

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

<b>SHARON BERTIN,</b>	)	
	)	
Employee/Grievant,	)	
	)	
v.	)	<b>DOCKET No. 20-10-789</b>
	)	
<b>DEPARTMENT OF HEALTH AND SOCIAL</b>	)	<b>DECISION AND ORDER</b>
<b>SERVICES/DIVISION OF DEVELOPMENTAL</b>	)	
<b>DISABILITIES SERVICES,</b>	)	
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:30 a.m. on August 19, 2021, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904. The Board provided a teleconference line for participation.

**BEFORE** W. Michael Tupman, Chair; Paul R. Houck, Jacqueline Jenkins, Ed.D., Victoria D. Cairns and Sheldon N. Sandler, Esq., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

Ilona Kirshon  
Deputy Attorney General  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Sharon Bertin *(via teleconference)*  
*Pro Se*

Nicholas Picollelli  
Deputy Attorney General  
on behalf of the Department of  
Health and Social Services

## **BRIEF SUMMARY OF THE EVIDENCE**

The employee/grievant, Sharon Bertin, offered eighteen (18) documents into evidence of which the Board admitted fifteen (15), marked as Grievant Exhibits 1 - 15.

The Department of Health and Social Services (“Agency”) offered seven (7) documents into evidence all of which were admitted and marked as Agency Exhibits A through G.

The Grievant testified on her own behalf.

Two witnesses testified on behalf of the Agency: Marissa Catalon, DHSS/Division of Developmental Disabilities Services (“DDDS”) Director; and Kamin Giglio, DHSS/DDDS Social Services Chief Administrator.

## **FINDINGS OF FACT**

Ms. Bertin has worked for the Agency for fourteen (14) years and has been the Nursing Supervisor for New Castle County since 2013. The Nursing Supervisor for the Kent and Sussex position was vacated in 2019 but was not refilled by the Agency. Ms. Bertin has served as the sole DDDS Nursing Supervisor, responsible for statewide duties, since that time.

Because the positions of Nursing Administrator and Nursing Director in DDDS are not filled,<sup>1</sup> Ms. Bertin, as the sole Nursing Supervisor, is the highest ranking nursing position in DDDS. She reports to the Social Services Chief Administrator (“SSCA”), who performs most of the functions listed in the Nursing Administrator job description, in addition to her other Social Services Chief Administrator duties. In addition to the job classification specifications in the Nursing Supervisor PG 16 job classification, Ms. Bertin has also been performing job duties

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<sup>1</sup> Transcript at pages 33, 55.

enumerated in the Nursing Director job classification, PG 20.<sup>2</sup>

Ms. Bertin has been performing duties outside her classification including: contract management, representation of DDDS on four Boards and various committees and teams; and serving as contact person for Professional Services RFPs.<sup>3</sup> In addition, the SSCA testified that Ms. Bertin performs the following duties, which fall within the Nursing Director classification:

1. Makes recommendations to the SSCA concerning needs of the nursing department;
2. Drafts nursing policies and procedures which are provided to Giglio for revision;
3. Makes recommendations on direction for nursing programs and services;
4. Conducts research and gathers historical data to help prepare the budget.<sup>4</sup>

### **CONCLUSIONS OF LAW**

Working out of class is covered by Merit Rules 3.2 which provide as follows:

- 3.2 Employees may be required to perform any of the duties described in the class specification, any other duties of a similar kind and difficulty, and any duties of similar or lower classes. Employees may be required to serve in a higher position; however, if such service continues beyond 30 calendar days, the Rules for promotion or temporary promotion shall apply, and they shall be compensated appropriately from the first day of service in the higher position.

The Agency argues that the additional duties Ms. Bertin is responsible to handle fall within the second bullet of the Nursing Supervisor specifications, i.e., “[P]rovides adequate staff coverage to ensure the delivery of quality services to clients.”<sup>5</sup> The Board finds, however, that this bullet does not adequately cover the additional duties she has been required to perform, because they fall

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<sup>2</sup> Exhibit A.

<sup>3</sup> Transcript at pages 25 – 33.

<sup>4</sup> Transcript at pages 105 – 114.

<sup>5</sup> Exhibit A at page 3.

under the responsibilities set forth in the Nursing Director class specification. Further, the detailed duties in her performance plan (Agency Exhibit E) do not fit under the general description found in the second bullet of the Nursing Supervisor job specification, which lacks specificity.

An increase in the volume of work assigned to an employee, in and of itself, does not constitute working out of class. However, where, as here, an employee performs a substantial portion of the duties of a higher classification for a period greater than 30 calendar days, the employee is entitled to be compensated at the higher rate of pay.

An employee is working out of class when the duties assigned him are not those specified in the specification for the class in which he is incumbent. Rather, he is performing, for an extended period of time, the full range of duties enumerated in another class specification.” *Jenkins v. Delaware Department of Health and Social Services*, MERB Docket No. 07-01-380 at p. 5 (May 15, 2008).

In order to prevail, Ms. Bertin must establish that “there is another existing class with duties, responsibilities, and qualifications which is more consistent with what the employee actually does.” *Id.* While she may not be performing all of the job specifications of Nursing Director, “the Board does not believe this should be a mechanical process based on the number or percentage of the job specifications performed, or the percentage of time spent on each one. Rather, the Board believes it more appropriate to take a "totality of the circumstances approach." *Dorn v. Department of Finance, State Lottery Office*, Docket No. 16-01-646 at p. 6 (August 25, 2016).

Based on the totality of circumstances presented by the evidence in the record, the Board concludes as a matter of law that Ms. Bertin has met her burden to prove that she is serving in a "higher position" for purposes of Merit Rule 3.2.

The Merit Rules also place a time limitation on retroactive remedies as follows:

- 18.10 Retroactive remedies shall apply to the grievant only and, for a continuing claim, be limited to 30 calendar days prior to the grievance filing date. Any financial settlement shall be reduced by the amount of the grievant's earnings during the period covered by

the settlement regardless of source, excluding part-time income which was received prior to the separation.

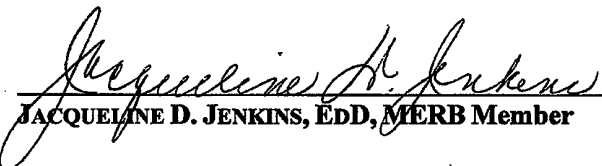
Accordingly, Ms. Bertin is entitled to compensation at the Nursing Director rate (Pay Grade N21), commencing thirty (30) calendar days prior to date on which she filed this grievance<sup>6</sup> and continuing for as long as she performs Nursing Director duties as set forth in the Findings of Fact section of this decision.

**DECISION AND ORDER**

It is this **23<sup>rd</sup>** day of **September 2021**, by a vote of 5-0, the Decision and Order of the Board to grant the grievance and direct the Agency to compensate the Grievant at the Nursing Director rate (Pay Grade N21) beginning March 3, 2020 and continuing for as long as she continues to perform Nursing Director duties.

  
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**W. MICHAEL TUPMAN, MERB CHAIR**

  
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**PAUL R. HOUCK, MERB Member**

  
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**JACQUELINE D. JENKINS, EDD, MERB Member**

  
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**VICTORIA D. CAIRNS, MERB Member**

  
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**SHELDON N. SANDLER, ESQ., MEMBER**

<sup>6</sup> Grievant Exhibit 15 contains Ms. Bertin's April 3, 2020 Grievance.