

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD  
OF THE STATE OF DELAWARE

RYAN CAVANAUGH,	)	
PAMELA E. HANCOCK,	)	
	)	
Employees/Grievants	)	<b>CONSOLIDATED</b>
	)	<b>DOCKET Nos.</b>
	)	<b>12-02-534 &amp;535</b>
	)	
	)	
DEPARTMENT OF HEALTH AND	)	<b>REMAND ORDER</b>
SOCIAL SERVICES,	)	
	)	
Employer/Respondent.	)	

After due notice of time and place this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on May 3, 2012 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

**BEFORE** Martha K. Austin, Chair, Dr. Jacqueline Jenkins, and Victoria D. Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

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

Deborah L. Murray-Sheppard  
Board Administrator

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

John C. Andrade, Esquire  
on behalf of the Employees/Grievants  
Ryan Cavanaugh and Pamela E.  
Hancock

### **BRIEF SUMMARY OF THE EVIDENCE**

The Board heard legal argument on the motions by the Department of Health and Social Services (DHSS) to dismiss the appeals of the employees/grievants, Ryan Cavanaugh and Pamela E. Hancock (together, “the Grievants”), for lack of jurisdiction.

On its own motion, the Board consolidated these two appeals for hearing and decision.

### **FINDINGS OF FACT**

On a motion to dismiss for failure to state a claim upon which relief can be granted, the Board “must assume that all well pleaded facts in the complaint are true. A complaint will not be dismissed unless the [grievant] would not be entitled to recover under any reasonable set of circumstances susceptible of proof.” *Farmer v. Brasch*, C.A. No. 09C-10-135-JRS, 2010 WL 596956, at p.1 (Del. Super., Feb. 12, 2010) (footnotes omitted).

The Board finds as a matter of fact that the following facts were well pleaded by the Grievants and they may be entitled to recover if they meet their burden of proof at a hearing on the merits.

Cavanaugh has worked at DHSS since 1999 as a Telecommunications/Network Technician III, pay grade 15. His current annual salary is \$45,968.

Hancock has worked at DHSS for 27 years. Since 2001, she has been a Telecommunications/Network Technician III, pay grade 15. Her current annual salary is \$48,787.

The Grievants allege that in 1999 there was a critical shortage of telecommunications technicians at DHSS. They allege that around 2000 DHSS asked the Office of Management and Budget (OMB) to approve a starting rate for Telecommunications/Network Technician III above the minimum pay grade. According to the Grievants, OMB approved the request and “leveled up” all

lower paid, equally qualified employees in the same class within the same geographic area receiving a lower rate.

According to the Grievants, DHSS did not level them up in 2000. As a result, the Grievants allege that the annual salary of two technicians in their group – Thomas Cherney and Mark Wilhelm – is \$60,086, 20-25% higher than the Grievants' salary. According to the Grievants, they only discovered this salary disparity sometime in 2011 when they accessed an on-line database which publishes the salaries of State employees ("Delaware Spends," published by the Caesar Rodney Institute). According to the Grievants, they filed timely Step One grievances within fourteen days of their discovery.

### **CONCLUSIONS OF LAW**

Merit Rule 4.4.3 provides:

**Upon agency request, the Director may approve a starting rate above the minimum for the paygrade where a critical shortage of applicants exists. The Director and Controller General may provide that all lower paid, equally qualified employees in the same class within the same geographic area receiving a lower rate shall also have their pay rates set as stated above if their performance is satisfactory.**

Merit Rule 18.6 provides:

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

DHSS argued that the Grievants failed to state claim for a violation of Merit Rule 4.4.3

because DHSS has not requested nor has OMB approved: (1) a starting rate above the minimum for the paygrade for Telecommunications/Network Technician III based on a critical shortage of applicants; and (2) a “leveling up” of the salaries of employees in that position whose job performance is satisfactory.<sup>1</sup>

After the Step 3 hearing on December 6, 2011, the hearing officer found that the Grievants “failed to identify any current circumstance that would trigger these mechanisms and adjust [their] pay rate upward. Thus I conclude that there has been no violation of the Merit Rules.”

Likewise, the Grievants did not present the Board with evidence of a *current* critical shortage of Telecommunications/Network Technician IIIs, much less a recent request by DHSS, approved by OMB, for a higher starting rate and a “leveling up” of employees in the same position.

However, in re-casting the Grievants’ claim to the Board on advice of legal counsel (they appeared *pro se* at the Step 3 hearing), the Board concludes as a matter of law that they have stated a claim for a violation of Merit Rule 4.4.3. If, as they allege, (1) there was a critical shortage in 2000; and (2) OMB approved an advance starting rate; and (3) OMB approved a “leveling up”; and (4) DHSS did not “level up” the Grievants; and (5) the Grievants’ job performance was satisfactory and they had equal or better education/experience as those within the same geographic area, then they have stated a claim for a violation of Merit Rule 4.4.3.

Because the Step 3 hearing officer did not have an opportunity to address this claim, the Board believes that it is appropriate to remand these grievances for further hearing at the Step 3 level before the Board can assert jurisdiction. The Board notes that the Grievants will have a considerable burden of proof to reconstruct events of twelve years go. The Board also notes that even if the

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<sup>1</sup> In their Merit Rule Appeal to the Board, the Grievants cited, in addition to a violation of Merit Rule 4.4.3, a violation of Merit Rule 4.1. At the Step 3 hearing, the Grievants abandoned their Merit Rule 4.1 claim so the Board does not need to consider it.

Grievants prevail at Step 3, their claim for retroactive back pay will “be limited to 30 calendar days prior to the grievance filing date.” Merit Rule 18.10.

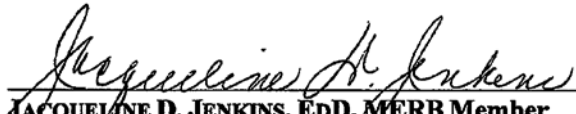
The Step 3 hearing officer should also consider on remand whether the Grievants filed timely Step 1 grievances within the fourteen days required by Merit Rule 18.6. The Grievants will have the burden to prove that they could not “reasonably be expected to have knowledge of the grievance matter” for nearly twelve years.

### **DECISION AND ORDER**

It is this **14th** day of May, 2012, by a unanimous vote of 3-0, the Decision and Order of the Board to deny the motions by DHSS to dismiss these consolidated appeals, and to remand the grievances to the Step 3 level for further hearing. The Board will retain jurisdiction over the appeals pending a decision by the Step 3 hearing officer.

  
MARTHA K. AUSTIN, MERB Chairwoman

  
VICTORIA D. CAIRNS, MERB Member

  
JACQUELINE D. JENKINS, EDD, MERB Member