BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

MICHAEL EDWARDS, Employee/Grievant, v. DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Employer/Respondent.	))))))))))	**DOCKET No. 05-06-328** **ORDER**

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board ("the Board") on August 26, 2009 at 11:00 a.m. in the Delaware Room at the Public Archives Building, 121 Duke of York Street, Dover, DE 19901.

BEFORE Martha K. Austin, Chair, John F. Schmutz, and Joseph D. Dillon, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Roy S. Shiels, Esquire
did not appear on behalf of Michael Edwards

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of Health and Social Services

PROCEDURAL HISTORY

On October 26, 2006, the Board by a vote of 4-1 granted the appeal of Michael Edwards ("Edwards") and ordered that his "advanced starting salary be adjusted to $53,948, the midpoint for his classification retroactive to the extent permitted by Merit Rule 18.10."

The Department of Health and Social Services ("DHSS") appealed the Board's decision to the Superior Court. By Order dated March 19, 2008, the Superior Court reversed and remanded to the Board "for proceedings consistent with this opinion."

The Board asked its legal counsel, DAG W. Michael Tupman, to conduct a pre-hearing conference with counsel for the parties. During the pre-hearing conference, DAG Tupman asked counsel to make written submissions as to what further proceedings before the Board the Superior Court's opinion required.

The Board's legal counsel received an opening written submission from DAG Kevin R. Slattery on June 26, 2009 on behalf of DHSS; a response from Roy S. Shiels, Esquire on July 6, 2009 on behalf of Edwards; and a reply from DAG Slattery on July 24, 2009.

SUPERIOR COURT OPINION

In its October 26, 2006 decision, the Board found that DHSS grossly abused its discretion in setting Edwards' advanced starting salary in violation of Merit Rule 18.5. The Superior Court held that Merit Rule 18.5 was not the applicable rule because "[t]he promotion itself is not questioned by either party." The Court held that the Board should

have decided Edwards' grievance under Merit Rules 4.4.2 and 4.6.

> The Rules adopted by MERB empower the agency to approve an advanced starting rate:
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> "Agencies *may* approve a starting rate up to 85% of midpoint where applicants' qualifications are clearly over and above those required as minimum by the class specification. *Upon agency request*, the Director *may* approve a starting rate higher than the 85th percentile if supported by documentation of the applicant's qualifications. Merit Rule 4.4.2 (emphasis added).
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> The discretionary nature is echoed in Rule 4.6 which states that at the time of a promotion, to be granted a starting salary greater than the default of a 5% increase of the minimum of the new paygrade, the Director "may approve" a higher starting salary. . . . Given the discretion afforded to the department and the bare evidence presented by appellee, the MERB's finding is not supported by substantial evidence.

Order at p.12.

The "finding" referenced by the Court is the Board's finding "that the Appellant has sustained his burden of demonstrating a gross abuse of discretion." October 26, 2006 Order at p. 24.

CONTENTIONS OF THE PARTIES

According to DHSS, the Court held that Edwards did not sustain his burden to prove a violation of the Merit Rules based on the evidence submitted at the first hearing and "this finding is conclusive and cannot be re-litigated. Opening up the record, or allowing the

Board to review the evidence in this matter and make new findings, would violate Judge Scott's decision." According to DHSS, the "remand is only *pro forma* for the Board to issue a decision denying Edwards' grievance in accordance with Judge Scott's decision."

According to Edwards, the Court only held that he did not meet his burden to prove a gross abuse of discretion under Merit Rule 18.5. "Neither the MERB nor the Court made any findings as to whether Edwards met the proper burden of proof under Merit Rule 4.6. . . . Whether a case meets, or does not meet, its burden under one merit rule does not establish whether it meets a required burden under another rule. A new hearing would be the first hearing at which meeting, or not meeting, the burden of proof under [Merit Rule] 4.6 was considered."

DHSS replied: "[N]ot only did Edwards not meet the gross abuse of discretion standard but he also failed to meet the less restrictive abuse of discretion standard. . . . Considering that the Board found a gross abuse of discretion to have occurred, it also found that a regular abuse of discretion also occurred." According to DHSS, Edwards "has already presented the case he is now contending should be re-litigated on demand. This is nothing more than ruse to give him a second chance to prove the case he had the opportunity to prove in July of 2006.

CONCLUSIONS OF LAW

The Board concludes as a matter of law that the only proceeding on remand consistent with the Superior Court's opinion is to issue an order denying Edwards' appeal.

The Court held that the Board erred as a matter of law in deciding Edwards' grievance by reference to Merit Rule 18.5 ("Grievances about promotions . . . .") because "[t]he promotion itself is not questioned by either party." Order at p.10. Rather, the Board should have decided the grievance under Merit Rules 4.4.2 and 4.6 (advance starting salary). Even applying the gross abuse of discretion standard in Merit Rule 18.5, however, the Court held that the Board erred as a matter of law because a finding of gross abuse of discretion was not supported by substantial evidence in the record.

The Board found a gross abuse of discretion because Edwards "requested and received an advanced starting salary in connection with his career ladder promotion to senior applications support specialist. His qualifications were, therefore, deemed by DHSS to be above the minimum for the classification." October 26, 2006 Order at p. 24.

The Superior Court held that the Board erred as a matter of law because the record did not contain substantial evidence to support the finding of gross abuse of discretion in the amount of Edwards' advance starting salary. If the record does not contain substantial evidence to support a finding of gross abuse of discretion, *a fortiori* it does not contain substantial evidence to support a finding of ordinary abuse of discretion, the standard under Merit Rules 4.2.2 and 4.6. *See Allstate Floridian Insurance Co. v. Ronco Inventions, LLC,*

890 So.2d 300, 302 (Fla. App. 2004) ("'gross abuse of discretion' . . . is more egregious than a typical abuse of discretion").

"The term 'a fortiori' is defined by Black's Law Dictionary 65 (8th ed. 2004), as 'By even greater force of logic, even more so.' The term has also been defined as meaning 'marked by certainty inferred from and taken to be even more conclusive than another reasoned conclusion or recognized fact.' Webster's Third New Int'l Dictionary 37 (2002)." *Quad-City Consolidation & Distribution, Inc. v. Deere & Company*, 2006 WL 2872508, at p.4 (Iowa App., Oct. 11, 2006). The Superior Court held that the Board committed legal error because there was not substantial evidence in the record to support a finding of gross abuse of discretion by DHSS. By even greater force of logic, the same evidence would not support a finding that DHSS violated the lesser included standard of abuse of discretion.

The Board concludes as a matter of law that the only proceeding on remand consistent with the Superior Court's opinion is to issue an order denying Edwards' appeal.

DECISION AND ORDER

It is this 3rd day of September, 2009, by a unanimous vote of 3-0, the Order of the Board to deny Edwards' appeal.

Martha K. Austin
Chair

John F. Schmutz
Member

Joseph D. Dillon
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 on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee's 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.
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> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
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> (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.
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> (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: September 4, 2009

Distribution:
Original: File
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Agency's Representative
Board Counsel

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