BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
MARGARET MURPHY	)	
	)	
APPELLANT,	)	
	)	
v.	)	**Docket No. 98-01-143**
	)	
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL	)	
	)	
AGENCY.	)	

COPY

FINDINGS, OPINION, AND ORDER OF THE BOARD

BEFORE Susan L. Parker, Chairperson, Robert Burns, Vice-Chairperson, John Schmutz, Member, and John W. Pitts, Member, of the Merit Employee Relations Board ("the Board" or "MERB"), constituting a lawful quorum of the Board pursuant to 29 *Del. C.* § 5908(a).

AND NOW, WHEREAS, the above-referenced matter came before the Board for a public evidentiary hearing on August 13, 1998, the Board hereby makes the following findings and conclusions and enters the following Order upholding the Agency's action and denying Margaret Murphy's appeal.

APPEARANCES:

For the Appellant:
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For the Agency:
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NATURE OF THE PROCEEDINGS

On January 21, 1998, after having followed the Merit System grievance step procedure, Margaret Murphy (hereinafter "Murphy" or "Appellant") filed this appeal with the Board pursuant to Merit Rule 21.0120. Ms. Murphy contends that her former employer, the Department of Natural Resources and Environmental Control (hereinafter "the Department" or "DNREC"), violated Merit Rules 13.0100 and 19.0100 by the procedures it used to fill the position of Environmental Scientist II for which she had applied and by unlawfully discriminating against her in filling the position with another applicant. Murphy's appeal was timely filed after a January 20, 1998 decision of the Fourth Step Hearing Officer concluding that Ms. Murphy's grievance should be denied. The appeal seeks, among other things, to have Murphy placed in the position for which she applied.

SUMMARY OF THE EVIDENCE

Ms. Murphy went to work for DNREC in February 1991 and worked for the Department until June 1997. While there is substantial disagreement as to the legal status of her employment, there is little dispute that at least initially, Murphy was hired as a temporary employee and that during her employment she performed some of the duties of the position at issue in this case, Environmental Scientist II.

1. The Position.

Ms. Murphy testified that in the first few years of her employment with DNREC, she was systematically terminated and promptly rehired as a temporary or seasonal employee. She was last terminated in December 1993 and rehired in January 1994; she was then continuously employed by

the Department until June 1997. DNREC conceded at the hearing that at some point before 1997, it had employed Murphy as a temporary employee for more than 130 days in a fiscal year. Murphy testified that her duties with the Department evolved and expanded over time and she was moved between divisions within the Department at least once. However, throughout her tenure, Murphy performed essentially the same job: managing the transporter permit program.

Sometime in 1996, Nicholas DiPasquale, Director of DNREC's Division of Air and Waste Management (the division for which Murphy then worked), initiated an evaluation of all of the Division's temporary positions. Mr. DiPasquale testified that this review was prompted by concerns throughout state government that temporary positions were being used inappropriately; his goal was to determine whether the temporary jobs in his Division were necessary and if so, whether they should be established as permanent positions. As a result of the Division's review, DiPasquale decided to create a permanent position, "Environmental Scientist II," ("ESII") which would encompass the job Murphy was doing, along with additional duties.

In October 1996, the Department announced a vacancy for the Environmental Scientist II position. The announcement included a preference for applicants with experience using specific computerized databases, working for a regulatory agency and dealing with the public. Murphy, still employed by the Division, applied for the position.

2. <u>The First Interview Panel</u>.

The Division established a panel to interview candidates for the opening: David Johnson, who was Murphy's direct supervisor; Richard Folmsbee, who was Johnson's supervisor; Michael Apgar, who had recently been appointed acting manager of the Solid Waste Management branch in which Murphy worked; and Sharon Brown, of DNREC's personnel office. On February 3, 1997, Murphy

was interviewed by all members of the panel except Johnson, who did not attend the scheduled interview.

Murphy presented the testimony of both Folmsbee and Apgar. Folmsbee confirmed that the Environmental Scientist II position was essentially the same job Murphy had been doing satisfactorily for several years. Folmsbee also testified that after the interview, he ranked Murphy as his second choice for the position, behind an applicant he felt better met the preferences for the listing; he believes that Murphy was also the second choice of panelist Brown. Folmsbee testified that in his opinion the applicant eventually hired, Anisa Parks, did not meet the preferences identified for the position.

Apgar, on the other hand, testified that he recommended Murphy for the opening. He was critical of the candidate recommended by Folmsbee and Johnson, believing that their recommendation gave too much weight to the candidate's computer expertise and too little to his ability to run the transporter permit program, which Apgar considered the principal duty of the position. Apgar also testified that he believed Mr. Johnson, Murphy's immediate supervisor, tried to make sure that Murphy was not offered the position; however, Apgar offered no additional explanation or details supporting his belief.

3. <u>Murphy's Complaints Against Her Supervisor</u>.

One of the grounds for Ms. Murphy's appeal is that she was not hired for the ESII position in retaliation for making complaints against David Johnson. The testimony presented at the Board hearing establishes that the working relationship between Johnson and Murphy was poor. Jane Magnan, a secretary for DNREC, testified that Johnson was unprofessional and overly critical of those he supervised and was particularly so with Murphy. Johnson's manner was often disrespectful

and he sometimes cursed; Magnan twice saw Johnson raise his voice and throw things while talking with Murphy. Magnan testified that she complained to Mr. Folmsbee about Johnson's conduct and urged Murphy to do the same.

Folmsbee confirmed that Murphy complained to him on more than one occasion about Johnson's behavior. Folmsbee testified that he talked with Johnson about his conduct and at least once added a note critical of such conduct to Johnson's performance record. Johnson's inappropriate behavior would subside for a time after Folmsbee counseled him, but always resurfaced.

Murphy herself described Johnson as "out-of-control": he yelled, cursed and stormed around the office. While she believes Johnson's treatment of her and female employees in general was particularly egregious, he was also abusive towards men in the office. At the time of the interview process, Murphy told the Board that she originally believed that Director DiPasquale was aware of the problems she was experiencing with Johnson; however, she has since come to understand that DiPasquale may not have been as informed about the poor relationship between her and her supervisor as she originally believed.

4. **The Second Interview Panel.**

The members of the first interview panel did not agree on which applicant to recommend for the Environmental Scientist II position and sometime in February 1997, Director DiPasquale created a second interview panel. DiPasquale identified several reasons for this decision: the lack of consensus by the first panel; Folmsbee and Johnson's recommendation of a candidate who did not seem to fit the position; disciplinary matters concerning Folmsbee and Johnson which resulted in DiPasquale relieving them of their supervisory duties around the time of the first interview panel; concern that the panel members had different views on what the ESII position required; and Sharon

Brown's concern about "tension" between Murphy and Johnson. DiPasquale provided the second panel with a two-page outline of the duties of the ESII position and the respective priorities he placed on the duties. DiPasquale testified that the duties included the transporter licensing program, which Ms. Murphy had been performing, but also included public education and outreach and regulatory development.

The second interview panel consisted of three members: an environmental scientist from another branch of the Division, a DNREC personnel officer, and a program manager from the Sewer and Water Conservation Division. After interviewing the top four ESII candidates, each member of the panel numerically ranked Ms. Murphy highest. Each panel member also prepared a narrative summary of the respective strengths and weaknesses of the candidates. DiPasquale met with the second panel after the interviews. He testified that the panel advised him that if the position was going to emphasis the transporter permit program, Murphy was the best candidate; if it was going to stress education and public outreach, Parks was the best applicant; and if the position was going to be more computer intensive, a third applicant was the best choice.

5. **Hiring Decision.**

In April 1997, several weeks after Murphy's interview by the second panel, but before DiPasquale announced his hiring decision, Murphy requested a meeting with DiPasquale. Murphy was approved for medical leave at the time but had been coming to work anyway; she testified she requested the meeting with the Director to urge him to make a decision on the ESII position so she would know whether to continue to come to work despite her leave status. Murphy testified that she was very blunt and direct in her comments to DiPasquale about his delay in making a hiring decision and in her description of her former supervisor, Johnson. Murphy believes that some of her

comments to DiPasquale were inappropriate, that he was insulted by her criticism of him and offended by her complaints about Johnson and that as a result, he hired another candidate for the ESII position.

DiPasquale denied that Ms. Murphy's comments either upset him or affected his hiring decision. He testified that he decided to hire candidate Parks instead of Murphy or the other applicants because the second interview panel suggested Parks was the best person to meet the expanded duties of the ESII position, particularly the community outreach and education responsibilities. DiPasquale agreed that Murphy had done a good job running the transporter permit program and had a detailed understanding of that program; Parks, however, had a teaching background, a teaching certificate, experience in the private sector dealing with regulated industries, and broader experience in a range of regulatory programs. He recognized that Murphy received the highest numeric score by the panel, but testified that he relied more heavily on the panel's narrative report and verbal recommendations and that he has never made a hiring decision based solely on the highest numeric ranking.

DiPasquale announced his decision to hire Parks within a few days of his meeting with Murphy. In June 1997, DNREC notified Ms. Murphy that her seasonal or temporary appointment had ended.

DISCUSSION AND FINDINGS

Murphy argues that DNREC violated the State's merit system in two ways. First, she says, the Department impermissibly discriminated against her on the basis of a non-merit factor, i.e., because she complained about Johnson's conduct and criticized DiPasquale's delay in making a hiring decision, in violation of Merit Rule 19.0100. Murphy also contends that DiPasquale grossly abused

his discretion by not hiring her, in violation of Merit Rule 13.0100. The burden of proof is upon Murphy to establish such violations. 29 *Del. C.* § 10125(c); *Thomson v. Department of Transportation*, Del.Supr., No. 3, 1988, Horsey, J. (May 19, 1988) (ORDER).

I. No Violation of the State's Non-Discrimination Policy.

Merit Rule 19.0100 prohibits discrimination against "any person" in "any aspect of personnel administration," including appointment, because of "non-merit factors." This Rule advances the overarching purpose of the Merit System, that state service be based on a person's value as an employee.[1] Merit Rule 2.000 defines "merit factors" by example: they "include but are not limited to, consideration of training, experience, knowledge, skill, education, conduct, and manner of performance of applicants or employees in the classified service." Conversely, examples of non-merit factors are political or religious affiliations, race, national origin, age, sex, and disabilities.[2]

The parties suggest that the Board analyze Murphy's discrimination claim via some variation of the framework established by the United States Supreme Court for Title VII actions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[3] The Board agrees that the shifting burdens of proof at the core of *McDonnell Douglas*, while not required under the Merit Rules or applicable law, are useful in analyzing this claim. Thus, the first question for the Board is whether Ms. Murphy established a *prima facie* case of discrimination based on non-merit factors by showing that: (1) she was a member of a protected class; (2) she was qualified for the ESII

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[1]See 29 *Del. C.* § 5902.

[2]See Merit Rule 19.0100.

[3]See also *Quaker Hill Place v. Saville*, Del.Super., 523 A.2d 947 (1987), aff'd at 531 A.2d 201 (1987).

position; (3) she was not hired for the position; and (4) a person outside the protected class was hired. *Id.*

DNREC argues that there is no protected class with respect to Murphy's claim or that if there is a specially protected group, it is the entire pool of qualified applicants; the conclusion then follows, according to the Agency, that since Parks was also a qualified applicant, Murphy's claim necessarily fails. Murphy argues that the protected class is composed of whistle-blowers, i.e., people who have complained to or about their supervisors.[4] This case was tried before the Board on the basis of retaliation, and the Board finds that Murphy failed to carry her ultimate burden of persuading the Board that any discrimination occurred because of her complaints. Murphy demonstrated to the Board's satisfaction that: she was a member of a class of people who complained about their supervisor, in that she complained about Johnson to Director DiPasquale and criticized DiPasquale directly; she was qualified for the ESII position; she did not get the position; and the position was awarded to an applicant outside the class, i.e., one who had not complained.

Pursuing the *McDonnell Douglas* analysis by analogy the Board reviewed whether DNREC had produced evidence of a non-discriminatory motive for its actions and whether Murphy persuaded the Board that the Department's proffered motive was simply a pretext. The Board finds DiPasquale, who made the final hiring decision, to be credible on both of these issues. DiPasquale explained he hired Parks because he envisioned the ESII position as more than simply running the transporter permit program and considered public contact, outreach and education important parts of the new position. His explanation is consistent with the original job posting which indicated that one of the

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[4]Murphy clarified at the Board hearing that while her complaints about Johnson included concerns that his treatment of women was particularly offensive, her discrimination claim is not based on gender.

duties of the position was organizing and conducting educational meetings with public and private agencies and private citizens. Apgar also confirmed that DiPasquale considered educational outreach important to the ESII position and confirmed that that was one of the reasons DiPasquale gave for rejecting the applicant with extensive computer knowledge recommended by Folmsbee and Johnson. Finally, DiPasquale's explanation is consistent with the narrative recommendations prepared by the second hearing panel, stressing Parks' communication abilities and her professionalism.

Ms. Murphy argues that DiPasquale's focus on the educational component is an after-the-fact justification for not hiring her. The Board agrees with Ms. Murphy's assessment that the emphasis placed on different parts of the ESII position changed from the first to the second interview panels. The Board finds, however, that this shift was the reasonable result of DiPasquale's direct intervention in the hiring process after receiving the recommendations of the first interview panel. Having learned that three of his managers or supervisors – Johnson, Folmsbee, and Apgar – had divergent ideas of what the ESII position should involve, DiPasquale took pains to explain and clarify *his* intention, as Director, to make the new position broader than management of the transporter permit program before the second set of interviews and before Murphy met with him.

In sum, the Board recognizes that in most cases, retaliation for non-frivolous complaints made within the appropriate chain-of-command can be a non-merit factor. In this case, however, the Board accepts DiPasquale's explanation for his hiring decision as legitimate and true. Murphy has not carried her burden of persuading the Board that DiPasquale was acting out of distaste or retaliation for her criticism or complaints and his selection was not a gross abuse of discretion.

II No Violation of the Merit Rules Regarding Promotions.

Ms. Murphy's second basis of attack on the Department's failure to hire her is that the Department violated the promotion standards of Merit Rule 13.0100. Since Murphy was hired as a temporary employee, the Board first must decide whether she is entitled to the protections of Rule 13.[5]

The Merit Rules were promulgated pursuant to 29 *Del. C.* § 5914, which requires the adoption of "rules covering the *classified service*" (emphasis added). Section 5918 of Title 29 specifically requires the rules to address promotions and Merit Rule 13 implements that mandate. Merit Rule 13 applies only to those positions in the classified service. During most of Murphy's employment with DNREC, "classified service" was statutorily defined as ". . . all positions of state employment other than the following positions, which are excluded: . . .

> (17) Temporary, casual and seasonal employees employed for less than 130 working days in any fiscal year . . . ."

29 *Del. C.* § 5903(17).[6]

The statutory definition of classified service is expansive, including "all positions of state employment" except those specifically excluded. The Board notes that exception (17) does not exclude *all* temporary, casual and seasonal positions from the classified service: it excludes only those temporary, casual and seasonal positions in which the employee is "employed for less than 130

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[5]By contrast, the protections against discrimination in Merit Rule 19 apply to "any person" and extend to recruitment. See also 29 *Del. C.* §5953.

[6]Section 5903(17) was rewritten effective July 1, 1996 and no longer provides for a 130 day term. In argument to the Board, the parties agreed that the pre-amendment definition is the one applicable to Murphy. They do not agree on the effect of the definition on the ultimate issue.

working days in any fiscal year . . . ." Murphy testified that she was last rehired in January 1994 and worked continuously from then until June 1997. The Department agrees that Murphy worked at least 130 days during some fiscal year between 1994 and her termination. Under this particular set of circumstances, the Board concludes that Murphy was occupying a position in the classified service for purposes of Rule 13 regarding promotions.

The Department argues that the Board lacks the authority to apply Rule 13 to Murphy because she was not a "permanent employee," as defined by the rules, and contends that this issue is controlled by *Showell v. Department of Corrections*, Del.Supr., No. 111, 1987, Walsh, J., (Nov. 5, 1987) (ORDER). *Showell*, however, did not address the question of whether a state employee is entitled to Merit System protections, an analysis necessarily turning on the definition of "classified service" in Section 5903. The employee in *Showell* was already in the classified service; the issue was whether the Merit Rules permitted the Board (then, the State Personnel Commission) to penalize an agency for exceeding its temporary appointment time frames by making a temporary promotion permanent. Since the Merit Rules did not specifically provide for such a result, the Court concluded that the Board had exceeded its authority. The current case, on the other hand, requires the Board to determine whether Ms. Murphy is entitled to Merit System protections in the first place; this question turns on the meaning of Section 5903, not on an expansion of the Merit Rules.

Merit Rule 13.0100 requires in part that vacancies in the classified service "shall be filled by promotion wherever practical and in the best interest of the classified service." See also 29 *Del. C.* § 5918. The rule also provides when a promotion grievance can be maintained: i.e.,

(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.

Murphy agreed at the hearing that the procedural requirements for promotions had been met. The Board has found no violation of Merit Rule 19.0100 (see Section I, *infra*), thus the Board finds no violation of Rule 13.0100(2). Nor is the Board persuaded that the candidate ultimately selected failed to meet the position's minimum qualifications because she was not experienced with the specified computer databases. The Board notes that the computer experience was a preference in the initial posting, not a requirement. Second, all of the candidates interviewed had already been placed on a certification list, assuring that each met the minimum requirements. Finally, the Board notes that the second panel interviewed only the top four candidates identified by the first panel, including Parks. The second panel concluded that while Parks did not have experience with the specific posted computer programs, she did have experience with other database programs and could easily learn those required for the ESII position.

The heart of Murphy's Rule 13 claim is that Director DiPasquale grossly abused his discretion in appointing Parks instead of Murphy. The Board appreciates Ms. Murphy's concerns, given the way the interview process developed. Indeed, the Board finds that Johnson's presence on the first interview panel *did* taint the results of those interviews and contributed to the lack of consensus among the members. The appointment of a second panel was unusual and as noted in Section I, there was some shifting in the emphasis placed on various aspects of the new position during the selection process, at least from the candidates' vantage point. Nonetheless, the Board concludes that DiPasquale's decision to hire Parks was not a gross abuse of his discretion.

Specifically, the Board finds that DiPasquale's decision to appoint a second interview panel was reasonable in light of the circumstances surrounding the first panel. DiPasquale was not simply faced with different recommendations from a divided interview panel. Johnson and Folmsbee, who had supervised Murphy and would have had supervisory duties over the ESII position, had recommended a candidate other than Murphy, one with computer expertise; during the interview process, the Director relieved Johnson and Folmsbee of their job duties pending an investigation into their use of the Department's computers. Apgar, who did recommend Murphy for the new position, had only recently been moved into a managerial role and had limited exposure to the job Murphy had been doing and what the ESII position was designed to encompass. The fourth panelist raised concerns about Murphy and Johnson's relationship which DiPasquale had not heard before; significantly, this panel member did *not* recommend Murphy, citing concerns about that relationship. In short, DiPasquale reasonably concluded that no member of the first panel was both knowledgeable and neutral with respect to the ESII position. His decision to appoint a second panel was a fair response to the circumstances confronting him and effectively removed the taint of Johnson's presence on the first panel.

As explained in Section I, the Board concludes that the emphasis on community outreach and education that led to Parks' selection was the result of DiPasquale's necessary and direct intervention in the interview process. The Board also finds that DiPasquale viewed the new position as broader than the transporter permit program from the beginning and thus, his directions to the second panel are consistent with his vision of the position. Even assuming that DiPasquale's emphasis did change over time, as Murphy contends, the Board cannot conclude that he grossly abused the discretion entrusted him, particularly since the original posting did identify educational meetings as a principal

accountability. Implicit in this conclusion is a finding that filling the ESII position by promoting Murphy was not practical and in the best interest of the classified service because the qualifications the Director was emphasizing were stronger in another applicant. See Merit Rule 13.0100.

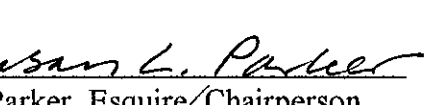
Finally, the Board cannot conclude that the Merit Rules require an agency to select a candidate based solely on their numeric ranking by an interview panel. Such a holding would undermine the goals of the Merit System by discouraging the use of broad-based panels in favor of direct selection (from the certification list) by the hiring official. Here, Parks' numeric scores from the second panel were high, even if lower than Murphy's. DiPasquale's testimony, which the Board has accepted, is that the second panel recommended Parks ahead of Murphy if the Department wanted to emphasis community education, which is the conclusion DiPasquale had reached. The Board has already concluded that DiPasquale was not influenced by Murphy's private criticism of him during their one meeting and that he neutralized the taint of Johnson's misconduct by appointing a second independent panel. In sum, Murphy has not carried her burden of demonstrating a gross abuse of discretion in either the selection process or the ultimate hiring decision.

ORDER

For the foregoing reasons, the Board upholds the agency's hiring decision and rejects Margaret Murphy's appeal.

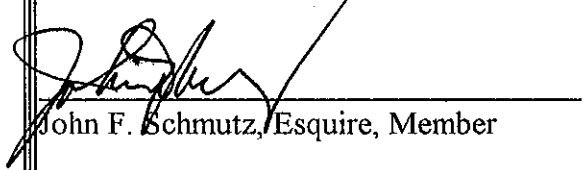
Board Member Pitts, with respect to Section II, concluded that the unusual interview process and the rejection of Murphy, who had been satisfactorily performing many of the duties of the ESII position, in favor of a lower-ranked candidate constituted a gross abuse of the Department's discretion in appointment decisions.

BY ORDER OF THE BOARD this 18th day of February, 1999.

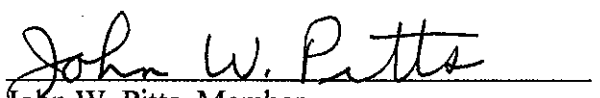


Susan L. Parker, Esquire, Chairperson

Robert Burns, Vice-Chairperson



John F. Schmutz, Esquire, Member



John W. Pitts, Member
Dissenting with respect to the conclusion in Section II as noted.

APPEAL RIGHTS

29 *Del. C.* § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with the law. The burden of proof of any such appeal to the Superior Court is on the grievant. 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.

29 *Del. C.* § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within thirty (30) days of the day the notice of the decision was mailed.

(c) the appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: Feb. 22, 1999

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