

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

CHARLES ROTENBERRY,)	
)	
Employee/Grievant,)	
)	DOCKET No. 19-03-720
v.)	
)	DECISION AND ORDER
DELAWARE DEPARTMENT OF LABOR,)	OF DISMISSAL
)	
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 July 18, 2019, at the Delaware Public Service Commission, 861 Silver Lake Boulevard, Dover, DE 19904.

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

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Charles Rotenberry, Grievant
Pro se

Kevin Slattery
Deputy Attorney General
on behalf of the Department
of Labor

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument on the motion by the Department of Labor (“Agency”) to dismiss the grievance for lack of jurisdiction. The Agency appended a copy of the grievance to its Motion.

The Grievant, Charles (Rob) Rotenberry (“Rotenberry”), provided a written response to the Agency’s motion.

FINDINGS OF FACT

The Grievant, Charles (Rob) Rotenberry, is employed by the Delaware Department of Labor, Division of Industrial Affairs, in the Workers Compensation unit. He is currently employed as a Labor Law Enforcement Officer II (“LLEO II”), a position he has held since 2013. He was promoted from a Pay Grade (“PG”) 10 Office Manager position (a position he held for approximately 18 months) to the PG 13 LLEO II position. At the time of his promotion his wage rate was set at 80% of the pay range¹ for PG 13, pursuant to Merit Rule (MR) 4.6.² He did not request and did not receive an advanced starting salary when he was promoted. He continues to be compensated at 80% of the PG 13 range, six years after his promotion.

Mr. Rotenberry is one of four LLEO II’s in the Workers Compensation unit, all of whom perform the same functions. Cases are assigned to the four LLEO II’s for processing alphabetically based on the claimant’s last name. In late August, 2018, Mr. Rotenberry learned through information published in a *News Journal*³ article that he was being paid approximately

¹ Pay ranges for State merit employees are established annually in the State Budget Act in Section 8 of the Budget Epilogue. The published pay range for each pay grade establishes “80% of Midpoint”, “100% of Midpoint” and “120% of midpoint”. 80% is the bottom of each pay range.

² MR 4.6 states, “Upon promotion, employees shall receive either the minimum salary of the higher paygrade or an increase of 5%, whichever is greater. Agencies may grant a greater increase not to exceed the 85th percentile under the criteria in 4.4.2. The DHR Secretary may approve a greater increase that exceeds the 85th percentile under the criteria in 4.4.2.

³ The News Journal is a daily newspaper published in Wilmington, Delaware with statewide circulation.

\$1,900 less than two of his colleagues, both of whom were hired in 2015. He also learned he was being paid less than his third colleague.

Mr. Rotenberry filed a grievance alleging the Agency violated MR 4.4.2 and 4.4.3 by paying him less than his colleagues who had less experience and who he alleged were less qualified than he was in 2015. During the processing of the grievance, he learned that the two colleagues were being paid at 85% of midpoint and that neither had requested an advanced starting salary at the time of hire or promotion.⁴ He requested that his salary be leveled up to 85% of midpoint and that he receive retroactive pay back to 2015. His grievance was advanced through the grievance process established in MR 18 and was heard by a Department of Human Resources (“DHR”) hearing officer at Step 3 on November 5, 2018.

On March 27, 2019, Mr. Rotenberry filed a request that the Merit Employee Relations Board hear his grievance. At that time, he had not received a Step 3 decision and he alleged that DHR had violated MR. 18.8⁵ by not providing the decision “within 45 calendar days of the appeal’s receipt”. On April 29, 2019, DHR issued the Step 3 decision denying his grievance.

The MERB scheduled the hearing in this matter for July 18, 2019, by letter dated May 9, 2019. The Agency filed a motion to dismiss the grievance on June 12, 2019. It was forwarded to Mr. Rotenberry who filed a written response on June 20, 2019.

⁴ Mr. Rotenberry stated one of these two individuals had an identical career path to his, albeit two years later, in that she was originally hired in an Office Manager position and then promoted to a LLEO II position.

⁵ MR 18.8 states, “Step 3: Any appeal shall be filed in writing to the DHR Secretary within 14 calendar days of receipt of the Step 2 reply. This appeal shall include copies of the written grievance and responses from the previous steps. The parties and the DHR Secretary (or designee) may agree to meet and attempt an informal resolution of the grievance, and/or the DHR Secretary (or designee) shall hear the grievance and issue a written decision with 45 calendar days of the appeal’s receipt. The Step 3 decision is final and binding upon agency management.”

CONCLUSIONS OF LAW

Merit Rule 4.4.2 provides:

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 DHR Secretary may approve a starting rate higher than the 85th percentile if supported by documentation of the applicant's qualifications.

Merit Rule 4.4.3 provides:

Upon agency request, the DHR Secretary may approve a starting rate above the minimum for the paygrade where a critical shortage of applicants exists. The DHR Secretary 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 18.2 defines a "grievance" to mean,

... an employee complaint about the application of the Rules or the Merit System law (29 Del.C. Chapter 59), which remains unresolved after informal efforts at resolution have been attempted. A grievance shall not deal with the substantive policies embodied in the Merit System law.

Section 5943, Enforcement of chapter by legal action, of Title 29, Chapter 59, Merit

System of Personnel Administration states, in relevant part:

- (a) **The exclusive remedy available to a classified employee for the redress of an alleged wrong, arising under a misapplication of any provision of this chapter, the merit rules or the Secretary's regulations adopted thereunder, is to file a grievance in accordance with the procedure stated in the merit rules. Standing of a classified employee to maintain a grievance shall be limited to an alleged wrong that affects his or her status in his or her present position...**

The Board concludes as a matter of law that the grievant does not have standing to assert a claim under either Merit Rule 4.4.2 or 4.4.3 because he has not suffered any change to his employment status in his current position.⁶ Consequently, the complaint does not constitute a grievance as defined in MR 18.2 because it concerns the “... substantive policies embodied in the Merit System law.”

The Board notes that the current merit rules do not provide a mechanism by which an agency may advance an employee within a pay range or grant wage increases for exceptional performance.⁷ The Board is not provided the authority to remediate salary inequities unless there is a violation of the merit rules. The Agency is limited by MR 4.4.2 and 4.6 to considering advanced starting salaries only upon hire or promotion. Neither rule requires that an applicant request an advanced starting salary, but states the agency “... 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.” It is within the Agency’s discretion to hire or promote in at 85% of midpoint.

Hiring in or promoting an employee at greater than 85% of midpoint requires the agency to request and DHR and the Controller General to approve a higher wage rate. MR 4.4.3. The rule states that DHR and the Controller “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.” This discretionary “levelling up” provision is not implicated in this case because none of Mr. Rotenberry’s colleagues are being paid above 85% of the Pay Grade 13 range.

⁶ This decision is consistent with the Board’s prior rulings in *Yaros v. DOT, DMV*, MERB 19-02-713 (6/18/19); *Lamplery v. DOT, DMV*, MERB 19-02-715 (6/19/19)

⁷ Mr. Rotenberry was the 2018 DOL Employee of the Year.

ORDER

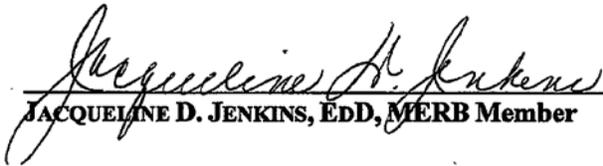
It is this 30th day of August, 2019, by a unanimous vote of 4-0, the Decision and Order of the Board to grant the Agency's Motion to Dismiss. Pursuant to 29 Del.C. §5943(a), the grievant does not have standing to assert a claim under either Merit Rules 4.4.2 or 4.4.3 because he has not suffered any change to his employment status in his current position.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member