BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF: **ELLEN H. WARREN,** **Appellant,** **v.** **DEPARTMENT OF HEALTH AND SOCIAL SERVICES,** **Agency.**	)	**DOCKET NO. 00-04-210** **FINAL DECISION AND ORDER DENYING GRIEVANCE APPEAL**

BEFORE Dallas Green, John W. Pitts and John F. Schmutz, Esquire, constituting a quorum of the Merit Employee Relations Board (hereinafter "MERB" or "Board") pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES

For the Appellant:
Roy S. Shiels, Esquire
Brown, Shiels & Chansanov
108 East Water St.
P. O. Drawer F
Dover, DE 19903

For the Agency:
A. Ann Woolfolk, Deputy Attorney General
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, DE 19801

NATURE AND STAGE OF THE PROCEEDINGS

This matter is before the Board as a grievance appeal through the steps of the Merit System grievance process. See Merit Rules, Chapter 20. The grievant, Ellen Warren, is employed by the

COPY

Department of Health and Social Services ("Department" "Agency" or "DHSS") where she sought promotion into a vacant Labor Relations Officer position. Ms. Warren was neither interviewed nor hired for the Labor Relations Officer position and filed a grievance asserting that she was wrongfully denied preferential consideration for the position as a promotional candidate. She complains that the failure of the Agency to interview her for the position constituted a gross abuse of discretion in violation of Merit Rule No. 13.0100 and 29 *Del. C.* §5918 and she seeks to have the position vacated and refilled. In her original grievance Ms. Warren also sought to have the State Personnel Office ("SPO") issue procedures to protect employee's rights and to have SPO require agencies to compensate promotional candidates who have been harmed by the lack of such procedures.

PRE-HEARING
MOTION TO DISMISS

By written motion dated September 1, 2000, the Department moved to dismiss the grievance appeal. The Board heard argument on this motion on October 25, 2000 and in a separate Decision and Order, for the reasons stated therein, denied the Motion to Dismiss and determined to schedule the grievance appeal for an evidentiary hearing. The hearing was thereafter scheduled for February 21, 2001.

MOTION FOR SUMMARY JUDGMENT

On February 1, 2001, through counsel, Ms. Warren filed a "Motion for Summary Judgment" regarding her grievance appeal to which the Department filed a written response on February 15, 2001. As a part of her motion, the appellant claimed that during the previous steps of the grievance process witnesses for the Department had testified that no preference for qualified persons employed within the Agency was considered as a part of the hiring process used to fill the vacant Labor

Relations Officer position. Ms. Warren reasserted her position that there was no preferential consideration given to existing employees of the Agency in filling the vacancy and there was therefore a failure to comply with Merit Rule No. 13.0100 and with 29 *Del. C.* §5918 which should result in the Labor Relations Officer position being vacated and filled anew. The Agency opposed the Motion for Summary Judgment on grounds that there was a material factual dispute since it contended that appropriate consideration was indeed given under Merit Rule No. 13.0100 and 29 *Del. C.* §5918; that hearings before the Board are *de novo* and that there was no preferential requirement that Ms. Warren be interviewed or placed in the Labor Relations Officer position. The appellant argued that since the Agency had not offered evidence at the prior steps in the grievance process in support of its contention that it was impractical and not in the best interest of the classified service to fill this position by promotion that it should be prevented or estopped from doing so at this point in the administrative grievance process.

The Board heard argument on the Motion for Summary Judgment on February 21, 2001, and in its consideration of the motion was aware from the prior Motion to Dismiss heard on October 25, 2000, that the Agency set out its contention that it had given consideration to the requirements of Merit Rule No. 13.0100 as early as its response to Ms. Warren's November 1999 e-mail inquiries concerning her non-selection for the list of individuals to be interviewed for the position. The Board finds that a significant factual dispute exists and deems it desirable to inquire more thoroughly into the facts in order to clarify the application of the appropriate Statutes and Merit Rules. The appellant would have the Board determine that the Agency is estopped from presenting facts to show that it properly considered Merit Rule No. 13.0100 and that it gave due consideration to the promotional status of Ms. Warren because they failed to put forth such evidence at prior steps in the grievance

process. The Board declines to so hold. While there are many good arguments which can be made for greater communication between management and employees and for concerted effort toward the resolution of grievances at the lowest practical level, there is nothing in the present grievance history which indicates that the management attempted to "sand bag" or mislead Ms. Warren in the earlier steps of the grievance process about its consideration of her qualifications for the Labor Relations Officer Position. A careful reading of the Step 3 decision issued by Thomas LoForo on March 21, 2000, at which Ms. Warren was represented by different legal counsel, indicates a good faith attempt to fully address this grievance at that level. The Board, by unanimous vote, denies the Motion for Summary Judgment and directs that this matter proceed to the evidentiary hearing consistent with the prior determination made on October 25, 2000.

SUMMARY OF THE EVIDENCE

The following is a brief summary of the evidence presented by the parties at the evidentiary hearing conducted before a quorum of the Board on February 21, 2001.

J. Michael Vance, being sworn testified that he has been a state employee for 28 years and is currently employed by the Department of Health and Social Services as a Human Resources Manager I. He identified Appellant's Exhibit No. 1 as a transmittal memo by Martha Austin, the Deputy Director of Human Resources and the thereto attached two page March 31 edition of the "Quarterly Labor Relations Update", a publication prepared by the Labor Relations Staff as a service to managers and supervisors. This publication notes, among other things, that hiring officials must apply Merit Rule No. 13.0100 when evaluating a promotional candidate for a position and that the

hiring manager must consider the promotional candidates' qualifications, performance record, seniority, conduct, and where applicable, the results of competitive examination.

Mr. Vance opined that an employee could file a grievance if he or she did not get a preference for a position which would be a promotion but he was not aware of any case where an employee had gotten such a preference.

Ellen Warren, after being sworn, testified that she had applied for several vacant Labor Relations Officer positions since 1996 and had not been hired for any of them although she continually made the Certification List as being qualified for the position. There were three such positions for which she had applied in DHSS. Ms. Warren testified that she has earned Bachelors and Masters degrees in Business Administration and a *Juris Doctorate* degree and that she meets the minimum qualifications for the Labor Relations Officer position for which she was not interviewed. She opined that Merit Rule No. 13.0100 and 29 *Del. C.* §5918 operate to give her a preference over someone who is not a state employee. She contends that this statutory preference was not considered in filling this position and that she was therefore denied a preference to which she is lawfully entitled. The individual hired for the position was not then a state employee and Ms. Warren asserted that all management would tell her is that in their view they selected the most qualified individual for the position. She was not, according to her testimony, given an explanation why the Agency did not promote from within the Agency rather than hiring someone from outside.

On cross examination Ms. Warren stated that she had been interviewed on several occasions for Labor Relations Officer positions within DHSS but that she was not given an interview on the last occasion when the position was open. She was on the Certification List and was therefore deemed to be qualified for the position. Ms. Warren told the Board that she believes there was an affirmative

obligation on the part of the Department to prepare her for the position. Ms. Warren described her present position as Human Resources Specialist III and in that capacity she operates the Service Letter Unit for DHSS. This responsibility involves the process of checking background of individuals to be employed in nursing homes or similar facilities. She also acts as assistant to the manager for classifications. Ms. Warren testified that in her present position she hires staff; however she does not always hire existing state employees to fill vacancies. Ms. Warren reiterated her view that an employee has a preference which, while not an absolute preference in her view, is nevertheless one which must be considered in filling a vacant position. The State, according to Ms. Warren, should fill a vacant position by the promotion of a qualified present state employee, rather than hire someone more qualified from outside. She contends that it was both practical and in the best interest of the classified service to have her fill the vacant Labor Relations Officer Position.

MOTION TO DISMISS
AT CONCLUSION OF APPELLANTS' EVIDENTIARY PRESENTATION

At the conclusion of Ms. Warren's evidentiary presentation the Department reasserted its Motion to Dismiss contending that the appellant had failed to meet her burden of establishing a violation of the Merit Rules or Statutes by a preponderance of the evidence. The Board, recognizing the appellant's obligation to meet the burden of establishing a violation of the Merit Rules, denied the motion unanimously, noting that Ms. Warren was clearly qualified for the position but perhaps not as qualified as the individual finally hired into the position and that additional evidence might shed sufficient light upon the circumstances of the filling of this position to permit a fair determination of the appropriateness of the consideration of Ms. Warren's candidacy. The Board therefore determined to hear the evidentiary presentation by the Agency.

Jerry Cutler, Esquire, in sworn testimony, told the Board that he is currently the manager of Labor Relations for the State of Delaware, a position he has held for the last five years. In that capacity he has participated on the hiring panels for Labor Relations Officer positions which became vacant during that period. According to Mr. Cutler, these are highly specialized positions dealing with, among other things, grievance handling, arbitration, and labor board activity.

Mr. Cutler asserted that he was a labor lawyer and was the highest ranking state official and the subject matter expert on the hiring panel which considered the vacant Labor Relations Officer position at DHSS in November of 1999 which is the subject of this grievance appeal. There were two other individuals on the interview panel which included Marie Collins who had recently been promoted from the position creating the vacancy to be filled. Mr. Cutler testified that the candidate finally selected for the position was LaTonya Barnes who was clearly the superior candidate of the 15 individuals listed on the Certification List. Mr. Cutler further testified that the interviewing or hiring panel interviewed more than 6 individuals. In his view, the responsibility of the panel was to select the most qualified person for the position and LaTonya Barnes was far above the rest of the candidates. According to Mr. Cutler, Ms. Barnes had recent Labor Officer type of experience serving as a staff representative for a labor union. He contrasted this "first chair" experience with Ms. Warren's classification experience which he viewed as of limited utility in a Labor Relations Officer position. He stated that he had previously interviewed Ms. Warren several times when she had applied for vacant Labor Relations Officer positions at DHSS and he was familiar with her experience and qualifications. He stated that he had considered Ms. Warren for this position even though she was not actually interviewed. He further testified that although Ms. Warren was qualified for the Labor Relations Officer position, each time she applied there always was another candidate with superior

qualifications which resulted in her non-selection. Mr. Cutler volunteered that, in this instance, Ms. Warren would have been his first choice even though she was not interviewed had it not been for the candidacy of LaTonya Barnes with her clearly superior qualifications. Mr. Cutler also testified that the required considerations were given to all of the 15 candidates for this position on the Certification List including three current state employee applicants who received interviews. According to Mr. Cutler this consideration was in keeping with Merit Rule No. 13.0100 and consistent with the requirements of Merit Rule No. 7.0100 which establishes the policy of the State to search widely and vigorously for the best qualified persons to fill positions in the classified service. Mr. Cutler testified that it was not practical to promote Ellen Warren and it would not have been in the best interest of the classified service to do so because there was a much more highly qualified applicant in the person of LaTonya Barnes.

Martha Austin, Deputy Director for Human Resources for the Department, in sworn testimony, recounted the subsequent history of the reclassification of the Labor Relations Officer position into the Human Relations class specifications and discussed the manner in which selective qualifications would be added to encompass labor relations skills and abilities where needed.

Marie Collins, after being sworn, testified that she is presently a Human Resources Manager I in the Department of Health and Social Services. She possesses two advanced degrees, including a law degree, and has twelve years of progressive experience in the human resources field. She was originally hired as a Labor Relations Officer in 1996. It was her promotion from the Labor Relations Officer position which created the vacancy about which Ellen Warren had filed the present grievance. Ms. Collins identified State's Exhibit No. 2 as the posting for the Labor Relations Officer position which she had vacated and about which Ms. Warren had grieved. Ms. Collins testified she was the

designated hiring official and the direct supervisor for this position. In that capacity she designated the hearing panel which consisted of Vickie Artis, a DHSS manager who was a consumer of the services provided by the Labor Relations Officer position, Jerry Cutler, the manager of labor relations for the state and herself, as the position supervisor. Ms. Collins testified that there were 15 individuals ranked on the Certification List (State's Exhibit No. 3) and 8 of those individuals were actually interviewed for the position. The successful candidate, LaTonya Barnes, was ranked as number 2 on the Certification List and Ellen Warren was ranked at number 11. Ms. Collins testified that there were four employees of DHSS who applied for the position and three of them were interviewed. Ellen Warren was not interviewed because, according to Ms. Collins, after discussion with Martha Austin, she concluded that Ms. Warren had been previously interviewed for the Labor Relations Officer position on multiple occasions and that it was not necessary to interview her again as she was quite familiar with her experience and qualifications which had not markedly changed from the time of the last interview.

Ms. Collins testified that there were no Merit Rules which specified who was to receive an interview but that SPO had offered guidance in the form of a memorandum from the Director to Cabinet Secretaries and Agency Heads entitled "Getting the best person for the job"(State's Exhibit No. 4) and a memorandum from the Deputy Director for Employee Relations to all Personnel Administrators, Officers and Representatives (State's Exhibit No. 5). This advice from SPO specifies that it is the intent to hire the best people available, consistent with Federal, State, and agency policies and notes that after a candidate's credentials are assessed, hiring managers may choose to interview

a single candidate, several, or all 15 and that any number may be interviewed without regard to their order of placement on the list.[1]

According to Marie Collins, each candidate on the Certification List, including Ellen Warren, was given full consideration and all requirements of Merit Rule 13.0100, including seniority, were met not only for Ms. Warren but also for the other three state employees who were actually interviewed for the position. Ms. Collins testified that Ellen Warren was well qualified for the Labor Relations Officer position but she was not the best qualified applicant and that such a determination could be made from the applications alone. In November of 1999, Ms. Warren was employed as a Human Relations Specialist III doing Service Letter work and some classification work and she had some rather minimal labor relations experience. Ms. Collins noted that the interviews were conducted on November 9 and 12, 1999. Over half of the 15 applicants were interviewed and all of the candidates were discussed by the hiring panel and it was the unanimous determination of the panel that LaTonya Barnes was clearly the best qualified candidate for the Labor Relations Officer position. In addition, according to Ms. Collins, Ms. Barnes brought additional diversity to the Department. Concerning the application of Merit Rule No. 13.0100, Ms Collins stated that, in her view, the Rule means that if it is practical and in the best interest of the classified service, a vacancy is to be filled by promotion. In this case, she stated, the best interest of the classified service caused the hiring of LaTonya Barnes.

---

[1]Any manager who follows such advice and deviates from the ranking on the Certification List should be aware that such deviation may give the appearance that improper non-merit factors are being used in the selection process. See Merit Rule No. 19.0100. Those officials should be prepared to provide a sound and credible explanation for any such deviation if called upon to do so. Furthermore, the Merit Rules contain an expectation that appropriate ranking or rating procedures will be fairly applied. See Merit Rule No. 8.0800.

RELEVANT MERIT STATUTES AND RULES

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 for an additional thirty (30) calendar days.

29 *Del. C.* § 5918. Promotions
The rules shall provide for promotions, giving consideration to the applicant's qualifications, performance record, seniority, conduct and, where practicable, to the results of competitive examinations. Vacancies shall be filled by promotion whenever practicable and in the best interest of the classified service. Any promotional competition for a position funded solely by general funded appropriations, involving 2 or more candidates and a qualifying examination certified by the Director, shall be considered a competitive examination under §5817 of this title.

29 *Del. C.* § 5937. Preference for residents.
The rules shall provide for preference to be given residents of this State in any case where 2 or more equally qualified persons are concerned.

29 *Del. C.* § 5939. Preference for unemployed.
In any case where 2 or more equally qualified persons are seeking employment with the State under this chapter, preference shall be given to unemployed residents of the State, provided such resident's other sources of income do not place them above the poverty level as established by federal government standards.

Merit Rule 13.0100. Promotion
Vacancies shall be filled by promotion where ever 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 No. 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 8.0800.
Applicants who have taken an examination or been rated by training and experience may appeal to the Director for review of their rating in any part of such examination to assure that uniform and appropriate procedures have been applied fairly. Such appeal must be mailed to the Director within ten (10) days after the date on which notification of such rating was mailed. The Decision of the Director shall be final.

Merit Rule 19.0100. Non-Discrimination Policy
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.

DISCUSSION, FINDINGS AND CONCLUSIONS

This grievance appeal brings before the Board the consideration of the favored status of present State employees in filling vacancies in the classified service. It is observed, both by statute (29 *Del. C.* §5918) and by Merit Rule (13.0100), that vacancies shall be filled by promotion whenever practicable and in the best interest of the classified service. Ms. Warren construes this direction as a preference for state employees and contends that such preference was not given in the filling of the DHSS Labor Relations Officer position for which she applied in 1999. The Agency disputes Ms. Warren's view of preference and asserts that all of the requirements of the relevant Statutes and Merit Rules were met in filling this position with the best qualified candidate who, in this instance, was not Ellen Warren.

The Board finds and concludes that Ms. Warren has not carried her burden of establishing a violation of the Merit Rules or Statutes in the filling of the Labor Relations Officer position by the Department. To the contrary, the preponderance of the evidence presented establishes that there was

compliance with the Merit Rules and that the best qualified candidate was hired. The Agency has demonstrated that there were sound reasons for filling the position with the most qualified candidate rather than promoting a lesser qualified candidate who happened to be a state employee.

The Board does not agree with Ms. Warren's position that a qualified state employee must be hired in preference to a significantly more qualified applicant who is not presently a state employee. It is clear that promotional candidates occupy a favored position in the State Merit System and, in the case of two applicants with equal qualifications, that favored position would militate in favor of the selection of the promotional candidate. cf. 29 *Del. C.* §5937 and §5939 (preferences for residents and the unemployed apply in any case where there are 2 or more equally qualified persons).

It is the view of the Board that the favored status given to promotional candidates such as Ms. Warren does not translate into an absolute right to be interviewed or selected for the vacancy. The policy of searching widely and vigorously for the most qualified persons to fill positions in the classified service, as set forth in Merit Rule No. 7.0100, is not inconsistent with the operation of a Merit System which values and promotes existing employees. The recognition of the favored status of promotion in filling positions in the classified service can co-exist with the desire to find the best qualified applicant who, in many instances, will be an existing state employee. The evidence establishes that in this case, the best qualified candidate was an applicant from outside the classified service and that Ms. Warren's candidacy received due consideration.[2]

---

[2]Ms. Warren complains that it took a hearing before the Merit Employee Relations Board before the Agency would produce any evidence that it had indeed given proper consideration to her application and made a determination that the best interest of the classified service would be served by hiring the candidate finally selected. The Board has not adopted her view that the Agency should be estopped or precluded from presenting such evidence at such a late stage in the grievance process. Nevertheless, it should be noted that there are significant benefits to both management and to the employee in resolving grievances at the lowest possible level and that such

ORDER

Based on the foregoing, the appeal of Ellen H. Warren to the Merit Employee Relations Board in Docket No. 00-04-210 is dismissed by the unanimous vote of the undersigned.

IT IS SO ORDERED:

Dallas Green, Member

John F. Schmutz, Esquire, Member

John W. Pitts, Member

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: April 12, 2001

Distribution:
Original:File
Copies: Grievant's Representative
Agency's Representative
Merit Employee Relations Board members
Board Counsel

---

successful resolutions are likely promoted by more rather than less information.