

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

LAURA A. KEELEY,	:	
	:	
Grievant,	:	
	:	
v.	:	<u>MERB Docket 17-06-672</u>
	:	
DEPARTMENT OF TRANSPORTATION,	:	
	:	
Employer.	:	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (“Board”) at 9:00 a.m. on March 1, 2018 at the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Suite 100, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Paul R. Houck, and Victoria D. Cairns, Members, a quorum of the Board pursuant to 29 *Del. C.* §5908(a).

APPEARANCES

Rae Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Laura Keeley
Employee/Grievant, *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department
of Transportation

BRIEF SUMMARY OF THE EVIDENCE

The employee/grievant, Laura A. Keeley (“Keeley”), offered thirty (30) exhibits into evidence. The Board admitted seventeen (17), marked as Exhibits 5 – 8, 12 – 18¹, 21, 25 – 28, and 30.

The Department of Transportation (“DOT”) offered nine (9) exhibits into evidence. The Board admitted eight (8), marked as Exhibits A – H.

The Board heard testimony from Ms. Keeley and from Dina Burge, Labor Relations Manager for DOT.

FINDINGS OF FACT

The following facts were established by the testimonial and documentary evidence received and reviewed by the Board, and are undisputed.

By letter dated August 23, 2016, an advanced salary request was submitted to DOT HR Manager Kim Nowacki, for Keeley, who at that time had been recommended for a career ladder promotion to a Planner IV position in the DOT Environmental Studies Office (“ESO”). The letter stated:

Laura is currently employed as a Planner III, at 85% of the midpoint for PG 15, and has worked in the ESO since August of 2012 when she was hired as a Planner II. She was promoted to the Planner III level in October 2014. Laura holds a bachelor’s degree in history with a minor in Legal Studies/Political Science as well as a master’s degree in Historic Preservation. We feel that she exceeds the minimum job requirements as detailed below and we are requesting an advanced salary classification of \$53,640.10 which is 85% of midpoint for a PG 17.²

On October 14, 2016, Keeley’s immediate supervisor notified her that DOT Human

¹ Grievant Exhibit 18 is identical to State Exhibit D.

² Agency Exhibit A. The request was filed by LaTonya Gilliam, who was or would become Keeley’s immediate supervisor. The document indicates Keeley’s career ladder promotion was approved by HR on August 24, 2016.

Resources had not granted the requested 85% advanced salary. Her supervisor included the email from HR which stated:

Due to internal equity, HR cannot support the original advanced salary request of \$54,445.05 (85% based on the new pay scale effective 10/1/16) of midpoint for a paygrade 17 for Laura Keeley.

However, HR does support an advanced salary of \$52,000, which is 81.18277% of midpoint for a PG 17. This advanced *[sic]* will be retroactively effective 6/12/16. Please notify your employee of this approval...³

On October 28, 2016, Keeley submitted a written grievance by email to both her immediate supervisor and to then DOT Director of Human Resources, Nicole Majeski. Keeley alleged violations of Merit Rules 4.6 and 4.4.2, and stated:

...The Merit Rules were not properly applied in the consideration of my request for an advanced salary upon promotion. MR 4.6 refers back to MR 4.4.2 which states, 'Agencies may approve a starting rate up to 85% of midpoint where applicants' qualifications are clearly over and above the job requirements as stated in 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.' The job requirements listed in the class specification for a Planner IV were not properly followed in evaluating my qualifications...⁴

On November 1, 2016, Keeley's immediate supervisor, an Environmental Stewardship Program Manager, sent an email to DOT HR Director Majeski in which she stated, "David⁵ and I fully support Laura's grievance concerning Merit Rule 4.4.2 and 4.6." Kelley's supervisor followed up with a more formal letter to HR Director Majeski, dated November 14, 2016:

I have discussed the attached grievance with Laura Keeley and informed her that I fully support her grievance concerning Merit

³ Grievant Exhibit 5, p. 52.

⁴ Grievant Exhibit 6, p. 78.

⁵ David Nicol, Assistant Director of Engineering Support, was copied on all of the email correspondence concerning Keeley's grievance.

Rules 4.4.2 and 4.6.

During the review of Ms. Keeley's advanced Salary request, Employment Services performed an internal equity review based on years of services with other Planner IV's throughout the Department and converted the education level to years of experience.

During that review, the selective requirements of the position were not accounted for during the internal equity review process. The position that Ms. Keeley holds has selective educational and work experience requirements that the other Planner IV positions included in the internal equity review do not require.

This position is highly specialized and meets the federal Department of the Interior educational requirements. This expertise in scientific field work and surveys, writing of technical reports, creating and implementing mitigation projects, etc., affords DeIDOT the ability to deliver our Capital Program more efficiently.

Per Merit Rule 4.4.2 the qualifications for an Architectural Historian are clearly over and above the job requirements as stated in the Planner IV class specification. I am in support of Ms. Keeley's request to submit the advanced salary request to the Office of Management and Budget requesting 90% of midpoint. I will review the existing advanced salary request and amend it to reflect the increased amount.⁶

On or about November 14, 2016, DOT Labor Relations Manager Dina Burge left a voice mail for Keeley, stating she wanted to speak with Keeley concerning her grievance. Burge's position is part of the DOT HR office and she reports to the DOT HR Director.⁷ On Friday, November 18, 2016, at 5:45 p.m., Burge sent an email to Keeley in which she stated:

I left you a voice mail message on Monday regarding your grievance. Specifically, I wanted to discuss with you skipping Step 1 and going directly to Step 2 in this case. If you can give me a call when you get a chance, it would be greatly appreciated.⁸

Keeley responded to Burge on Monday, November 21, 2016, also by email:

⁶ Grievant Exhibit 5, p. 56.

⁷ Grievant Exhibit 5, p.57. At that time, Majeski was the DOT HR Director.

⁸ Grievant Exhibit 5, p. 59.

Sorry for delay in returning your call. I just tried to call your office and I will try to follow up tomorrow, but I thought I'd send an email for now. I am a little confused about how it all works so I wasn't sure if I needed to return your call at first because my supervisor did the step one response and the result was her agreeing with my claim. Is that not right? I want to make sure to get this all correct. ⁹

On Tuesday, November 22, 2016, Burge responded to Keeley by email:

No worries. Unfortunately, the Merit Rules are not very clear. In this type of situation, the Step 1 doesn't have much effect as your immediate supervisor has no control over advanced salary requests. Thus, we normally start at a Step 2. Since you have technically had the Step 1 with your supervisor and we received a response, we can move forward to Step 2, at this point. I have requested that Secretary Cohan assign a hearing officer. Once assigned, that individual will contact you in regard to setting up a time and date for the hearing...¹⁰

By email dated December 1, 2016, Keeley was advised that a grievance hearing officer had been assigned. A Step 2 hearing was conducted on December 8, 2016, and Keeley's grievance was denied in the decision dated December 21, 2016.

Keeley then filed an appeal to Step 3 of the grievance process. A hearing was convened by a Senior Labor Relations and Employment Practices Specialist and a decision denying the grievance was issued on June 7, 2017. Thereafter, Keeley filed a timely request for hearing by the Merit Employee Relations Board on June 20, 2017.¹¹

CONCLUSIONS OF LAW

Merit Rule 18, Grievance Procedure, states in relevant part:

18.6 Step 1: Grievants shall file, within 14 calendar days of the date of the grievance matter or the date they

⁹ Grievant Exhibit 5, p. 58.

¹⁰ Grievant Exhibit 5, p. 58.

¹¹ The MERB hearing was originally scheduled for November 2, 2017, but was continued at Keeley's request because she was out of the office on an approved leave of absence through December. The hearing was rescheduled for January 4, 2018, but had to be rescheduled due to a winter storm which closed State offices that day. This grievance was heard at the next available hearing date of March 1, 2018.

could reasonably be expected to have knowledge of the grievance matter, a written grievance which details the complaint and relief sought with their immediate supervisor.

The following shall occur within 14 calendar days of receipt of the grievance: the parties shall meet and discuss the grievance and the Step 1 supervisor shall issue a written reply.

18.7 Step 2: Any appeal shall be filed in writing to the top agency personnel official or representative within 7 calendar days of receipt of the reply. The following shall occur within 30 calendar days of the receipt of the appeal: the designated management official and the employee shall meet and discuss the grievance, and the designated management official shall issue a written response.

The Board concludes as a matter of law that it does not have jurisdiction to decide the merits of Keeley's advance starting salary claim because: (1) The grievant prevailed at Step 1 of the grievance process; (2) the agency did not file a timely appeal to Step 2; and (3) the grievant did not agree to waive her right to Step 1. Therefore, the Step 1 decision is final and binding on the agency. ¹²

In *Chapman v. DHSS*¹³ ("*Chapman*"), the Assistant Director of the Delaware Psychiatric Center ("DPC") rescinded the grievant's promotion to Psychiatric Social Worker III (PSW III) for failure to follow directives for mandatory drug testing. Two days later, the grievant e-mailed a grievance to her immediate supervisor and the Director of Human Resources. On September 1 and 4, 2006, the grievant met with her immediate supervisor to discuss her grievance. By e-mail dated September 8, 2006 to the HR and DPC Director, the

¹² The Board notes that the agency's Human Resources Office was on notice of the filing of the grievance on October 28, 2016, but did not apparently take any steps to make sure that the grievant's immediate supervisor complied with the agency's internal protocols for the conduct of a Step 1 meeting. Even after receiving the Step 1 decision, the agency waited over a week to respond and suggest that the parties move forward at Step 2.

¹³ C.A. No. 08A-04-009-WCC, 2009 WL 2366080 Del. Super., July 31, 2009.

immediate supervisor wrote that the grievant “provided a satisfactory drug test” and requested that the grievant “be reinstated to the PSW III position.” The agency did not file a written appeal “to the top agency personnel official or representative within 7 calendar days of receipt of the [Step 1 decision].” Merit Rule 18.7. The Superior Court reversed the Board’s decision in favor of the agency.

The Court finds that the agency’s failure to follow the time limits set forth in the MERB rules bound them to the decision made by the [grievant’s] immediate supervisor under Step 1 of the grievance procedure.

Chapman, at p.12.

The Board believes that the facts in this case fall squarely within the Superior Court’s holding in *Chapman*: Keeley filed a timely grievance with her immediate supervisor on which she copied the DOT HR Director; she then met with her immediate supervisor to discuss the grievance; her immediate supervisor issued a written reply which was addressed to the DOT HR Manager; and DOT did not file a written appeal within seven calendar days of receipt of the reply, as required by Merit Rule 18.7. “[T]he agency’s failure to follow the time limits set forth in the MERB rules bound them to the decision made by the [grievant’s] immediate supervisor under Step 1 of the grievance procedure.” *Chapman*, at p.12.

The agency attempted to distinguish *Chapman* in three ways:

First, the agency argued that a valid Step 1 meeting did not take place because Merit Rule 18.6 requires that “the parties shall meet and discuss the grievance.” According to the agency, the term “parties” requires an agency representative attend the Step 1 hearing to present evidence, testify, and otherwise advocate the agency’s position.

The Board disagrees. Merit Rule 18.6 only identifies two necessary parties for a Step 1 meeting: the grievant, and her immediate supervisor. The term “parties” is merely a

collective reference to the two necessary parties. This interpretation of the Board's own rule is consistent with an important objective of the merit grievance system "to provide an informal means of resolving disputes," *Chapman*, at p. 12 (citing Merit Rule 18.1), rather than a full-blown adversarial process. "[I]t is clear that the MERB rules are structured to first attempt to resolve the dispute by the informal meeting and discuss it with the employee's immediate supervisor and not elevate it to higher levels in the bureaucracy until the need arises." *Chapman*, at p. 13-14.

Moreover, the agency is estopped from contending that a Step 1 meeting did not take place because the agency admitted in an e-mail dated November 22, 2016 that "you have technically had the Step 1 with your supervisor and we received a response." The Board believes that this admission by a high level agency representative (Labor Relations Manager) is binding on the agency.

Second, the agency contended that Keeley's immediate supervisor did not comply with internal protocols for the conduct of Step 1 meetings; therefore, the DOT can disregard the Step 1 result. According to Burge, there must be a representative from the Human Resources Office present to advocate the agency's position, and the Step 1 decision must be in an approved form, and the decision must be reviewed by the DOT Human Resources Office before being issued. Burge acknowledged that these protocols are not written down anywhere, but she testified that supervisors had received training.

An agency may adopt procedural requirements which supplement those required by Merit Rule 18 so long as they do not unduly frustrate the merit grievance process. An agency is not free, however, to use its own internal protocols to re-write the Step 1 process in Merit Rule 18.6 to deny that a Step 1 hearing occurred. If Keeley's immediate supervisor did not comply with the DOT's internal protocols that is a management issue and does not

negate the fact that a Step 1 meeting was conducted in accordance with Merit Rule 18.6.¹⁴

Third, the agency contends that the grievant, by her conduct, tacitly agreed to delay the time period for Step 2 by going forward with a Step 2 hearing on December 1, 2016. However, “[t]here clearly was no written agreement to delay a grievance step as required under Merit Rule 18.4.” *Chapman*, at p. 16 (“the Board’s finding of a tacit agreement is not supported by the record and is legal error”)

Merit Rule 18.4 also provides that the parties may agree “to waive any grievance step.” The Board believes that any such waiver must be knowing and voluntary and given before the Step 1 grievance is heard and decided. There is no evidence in the record to suggest that the grievant knowingly and voluntarily agreed to waive Step 1, certainly not after she had already received a decision in her favor. She had no choice but to continue with the process at the agency’s insistence. It was the only way she might obtain her advance starting salary and, ultimately, bring her grievance to the Board if she were unsuccessful at the agency level.

DECISION AND ORDER

It is this **27th** day of **March, 2018**, the unanimous decision of the Board that the grievant satisfied all of the requirements of Merit Rule 18.6. The agency did not file a timely appeal from the grievant’s immediate supervisor’s written reply at Step 1, and therefore the Step 1 decision in the grievant’s favor is final and binding on the agency, except as modified by the Board below.

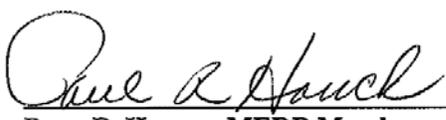
¹⁴ The Board notes that the agency’s Human Resources Office was on notice of the filing of the grievance on October 28, 2016, but apparently did not take any steps to insure that the grievant’s immediate supervisor complied with the agency’s internal protocols for the conduct of a Step 1 meeting. Even after receiving the Step 1 decision, the agency waited over a week to respond by suggesting the parties agree to move the grievance forward to Step 2.

The Board orders DOT to pay Keeley an advance starting salary of 85% of midpoint of PG 17, retroactive to thirty (30) calendar days prior to the filing date of the grievance, as a lump-sum within ten (10) business days after DOT receives a copy of the Board's Decision and Order. Keeley's wage rate should be adjusted to the 85% advanced salary granted in the Step 1 grievance decision.

The Board is aware that the grievant requested 90% of midpoint in her grievance, not 85%, and that the Step 1 hearing officer recommended that the agency make a request to the Secretary of Human Resources to approve a 90% increase. Under the Merit Rules, the agency has discretion to grant an advanced starting salary up to 85% of midpoint. Only the DHR Secretary, however, "may approve a greater increase that exceeds the 85 percentile under the criteria in [Merit Rule] 4.4.2." Merit Rule 4.6. The DHR Secretary is not a party to this case, and the Board does not have jurisdiction to order her to approve a higher rate, nor did the Step 1 hearing officer have authority under the Merit Rules to award an advance starting salary in excess of 85% of midpoint.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



VICTORIA D. CAIRNS, MERB Member