

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF)
DELAWARE/Department of)
HEALTH AND SOCIAL)
SERVICES,)

C. A. No.: 06A-11-006-1-CLS

Appellant/Employer,)

v.)

MICHAEL EDWARDS and the)
MERIT EMPLOYEE RELATIONS)
BOARD.)

Appellee/Employee.)

Submitted: December 1, 2007
Decided: March 19, 2008

Upon Employer's Appeal from a Decision of
the Merit Employee Relations Board,
REVERSED and REMANDED.

ORDER

Kevin R. Slattery, Wilmington, Delaware, Attorney for Appellant, the State of Delaware.

Roy S. Shiels, Dover, Delaware, Attorney for Appellee, Michael Edwards.

SCOTT, J.

Introduction

Before the Court is appellant, the State of Delaware, Department of Health and Social Services' (hereinafter "Department") appeal from a decision of the Merit Employee Relations Board (hereinafter "MERB"). The decision found appellee met the burden of proof for his grievance against the department. Having reviewed the parties' submissions and the record below, the Court concludes the MERB's finding was an error of law. The MERB's decision is therefore **REVERSED** and **REMANDED**.

Facts

When the advance he requested upon his promotion to senior application support specialist was granted, but at an amount lower than he requested, appellee filed a grievance.¹ The grievance alleged violations of Merit Rules 4.6, 4.2, and 2.1. An advance is a salary above the minimum of the range for the position.² If there is no advance request, then the default salary upon promotion is a 5% increase from the previous salary or the minimum amount of the range for the new position, whichever is greater.³ Under Merit Rule 4.4.2, the decision to grant an advance is discretionary.⁴

¹ D.I. 5 at A3.

² *Id.* at A6-7.

³ Del. Merit Rules, R. 4.6

⁴ "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."

The department states that it exercises this discretion by weighing the following factors: (1) existing conditions within the department, (2) internal equity among employees, (3) market factors, and (4) the state's financial situation.⁵

Testimony was heard from Ms. Marie Collins, who is employed as a human resource specialist by the department and from Mr. Joseph Davidson, the manager of application support specialists.⁶ Neither representative from the department was directly involved in making the decision regarding appellee's requested advance.⁷

Appellee's Qualifications and Tenure

Appellee was hired on May 16, 2001 as a full-time seasonal employee; shortly thereafter he became a full-time merit employee.⁸ After his promotion to senior application support specialist, he obtained an associate's degree in computer science.⁹ Prior to his employment with the State, his related experience included working for several months as a tutor in computer programming.¹⁰

⁵ D.I. 5 at A7-8.

⁶ *Id.* at A6, A15.

⁷ *Id.* at A17.

⁸ *Id.* at A15.

⁹ *Id.* at A3.

¹⁰ *Id.*

Appellee testified that during his tenure with the department, all evaluations have rated his performance as above average.¹¹ Additionally, appellee was assigned to work on two special projects outside of the department to which he is primarily assigned.¹² While employed as an application support specialist, appellee's salary was \$38,310.¹³

Promotion and Request for Advanced Starting Salary

After three years of employment, appellee was promoted, pursuant to the Career Ladder Program, to senior application support specialist.¹⁴ The salary range for this position is \$43,158 to \$64,730.¹⁵ The promotion was approved in December, 2004.¹⁶ The Career Ladder is a program whereby an employee is promoted through a non-competitive process after meeting specified qualifications.¹⁷

Such a promotion brings the opportunity for the employee to request an advanced starting salary.¹⁸ Appellee made such a request.¹⁹ He requested

¹¹ *Id.*

¹² *Id.* at A4.

¹³ *Id.* at A19.

¹⁴ *Id.* at A15.

¹⁵ D.I. 6 at 177.

¹⁶ D.I. 5 at A15.

¹⁷ *Id.* at A6-7.

¹⁸ *Id.*

¹⁹ *Id.* at A3.

a salary of \$59,000 but his approved increase was \$44,500.²⁰ This reflects a 16% increase.²¹

Salaries Within the Department

The evidence presented to the MERB consisted of two charts prepared by the department to assess the internal equities of appellee's request, entered as a joint exhibit. Appellee was identified as employee eight on the chart.²² Prior to the year 2000, advanced salaries were frequently given to employees in the information technology department, but testimony indicated that recently, those candidates have been unable to command such high salaries.²³ The chart reflects that no advanced starting salaries were given in this department from 2002 through 2004, with the exception of employee nineteen.²⁴

Employee nineteen was hired after appellee at a salary of \$53,644.²⁵ This employee has a bachelor's degree and twenty-nine years of programming experience.²⁶ The salary reflected an advance which was attributed by HHS to a critical shortage of applicants for the position.²⁷

²⁰ *Id.* at A5; D.I. 6 at D1.

²¹ D.I. 5 at A4.

²² D.I. 5 at A5.

²³ D.I. 5 at A17.

²⁴ D.I. 6 at D, E.

²⁵ D.I. 6 at D, E.

²⁶ *Id.*

²⁷ *Id.*

As a result of hiring employee nineteen, the department requested a 'leveling up' of employee six who had thirty-one years of experience, an MBA, and a client server technology certificate.²⁸ After leveling up, employee six was also making \$53,644.²⁹ Leveling up occurs when one employee's salary is increased to the level of another who is: (1) equally qualified, (2) in the same geographic area, and (3) the request is approved by the director of the State Personnel Office, the budget director and the comptroller general.³⁰

Like appellee, employees two and nine were promoted through the Career Ladder in September 2001 and are paid \$53,674 and \$51,987, respectively.³¹ Each received the standard five percent increase from their prior position at the time of their promotion.³²

Employee one is paid \$53,644.³³ This employee was hired in 1999 and was making \$48,000 prior to his promotion to the senior level.³⁴ This employee has nearly completed a bachelor's degree and has twelve years of experience.³⁵

²⁸ D.I. 5 at A10.

²⁹ D.I. 6 at Exhibit D.

³⁰ D.I. 5 at A7.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

The Board referenced employee five in its decision but this employee was not addressed during the hearing. Employee five has an educational background consisting of courses.³⁶ This person was hired in 1998 and currently makes \$51,987.³⁷

Employee ten, like appellee, has an associate's degree and nearly five years of experience.³⁸ He was hired in 1999 and promoted to the senior level in 2000.³⁹ His salary is \$62,844.⁴⁰

Employee twenty-five received an advanced salary of \$54,500 when he was promoted to the senior level in 2000.⁴¹ This employee had two years of education and six years of experience at the time of his promotion.⁴²

Finally, employee sixteen was hired in October of 2001 at a salary of \$58,500 and currently makes \$62,078 at the senior level. The higher starting salary reflects a requested advance-upon-hire. This employee's qualifications are an associate's degree, a master's degree in English and seven years of experience. This individual was hired six months after appellee. Noted differences between this individual and the appellee are the amount of education and years of experience.

³⁶ *Id.*

³⁷ *Id.*

³⁸ D.I. 6 at Exhibit D.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

The Board's Decision

1. Leveling Up

Appellee argued before the Board that he should have been leveled up by the department at the same time as employee six.⁴³ The Board determined this argument was without merit because Appellant was "clearly not equally qualified to employee nineteen or employee number six."⁴⁴

2. Advanced Salary Request

The MERB found the department grossly abused its discretion by not granting him the greater advanced salary because of "the inconsistencies raised by the [appellee] 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."⁴⁵ The basis for the MERB's decision begins with the fact that the department partially granted appellee's request for an advance, therefore, the department considered appellee's qualifications to be above the minimum for his class.⁴⁶

⁴³ D.I. 5 at A22.

⁴⁴ *Id.*

⁴⁵ D.I. 5 at A24.

⁴⁶ *Id.*

The MERB cited to Merit Rule 18.5 as the controlling rule in this matter.⁴⁷ A grievance related to a promotion can only be sustained on a limited basis under Merit Rule 18.5. As a remedy the Board raised appellee's salary to \$53,948.⁴⁸

STANDARD OF REVIEW

When reviewing the decision of an administrative agency, this Court's role is to determine only whether the agency exercised its power arbitrarily, committed an error of law, or made findings of fact which are unsupported by the evidence.⁴⁹ The agency's decision must stand so long as it is supported by substantial evidence.⁵⁰

Substantial evidence is relevant evidence that a reasonable person would accept as adequate, this standard requires more than a scintilla but less than a preponderance.⁵¹ The Court is not the trier of fact and will not assess the credibility of witnesses.⁵² However, review of the Board's application of legal principles is *de novo*.⁵³

DISCUSSION

⁴⁷ *Id.*

⁴⁸ *Id.* at A26.

⁴⁹ *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981) citing *Kreshtool v. Delmarva Pwr. & Light Co.*, 310 A.2d 649 (Del. Super. Ct. 1973).

⁵⁰ *Id.*

⁵¹ *Id.* at 614.

⁵² *Id.* at 613

⁵³ *E.I. DuPont De Nemours & Co. Inc., v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

A. The Board's Remedy

Appellant contends that the remedy fashioned by the Board in this case exceeds its statutory authority and violates the Board's own rules.

Because the Court reverses the Board's decision, this issue is moot.

B. Advanced Starting Salary

First, 18.5 is not the applicable Merit Rule in this case; second, even if it were the applicable rule, several reasons indicate that the MERB's decision is not legally sound.

Merit Rule 18.5 provides:

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 in the Merit Rules or (3) there has been a gross abuse of discretion in the promotion.”
(emphasis added)

The promotion itself is not questioned by either party. Appellee was promoted to a senior application support specialist, and neither party cites error in that determination. There is no question that he meets the minimum qualifications, or that Rule 2.1 was violated, or, finally, that there was a

gross abuse of discretion in making the decision to promote. The issue is his salary, as such, 18.5 is not the applicable rule.⁵⁴

Even if 18.5 were the correct rule under which the facts of this case should be analyzed, there are errors of legal application in the decision; (1) the MERB improperly shifted the burden of proof to the appellant, (2) the evidence established market factors at play in setting the salary for senior application support specialists within the pay grade such that no bad faith can be found, and (3) the Board's decision is lacks internal consistency.

Burden of Proof

Under Delaware's Administrative Procedures Act, the burden of proof "shall always be upon the applicant or proponent."⁵⁵ The evidence presented by appellee was that he requested and received an advanced starting salary. He then pointed to others within the department who earned more.

The MERB stated that "[a]lthough 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.*" (emphasis added) Appellee argues the State presented an affirmative defense for which it bore the burden. That may be, but appellee still bears the ultimate burden of proof.

⁵⁴ See also *State v. Justice*, C.A. No.: 06A-12-006 (Del. Super. Filed August 23, 2007).

⁵⁵ 29 Del. C. § 10125(c)

The Rules adopted by MERB empower the agency to approve an advanced starting rate:

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. (emphasis added) Merit Rule 4.4.2

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. Moreover, Rule 1.4 expressly states that "[t]he State has the exclusive right to manage its operations and direct employees except as specifically modified by these Rules." Importantly, the Board found no merit in Appellee's argument that Merit Rule 2.1 was violated.⁵⁶ Given the discretion afforded to the department and the bare evidence presented by appellee, the MERB's finding is not supported by substantial evidence.

Bad Faith

The Board noted that "[t]o find that the agency committed a gross abuse of discretion the standard is whether the agency's determination was

⁵⁶ D.I. 5 at A24.

'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any other ground than bad faith.'"⁵⁷ The explanation proffered by appellant was that various market factors and internal equities were considered before determining whether to exercise discretion and grant an advanced salary to appellee.

Specifically, appellant cited to a high demand for information technology personnel around the year 2000. In order to compete with the private sector for the demand of those skilled employees, appellant granted higher salaries. However, as demand decreased for those skilled professionals, salaries have correspondingly shifted downward. So, while most of appellee's colleagues have greater qualifications than he does, many of them were also hired during a time in which they were in high demand. The explanation provided by appellant does not support a finding of bad faith, as such, that finding is an error.

Internal Consistency

Finally, the MERB's decision on the issue of the advanced starting salary is not consistent with its findings regarding the issue of leveling up. The Board found appellee was "clearly not" as qualified as Employees six and nineteen but their salary is \$53,644 and the salary ordered for appellant by

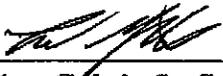
⁵⁷ Bd. Decision at 24.

the Board was \$53,948—making his salary higher than two of those who were deemed by the Board to clearly more qualified than appellant.

Conclusion

For the above-stated reasons the decision of the Merit Employee Relations Board is hereby **REVERSED** and **REMANDED** for proceedings consistent with this opinion.

IT IS SO ORDERED.



Judge Calvin L. Scott, Jr.