

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

PAMELA DAISEY,)	
)	
Employee/Grievant,)	
)	
v.)	Docket No. 23-03-870
)	
DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH, AND THEIR FAMILIES, DIVISION OF PREVENTION AND BEHAVIORAL HEALTH SERVICES,)	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 August 2, 2023, at the Delaware Division of Professional Regulation, Silver Lake Plaza, Cannon Bldg., Hearing Room A, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Jennifer Cohan, Chair; Joseph A. Pika, III, Ph.D., Dinah Davis-Russ, and Lester E. Johnson, Jr., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Victoria R. Sweeney
Deputy Attorney General
Legal Counsel to the Board

Pamela Daisey
Employee/Grievant, *pro se*

Donna S. Thompson, Esq.
Deputy Attorney General
on behalf of the Department of
Services for Children, Youth, and
Their Families

PRELIMINARY PROCEDURAL MATTER

Pamela Daisey (“Grievant”) filed a grievance against the Department of Services for Children, Youth and Their Families, Division of Prevention and Behavioral Health Services (“Agency”), alleging that the Agency discriminated against her and miscalculated her compression salary adjustment, in violation of Merit Rule (“MR”) 4.6 and 2.1. The Grievant also alleged that the Agency violated MR 18.8 by not properly processing her grievance.

Prior to the hearing, the Agency filed a Motion to Dismiss, arguing that the Grievant’s claims failed as a matter of law because (1) the Board did not have jurisdiction over the Grievant’s resulting salary determination; (2) the Grievant’s MR 4.6 claim was inapplicable because the Grievant was not promoted; and (3) the Grievant’s MR 18.8 claim was moot since the grievance was appealed to the Board.

As a preliminary matter, the Board heard oral argument on the Agency’s Motion to Dismiss. After reviewing the parties’ written submissions and hearing the parties’ arguments, the Board held the motion in abeyance and proceeded to consider the documentary and testimonial evidence as to whether the Agency violated MR 2.1, 4.6 and 18.8.

BRIEF SUMMARY OF THE EVIDENCE

The Grievant offered thirteen (13) documents as evidence. After the prehearing conference, the Board admitted Grievant Exhibit 1 (pages 2, 15 and 16), Exhibit 5, Exhibit 6, Exhibit 9 (page 67–68), and Exhibit 13 (page 93–94).

The Agency offered five (5) documents as evidence, all of which were admitted into evidence as Exhibits A–E.

Two witnesses testified at the hearing: the Grievant and Jennifer Manners, Human Resources Administrator.

FINDINGS OF FACT

At all times relevant to this grievance, Ms. Daisey was employed by the Agency as a Family Services Program Support Supervisor (Pay Grade 18).¹ She served in that supervisory role for four (4) years, and in July 2022, her salary was \$62,559.73.²

On September 26, 2022, the Agency submitted a request to the Delaware Department of Human Resources (“DHR”) for compression salary adjustment for the Family Services Program Support Supervisor as a result of recent collective bargaining agreements and negotiated wage increases for their subordinates that were implemented in July 2022.³ The Agency requested that DHR establish a blanket starting salary for the Family Services Program Support Supervisor classification, at 90.88% of the midpoint. On November 1, 2022, DHR approved the Agency’s compression salary adjustment request. DHR determined the compression salary adjustment for each Supervisor by adding 5% to the salary of the highest paid direct report to that Supervisor, as of July 1, 2022. DHR notified the Grievant that, effective July 3, 2022, her new salary was \$66,336.90.⁴

The Grievant was one of five Supervisors who received a compression salary adjustment in November 2022, retroactive to July 3, 2022.⁵ The highest paid supervisor was a male and his salary was adjusted from \$63,603.49 to \$69,496.35. Both the Grievant and the male supervisor had four years’ experience as Family Services Program Support Supervisors for the Agency. Prior to employment with the Agency, however, the male supervisor had an additional twenty years’

¹ At the time of the hearing before the Board, the Grievant was employed by a different state agency.

² Agency Exhibit B.

³ Agency Exhibit A.

⁴ Agency Exhibit D.

⁵ Agency Exhibit B.

prior experience in a similar position and had requested an advanced starting salary upon hire.⁶ On July 1, 2022, the Grievant's male counterpart was paid \$1,043.76 more than the Grievant. After the compression salary analysis, the difference was \$3,159.45.

The compression salary adjustment analysis is conducted annually.⁷ Neither the Agency nor the Agency's Human Resources Administrator reviewed compression salaries following DHR's approval for anomalies because it would be a time consuming process.⁸

The Grievant's two grievances concerning her compression salary were combined at Step 3 of the grievance process. The Grievant appealed to Step 3 in December 2022, and DHR issued its Step 3 consolidated decision in March 2023.⁹

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 4.6

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.

Merit Rule 18.8

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

⁶ Transcript ("TR") at p. 28.

⁷ On cross examination the Agency's HR Administrator testified, "They look at it with any type of Union negotiations. It is usually timed around there with their negotiated salary. They do poll everybody as of 7/1 their direct reports to and look at compression. But it is done annually." *Transcript ("TR") at p. 18.*

⁸ TR at. p. 31.

⁹ Grievant Exhibit 9.

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 within 45 calendar days of the appeal's receipt. The Step 3 decision is final and binding upon agency management.

The Board finds that the Agency did not violate the Merit Rules as alleged by the Grievant. The Grievant's claim that the Agency violated MR 4.6 is denied because the Agency did not promote the Grievant as contemplated by MR 4.6. Instead, the Agency submitted a salary compression adjustment request to DHR. Pay ranges for State merit employees are established annually in the State Budget Act in Section 8 of the Budget Epilogue.¹⁰ Section 16 of the Epilogue ("the Epilogue") addresses pay compression adjustments:

Notwithstanding Merit Rules 4.4.2 and 4.4.3, approval of a rate higher than 80 percent of the midpoint which results in a need for leveling-up to address pay compression or pay equity, as defined by a criteria established by the Secretary of the Department of Human Resources, shall only occur with the concurrence of the Secretary of the Department of Human Resources, the Director of the Office of Management and Budget and the Controller General, provided that sufficient funds exist within the agency's base budget to fund such actions. Notwithstanding any provisions of this Act or the Delaware Code to the contrary, no provision of Chapter 4.0 of the Merit Rules shall be considered compensation for the purposes of collective bargaining. The Secretary of the Department of Human Resources, the Director of the Office of Management and Budget and the Controller General, with the concurrence of the Co-Chairs of the Joint Finance Committee, shall promulgate policies and procedures to implement this section.¹¹

The FY 2023 Epilogue requires DHR to determine compression salary adjustments based on criteria established by the DHR Secretary.¹² After the Agency submitted the compression

¹⁰ MR 4.1. Uniform pay schedules based on current legislation will be issued by the DHR Secretary. Each position shall be assigned to a paygrade for pay purposes. The pay of employees occupying positions in the Classified Service shall follow the published rates set for the assigned paygrades.

¹¹ Fiscal Year 2023 Appropriations Act, Senate Bill 250 at 107:6-15 (June 7, 2022) <https://legis.delaware.gov/BillDetail?LegislationId=119629>

¹² There was no DHR Policy or other document which established the criteria used by DHR provided during this proceeding. The Board relied upon the testimony of Agency's HR Administrator concerning the process used by DHR.

salary adjustment request to DHR on behalf of the Grievant (and others in her classification), the Agency was not involved in determining the appropriate salary for Ms. Daisey. That decision was made by DHR.

The Board further finds that the Grievant's claim that the Agency violated MR 2.1 is unsupported by the evidence in this case. In this case, the Agency did not violate MR 2.1 or discriminate against the Grievant based on her sex. Direct reports are assigned to supervisors based on operational need.¹³ DHR determined the Grievant's compression salary adjustment simply by identifying the salary of her highest paid direct report (as recorded in the State's PHRST system) and then adding 5% above that salary.¹⁴

The Grievant bears the burden of establishing a *prima facie* case of sex-based discrimination. To do so, she must establish that: (1) she was a member of a protected class; (2) that she suffered an adverse employment action; and (3) that there is a causal connection between the protected class and the adverse employment action.¹⁵ If the Grievant establishes a *prima facie* case, the burden shifts to the Agency to present a legitimate, non-discriminatory reason for the adverse employment action. *Id.* If the Agency meets this burden, the burden again shifts to the Grievant to prove the Agency's legitimate, non-discriminatory reason was merely pretext for discrimination. *Id.*

Here, the Grievant claims she has been disparately treated because she received a lower salary adjustment than her male counterpart. As a woman, the Grievant is a member of a protected class. The Board finds, however, that the record is devoid of any evidence or testimony that the Grievant suffered an adverse employment action based on her sex. Consequently, she has not

¹³ TR at p. 29.

¹⁴ TR at p. 24.

¹⁵ *Ennis v. Del. Transit. Corp.*, 2015 WL 1542151, at *5 (Del. Super. Mar. 9, 2015) (discussing the *McDonnell Douglas* framework to establish a claim of disparate treatment).

established a *prima facie* case of sex-based discrimination.

Finally, the Grievant claims her Step 3 grievance hearing and decision were untimely, in violation of MR 18.8. Merit Rule 18.9 requires a grievant to file an appeal to the Board “within 20 calendar days of receipt of the Step 3 decision.” The Board has determined, and both the Delaware Superior and Supreme Courts have affirmed, that it does not have jurisdiction to process an appeal from a Step 3 decision unless such appeal is timely filed, and has specifically rejected appeals which were filed prior to the issuance of the Step 3 decision by DHR.¹⁶

If [DHR] does not [issue a decision within forty-five days of the receipt of a Step 3 appeal], the Board does not believe that [DHR] is divested of jurisdiction so as to allow the grievant to appeal to the Board.¹⁷

...As a general rule, where a statute which imposes upon a public officer the duty of performing some act relating to the interests of the public and which fixes a time for the doing of such act, the requirement of time will be construed as directory rather than mandatory, and not as a limitation on the exercise of the power,”¹⁸ [S]uch an act will be construed as merely a guide for the officers in the conduct of the public business so as to insure the orderly and prompt performance of public duties.”...

The Agency cannot control the scheduling of Step 3 hearings by DHR or its issuance of the resulting decision. Moreover, any timeliness issue related to the Step 3 hearing or decision is cured when the Grievant appealed the Step 3 decision to the Board and was afforded full opportunity to present her case before the Board for a full and fair hearing.¹⁹

The Board “is not provided the authority to remediate salary inequities unless there is a violation of the merit rules.”²⁰ Standing to file a grievance under the Merit Rules is limited to an

¹⁶ *Banner v. DHSS*, MERB No. 12-07-551 (2013); aff'd N13A-04-013 (Del.Super. 2014); aff'd 123 A.3d 472 (Del. 2015).

¹⁷ *Pinkett v. DHSS*, MERB No. 08-02-415 (MERB, 2009).

¹⁸ *Pitts v. White*, 111 A.2d 217, 218-19 (Del. 1955).

¹⁹ *L. Britt Davis v. DSHS, Capitol Police and MERB*, C.A. S20A-12-005-FJJ (Superior Court, 4/28/21) at p. 5.

²⁰ *Charles Rotenberry v. Del. Dept. of Labor*, MERB No. 19-03-720 (MERB Aug. 30, 2019), p. 5.

employee's claim that the rules or the statutes have been violated. Merit Rule 18.2 states a grievance may not deal with the "substantive policies embodied in the Merit System law." The Board finds that the claims raised in these grievances raise concerns which constitute issues of substantive policy, which are not subject to grievance under either Merit Rule 18.2 or 29 Del. C. §5943. Consequently, the grievance fails to state a claim for which relief can be granted by this Board.

ORDER

It is this 6th day of **November 2023**, by a unanimous vote of 4-0, the Decision and Order of the Board to grant the Motion to Dismiss and deny the grievance.



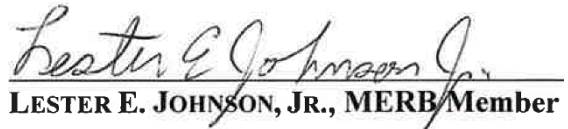
JENNIFER COHAN, MERB Chairperson



JOSEPH A. PIKA, III, PH.D., MEMBER



DINAH DAVIS-RUSS, MEMBER



LESTER E. JOHNSON, JR., MERB Member