

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

TAYA HUDSON, JESSICA MARTIN, ANDREZA)	
PETICACIS, EBONY JONES, ROBIN SUDLER,)	<u>DOCKET NUMBERS</u>
AND ROBERT KURLAND,)	20-05-759
)	20-05-760
Employees/Grievants,)	20-05-761
)	20-05-762
v.)	20-05-763
)	20-05-764
FAMILY COURT OF THE STATE OF DELAWARE,)	
)	DECISION AND ORDER
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 November 5, 2020 at the Delaware Public Service Commission, 861 Silver Lake Boulevard, Dover, Delaware 19904.

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

APPEARANCES

Carla A.K. Jarosz
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Heather Heilman, Esq.
Kahn, Smith & Collins, P.A.
on behalf of Employees/Grievants

Victoria Sweeney
Deputy Attorney General
on behalf of Family Court
of the State of Delaware

PRELIMINARY PROCEDURAL MATTER

The Board heard legal argument on the motion filed by the Family Court of the State of Delaware (“Court”) to dismiss the six grievances for lack of standing and failure to state a claim under the Merit Rules for which relief could be granted as a matter of law.

The Board also considered the written response filed on behalf of Taya Hudson, Jessica Martin, Andreza Peticacis, Ebony Jones, Robin Sudler, and Robert Kurland (“Grievants”) in opposition to the Court’s Motion.

BRIEF SUMMARY OF THE EVIDENCE

The Grievants offered twenty-two (22) exhibits of which the Board admitted nineteen (19) into evidence. The Court offered fourteen (14) exhibits, of which the Board admitted eleven (11) into evidence. The admitted exhibits included eight (8) identical exhibits offered by both parties.

No witnesses testified at the hearing.

FINDINGS OF FACT

Each of the six grievances is based on the same relevant set of circumstances and raise identical claims and questions of law. The Board scheduled the hearing of all six grievances for the same day for purposes of administrative efficiency.

Each of the Grievants is employed by the Court as a Mediation/Arbitration Officer (“Mediator”). Beginning in 2017 and continuing through 2019, the Court hired Mediators with higher starting salaries than the wage rates at which the Grievants were being paid. The Court did not assert that any of the recent hires had qualifications which were “clearly over and above the job requirements stated in the class specification”, nor that there was a “critical shortage of applicants” at the time of their hire.

None of the new Mediators were paid more than 85% of the midpoint for the Pay Grade

11 position at the time of their hire.

CONCLUSIONS OF LAW

Merit Rule 2.1 provides:

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, gender identity, genetic information or other non-merit factors is prohibited.

Merit Rule 4.4.1 provides:

Upon initial appointment, employees shall be paid a salary equal to the minimum for their assigned paygrade, except as hereinafter provided.

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 grievances allege the Court violated Merit Rules 2.1, 4.4.1, 4.4.2 4.4.3¹ and the State Compensation Guidelines. The Grievants assert the Court failed to conduct an internal equity analysis and failed to level the Grievants’ salaries up to the salaries it paid to recent hires.

The Board concludes as a matter of law that the Grievants do not have standing to assert a claim under Merit Rules 4.4.1 and/or 4.4.2 because they have not suffered any change to their employment status in their current positions.²

The merit rules do not provide a mechanism by which an agency can advance a current employee within a pay range or grant wage increases other than when the employee is promoted. Even then, the rules constrain an agency’s discretion to grant wage increases.

Under Merit Rule 4.4.2, agencies have the discretion to “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.” If an agency wishes to hire at a wage rate greater than 85% of midpoint, the agency must secure the approval of the Secretary of Human Resources based upon documentation which establishes the applicants’ superior qualifications for the position.

The Grievants argue that leveling up is implicitly included in Merit Rule 4.4.2, although it does not explicitly require that current employees in a given classification be leveled up when a new hire is granted an advanced starting salary. The Grievants point to the Compensation Guidelines issued by the Department of Human Resources (“DHR”) (as last revised in May

¹ During the hearing, the Grievants withdrew their claims under Merit Rule 4.4.3.

² *Charles Rotenberry v. Delaware Dept. of Labor*, MERB 19-03-720 (8/30/19).

2011)³, which they assert require agencies to consider internal equities in wage rates. The Compensation Guidelines, however, provide guidance to agencies for “preparing compensation requests” for consideration by DHR. Compensation requests are only made to DHR when an agency seeks approval to grant an advanced starting salary “higher than the 85th percentile”.

This case involves new Mediators whose starting salaries were within 85% of midpoint. Consequently, the Court did not need to make a compensation request of DHR and the Compensation Guidelines were not applicable.

The Board finds there has been no adverse human resource action taken which impacts any of the Grievants, who remain in the same positions with the same wage rates as they held prior to the Court hiring additional Mediators. The Grievants’ assertion that they have been discriminated against based on non-merit factors in violation of Merit Rule 2.1 is without basis in either fact or law.

Standing to file a grievance under Merit Rules is limited to an employee’s claim that the rules or the statute have been violated. Per Merit Rule 18.2, a grievance may not deal with the “substantive policies embodied in the Merit System law.” The claims raised in these grievances raise concerns about equity and fairness and constitute issues of substantive policy, which are not subject to grievance under either Merit Rule 18.2 or 29 Del. C. §5943. Consequently, the grievances fail to state a claim for which relief can be granted by this Board.

ORDER

It is this **30th** day of **November, 2020**, the unanimous Decision and Order of the Board to grant the Court’s Motion to Dismiss the Grievants’ appeals. The Board finds the Grievants do not

³ Introduced into evidence as Court Exhibit J.

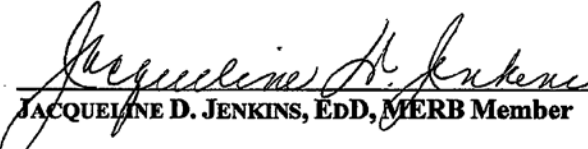
have standing and have failed to state a claim upon which the Board can grant relief.



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