

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

RENEE BIRNEY,)	
)	
Employee/Grievant,)	
)	<u>Docket No. 21-07-812</u>
v.)	
)	
DELAWARE DEPARTMENT OF SERVICES FOR)	DECISION AND ORDER
CHILDREN, YOUTH AND THEIR FAMILIES,)	
DIVISION OF YOUTH REHABILITATIVE SERVICES,)	
)	
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 October 21, 2021, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair; Paul R. Houck, Jacqueline D. Jenkins, Ed.D, 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

Renee Birney, *pro se*
Employee/Grievant

Zi-Xiang Shen
Deputy Attorney General
on behalf of the Department of
Services for Children, Youth and
Their Families

BRIEF SUMMARY OF THE EVIDENCE

During the Board's hearing on October 21, 2021, it also heard the matter of *Ryan Brabson v. Department of Services for Children, Youth and Their Families/Division of Youth Rehabilitative Services* (MERB 21-07-811). Both the *Brabson* grievance and this grievance arise from the same set of circumstances. The Board takes administrative notice of the testimony offered during the *Brabson* hearing and accepts the exhibits admitted in that grievance as relevant to this grievance.

FINDINGS OF FACT

The employee/grievant, Renee Birney, is employed by the Community Services Unit of the Division of Youth Rehabilitative Services (DYRS), within the Department of Services for Children, Youth and Their Families (DSCYF). She serves in the Family Services Program Support Supervisor classification (#MDD103)¹ under the working title of Regional Manager.

At the conclusion of the *Brabson* hearing, Ms. Birney notified the Board that she accepted the record as created in that hearing and had nothing further to add. Wherefore, the Board incorporates by reference the finding of fact as set forth in its decision in *Brabson v. DSCYF/DYRS* (MERB 21-07-811) as the evidentiary record in this case, the two grievants for all material purposes being similarly situated.

CONCLUSIONS OF LAW

Merit Rule 3.2 states:

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

¹ Grievant Exhibit 1.

they shall be compensated appropriately from the first day of service in the higher position.

An increase in the volume of work assigned to an employee by itself does not constitute working out of class.² 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 an incumbent. Rather, he is performing, for an extended period of time, the full range of duties enumerated in another class specification.”³ In order to prevail, Ms. Birney 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 Ms. Birney may not be performing all of the job specifications of Family Services Program Support Manager, “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’.”⁴

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

The Merit Rules 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

² *Sharon Bertin v. DHSS/DDDS*, MERB Docket No. 20-10-789 at p.4 (September 23, 2021).

³ *Id.*, citing to *Jenkins v. Delaware Department of Health and Social Services*, MERB Docket No. 07-01-380 at p. 5 (May 15, 2008).

⁴ *Dorn v. Department of Finance, State Lottery Office*, Docket No. 16-01-646 at p. 6 (August 25, 2016).

separation.

Accordingly, Ms. Birney is entitled to backpay at the rate of compensation for a Family Services Program Support Manager (#MDD104), commencing 30 calendar days prior to the date on which she filed her grievance⁵ and continuing for as long as she performs the Family Services Program Support Manager duties set forth in the Findings of Fact section of this decision.⁶

DECISION AND ORDER

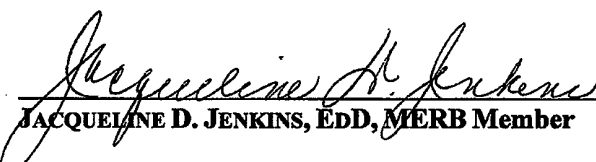
It is this 2nd day of December 2021, by a vote of 4-0, the Decision and Order of the Board to grant the grievance and award backpay commencing March 21, 2021 and continuing for as long as Ms. Birney continues to perform Family Services Program Support Manager duties.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER

⁵ Ms. Birney's Merit Grievance was dated April 20, 2021.

⁶ To the extent that Ms. Birney seeks critical reclassification of the position and pay grade to a higher position and paygrade as a remedy, Budget Epilogue language in SB 240, Section 8(e), states that "[C]ritical reclassification requests and pay grade determinations shall not be appealed to the Merit Employee Relations Board" precluding the Board from granting such relief. See also *Morton v. Department of Treasury*, Docket No. 13-12-598 (September 19, 2014).