

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

COPY

IN THE MATTER OF:)	
MARK BARRETT)	
)	
Grievant,)	DOCKET NO. 01-06-243
v.)	
)	
STATE OF DELAWARE)	DECISION AND ORDER
OFFICE OF INFORMATION SERVICES,)	
)	
Agency.)	
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BEFORE, Brenda Phillips, Chairperson, Dallas Green, John F. Schmutz, and John W. Pitts, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* §5908(a).

APPEARANCES

For the Grievant:
Mark Barrett, *Pro se*

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

PROCEDURAL HISTORY

This appeal comes before the Merit Employee Relations Board ("MERB" or "Board") as an appeal filed after a Step 3 grievance decision dated June 15, 2001. (See Merit Rules No. 20.8 and 20.9) The Step 3 decision by the designee of the Director of the State Personnel Office agreed with Mr. Barrett's contention that the Office of Information Services ("OIS") had improperly "short-circuited" the "leveling up" approval process set forth in Merit Rule No. 5.0712 to Mr. Barrett's

detriment. The Step 3 hearing officer directed OIS to rescind its withdrawal of the original request for a leveling up salary increase for Mr. Barrett (and for six other individuals employed by OIS) which had been approved by the Director of State Personnel but which was withdrawn by OIS prior to formal consideration by the Budget Director and Controller General. Mr. Barrett, unsatisfied with the result of the grievance process at Step 3, filed his appeal with the Board on June 26, 2001. The Board conducted an evidentiary hearing on Mr. Barrett's appeal on February 7, 2002. This is the Board's written decision based upon the evidence and arguments presented.

RELEVANT MERIT RULE

MERIT RULE NO. 5.07121

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.

MOTION TO DISMISS FOR LACK OF STANDING

At the commencement of the hearing OIS, through its attorney, moved the Board to dismiss the grievance appeal on the ground that Mr. Barrett lacked standing to pursue his grievance because he had resigned from his position at OIS and transferred into another position at the Department of Transportation. OIS argued that 29 *Del. C.* §5943(a) provides in pertinent part "Standing of a classified employee to maintain a grievance shall be limited to an alleged wrong that affects his or her status in his or her present position." (Emphasis added). Mr. Barrett claimed that he had taken a lateral transfer from the position of Senior Applications Support Specialist at OIS in a paygrade 16 to a Senior Applications Support Specialist position at the Department of Transportation as a

paygrade 16 and therefore nothing had changed and he therefore had standing to pursue this grievance which was filed while he was a Senior Applications Support Specialist at OIS.

After hearing argument and deliberating, the Board deferred action on the Motion to Dismiss For Lack of Standing pending completion of the evidentiary presentation. At the conclusion of the Board deliberation on the merits of the case, the Motion to Dismiss For Lack of Standing was dismissed as moot in light of the Board's determination that Mr. Barrett did not have an entitlement to leveling up with the resulting dismissal of his grievance.

SUMMARY OF THE EVIDENCE

The Appellant, Mr. Mark Barrett, in sworn testimony identified a copy of his original grievance (Appellant's Exhibit No. 1) and a copy of a letter from John J. Nold, Executive Director of Office of Information Services, to Harriet N. Smith Windsor, Director, State Personnel Office, dated December 1, 1999 requesting a leveling up of Mr. Barrett's salary with that of a recently hired Senior Applications Support Specialist. (Appellant's Exhibit No. 2). Mr. Barrett noted that the request from OIS was approved by the Director of the State Personnel Office on December 16, 1999 and sent forward to the Budget Director and received in that office on December 20, 1999. Mr. Barrett testified that, as had been determined by the Step 3 Hearing Officer, OIS withdrew the request from the Budget Office and the Budget Office did not therefore officially act on the request which had been sent forward from OIS with the approval of the State Personnel Director. Mr. Barrett noted that the remedy ordered by the Step 3 Hearing Officer that OIS resubmit the request for formal consideration by the Budget Director and the Controller General was not an effective remedy and that the appropriate remedy was to credit him with the salary increase which had been sought by OIS and approved by the Director of the Office of State Personnel. Mr. Barrett observed

that the request was resubmitted in June of 2001 by OIS as directed by the Step 3 Hearing Officer and, as of February 7, 2002, he has still not any remedy for OIS having withdrawn the request. Mr. Barrett testified that the positions at OIS are to become non-merit positions and he therefore sought and accepted a lateral transfer to a Senior Applications Support Specialist position with the Department of Transportation. Mr. Barrett asserted that the application withdrawal by OIS improperly short circuited the required approval process and he and the other individuals who had their requests withdrawn were irrevocably harmed.

Richard J. Iovino stated, in sworn testimony, that he is presently the Deputy Executive Director of OIS and has been with that agency for 22 years. In the Fall of 1999, OIS had hired a Senior Applications Support Specialist at an increased starting salary and asked other OIS staff to provide documentation to be used in an attempt to level their salaries up to the salary of the recently hired Senior Applications Support Specialist. Mr. Iovino testified that OIS had been successful on prior occasions in securing such upgrades for its personnel under Merit Rule 5.0712. He noted that this request progressed quickly from the OIS Director on December 1, 1999 to the Director of the Office of State Personnel, who approved it on December 16, 1999 and forwarded it to the Office of the Budget Director on December 20, 1999. Mr. Iovino had several meetings following up on the request and, after a meeting with the acting Budget Director, he requested that the leveling up requests be withdrawn because he had clear indications that, based on the salary deficit which was being projected for OIS, the requests would not be approved by the Budget Director. Mr. Iovino testified that he thereafter asked the supervisors to meet with the individuals affected and explain the situation.

Mr. Iovino identified State's Exhibit No. 1 as a memorandum dated June 22, 2001 which he sent to Peter Ross, Budget Director, and Russell Larson, Controller General, transmitting the Step

3 grievance decision in this case and noting that requests to level-up seven employees were submitted in December 1999. State's Exhibit No. 1 also noted that early in calendar year 2000 the OIS salary line was projected to have significant shortfall and that as a result of discussions with Budget Office Staff, Mr. Iovino withdrew the requests which were returned on March 8, 2001 without approval or disapproval.

On cross examination Mr Iovino testified that there were subsequent leveling-up requests albeit for different positions submitted by OIS and granted in the next fiscal year.

Robert Scoglietti, after being sworn testified that he has been with the Budget Office for 15 years and is presently Deputy Budget Director. He was involved with the leveling-up requests submitted in December of 1999 by OIS and met with Mr. Iovino to discuss the requests. At that time Peter Ross, the Budget Director, was ill and Mr. Scoglietti was acting Budget Director. Mr. Scoglietti testified that he told Mr. Iovino that the Budget Office was not going to approve the requests as there was a projected salary deficit of \$300,000 for OIS during that fiscal year. Mr. Scoglietti identified State's Exhibit No. 2 as page one of a spread sheet which was an internal Budget Office report showing standing of agencies as to expenditures which reflected a projected \$300,000 salary deficit within OIS. Mr. Scoglietti testified that on December 20th the request for leveling up was received at the Budget Office; the determination was made that funds for the requested OIS leveling-up were not available; that information was given to Richard Iovino and, at Mr. Iovino's request, the leveling up requests were returned to the agency. According to Mr. Scoglietti, the new hire which prompted the leveling up request had occurred in fiscal year 1999 which ended June 30, 1999. The hiring of the new employee at the increased salary did not require the approval of the Budget Director. The leveling up requests were received in December 1999 which was during fiscal year 2000 in which OIS was projected to have a \$300,000 salary deficit.

FINDINGS OF FACT

The Board finds that a request to level up Mark Barrett's salary and the salaries of six other OIS employees was submitted from OIS, with the approval of the Director of the Office of State Personnel to the Budget Director and the Controller General, as contemplated by Merit Rule No. 5.0712. The leveling up request form was not formally executed by either the Budget Director or the Controller General. The request for leveling up was the basis of meetings between personnel from the Budget Director's Office and OIS with the resulting understanding between the acting Budget Director and Mr. Iovino that the requests would not be approved and would be withdrawn. The basis for the understanding that the requests would not be approved by the Budget Office was the existence of a projected salary deficit of \$300,000 during the fiscal years in which the requests were being considered (State's Exhibit No. 2). The hiring of the employee at the increased salary which gave rise to the requests for leveling up for other OIS employees occurred in fiscal year 1999 and did not require the approval of the Budget Office. The leveling up request submitted in the subsequent fiscal year required the approval of both the Budget Director and the Controller General in addition to the approval by the agency and the Director of the State Personnel Office. Neither the Budget Office nor the Controller General have ever formally executed or "signed off" on a denial of the leveling up request although it was resubmitted on June 22, 2001 at the direction of the Step 3 Hearing Officer (State' Exhibit No. 1).

DISCUSSION AND ORDER

Merit Rule No. 5.0712 provides for a discretionary process whereby it is possible for an agency to level up the salaries of certain similarly situated employees in the same geographical area under certain circumstances. It is clearly a discretionary activity and requires a series of approvals

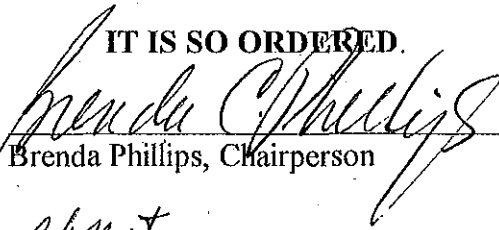
for implementation. The agency must make an initial determination to seek leveling up, and identify which of its employees qualify. The agency must then institute and forward a request to the Director of State Personnel who must approve or disapprove the request. If the Director, in the exercise of his or her discretion, approves the request then it moves forward to the Budget Director and the Controller General, both of whom must concur with the request for it to become effective. The testimony in this case by the then acting Budget Director establishes that there was a reasoned non-discriminatory basis for the denial of the OIS leveling up request, to-wit, a projected \$300,000 salary deficit for that agency in that fiscal year. This determination was clearly within the discretion of the Budget Office and the proposed disapproval was communicated to Mr. Iovino of OIS by the Acting Budget Director. The disapproval by the Budget Office was not formally registered, nor was it presented in writing by the Budget Office to either OIS or to the employees for whom OIS was seeking the salary increases. This unfortunate informality in communicating the disapproval of the Budget Office, while not rising to the level of an abuse of discretion, has unfortunately precipitated this grievance. It is regrettable that the Budget Office did not process this request by formally responding to it.


In the future the Budget Director and the Controller General should process any such leveling up requests forwarded by the Director of the Office of State Personnel by timely signing off either approving or disapproving such requests. It would be helpful to the agencies and the employees if the reasons for any disapproval were also set forth. The Director of State Personnel, as well as agencies and their employees, are entitled to no less and should insist on this.

In this instance, Mr. Barrett has not received the requisite approvals required under Merit Rule No. 5.0712 which are necessary for leveling up his salary to the level requested by OIS on December 1, 1999. The evidence established there was a de facto denial leading to a withdrawal by

the agency. Mr. Barrett has failed to establish either an entitlement to the requested salary increase through the leveling up approvals required by Merit Rule No. 5.0712, or an abuse of discretion in the denial of such approvals, and his grievance must be denied. The motion of the Agency to dismiss Mr. Barrett's grievance for lack of standing under 29 Del. C. §5943(a) is dismissed as moot.

IT IS SO ORDERED.


Brenda Phillips, Chairperson


Dallas Green, Member

absent
John F. Schmutz, Member


John W. Pitts, Member

APPEAL RIGHTS

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: Oct. 27, 2002

Distribution:

Original: File

Copies: Grievant

Grievant's Representative

Agency's Representative

Board Counsel