BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

IN THE MATTER OF NANCY HUDSON, Grievant, and STATE OF DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES	DOCKET NO. 95-03-05 OPINION AND ORDER

BEFORE Woo, Chairperson; Burns, Bowers and Green[1], constituting a lawful quorum of the Board pursuant to 29 Del. C., § 5908(a).

And now, this 30th day of August, 1995, the above-referenced matter being before the Board on April 27, 1995, the Board made the following Findings of Fact and Conclusions of Law; to wit:

SUMMARY OF EVIDENCE

1. Nancy Hudson, Grievant, was sworn and testified as follows: Nancy Hudson is a Habilitation/Rehabilitation Specialist II at the Stockley Center, Department of Health & Social Services, Sussex County, Delaware. In early 1993, Ms. Hudson was assigned to fill in as the Acting Supervisor in Workshop W-4 by Laura McCann and Robert Drehmer.

2. Ms. Hudson testified that in November, 1993, the position of Sheltered Workshop Production Foreman was posted as Recruitment Position 94-144, by the Department of Health & Social Services (Grievant Exhibit No. 1).

3. Ms. Hudson further testified that she and Doris D'Orazio were both interviewed for the position by Robert Drehmer and Dan Haynes.

4. Ms. Hudson testified that Doris D'Orazio was selected for the position, and Ms. Hudson timely filed a Grievance, pursuant to Merit Rules 13.0000 and 13.0100, on the process by which Ms. D'Orazio was selected.

[1] Mr. Dallas Green recused himself from any deliberations or decisions in this matter prior to the start of the hearing. Transcript p3-4.

5. Ms. Hudson testified that Mr. Drehmer and Ms. McCann told her in Ms. McCann's office that "if I would straighten out W-4, they would certainly look into me having that position when it became available."

6. Ms. Hudson also testified that during the year that she served as Acting Supervisor, there was only one occasion when Mr. Drehmer discussed with her any problems with her job performance. Grievant Exhibit No. 2 was the 1993 employee Performance Planning and Appraisal (EPPA) of Ms. Hudson, reflecting a rating of 5.43. Grievant Exhibit No. 3 was the 1992 EPPA of Ms. Hudson, reflecting a rating of 5.98.

7. Ms. Hudson testified that she had been a Supervisor in the workshops for nine years and that Ms. D'Orazio had not supervised in any of the workshops. Ms. Hudson testified that she was not selected because Mr. Drehmer needed a more aggressive type style management to supervise W-4, and that the aggressive style management was not stated in the job announcement or at the interview.

8. Upon cross-examination, Ms. Hudson testified that she had supervised severely and profoundly retarded clients at the Stockley Center over eight to nine years, as well as related staff. Ms. Hudson further stated that she had an Employee Performance and Planning Appraisal (EPPA) completed on January 26, 1994, which was above average. The 1992 and 1993 EPPAs were introduced into evidence as Exhibits Grievant's No. 2 and No. 3.

9. Ms Hudson testified on cross-examination that she thought the interview was a formality that the division had to conduct, and that she may be naive, but she thought she had been promised the position.

10. Martha Austin was sworn and testified that Ms. Hudson was not paid additional compensation during the time that she supervised W-4, because she was not occupying the higher level position, but just doing some of the functions of the foreman position. Upon cross-examination, Ms. Austin testified that Ms. Hudson was not underfilling the position, nor was she temporarily occupying the higher level position.

11. Robert Drehmer was sworn and testified that the same questions were asked of all applicants, and that the questions were standard in format. The answers were not numerically rated, but were written down and reviewed. Mr. Drehmer testified that neither the questions nor the answers were available at the hearing. Mr. Drehmer on cross-examination testified that

he did tell Ms. Hudson that the department would give strong consideration if any portion becomes available. Mr. Drehmer further testified that he supervised both Ms. Hudson and Ms. D'Orazio, and that he did not place Ms. D'Orazio in the supervisory aspect of the position due to the fact that her job description did not reflect consideration. Mr. Drehmer also testified on cross-examination that Ms. Hudson had been doing the job, but that he selected Ms. D'Orazio over her.

12. Mr. Drehmer further testified that it was a very difficult decision for him to make, and that although Ms. Hudson brought the morale up to a certain level, that he was encouraged by the superintendent to bring it up to a new level, so he chose Ms. D'Orazio. Mr. Drehmer concluded that Ms. Hudson had done a good job, but he felt that he needed a great job, so it was comparing two good candidates, and it was a hard decision.

13. Mr. Drehmer on redirect explained that the previous occupant of the position had passed away in 1990, and the position was then eliminated. A similar position became vacant in 1993 when Ms. Hudson was temporarily assigned to W-4. The paperwork became final for the position in late 1993, and the position was posted and then filled.

THE LAW

29 Del. C. § 5931. Grievances.

> "The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final 2 steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The Director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within 90 calendar days of submission tot he Board. Upon approval of all parties, the 90 days may be extended an additional 30 calendar day. (29 Del. C. 1953, § 5931; 55 Del. Laws, c. 443, § 6, 69 Del. Laws, c. 436, § 7.)"

Effect of amendments. -- 69 Del. Laws, c. 436, effective July 14, 1994, rewrote this section.

Merit Rule 13.0100 Promotion

Vacancies shall be filled by promotion wherever practical and in the best interest of the classified service.

Whenever a position is to be filled by promotion, the candidate shall meet the minimum requirements of the class specification. Consideration shall be given to qualifications, performance, record, seniority, conduct and, where applicable, the results of competitive examination.

No grievance may be maintained concerning a promotion except where:

(1) the person who has been promoted does not meet the minimum qualifications;

(2) there has been a violation of Merit Rule 19.0100 or any of the procedural requirements in the Merit Rules; or

(3) there has been a gross abuse of discretion in the promotion.

FINDINGS OF FACT

1. Position #94-144, Workshop Production Foreman, was properly posted in accord with State law and Merit Rules 13.0100, subpart (2), procedural requirements.

2. A certification list was produced and all three candidates who were interviewed, including Nancy Hudson and Doris D'Orazio were minimally qualified for the position, in accord with Merit Rule 13.0100, subpart (l).

3. No violation of Merit Rule 19.0100 was found to have occurred in the promotional process.

4. The hiring authority improperly gave greater weight to Ms. D'Orazio for supervisory work done at a restaurant in the private sector 15 years prior than to Ms. Hudson for her supervisory experience in Stockley for the past year in performing the majority of the job functions for the position in question, and her experience as an Assistant Supervisor for the previous eight years, based on the uncontroversial testimony of Ms. Hudson.

5. The hiring authority made a gross abuse of discretion, in violation of Merit rule 13.0100 subpart (3), when it awarded the position of Workshop Production Foreman to Doris D'Orazio over Nancy Hudson in a close decision when the predominate factor was supervision,

and the "adequate supervisory experience" in a private sector restaurant of Ms. D'Orazio, that was cited, was not similar to the nine years supervisory experience of Ms. Hudson in the sheltered workshop with the clients of the Stockley Center, based on the testimony of Ms. Hudson and Mr. Drehmer.

CONCLUSIONS OF LAW

The Grievance is maintained due to a finding of gross abuse of discretion by the hiring authority, the Department of Health & Social Services, that was not a legitimate exercise of discretion in hiring for the position of Sheltered Workshop Production Foreman.

REMEDY

Ms. Hudson is to be placed in the position of Sheltered Workshop Production Foreman (Pay Grade 11) by September 30, 1995, as per her requested remedy in her appeal to the Merit Employee Relations Board.

Katy Woo

Katy K. Woo, Chairperson

Robert Burns, Vice-Chairperson

Walter Bowers

Issue Date: 8-30-95

APPEAL RIGHTS

29 Del. C. §5949 provides that the Department of Health and Social Services shall have a right of appeal to the Superior Court on the question of whether the appointing authority acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the appointing authority. All appeals to the Superior Court within 30 days of the employee being notified of the final action of the Board.

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