

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

IN THE MATTER OF
CARL McILROY,

Appellant,

v.

DEPARTMENT OF HEALTH AND
SOCIAL SERVICES,
Employer/Agency.

DOCKET NO. 97-12-113
DECISION AND ORDER

Before John F. Schmutz, Esquire, Dallas Green, and John W. Pitts, constituting a quorum of the Merit Employee Relations Board ("the Board") as required by 29 *Del. C.* §5908(a).

APPEARANCES:

For the Department: James Maxwell
Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, DE 19801

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

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 appellant.

The grievance which was the subject of the appeal concerned the promotion of Felix "Buddy" Dobrzynski to a vacant position of Field Investigator Supervisor within the Department of Health and Social Services in the Division of Management Services Audit and Recovery Managements Services ("ARMS") unit.

The appellant, Carl McIlroy, alleged that the selection of Mr. Dobrzynski for the position was the product of impermissible pre-selection for a position that was improperly posted in violation of the Merit Rules and also that Mr. Dobrzynski was not qualified for the posted position. Mr. McIlroy

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also asserted that Mr. Dobrzynski's selection was a gross abuse of discretion by the Agency and that it was the product of discrimination against Mr. McIlroy on the basis of non-merit factors, specifically, retaliation for a previously filed grievance. The appellant, pursuant to Merit Rule No. 21.0230, 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

Fred J. DeCusatis, in sworn testimony stated that during most of 1995 he worked for the Audit Recovery Management Services Unit as the Field Investigation Supervisor. He resigned that position in October of 1995 to take another State position and is presently employed by Wilmington Trust Company. As the Field Investigation Supervisor, Mr DeCusatis reported directly to Mr. Nelson Faulkner, Jr. who in-turn reported to William Garfinkle.

Mr. Garfinkle and Mr. DeCusatis were in route to Washington, D.C. for a meeting the day after Mr. DeCusatis had announced his resignation from the position of Field Investigation Supervisor and Mr. Garfinkle asked Mr. DeCusatis who would be taking over his duties. According to Mr. DeCusatis, he responded that he was teaching Nelson Faulkner how to assign the cases and to use the computer system. Mr. DeCusatis testified that at that point Director Garfinkle told him Nelson Faulkner was not the proper person for that job and Mr. Felix "Buddy" Dobrzynski was the proper person. Mr. Garfinkle directed Mr. DeCusatis to stop teaching Nelson Faulkner and start teaching Mr. Dobrzynski. Mr. DeCusatis testified that in his mind Mr. Garfinkle had already selected Mr. Dobrzynski as his successor. Mr. DeCusatis stated that he then asked Mr. Garfinkle if Carl McIlroy should also be trained on the computer system and Mr. Garfinkle instructed him to train Mr. Dobrzynski and Mr. Dobrzynski only. Mr. DeCusatis testified that he had mentioned that Carl McIlroy had five years experience at that time. Mr. Garfinkle had stated something to the effect that experience does not matter, train Buddy Dobrzynski. Mr. DeCusatis stated that he did not know how Mr. McIlroy got back into it but that just before he left the position he was directed to give training to both Mr. McIlroy and Mr. Dobrzynski on the computer program used to produce reports on field investigations.

Mr. DeCusatis testified that in 1992 he was involved with Nelson Faulkner, Carl McIlroy and Larry Brown, another investigator, in a grievance concerning unfair treatment by Will Garfinkle. There was a meeting with Director Wayne Bergner concerning the grievance and it was understood that there would be some changes made to get the flow of information going among the members of the unit. Mr. DeCusatis testified that after several meetings they did not feel that Mr. Garfinkle was living up to the agreement. Another letter was sent to Director Wayne Bergner expressing concern. Mr. Bergner responded that they were not giving Mr. Garfinkle enough time to make the system work. According to Mr. DeCusatis the grievants, at that point, did not pursue the matter further.

According to Mr. DeCusatis, William Garfinkle never forgot that those individuals had brought a grievance against him and always held it against them. He thereafter acted differently and less favorably towards those individuals than he did with the rest of the members of the Audit Recovery Unit.

Mr. DeCusatis further testified that Kathy Coffin was the investigative auditor supervisor and did not supervise the field investigators with the exception of Mr. Dobrzynski who she hired. Normally field investigators were interviewed by Nelson Faulkner and Fred DeCusatis but that procedure was not followed for the hiring of field investigator Dobrzynski. Mr. DeCusatis testified that he believed this situation related back to the subject of the grievance against Mr. Garfinkle who had been trying to reorganize the unit so that the investigators would be put under the control of the auditors and Ms. Coffin. Under Mr. Garfinkle's proposed reorganization Mr. DeCusatis would be left with the title of field investigative supervisor doing special projects for Mr. Garfinkle regarding food stamps.

On cross examination, Mr. DeCusatis testified that the computer program in use in his office was one of his own creation and that anyone who was to use it would have to consult with him. Mr. DeCusatis stated that the reorganization in the unit had not occurred when he resigned at 4:00 p.m. on October 10, 1995 but there were rumors that there was going to be a reorganization. Mr. DeCusatis further testified that field investigator Dobrzynski reported to Kathy Coffin but received his assignments from him. He stated that he had no problems with Mr. Dobrzynski's work as an investigator. Mr. DeCusatis told the Board that when he left both for his new job both Buddy

Dobrzynski and Fred McIlroy had been trained in the use of the computer program used to track Rule 9 warrants and investigations.

In response to Board members' questions, Mr. DeCusatis testified that Mr. Garfinkle did not outwardly display his bad feelings for the individuals who had filed the grievance against him rather he hid it. He also related that there was another individual, Mr. Bubacz, who would have been able to operate the computer program and that there was a manual available so that someone with basic knowledge could follow it and get the information. DeCusatis also stated that after the grievance William Garfinkle did not take him into his confidence anymore.

Nelson Faulkner, Jr., being sworn, testified that he has been employed by the Division of Management Services Audit Recovery section since the unit was originally formed in 1975 and was working there when he and others filed a grievance against William Garfinkle. According to Mr. Faulkner, the difficulty was with Mr. Garfinkle and related to his wanting them to perform jobs that differed from that described in the descriptions of the positions. Mr. Faulkner stated that as a result of the grievance there was supposed to be a leadership team set up and leadership team meetings but the meetings eventually fell apart. According to Mr. Faulkner, William Garfinkle was always taking work away from him until he had stripped him of his merit system job specifications and this was done because of Mr. Faulkner's participation in the grievance in 1992. Mr. Faulkner was a manager directly under Mr. Garfinkle and according to his testimony never received any work related information and was just cut out by Mr. Garfinkle.

Mr. Faulkner testified that he had asked Fred DeCusatis to familiarize him with his duties so he could take over until a replacement was hired. Mr. Faulkner stated that he was told that Fred DeCusatis was to train Buddy for the job and that he (Faulkner) would be doing something else. It was during this period, according to Mr. Faulkner, that he was moved from his office to a position beneath another person with a lower pay grade in the accounting section. Mr. Faulkner stated that his placement below a person with a lower pay grade who was to supervise him was related to the prior grievance. It was not the only thing, but the prior grievance was a part of it and he believed that the ill feelings that existed between him and Mr. Garfinkle also existed between Mr. Garfinkle and

Mr. McIlroy and that those ill feelings would interfere with the selection of Mr. McIlroy for any position for which he applied.

Oscar Sebastian, being sworn, testified that he had been a state employee for about 23 years presently with the Audit and Recovery Unit. He testified that, around the time of the grievance in 1992 William Garfinkle had been in Sebastian's office and had commented that he would not forget those who had been a part of the grievance against him. His statement was to the effect that he would remember each and every one of them and he was upset with the individuals who had filed the grievance.

Carl McIlroy, being sworn, testified that he is currently employed as a field investigator for the Division of Management Services Audit and Recovery Group stationed at the Milford Service Center. Prior to joining the unit in 1991 Mr. McIlroy had been the Chief of Police for the City of Harrington and for the Town of Felton. Concerning the 1992 grievance which involved William Garfinkle, Mr. McIlroy testified that the grievance centered on things that were being done within the organization. As a result of the grievance additional training was made available but the team meetings that were to result did not continue. Mr. McIlroy did not think it was a good working relationship with Mr. Garfinkle after the grievance and he felt that Mr. Garfinkle was trying to get him for the grievance.

At the time Mr. DeCusatis resigned, Mr. McIlroy, according to his testimony told Mr. Garfinkle that he was interested in applying for the position being vacated and asked him if he could sit in with Mr. DeCusatis during the interim before Mr. DeCusatis went to his new job. According to Mr. McIlroy, Mr. Garfinkle told him that not only could he not sit in during the interim but that if he wanted to move up after the reorganization he could apply for an auditor's position. Mr. McIlroy testified that he had requested to sit in during the interim because there was a practice that if you sat in during the interim you were selected for the position. He stated that on October 18th he received a memo from Mr. Garfinkle that stated that he could not sit in and that he would better serve the unit by doing his work in Kent and Sussex County because he was the only investigator for those counties. On Friday, October 27th according to Mr. McIlroy, he was informed that he could come to Wilmington for training with Mr. DeCusatis and he was given eight and one-half hours of training

on Monday and Tuesday October 30th and 31st. Mr. McIlroy stated that Ms. Coffin had sent an E-mail to Oscar Sebastian informing him that Carl McIlroy would be allowed to come up on Monday and Tuesday for training. According to Mr. McIlroy, he called Ms. Coffin when he became aware of the E-mail to Mr. Sebastian and reminded her that he was the senior investigator and inquired why he could not have training before that time. He stated that she told him that it would not be fair to Buddy for him to sit in on that position as they were trying to bring Buddy Dobrzynski to his level.

Mr. McIlroy testified that during the interim between the time Mr. DeCusatis resigned and the time that the position was filled Mr. Dobrzynski was preparing reports that Mr. DeCusatis had done and had become the contact person for Rule 9 warrants which was another responsibility of Mr. DeCusatis' position. Also, prior to his resignation, Mr. DeCusatis had been the person that was in charge of DELJIS access. Mr. McIlroy testified that in November he had a problem with his DELJIS password and, since Mr. DeCusatis, the security officer, was no longer there, he contacted DELJIS to straighten the matter out and was told to contact his security officer, Mr. Dobrzynski. Mr. McIlroy testified that he felt Mr. Dobrzynski had already been selected for Mr. DeCusatis' position.

Mr. McIlroy told the Board that he was interviewed for the position on the day of the unit's Christmas party which was on December 18th. At the interview, Mr. McIlroy was told that the position for which he had applied was not really the job that the individual selected would be performing. The position to be filled was not to have supervisory responsibility. Mr. McIlroy testified that one of the reasons he applied for the position was because of his supervisory background. He stated that, to his knowledge, Mr. Dobrzynski did not have any supervisory experience and that he was a corporal with the Delaware State Police for 21 years and, according to Mr. McIlroy, a corporal with the State Police is not a supervisory position. Mr. McIlroy testified that he believed that he would not be selected for the position no matter how good his qualifications.

On cross examination Mr. McIlroy testified that Mr. Dobrzynski is a good investigator but he did not think him qualified for the position because of the supervisory experience requirement.

In response to questions from the Board members, Mr. McIlroy testified that the position for which he applied no longer existed and now the title has been changed to Chief Investigator. When

he applied for the position he was a paygrade 10 and the position which Mr. DeCusatis had held was a paygrade 13.

Arlene M. Grinnage was sworn and testified that she is a senior secretary in Audit and Recovery Management Services. She works for William Garfinkle and has done so since he began working in the unit in 1986 or 1987. She testified that during an internal investigation she had indicated that there was selected for positions within the unit. She stated that it was her belief that Mr. Dobrzynski was preselected for the position because he was offered the training after Mr. DeCusatis resigned. According to Ms. Grinnage, the individuals involved with the preselection were Ms. Coffin, Mr. Garfinkle and Mr. Meara.

On cross examination, Ms. Grinnage testified that the preselection opinion was her opinion and that her opinion was based on the training given to Buddy Dobrzynski and the fact that he was up there in Mr. DeCusatis' office before the position was filled. She testified that the training was for the database which Fred DeCusatis had set up.

Sandra Correll being sworn testified that she is a personnel officer II with Delaware Health and Social Services and has worked in the human relations field since 1981. In October of 1995 her office received a request to open a competitive selection for a field investigator supervisor position from William Garfinkle and his Division Director Wayne Bergner. After the posting of the position, applications were received and Ms. Correll reviewed them for minimum qualifications and scoring of the applications. She reviewed the qualifications of Mr. Dobrzynski and determined that he was qualified. There were at least 16 qualified applicants including Mr. Dobrzynski and Mr. McIlroy. Ms. Correll testified that the scoring of the applicants which she performed was to determine inclusion on the certification list had no applicability in the final selection process. She stated that all 15 applicants on the list were deemed qualified and could be selected for the position. Ms. Correll testified that Mr. Dobrzynski had sufficient supervisory knowledge and experience from his associates degree in business administration which standing alone would have met the minimum qualification. In addition, he had functioned as an acting supervisor during his employment with the Delaware State Police.

David Meara being sworn testified that during 1995 he was employed by the State of Delaware in the Division of Quality Control, Bureau of Quality Control with the Division of Management Services. William Garfinkle asked him to serve on an interview team with Kathy Coffin. Mr. Meara testified that he reviewed the applications with William Garfinkle and Kathy Coffin and they interviewed and discussed the applicants over two days of scheduled interviews. William Garfinkle was present for the first day of interviews and then became ill. The second day of interviews was rescheduled and the interviews were conducted by David Meara and Kathy Coffin. One of the candidates favored by William Garfinkle was a woman with prior experience with either the Secret Service or the Federal Bureau of Investigation. Mr. Meara and Kathy Coffin had other opinions and, according to Mr. Meara, since Mr. Garfinkle had not been present for the second interview day he determined that he would not further participate in the selection and would defer to the selection of Mr. Meara and Ms. Coffin. Mr. Meara and Ms. Coffin selected Mr. Dobrzynski.

On cross examination, Mr. Meara testified that he and Kathy Coffin listened to William Garfinkle about those candidates which he had interviewed and Mr. Garfinkle was present for the interview of Carl McIlroy. He also related that during the interviews either William Garfinkle or Kathy Coffin had advised each applicant that the position would not have any supervisory responsibility. Every applicant was asked the same series of pre-prepared questions which Kathy Coffin had gotten from the human resources office. Mr. Meara testified that he regarded William Garfinkle as a friend and they both worked for many years as branch chiefs.

Kathy Coffin, being sworn testified that she is employed as a social service senior administrator in charge of field operations with the Audit and Recovery Management Services Unit of the Department of Health and Social Services. Ms. Coffin testified that effective October 10, 1995, the unit was reorganized. Under the prior organization there was a unit called Field Investigations or Litigation and Enforcement group with a manager supervisor and three field investigators statewide. Under the new organization that group was disbanded and field investigators were placed under the supervisors of the investigative auditors. Before the reorganization Mr. DeCusatis' position had three investigators reporting to it and after the reorganization no one reported to that position.

According to Ms. Coffin, within minutes after receiving the news of the reorganization and leaving Mr. Garfinkle's office, Mr. DeCusatis sent an E-mail to his supervisor Nelson Faulkner saying that he had accepted a position with the Division of Drug and Alcohol and that he would be leaving October 31st.

Ms. Coffin testified that Fred DeCusatis had a complex D-base III plus system about which she knew absolutely nothing and other people in the unit did not know about either so she asked for a meeting with Mr. DeCusatis and with Will Garfinkle. According to Ms. Coffin, Larry Brown, one field investigator, had left the unit on October 3rd and she was left with two field investigators statewide. Ms. Coffin testified that because the meeting she requested took place in William Garfinkle's office, which was in New Castle County she asked Mr. Dobrzynski to sit in on the meeting. At the meeting Mr. DeCusatis gave her a quick description of his job responsibilities. She stated that she was upset that they had no one that could extract information from Mr. DeCusatis' computer program and she had only 21 days before Mr. DeCusatis left. She testified that Felix Dobrzynski was asked to learn how to pull information out of the system for reports because he was located in New Castle County. Mr. McIlroy's office was in Kent County. Ms. Coffin testified that she was counting on Mr. Dobrzynski to keep things going in New Castle County while Mr. McIlroy kept things going in Kent and Sussex counties. When Mr. McIlroy felt that Mr. Dobrzynski was being trained for the position, he, according to Ms. Coffin, asked to come to New Castle County to be trained also and eventually he was brought up and received training with Mr. Dobrzynski. Ms. Coffin testified that she sent an E-mail restricting the number of days that Mr. McIlroy could come to New Castle County to two days a week to keep the case load on investigations in Kent and Sussex Counties from slipping. Mr. Dobrzynski complained, according to Ms. Coffin, that he had to keep his case load up and was not going to be able to spend as much time training as Carl McIlroy which was another reason she limited Carl McIlroy to two days a week. Ms. Coffin testified that she was concerned about getting any additional help from Mr. DeCusatis after he left because he had not been very helpful to her or to Will Garfinkle up until the time he left. She thought he might give and McIlroy some help but would not do it if she requested it of him.

Ms. Coffin stated that after the position was posted that she had two conversations with Carl McIlroy and on one occasion in her office he had stated to her that if he did not get the position he would file a grievance against her or against the unit. She related that William Garfinkle had been present for 8 of the 16 interviews.

Ms. Coffin recounted that the reorganized position was to perform special investigations and there would be no staff under that position however she contended that it was the same position that Mr. DeCusatis had occupied but just with no one to supervise.

As to the meeting at which the selection was made, Ms. Coffin testified that after the interview with Carl McIlroy which was held in Mr. Garfinkle's office, the three individuals on the selection committee discussed applicants. Mr. Garfinkle favored a candidate from the FBI but since Mr. Garfinkle had not interviewed all of the applicants, he left the decision up to Mr. Meara and Ms. Coffin. They, according to Ms. Coffin, selected Mr. Dobrzynski. She testified that she never told anyone that she thought Buddy Dobrzynski was really the only candidate that should be selected nor did she ever say that Carl McIlroy should not be the person selected.

Ms. Coffin testified that she had previously hired Mr. Dobrzynski in January of 1995 as a field investigator and had the opportunity to speak with his supervisor at the State Police who gave him a high recommendation. According to Ms. Coffin, Mr. Dobrzynski's reference check was impeccable at the time she hired him. She testified further that during the interviews, supervisory duties and abilities of the applicants were not really discussed because the position was to have no supervisory responsibility.

Ms. Coffin testified that after Carl McIlroy filed his grievance she made a comparison of the qualifications of Mr. McIlroy and Mr. Dobrzynski (State's exhibit 8) which she testified was taken from the applications each submitted for the position.

According to Ms. Coffin, the Agency did not tell the State Personnel Office that the principals accountabilities for the position were to be changing because it was no longer to be a supervisory position. Ms. Coffin stated that she was not familiar with any requirement that State Personnel had to be notified of any changes in the minimum qualifications for a position. She also testified that, after the fact, she had become aware that Mr. McIlroy had asked Mr. Garfinkle for additional training on

the computer system which request Mr. Garfinkle had denied. She testified that she did not tell Mr. McIlroy that Mr. Dobrzynski was to get additional training to bring him up to the level of McIlroy. Ms. Coffin testified that she was so intent on trying to keep an even keel between Dobrzynski and McIlroy and was so afraid that she was going to do something wrong and that one was going to get to do more than the other, that she may have made such a statement but she contended it was taken out of context.

Ms. Coffin stated that after the reorganization there were six new field investigators hired in New Castle County, two new investigators hired in Kent, and two hired in Sussex County. She also testified that the person with the most D-Base computer program experience was not necessarily the most desirable employee since the D-Base system was no longer in use. According to Ms. Coffin, she needed someone with knowledge of Mr. DeCusatis' D-Base system only for a short while and that all of the applicants were told during the interview that the existing computer system was to be phased out. She stated that it took about one year after the reorganization to get a new computer system in place.

In response to questions from Board members, Ms. Coffin testified that a person having all of the qualifications for the posted position except for the supervisory experience should have been able to apply for the posted position but the only way such persons would have known that the supervisory experience was not a requirement was if they had applied for the position and had been interviewed. She also stated that the threat to file a grievance made by Mr. McIlroy did not come up in the interview discussion and that while Mr. Garfinkle knew of it, Mr. Meara did not. Ms. Coffin stated that after the second threat by Mr. McIlroy she was so upset about it that she took it on herself to call human resources.

Felix Dobrzynski being sworn, testified that his position with the State is technically as a supervisor of field investigations. He stated that both he and Carl McIlroy were both trying to learn Fred DeCusatis' computer program before Mr. DeCusatis left and after he left as well and that on several occasions it was necessary to call Mr. DeCusatis for help after he had gone to his new position. The system was eventually discontinued in July of 1996.

Mr. Dobrzynski testified that he had over 22 years service with the Delaware State Police and was a Master Corporal for seven or eight years prior to his retirement. In that capacity he was technically considered the assistant supervisor from his department the Youth Aid Division. His supervisory responsibilities included assigning criminal complaints, reviewing and approving reports, authorizing vacation schedules, investigating outside complaints made against subordinates, and obtaining criminal warrants through a database. Mr. Dobrzynski stated that there were a number of things about the computer program that Fred DeCusatis did not tell him or Carl McIlroy. Mr. Dobrzynski told the Board no one had promised him the supervisor position before the position was formally offered to him. He testified that he did not recall attending a meeting with Ms. Coffin and Mr. Garfinkle a week or so prior to the time he began his training with Mr. DeCusatis. He testified that he understood that he was given training because it was convenient since his office was right next to Fred DeCusatis' office. It was, according to Mr. Dobrzynski, common knowledge in the department that he was being trained on the computer program and that Carl McIlroy was not being trained. Mr. Dobrzynski testified that he has never supervised anyone in his present position.

The Appellant and the Agency, through counsel, stipulated that if State Police Sergeant John Slank were called as a witness his sworn testimony would support the testimony of Felix Dobrzynski concerning his supervisory responsibilities as a Master Corporal with the Delaware State Police.

Martha Austin, Deputy Director of Human Relations with the Department of Health and Social Services, being sworn, testified that the position of supervision special investigations is a functional job title that does not come with all of the qualifications and principal account abilities that are listed in the position posting by the State Personnel Office. She opined that the duties and principal account abilities of a position are not exclusive and are not all inclusive and indeed, vary depending on the particular location of the position. She could not, however, call to mind any job title which called for supervisory responsibilities where the position did not entail any supervision.

The position, according to Ms. Austin is still a field investigator supervisor but the functional title was different. Ms. Austin testified that an agency can make changes in a position before or after it is filled but that they are required to report the changes to the Director of State Personnel so that the position can be reviewed to see if it is properly classified. She agreed that it would be unusual to

require supervisory experience as a minimum qualification for a position which is doing no supervising.

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. 7.0200

When posting a vacant position, the appointing authority shall post inter-agency vacant positions for a period of at least five (5) working days and inter-agency vacant positions for at least fifteen (15) calendar days before the closing date for receipt of applications. Notices shall contain all pertinent information about the positions being filled.

DISCUSSION, FINDINGS AND CONCLUSIONS

PRE-SELECTION AND RETALIATION

In this instance the majority of the quorum of the Board hearing this matter finds that the appellant has produced sufficient credible evidence to meet his burden of showing that there was improper pre-selection of Mr. Dobrzynski for the position of Field Investigator Supervisor to the detriment of Mr. McIlroy. The evidence that the non-selection of Mr. McIlroy for the position was grounded on retaliation against him by William T. Garfinkle (who was not called as a witness in this proceeding), is perhaps less compelling than the evidence of pre-selection but it is none the less sufficient to convince a majority of the quorum of the Board hearing his matter of the truth of the allegation that a substantial factor in Mr. McIlroy's non-selection was retaliation for Mr. Garfinkle's announced intent to remember those who had filed a grievance against him in 1992 and for his perceived threats (which Mr. McIlroy denied having made as threats) to Ms. Coffin to file grievances concerning the filling of the position.

Fred D. DeCusatis, Nelson Faulkner, Jr. and Arlene Grinnage testified convincingly that ARMS Director William Garfinkle had selected Felix "Buddy" Dobrzynski to fill the position of Field Investigation Supervisor from which Mr. DeCusatis had resigned on October 10, 1995. Mr. Garfinkle directed Mr. DeCusatis to terminate his instruction of Nelson Faulkner and to begin instructing Buddy Dobrzynski in the intricacies of the unique D-Base computer program Mr. DeCusatis has designed. Beyond the training, or as a result thereof, Mr. Dobrzynski began performing more and more functions of the position and, as Mr. McIlroy testified was even designated as the supervisor for purposes of access to the Delaware Criminal Justice Information System ("DELJIS"). Ms. Arlene Grinnage, Mr. Garfinkle's secretary since approximately 1986 knew pre-selection when she saw it and testified that, in her opinion, Mr. Dobrzynski had indeed been pre-selected to fill the position before it had been posted. The Department responds that the "selection" of Felix Dobrzynski resulted from necessity and was driven by the resignation of Fred DeCusatis and the circumstances Mr. Garfinkle and Ms. Coffin were presented because of his "home grown" computer program which no one else could effectively use. The Agency also points to Mr. McIlroy's work location in Kent and Sussex Counties. The Department also contends unconvincingly that any adverse influence which Mr. Garfinkle may have had in either pre-selection or retaliation was eliminated when he stepped back from the decision process because his illness had prevented him from interviewing all of the candidates. Carl McIlroy and others in the unit learned of the training given to Buddy Dobrzynski and, as Mr. McIlroy testified, there was a general perception that the person trained would get the job. He confronted Kathy Coffin about also receiving training on the operation of Mr. DeCusatis' computer program. Mr. McIlroy denies having threatened to file a grievance if he did not receive the training or get the position. Ms. Coffin testified that he made such a threat on two occasions. It is clear that without regard to what Mr. McIlroy meant by his statements, Ms. Coffin perceived them as threats to file a grievance. He was eventually given limited training on the system by Fred DeCusatis together with Mr. Dobrzynski and it is clear that this was a management effort to neutralize his concern over the expectation that the individual who was trained would get the position. Mr. McIlroy testified that Ms. Coffin had told him that it was an effort to bring Mr. Dobrzynski's computer ability up to his. Ms. Coffin denies any such motivation

or statement and insists that the designation of Mr. Dobrzynski was grounded in her need to have someone immediately available to operate and to get reports out of the computer system because of the unexpected resignation of Fred DeCusatis.

At the time of these events, and thereafter, the management structure always placed Mr. Garfinkle in a position where Ms. Coffin reported to him. It is evident that Mr. Garfinkle had been attempting for some period, perhaps as early as the 1992 grievance, to restructure the organization with the investigators reporting to Ms. Coffin.

With Mr. Garfinkle's secretary testifying that she had concluded that Mr. Dobrzynski had been pre-selected for the position it is not inconceivable that Ms. Coffin was also aware of such pre-selection and indeed, since she was already the supervisor for Felix Dobrzynski, supported it. Also, as a long term employee reporting to Mr. Garfinkle, Ms. Coffin was aware of the prior grievance brought by Fred DeCusatis, Nelson Faulkner, Jr., Larry Brown and Carl McIlroy against Mr. Garfinkle and of the lingering bad feelings harbored by Mr. Garfinkle as testified to by Carl McIlroy, Fred DeCusatis, and by Nelson Faulkner, Jr. According to the testimony of Ms. Coffin, Mr. Garfinkle was also aware of the "threats" of another grievance by Carl McIlroy. Under these circumstances, the pre-selection of Mr. Dobrzynski was also the non-selection of Carl McIlroy to fill the newly reorganized position which was, contrary to the posting of the position, was to no longer supervise the field investigations but rather was to conduct special investigations as directed by Will Garfinkle and Ms. Coffin, neither of whom wanted to see Carl McIlroy in that position.

QUALIFICATIONS OF THE SELECTED APPLICANT

Mr. McIlroy has failed to support his allegation that Felix Dobrzynski was not qualified for the position into which he was promoted or that, absent the improper pre-selection, his selection amounted to a gross abuse of discretion. On the contrary, even with the erroneous inclusion of the qualification relating to supervisory experience, for a position which had been reorganized to eliminate any supervision, the evidence produced by the Department shows Felix Dobrzynski to be qualified for the position and indeed, he may well have been the best qualified candidate.

POSTING OF THE REORGANIZED POSITION

The timing of the posting of the position of Field Investigation Supervisor and the complete reorganization of the Audit and Recovery Unit reporting responsibilities was unfortunate at best. As a practical matter, it resulted in the posting of a supervisory position which was no longer supervisory and included a preferential requirement of limited usefulness given the reorganized position. One-third of the posted minimum qualifications were no longer required qualifications of the position which was actually being filled. The first listed accountability of the position (supervises, trains and evaluates the performance of field investigative personnel) had been eliminated. Under the circumstances presented, this posting rises to the level of a material violation of Merit Rule No 7.0200 which requires that notices shall contain all pertinent information about the positions being filled.

The Board, by vote of two to one, with Board Member John F. Schmutz dissenting, finds that persuasive evidence was presented of both the inappropriate pre-selection of Mr. Dobrzynski and the retributive non-selection of Carl McIlroy. The Board however is unanimous in its determination that the position posting in this situation was for a position significantly different than the position that was filled both in terms of the principal account abilities and the minimum qualifications. It should be properly posted as the reorganized position actually being filled.

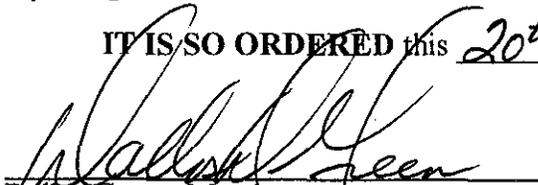
The evidence is convincing that Mr. McIlroy did not receive full and fair consideration for this position and the Board so finds. The process by which this position was posted and filled can not, under these circumstances, be permitted to stand. The pre-selection by management was established and was, under the circumstances, unnecessary and inappropriate. The non-selection of Mr. McIlroy is inextricably intertwined with the improper pre-selection and by the taint of the retribution for a prior grievance which is not removed by the absence of Mr. Garfinkle from the final selection committee with the continued presence of Ms. Coffin who directly reported to Garfinkle and who was aware of the preference for Mr. Dobrzynski. It is equally clear that Mr. Dobrzynski was without blame in this matter and may, indeed, have been the best qualified candidate for the position even though the independent ranking for the limited purpose of placement on the certification list gave Mr. McIlroy one point higher. The Board unanimously concludes that this position, as reorganized, with

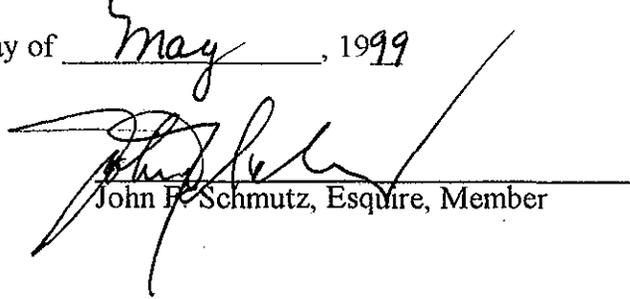
the proper and objectively drafted qualifications and account abilities should be promptly posted and filled. Both Mr. Dobrzynski and Mr. McIlroy will be eligible to apply for the newly posted position, and should, along with any other properly qualified applicants, be given honest and fair consideration by a selection process that does not include either Ms. Coffin or Mr. Garfinkle nor anyone reporting to either of them.

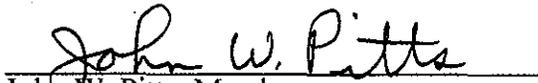
ORDER

For the foregoing reasons, the grievance is upheld. The reorganized position, with proper account abilities and qualifications is to be posted, advertised and filled with the best qualified candidate. The Selection Committee is not to include either Ms. Coffin nor Mr. Garfinkle nor anyone reporting to either of them.

IT IS SO ORDERED this 20th day of May, 1999


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 filed within thirty (30) days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial *de novo*. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

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

Mailing Date: May 21, 1999 *JD*

Distribution:

Original: File

Copies: Grievant's Representative
Agency's Representative