BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

IN THE MATTER OF: **RONALD S. RINGER** **Appellant,** **v.** **DEPARTMENT OF TRANSPORTATION** **Employer/Agency.**	**DOCKET NO. 98-10- 168** **DECISION AND ORDER**

Before Robert Burns, Vice Chairman; John F. Schmutz, Esquire; and Dallas Green, Member, constituting a quorum of the Merit Employee Relations Board ("the Board") as required by 29 *Del. C.* §5908(a).

APPEARANCES:

For the Department: Frederick H. Schranck
Deputy Attorney General
Department of Transportation
P. O. Box 778
Dover, DE 19903

For the Appellant: Ronald S. Ringer, *Pro Se*
527 William Street
Dover, DE 19904

NATURE OF THE PROCEEDINGS

This matter came before the Merit Employees Relations Board ("Board") pursuant to Merit Rule No. 21.0120 as an appeal after a 4th Step grievance decision which was adverse to the grievant. This grievance concerned the efforts in 1997 and 1998 of the Department of Transportation ("Department") to fill a Road Design Technician V position in the Office of Preconstruction (Position No. 9558).

The appellant, Ronald S. Ringer, alleged that his non-selection for the position was a violation of Merit Rule No. 13.0100 by failure to fill a position through promotion and was a gross abuse of

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discretion. Mr. Ringer also asserted that the Department improperly discriminated against him on the basis of non merit factors in violation of Merit Rule No. 19.0100. Pursuant to Merit Rule No. 21.0230, Mr. Ringer was designated as the moving party. This is the Board's Decision and Order based upon the evidence presented at the hearing.

SUMMARY OF THE EVIDENCE

Ronald S. Ringer called 7 witnesses and marked 26 exhibits for consideration by the Board. Twenty-two exhibits were received into evidence with the remainder being either withdrawn or not offered.

The exhibits considered by the Board consisted of a project status information sheet for the purpose of showing that Mr. Ringer was working on 3 projects during the relevant time period and that one of them was the Kennett Pike Project. Other exhibits consist of various E-mail traffic from and to Mr. Ringer, copies of interviewers question sheets with scoring by the interviewers and an excerpt from Department Secretary Canby's March report to the Governor which was received into evidence in lieu of calling Secretary Canby as a witness.

Jonathan Hermes, an engineer who formerly held the position for which Mr. Ringer was applying, was sworn and described the duties of the position. Mr. Hermes testified that the position was changed after he left it with a change in the responsibility for railroad coordination. He testified that he was told that to get more experience he would be moved to the Road Design section and someone from there would be moved over into his job but there were no names mentioned. Mr Hermes also discussed the Kennett Pike project where he worked on the railroad coordination.

James Satterfield, a supervising engineer with the Department testified that Ronald Ringer was working on 3 projects of differing complexity during the period when he applied for the Road Design Technician V position. Among these projects was the Kennett Pike Project which was one in which Secretary Canby had taken a particular interest. Mr. Satterfield testified that if Mr. Ringer had been promoted the Kennett Pike project would have been reassigned and reassignment of the project can

cause delay. Individuals who are reassigned can be called back to consult on a project. Mr. Satterfield testified that he had no part to play in filling the Road Design Technician V position.

Collette Haycraft, with the Human Relations section of the Department of Transportation was sworn and testified that she had been detailed to address concerns Mr. Ringer had raised about filling the Road Technician V position. She testified that no one told her to stop communicating with Ronald Ringer concerning his grievance but her boss did tell her not to go any further with it as she had other work to do. She discussed an E-mail she had provided to Mr. Ringer relating to filling the position and told the Board she shared office space with Judith Rini who was the wife of an applicant for the position of Road Design Technician V. Ms. Haycraft testified that she sits on interview panels for hiring and that she uses a check plus or minus system for candidate grading and that possibly she has changed grades during discussions after interviews. She was not a participant in Mr. Ringer's interview.

Joel Leidy, a participant on the interview panel, was sworn and testified that Mr. Ringer was viewed as qualified for the position or his name would not have appeared on the Certification List. Mr. Ringer questioned Mr. Leidy concerning his score sheet for the interview (Appellant's Exhibit No. 6) and Mr. Leidy testified that he had scored Mr. Ringer higher on the question part of the interview than candidates who were ultimately ranked as No.2 and No. 3. Mr. Leidy testified that the determination of ranking was made on the basis of the responses to the questions asked of each candidate and the nature and complexity of the plans which each applicant brought to the interview. Mr. Leidy developed the questions and had them approved by the Department's Human Relations section before they were asked of each applicant. Mr. Leidy testified that he did not tell Roberta Weakland (one of the interview panel members) that she had rated the candidates wrong. The witness explained that the Road Design Technician V position had been modified and no longer had railroad coordination responsibilities and such experience was not a consideration in filling this position. The railroad coordination responsibilities were transferred away from the position shortly after Mr. Hermes left and the position was to be filled with someone with utility coordination skills.

Mr. Leidy explained that Candidate No. 3 had brought plans to the interview which were considerably more complex than those submitted by Mr. Ringer. Mr. Leidy scored candidate No. 1 with 27 points; candidate No. 2 with 15 points and candidate Nos. 3 and 4 each with 14 points. He told the Board that the position was not offered beyond candidate No. 3 because he doubted that the remaining candidates could be effective in the position. He testified that he told Mike Angelo that Ringer would not be good in the position. He stated that a Road Design Technician V is a high lever position and he did not feel comfortable with candidate Ringer because of the quality of the plans he had submitted and because, with Mr. Ringer's experience with the Department, he had expected him to have a higher score on the questions. Mr. Leidy testified that candidate No. 3 was already a Technician V level employee and had submitted a much more complex set of plans than had Mr. Ringer.

Judith Rini, being sworn as a witness, told the Board that she is a Personnel Officer II and in charge of the personnel section of the Human Relation department at the Department of Transportation and that she sits on most interview panels for the Department but in this instance, since her husband was an applicant for the position, she took herself out of the process. The position was offered to her husband at an increased salary and he turned down the offer. She stated that she does not grade candidates during interviews rather she just assesses them and comes up with the top 3 or 5. She also testified that it is standard practice for the Department to "go outside" and advertise for positions. As to the Road Design Technician V position, Ms. Rini testified the original posting had been corrected with the addition of a correction to the qualifications and that the selective changed to require experience in utility relocation and the closing date for applications was extended. She stated that the position has not been filled and has been put in for reclassification.

Roberta H. Weakland, after being sworn, told the Board that she is the Department Training Administrator and was a member of the panel which interviewed Mr. Ringer. She discussed with Mr. Ringer an E-mail she sent him on February 6, 1998 replying to his questions about filling the position. She noted that she had chosen her words carefully and that, as an applicant, Mr. Ringer did not have

a right to know the status of the matter at that time. She stated that she had ranked the candidates after the interview process and then she was out of the selection decision. Ms. Weakland described her scoring process for the candidates and gave Ronald Ringer 60 points for answers to the questions and 20 points for his plans. She stated that during the discussions she determined that she had incorrectly scored one of the questions and so corrected Mr. Ringers score on the questions by taking away the five points she had given for the question that had been answered incorrectly but which she thought had been correctly answered. She also changed the score for Mr. Rini who was Candidate No. 2 by giving him an additional five points. She stated that on question 3 after checking the "barometer" answers, she had given Mr. Ringer 5 points to which he was not entitled and that for Mr. Rini she had originally given him 20 points on his plans but determined that the plans he submitted were more complex and gave him 5 points raising his score on the plans portion from 20 to 25.

Concerning question no. 1 regarding educational background, Ms. Weakland stated that she gave both Mr. Rini and Mr. Ringer a score of 10. Mr. Ringer has an Associates Degree and Mr. Rini does not have a degree but had experience.

Ms. Weakland testified that, had she been the hiring manager, she would not have offered the position to any of the candidates after Nos. 1 and 2. According to her view there was a vast difference between the first two candidates and the rest of those interviewed. She stated that while all candidates met the minimum there was considerable variation in the depth of qualifications.

Michael Angelo, being sworn testified that he was a part of the interview panel for the position of Road Design Technician V and he presumed that Mr. Ringer was qualified for the position because he made the Certification List. Mr. Angelo stated that, using his own scoring system, he gave a higher score on the interview questions to Mr. Ringer than he did to the candidate who was ranked No. 2. Mr. Angelo testified that he believed that, taken in context, question 1 regarding educational background was fairly graded although Mr. Ringer did have a degree and others with the same score but with more experience did not. The witness told the Board that the Kennett Pike project was a politically sensitive project and that if Mr. Ringer had been promoted the project would

probably have been reassigned and that might or might not have caused a delay. The project might have been assigned to a consultant who was up to speed on it.

Mr. Angelo testified that the fact that Mr. Ringer was working on that project did not hold him back. According to Mr. Angelo, it was his decision to postpone the filling of the position. He stated that you could group the candidates into three groups. The first candidate was clearly superior. The next two candidates both stood out and the remaining three candidates could be lumped together. The second ranked candidate, Mr. Rini, had a wealth of experience in dealing with utility projects, an area where they had problems. As to the third ranked candidate, they were gambling on him with the offer but he had done a project which required a lot of outside coordination and had done a very good job. The next two candidates, including Mr. Ringer, were not, according to Mr. Angelo, at that level which was needed for the position.

Mr. Angelo stated that a decision was made to hire an outside consultant who has the expertise to deal with the utilities and this position of Road Design Technician V was not to be filled and that the position would be reclassified.

Debra Feiblekorn was called as a witness by the Department and was sworn. She has been a personnel administrator for the Department of Transportation for the past four years and oversees the Human Resources section which assists in filling over 50 positions annually for the Department. She stated that the Road Design Technician V position has not been filled and that it is not unusual not to fill a position. She testified that filling a vacancy is a management prerogative and because a person is on the Certification List does not mandate that they be selected. Ms. Feiblekorn discussed the methods of posting a position and stated that to increase diversity the Department went with open competitive postings and stated that the final decision on a candidate is made by the hiring manager.

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."

MERIT RULE NO. 13.0100

"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 examinations. 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."

MERIT RULE NO. 19.0100

"Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline or any other aspect of personnel administration because of political or religious opinions or affiliations or because of race, national origin, age, sex, physical or mental disability, or other non-merit factors will be prohibited." Employees shall receive a written reprimand where appropriate based on specified misconduct, or where a verbal reprimand has not produced the desired improvement."

MERIT RULE NO. 19.0230

"Any candidate whose name appears on a certified list may be considered to fill the vacancy for which the list was requested. Should the list be unsatisfactory, it may be returned and subsequent lists may be requested provided the reasons for the rejection accompany the returned list."

DISCUSSION, FINDINGS AND CONCLUSIONS

Five individuals were interviewed from the Certification List (Appellant's Exhibit No. 5) for the position of Road Design Technician V. The position was offered to the candidates who were ranked No. 1 through No. 3 after the interviews. Mr. Ringer who was ranked as candidate No. 4 after the interview, challenges the determination of the Department not to offer the position to any of the candidates after candidate No. 3 and he further challenges the validity of his ranking as No.4.

He seeks to be placed in the unfilled position, which the Department has determined not to fill as of March 1998, with back pay. The Board, by unanimous vote of the members hearing this matter, finds that Mr. Ringer has not met his burden of establishing a violation of the Merit Rules or law which would permit the Board to grant such relief and therefore his appeal must be denied and dismissed.

Mr. Ringer questions the propriety of the Department's posting of this position for open competition and the attempt to fill the position other than by the promotion of a present merit system employee. He notes that certain candidates were not State employees. His criticism of the Department on this basis is unfounded. The Agency clearly has the discretion to post the position publicly for open competition. See Merit Rule No. 7.0111. The preference expressed in Merit Rule No. 13.0100 for filling vacancies through promotion is clearly conditioned by the phrase "wherever practical and in the best interest of the classified service". The appellant has not shown here that such discretion was abused and, indeed, the position has not and, according to the testimony presented, will not, be filled.

Mr. Ringer also complains that his score sheet for the interview was altered to reduce his score and that the score of another candidate was increased. This did occur but the impropriety which Mr. Ringer infers was associated with such change was not shown to be present. Roberta Weakland, one of the interview panel members provided an explanation for the alteration of the scores which was credible and reasonable. Her personal scoring system incorporated a maximum award of 5 points for a correct answer to each of the questions prepared by Joel Leidy which were asked of all applicants. As Ms. Weakland testified, she was not the subject matter expert ("SME") and in reviewing the score sheet with the other interviewers she determined that an answer given by Mr. Ringer to question No. 3, which she had perceived as correct was not the answer being sought. Therefore she adjusted her score accordingly reducing Mr. Ringer's score from 65 to 60 for the question portion of the interview. There is no evidence that there was any improper motivation for this correction.

Mr. Ringer also challenges the awarding of equal points on question No. 1 relating to education where all of the candidates received the same score while they had different education credentials and where only candidates ranked as No. 4 (Mr. Ringer) and No. 5 had college degrees. The Department established that the question related to "educational background" and that experience in the field was reasonably included in the consideration. For example, the No. 2 candidate, William Rini, had extensive experience gained working with public utilities. The position to be filled was, according to the testimony of Joel Leidy, one where the individual to be selected was someone who could go toe to toe with utility engineers and test the reasonableness of their projections about the time needed for the relocation of utility facilities necessitated by road construction or reconstruction. The manner of scoring the individual applicants relating to their level of "educational background" has not been shown to be an abuse of discretion nor as a discriminatory act against Mr. Ringer.

Similarly, the evidence does not establish any impropriety on the part of Judith Rini who totally removed herself from any participation or involvement in processing the filling of the position for which her husband was an applicant.

The essence of Mr. Ringer's allegation of discrimination against him on the basis of non-merit factors in violation of Merit Rule No. 19.0100 is grounded in his personal view that he was too valuable in his present position to be promoted. He did establish that the Kennett Pike Project which he was designing was an important and "politically sensitive" project in which Secretary of Transportation Ann Canby, was personally interested. He did not establish by any credible evidence that his involvement with that, or any other project, was in any way involved in his non-selection for the Road Design Technician V position. There were a number of alternatives available to the Department should Mr. Ringer have been promoted including, according to the testimony, the use of outside consultants on the project who could have picked up with little or no delay to the project. Similarly, Mr. Ringer produced no credible evidence that his status as an engineering student with 3

classes remaining to his bachelor degree had any bearing upon his non-selection for the Road Design Technician V position.

Nor does Mr. Ringer hit the mark when he raises the question of why the Department offered the position to candidates No. 1, No. 2, and No. 3 and why, when each of them refused the position because of the salary constraints, the position was not offered to Mr. Ringer who was candidate No. 4. The circumstances presented by such Departmental action in stopping at candidate No. 3 carry in them the potential that such action was based upon improper considerations in violation of the Merit Rules. Mr. Ringer bears the burden of establishing such impropriety under both the State Administrative Procedure Act [29 Del. C. §10125(c)] and Delaware case law (See, *Hopson v. McGuinness*, Del.Supr., 391 A.2d 187 (1978).

The Department was presented with a Certification List of applicants for the position all of whom had been screened for the minimum qualifications. In other words, each of the individuals on the Certification List had been determined by the State Personnel Office to have met the minimum qualifications and thus were considered qualified to be selected for the position. To the extent that such inclusion on the Certification List may rise to the level of presumptive qualification, it can be rebutted by a proper showing under Merit Rule No. 13.0100 which expressly provides that the selection of an unqualified applicant can be challenged on the basis that he or she does not meet the minimum qualifications. However, that is not the situation presented here. In this instance, the inclusion of Mr. Ringer on the Certification List works in his favor and tends to show that he was qualified to be considered for the Road Design Technician V position. (See Merit Rule No. 10.0230). However, the presence of sufficient minimum qualifications to be considered is no guarantee of selection and does not translate into entitlement to be selected. The evidence established that in seeking to fill this position, the Department was looking for an individual to "take on" the experienced engineers working for various utilities involved in utility relocation projects connected with road design projects.

The numerical scores resulting from individual interview panelist's various personal scoring approaches to the interviews were not widely disparate, however candidate No. 1 was, by the testimony presented, far and away the outstanding choice. He was offered the position and declined. Candidate No. 2 was an individual with considerable public utility experience in the private sector and he too declined the position. There was clearly some reservation according to the testimony of Joel Leidy, about offering the position to candidate No. 3. However, because of the complexity of the plans which candidate No. 3 brought to the interview and because of his successful defense of a Department project in a difficult situation in a public forum, Mr. Leidy testified that he was willing to take a chance and offer the position to him. Candidate No. 3 was already in a position where the job of Road Design Technician V being offered would be a lateral transfer but to a position not funded for overtime and thus, in effect, a potential reduction in pay and so candidate No. 3 also declined.

The testimony supports the conclusion that there was a significant change in the level of qualifications of the candidates after candidate No. 3. In the vernacular, candidates 4 and 5 were just not yet ready for prime time. Indeed, Ms. Weakland, even though she was not a SME, [subject matter expert] in road design, concluded from her participation on the interview panel that she would have cut off the offer after candidate No. 2 had she been the hiring manager.

Mr. Ringer takes the position that he was next on the list after the first three candidates turned down the position; that he was qualified by virtue of his inclusion on the Certification List; and therefore the Department had an obligation to offer the position to him. He views the decision by the Department not to offer the position to him as being an abuse of discretion and as being necessarily based on some non-merit factor.

In actuality the decision by the Department was that rather than offer the position to someone who was only minimally qualified, the position would not be filled and the skills and abilities sought for the position would be provided by a consultant with the Road Design Technician V position being reclassified to a higher level position which would supervise such outside consultants. The preferable

course is to write minimum qualifications for positions with sufficient clarity and specificity so that when coupled with the appropriate use of carefully crafted selective requirements the stage will be set so that any applicant who makes the Certification List will be fully appropriate for the position and the selection committee can concentrate in selecting the most qualified person in keeping with the policy expressed in Merit Rule 7.0100. However, that does not always occur and, as indicated by Appellant's Exhibit No. 2 [E-mail from Collette Haycraft to Ronald Ringer], it is not unusual for a section to post with a selective, then re-post with a different selective, and finally to decide that it is more appropriate to withdraw the posting than to fill the position at that time. It is clear that the Merit Rules contemplate that a Certification List can be returned by an appointing authority without selection and additional lists requested. See Merit Rule No. 10.0230. Therefore, mere inclusion on the Certification List standing alone is no entitlement to selection for the position.

Obviously such non-selection cannot be a subterfuge for unlawful discrimination against an individual on the basis of non-merit factors or for another improper discriminatory reason. In this case there was no credible evidence presented of improper discrimination against Mr. Ringer by the Department of Transportation on the basis of non-merit factors or otherwise and there is no abuse of discretion. There is, in short, no persuasive factual basis for concluding that his grievance should be granted.

ORDER

For the foregoing reasons, the 4th Step grievance decision is approved and this grievance appeal is denied and dismissed.

IT IS SO ORDERED this 8th day of June, 1999

Dallas Green, Member

John F. Schmutz, Esquire, Member

Robert Burns, Vice Chairman

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 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 fined 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: June 9, 1999

Distribution:
Original: File
Copies: Grievant's Representative
Agency's Representative