

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

DANITA ELLIS,)	
)	
v.)	DOCKET No. 19-05-726
)	DECISION AND ORDER
DEPARTMENT OF HEALTH AND 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 September 19, 2019 at the Delaware Public Service Commission, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Paul R. Houck, Jacqueline Jenkins, Ed.D, Victoria Cairns, and Sheldon Sandler, Esq. 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

Danita Ellis, Employee/Grievant
Pro Se

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

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services/Division of Medicaid and Medical Assistance (“DHSS/DMMA”) offered, and the Board admitted, eleven (11) documents into evidence marked for identification as Agency Exhibits A – K. DMMA called no witnesses.

The Employee/Grievant, Danita Ellis (“Ellis”), offered and the Board admitted into evidence six (6) documents marked for identification as Grievant Exhibits 1 – 6. Ellis called three (3) witnesses: Alexis Bryan-Dorsey (“Bryan-Dorsey”), Chief of Administration, DHSS/DMMA; Renee D’Amore (“D’Amore”), Human Resources Manager, Classifications, Compensation and Applicant Services, DHSS; and Dina Burge (“Burge”), Labor Relations Manager, Department of Transportation. DHSS/DMMA stipulated Sandra Ross Johnson, Secretary, Department of Human Resources, received Ellis’ request for a Step 3 grievance hearing on December 21, 2018 and read the email on the same day. Ellis testified on her own behalf.

Upon conclusion of the grievant’s case, the Board, *sua sponte*, made a motion to deny the grievance for failure to state a claim.

FINDINGS OF FACT

At all times relevant to her grievance, Ellis was employed by the Department of Transportation, holding the position of Administrative Specialist III (PG¹ 9) in its Traffic Management Center. She has been employed by the State since 2008. *Agency Exhibit B.*

On September 14, 2018, DHSS/DMMA posted a vacancy for an Office Manager position (PG 10) and Ellis applied. *Agency Exhibit A.* The posting included a “yearly” salary range of “\$31,912/Min to \$39,890/Mid”. Ellis was interviewed and offered the position by the Hiring

¹ “PG” denotes Pay Grade in the State of Delaware merit system.

Manager, Bryan-Dorsey, on October 12, 2018, at the minimum salary rate of \$31,912. *Grievant Exhibit 1*. In response to the offer, the Grievant indicated her interest in accepting the position, but asked about the negotiability of the salary, because the salary offered by DHSS/DMMA was less than the salary she was currently making as a PG 9 Administrative Specialist III. She questioned how she could be promoted but earn a lesser salary in the new position.

Based on her understanding that the salary was “negotiable”, Ellis requested an advanced starting salary of “114% of the Midpoint (\$45,474.60)” by email dated October 15, 2018. She provided supporting information which included explaining her 20 years of prior, related business experience, her education, certifications, training and supervisory experience. *Agency Exhibit C*.

By email dated October 16, 2018, Bryan-Dorsey advised Ellis, “I am trying to negotiate the advanced salary. What is your current salary?” *Agency Exhibit E*. Ellis responded, “My current salary is 33,470.06.”

At some point on or around October 24, 2018, Bryan-Dorsey offered Ellis a starting salary equivalent to that paid to the prior DHSS/DMMA Office Manager, \$33,847.84. *Agency Exhibit F*. Ellis declined this offer.

On October 25, 2018, by email time stamped 1:36 p.m., Ellis filed a merit grievance with John Mooney, DHSS Deputy Director for Human Resources.² *Agency Exhibit I*. The grievance alleged DHSS/DMMA violated Merit Rules 2.1, 4.6, 4.4.2 and 4.4.3. *Grievant Exhibit 1*.

Bryan-Dorsey received an email from DHSS HR Manager D’Amore late on October 25, 2018, which stated:

I have confirmed with DHR³ that Ms. Ellis is a Merit pay grade 9,

² Although Ellis sought to have Mooney testify at the hearing, he had retired from State service before the September 19, 2019 MERB hearing.

³ The Department of Human Resources is a cabinet level agency parallel to the Department of Health and

Administrative Specialist III. As such, the merit rules allow for a 5% promotional increase into a Merit PG 10. We cannot tell you what that amount is since we cannot see her current salary. But we can offer her 5% on top of her existing base salary (not including shift, overtime, or any other premium pays). She would not need to reduce her current base pay to take the position, even though she is supposedly already above the PG 10 minimum.

At this point, our recommendation would be for you to reach back out to her and clarify this point, and see if she is willing to take the position. But DMMA is under no obligation to give her more than the 5% promotional increase. *Agency Exhibit G.*

Later that day, Friday, October 26, Bryan-Dorsey responded to D'Amore's email: "I offered Ms. Ellis the 5% above her current salary and she said that she needed to think about it. She will contact me by Monday to let me know." *Agency Exhibit G.*

The following Monday morning, at 8:28 a.m., Ellis responded to Bryan-Dorsey: "Thank you for your call on the afternoon of Friday, October 26, 2018 on behalf of HR with the offer of 5% over my current salary. I want to appeal this current offer based on my experience, skills and qualifications." *Agency Exhibit H.* Bryan-Dorsey responded at 12:27 p.m. to clarify that the 5% above her current salary was DHSS/DMMA's final offer. Ellis responded by email the next morning, "At this time I will have to decline due to the offer rate, just as I have declined the previous offer of a pay cut (demotion) that clearly violated the merit rules. Please inform HR that this rate is disrespectful of my experience and education." *Agency Exhibit H.*

Bryan-Dorsey informed HR Manager D'Amore of Ellis' decision later on October 30 and asked if she could move forward to hire another candidate. D'Amore responded, "I talked to LR, they would prefer that we hold off a little longer on making an offer. We are pushing her grievance back to her agency, and we are hoping that she ends up dropping it through them." *Agency Exhibit*

Social Services.

H.

On November 9, 2018, Ellis emailed DHSS Deputy Director Mooney requesting a Step 2 grievance hearing because her Step 1 grievance had not been processed in accordance with Merit Rule 18.6, as she had not met with anyone from DHSS nor had a written reply been issued within the required 14 calendar day period. *Grievant Exhibit 1.* Mooney responded:

Sorry to hear that you have not been contacted. I referred this grievance to DelDOT HR last week. DelDOT and DHSS Labor Relations are to coordinate the processing of this grievance which we believe should have been initiated through DelDOT. *Grievant Exhibit 2.*

There is no evidence in the record that DHSS HR ever notified Ellis, prior to her request to advance her grievance to Step 2, that they had contacted or referred the matter to the Department of Transportation (“DOT”) for processing.

By email dated November 13, 2018, DOT Labor Relations Manager Burge contacted Ellis:

I wanted to let you know our Department’s stance on this. DHSS did forward the grievance to DelDOT HR requesting that we handle it. However, given the grievance is based on DHSS’s actions during the hiring process, I advised DHSS that we would not be handling the matter. Therefore, DHSS should be addressing your email inquiry from Friday, November 9, 2018. *Grievant Exhibit 5.*

By email also dated November 13, 2018, DHSS Labor Relations Manager David Wesley⁴ notified Ellis he would be handling the Step 2 hearing process on behalf of DHSS. He asked if there were any dates on which she was unavailable in the following “couple of weeks”. Ellis promptly responded with her schedule. *Grievant Exhibit 1.* A Step 2 hearing was later convened and a decision issued on December 17, 2018. Ellis appealed this decision (which denied her

⁴ DHSS Labor Relations Manager Wesley had also retired from State service prior to the September 19, 2019 MERB hearing.

grievance) to the Secretary of the Department of Human Resources pursuant to Merit Rule 18.8.

Grievant Exhibit 1.

A Step 3 hearing was convened by the DHR Secretary's designee on March 27, 2019, and the Step 3 decision denying the grievance was issued on May 8, 2019. Ellis appealed to this Board on May 24, 2019, pursuant to Merit Rule 18.9.

CONCLUSIONS OF LAW

Merit Rule 2.1 provides:

Prohibits discrimination in any human resource action covered by these rules or Merit System law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors.

Merit Rule 4.6 provides:

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 4.4.2.⁵

The Board concludes as a matter of law that Ellis has failed to state a claim for relief under the Merit Rules. When she declined to accept the position at the salary offered, she relinquished any claim to relief for violations of Merit Rules 4.6 or 4.4.2. The opportunity to contest an advanced starting salary (or lack of such) accrues to employees who hold positions in which they

⁵ Merit Rule 4.4.2 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 DHR Secretary may approve a starting rate higher than the 85th percentile if supported by documentation of the applicant's qualifications."

have an actual interest in the salary being paid. Ms. Ellis did not accept the position and continued to work in DOT in her prior position.

The Board further concludes that Ellis has failed to establish any basis upon which a claim of discrimination and violation of Merit Rule 2.1 may be found. “In order to establish a prima facie case of discrimination a grievant must show: (1) they were a member of a protected class, i.e. age, race, gender, sexual orientation, non-merit factor; (2) they were qualified for promotion; (3) they suffered an adverse employment decision; and (4) their employer’s refusal to promote them occurred under circumstances that give rise to an inference of discrimination.” *McClement v. Port Authority Trans-Hudson*, 505 Fed.Appx. 158, 2012 WL 5863424, at p.3 (3rd Circ., Nov. 30, 2012). Ellis is a female person of color. She based her discrimination claim solely on her observation that the individual who was hired after she declined the position was a white male, who she considers to be less qualified than she is. There is no evidence in the record on which it can be concluded that Ellis suffered an adverse employment action and/or that DHSS/DMMA failed to promote her under “circumstances that give rise to an inference of discrimination.”

Ellis argued that she believed she and Bryan-Dorsey were engaged in a salary negotiation. This belief, however, is inconsistent with the requirements of the Merit Rules. There is no question that advancing from a Pay Grade 9 position to a Pay Grade 10 position constitutes a promotion. Merit Rule 4.6 explicitly provides that, upon promotion, a merit employee “shall receive either the minimum salary of the higher paygrade or an increase of 5%, whichever is greater” (*emphasis added*). The rule goes on to state that “... agencies may grant a greater increase not to exceed the 85th percentile.” The 5% increase above her existing salary placed Ellis at the 88th percentile.

Because the 5% above her existing salary constituted 88% of midpoint, it was greater than 85%, which DHSS/DMMA had the discretion to grant without external approval. Any increases

to her starting salary beyond 85% required the approval of the Secretary of the Department of Human Resources. Simply stated, neither DHSS nor Bryan-Dorsey had authority under the merit rules to increase Ellis' salary beyond 5% above her current salary. Only the DHR Secretary had that discretion and only upon request from DHSS.

The Board finds Ellis rejected the DHSS/DMMA Office Manager position offer. While her background, experience and education may be exemplary, the Board finds DHSS/DMMA did not violate Merit Rules when it offered her 5% above her current salary, consistent with the requirements of MR 4.6.

ORDER

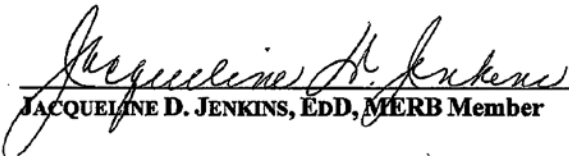
It is this **26th** day of **November, 2019**, by a unanimous vote of 5-0, the Decision and Order of the Board to deny Ellis' appeal. The Board finds Grievant failed to state a claim that DHSS/DMMA violated the Merit Rules.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER