BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

COPY

IN THE MATTER OF:	)	
GERALD KNABLE,	)	**DOCKET NO. 05-08-334**
	)	
Grievant,	)	
	)	
v.	)	
STATE OF DELAWARE	)	**ORDER**
DEPARTMENT OF HEALTH AND	)	
SOCIAL SERVICES (DHSS)	)	
	)	
Agency.	)	

BEFORE Brenda Phillips, Chairperson, and Board members, Paul Houck and Joseph Dillon constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* §5908(a).

APPEARANCES:

For the Grievant:
Gerald Knable, *Pro Se*

For the Agency:
Gregory E. Smith
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

PROCEDURAL HISTORY

This is a timely filed appeal from a Step 3 decision, docket number 05-08-334, dated May 17, 2005. The Step 3 decision denied the grievance of Gerald Knable ("the Appellant") finding that the Appellant failed to demonstrate a violation of Merit Rule 18.5 with regard to the decision of the Department of Health and Social Services ("DHSS") not to select him for a transfer candidate position as a developmental

disabilities case manager for the Department of Developmental Disability Services ("DDDS") in Kent County.

This is the Decision and Order of the Board after consideration of the testimony and exhibits at the evidentiary hearing, which, for the reasons stated below, finds for the Agency and denies the appeal.

RELEVANT MERIT RULE

MERIT RULE NO. 18.5 Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the minimum qualifications; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements of the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.

Merit Rule No. 2.1
Discrimination in any human resources action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors is prohibited.

SUMMARY OF THE EVIDENCE

Gerald Knable was sworn and testified that he applied for a lateral position with DDDS.[1] He interviewed for the position and thought that the position would be similar to what he was doing. He understood that there would be some differences because the particular type of position was not one found on the community side of DDDS. During the interview he was asked about his intake experience and whether he spoke Spanish. He subsequently learned that he was not selected for the position and filed the grievance to more clearly understand why he was not suited to the position since he was already in the position of a developmental disabilities residential unit manager. He believed that his extensive knowledge and capabilities and the number of years that he worked at the

[1] Mr. Knable was sworn during his opening statement since his presentation crossed over into testimony.

Stockley Center should have placed him over the person who was selected for the position. He believed that he was clearly qualified based on the advertisement for the position. He believed that overemphasis was placed on intake experience and the ability to speak Spanish since those were not posted requirements for the position and were not emphasized during his interview.

Mr. Knable stated that he had three concerns about Merit Rule 2.0, Non-Discrimination, which he raised at the Step 2 grievance level. He had concerns about the number of individuals over 50 hired by DDDS in the past 3 years, the gender mix for that group and the number of persons hired from within the community services branch at DDDS within the past 3 years. In response to his concerns, he was presented with an EEO-4 Status Report that he did not feel clearly gave the breakout as to males. He did feel that it showed a lower percentage of males hired within this particular division as compared to other areas.

His second area of concern had to do with how many people had been hired from within the community services branch or department of the division because his research showed that the person who was selected for the position was not in the classification of a developmental disabilities residential unit manager. He felt that he was bringing 14 years plus background in the field to the position. He stated that the announcement for the position very clearly describes what he has been doing with the division for quite a few years.

In addition, he testified that he has experience in intake, the subject that surfaced during the interview. He felt that his ability to speak Spanish was not delineated or indicated to be a major concern. He stated that if the ability to speak Spanish was a major

concern it should have been listed in the announcement. He stated that he would not have interviewed and wasted everyone's time if it had been a requirement of the position rather than a side benefit that the person selected might be bringing to the position. He added that in his 14 plus years with DDDS the issue of language capability other than English has never been deemed important for functioning as a developmental disabilities residential unit manager. He believes, however, that the ability to speak Spanish was of paramount importance to the interview panel. He did not understand why he was not just considered for a lateral transfer as a matter of an administrative move as had happened before when he was with DHSS doing intake at the Hudson Center and was moved to Dover. In his opinion, it seemed to come back to the issue of Spanish capability.

Mr. Knable testified that he never believed that his request for information on how the candidates were scored was fully answered and felt that the decision making process was incomplete particularly with regard to the fact that his references were not contacted. He did not see how references could be excluded for the scoring process of the candidates.

Mr. Knable acknowledged that he and the selected candidate went into the interview on the same playing field as far as meeting the minimum qualifications. He felt that the major difference was that he was already doing the job as advertised in the announcement for the position, exclusive of his ability to speak Spanish and his intake experience, which surfaced as factors in the interview and not the announcement. He reiterated that the ability to speak Spanish and intake experience should have been listed as preferential factors in addition to listing the minimum qualification if they were important. Appellant's Exhibit 1 was admitted over the objection of the State. Appellant's

Exhibit 1 contains Mr. Knable's overview of the process and summarizes items he discussed during his testimony. It also includes the EEO-4 Status Report he discussed.

On cross-examination, Mr. Knable was shown a copy of Merit Rule 18.5 and acknowledged that there are only three criteria upon which to challenge another individual's promotion. He agreed that as to the first basis for a dispute, he is not arguing that the successful candidate did not meet the minimum qualifications. He also agreed that he was not challenging the promotion under a gross abuse of discretion standard under number 3. He agreed that his challenge to the promotion was based upon his allegation that there was a violation of Merit Rule 2.1 which provides "Discrimination and any human resources actions covered by these rules or the Merit System Law because of race, color, national origin, sex, religion, age, disabilities, sexual orientation, or other non-merit factors is prohibited." Mr. Knable acknowledged that the only basis for his claim under Rule 2.1 is his allegation of discrimination based on age. He is fifty – eight years old and he believed that the selected candidate, Ms. Abrams, was over forty. He added that gender figures into his complaint somewhat also. He testified that the hiring trends in the division show that the preponderance of individuals hired on the administrative end or for professional positions are women.

He agreed that he could not say that age was the only factor considered by the interview panel but he could not help but feel that it was part of the consideration based on the factual difference in his age and the person selected. He stated that age would probably have not been as much of an issue until it is combined with the other issues he has raised. He agreed that the other issues he has raised regarding the process do not fall under Merit Rule 18.5 and submitted that they fall under Merit Rule 6.0, Recruitment and

the Application Process. Specifically, he referred the Board to Rule 6.1.which provides "It is the policy of the State of Delaware to search widely and vigorously for the most qualified persons to fill positions in the classified service while providing equal employment opportunity and meeting the objective of the State of Delaware affirmative action plan." He stated that he believed that Rule 6.1 fits within his claim under Rule 18.5 because he was more qualified by virtue of the fact that he was already in the position. Under the obligation to "search widely and vigorously", he felt that he was the most qualified candidate for the position as advertised which did not have any qualifiers regarding Spanish and intake capabilities. He did not dispute that a hiring entity could consider other factors but felt that factors that were important should have been listed in the announcement and expectation of qualifications.

On further cross-examination, Mr. Knable testified that his current position is at the Stockley Center. He described the Stockley Center and changes to its organization over the years in the way services are delivered for people with mental retardation and developmental disabilities. The position of developmental disabilities residential unit manager came out of those changes. The position was designed to supervise and assure that comprehensive services were delivered in an adequate and proper way to assure the quality of life for the individuals served. He has been doing the job for 14 and a half years and stated that, going into the interview, he had reason to believe the position for which he was applying would be similar with some modifications since it would be a community based program rather than institutional. He felt, however, that his capabilities and skills were transferable. He already participates in an aggressive program to get people at Stockley integrated into a community living operation. He agreed that Stockley

is an institutional setting and that the job for which he applied is primarily community based. He agreed the positions were different but felt that the functions were relatively the same. He stated that he has been a residential unit manager in a variety of environments including skilled nursing care, providing support and services for people with mild to moderate mental retardation and duly diagnosed, providing services for people with profound and severe mental retardation and most recently, Alzheimer's and dementia.

Roy LaFontaine, Ph.D, was sworn and testified that he is employed by DHSS as the deputy Director of DDDS. He is the second in command of the division administratively for all operations and personnel within the division. He has direct responsibility and oversight for training and professional development of people who are hired into their intake unit. He serves as a consultant and advisor to subordinate managers and supervisors within the division.

Dr. LaFontaine identified the posting for the developmental disabilities residential unit manager position at issue. The posting was introduced as State's Exhibit 1, without objection. He was familiar with the posting. It was a recruitment request to fill a position in their intake unit. He believed State Personnel drafted the posting. He explained that once the posting closed they received a certification list from Applicant Services and canvassed it for applicants they wanted to interview. Dr. LaFontaine identified the certification list ("Cert List"), which was then introduced as State's Exhibit 2, without objection. All of the individuals on the Cert list have been cleared by Applicant Services as meeting the minimum qualifications. Mr. Knable and the successful candidate, Ms. Abrams, were on the list.

After receiving the list an interview panel was formed consisting of Dr. LaFontaine, Dr. Keyes and Sue Morrison Smith. The panel selected six individuals to be contacted for interviews. One person declined and one could not be located. The panel interviewed the remaining four applicants including Mr. Knable and Ms. Abrams. Interviews were scheduled for an hour and ranged in actual length from half an hour to 45 minutes. The duties and responsibilities of the position were explained to each applicant. Each of the applicants was asked the same questions and the interviewers recorded their independent notes on the response sheet. The applicant was then asked if he or she had any questions and the interview was concluded. Dr. LaFontaine identified documents titled "Intake Assistant Questions, Gerald Knable" and "Intake Assistant Questions, Dorphine Abrams." The documents were introduced without objection respectively as State's Exhibits 3 and 4. The documents contain the questions asked of all of the applicants. Dr. LaFontaine testified that the handwritten notes under each of the question are notes he made to capture key thoughts, concepts and words relevant to the applicant's responses to the questions. He took the notes to trigger his recollection during the panel's deliberations on the candidates.

Dr. LaFontaine testified that in interviewing the candidates the panel members looked at the applicant's experience, their application, their work experience, the skills that they presented in the interview and on paper and their responses to the interview questions. All of those items were considered in their discussion over who was the better-qualified candidate to fill the position. Ms. Abrams stood out over Mr. Knable due to her extensive experience working in community-based services. She also had extensive knowledge and experience in helping families in the community to address and solve

problems and get resources in the community so that they could support their child with a disability. She also indicated on her application that she could read, write and speak Spanish. Her language skills were a plus in the hiring decision because of the ballooning population of individuals, especially in the lower two counties, where Spanish is the primary language spoken in the home. He stated that the position could have still been filled if none of the applicants spoke Spanish. The ability to speak Spanish was not a requirement for the position.

Mr. LaFontaine testified that he is very familiar with the Stockley Center and explained the differences between services provided in the position at issue and those provided at Stockley. Currently there are only 87 people living at Stockley, down from 250 in the last 5 years, out of 3,000 people with developmental disabilities statewide who are served by community based services. The General Assembly and Joint Finance Committee mandated that as people are moved out of Stockley, resources from Stockley are also to be moved into the community. Positions have been taken out of Stockley and reallocated to community positions to more effectively serve families and people who live in the community. A vacant residential services unit manager position was taken and reallocated to the division office to help with the ever-increasing intake caseload.

Dr. LaFontaine testified that DDDS did not have time to do a reclassification of the position before it was posted. In addition, there is currently no intake person classification. The position was posted with the knowledge that minimum qualifications listed came pretty close to what an intake person would do. He added that during the interviews the panel was very specific with each of the applicants that, although the position was a developmental disabilities residential unit manager, the position was going

to be used for intake. They wanted to make sure that each applicant knew what the job would entail so that the applicant could determine if he or she wanted to continue being considered for the position.

Dr. LaFontaine testified that Ms. Abrams was a senior case manager assigned to the division's Kent County Office of Community Services before being selected for the developmental disabilities residential unit manager position. He could not recall how long she held the position but believed it was in excess of 10 years. Dr. LaFontaine denied that Ms. Abrams age was a factor that he considered in selecting her for the position.

Dr. LaFontaine stated that he is 57 years old and a white male. He has no personal bias against white males over the age of 50.

On cross-examination, Dr. LaFontaine stated that he did not specifically recall Mr. Knable's resume but recalled that he held positions with the Division of Social Services. He was aware of the experience Mr. Knable listed on his resume and what he shared in the interview. Dr. LaFontaine denied that the line of questioning directed to Ms. Abrams emphasized her intake experience. He stated that all of the applicants were asked the same questions.

Joseph Keyes, Ph.D., was sworn and testified that he is employed by DDDS as the director of professional services. The position reports to Dr. LaFontaine. His responsibilities include technical assistance in the area of clinical support, psychology, and responsibility for the intake program. The position at issue reports to Dr. Keyes.

Dr. Keyes testified that he was a member of the interview panel. He did the introduction of the candidates that were interviewed. He also explained the duties, responsibilities, hours and specific location of the position. He then participated in asking

questions of the candidates and gave his opinion regarding the best candidate for the position.

Dr. Keyes identified documents titled "Intake Assistant Questions, Dorphine Abrams" and "Intake Assistant Questions, Gerald Knable." The documents were introduced without objection respectively as State's Exhibits 5 and 6. The documents contain the questions that were asked. The panel members rotated asking specific questions. He made the notes shown on the documents so that he could have a reference to note things that he felt were relevant and important in his opinion regarding whom to hire. He participated in all of the interviews and reached a decision that Dorphine Abrams was the best candidate for the position. His opinion was based on her work experience, specifically with families and community service experience, and her knowledge of Spanish were things that made her more qualified than the other candidates interviewed.

Dr. Keyes stated that he is 58 years old and a white male. He does not have any personal bias against white males over the age of 50. Ms. Abrams' age was not a factor in his decision. He did not know Ms. Abrams' age.

On cross-examination, Dr. Keyes was asked whether his thoughts about who would have been the best candidate would change if intake and the ability to speak Spanish were taken out of the consideration. Dr. Keyes responded that if intake were removed from the consideration there would not have been a position. The position they were hiring for was an intake person who works with the families who are applying for services and who are often in crisis. He thought that the minimum qualifications captured the kinds of skills that they were looking for in the position. The position was obviously

specifically in the intake unit working with families and determining eligibility for services.

Dr. Keyes could not give an exact percentage of people who have gone through the intake process where the ability to speak Spanish has been helpful. Dr. Keyes stated that they are seeing more families where Spanish is the primary language and are in the process of having the University of Delaware translate their application documents into Spanish.

Susan M. Smith was sworn and testified that she is employed by DDDS. She is currently the senior social services administrator. Prior to obtaining that position she was the intake coordinator for the division for approximately 17 years. She was the incumbent for the position at issue and served on the interview panel to find her replacement. Ms. Smith was on the panel primarily as the person who was familiar with the day-to-day operations and functioning of the position. She was the person with the expertise and knowledge of what was involved in doing the position responsibly and competently.

Ms. Smith identified documents titled "Intake Assistant Questions, Dorphine Abrams" and "Intake Assistant Questions, Gerald Knable." The documents were introduced without objection respectively as State's Exhibits 7 and 8. Ms Smith testified that she used the documents during the interview process and made notes to refresh her memory when it came time to debate the skills and qualifications of interviewees to determine who best fit the job. She participated in all four of the interviews and concluded at the end of the interviews that Dorphine Abrams would probably be the best person for the position. Ms. Smith stated that she was very impressed with the way in

which Ms. Abrams answered and asked questions. It indicated to Ms. Smith that Ms. Abrams had very good skills in terms of listening, interview, counseling, and working with families. That, in conjunction with her strong background in community services and understanding available resources in the community that are needed to support people with mental retardation, made Ms. Adams the best person in Ms. Smith's opinion. She did not base her decision on Ms. Abrams' age. Ms. Smith stated that she is sixty-seven and has no bias against males over the age of 50.

On cross-examination, Ms. Smith stated that previous education was important to her but it was not as much education and training as it was the ability to work with families to do conflict resolution, to be able to refer families in crisis to appropriate resources in the community and to be familiar with the mental health system and other agencies throughout the state that are able to help people who have family members with mental health issue.

Ms. Smith stated that she is familiar with the work done by developmental disabilities residential unit managers at Stockley. She was a DD case manager there for two years in 1985. She agreed that a person in that position does a lot of interfacing with a lot of different people other than residents including staff, family and people in the community as part of their responsibilities to advocate and provide support and services for the residents at Stockley. She distinguished it from the work of an intake work coordinator who works on a statewide basis. She stated that it is important to have a networking and familiarity with people in other agencies that you are not necessarily in touch with as just a case manager. She agreed that she was referring to something akin to

the No Wrong Door concept. She was not aware of Mr. Knable's particular training. She added that she was a statewide trainer in No Wrong Door.

Ms. Smith agreed that she was aware that Mr. Knable did work for the Division of Social Services in the capacity as a social worker in intake.

FINDINGS AND DISCUSSION

The exhibits introduced into evidence were made part of the record and considered by the Board in making its decision. The Board heard sworn testimony from Appellant Gerald Knable, Roy LaFontaine, Ph.D., Joseph Keyes, Ph.D., and Susan M. Smith.

Merit Rule 18.5 only permits a grievance with regard to a promotion under very limited circumstances:

MERIT RULE NO. 18.5 Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the minimum qualifications; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements of the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.

Merit Rule No. 2.1
Discrimination in any human resources action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors is prohibited.

Mr. Knable acknowledged that Ms. Abrams met the minimum qualifications and therefore Merit Rule 18.5 (1) does not provide a basis for his appeal. He also candidly admitted that there was no gross abuse of discretion ruling out Merit Rule 18.5 (3). The only basis, therefore, upon which Mr. Knable can base his appeal, is Merit Rule 18.5 (2) by alleging discrimination in violation of Merit Rule 2.1. However, Mr. Knable has

provided no direct evidence of discrimination based on his age or sex in violation of the Merit Rules. The only factor he points to as a basis for an age discrimination claim is that he was over 50 and the successful candidate was over 40. He again candidly admitted that he did not believe that age alone was the basis for the selection decision but argued that he could not ignore it when coupled with the other factors he raised.

Although he premised his complaint on the fact that he is a white male over 50, his real complaint is less about discrimination than his concern about the process and the fact that he believes the interviewers placed too much importance on the ability to speak Spanish and on intake skills, factors he argues were not emphasized in the posting. However, he agreed that an employer could consider factors beyond the minimum qualifications in the posting.

As evidenced throughout his testimony and his questioning of the witnesses, Mr. Knable's real complaint is that he feels that he was the more qualified candidate if intake experience and the ability to speak Spanish are taken out of the consideration because he has been doing a substantially similar job for over fourteen years. He referred the Board to Rule 6.1.which provides "It is the policy of the State of Delaware to search widely and vigorously for the most qualified persons to fill positions in the classified service while providing equal employment opportunity and meeting the objective of the State of Delaware affirmative action plan" and argued that he was more qualified by virtue of the fact that he was already in the position. There was no evidence presented to show that the agency failed to search widely and vigorously. To the contrary the evidence demonstrated that the position was posted and six applicants were initially identified for potential interviews, with four candidates ultimately being interviewed including Mr.

Knable. However even if a violation of Rule 6.1 was found to have occurred, which the Board does not find, Mr. Knable has failed to offer any evidence as to show how a violation of Rule 6.1 that supports his claim of discrimination under Merit Rules 18.5 and 2.1. Unfortunately, the factors about which Mr. Knable is complaining have nothing to do with discrimination based on age or the fact that he is a white male.

The evidence presented by the agency clearly established the decision by the panel members to select another candidate for the position was based on legitimate non-discriminatory reasons related to the position including a growing population of Spanish speaking individuals in need of services which made consideration of the successful applicant's proficiency in the Spanish language a plus for the position but not a requirement. In addition, although the job was posted as a developmental disabilities case manager, the evidence established that it was clear that the vacant position was going to be used as an intake position. Mr. Knable acknowledged that the panel members made that fact known at the outset of the interview. Therefore, it was not inappropriate to look at the applicants' respective intake experience.

In addition, all of the panel members were over 50 and two of them were white males. The panel members were credible in their testimony that their decision was based solely on finding the most qualified candidate and had nothing to do with the fact that Mr. Knable was a white male over 50 or the age of the selected candidate. Mr. Knable offered no evidence to refute the testimony of the panel members that they were unbiased in their selection of the successful candidate.

Mr. Knable has failed to meet his burden of establishing discrimination in violation of Merit Rule 18.5 (2) based on Merit Rule 2.1.

ORDER

For the foregoing reasons, the grievance appeal of Gerald Knable is **DENIED**.

IT IS SO ORDERED this _____ day of _____, 2006:

Brenda Phillips, Chairperson

Paul Houck, Member

Joseph Dillon, 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 filed within 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.

Nov. 22, 2006
Mailing Date:

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