF LAW

7.The Delaware Supreme Court has stated that the authority granted to an administrative agency "should be construed so as to permit the fullest accomplishment of the legislative intent or policy. An express legislative grant of power or authority to an administrative agency includes the grant of power to do all that is reasonably necessary to execute that power or authority." Atlantis I Condominium Assoc. v. Bryson, Del. Supr., 403 A.2d 711, 713 (1979); Sutherland Statutory Construction, supra, § 65.03.[1]

8. The purpose of the Merit System of Personnel Administration created by the General Assembly is "to establish for this State a system of personnel administration based on merit principles and scientific methods governing the employees of the State in the classified services consistent with the right of public employees to organize under Chapter 13 of Title 19." 29 Del. C. § 5902. Worsham, Latney and Morris v. State of Delaware, Del. Super. C.A. No. 90-A-028, DelPesco. J.,(August 19, 1993)

9. The Board "shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules. 29 Del C. § 5931.

ORDER

10. The Motion to Dismiss is denied. The Board has jurisdiction to hear and determine this matter.

SCHEDULING ORDER

11. The matter will reconvene before the Board on December 20, 1995 at 1:00 P.M. at the Tatnall Building, Hearing Room 112, The Green, Dover, DE, and will render a decision in accord with 29 Del. C. Section 5931 that is reviewable on the record by the Superior Court.

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[1]For an application of this principle in the Merit System context, see State Personnel Commission v. Howard, Del. Supr., 420 A.2d 139, 141 (1980).

IT IS SO ORDERED

Katy K. Woo, Chair

Walter Bowers

Dallas Green

Gary Fullman

Original: File
XC: Grievant
Grievant's Counsel
Agency
Agency's Counsel
Board
State Personnel Office (2 copies)

DATE MAILED Nov. 30, 1995

EXHIBIT NO 2
TO MERB ORDER OF
DISMISSAL

BEFORE THE MERIT EMPLOYEES RELATIONS BOARD

OF THE STATE OF DELAWARE

RECEIVED
MERIT EMPLOYEE
RELATIONS BOARD
95 DEC -7 AM 8:52

STEPHEN WALLS,	)	
	)	
Grievant,	)	
	)	
v.	)	Docket No. 95-06-34
	)	
	)	
DEPARTMENT OF CORRECTION,	)	
	)	
Employer.	)	

NOTICE OF MOTION

TO: Douglas B. Catts, Esq.
Schmittinger & Rodriguez
414 S. State Street
P. O. Box 497
Dover, DE 19903

John F. Brady, Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, DE 19801

PLEASE TAKE NOTICE that the attached Motion to Dismiss will be considered by the Merit Employees Relations Board at its earliest convenience.

Janice R. Tigani
Deputy Attorney General
Department of Justice
820 N. French Street, 8th Flr.
Wilmington, DE 19801
(302) 577-2500

ATTORNEY FOR DEPARTMENT
OF CORRECTIONS

DATED: December 4, 1995

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

STEPHEN WALLS,	)	
	)	
Grievant,	)	
	)	
v.	)	Docket No. 95-06-34
	)	
	)	
DEPARTMENT OF CORRECTION,	)	
	)	
Employer.	)	

MOTION TO DISMISS

COMES NOW the Department of Correction ("Correction"), by and through its attorney, Janice R. Tigani, Deputy Attorney General, and moves the Merit Employee Relations Board ("MERB") to dismiss the above grievance for lack of jurisdiction. In support of its motion Correction states as follows:

1. Stephen Walls ("Walls") is employed by Correction as a Correctional Officer. As a Correctional Officer, Walls is a member of the employee bargaining unit known as the Delaware Correctional Officers Association ("DCOA") for collective bargaining purposes.

2. On or about November 6, 1991 the DCOA and Correction entered into an Agreement, effective from November 1, 1991 through December 31, 1993, with automatic renewal year to year thereafter absent 60 days' notice by either party of a desire to terminate, modify or amend. See attached.

3. On or about September 15, 1994 Correction and DCOA entered into an interim agreement that modified some terms and maintained others. Article 34, governing "Transfers Within An Institution - All Employees" was modified in part and retained in part. See attached. Specifically retained in full was Article 34.c.(2):

> Any dispute arising due to the movement of employees from a primary assignment is grievable only on the issue of whether the movement was based on favoritism, union activity, political affiliation, age, race or sex. The Union may file a written appeal of the Warden's Step 1 decision to the Commissioner or designee, whose decision shall be final and binding. Such appeal shall state the basis of the dispute... (Emphasis added.)

Article 34.c. covers primary assignments and delineates the grievance process available to members of the DCOA.

4. The MERB has jurisdiction to hear grievances filed pursuant to the Merit Rules adopted or amended by it or its predecessor. 29 Del. C. § 5943; Merit Rules 21.0000, et. seq. However MERB does not have jurisdiction to consider a grievance filed by an employee covered by a collective bargaining unit. Merit Rule 1.0100, 20.0210. In addition, state law provides:

> The rules adopted or amended by the Board under the following sections shall not apply to any employee in the classified services represented by an exclusive bargaining representative to the extent the subject thereof is covered in whole or in part by a collective bargaining agreement...: §§ 5922 through 5925 of this title, except where transfer is between agencies or where a change is made in classification or pay grade,... 29 Del. C. § 5938(d) (emphasis added).

5. Walls is clearly covered by the collective bargaining agreement between Correction and DCOA. Article 34 clearly covers, in whole, the issue of primary assignments and how disputes thereon are to be processed.

6. Walls claims that he has not applied for a particular primary assignment because of the perceived favoritism or sex discrimination. However, his failure or unwillingness to apply for a particular assignment based on his perception does not take his grievance outside the collective bargaining agreement.

7. The collective bargaining agreement provides that <u>any dispute</u> regarding primary assignment movement is grievable only through the process specified: an appeal of the Warden's Step 1 decision to the Commissioner or designee, whose decision shall be final and binding. Walls' complaint is a dispute regarding primary assignment and movement therefrom, and must follow the process delineated in the agreement. A grievance to MERB is outside of MERB's jurisdiction.

8. Section 5925 of Title 29 governs transfers within an agency, including within agency institutions. To the extent transfers are governed, in whole or in part, by a collective bargaining agreement the Merit Rules <u>shall not</u> apply. Article 34 governs transfers of employees, including Walls, who are covered by the collective bargaining agreement, therefore the Merit Rules do not apply.

9. The MERB cannot exercise jurisdiction over Walls' grievance, regardless of the basis for his claim, as the issue of transfers and primary assignment in any and all regards is covered and governed by the collective bargaining agreement between DCOA and Correction at Article 34.

10. The MERB relies on Worsham, et al v. State of Delaware, et al., C. A. Nos. 90A-028, 91A-029 & 91A-051, Del Pesco, J. (8/19/93) in holding that it has jurisdiction over the case at bar regarding primary assignment movement. The MERB's reliance on Worsham is faulty, as the case is readily distinguishable from the case at bar.

11. In Worsham, MERB's predecessor, the State Personnel Commission ("Commission"), held that it had jurisdiction over the grievances, as the underlying issue was reclassification of certain positions, but that it did not have authority to order a remedy, whether the remedy was ordering back pay or ordering the grievants be placed into the reclassified positions. The Superior Court affirmed the jurisdiction holding pursuant to 29 Del. C. § 5838(c), but reversed and remanded the remedy portion of the holding. In so doing the Superior Court cited the Supreme Court's holding in Atlantis I Condominium Assoc. v. Bryson, Del. Supr. 403 A.2d 711, 713 (1979) that authority or power granted to an administrative agency includes the "grant of power to do all that is reasonably necessary to execute that power or authority." However, in order to exercise its power or authority in reasonably necessary fashion, the MERB must first have jurisdiction over the matter brought before it.

12. Had the Superior Court found that the Commission did not have jurisdiction in Worsham, it would not have gone further to address the issue of remedy. Without jurisdiction an administrative agency has no authority to confer a remedy, regardless of the merit of the claim or equitable considerations, and regardless of what broad powers and authority it may have.

13. As noted above, in the case at bar the MERB has no authority or power

over the issue of transfers, including primary assignment, when the subject has been covered in whole or in part by the collective bargaining agreement. 29 Del. C. § 5838(d). Merit Rules governing transfers shall not apply when the employee is represented by an exclusive bargaining representative and the subject is covered by a collective bargaining agreement. § 5838(d); Merit Rule 1.0100. The collective bargaining agreement between DCOA and Correction clearly covers the subject matter of primary assignment movement. Article 34.c.(2).

14. In negotiating the subject of transfers, including primary assignment, DCOA and Correction agreed that primary assignment movement could be grieved only on the issue of favoritism, union activity, political affiliation, age, race or sex. The collective bargaining agreement therefore not only covers the subject matter but also governs on what bases a grievance on the issue can be filed. In addition, the collective bargaining agreement governs how the grievance will be decided:

> A Step 1 decision by the Warden is appealable only to the Commissioner or designee, whose decision is final and binding.

Article 34.c.(2) of the collective bargaining agreement.

15. The MERB has the authority to grant certain specified remedies when it determines that there has been a misapplication of any provision of 29 Del. C. ch. 59 or the Merit Rules. 29 Del. C. §5931. However, before it can reach a decision upon which it can impose those remedies, it must first determine whether it has the authority to exercise its jurisdiction. When it has no jurisdiction, as in this case, the MERB must dismiss the matter before it with no further consideration or proceedings.

WHEREFORE Correction prays that the MERB dismiss the grievance filed by Stephen Walls for lack of jurisdiction.

Janice R. Tigani
Deputy Attorney General
Department of Justice
820 N. French Street, 8th Flr.
Wilmington, DE 19801
(302) 577-2500

ATTORNEY FOR DEPARTMENT
OF CORRECTIONS

DATED: December 4, 1995

AFFIDAVIT OF MAILING

STATE OF DELAWARE)
) **SS:**
NEW CASTLE COUNTY)

I, Mary Beth Mullaney, being first duly sworn, deposes and says that :

1. She is a secretary with the Department of Justice.

2. That on December 4, 1995 caused to be mailed by U.S. mail two true and correct copies of within document to:

Douglas B. Catts, Esquire
Schmittinger & Rodriguez
414 S. State Street
P. O. Box 497
Dover, DE 19903

John F. Brady, Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, DE 19801

MERB
Cannon Building
Suite 203
P. O. Box 1401
Dover, DE 19903

Mary Beth Mullaney

Mary Beth Mullaney

SWORN TO AND SUBSCRIBED before me this 4th day of December, 1995.

Janice R. Tigani

Janice R. Tigani
Deputy Attorney General
Pursuant to 29 Del. C. § 2508

to MERB ORDER OF
DISMISSAL

THE MERIT EMPLOYEE RELATIONS BOARD OF THE STATE OF DELAWARE

RECEIVED
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STEPHEN WALLS,	*	Docket No. 95-06-34
	*	
Grievant,	*	
	*	
v.	*	
	*	
DEPARTMENT OF CORRECTION,	*	
	*	
Employer.	*	

GRIEVANT'S RESPONSE TO DEPARTMENT OF CORRECTIONS MOTION TO DISMISS

COMES NOW, the Grievant, Stephen Walls, by and through his attorneys, Schmittinger and Rodriguez, P.A., and responds to the Department of Correction's motion to dismiss as follows:

1. This matter has already been heard, argued and decided by the Board in its Order of November 30, 1995. The Department of Correction has already made a motion for reargument and the Board has denied the motion. This is the third attempt by the Department of Correction to have the matter dismissed on the grounds of lack of jurisdiction. The Grievant respectfully submits that the matter has already been decided and should not be reopened.

2. The Grievant refers by reference to the Board's well-reasoned Order of November 30, 1995.

3. Where there is uncertainty as to whether or not the Merit Rules or a Collective Bargaining Agreement controls, doubt should be resolved in favor of the Merit Rules. Worsham et al. v. State of Delaware, Del. Super., C.A. No. 90-A-028, Del Pesco, J. (August 19, 1993) at page 5.

4. There is an express legislative grant of power or

authority to an administrative agency to do all that is necessary to execute that power or authority. Worsham et al. v. State of Delaware, Del. Super., C.A. No. 90-A-028, Del Pesco, J. (August 19, 1993 at page 8).

5. The Collective Bargaining Agreement only applies to an employee who has a bid and is moved off a bid.

6. The Delaware Supreme Court has ruled that the authority granted to an administrative agency "should be construed so as to permit the fullest accomplishment of the legislative intent or policy." Atlantis I Condominium Association v. Bryson, Del. Supr., 403 A.2d 711, 713 (1979).

7. The purpose of the Merit System of Personal Administration created by the General Assembly is to "establish for this State a system of personnel administration based on Merit principles and scientific methods governing the employees of the State in the classified services consistent with the right of public employees to organize under 19 Del. C. §1300 et seq. Worsham et al. v. State of Delaware, Del. Super., C.A. No. 90-A-028, Del Pesco, J. (August 19, 1993).

8. The definition of a grievance is any employee complaint which concerns applications of the Merit Rules or the Merit System statute which remains unresolved after informal efforts at satisfaction have been attempted. Merit Rule 20.0200. Mr. Walls has not grieved his movement to or from a primary assignment, but grieved that there is a discriminatory practice of retaining certain female correction officers in non-housing positions after they are awarded housing assignments. Naturally, this makes it

more difficult for someone to transfer from housing (considered one of the most undesirable positions) to another position inasmuch as those positions are often already taken by females who are assigned to housing, but working somewhere else.

9. In the Motion for Reargument, the Department of Correction has cited 34.c(2) of the Collective Bargaining Agreement without citing 34.c(1). To understand 34.c(2), it must be read in conjunction with 34.c(1) which provides:

> Posted vacancies at each institution within all classifications shall also include the primary assignment, if any, as defined by the Employer.
>
> (1) The primary assignment shall be posted for informational purposes only and shall not be construed as a guarantee that the employee will always be so assigned. The Employer reserves the right to move employees to other assignments within the institution but may not change the employee's shift or days off, except as provided in 34.e below. Furthermore, this section is subject to the institutions' right to change their assignment process in accordance with 34.f.

The grievance is not that the grievant has been moved as provided in 34.c(1). Also, of course, the Department of Correction reserves the right to move employees to other assignments within the institution per the Collective Bargaining Agreement.

Part 34.c(2) begins as follows:

> (2) Any dispute arising due to the movement of employees from a primary assignment is grievable only in the issue of whether the movement was based on favoritism, union, activity, political affiliation, age, race, or sex.

Part 34.c(2) refers to 34.c(1) which refers to a specific employee who has been moved from a primary assignment. Mr. Walls was not moved from a primary assignment. In other words, 34.c(2) refers to an employee who has been moved and Mr. Walls has not been moved. In fact, it is quite obvious that the female employees that

have a primary assignment with housing (undesirable) and do different jobs such as control do not have personal motivations to file a grievance, inasmuch as discrimination is in their favor.

10. The grievant acknowledges there is no guarantee that a person will be assigned per 34.c(1), but it is clear that a prima facie case shows that there is sexual discrimination against men and in favor of women assigned to housing, inasmuch as the men assigned to housing are not moved to the "more desirable jobs", but the women are moved despite having a primary assignment in housing. These facts have been demonstrated by testimony and exhibits in this case. Article 34 of the Collective Bargaining Agreement refers to those persons who have bid and been moved. Mr. Walls has not been moved. Accordingly, the Merits Rules must apply.

SCHMITTINGER & RODRIGUEZ, P.A.

BY: _____

DOUGLAS B. CATTS, ESQUIRE
414 S. State Street
P. O. Box 497
Dover, DE 19903
Attorney for Grievant and
Delaware Correctional
Officers Association

DATED: 4/19/96
DBC:ksh

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the following:

GRIEVANT'S RESPONSE TO DEPARTMENT OF CORRECTIONS
MOTION TO DISMISS

to be served upon: Janice R. Tigani, Esquire
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

John F. Brady, Esquire
Department of Justice
Carvel State Office Building, 8th Floor
820 N. French Street
Wilmington, DE 19801

by mailing copies to them at their addresses listed above, postage prepaid on 4/15/96

SCHMITTINGER & RODRIGUEZ, P.A.

BY: _____

DOUGLAS B. CATTS, ESQUIRE
414 S. State Street
P. O. Box 497
Dover, DE 19903
Attorney for Grievant and
Delaware Correctional
Officers Association

DATED: 4/15/96
DBC:ksh

EXHIBIT NO 4
TO MERB ORDER OF
DISMISSAL

MERIT EMPLOYEE RELATIONS BOARD

STATE OF DELAWARE

STEVEN WALLS	:	
V.	:	Docket No. 95-06-34
DEPARTMENT OF CORRECTIONS	:	IN RE: TRANSFERS

DATE OF HEARING:
MAY 25, 1996

BOARD:

KATY WOO, CHAIRPERSON
ROBERT BURNS, Vice-Chairperson
DALLAS GREEN, Board Member
GARY FULLMAN, Board Member
WALTER BOWERS, Board Member
JOHN BRADY, ESQ. as
Board Counsel

APPEARANCES:

ELIZABETH D. MARON, ESQ. for the
Department of Corrections
DOUGLAS B. CATTS, ESQ. for Steven
Walls

KATY WOO: Good morning. Today is April 25. The time is about ten after ten. The Merit Employee Relations Board has full members attending this morning. Mr. Dallas Green, Walter Bowers, Gary Fullman and Vice-Chair, Robert Burns. We have a legal hearing scheduled of Steven Walls v. Department of Corrections. We will delay the other one to one o'clock this afternoon. I'd like to turn the hearing over to Deputy Attorney General Mr. John Brady.

JOHN BRADY: Thank you Chairperson Woo. This is matter 95-06-34, Steven Walls versus The Department of Corrections. The Department of Corrections by a motion dated December 4, 1995 upon a letter request from the Chair dated March 26, 1995, I believe, the grievant was asked to file an answer to the Motion to Dismiss. The grievant filed said motion on 4/19/96. Copies of both motions have been forwarded to members of the Board. At this point, I'd like to hit the salient points in the law and let you decide how you wish to handle this matter. The Motion to Dismiss on Walls is based on a reading of Merit Rule No. 1.0100. The Rules adopted or amended by the Board under the following sections shall not imply to any employee in the classified service represented by an exclusive bargaining representative to the extent that the subject thereof is covered in whole or in part by a collective bargaining

agreement. And that 5938D provides that the Merit Rules shall not apply. The matter as filed was a discrimination claim under Merit Rule 19 alleging discriminatory practices by The Department of Corrections in the assignments of female correctional officers to housing units in violation of a consent order of the United States District Court, which was issued in 1993. The sum basis if The Department of Corrections argument is that this is an exclusively a matter that is handled under the Collective Bargaining Agreement, and as such this Board does not have the statutory jurisdiction to hear any claim resulting from a matter covered in whole or in part by Collective Bargaining Agreement. They go on to state that under paragraph 7 of the Motion to Dismiss, "The Collective Bargaining Agreement under Article 34 of the contract provides that any dispute regarding assignment movement is grievable only through the following process: First, an appeal to the warden step one decision to the Commissioner or designee whose decision shall be final and binding." The Department of Corrections alleges that Walls' complaint is a dispute regarding primary assignment and movement thereof, and must therefore follow the process in the Agreement and that the Merit Rules do not apply. They also cite for that provision the Wursham case (phonetic), the Atlantis One Condominium Association v. Brison that says, "The authority or power

granted to administrative agency includes that grant of power to do all that is reasonably necessary to execute that power." But remind you that your power is statutorily derived and you are limited to what the General Assembly said you can do. The response by Mr. Walls through his counsel, Mr. Catts, initially references first that this Board heard oral argument on this matter on November 16th and then a written order dated November 30th, decided it did have jurisdiction and that the order of that date should be maintained. In addition the grievant contends where there is uncertainty as to whether or not the Merit Rules or Collective Bargaining Agreement controls, doubt should be resolved in favor of the Merit Rules, and cites as an example of that argument, Wursham v. State of Delaware. The Wursham case was probably the last case that interpreted the former State Personnel Commission's powers and duties. The grievant argues that the Collective Bargaining Agreement only applies to an employee who has a bed and moved off a bed. This grievant's complaint that concerns the application of the Merit Rules or the Merit System which remains unresolved after informal efforts and satisfaction have been attempted. Mr. Walls has not grieved his primary assignment, but has grieved that there is a discriminatory practice of retaining certain female correction officers in non-housing positions after awarded housing assignments. The grievant

argues in his Motion, under 34, the Collective Agreement, paragraph 34C(1). C(2) is the one that delineates the process. C(1) says that the primary assignment shall only be posted for informational purposes only and shall not be construed as a guarantee that the employee will also be so assigned. The employer reserves the right to move employees to other assignments within the institution but may not change the employee's shift or days off except as provided in 34E. Furthermore, this section is subject to the institution's right to change their assignment process in accordance with 34F. The grievance is not that the grievant has been moved as provided. This is that female employees, according to the grievant, that have a primary assignment with housing which is alleged to be undesirable and do different jobs, such as control, do not have personal motivations to file a grievance because discrimination is in their favor. And that the discrimination under the Merit Rules allows this Board to heard it because this is primarily a discriminatory practice claim of the Department of Corrections as alleged in the incident. What this Board has to do is to make a factual finding. When you make your factual finding, then the factual finding will flow to the legal finding. You must, therefore, make the factual finding as follows: Is it as the Department of Corrections argues, a dispute regarding primary assignment and movement therefrom, which

has as the only remedy the Collective Bargaining Association and the two step process which ends with the Commissioner's office, or is it as grievant alleges, a discriminatory practice of which you the power to hear grievances involving discriminatory practices where informal attempts to resolve the situation have not worked. Under the non-discrimination provisions of the Merit Rules which is Chapter 19.0100, "Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline, or any other aspect of personnel administration because of political or religious opinions, affiliations, or because of race, national origin, age, sex, physical or mental disabilities, or other non-merit factors, will be prohibited." And it says that grievances in appeals arising from such factors, shall be made in accord with Chapter 20.0 and 21.0. That's Merit Rule 19.3. Madam Chair, do you understand the question that Board must resolve this morning first, and then the law that will apply once you make the factual determination?

KATY WOO: I believe that's clear. Do any Board members have any questions? I need to determine the factual finding. This Board will now go into deliberation. The Board is ready to make a motion on the factual finding for the case, Walls v. Department of Corrections. Mr. Dallas Green I believe is ready to make a motion.

MR. GREEN: Yes. After reviewing these documents, all members of the Board, they feel that the Motion to Dismiss and inasmuch as we find there is discrimination on this, we feel that we have power over making the determination on this.

JOHN BRADY: You need to address the Motion to Dismiss filed by the State. You have to say if you're going to grant it, or deny it. And then you have to say the reasons why you're either granting it or denying it.

KATY WOO: Is it your motion to deny the State's Motion to Dismiss?

DALLAS GREEN: Yes. Thank you. Is there anything else I should say?

JOHN BRADY: The reasons why the Board is denying the Motion.

KATY WOO: Let me see if I can interpret that, Mr. Green. The alleged discrimination claim is covered under the Merit Rules. The claim might be discrimination in nature and not one regarding primary assignment. Therefore, the Board does have jurisdiction to hear the case. Can I see a second to that Motion of Mr. Green?

ROBERT BURNS: Seconded.

KATY WOO: Seconded by Mr. Burns. Any discussion?

BOARD MEMBER: No.

KATY WOO: Would all those in favor of the motion, please say "aye."

BOARD MEMBERS: Aye.

KATY WOO: Aye. Objections? None. The motion is passed, denying the State's Motion to Dismiss the case. That case then will be rescheduled for future hearing. Thank you very much.

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CERTIFICATE OF TYPIST

I, Katherine R. Marshall, typist for the Merit Employee Relations Board of the State of Delaware do hereby certify that the foregoing is an accurate transcript of the testimony adduced and proceedings had, in the case herein stated, as the same remains of record.

DATED: *July 22, 1997*

Katherine R. Marshall

Katherine R. Marshall

MERB ORDER OF
DISMISSAL

MERIT EMPLOYEE RELATIONS BOARD

STATE OF DELAWARE

— — — —

STEVEN WALLS	:	
V.	:	Docket No. 95-06-34
DEPARTMENT OF CORRECTIONS	:	IN RE: TRANSFERS

— — — —

DATE OF HEARING:
MAY 22, 1996

— — — —

BOARD:

KATY WOO, CHAIRPERSON
ROBERT BURNS, Vice-Chairperson
DALLAS GREEN, Board Member
GARY FULLMAN, Board Member
WALTER BOWERS, Board Member

JOHN BRADY, ESQ.
Board Counsel

APPEARANCES:

ELIZABETH D. MARON, ESQ. for the Department of Corrections
DOUGLAS B. CATTS, ESQ. for Steven Walls

RECEIVED
MERIT EMPLOYEE
RELATIONS BOARD
97 JUL 21 PM 12:30

KATY WOO: Good morning. The Merit Employee Relations Board has the entire Board here. Mr. Green, Dallas Green, Walter Bowers, Gary Fullman, Vice-Chair Robert Burns, and I'm Katy Woo, Chair. We have the continuing hearing of Steve Walls versus the Department of Corrections this morning. I would like to refer now to our Deputy Attorney General Mr. John Brady, please.

JOHN BRADY: Thank you, Madam Chair. This is docket number 95-06-34, Steven Walls, Grievant versus The Department of Corrections. This matter came initially before the Board on October 11, 1995. On November 30, 1995 the Board made a written order with a finding of fact that the substantive basis of this grievance should be alleged discriminatory practice of retaining certain female correction - and the spelling is incorrect there, it was supposed to be correctional - officers in prior non-housing positions when they were awarded housing assignments based upon a review of grievant's sworn testimony in the record on this matter. The Board finds that the claim of discrimination under Rule 19.0100 as alleged in this case is not limited to the contractual remedy contained in the interim DOC agreement, but is within the jurisdiction of the Board to hear and adjudicate. That was done after counsel for the Board reviewed the oral argument made by Mr. Martinger on behalf of The Department of

Corrections and the response to The Department of Corrections Motion to Dismiss by Mr. Catts, counsel for The Delaware Correctional Officers Association. Since that time there was a Motion to Dismiss filed by The Department of Corrections by Janice R. Tigani, Deputy Attorney General, dated December 4, 1995, to which an answer was filed on April 19, 1996 by The Department of Corrections after opportunity to answer was requested by the Chair of The Merit Employee Board. At a hearing on April 15, 1996, at approximately 9:30 in the morning the Board voted that the cause in this action was that discrimination was the claim being adjudicated here as was the position articulated by the DCOA, and not a transfer within an institution under Article 34. Yesterday the counsel for the Board, myself, was advised by the new counsel of a Delaware Supreme Court decision that may affect this matter. That case is John L. Sullivan, Commissioner of Corrections, Bureau of Adult Corrections, Department of Corrections of the State of Delaware, defendant v. Local Union 1726 of AFSCME AFL-CIO, plaintiff appellees, decided August 3, 1983 by the Supreme Court of Delaware. In an opinion by then Justice Horsey which is contained at 464 A.2d 899. Justice Horsey held, upholding a Superior Court decision, that a temporary transfer is controlled by the contract and not by the Merit Rules. This case came before the Superior Court and the Supreme

Court in 1983 where the ultimate question was whether such temporary transfers were controlled by the Collective Bargaining Agreement as the Union contended, or by the State Merit Rule adopted by statute, as the Department contended. Apparently, at that time there was an Attorney General's opinion that the State Merit Rules took precedence over the provision of the Collective Bargaining Agreement for the use of these temporary transfers. The Union sought relief in the Superior Court because the arbitrator under the contract, directed that the Department rule in the Union's favor. The arbitrator ruled in the Union's favor stating in part, "The evidence as a whole strongly suggests the Department's primary concern is the cost in overtime in covering those absences in other areas without transferring someone at straight time." The State failed to abide by the arbitrator's order and this matter went to the Superior Court. The Superior Court defined the issue of whether temporary transfers of Correctional Officers were controlled by the party's Collective Bargaining Agreement, or by the Merit Rules. The Court in a decision that runs about six pages, referred to 29 Del.C. 5938, Collective Bargaining Agreement and determined finally that the temporary transfer was controlled by the contract and the Merit Rules. This case stands for the provision that matters referring to temporary transfers and work schedules are not under the statutory provisions for

classification uniformity. Those provisions of Merit Rules do not supersede the Collective Bargaining Agreement results. This Board found that this was a discriminatory practice. Nevertheless, it does not appear that this Board would have the jurisdiction to adjudicate this claim. This matter appears wholly to be covered under the Collective Bargaining Agreement. As such, as has been the practice, instead of going into executive session to render legal advice, I have given you the legal advice on the record, so that all parties will know exactly where I was coming from and the resources that I cited. It would appear from a reading of the Sullivan case, which a copy was provided to all Board members, before I go further, when I was made aware of the Sullivan case, I notified both Ms. Maron and Mr. Catts of the case and gave them the citation and provided copies to Ms. Maron yesterday afternoon upon her request, and Mr. Catts this morning upon his request, of this matter. It would appear that in this case my previous opinion, was made without the knowledge contained of the Supreme Court's decision in the Sullivan case. Had I been aware of that, I may have come to a different conclusion back in December. I will note that this case was not cited by either party and I wasn't aware of it until counsel, Mr. Tischer, brought it to my attention yesterday. At that point I immediately brought it to both counsels attention for today's hearing

and told them that I would be reviewing it. Having reviewed it, it is my opinion that this Board, based on the jurisdiction that this Board flows from is statutory in nature, and the Supreme Court's decision in Maxwell v. Better, that this Board does not have the jurisdiction to determine any claim related to a temporary transfer, even when an allegation of discrimination is made. Your finding of discrimination, nevertheless, does not confer upon you the jurisdiction to resolve this matter. I believe that counsel may wish to make exceptions to this ruling, and Madam Chair, I recommend that if either party wishes to place any evidence on the record, that they be given the opportunity to do so.

BOARD MEMBER: Is that a ruling already before we argue?

JOHN BRADY: That is my recommendation. In reviewing the order that was issued in November, and was affirmed by this Board in April. And in reviewing that - I don't make rulings, I make recommendations. The Board will make the final ruling. I suggest that the parties be given the opportunity, because this was something they were not prepared for today, given the late notice of finding, if the parties request that they be given the time to prepare a response to that, I believe you should give them the time that they request.

BOARD MEMBER: I think I can go forward, if you don't mind, do you mind if I pass out copies of the grievant's response to the Motion to Dismiss? I don't see where this changes anything. It's the same argument.

MS. MARON: If I may, Ms. Woo, can I address the procedural matter?

KATY WOO: Yes, you may.

MS. MARON: It is my understanding that you are reviewing the Board - the attorney has requested this Board to review its oral ruling last month relating to the State's Motion to Dismiss. If that's the case, then I think the State is entitled to proceed with oral argument first. I would request if I could just address....

KATY WOO: I was just going to make sure that in this instance the State would have an opportunity to begin first your argument for presentation.

MS. MARON: Thank you.

JOHN BRADY: And I remind everyone when they address, that they identify themselves for the taping purposes.

MS. MARON: Elizabeth Maron on behalf of the Department of Corrections. The Department of Corrections stands by the written papers that were submitted some time, I don't know the

exact date, it was filed by Janice Tigani by the Department of Justice. Mr. Brady did bring the Sullivan case to my attention. I believe that's in essence what we argued in written papers, although I apologize that we did not bring this to the Board's attention. I think it stands on all fours what this case is about. What this case is about is shift assignments within the Correctional facility. It is undisputed that the contract applies with regard to movement within each institution and contract No. 34.C which has been submitted as evidence by the grievant prior to a full hearing. I think that the Board is bound by the finding of Sullivan and which has been cited again by the Delaware Supreme Court for the proposition that a valid collective bargaining agreement is in effect. It takes precedent over contrary provisions in the Merit System Rules concerning work schedules. And that the Sullivan case was cited in Department of Corrections v. Correctional Officer Supervisors 514 A.2 405 in April of 1986. I think the Board is also bound by the Delaware Supreme Court decision that unfortunately you do not have jurisdiction. I would remind the Board that the contract does provide for a grievance procedure, although this body does not have jurisdiction, this does not mean that Mr. Walls or any other grievant who has a grievance related to this issue. There is a form for that and unfortunately it's not this body. There is a full - the Union and

the Department has negotiated the grievance process that's contained within the contract. If there is an issue it would be with regard to arbitration. Again, the Department would move, or request that you grant the Motion to Dismiss on the basis that we do not have jurisdiction. Thank you.

KATY WOO: Thank you. Ms. Maron, I have a request from our Vice-Chair to see if you could provide that section of the Union contract it speaks about.

BOARD MEMBER: We may have gotten it before, but if we could have a copy.

MR. CATTS: It will be in my response to the Motion.

MS. MARON: I can give you my copy.

BOARD MEMBER: He said it would be in his response, so that's okay.

MS. MARON: And it's also in our - it's quoted in our written submissions, 34.C, and I think both Mr. Catts and Ms. Tigani quoted it in full. And I believe the grievant is going to argue that the Sullivan case there was a different union and it was a different contract. But the same principles apply here. There's a contract with a union that says grievances regarding movement within the institution

goes to - a grievance is a grievable issue. The Merit System does not apply. Despite the fact that it's a different contract, the Delaware Supreme Court is binding you to a ruling that we do not have jurisdiction.

KATY WOO: Thank you very much. Mr. Catts.

MR. CATTS: Ms. Chairman, would it be possible for me to pass out the response, a copy of the response that we made to the original - the third motion really.

KATY WOO: Do you have copies for everyone?

MR. CATTS: Right here. I can pass them down. And at the same time, can I hand out a copy of your ruling of November 30th so everybody has the final notice, and so people will have everything.

(Conversation aside while Board received papers.)

MR. CATTS: Does everybody have a copy of each?

BOARD MEMBER: Yes.

MR. CATTS: If I could start. First of all, this is the fourth time the State has tried this motion. If this were so

important they would have cited it in the first place. I think they're grasping at straws in this case. In looking through this case, first of all, it was a completely different contract. Not the contract at issue in this case. I would also point out that the same argument we made in the response, and we've made all along, is that Mr. Walls was not transferred. The contract refers to someone whose been transferred. This case is brought on discrimination. He saw this going on, with people being placed in primary assignments and then moved away, not having to do the housing work, if you recall. The difficult work involved. Mr. Walls was never transferred. His grievance is that their doing it. You can bring this because you have to follow the Merit Rules and anybody can bring a grievance. We've been through all that before, too. And, also because the women were getting control of good posts and he was getting bad posts, and he couldn't get those same posts. It's pointed out on page three of the Motion, the Response to the Motion, it says,"34C2. Any dispute arising to the movement of employees from a primary assignment to another is grievable only in the issue of whether...." But, what they didn't point out before, and they don't point out again, is on the next page about the primary, excuse me. Going above, the primary assignment has to be posted and that's the way it works. I've pointed most of this out in the brief. Now, the point

is, he was never moved. So, the primary assignment issue, which is the key to the contract, is not at issue in this contract, and I think if you look at number 10 of the Response, it clears up exactly what has happened. He's not complaining about any transfers on his own behalf. I'd like to point out that the Sullivan case is a completely different contract. So, we got different language we're dealing with. I would also like to point out in the Sullivan case, that at that time they were betting posts. This isn't betting posts in this case; it's a primary assignment case. They also, I'd like to point out, that the grievants in the Sullivan case, and I think this is a key issue and I have a witness here to testify about this. Fortunately, even though I had short notice, we have a witness that knows about it. The grievants were the ones that were transferred. Mr. Walls wasn't transferred. That's a big distinction in this case. We said from the beginning, if he were transferred then we would go to arbitration. That's why we're here and the State goes along with that until we get this far. If they really meant this, it would have been in their first motion. It wasn't brought up by either side because it's not applicable. I'd also like to point out on page 901, the first full paragraph of the Sullivan decision, they're going to Merit Rule 3.0420. Well, nobody's mentioned this to you. That's not why we're here. That's on classification. He doesn't have a grievance

on classification. He has a grievance on discrimination. We brought that forward. Our grievance is on 19.010, and has been from the beginning of the case, and all rulings have been based on that. It's based on discrimination, not classification. If you'll look again to the response, you'll see you have wide latitude in the Merit Rules on discrimination, and that should be applied. I am applying your own decision of November 30th. If there is a doubt between the two, you pick the Merit Rules on discrimination. Again, he is in a position where he wasn't transferred, and that's what this is all about. The contract specifically has a remedy only for transfers. He wasn't transferred. The Merit Rules specifically have a remedy for discrimination. That's why we're here. If there's any conflict, the Merit Rules are supreme. Can I just have a second.

KATY WOO: Yes, you may.

MR. CATTS: If it's okay, I'd like to call a witness up to give you some of the history of this case.

MS. MARON: I object. I mean....

MR. CATTS: How can I make a record?

MS. MARON: You don't need a record. You have a Delaware Supreme Court case that says you do not have jurisdiction. Attorneys can make their argument on whether or not this

factually applies. We're now going to have a hearing on whether or not Sullivan was about this, you have a Delaware Supreme Court which states the facts. We stated to you the facts and why we think this applies. Mr. Catts has now said his understanding and why he thinks it doesn't apply. And it's now the Board's obligation to make a determination, a legal ruling as to whether or not you have jurisdiction. Mr. Brady can advise you accordingly. To have a little mini-hearing on what the Sullivan v. Local Union 1726 was about, is ridiculous.

KATY WOO: Well, I'm going to make sure that we would not.... We would make the ruling first before we entertain any witnesses. Is that correct, Mr. Brady?

JOHN BRADY: If Mr. Catts wishes to make a proffer of what the witness would do in order to establish a record in case that he wishes to do, the Association wishes to appeal any ultimate decision or the Department. He should be given the opportunity to make a proffer of that evidence to the extent that calling a witness on oral argument, though, is not provided for. I believe we should give Mr. Catts time to take notes as to what the witness would be testifying to and as an officer of the court, Mr. Catts can present that as part of the record to you. And if Mr. Catts would like some time to do that, I think he should be given the time to do that. That would be,

I believe, my understanding of what is appropriate to preserve the record in this. An appropriate offer of evidence in support of his position for the record.

KATY WOO: So, that means the Board would defer from making a decision?

JOHN BRADY: No. What I'm saying is, let Mr. Catts offer whatever he wishes. It would not be appropriate to call specific witnesses, but he can offer and say, I could have witness X who would testify to these following things. He can make that proffer to the Board as part of his argument this morning. If he wishes to have time to prepare that, or wishes to do that in writing, that's a request that you could consider and you could defer this matter to do that. This did come up late yesterday, and neither party was given a proper - the Rules provide for twenty days notice on scheduling a hearing, this was scheduled as a factual hearing and turned into a legal hearing because of what came up, the events of yesterday in locating this case.

MR. CATTS: Why don't I take two minutes, walk outside with Mr. Morris, make sure I have it right, and walk back in. Everybody stays here and we won't waste time.

KATY WOO: That's fine.

(Recess. Off the record.)

KATY WOO: Mr. Catts.

MR. CATTS: Yes, I have consulted with Mr. Morris and he would testify. The proffer if that first of all, the grievants in the Sullivan case were people who were transferred. It goes back to a different contract, an old contract where the post was guaranteed, and they were just transferring people. A whole different thing. It wasn't brought on discrimination. As Mr. Walls was never transferred. As the contract reads now, they have a primary assignment. That's not guaranteed. They can be moved around. However, they can't be moved around in a discriminatory fashion, and that's the difference. That's why it's a discrimination case. He would also point out that this case was based on classification, which is right there in the case, on page 901, Merit Rule 3.0420. Our case is on 19.100, which is discrimination. The grievance was moved before under classification illegally. The word discrimination doesn't appear in here, anywhere whatsoever. That's all.

KATY WOO: Thank you very much, Mr. Catts.

MS. MARON: Ms. Woo, may I make a short reply?

KATY WOO: Yes, you may.

MS. MARON: The current contract says any dispute due to movement of employees from a primary assignment is grievable only on the issue of whether the movement was based on favoritism, union activity, political affiliation, age, race, or sex. That's exactly what they're arguing, that there is a dispute arriving out of, although it says movement, they're arguing lack of movement, as a result of sex. There's a complete contract directly on point, the Sullivan case, whether or not it was a different issue, temporary transfer, whatever you want to call it, Sullivan case says contract applies over the Merit System Rules. The contract applies and the grievance procedure in this contract which they negotiated, is what they need to proceed under. Unfortunately, not the Merit System. And then, finally, the Union with righteous indignation, claims that - we keep arguing this - a party can raise a jurisdictional defect at any time. Mr. Brady brought this to our attention. There is a Delaware Supreme Court case which says a party can raise a jurisdictional defect at any time, and that's DeForest v. Dick.

MR. CATTS: In response to that, we have had testimony in the previous hearings going back to October or November, whenever we had it, that the history of collective bargaining was that it referred, and the language says it anyway, to a person who

was actually moved had standing for the grievance under the contract. And he didn't have standing for the grievance. I think he's switching this all around. If he had filed a grievance it would have been a whole different backwards argument. We're here on discrimination - that's what you're here for. And that's the important thing. If you read the response to their third Motion, I point all that out. I'm not here on classification. Sullivan is before you on classification.

KATY WOO: Thank you very much.

MS. MARON: Ms. Woo. I'm sorry. Just for the record, I'm not waiving the argument that Mr. Walls has standing to bring a grievance because of discrimination. I'm just saying that his argument is that there is discrimination due to movement and the contract applies and this body does not have jurisdiction.

KATY WOO: I believe that's clear to Board members.

MS. MARON: Thank you.

KATY WOO: At this point, do we need to go off the record for deliberation?

BOARD MEMBER: Well, before we do that, I would like to hear if what the attorneys have said had any impact on what counsel has advised.

JOHN BRADY: Okay. Consistently from the start of this hearing on October 11, 1995 to today, I believe I've said that the Board had to make a finding. The Board made a finding that the substantive basis of this grievance is an alleged discriminatory practice. Counsel for the Association is correct. The Sullivan case did not cover discrimination. The Sullivan case, however, did cover the temporary transfer of employees from one position to another within a facility. And that is the underlying issue in this matter. In the absence of the Sullivan case, this would be clear, that this is an issue of first impression for this Board. However, reading Sullivan and the Department of Corrections, First Correctional Officers, Supervisors, it is clear that Sullivan stands for the proposition where a valid collective bargaining agreement is in effect, it takes precedent over contrary provisions in the Merit System Rules concerning, in that case, work schedules. This case deals with work schedules. As such it is my opinion that this Board does not have the jurisdiction because there is a valid contract in effect and that contract in paragraph 34C2 has the provision to resolve such issue. I am the first to admit that this is a change from what I said before, and the change is based on the Sullivan case. And the Supreme Court's holding in this. As in the original order of this Board, signed on November 30th, in the absence of any specific

direction from the Supreme Court, the Atlantic First Condominiu Association versus Brison, 403 A.2 711, says, "An express legislati grant of power or authority to administrative agency including the gra of power to do all that is reasonably necessary to execute that pow or authority." I did not find Sullivan and did not know it existed un yesterday. And, to the extent that it showed that my research was nc as thorough as it should have been in this matter, I apologize to th Board. When I reviewed these matters, I review all the filings and look up all the relevant cases. This case was found yesterday by a search on a different topic matter under Labor Relations for another case that you're going to have in the future, by the new counsel assigned to this Board. After reading it, I revised my opinion and gave you the basis for my opinion initially, let counsel argue the application, but I have to stand by what I advised approximately half an hour ago.

BOARD MEMBER: Katy, I'm ready to deliberate.

KATY WOO: Is that a consensus? Are you ready to make a motion on whether we have jurisdiction on this case or not?

BOARD MEMBER: I am.

BOARD MEMBER: So am I.

MR. FULLMAN: I don't know that I'm in the mood to play lawyer this morning. We have counsel here to advise us on the legal issues and our counsel has done that.

KATY WOO: Would you like to make a motion, Mr. Fullman, please?

MR. FULLMAN: Yes, on advice of counsel I would like to make a motion that this Board does not have jurisdiction over the case of Steven Walls v. DOC, and on that basis, that this case be dismissed.

MR. BURNS: Second.

KATY WOO: That motion has been seconded by Mr. Burns. Is there any discussion further on this motion?

BOARD MEMBER: Not at all.

KATY WOO: May I hear a vote supporting the motion?

BOARD MEMBER: Members indicate "Aye."

KATY WOO: Any dissents? There being none, motion is passed to dismiss the case.

JOHN BRADY: Pursuant to 29 Del.C. Chapter 59, 49B, the employee shall have the right to appeal in the Superior Court on whether the appointing authority acted in accordance

with the law. The burden of proof on such appeal to the Superior Court is on the employee. All appeals to Superior Court shall be by filing of a notice of appeal with the court within thirty days of the employee being notified of the final action of the Board. What you have heard this morning is the oral decision of the Merit Employee Relations Board on this matter, document number 95-06-34. A written decision, signed by all the members of the Board, will be issued and your appeal rights will be noted on the end of it. This hearing was completed at 11:30 a.m.

KATY WOO: Thank you.

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CERTIFICATE OF TYPIST

I, Katherine R. Marshall, typist for the Merit Employee Relations Board of the State of Delaware do hereby certify that the foregoing is an accurate transcript of the testimony adduced and proceedings had, in the case herein stated, as the same remains of record.

DATED: *July 19, 1997*

Katherine R. Marshall

Katherine R. Marshall