

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF:  
MICHAEL EDWARDS,

Grievant,

v.

STATE OF DELAWARE  
DEPARTMENT OF HEALTH AND  
SOCIAL SERVICES (DHSS)

Agency.

DOCKET NO. 05-06-328

ORDER

ORIGINAL

BEFORE Brenda Phillips, Chairperson, and Board members, John F. Schmutz, Paul Houck, Bernice Edwards and Joseph Dillon constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* §5908(a).

**APPEARANCES:**

For the Grievant:  
Roy S. Shiels, Esquire  
Brown, Shiels & O'Brien  
P.O. Drawer F  
Dover, DE 19903

For the Agency:  
Kevin Slattery  
Deputy Attorney General  
Carvel State Office Building  
820 N. French Street  
Wilmington, DE 19801

**PROCEDURAL HISTORY**

This is a timely filed appeal from a Step 3 decision, docket number 05-06-328, dated May 24, 2005. The Step 3 decision denied the grievance of Michael Edwards ("the Appellant") finding that the Appellant failed to demonstrate a violation of merit Rule 18.5 with regard to the advanced starting salary he received from the Department of Health and Social Services ("DHSS") when he was promoted from Application Support

Specialist (pay grade 14) to Senior Application Support Specialist (pay grade 16) effective September 14, 2004.

This is the Decision and Order of the Board after consideration of the testimony and exhibits at the evidentiary hearing which, for the reasons stated below, finds for the Appellant and upholds the appeal on the issue of Appellant's advanced starting salary.

### **RELEVANT MERIT RULES**

**MERIT RULE NO. 4.4.2** 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 85<sup>th</sup> percentile if supported by documentation of the applicant's qualifications.

**MERIT RULE NO. 4.4.3** Upon agency request, the Director may approve a starting rate above than the minimum for the pay grade where a critical shortage of applicants exists. The Director, Budget Director and the 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 NO. 4.6** Promotion. Upon promotion, employees shall receive either the minimum salary of the higher pay grade or an increase of 5%, whichever is greater. Agencies may grant a greater increase not to exceed the 85<sup>th</sup> percentile under the criteria in 4.4.2. The Director may approve a greater increase that exceeds the 85<sup>th</sup> percentile under the criteria in 4.4.2.

**MERIT RULE NO. 18.5** Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the minimum qualifications; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements of the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.

### **SUMMARY OF THE EVIDENCE**

As a preliminary matter the parties entered as Joint Exhibit 1 a 24 page exhibit including a 1 page grid of all senior application support specialists in the IT section of

DHSS. The additional 23 pages consists of all exiting letters supporting the requests for each of the advanced starting salaries with the exception of employee number 6 which could not be located.<sup>1</sup> State's Exhibit 1, Tabs A through E, was also admitted without objection.<sup>2</sup>

**Michael Edwards** was sworn and testified that he is a senior application support specialist (SASS) with DHSS. He has worked for the State for over 5 years. He holds an associate's degree in computer science which he obtained after the promotion in question because he was a couple of credits short. Prior to working for he State has was a tutor for computer programming for several months at Del Tech. When he started doing computer programming for the State he was doing basically the same work he does currently just not at a senior level. In his first job with the State he was on a team of programmers that supported the psychiatric center. Shortly thereafter he was hired by the medical examiner's office where he is currently their sole programmer. He maintains, writes and designs all of their applications and takes care of any database problems that come up. His job includes intermingling with the IT support for other areas of the Department. All of his evaluations during his over 5 years of employment have been above average.

Mr. Edwards filed his grievance over his pay because he was aware that almost all of the other senior support specialists had received advanced starting salaries that where very much above what he received. In addition, he learned that another senior support specialist hired a month after him had been given an advanced starting salary after he was

---

<sup>1</sup> The employees are listed on the grid by number rather than name for privacy reasons.

<sup>2</sup> Mr. Shiels did note for the record that although the Step 3 Decision is a part of the record the hearing before the Board is de novo. He also noted that he submitted an additional letter regarding the appeal that was not in State's Exhibit 1 and reserved the right to submit it if necessary.

told that he could not have one. He stated that he did eventually receive an advanced salary but it was extremely small compared to the others, including the new hire.

Mr. Edwards stated that he performs basically the same work as the other senior application support specialists except that he has been asked to help out on other projects outside and been given responsibilities that the others have not. The projects were outside of the medical examiner's office and included completing an application that he believed all of DHSS was going to use to submit leave requests to their supervisors. He was also asked by management to set up a server that would allow the other programmers he works with to store all of their code on a central server and back it up. He was asked to coordinate with a lot of other teams to get their projects into the one server as well. Mr. Edwards was told by the manager who asked him to do the State server project that the work was above the level of a senior applications support specialist. At the time of the project he had not yet been promoted to the senior position.

Mr. Edwards testified that the work he was doing was known to the State at the time of the promotional decision in 2004. He knew of no work reason as to why he did not receive an advanced salary equal to the other senior support specialists around him. He was surprised by the low amount of the salary he was offered even though it was some degree of an advance.

On cross-examination, Mr. Edwards acknowledged that he received a 16 percent increase above his previous salary. He believed that it was not relevant because his original salary was so low. He could not recall if the first of the two outside projects he did was done before or after his promotion. He believed the first project was around the same time. It was not one of the projects he was slated to do to get the promotion. The

State server project occurred before the promotion but is ongoing because he currently maintains it. Again, it was not one of the projects he was slated to do to get the promotion. It was an additional project.

Mr. Edwards acknowledged on cross-examination that in the documentation he submitted for his promotion he stated that he was six (6) credits short of the credits needed for his associate's degree. After reviewing State's Exhibit 1, Tab B, Mr. Edwards agreed that in his original grievance filed on February 4, 2005 he requested a salary of \$59,000. He believed the amount was reasonable because it would still be lower than other IRM senior application support specialist whose performance and qualifications were comparable to his. He acknowledged that if his request was granted he would be receiving a 54 percent increase above his previous salary at the time. Looking at State's Exhibit 1, Tab D, Mr. Edwards agreed that no other senior support specialist has ever received a 54 percent increase. He contended, however, that the others had such high salaries to begin with.

Mr. Edwards identified employee number 19 on State's Exhibit 1, Tab E, as the employee hired after him who received a higher starting salary. Mr. Edwards acknowledged that employee number 19 had a bachelor's degree in computer science which he agreed that he does not have. Employee number 19 also had 28.99 years of programming experience and 22.99 years of experience at the senior level at the time he received his advanced starting salary. Mr. Edwards was identified as employee number 8 on the Exhibit. He agreed that at the time of his promotion he had not yet earned his associate's degree and less than four years of programming experience and less than one month at the senior level.

On redirect examination, Mr. Edwards testified that State's Exhibit 1, Tab D, shows that the reason given for the advanced salary awarded to employee number 19 was a critical shortage of applicants.<sup>3</sup> Mr. Edwards stated that out of all of the employees listed, he and one other person are the lowest paid.

**Marie Collins** was sworn and testified that she is employed by DHSS as a Human Resources Specialist IV working in the area of labor relations. She also has a broad background as a generalist. She explained that IRM stands for the information resources unit at DHSS. IRM provides a wide range of information technology services from handling the help desk to designing and programming programs unique to the agency. Mr. Edwards is in the agency's IRM group.

Ms. Collins explained the concept of career ladder as an opportunity for an employee to non-competitively promote within a series that the Office of Management and Budget (OMB) has designed such that the employee can advance within the career ladder once he meets the qualifications. The career ladder in IRM is from an applications support specialist to a senior applications support specialist. An individual desiring to move up the career ladder must meet the minimum qualifications for the classification to which he is promoting and must meet promotional standards that demonstrate that he has fulfilled certain work at the lower level making him eligible to move up. There is also a grade requirement which means that the employee has to be at the lower level for a certain period of time before being eligible to promote. The employee must also have a satisfactory performance review.

At the time of a career ladder promotion an employee can request an advanced starting salary. An advanced starting salary is a salary that is above the minimum for the

---

<sup>3</sup> The abbreviations used in the exhibit are explained at the bottom of the exhibit.

pay grade identified for the position to the employee is promoting. Under the merit rules performance plays no role in determining advanced salary; advanced salary is based on the qualification of the individual related to the minimum qualifications for the classification.

Ms. Collins then distinguished leveling up as the process by which employees in a particular classification can have their salaries increased to the level of another employee's salary if a series of requirements are met. The requirements are that the employees must be in the same classification and be equally qualified, they must work in the same geographic area and the request must be approved by the director of the State personnel office (now OMB), the budget director and the comptroller general. It is within the discretion of the agency to request a leveling up; it is not mandated that everyone be leveled up during and request are still subject to approval by the director, the budget director and the comptroller general. Likewise, it is not mandatory that a request for an advanced starting salary be granted. Granting the request is within the discretion of the agency or the director.

Ms. Collins explained that decisions regarding leveling up and advanced salaries are made at the fixed moment of time based on the facts as they exist at the point in time when the employee is making a request and when his request is evaluated. A real time current process is used to evaluate the request. The fact that someone received an advanced salary in 1999 or 2000 would not be relevant to the evaluation of a request by another individual in the same class in 2004 other than creating a current salary of an incumbent that would then be part of the process of evaluating internal equity. There is no retroactive applicability.

Ms. Collins described internal equity as the process that is used to evaluate the fairness or appropriateness of one individual salary against all of the incumbents in the same classification. Using her own position as a Human Resources Specialist IV as an example, Ms. Collins stated that the agency and the State personnel office would look at all of the other incumbents in the same classification and look at things like their length of service, their experience in HR, their experience in a specific area of HR, and their educational credentials with respect to degrees or training.

Ms. Collins testified that she created the charts in State's Exhibit 1, at Tabs D and E, for the purpose of addressing internal equity at the third step grievance process and at the OMB level. The chart involves information culled from PHRST with regard to the credential of the other individuals available through personnel paper work such as applications. She was assisted by Joe Davison a colleague in the IRM unit who provided the information with respect to the specific qualifications of individuals such as their length of service with respect to computer programming or their educational credentials. An internal equity chart is prepared by Mr. Davison at the point in time that an employee is making a request or a potential new hire is making a request for an advanced starting salary. In addition to internal equity, HR also looks at competitive or market factors such as the marketplace and what a private employer may be paying for similarly situated employees. The agency's budget is also a factor.

The charts [Tabs E and D of State's Exhibit 1] reflect that no advanced starting salaries were provided to this section between 2002 and 2004. There was a period of time before 2000 where advanced salaries were frequently granted. However, there was a hiring freeze between 2001 to the end of fiscal year 2002. In addition, in Ms. Collins'



experience in HR, individuals in the information technology field were not able to command the same salaries that they commanded previously. The chart under Tab D shows that the employee number 19, hired on October 18, 2004 received an advanced salary of \$53,644. Employee number 10 received an advanced salary that was almost \$9,000 more than Mr. Edwards because the Merit rule requires looking at the applicant's qualifications in reference to the minimum qualifications and the applicant had a bachelor's degree, a certificate in client servers and approximately 29 years of total programming experience. Contrasting that with Mr. Edwards [employee number 8 on the chart] and looking at internal equity at the time of the decision making, Mr. Edward's had not yet achieved his associate's degree and had dramatically less experience, having approximately 3.5 years of experience in the same category.

Ms. Collins testified that her agency's interpretation of career ladder vis-à-vis the Merit Rule 4.4.3 for leveling and how it was applied in Mr. Edward's case is that a career ladder promotion is non-competitive by definition. An employee can be promoted non-competitively in a career ladder. Rule 4.4.3 applies when a critical shortage of applicants is identified and the agency goes out and posts and advertises for a positions and then gets a certificate list to look at hiring someone or promoting someone competitively; a critical shortage of applicants may exist base on what comes out of the recruitment process. Leveling up is triggered where a critical shortage of applicants exists. In Mr. Edward's case there was no critical shortage of applicants because it was a career ladder promotion. The agency never invoked or applied Merit Rule 4.4.3 in regard to Mr. Edwards.

Subsequent to Mr. Edwards' request for an advanced starting salary, employee number 19 was hired at an advanced starting salary. Ms Collins stated that the critical shortage rule was not triggered as to Mr. Edwards, but even if hypothetically it had been, Mr. Edwards would not have been deemed equally qualified to employee number 19 so as to warrant leveling up. The chart at State's Exhibit 1, Tab E, reflects that individual number 6 was leveled up as a result of employee number 19's hire at an advanced salary. Employee number 6 had a bachelor's of science in business, a master of business administration and a certificate in client server technology. The individual also had total programming experience of approximately 28 years. That individual's qualifications compared to those of employee number 19.

On cross-examination Ms. Collins stated that she prepared both charts in State's Exhibit 1, Tabs D and E. She did not recall if both D and E were produced at the last stage of the grievance process and would need to check her file. The exhibit at Tab E prepared after the one at Tab D is sorted differently. The chart at Tab D is sorted by salary and identifier. The chart at Tab E is sorted by the date that the person became a senior application support specialist and identifier. The columns in D and E are not exactly the same. Moving to the right, the charts are the same until you reach the column marked percent increase. Thereafter, the chart at Tab D has a column that says relevant education. The chart at Tab E has years of experience as a State of Delaware senior application person. The chart at Tab E then talks about years of experience at the senior level, years of experience in programming, education and then the columns pick up again as the same columns. All of the data on both charts is available on one big Excel spreadsheet but can be printed to show different columns, in different orders and with

different sorts. All of the information in both charts was available at the time of the review. Ms. Collins agreed that the changes between D and E are that a column called "years of experience" was added to E and the column called "education" was deleted leaving the column called "relevant education."

Ms. Collins testified that she could not explain what types of certificates were referred to in the relevant education column. She also was unable to state whether the reference to an associate's degree or bachelor's degree in the relevant education column on the chart in Tab D indicated that the degree was in computers or computer education. She indicated that that information was provided to her by Joe Davison. She stated, however, that all of the information including the degree field would have been available when the decisions were made and noted that the degree field is reflected on the chart at Tab E.

Ms. Collins agreed that the Chart under Tab D shows that employee number 6 was given an advanced starting salary in 2004. The chart shows that employee number 6 was hired in September of 2001 at the rate of \$43,158. In June of 2004 employee number 6 became a senior applications support specialist and received an advanced salary of \$45,257. Employee number 6 was then leveled up [to employee number 19] four months later in October of 2004. Ms. Collins agreed that employee number 6 had worked for the State for approximately three years when the leveling up occurred. Ms. Collins disagreed that the relevant education was only a certificate and stated that the employee also had a bachelor's degree. The certificate was a client server certificate. She had no knowledge as to what projects employee number 6 might have worked on during the three year period. Ms. Collins stated that DHSS did not consider forwarding Mr. Edwards for a

leveling up in October of 2004 because his qualifications were not equal to employee numbers 19 or 6. Even if he had been deemed equally qualified, the determination as to whether to request leveling up is within the discretion of the agency and final approval is within the discretion of "the big three."<sup>4</sup>

Ms Collins explained that when Mr. Edwards received his career ladder promotion, he received an advanced starting salary under the merit rule that allows for an advanced starting salary on promotion when the qualifications of the individual are above the minimum for the classification. The fact that he had been promoted by career ladder had no bearing on whether he was entitled a short time later to be leveled up to employee numbers 6 and 19.

Ms. Collins stated that Mr. Davison would have to speak to how determinations are made to establish similarities in education and experience for purposed of leveling up. Her understanding of the agency's practice with regard to education is to look at both IT and other education as shown on the chart under Tab E. The type of education and relevance of the education is considered.

Referring to State's Exhibit 1, Tab D, Ms. Collins agreed that the chart shows that in the year 2000 employee number 25 was promoted to a senior applications support specialist and received an advanced salary of \$54,500 representing a 10.6 percent increase over their previous salary of \$49,428 or 115 percent of midpoint. She agreed that according to the chart the employee had two years of education but had not received a degree and had only 1.58 years of programming experience.

Ms. Collins clarified that employee number 19 got an advanced stating salary based on a request for advanced starting salary. Employee came out of a certificate list

---

<sup>4</sup> The director of the State personnel office (now OMB) the budget director and the comptroller general.

and a competitive shortage of applicants. That opened the door for the agency to pursue leveling up for employee number 6. Employee 19 was never leveled up at all. Employee number 19 got an advanced starting salary because there was a critical shortage of applicants with respect filling the one position that was filled by employee 19. The critical shortage refers to that one moment in time on October 18, 2004 related to the one position. Mr. Edwards and employee number 19 are in the same classification, not the same position.

On redirect examination, Ms. Collins explained that it is possible to have employees with the same classification and same pay grade but with different salaries. Referring to State's Exhibit 1, Tab E, Ms. Collins clarified that employee number 25 had two years of course work but had not attained a degree. The employee also had 6.66 years of computer programming at the time of receiving their advanced starting salary on promotion to the senior level. The dollar amount of the actual increase was \$5,072. The chart shows by comparison that Mr. Edwards received an increase in the amount of \$6,190. Immediately, before his promotion to the senior level, Mr. Edwards was making \$38,310 and employee number 25 was making \$49,428 before promotion. At the time of promotion to the senior level employee 25 got a 10.26 percent increase whereas Mr. Edwards received an increase of 16.16 percent. Ms. Collins agreed that projects are not one of the factors listed on the charts for purposes of determining an advanced starting salary.

On further cross-examination, Ms. Collins agreed that it is the practice of the agency to look at the breadth and depth of actual experience as well as education in determining qualifications.

On examination by the Board members, Ms. Collins clarified that that one of the columns on the chart at Tab D on State's Exhibit 1 shows the salary that the person had immediately prior to their promotion to the senior level. It is not necessarily the salary the person received on initial hire. She agreed that Mr. Edwards and employee number 6 had different starting salaries even though they were both hired in 2001. Both lacked degrees at the time of hire. Because individual number 6 was originally hired into a different agency, Ms. Collins had insufficient information in term of the classification individual number 6 was hired into and his whole salary history to enable her explain the differences in the starting salaries. She agreed that Mr. Edwards was hired in their division first and that education is important factor for their positions.

Ms. Collins explained that the term "EDP" stands for electronic data processing and that "seasonal" is used to describe a casual seasonal employee as opposed to a merit position. She agreed that employee number 6 transferred from a seasonal position. His seasonal salary was \$43,000 and he received an advanced starting salary of 86 percent of midpoint. Ms Collins clarified that seasonal does not necessarily mean part-time. A seasonal employee can be a full-time employee. The position is a different kind of position than that of someone in a merit position and they would not have benefits of other protections of a merit employee. From the employer's perspective the seasonal allows the employer to get a worker for a fixed period of time to do a specific thing that is not going to be long term; it is like a temp. She agreed that it is possible for the temp to be paid more than a full-time employee based on all of the factors that are taken into consideration.

On final cross-examination, Ms. Collins agreed that a limited term is a type of seasonal. However, on final redirect she stated that it can be for a specific length or for an indefinite period. The salary listed for employee number 6 was the salary the person received right before the promotion. She clarified that the salary is what a full time person in that position would have earned.

**Joseph Davison** was sworn and testified that he works for DHSS in the IRM section as the manager of the application support specialists. He reports to the director of IRM, Judith McClafferty. He has been in his current position for about eight and a half years. His duties include managing the departmental IT help desk and day to day projects. He supervises the IT trainer for the department application support specialist, manages the IRM's budget and serves as the liaison for human resources matters.

Mr. Davison is familiar with Mr. Edwards. Mr. Edwards was hired in 2001 as a full-time seasonal employee. He became a merit employee in October/November 2001. Since joining IRM Mr. Edwards has been in the application career ladder starting as an application programmer, moving to application support specialist and now senior application support specialist. He progressed through the career ladder by promotion.

Mr. Edwards put in his actual paperwork request for an advanced starting salary in connection with his promotion to senior applications support specialist in January of 2005. The promotion was made retroactive to the date the last task was completed. Mr. Davison became aware of the request from Mr. Edwards' supervisor, Patrick Galinger. Once informed of the request Director McClafferty asked Mr. Davison to prepare the internal equities charts which are prepared every time an outside hire is going into the senior applications support specialist classification or someone is going via a career

ladder promotion. He has prepared approximately 20 of these types of charts during his tenure. The information in the charts includes demographic experience and then years of experience as a senior applications support specialist for the State, the years at the senior level, the total programming experience and educational background. Years of experience is broken down into total programming and experience at the senior level.

With regard to education, Mr. Davison includes the total educational background and relevant education. Relevant education is something in the IT field which is very closely affiliated or has a strong IT component. Mr. Davison stated that all education is considered. He could not speak to the emphasis placed on the relevant education. He does not make a distinction between courses done at the college or university level versus courses done at a technical school or over the internet. He does note the type of degree received.

Mr. Davison agreed that he assisted with the preparation of the chart under Tab E of State's Exhibit 1. His internal equities portion of the chart begins with the column including years of experience as a state of Delaware SASS over to and excluding the comments section. He prepares the internal equities every time there is a request for an advanced starting salary at the SASS level. After he prepares the chart it goes to his boss, the director of IRM. The purpose is to gather relevant information in terms of education and experience to compare an incoming applicant or someone being promoted against the other people already in the classification. At the time of Mr. Edwards' request, individual numbers 2 and 9 were also in the process of completing their career ladders but did not make advanced salary requests. They received the standard five percent increase on promotion. Mr. Edwards received a 16 percent increase. There was also an



external hire that was filled with employee number 22 on the chart. Employee number 22 was given an advanced starting salary of 82 percent of midpoint. He was given the exact same starting salary as Mr. Edwards. Employee number 22 had a bachelor's degree in computer science and just less than two years of programming experience. Mr. Edwards and employee number 22 were considered to be roughly equivalent in combined experience and education.

Mr. Davison testified that Mr. Edwards' salary percentage increase was greater than that received by other employees in the last 5 years. There were some larger increases back in 1999 and 2000 but that was at time when they had a terrible time recruiting and holding on the programming staff. They had a 40 percent vacancy rate as opposed to a rate that is under 15 percent currently. The lower vacancy rate was a factor in determining advanced salaries in 2004 and 2005.

On cross-examination, Mr. Davison stated that once he prepares the charts he gives them to his boss who passes them on to someone higher. Neither he nor his boss makes recommendations based on the charts. Mr. Davis stated that there were columns in the charts at Tabs D and E beyond what he normally prepares. Mr. Davison stated that he assisted Marie Collins with the preparation of the charts. He believed he was requested to assist her in regard to an earlier hearing. He believed that both charts had essentially the same information just sorted differently. He did not know why two charts were prepared but believed they were prepared at the same time.

Mr. Davison agreed that the chart at Exhibit 1, Tab E, has one column for education and one column for relevant education. Education shows the larger picture of someone's total and relevant education shows the education that is more directly related

to IT. Mr. Davison did not know how it was weighted once he forwarded it on. All he does is provide the information.

Mr. Davison agreed that he has experienced being unable to hire IT people for what his agency was able to offer. The current vacancy rate, estimated to be less than 15 percent, reflects the experience of not being able to match salary demands but it is also a consequence of turnover and the time that it takes to fill vacancies. Mr. Davison stated that there is always going to be a certain amount of vacancies. He agreed that within the last year there have been IT people that he could not hire for what his agency could pay. There were people he could have hired if they would have accepted the pay that was offered.

Mr. Davison clarified that when he prepared the charts the term "courses" was used to mean courses taken at the university level or at someplace like Del Tech. If it says courses under relevant education it means they have taken courses in IT. A course in history would probably not be listed as relevant education. The listing of certificates does not distinguish whether the certificate was based on two or three classes or five or six. Mr. Davis agreed that that range of salary for a senior applications support specialist is between \$62,000 and \$44,500. He also agreed that Mr. Edwards is at the very bottom of the pay range. He agreed that Mr. Edwards has been employed by the department for roughly five years.

On examination by the Board members, Mr. Davison stated that he prepared his portion of the chart at Tab D back in December of 2004. He assisted Ms Collins with the preparation of the chart at Tab E. The timeframe was sometime between December of

2004 and late 2005. A bachelor's degree is typically a four year degree and weighted more than a two year associate's degree.

Mr. Davison explained that Mr. Edwards was a seasonal programmer when he was hired in 2001. He was not making \$38,000 as a seasonal employee. The \$38,000 is what he would have been making as an application support specialist just prior to his promotion to the senior level. At that time he was a full time employee. Mr. Davidson agreed that employee number 1 on the chart at Tab E was hired as a full-time application support specialist in 1999 with 114 credits in computer science and 12 years of experience. He disagreed the employee was hired at \$48,000 initially. That figure was what he would have been making just prior to his promotion to the senior level. Mr. Davison was not able to state what the starting salary would have been in 1999 without having the employee's salary history. As of this time employee number 1 has been in the State system for approximately 5 years. Mr. Davison explained that the SASS salary on the chart at Tab E is the salary that the individual received at the time they were promoted or hired into the classification. The listing for current salary is as of 2005 when the chart was prepared.

Mr. Davison stated that, in his opinion, years of service and years of programming experience are more important than a degree.

On further cross-examination, Mr. Davison stated that he could not answer as to the relative importance of an associate's degree in IT versus a four year degree in something like history.

## ARGUMENTS

Appellant has argued two separate theories in support of his appeal. First, the Appellant contends that he should have received a greater advanced starting salary at the time of his promotion based on his qualifications. He submits that other senior application support specialists with comparable qualifications have received greater advanced starting salaries upon promotion to the position of senior support applications specialist. Appellant argues that there is no work related reason for the disparity in advanced starting salaries and, as a result, it is discrimination and an abuse of discretion for the agency not to give him an advanced starting salary equivalent to the advanced starting salaries received by other senior application support specialists. The relief sought by the Appellant is an increase in the advanced starting salary he received. Appellant requested an advanced starting salary of \$59,000.

As a second theory, Appellant has argued that he should have been leveled up in 2004 because he was in the same geographic area, he had similar qualifications to employee number 6 and was in the same layer as a senior support applications specialist as employee number 6 who was leveled up to employee number 19, a new hire. Appellant submits there was a critical shortage of applicant's when employee 19 was hired triggering Appellant's entitlement to consideration for leveling up and that it was unreasonable for the agency not to do so. Appellant argues at a minimum he should have had his position sent up to the trio for a determination on the leveling up issue.<sup>5</sup>

---

<sup>5</sup> Appellant's counsel raised for the first time during summation a legal argument that the Board should be making the ultimate decision on leveling up and should not be forwarding it as provided in Rule 4.4.3. Appellant submitted that the legislature made the Board the final authority in dealing with personnel matters, including a uniform pay plan. The Appellant suggested that the rule delegates the Board's authority and is contrary to statute.

Counsel for the State strongly disagreed and submitted that the final determination as to a uniform pay plan is in the hands of the Governor after review by the budget director, the comptroller general and the director

As to Appellant's first theory, the State has submitted that Mr. Edward's requested and received an advanced starting salary. He simply did not receive the as great an increase as he would have liked. The State has submitted that DHSS did not abuse its discretion in making the determination as to the amount. The standard is discretionary and the Board would have to find the agency's determination to be arbitrary and capricious to find an abuse of discretion. The State submitted that the agency properly evaluated qualifications and considered internal equity and that there was no abuse of discretion in giving Mr. Edwards a 16.6 percent increase in salary, more than anyone in that classification has receive in years with one exception. The State submitted that if the Appellant's request is granted, Mr. Edwards would receive a 54 percent increase giving him the largest increase in the history of the classification on an advanced salary and, in fact, would place him at a greater salary than the rest of the individuals in the classification and would create an unjust and skewed result.

As to Appellant's second argument, the State responds that that there was no leveling up situation in existence at the time of Appellant's request for an advanced starting salary and, therefore, leveling up is not an issue to be confused with the advanced salary determination made by DHSS as to Mr. Edwards. The State submitted that leveling up only applies to the extent that Mr. Edwards is arguing that he should have been leveled up along with employee number 6 at the time that employee number 9 received an advanced starting salary which the State contends is clearly not the case when Mr. Edwards' qualifications are compared to those of employee numbers 6 and 19. In fact,

---

of human resources and management. Counsel argued that Appellant's counsel was incorrectly interpreting the statute.

No legal authority was presented by Appellant's counsel to support the argument advanced. The Board finds it unnecessary to address the issue further since, for the reasons stated herein, it finds the leveling up argument to be without merit.

Mr. Edwards never asked to be leveled up and put in his request for an advanced starting salary after the leveling up determination with regard to employee number 6 had already been made.

### **FINDINGS AND DISCUSSION**

The Exhibits introduced into evidence were made a part of the record and considered by the Board in making its decision. The Board heard sworn testimony from Appellant Michaels Edwards, Marie Collins and Joe Davison.

Mr. Edwards has made two arguments in support of his request for an increase in his salary. The Board first addresses Appellant's second argument that he should have been considered for leveling up and finds that it has no merit.

Appellant contends that when employee number 19 was hired at an advanced starting rate Merit Rule 4.4.3 was triggered. Essentially, Appellant argued that the Agency should have pursued leveling up of his salary to the salary of employee number 19 as was done with employee number 6. However, Appellants argument not only ignores the discretionary nature of a request for leveling up, the record demonstrates that Appellant was clearly not equally qualified to employee 19 or employee number 6.

Appellant acknowledged during his testimony, and State's Exhibit 1, Tabs D and E, demonstrate that employee number 19 had a bachelor's degree in computer science and 28.99 years of programming experience and 22.99 years of experience at the senior level at the time he received his advanced starting salary. The chart at State's Exhibit 1, Tab E, outlines the qualifications of employee number 6 who was leveled up as a result of employee number 19's hire. Employee number 6 had a bachelor's of science in business, a master of business administration and a certificate in client server technology

and programming experience of approximately 28 years.

Mr. Edwards by comparison acknowledged, and the exhibits demonstrate, that at the time of his promotion which occurred in essentially the same relevant time period, he had not yet earned his associate's degree in computer science and had less than four years of programming experience and less than one month at the senior level. Appellant failed to demonstrate an essential element for the application of Merit Rule 4.4.3. Specifically, he failed to establish that he was "equally qualified" to employee numbers 19 and 6. In addition, Mr. Edwards offered no testimony to establish that he requested that his salary be considered for leveling up. Clearly, however, even if he had made such a request he could not demonstrate that his qualifications were equal so as to even warrant consideration. Moreover, there is no automatic entitlement to leveling up. *See, In the Matter of Michael Touchton v. DHSS*, MERB Docket No. 00-060612 (February 22, 2001).

The Board next addresses Appellant's second argument that DHSS abused its discretion in not awarding him a greater advanced salary in connection with his career ladder promotion to a senior applications support specialist. The Board finds that the applicant has sustained his burden of proof with regard to the second argument.

As a preliminary matter that Board recognizes again the discretionary nature of a request for an advanced starting salary under Merit Rule 4.2.2. Merit Rule 18.5 only permits a grievance with regard to a promotion under very limited circumstances:

**MERIT RULE NO. 18.5** Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the minimum qualifications; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements of the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.

Although counsel for Appellant argued that the DHSS discriminated against Appellant based on non-merit factors in violation of Merit Rule 2.1, the Board finds no evidence to support the claim and finds that the Appellant failed to sustain his burden of proof with regard to any claims of discrimination.

The only remaining issue, therefore, is whether DHSS grossly abused its discretion in connection with the advanced salary given to Appellant under Merit Rule 4.4.3 in violation of Merit Rule 18.5. To find that the agency committed a gross abuse of discretion the standard is whether the agency's determination was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any other ground than bad faith." *See, Alinda v. Internet.Com Corporation*, 2002 WL 31584292, at \* 4 (Del. Ch.). By a vote of four (4) to (1) the Board finds that the Appellant has sustained his burden of demonstrating a gross abuse of discretion.

It is undisputed that Appellant 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.

The State presented evidence to show that the salary decision was based on Appellant's qualifications and an internal equity review designed to ensure fairness or appropriateness of one individual salary against all of the incumbents in the same classification. State's Exhibit 1, Tabs D and E were submitted to show a comparison of all of the senior applications support specialists. The State offered that the charts support the agency's decision by showing that the differences in salary in the same classification are based upon variables such as start date, length of service, education, experience and



market factors. The State provided employee 22 as an example of an employee with qualifications comparable to Appellant who receive a comparable advanced starting rate.

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 Board recognizes that the Merit Rules also provide that a starting salary may, in certain circumstances begin at various points within an evenly applied pay range. The Board, however, was not persuaded by the market variable explanation for disparity in ranges of the salaries listed for the other senior application support specialists on the charts. Although the burden of proof is on the Appellant, the Board was also not persuaded that the inconsistencies in the salaries shown on the charts were adequately explained by the agency.

Appellant raised the point that neither Ms. Collins nor Mr. Davison was able to testify as to how the various factors on the charts were weighted since they were not the individuals who made the salary determinations. As an example, the Board notes that employee number 5, hired in 1998, received a starting salary of \$51, 978 on his career ladder promotion to senior applications support specialist. Employee number 5's education is listed only as two and a half years of courses in computer programming.


The Board's finding of gross abuse of discretion is, therefore, based upon the inconsistencies raised by the Appellant among the various salaries of the senior application support specialists and the lack of evidence as to how Mr. Edward's experience and education were weighted vis-à-vis the qualifications of the other senior support application specialists.

**ORDER**

The Board finds by a vote of four (4) to one (1) that the grievance appeal of Michael Edwards is upheld on the issue of the advanced starting salary only. The Board directs that that Mr. Edward's advanced starting salary be adjusted to \$53,948, the midpoint for his classification retroactive to the extent permitted under Merit Rule 18.10.

**BY ORDER OF THE BOARD:**

  
Brenda Phillips, Chairperson

  
John F. Schmutz, Member  
(Dissenting)

  
Paul Houck, Member

Bernice Edwards, Member

  
Joseph Dillon, Member