BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

COPY

IN THE MATTER OF KHALID A. ASAD (Formerly known as STEVEN A. RODNEY), Grievant, v. DEPARTMENT OF HEALTH & SOCIAL SERVICES, STATE OF DELAWARE Agency.	**DOCKET NO. 95-09-59** **FINDINGS, OPINION, AND** **ORDER OF THE BOARD**

BEFORE Katy K. Woo, Chairperson, Robert Burns, Vice Chairperson, Walter Bowers, Gary Fullman and Dallas Green, Members of the Merit Employee Relations Board, constituting a lawful quorum of the Board pursuant to 29 Del. C., Section 5908(a).

AND NOW, on this date, the 5th of September, 1996, the above-referenced matter being before the Board for an evidentiary hearing on June 20, 1996, for the reasons set forth hereinafter, the Board makes the following findings and conclusions and enters the following Order:

APPEARANCES:

For the Grievant: Kester I. H. Crosse, Esquire
Potter, Crosse and Leonard, P.A.
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For the Department: Elizabeth D. Maron
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NATURE AND STATE OF PROCEEDINGS

This is an appeal filed with the Board under the grievance process pursuant to 29 Del. C. Ch. 59 and the Merit Rules after a decision adverse to the Grievant at the fourth-step grievance hearing held on August 8, 1995. (Merit Rule No. 20.034).

The Grievant is presently employed by the State of Delaware as a Training Administrator for the Division of Mental Retardation, having recently been promoted from the position of Developmental Disabilities Program Case Manager, a position which he formerly held and to which he was demoted as a result of the events giving rise to this grievance.

After a pre-decision meeting conducted on February 6, 1995, the Grievant was, effective March 16, 1995, demoted from the position of Social Services Administrator with the Division of Child Support Enforcement, a position into which he was hired on May 1, 1994. The basis of the disciplinary demotion was the alleged falsification of State of Delaware employment applications by certifying to a master's degree from Wilmington College when no such degree had been awarded.

SUMMARY OF EVIDENCE PRESENTED

The Department, as the moving party in this matter pursuant to Merit Rule No. 21,0230, marked and introduced without objection, twelve multi-page exhibits consisting of seven (7) State of Delaware employment applications; a letter report from Wilmington College concerning the educational status of Steven A. Rodney; correspondence from the Department relating to the imposition of the demotion including the report of the fourth-step decision; and the original employment application filed with the State by the Grievant in 1993.

Ms. Anne M. Spano, a Personnel Administrator II and Human Resources Administrator for the Division of Health and Social Services was sworn and testified that it is a part of her responsibilities to investigate certain personnel matters. It came to her attention that a request for additional compensation had been made by the occupant of a clinic manager position. In seeking to justify the request for additional compensation, the Division of Public Health was required to show that no other applicants were qualified for the position. One of the applicants for this position with the Division of Public Health was Steven A. Rodney, and the reason given by the Division for his non-consideration was that he has stated on his application that he had a master's degree in Human Resource Management from Wilmington College when, in fact, he had no such degree.

Ann Spano testified that she investigated and acquired a copy of the "falsified application" (State's Exhibit No. 1) and five (5) other applications (State's Exhibits Nos. 2-6) submitted by Steven Rodney. In the process of her investigation, she also acquired verification from Wilmington College that Steven A. Rodney had additional course work, including a thesis, to complete his master's degree program. (State's Exhibit No. 7).

Of the six (6) applications reviewed by Ms. Spano, which had been submitted by the Grievant between November, 1993 and January, 1994, five (5) of them were certified to and submitted for various positions in November of 1993.

Those applications show attendance at Wilmington College from 10/92 to 1/94 (which is a date subsequent to the date of certification and submission by the Grievant) and report the diploma or degree received as "Masters" with a major subject of "Human Resource Management."

However, the application for the position of Clinic Manager at the Division of Public Health (State's Exhibit No. 1) was signed and certified as true and complete by Steven A. Rodney on January 10, 1994. Ms. Spano testified that Mr. Rodney had explained to her during her investigation that on January 7, 1994, he had learned from Wilmington College that he could not be registered for the one course he needed in January because of an outstanding financial obligation to the college.

Ms. Spano took the position that the certification of a master's degree by the Grievant on January 10, 1994, after he admittedly knew that a required course for the degree would not be available to him in 1994, constituted the falsification of the application. She testified that the master's degree was not a requirement for the Clinic Manager position (State's Exhibit No. 1) or for the position of Social Services Administrator with the Division of Child Support Enforcement into which he was hired on May 1, 1994, and although he did receive extra points for an advanced degree, the scoring did not make a difference in the selection to fill the position. Ms. Spano reviewed the employment applications she investigated and pointed out that each had been tailored for the position being sought and that the applications differed in the position applied for section; in the minimum qualifications section; and in spellings on the language proficiency section; and so appeared not to be simple photocopies of previously submitted applications.

Ms. Spano further testified that when she had concluded her investigation, she reviewed a decision by MERB in which a grievant's termination of employment for falsification of

educational requirements was upheld by the Board and, to be consistent, recommended that Steven A. Rodney be terminated from his present State employment for having falsified his educational qualifications. She stated that the Division of Child Support enforcement felt that termination of employment was too severe a discipline for what had transpired and that Mr. Rodney had a good record and had been a good State employee, and therefore it was determined to pursue an involuntary demotion rather than termination of employment.

Ms. Spano recounted that she held an investigative meeting with Steven Rodney on July 20, 1994 and, at the time, he stated that he did not have the master's degree referred to on the applications and admitted to carelessness in the way in which the applications were completed. Ms. Spano related that the Grievant was concerned about the perception that he had falsified his status and offered to resign the position if his master's degree was a material factor in his getting the job over another applicant. he also offered to take a lie detector test concerning his lack of intent to falsify his educational status.

Ms. Spano did acknowledge that students do put "anticipated" dates of graduation on applications submitted prior to graduation, but she noted that on Exhibit No. 1, which provided for attendance dates at Wilmington College from "10/9 to 1/94," the certification was signed on January 10, 1994 which was at least three days after the Grievant admittedly knew he would not be registered for the final course he needed to complete the master's program. She also observed that such a practice can be very misleading to hiring supervisors who may review the application months after its submission and who often tend to relay on the certification rather than verifying the data contained on the application. She also acknowledged that as to the applications filed prior to January, 1994, it is possible to assume that the Grievant had reason to expect that he would in fact have the master's degree listed after 1/94.

Khalid A. Asad, formerly known as Steven A. Rodney, was sworn and testified that he is 30 years old, married with five children. He became a State employee in May of 1993 as a Developmental Disabilities Program Case Manager and, at the end of 1993 and beginning of 1994, he submitted a series of State of Delaware employment applications for various state jobs. It was his practice to keep the first two pages with the personal data, static and photocopy them. He testified that State's Exhibit No. 1, the application he submitted on January 10, 1994, was a copy of the prior applications marked as State's Exhibits No. 4 and No. 5, both of which he certified and submitted in November of 1993 with the exception that he would have his master's degree in January of 1994. It was on the 6th or 7th of January, 1994 that he found out

he would not be able to enroll in the last course he needed because of an outstanding bill he owed to the school. He stated that he was still enrolled as a student even though he was unable to take the class and that he had, in fact, completed writing his thesis. He admitted signing and submitting the application for Clinic Manager for the Division of Public Health after he became aware that he would not be receiving his master's degree in January of 1995. His score on the test for that classification was 95, and his score on the test for the Social Service Administrator position at pay grade 16, which he accepted on April 4, 1994, was 94.

The Grievant introduced eight (8) Exhibits marked and summarized as follows:

Exhibit 1. Scores on Examinations for positions of Social Service Administrator and Clinic Manager and job office and acceptance for the position of Social Services Administrator.

Exhibit 2. Authorization for release of information and request from Anne M. Spano with response from College Registrar. (See also State's Exhibit No. 7, as corrected.)

Exhibit 3. Joseph Davidson's notes from July 20, 1995 meeting with Anne Spano and Steven Rodney; August 9, 1995 e-mail from Davidson to Spano regarding July 20th meeting.

Exhibit 4. Memorandum to Anne Spano from Steven Rodney transmitting attached notes of recollections of what took place at July 20th meeting and in a July 21 telephone conversation between Rodney and Spano.

Exhibit 5. Not offered by Grievant.

Exhibits 6, 7, 8. Letter report of Lorraine Mekulski to Barbara A. Paulin concerning pre-decision meeting; letter from Paulin to Rodney imposing demotion; letter upholding first step grievance from Joseph Davidson to Rodney; second step grievance report from Paulin upholding demotion; see also State's Exhibits 8, 9, 10.

Exhibit 9. Not offered by Grievant.

Exhibit 10. Letter dated August 10, 1995 from Acting Registrar, Wilmington College stating that Steven Rodney is still active in the master's program with only one course to complete.

Grievant testified that it was not his intent to mislead anyone but rather to show that in January, 1994, he would have his master's degree, and he acknowledged that he failed to change the fact page of the application he filed on January 10,m 1994 and thereafter failed to update the application. He stated that he had at least three different interviews for the various

positions for which he had applied and that at all of the interviews no one asked him about his education. He related that he occupied the position from which he was demoted for not quite a year and was evaluated as a 5 or 6 out of a possible 7 rating.

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 two (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 ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days. (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 No. 15.1

Both the State and the Grievant concur that the grievance is governed by the terms of Merit Rule No. 15.1 which provides:

Employees shall be held accountable for their conduct. Measures up to and including dismissal shall be taken only for just cause. "Just cause" means that management has sufficient reasons for imposing accountability. Just cause requires:

- showing that the employee has committed the charged offense;
- offering specified due process rights specified in this chapter; and
- imposing a penalty appropriate to the circumstance.

FINDING OF FACT

1. During November, 1993, Steven A. Rodney completed, submitted, and certified as true and complete, a series of State of Delaware employment applications on which he indicated that in January, 1994, he would be receiving a master's degree from Wilmington College with a major subject of Human Resource Management.

2. On January 10, 1994, Steven A. Rodney signed and certified as true and complete, a State of Delaware employment application for the position of Clinic Manager, Division of Public Health.

3. The January 10, 1994 certification was made by Mr. Rodney at a time when he was on Notice that he would not be enrolled in the final course he needed to complete his master's program.

4. The error in the January 10, 1994 certification was shown to be careless and made without the design to mislead or deceive. It was unintentional, inadvertent and adequately explained by the Grievant. Furthermore, the error was not material in that the master's degree was not required for the applied-for position of Clinic Manager or the successfully obtained position of Social Services Administrator and did not materially affect the Grievant's ranking or his selection for State employment.

5. Under the circumstances, the penalty of demotion imposed was not appropriate to the circumstances.

6. The demotion "cost" the Grievant approximately $12,000 on an annual basis by the reduction in pay grade, although Grievant did receive a promotion in the interim.

CONCLUSIONS OF LAW

The evidence presented established that the requirements for "just cause" in Merit Rule No. 15.1 were not present in the demotion of Steven Rodney. The State is not required to prove intent to deceive in the case of an erroneous or mistaken certification, but it is required to fully consider the circumstances of each case. While the Board will not lightly overturn the decision of the appointing authority, in those situations such as here where the Grievant establishes that the penalty is significantly out of proportion to the materiality and severity of the offense, the Board is obligated to make the employee whole under 29 Del. C. §5931. In this grievance, that will be accomplished by rectifying the situation so that the actual penalty imposed is in proportion to the severity and materiality of the admitted careless mistake.

ORDER

Steven A. Rodney, now known as Khalid A. Asad, shall be restored to the position from which he was demoted without just cause. Such restoration shall be on a prospective basis only with no provision for back pay or the restoration of other benefits.

IT IS SO ORDERED

Katy K. Woo, Chairperson

Robert Burns, Vice Chairperson

Dallas Green, Member

Gary Fullman, Member

APPEAL RIGHTS

29 Del. C. §5949 provides that the appointing agency shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the appointing agency. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

Mailing Date: September 9, 1996

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