

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD  
OF THE STATE OF DELAWARE

COPY

IN THE MATTER OF: )  
MICHAEL TOUCHTON )  
Grievant, )  
v. )  
STATE OF DELAWARE )  
DEPARTMENT OF HEALTH AND )  
SOCIAL SERVICES, )  
Agency. )

DOCKET NO. 00-06-212

DECISION AND ORDER

BEFORE, Brenda Phillips, Chairperson; John W. Pitts, Dallas Green, and John F. Schmutz, Esquire, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. §5908(a).

APPEARANCES

For the Agency:

Ilona M. Kirshon, Esquire  
Deputy Attorney General  
Carvel State Office Building  
820 N. French Street  
Wilmington, DE 19801

For the Grievant:

Michael Touchton, *Pro se*

PROCEDURAL HISTORY

This matter comes before the Merit Employee Relations Board ("MERB" or "Board") on an appeal filed on June 21, 2000 by Michael Touchton after an adverse Step Three grievance decision. (See Merit Rule No. 20.8). By motion dated November 14, 2000 the Department of Health and Social Services ("DHSS") moved to dismiss this grievance appeal for failure to state a claim upon which relief can be granted. The motion was set for argument before the Board on December 7, 2000. At Mr. Touchton's request the matter was continued and was rescheduled before the Board

on February 1, 2001. This is the decision of the Board on the Motion to Dismiss which, for the reasons set forth below, grants the motion and dismisses the grievance appeal.

### **SUMMARY OF THE EVIDENCE**

There is no material dispute concerning the facts giving rise to this grievance. Mr. Touchton is currently employed with the Department of Health and Human Services ("DHSS") in the position of Physical Plant Maintenance/Trades Mechanic III. In January 2000, the Department of Administrative Services ("DAS") posted a Physical Plant Maintenance/Trades Mechanic III position in the City of Wilmington with a starting salary of 100% of midpoint of pay grade 9.

Mr. Touchton works in the same geographic area (City of Wilmington) and is employed in the same Merit System position classification and in the same pay grade but for a different agency to wit: DHSS. In his position with DHSS Mr. Touchton does not earn a salary equal to 100% of the midpoint of pay grade 9 and he contends that, since DHSS posted the position at a rate higher than the minimum for the pay grade, and since his performance is satisfactory, that his pay rate should be increased to 100% of the midpoint for pay grade 9.

The grievant is not a DAS employee and no request has been made by the Secretary of DHSS for advanced starting salary for the Physical Plant Maintenance/Trades Mechanic III classification employed by that Agency.

DHSS has moved to dismiss the appeal and takes the position that Merit Rule 5.0712 does not authorize the Secretary of one agency (DAS) to ask for pay increases for employees in a different agency (DHSS) and that the Merit Rule does not create a "leveling up" right for all employees in the same classification and geographic area but in different agencies.

## RELEVANT MERIT RULE

### **MERIT RULE NO. 5.0712**

The appointing authority may request, and the State Personnel Director may approve, a starting rate higher than the minimum for the paygrade where a critical shortage of applicants exists. The State Personnel Director, in concurrence with the State Budget Director and the Controller General, after specifying all equally qualified incumbents of the same classification within the same geographic area receiving a lower rate, may provide that these employees shall also have their rates increased to the rate established for entrance if their performance is satisfactory.

## DISCUSSION

This grievance appeal requires the Board to determine whether or not Mr. Touchton has an entitlement under the Merit Rules to have his salary, which is budgeted for and paid by DHSS "leveled up" to the starting salary for the same classified position in the same geographic for another agency. The short answer is that he does not.

While there is an expectation embodied in the Merit System that uniform qualifications and pay ranges shall apply to all positions in the same classification [29 Del. C. §5915(a)], the Merit Rules also provide that a starting salary may, in certain circumstances begin at various points within an evenly applied pay range. In this case, Mr. Touchton began his employment with DHSS over ten years ago at a pay grade less than 100% of midpoint and he is therefore being paid less than someone hired to the DAS posted position which, with the approval of the State Personnel Director, carries a starting salary of 100 % of midpoint. Mr. Touchton would have the Board determine that he has an entitlement to have his salary "leveled up" because he is in the same classification and in the same geographic area without regard to the fact that the starting salary exception was granted to a different agency and was not requested by the agency which employs him.

The Board does not find that Merit Rule 5.0712 creates an entitlement to leveling up even within the same agency. It provides in permissive language ("may"), that the State Personnel Director

in concurrence with the State Budget Director and the Controller General may level up salaries of employees in the same classification and in the same geographic area provided their performance is satisfactory.

While pay ranges for a classification are to be uniform, the exact pay of a particular individual within the prescribed range will be a function of several variables including the individual's length of service and starting salary which may be at an increased level because of a critical shortage of applicants as recognized by Merit Rule No. 5.0712. If the applicable Merit Rule did create an absolute entitlement to leveling up then Mr. Touchton's contention that all persons in the same classification in the same geographic area should be considered for such treatment would be compelling. As a practical matter the effect may indeed be the same since if there is actually a shortage in a particular classification within a geographic area so as to cause the State Personnel Director to approve a higher starting salary such a shortage could be expected to adversely affect all agencies attempting to fill positions in that same classification from the same labor pool. As the Step Three decision notes, one remedy available to Mr. Touchton was to apply for the DAS position and vacate his DHSS position. If indeed there was a shortage of Physical Plant Maintenance/Trades Mechanic III applicants in the City of Wilmington, it would not be alleviated by having Mr. Touchton or any employee engage in agency hopping to chase a higher starting salary. It therefore would appear that when the Director of the Office of State Personnel reviews agency requests for an increase in starting salary for reasons of shortage of applicants in a particular classification this problem should be considered so that a shortage at one agency does not thereby become a shortage at another agency with the same requirements in the same area. The Board, however, concludes that the authority to engage in "leveling up" rests with the State Personnel Director and is not an automatic entitlement. The Board further notes that Merit Rule No. 5.0712 does not limit the

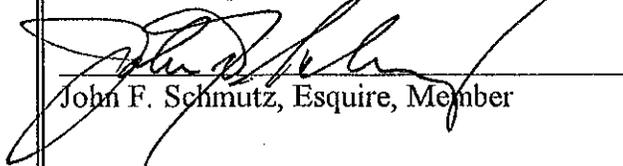
propriety of raising the rates for other satisfactorily performing employees in the same classification within the same geographic area to those in the same agency. The Director is not so limited in the exercise of his or her discretion and, in consultation with the Controller General and the State Budget Director, there very well may be situations where the circumstances presented suggest that all similarly situated employees without regard to the employing agency have their pay levels raised. To the extent that such a determination was not made in this instance, the Board recommends that the Director undertake such a review for those employees who are within the Physical Plant Maintenance/Trades Mechanic III classification working within the same geographic area as the appellant.

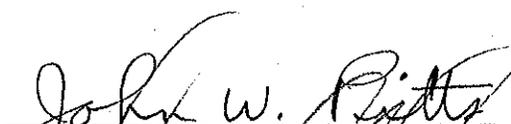
**ORDER**

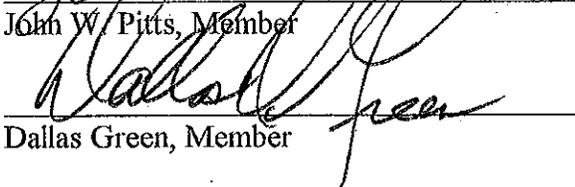
For the reasons stated, by unanimous vote of the undersigned members of the Board, the Motion to Dismiss is granted and the grievance is dismissed.

**IT IS SO ORDERED.**

\_\_\_\_\_  
Brenda Phillips, Chairperson

  
\_\_\_\_\_  
John F. Schmutz, Esquire, Member

  
\_\_\_\_\_  
John W. Pitts, Member

  
\_\_\_\_\_  
Dallas Green, Member

**APPEAL RIGHTS**

29 Del. C. § 10142 provides:

- Court.
- (a) Any party against whom a case decision has been decided may appeal such decision to the
  - (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: 2/22/01

Distribution:

Original:File

Copies: Grievant

Grievant's Representative

Agency's Representative

Board Counsel