

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

WILLIAM BISHOP, BURNELL BROWN,)
CHARLES J. BUTCHER, LARRY H.)
KENDALL, CAROLYN RUDD, MARIBEL)
SOTO, FRANK SZRAMIAK, MICHAEL)
TACCONELLI, JANET WILKERSON,)
KEVIN WILLIAMS, JOHN WRIGHT,)
MONTE GREGG, and KEVIN CASSIDY,)

Employee/Grievants,)

v.)

FAMILY COURT OF THE STATE)
OF DELAWARE,)

Employer/Respondent.)

**CONSOLIDATED DOCKET
Nos. 11-01-491 thru 11-01-503**

DECISION AND ORDER

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 July 7, 2011 at the Public Service Commission Conference Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

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

APPEARANCES

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

Deborah L. Murray-Sheppard
Board Administrator

Monte Gregg
Employee/Grievant *pro se*

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

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument on the motion by the Family Court of the State of Delaware (Family Court) to dismiss these consolidated appeals for lack of jurisdiction and failure to state a claim upon which relief can be granted. Four of the employee/grievants filed a response to the motion, and only one, Monte Gregg, appeared for the hearing.

The Family Court attached to its motion to dismiss six documents: Order dated May 10, 2010 (Exhibit A); Grievance Form dated June 16, 2010 (Exhibit B); Step 3 Grievance Decision (Exhibit C); Merit Rule Appeal to the Board (Exhibit D); *Tucker v. Family Court*, MERB Docket No. 10-10-486 (Apr. 13, 2011) (Exhibit E); and OMB Job Postings (Exhibit F).

FINDINGS OF FACT

By Order dated May 10, 2010, the Chief Judge of the Family Court (Chandlee Johnson Kuhn) designated Judicial Assistants and Court Security Officers as process servers. The Chief Judge based her Order on Family Court Civil Rule 4 which provides: “Service of process shall be made by the sheriff to whom the writ is directed, by a sheriff’s deputy, by a deputy designated by the Chief Judge or by some other person specially appointed by the Court for that purpose.”

On June 16, 2010, the United Food and Commercial Workers, Local 27 filed a grievance on behalf of one of the Family Court Judicial Assistants, Robert K. Tucker (Tucker), claiming the Chief Judge’s Order violated a collective bargaining agreement. After a pre-arbitration hearing on August 4, 2010, the hearing officer determined that the grievance was for working out of class and controlled by Merit Rule 3.2, not the collective bargaining agreement. The hearing officer determined “that the duties within the class specifications for the Security Staff reasonably encompass serving legal process in the manner described. Since serving process is a similar duty, no violation of Merit Rule 3.2 has been established.”

As a result of negotiations between the Family Court and the union, the Family Court agreed that Judicial Assistants and Court Security Officers “will not be asked to serve outside the courthouse and its curtilage.”

On October 25, 2010, the Board received Tucker’s appeal. Tucker stated in his appeal that he was the “designated member of the security unit and all others named herein agree to said appeal” and listed fourteen names with signatures.

In a Decision and Order dated January 14, 2011, the Board decided that Tucker’s appeal was timely, but decided that the Board did not have “legal authority to allow Tucker to pursue an appeal on behalf of other Family Court employees who have not filed their own grievances with the Board under the Merit Rules.” Decision at p.5 (quoting *Tucker v. Family Court*, MERB Docket No. 08-03-418 (Oct. 2, 2008) at p.6)).

On January 14, 2011, thirteen other Judicial Assistants filed their own appeals with the Board. By Order dated June 22, 2011, the Board Chair consolidated those appeals for hearing. One Judicial Assistant, Charles Butcher, withdrew his appeal prior to the hearing on July 7, 2011. The Board will refer to the remaining appellants as “the 12 JAs.”

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 and 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 Board concludes as a matter of law that the 12 JAs failed to state a claim for

which the Board can grant relief under Merit Rule 3.2.

Like Tucker, the 12 JAs argued that serving process on behalf of the Family Court constitutes serving in a “higher position” because those duties are also performed by deputy sheriffs whose salaries are higher than a Judicial Assistant. The Family Court argued that a “higher position” must be another position within the classified service. According to the Family Court, deputy sheriffs are not Merit or even State employees so the 12 JAs cannot state a claim as a matter of law under Merit Rule 3.2 using the duties of a deputy sheriff as the “higher position.”

Merit Rule 3.2 provides that an employee may be required: (1) “to perform any of the duties prescribed in the class specification”; (2) “any other duties of a similar kind and difficulty”; (3) “any duties of similar and lower classes”; or (4) “to serve in a higher position.” The term “higher position” is not qualified by the term “class specification” or “class,” but the Board believes that each section of the rule should be construed *in pari materia*. Taken as a whole, the rule only makes sense if a “higher position” is a higher class or class specification within the Merit system. Merit Rule 19 defines “class” as “all Merit positions sufficiently similar in duties.” Merit Rule 19 defines “class specification” as a written description of the distinguishing characteristics of all positions in a class.” By those definitions, a “higher position” for purposes of Merit Rule 3.2 is a higher class within the Merit system or a Merit-comparable position.

Even if the Board considered a deputy sheriff as a higher position for purposes of Merit Rule 3.2, the 12 JAs would have to show that they perform substantially all of the same duties as a deputy sheriff, not just service of process. By statute, another significant duty of sheriffs is the sale of property under execution of process. *See 10 Del. C. §2106*. The 12 Judicial Assistants would also have to show that serving process requires a significant percentage of their time. Like Tucker, Monte Gregg acknowledged that he has spent zero percent of his time serving process on behalf of the Family Court since the Chief Judge’s May 10, 2010 Order. And unlike deputy sheriffs – who

may be called on to serve process throughout New Castle County – the Family Court may require a Judicial Assistant to serve process only within the courthouse or immediately outside.

For all these reasons, the Board concludes as a matter of law that the 12 JAs failed to state a claim for which relief can be granted under Merit Rule 3.2. The Board does not need to address the Family Court’s other legal arguments regarding standing and the timeliness of their appeals.

DECISION AND ORDER


It is this 19th day of July 7, 2011, by a unanimous vote of 4-0, the Decision and Order of the Board to dismiss the appeals of the 12 Judicial Assistants.



MARTHA K. AUSTIN, MERB Chairwoman



VICTORIA D. CAIRNS, MERB Member



JOHN F. SCHMUTZ, MERB Member



PAUL R. HOUCK, MERB Member

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: July 19, 2011

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel