

MERIT EMPLOYEE RELATIONS BOARD

STATE OF DELAWARE

COPY

Appeal of:)

MELINDA CARL)

v.)

DEPARTMENT OF ADMINISTRATIVE)
SERVICES)

) Docket No. 99-01-175

150 William Penn Street
Tatnall Building, Room 113
Dover, Delaware

Hearing Dates:
Wednesday, October 27, 1999 and
Thursday, November 4, 1999

APPEARANCES:

Melinda Carl, Grievant, *Pro Se*
Lawrence W. Lewis, Deputy Attorney General
for the Department of Administrative Services

BOARD MEMBERS:

Robert Burns, Chairperson
John Schmutz, Member
John W. Pitts, Member
Dallas Green, Member

C: Cullen Rooney, Deputy Attorney General
for the Board

PROCEDURAL POSTURE

Following a Fourth Step Grievance Hearing on July 14, October 1, and November 5, 1998, a decision in favor of the Department of Administrative Services was issued; the Grievant appealed the December 22, 1998 decision to this Board.

SUMMARY OF THE EVIDENCE

The Grievant testified on her own behalf and presented the testimony of the following witnesses: G. Arthur Padmore, Jr., Linda Mills, Robert L. McMahon, Bruce H. Burcat, Constance McDowell, Kay Warren and Gloria Homer. The Department of Administrative Services additionally called John P. Mulhern. The exhibits, marked and admitted into evidence, are hereby incorporated by reference.

The Grievant testified that she is a State employee and has been since 1990. She began State employment as a Public Information Officer for the Public Service Commission. In 1995-1996, the Public Information Officer position was reclassified as a Community Relations Officer for the Public Service Commission. The reclassification was a promotion with a comparable salary increase and additional responsibilities. In March of 1998, she was laid off because of a restructuring of the positions in the Public Service Commission. She believes that the Public Service Commission targeted her position for elimination in retaliation for a 1995 incident involving Dr. McMahon and Linda Mills. The Grievant's responsibilities were distributed among other employees. In her capacity as Community Relations Officer, she did receive tuition reimbursement for college courses taken at the Master's level but was unable to obtain all of the technical training she had requested.

The Grievant testified that the elimination of the Community Relations Officer position

was unfair in two respects. First, the layoff caused others to treat her differently and was a form of discrimination. Second, she was never offered any substitute positions within the Public Service Commission. She seeks a reinstatement of pay and benefits from the period of her layoff in June of 1998 until her re-employment with the State in December of 1998. The elimination of her job at the Public Service Commission has harmed her reputation and her ability to achieve her goals in the area of her choice, public relations. Even though she is presently employed in a comparable position with the Department of Natural Resources and Environmental Control, she was harmed because it will require learning in a new field. She also begins this position without seniority status.

G. Arthur Padmore, Jr. is a Senior Hearing Examiner at the Public Service Commission. He is also part of the Management Committee which eventually voted on the restructuring of the Public Service Commission effecting Grievance's position. He did not participate in the decision-making process of the restructuring effort. The restructuring itself had been discussed for weeks or months because there was a perceived need for additional technical analysts.

Linda Mills was the Grievant's Supervisor since 1994. She was instrumental in obtaining the reclassification and comparable salary increase for the Grievant in 1995-1996. Later, the position was eliminated to accommodate the Public Service Commission's need for an additional analyst. The decision was made in a joint effort by Administrative Services and the Public Service Commission Management Committee.

Dr. Robert L. McMahon was Chairman of the Public Service Commission at the time of the Grievant's layoff. The decision to eliminate the Community Relations Officer position

was essentially made by the Management Committee. The Commission voted for the reorganization with prior input from Secretary Meconi and the Department of Administrative Services. He had no recollection of specific conversations with the Grievant which were of a contentious nature.

Bruce Burcat is the Executive Director of the Public Service Commission. He was part of the process which led to the restructuring of the Public Service Commission and the subsequent elimination of the Grievant's position in order to obtain an additional technical analyst position. The restructuring was necessary because of the proliferation of cases which required technical expertise. It was difficult for him to lose a valued employee like the Grievant. In the layoff process, the Grievant was advised of her rights to bump within the designated fields selected by State Personnel. Linda Mills, the Grievant's Supervisor, took a medical leave and subsequently retired after the position of Community Relations Officer was eliminated. Ms. Mills' position was filled in-house. Mr. Burcat testified that the Grievant was offered technical training through seminars which were geographically closer than the ones she requested on the West Coast. It was her choice not to attend these seminars. The State Personnel was very committed to finding the Grievant a position after her layoff. The Grievant was offered a position with DEMA which she did not accept. Once the Grievant had a solid offer from another agency which she refused, the agency felt a need to recognize the unemployment layoff status of the Grievant. She continued to receive a preference for hiring status with the State.

Constance McDowell is the Chief of Technical Services and a Public Utilities Analyst at the Public Service Commission. All ten positions are filled at this time. She would agree

that the Grievant got along with the analysts.

Kay Warren, from State Personnel, testified that she worked with the Grievant in order to provide opportunities for State employment. She was also aware that the Public Service Commission had a secretarial position which was vacant on June 2nd and a temporary need to fill Linda Mills' position in August, 1998.

Gloria Homer testified that she is the Administrative Assistant for the Department of Administrative Services. She received the request for the restructuring and reviewed it with Secretary Meconi; both believed it to be a reasonable approach to solve a problem. She was aware that the Grievant was offered the DEMA job which was not accepted. The layoff was a critical reclassification which eliminated the Community Relations job in March of 1998.

John P. Mulhern testified that he offered the Grievant a position as a Public Information Officer for DEMA. She was offered an accommodation which would assist her in the training aspect of the position. The Grievant did not accept the position.

DISCUSSION AND FINDINGS

The issue presented to the Board for determination today is whether the Department of Administrative Services and the Public Service Commission eliminated the Grievant's position of Community Relations Officer for a legitimate business purpose or, as the Grievant suggests, a pre-textual discharge on non-merit factors in violation of the anti-discrimination provisions of the Merit Rules. (See Rule 19); and, whether the rules regarding Grievant's bumping rights and preference for hiring, after an economic layoff, were followed.

With regard to the discrimination allegations, the Board finds that the Grievant has not sustained her burden of showing that the ultimate elimination of her position by the

restructuring in 1998 was anything other than a legitimate business purpose related to a need for an additional analyst position.

"A grievance means an employee's complaint which remains unresolved after informal efforts at satisfaction has been attempted. A grievance may not deal with the substantive policies embodied in 29 *Del. C.* Chapter 59 of these rules." (See Chapter 2, Definitions, page 6). It is uncontroverted that the Grievant never filed a grievance prior to her layoff in 1998. The substantive policies and the regulations permit layoffs for a business purpose. The Department of Administrative Services has presented strong evidence that the restructuring was prompted by a proliferation of cases and the analyst's workload at the Public Service Commission. The restructuring was believed to be necessary and reasonable when reviewed by the Department of Administrative Services. The Grievant presented evidence that she was overworked and appreciated for her contributions. She was technically knowledgeable but not to the degree required for an analyst's position. When her position was eliminated, her duties were assumed by many of her co-workers. The evidence does not suggest that Grievant was terminated for non-merit factors in violation of the Anti-Discrimination Rule 19. Merit factors include training, experience, knowledge, skill, education, conduct, and manner of performance of applicants or employees in the classified service. Rule 19, page 7. Grievant presented her disfavor with Dr. McMahon as a non-merit factor which caused her ultimate separation. However, the restructuring process needed approval from the Public Service Commission and the Department of Administrative Services. At no time did Dr. McMahon have the authority to make a decision which would effect the elimination of the Grievant's position. Ms. Homer testified that she reviewed the application for restructuring and believed it to be reasonable, as

did Secretary Meconi. In order for the restructuring efforts to be successful, the approval and decision of many people came into play. The evidence offered by the Grievant does not show that she was treated differently than another employee in the same or similar situation. The Board finds that the restructuring effort was for a legitimate business purpose and not a pretextual discriminatory separation based on non-merit factors.

The Merit Rule 14.0200 provides that "the appointing authority may layoff an employee in the classified service by reason of lack of funds or work, the abolition of the position, or other material changes in the duties of organization, or for related reasons which are outside the employee's control and which did not reflect discredit upon the service of the employee. The duties performed by an employee laid off may be reassigned to other employees already working who hold positions in the appropriate classes." The employee's position was abolished because of "material changes in the duties of the organization." The regulation allows necessary and legitimate layoffs. The Grievant's layoff was unfortunate but necessary for the organization.

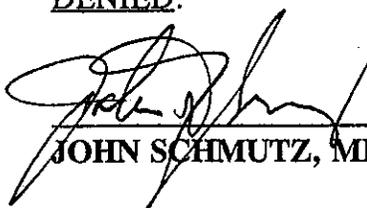
The Board concludes that the separation from employment was the result of a legitimate business purpose and the layoff which followed, entitled the Grievant to certain protections under the bumping rules of Chapter 14. The Grievant states that she was not given an opportunity to fill the secretarial position at the Public Service Commission or later, Linda Mills' position during her medical leave and subsequent retirement. The Board has reviewed Rule 14.024 which states: "When layoff decisions are made in accordance with 14.0200, affected eligible employees may exercise their right to bump into a position for which they qualify within the present class . . . series, and within the same layoff field, except that

bumping up shall not be permitted. Eligibility for bumping rights shall be determined in accordance with 14.0241." The Grievant never demonstrated that she qualified for either position at the Public Service Commission. The evidence did not suggest that she ever worked as a secretary or that she would have qualified for Linda Mills' position. The field determined by State Personnel limited the available positions for bumping rights to the Public Service Commission, but none were available within her class. The Grievant was notified of her layoff on March 19, 1998 and continued to be employed at the Public Service Commission until June of 1998. During this time, several positions were identified as possible employment opportunities available to the Grievant on her preference for hiring status. One such position at DEMA was offered to the Grievant and refused. Based on the totality of the evidence, the Board concludes that no violations of the Grievant's bumping rights following her separation from employment at the Public Service Commission in March of 1998.

DECISION

The Board finds that the grievance, for the reasons stated above, should be and is

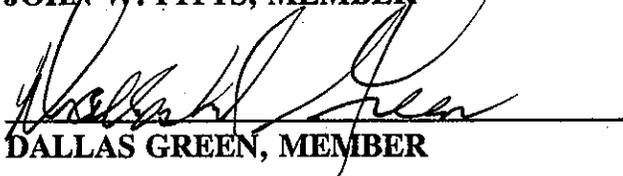
DENIED.



JOHN SCHMUTZ, MEMBER



JOHN W. PITTS, 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.

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 thirty (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: 12/21/99

Distribution:

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Agency's Representative