BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF MONICA GULLEDGE, Grievant, v. DEPARTMENT OF FINANCE, DIVISION OF REVENUE, STATE OF DELAWARE, Agency	**DOCKET NO. 96-06-91** **FINDING OF FACT** **OPINION AND ORDER**

BEFORE Katy Woo, Chairperson, Walter Bowers, and Dallas Green, Members of the Merit Employee Relations Board, constituting a lawful quorum of the Board pursuant to 29 Del. C., § 5908(a).

AND NOW, on this date, the 19th of September, 1996 the above-referenced matter being before the Board on August 28, 1996, the Board makes the following Finding of Fact and Conclusions of Law; to wit:

APPEARANCES:

For the Grievant: Roy S. Shiels, Esquire
Brown, Shiels & Chasanov
108 E. Water Street
PO Drawer F
Dover, DE 19903

For the Agency: J. Patrick Hurley
Deputy Attorney General
Division of Revenue
Carvel State Office Building
820 North French Street
Wilmington, DE 19801

NATURE AND STATE OF PROCEEDINGS

This matter came before the Board for evidentiary hearing on August 28, 1996, having been filed on June 28, 1996 as an appeal after a Fourth Step grievance decision under Merit Rule No. 21.0120.

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SUMMARY OF EVIDENCE

The factual predicate for this grievance is relatively uncontroverted by the parties. Three witnesses presented testimony and five exhibits were received into evidence as hereinafter discussed.

Monica Gulledge was sworn and testified that she has been a State employee for approximately twenty-eight years and has been employed with the Division of Revenue for the last twenty years. In 1988, Ms. Gulledge was a Revenue Officer III working in Wilmington when, for medical reasons, she requested a voluntary demotion to Revenue Officer II in order to fill a position in Dover and avoid the commute to Wilmington. Pursuant to Merit Rule 13.0340, Ms. Gulledge sought retention of her current salary level after the voluntary demotion. Ms. Gulledge identified as Grievant's Exhibit No. 1, a copy of a memorandum from Robert W. Chastant, then Director of Revenue, to the then State Personnel Director, Marcilee A. Bierlein, requesting the approval of the Secretary for a demotion without a salary decrease for Monica Gulledge. The Memorandum reflects the February 15, 1988 denial of the request by Marcilee A. Bierlein.

The Grievant introduced as Grievant's Exhibit No. 2, a Memorandum from Director Bierlein to Stephen T. Golding, Secretary of Finance, setting forth Ms. Bierlein's reasons for denial of the request to maintain the salary of Monica Gulledge at the same level in light of the voluntary demotion.

In the Memorandum, Ms. Bierlein noted that should Monica Gulledge retain her current salary it would place her at 115% of midpoint for a Revenue Officer II. Ms. Bierlein set out her other reasons in the following language:

> As a general principle, a demotion brings with it a reduction in salary. In a situation such as this one, where it is at the request of the employee, one could expect the reverse of a promotion to take place, i.e., a 5% reduction in pay. In this particular situation, the employee will no longer have responsibility for supervising an employee, will no longer have the expense and inconvenience of traveling each day between Dover and Wilmington and will no longer pay the Wilmington wage tax. In all likelihood, Ms. Gulledge would have an actual increase in pay if she were permitted to retain her salary upon this voluntary demotion. I do not believe such a result is within the intent of Merit Rule 13.0340.

Ms. Gulledge testified that she accepted the reasons given and accepted the change in position to Dover and the 5% pay decrease and began working in Dover in 1989. However, in August of 1995, as the result of the publication of State employees' salaries in the newspaper, she became aware that a co-worker, Barbara Bennett, who had taken a demotion to move from

the Wilmington office to the Dover office in similar circumstances had been allowed to retain her pre-transfer pay level without a 5% decrease.

Ms. Gulledge testified that she feels she has never been given a merit-related reason why she was treated differently than Barbara Bennett and, in August of 1995, filed the present grievance alleging that she had been discriminated against on non-merit grounds in violation of Merit Rule 19.0100.

On cross-examination, Ms. Gulledge identified a letter marked as State's Exhibit No. 1, dated April 21, 1988, to her from Marcilee A. Bierlein responding to a request for reconsideration of the denial of retention of pay upon demotion wherein Ms. Bierlein concluded: "Although I am sympathetic to your medical condition, I think it would be inconsistent with the Merit System rules to grant the retention of a salary based on the information provided."

Monica Gulledge related that while she had experienced a personality conflict within the Division of Revenue, she had no such problems with Ms. Bierlein, and she had no doubt that the reasons stated by Ms. Bierlein were, in fact, the reasons which actually motivated Ms. Bierlein to deny the requested salary retention.

Barbara Bennett was sworn and recounted that, like Monica Gulledge, she had, approximately four years ago, requested a demotion transfer from Wilmington to work in Dover for personal reasons. Ms. Bennett testified that she was allowed to keep the same salary after the transfer and that she had only recently seen the letter requesting such salary retention sent on her behalf by the Secretary of the Department of Finance, Karen Field Rogers, to the State Personnel Director, Sharon J. Rothwell.

Ms. Bennett stated that upon the transfer she had expected a cut in pay but had not received one and did not question the situation. Ms. Bennett testified that she lives in Middletown, Delaware and that she has approximately the same commuting trip to Dover as she had when she was working in the Wilmington office. She no longer pays the City of Wilmington wage tax, but her job does still require her to make trips to Wilmington and, on occasion, to Georgetown, Delaware. Ms. Bennett identified State's Exhibit No. 2, a Periodic Performance Progress Report for the period December 1, 1994 to May 31, 1995, she received which notes, in part, that: "Barbara is a supervisor's dream of an efficient, reliable and productive employee."

Mary Jane Donnelly, the Personnel Administrator for the Department of Finance, was sworn and described the process for requesting salary retention upon voluntary demotion for an employee. She stated these are infrequent events and could recall approximately three within the seven and one-half years she had been working at the Department. It is only in the situation where there is a request for salary retention that the State Personnel Office becomes involved in an employee's request for voluntary demotion, and it is usually done in the form of a request letter from the Cabinet Secretary to the Director of State Personnel. Ms. Donnelly identified as State's Exhibit No. 3, a copy of a letter by the Secretary of the Department of Finance, Karen Field Rogers, to the State Personnel Director, Sharon J. Rothwell, requesting and giving reasons for salary retention for Barbara Bennett.

Ms. Donnelly testified that since 1988, during her tenure as Personnel Administrator for the Department, she has not been advised of any policy or guidelines by State Personnel for the relevant factors to be considered for requests for salary retention in situations of voluntary employee demotions.

THE LAW

29 Del. C. §5931. Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The director and the Board, at their respective steps in the grievance procedure, 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. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days. (29 Del. C. 1953, §5931; 55 Del Laws, c. 443, §6, 69 Del. Laws, c. 436, §7.)" Effect of amendments -- 69 Del. Laws, c. 436, effective July 14, 1994, rewrote this section.

The applicable Merit Rules for this grievance are Merit Rule No. 13.0340 which provides:

> The rate of pay to be authorized an incumbent, demoted not due to discreditable circumstances, shall be the rate of pay in the class of the lower paygrade recommended by the appointing authority and approved by the Director. However, upon written request of such incumbent employee and written recommendation of the appointing authority, the Director, in his/her discretion, may authorize the employee to continue to receive his/her previous higher rate of pay.

and 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.

DISCUSSION AND FINDINGS

Monica Gulledge has filed a grievance alleging discrimination on the basis of non-merit factors under Merit Rule No. 19.0100, because she perceives that she was treated differently in regard to salary retention upon voluntary demotion than was a co-worker who she perceives to be in a similar situation; a situation she did not discover until August of 1995.

Merit Rule No. 13.0340 clearly places discretion in granting such request for salary retention in the Director of State Personnel, and in this present situation, that discretion was exercised by two different State Personnel Office directors, based upon two significantly different submissions by two different Secretaries of the Department of Finance for two different employees. Not unexpectedly, the results were different. This does not establish prohibited discrimination.

The Board finds that there are no rules, guidelines, or criteria for use by Division Directors in requesting nor the State Personnel Director in granting or denying such requests. The Board commends this absence to the attention of the State Personnel Office for review and consideration of the development of appropriate guidelines. This suggestion is made in an effort to insure that, as long as the discretion to grant or deny such requests for salary retention rests in the Director, an office whose occupant changes from time to time, that discretion can be exercised in a reasoned manner which will eliminate or reduce the potential for any appearance of prohibited discriminatory treatment of employees.

The Board finds that Monica Gulledge and Barbara Bennett, while somewhat similarly situated, were sufficiently different in their individual situations such as commuting distances; the quantity and nature of the supporting information conveyed to the different Directors for use in the exercise of their discretion; and work requirements to justify disparate treatment in regard to salary retention upon voluntary demotion.

The Board finds that the Grievant has not met her burden to establish a violation of Merit Rule No. 19.0100 and that the action of the Director of State Personnel should be upheld.

ORDER

Based upon the foregoing, it is ordered that the grievance of Monica Gulledge is, by the unanimous vote of the undersigned, denied, and the action of the Director is upheld.

IT IS SO ORDERED

Katy K. Woo, Chairperson

Walter Bowers, Member

Dallas Green, 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 of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

Mailing Date: September 24, 1996

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