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

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| IN THE MATTER OF<br><br>THEODORE R. GRABLIS,<br><br>Grievant<br>v.<br><br>DEPARTMENT OF FINANCE<br>STATE LOTTERY OFFICE,<br><br>Employer/Agency. | **DOCKET NO. 96-08-109**<br>**ORDER ON MOTION TO DISMISS**<br>**DECISION ON THE MERITS** |

**BEFORE** Katy K. Woo, Chair, Walter Bowers, Member, Dallas Green, Member, and John Schmutz, Member, constituting a quorum of the Merit Employee Relations Board (the "Board") pursuant to 29 Del. C. Section 5908(a).

**AND NOW**, this 18th day of September, 1997, before the Board is a motion by the State Lottery Office to dismiss the appeal filed by the grievant Theodore R. Grablis.

On December 12, 1997, the Merit Employee Relations Office received a timely appeal by Mr. Grablis from a Step 4 decision by the State Personnel Office. Mr. Grablis alleges a violation of two Merit Rules, Rule 13.0240 (transfer) and Rule 19.0000 (age discrimination).

The day before the hearing on September 18, 1997, the State Lottery Office filed a motion to dismiss the part of the appeal based on Merit Rule 13.0240. At the hearing, the Board asked Mr. Grablis if, despite the late date, he was prepared to go forward and oppose the motion to dismiss, or whether he preferred to have a continuance. Mr. Grablis stated that he wanted to go forward.

Merit Rule 13.0240 provides: "A permanent or probationary employee may voluntarily request placement on transfer list by filing an application with the agency, department of interest or the State Personnel Office when vacancies are announced and applications are being accepted." As

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the State points out in its motion to dismiss, however, Merit Rule 13.0210 provides that "[a]n employee may be transferred within an agency or department by an appointing authority from one position to another within the same class."

Mr. Grablis acknowledged at the hearing that while he was transferred from New Castle County to another territorial area covering parts of Kent and Sussex County, this was to another position in the same class. Accordingly, Mr. Grablis fails to state a claim for a violation of Merit Rule 13, and that portion of his appeal is dismissed. The Board made it clear to Mr. Grablis that he could introduce evidence regarding his transfer in support of his claim for age discrimination.

## Summary of the Evidence

Mr. Grablis called as his first witness Frank Brown, a 22-year employee of the State Lottery Office. Mr. Brown testified that during his tenure at the Lottery Office, working for five different directors in various positions, he did not know of any instance in which Mr. Grablis had been reprimanded for his job performance, or had violated any office rules. Through the testimony of Mr. Brown, the Board admitted into evidence (marked for identification as "G-1") a "Certification From of the State of Delaware Personnel Office" showing that Theodore R. Grablis had been hired on August 12, 1980 by the State Lottery Office for the position of "Field Sales Representative -- New Castle."

Mr. Grablis called as his second witness Wayne Lemons, the Director of the State Lottery Office. Mr. Lemons testified that in July 1996 he had approved a plan to restructure the geographic regions for the lottery field representatives. As as part of that plan Mr. Grablis had been transferred from Territory 2 (Wilmington/New Castle County) to Territory 3 (Kent County). The plan was intended to increase lottery sales. Mr. Lemons did not know specifically why Mr. Grablis was

assigned to Territory 3, but he said that age was not a criterion for the reassignments of any of the five field representatives.

Mr. Grablis then took the stand and testified that "I was hired for New Castle County. That was where I wanted to work." He felt that he was being discriminated against on the basis of his age in favor of Tim Fales, who was re-assigned to his former territory in New Castle County. Mr. Fales was 36 years old at the time, whereas Mr. Grablis was 57. Mr. Grablis testified that Territory No. 2, where he used to work, was the "best" of all the territories because it accounted for 30-40% of total business in the State. In contrast, Territory No. 3 where he was transferred was the "poorest" territory, accounting for only $14-15 million in sales. On cross-examination, the State introduced into evidence (marked for identification as "S-1") a copy of Mr. Grablis' employment application, in which he checked, in response to the question "In what Delaware counties will you accept employment?" both "New Castle" and "All Counties." Mr. Grablis confirmed that as a result of his transfer, there was no change in his salary or his hours of appointment. Furthermore, he still had to report to the State Lottery Office in Dover every morning at 8:00 a.m. with all the other field representatives, just as he had to do when his territory was in New Castle County.

The State called three witnesses: Brian W. Prahl; Mary Jane Donnelly; and Wayne Irons. Mr. Prahl is the Deputy Director of Sales and Marketing at the State Lottery Office, with supervisory responsibility for all the field representatives. He testified that in July 1996 the State Lottery Office reassigned all of its field representatives. This was consistent with a longstanding office policy to rotate employees and cross-train. For example, in a memorandum dated April 20, 1995 to all lottery employees (marked for identification as "S-2"), he had noted: "All of the Lottery Sales Representatives have either changed territories or job functions within the last two years. We hope to continue this trend in the future as periodic change has two advantages: one for the Lottery, and

one for the individual. The Lottery increases depth in qualified personnel, while the individual increases perception and career options." With regard to the reassignments of field representatives in July 1996, Mr. Prahl testified that "age never came into" the decision.

Ms. Donnelly is the Personnel Administrator for the Department of Finance. She testified that the following reassignments of field representatives were made in July 1996: Tim Fales, age 36, went from Kent to New Castle County/Wilmington; Barbara Gaddis, age 34, went from inside sales to Sussex; Ted Grablis, age 57, went from New Castle County/Wilmington to Kent; and Robert Lane, age 51, went from Sussex to Newark/Wilmington. See "S-3" (findings of fact from Step 4 decision). Through Ms. Donnelly, the State also introduced into evidence "S-4," a summary statement of the nature of scope of the duties of a Lottery Field Representative.

The last witness called by the state was Mr. Irons, the Manager of Lottery Sales and Retail Development, who supervises the field representatives. Mr. Irons testified that in January 1994, as a result of new procedures mandated by the state vehicles fleet operator, all lottery field representatives (including Mr. Grablis) were required to report to Dover each morning at 8:00 a.m. to pick up a state vehicle, and to return that vehicle to Dover at the end of the day. He further testified that the reassignments in July 1996 were not based on anyone's age, but were necessary due to the dynamics of the lottery business, which had grown from a $35 to a $300 million a year organization.

## Findings of Fact

Mr. Grablis was 56 years old at the time of the reassignment of his sales territory, and therefore he is within a protected class for purposes of the anti-age discrimination laws. His former

territory was assigned to a younger person, Tim Fales, who was 36 years old at the time, outside the protected class for purposes of age discrimination.

As a result of his reassignment, Mr. Grablis did not lose any salary or benefits. It was a lateral transfer, and all of the other sales representatives were reassigned at the same time. Since 1994, all of the sales representatives had to report each morning to Dover to pick up a state car, which then had to be returned to Dover at the end of the day. Since Mr. Grablis lives in New Castle County, he had to drive to Dover every day irrespective of where his sales territory was.

All of the evidence supports the conclusion that age had nothing to do with the decision to reassign the State Lottery Office field territories in July 1996. The reassignments were in response to the dramatic increase in state lottery sales in recent years. The reassignments were also consistent with longstanding management policy to rotate employees to increase the experience of personnel and their career options.

There was no evidence presented to suggest that the valid business reasons articulated for the reassignments of the field territories were a pretext or a sham used to discriminate against Mr. Grablis for his age.

## Conclusions of Law

In order to establish a prima facie case of age discrimination, the complainant must show: (1) he or she is within the protected class; (2) he or she is qualified for the position; and (3) he or she suffered some adverse employment action in favor of someone not within the protected class. See Quaker Hill Place v. Saville, Del. Super., 523 A.2d 947, 954 (1987). Once the complainant establishes a prima facie case, "the burden of production shifts to the person charged with discrimination to articulate a legitimate, non-discriminatory reason" for the employment action. Id.

If the employer articulates a legitimate, nondiscriminatory reason for the employment action, the "complainant then must demonstrate that the proffered reason was a sham." Id. at 955.

We hold that Mr. Grablis has not established a prima facie case of age discrimination because he did not suffer any adverse employment action. The employment discrimination laws were not designed "to address every decision made by employers" but only "what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting and compensation." Page v. Bolger, 645 F.2d 227, 233 (4th Cir.) (en banc), cert. denied, 454 U.S. 892 (1981)).

In some cases, the courts have found that a transfer involved a significant change in management responsibilities so as to be actionable under the employment discrimination laws. We do not find, however, that Mr. Grablis' reassignment did not alter any of the terms or conditions of his employment. Mr. Grablis may have preferred to work in his old territory in New Castle County, but his transfer to a territory further south did not result in any loss of salary or benefits, or otherwise materially alter the conditions of his employment. While he suggested that the opportunities were better in New Castle because of the larger volume of business, the opportunity to succeed could have been even greater in a region ripe for development of new sales. The only tangible harm to which Mr. Grablis testified was the daily commute from his home in New Castle to Dover. The evidence was undisputed, however, that at least since 1994 all field representatives, including Mr. Grablis, were required to report to Dover every morning to pick up a state car. That did not change with the reassignment of his territory.

We also hold that the State Lottery Office produced ample evidence of a legitimate, non-discriminatory reason for Mr. Grablis' reassignment. There was a longstanding policy at the State Lottery Office to rotate employees and cross-train. The decision to reorganize and reassign the

territories of the field representatives was made in response to the dramatic changes in recent years in the lottery business in Delaware.

Mr. Grablis did not demonstrate that these legitimate business reasons were a sham or pretext to discriminate against him on the basis of age. Indeed, the evidence showed that all four of the sales representatives changed positions, two of whom were over 50 years old, and two of whom were under 40 years old. There is no evidence of any disparate treatment in the effects of these reassignments.

**IT IS SO ORDERED**, for the reasons stated above, that the appeal from the Step 4 decision of the State Personnel Office is found to be without merit, and is accordingly dismissed.

Katy K. Woo, Chair

Walter Bowers, Member

John Schmutz, Member

Dallas Green, Member

Mailing Date: October 30, 1997

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