

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD  
OF THE STATE OF DELAWARE**

<b>BRANDON BADLEY,</b>	)	
	)	
Employee/Grievant,	)	
	)	<b><u>Docket No. 15-10-639</u></b>
<b>v.</b>	)	
	)	<b>DECISION AND ORDER</b>
<b>DEPARTMENT OF HEALTH AND</b>	)	
<b>SOCIAL SERVICES, DIVISION OF</b>	)	
<b>DEVELOPMENTAL DISABILITIES SERVICES,</b>	)	
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the “Board”) at 9:00 a.m. on April 21, 2016 in the Delaware Department of Transportation, 800 S. Bay Road, Dover, Delaware 19901.

**BEFORE** Martha K. Austin, Chair, Victoria Cairns, and Paul R. Houck, Members, a quorum of the Board under 29 *Del. C.* § 5908(a).

**APPEARANCES**

Patricia Davis  
Deputy Attorney General  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Brandon Badley  
Employee/Grievant, *pro se*

Kevin Slattery  
Deputy Attorney General  
on behalf of the Department  
of Health and Social Services

## **BRIEF SUMMARY OF THE EVIDENCE**

The Department of Health and Social Services/Division of Developmental Disabilities Services (“DDDS”) offered, and the Board admitted into evidence nine documents marked for identification as Exhibits A-I. DDDS called no witnesses.

The Grievant, Brandon Badley, offered, and the Board admitted into evidence, sixteen documents marked for identification as Exhibits 1-16. Mr. Badley called Karen Wilson, DDDS Regional Program Director; Frann Anderson, former DDDS Quality Improvement Director; Dana Aurand, prior Behavior Analyst Supervisor (via telephone); Allan Zaback, Program Administrator, DDDS; Dr. Terrence Macy, Director of Community Services, DDDS; and testified on his own behalf.

Upon the close of the Grievant’s case, DDDS moved for an involuntary dismissal of the grievance, asserting that Mr. Badley had failed to meet his burden to provide sufficient evidence to establish that a violation of Merit Rules 18.5, 10.4, 6.3.2, or 2.1 had occurred. The Board deliberated and granted DDDS’s motion for dismissal.

## **FINDINGS OF FACT**

Brandon Badley, Senior Behavior Analyst at DDDS has worked for DDDS as a Behavior Analyst for one year and as Senior Behavior Analyst for two years. Mr. Badley applied for the Behavior Analyst Supervisor vacancy when it was posted on March 13, 2015 with a closing date of March 19, 2015.<sup>1</sup> DDDS hiring panel interviewed seven applicants on April 28, 2015, including Mr. Badley.<sup>2</sup> After concluding this first day of interviews, the panel determined the interviewed candidates did not speak to the direction in which DDDS was seeking to expand.

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<sup>1</sup> Grievant Exhibits, Exhibit 1 (“Grievant Exhibit”).

<sup>2</sup> Grievant Exhibit 6 (Interview Schedule).

The panel, upon unanimous vote, agreed to contact additional applicants from the applicant referral list and to schedule a second day of preliminary interviews. The panel interviewed three additional applicants, including MaryCarol Beard, the successful candidate, on May 1, 2015.

Prior to initiating interviews, the hiring manager, Karen Wilson, sent a list of interview questions to her supervisor, Dr. Terrence Macy. She did not provide draft questions to any other panel members or to the administrative employee who was scheduling the interviews. Wilson reviewed the candidates' information to ensure that each met minimum qualifications for the position. Frann Anderson, Karen Wilson, and Dr. Terrence Macy testified that Ms. Anderson informed the Panel that she knew two of the candidates, including Ms. Beard, and that she previously mentored Ms. Beard professionally. Allan Zaback testified that Ms. Anderson did point out her relationship to Ms. Beard, but that Ms. Anderson did not recuse herself and that Allan Zaback believed such recusal should have occurred.

Mr. Badley provided email correspondence between Ms. Anderson and Ms. Beard and Ms. Anderson introduced Ms. Beard (the candidate) to Dr. Terrence Macy on April 10, 2015, several days prior to the interviews. He also provided a copy of correspondence between Ms. Anderson and Ms. Beard in which Ms. Beard informed Ms. Anderson that she had applied for the Behavior Analyst Supervisor position. Ms. Anderson further testified that due to her mentoring relationship with Ms. Beard, she received such information from Ms. Beard whenever Ms. Beard applied for a position.

Ms. Anderson testified that she was contacted by Ms. Beard and another candidate prior to the interviews, requesting information as to the status of the applications since neither had received a call. This applicant correspondence, Ms. Anderson testified, prompted her to contact the employee charged with calling interviewees to gather information for the applicants.

Mr. Badley argued, and Allan Zaback testified, that Ms. Anderson had a pre-determined mind to hire Beard. Mr. Badley also argued that Ms. Beard was in fact not qualified as was presented by her resume and interview. This argument was based on her lack of experience working as a Behavior Analyst and a claimed lack of experience drafting behavior plans. Ms. Beard has a Master's degree in social work and had worked as Transitional Assistant at DDDS for three years at the time of the application.<sup>3</sup> Mr. Badley claimed support for his charge in the fact that several of the considered applicants had previously worked as Behavior or Senior Behavior Analysts while Ms. Beard had never held such a position. Furthermore, Mr. Badley argued the presence of discrepancies in Ms. Beard's claim of drafting experience when Ms. Beard's resume stated she had such experience, but her answers in the interview seemed to suggest she had solely assisted in providing information for drafting purposes and her short work experience in a position that would require such drafting indicated the unlikelihood of experience in such work. Allan Zaback also testified that he believed the qualifications of Ms. Beard to be lacking and her answers to be disingenuous. Ms. Wilson, Ms. Anderson, and Dr. Terrence Macy testified that they believed Ms. Beard to be qualified and that, after the withdrawal of the favored first day interview candidate,<sup>4</sup> Ms. Beard presented those qualities of individual assessment approach, through her answers in the interview, in which the Panel and DDDS were interested.

The Board finds as a matter of fact that DDDS called additional candidates for a second day of interviews because it did not find in the first day candidates those desired qualities of individual assessment which it was seeking.

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<sup>3</sup> Grievant Exhibit 3.

<sup>4</sup> Several Board members testified that another candidate was preferred after both days of interviews but that this preferred candidate withdrew her application as DDDS was approaching the reference-contacting phase of the hiring process. As per the testimony of Ms. Wilson, Ms. Anderson, and Dr. Terrence Macy, Ms. Beard was the next choice and thus was offered (and accepted) the position.

The Board finds as a matter of fact that Ms. Beard possessed a Master's degree in a social science field and had the required experience, thus being qualified for the awarded position.

The Board finds as a matter of fact that DDDS was seeking a candidate that displayed an individual-centered approach to patient treatment different from the then-practiced assessment related approach.

### **CONCLUSIONS OF LAW**

Merit Rule 18.5 provides:

Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the job requirements; (2) there has been a violation of Rule 2.1 or any of the procedural requirements in the Merit Rules; or (3) there has been gross abuse of discretion in the promotion.

Merit Rule 2.1 provides:

Discrimination in any human resource actions 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.

Merit Rule 10.4 provides:

Promotion. Candidates selected for promotion shall meet the position's job requirements. Vacancies shall be filled by promotion wherever practical and in the best interest of the classified service. Consideration shall be given to qualifications, performance record, seniority, conduct and, where applicable, the results of the screening and ranking process.

Merit Rule 6.3.2 provides:

The applications must be signed by the candidate. Any misrepresentations or falsifications may result in rejection of application, dismissal and disqualification or future applications.

In order to establish a *prima facie* case of discrimination a grievant must show: "(1) he was a member of a protected class, *i.e.*, . . . [age, race, gender, sexual orientation]; (2) he was

qualified for the new position; (3) he suffered an adverse employment decision . . . ; and (4) his employer's refusal to promote him occurred under circumstances that give rise to an inference of discrimination.”<sup>5</sup>

This Board has held that “[g]ross abuse of discretion is a high standard akin to reckless indifference or is found where there is an extreme departure from the ordinary care normally given to a situation.”<sup>6</sup> Delaware Courts have applied the business judgment rule's interpretation of gross abuse of discretion.<sup>7</sup> “The business judgment rule may be rebutted in those rare cases where the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith. The decision must be egregious, lack any rational business purpose, constitute a gross abuse of discretion or be so thoroughly defective that it carries a badge of fraud.”<sup>8</sup>

The Board finds as a matter of law that Mr. Badley has failed to meet his burden to establish that DDDS hired Ms. Beard when she was not qualified for the position, discriminated against Mr. Badley when they selected Ms. Beard based on a pre-determined decision as a result of Ms. Anderson's relationship to Ms. Beard, did not follow proper Merit Rule procedure, grossly abused its discretion in the hiring, and failed to reject Ms. Beard's application.

Mr. Badley failed to provide sufficient evidence that Ms. Beard does not meet the job requirements for the Behavior Analyst Supervisor position. Ms. Beard has a Master's degree in social work and had worked as a Transition Assistant for three years at the time of the application. Ms. Beard provided information in her application and interview stating her experience in aiding the drafting of behavior plans. While Mr. Badley argued that Ms. Beard's

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<sup>5</sup> *McClement v. Port Authority Trans-Hudson*, 2012 WL 5862424, at \*3 (3d Cir. Nov. 30, 2012).

<sup>6</sup> *In re Matter of Richard D. Smith*, MERB Docket No. 05-04-327, at p. 10 (2007).

<sup>7</sup> *Leung v. Schueller*, 2000 WL 264328, at \*11 (Del. Ch. 2000).

<sup>8</sup> *Aldina v. Internet.com Corp.*, 2002 WL 31584292, at \*4 (Del. Ch. Nov. 6, 2002) (internal quotation omitted).

experience was insufficient based on her lack of having held the position of Behavior Analyst while several other applicants had provided such services previously and Mr. Badley perceived such experience as pre-requisite, the actual job requirement was not so narrowly tailored and allowed for broadening of the pool of candidates as long as the desired skills and period of experience were found. Likewise, Mr. Badley contested that Ms. Beard misrepresented her experience in drafting behavior plans and was not qualified when her statements and descriptions in her resume lead to the inference that she did not in fact draft those plans herself but solely provided data for the provision and drafting of such plans. However, the descriptions of the work previously provided by Ms. Beard taken at their face value show her experience meeting the job requirements and the required experience as stated in the posting. The Board finds that no evidence was submitted that shows that Ms. Beard did not have the required experience and qualifications.

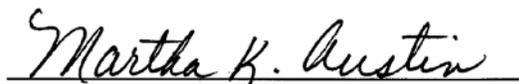
While Mr. Badley presented some evidence that showed a professional relationship between Ms. Anderson and Ms. Beard and prior contact between Dr. Terrence Macy and Ms. Beard, the evidence provided is insufficient to rise to the high standard of discrimination through pre-determination. Several Panel members testified that Ms. Anderson disclosed her relationship to the Panel and that the Panel nonetheless continued with the interviews. Furthermore, while communications with Ms. Beard indicate additional correspondence not received by other applicants, the procedures and process when evaluated objectively do not provide for the inference of discrimination. There is evidence that Ms. Beard possesses the qualities searched for in the candidate, that the Panel had not found what it was looking for in the first interview day candidates, and that the Panel in fact considered another candidate preferable prior to that candidate's withdrawal then choosing Beard based on her individual centered approach answer

during her interview. Thus, the Board finds no discrimination or gross abuse of discretion in the hiring of Beard and no violations of Merit Rules 18.5, 2.1, or 10.4.

Finally, the Board finds no violation of Merit Rule 6.3.2 when there was no evidence presented that the information provided by Beard in her application was in fact false. Although Mr. Badley stated that Ms. Beard's application when compared to her supporting documents and statements in her interview lead to the inference that she provided false information in the application, there was no more than this claimed inference provided. Thus, Mr. Badley did not meet his burden of proof in showing a violation of Merit Rule 6.3.2.

**ORDER**

It is this 6<sup>th</sup> day of June, 2016, by a unanimous vote of 3-0, the Decision and Order of the Board to deny Mr. Badley's appeal. The Board finds the Grievant failed to provide sufficient evidence that DDDS violated Merit Rules 18.5, 10.4, 6.3.2, or 2.1 when it hired MaryCarol Beard, rather than Brandon Badley, for the Behavior Analyst Supervisor position.

  
MARTHA K. AUSTIN, MERB Chairwoman

  
PAUL R. HOUCK, MERB Member

  
VICTORIA D. CAIRNS, MERB 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 on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must 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 of 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 6, 2016**

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