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BEFORE THE MERIT RELATIONS BOARD

OF THE STATE OF DELAWARE

JOYCE M. PINKETT, Employee/Grievant, v. DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Employer/Respondent.	))))))))))	**DOCKET No. 06-05-355** **DECISION AND ORDER**

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 17, 2008 at the Margaret M. O'Neill Building, 410 Federal Street, Suite 213, Dover, DE 19901

BEFORE Brenda C. Phillips, Chair, and John F. Schmutz, Joseph D. Dillon, and Martha K. Austin, Members, constituting a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman, Esquire
Deputy Attorney General
Counsel to the Board

Jean Lee Turner
Administrative Assistant to the Board

Joyce M. Pinkett
pro se

Kevin R. Slattery, Esquire
on behalf of the Department of
Health and Social Services

SUMMARY OF THE EVIDENCE

The grievant, Joyce M. Pinkett ("Pinkett"), called four witnesses: Frank O'Conner, retired Chief of Administration, Division of Social Services ("DSS"); Beth Laucius, Chief of Administration, Division of Medicaid and Medical Assistance ("DMMA"); and Emma Curtis, a Social Services Administrator at DMMA.

The Department of Health and Social Services ("DHSS") called the same three witnesses and Harry Hill, the Director of DMMA.

The Board admitted into evidence without objection twelve exhibits offered by DHSS: Merit Rules 10.4 and 18.5 (S-1A); Job Posting for Social Services Chief Administrator position (S-1B); Pinkett's employment application (S-1C); employment application of Marie Nonnemacher (S-1D); Certification List for Social Services Chief Administrator position (S-1E); Interview notes of Beth Laucius (S-1F); Interview notes of Frank O'Conner (S-1G); Interview notes of Dennis Savage (S-1H); Interview scoring sheet (S-1I); Pinkett's initial grievance dated February 1, 2006 (S-1J); Pinkett's amended grievance dated February 28, 2006 (S-1K); and Step 3 Grievance Decision (S-1L).

FINDINGS OF FACT

In 2005, DHSS posted an opening for the position of Social Service Chief Administrator (paygrade 20). The posting listed six minimum qualifications for the job, including: "Experience in the management of an operation involved in delivering service-oriented programs in accordance with federal rules and regulations."

Pinkett (who at the time was a paygrade 16) applied for the job. Pinkett met the minimum qualifications and was placed on the certification list with 32 others. An interview panel (Beth Laucius, Frank O'Conner, and Dennis Savage) developed a standard list of questions and interviewed eight candidates on the certification list, including Pinkett. The candidates' interview score sheets ranged from 26 to 90. Pinkett scored 77. Three candidates scored higher than Pinkett. Marie Nonnemacher, who worked for the Department of Services for Children, Youth and their Families ("DSCYF"), scored the highest (90).

Mr. O'Conner testified that he believed Nonnemacher was the most qualified candidate because she had a Masters in Public Administration and extensive budget and fiscal experience: she had worked as a Senior Fiscal and Policy Analyst at the Office and Management and Budget for six years (1985-1992) with principal responsibility for DHSS.

At the time of the interviews, Ms. Laucius had just left the position of Social Services Chief Administrator and was personally familiar with the knowledge, skills and abilities the job required. Ms. Laucius testified that she believed Nonnemacher was the most qualified candidate because of her OMB budget forecasting experience; her education and professional associations; and her fiscal experience with DSYCF since 1992 as the Cost Recovery Administrator.

Based on the interview panel's unanimous recommendation, the Director of DMMA, Harry Hill, promoted Nonnemacher to Social Services Chief Administrator.

At the time Pinkett applied for the position she was 47 years old. Nonnemacher was 55. The members of the interview panel were 54 (Laucius), 59 (O'Connor), and 57 (Savage). Mr. Hill was 58.

Mr. Hill testified that in the last two years, DSS/DMMA has hired 20 people at paygrade 17 or higher, sixteen from within the Division, two from other State agencies, and two from outside State employment.

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 minimum qualifications; (2) there has been a violation of Merit Rule 2.1 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 10.4 provides: "Candidates for promotion shall meet the position's minimum qualifications. 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 competitive examinations."

Pinkett makes four claims: (1) Marie Nonnemacher did not meet the minimum qualifications for the position of Social Services Chief Administrator; (2) DHSS discriminated against Pinkett on the basis of her age by not promoting her to that position; (3) DHSS grossly abused its discretion in promoting someone from outside the Department; and (4) DHSS did not consider Pinkett's seniority and performance record in deciding which candidate to promote.

Pinkett bears the burden of proving each of her four claims by a preponderance of the evidence. "The burden of proof on any such appeal to the Board . . . is on the employee." 29 *Del. C.* §5949(b). "[T]he statutory plan places the burden upon an employee in an appeal to the [Board]. In other words, on such an appeal, an employee must present evidence sufficient to rebut

the presumption that the [agency's action] was correct." *Hopson v. McGinnes*, 391 A.2d 187, 188 (Del. 1978).

The Board concludes as a matter of law that Pinkett did not meet her burden of proving any of her four claims.

1. Minimum Qualifications

Pinkett claimed that Marie Nonnemacher did not meet the first minimum qualification listed in the posting for the position of Social Services Chief Administrator: "Experience in the management of an operation involved in delivering service-oriented programs in accordance with federal or state rules and regulations." Pinkett claimed that Nonnemacher misrepresented her job responsibilities at DSYCF on her application in order to meet that qualification and that she did not have experience in managing the delivery of social services to DSCYF clients.

Pinkett's own witness, Emma Curtis, however, testified that Nonnemacher accurately described her job responsibilities at DSCYF on her application when she stated: "I am currently the Manager of a unit of 11 individuals who are responsible for maximizing Medicaid and IV-E revenue for the state by determining and facilitating eligibility for social service programs and by creating Medicaid claims for the mental health services provided by DSCYF to children in our care." Ms. Curtis agreed that Nonnemacher's position at DSCYF gave her experience managing the delivery of social services by "providing services to someone in need."

Pinkett felt that Nonnemacher's application was misleading because it suggested that her unit at DSYCF was responsible for "determining" Medicaid eligibility and only DMMA can make that determination. On her application, Nonnemacher stated that the unit she supervised was

responsible "for maximizing Medicaid and IV-E revenue for the state by determining or facilitating eligibility for social service programs and by creating Medicaid claims for the mental health services provided by DSCYF to children in our care." Ms. Curtis testified that this was accurate because DSCYF facilitates the Medicaid process by preparing the initial paperwork for DMMA's review, and DSCYF was responsible for determining eligibility for IV-E (foster care) revenue. [1]

The Board concludes as a matter of law that Pinkett failed to meet her burden to prove that Nonnemacher did not meet the minimum qualifications for the position of Social Services Chief Administrator. All of the information in the first paragraph of Nonnenmacher's application was accurate and showed she met that minimum qualification for the job.

2. Age Discrimination

To make out a *prima facie* case of intentional age discrimination, Pinkett must show: "'1) that [she] belongs to the protected class [over the age of 40], 2) that [she] applied for and was qualified for the job, 3) that despite [her] qualifications [she] was rejected, and 4) that the employer either ultimately filled the present position with someone sufficiently younger to permit an inference of age discrimination or continued to seek applicants from among those having [her] qualifications.'" *Barber v. CSX Distribution Services*, 68 F.3d 694, 698 (3rd Cir. 1995) (quoting

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[1] Pinkett also felt that another statement in Nonnemacher's application was inaccurate: "Already considered a subject matter expert in Medicaid regulations regarding mental health, services and eligibility for children, the addition of the client eligibility function requires me to conduct extensive research on the Title IV-E program (Foster Care and Adoption Assistance)." Ms. Curtis testified that she did not know one way or the other whether that statement was accurate, and Pinkett did not offer any evidence that it was not.

Fowle v. C&C Cola, 868 F.2d 59, 61 (3rd Cir. 1989)).

Pinkett belongs to the protected class (she was 55 when she applied for the Social Services Chief Administrator position); she applied for and qualified for the job; and DHSS did not select her for the position. The Board, however, concludes as a matter of law that DHSS did not fill the position with someone sufficiently younger to permit an inference of age discrimination. At the time of her promotion to the Social Services Chief Administrator position, Marie Nonnemacher was 47 and Pinkett was 55. The Board does not believe that an eight-year age difference is a sufficient basis to infer that DHSS discriminated against Pinkett on the basis of her age, particularly since both candidates were over the age of forty.

Even if Pinkett made a *prima facie* case of age discrimination, the employer can rebut the presumption of discrimination "by providing a legitimate, nondiscriminatory reason for the adverse employment decision." *Steward v. Sears Roebuck & Co.*, 231 Fed.Appx. 201, 2007 WL 2310028, at p.6 (3rd Cir., Aug. 14, 2007). "If the employer has met its burden to offer a legitimate nondiscriminatory reason for the decision, the burden shifts back to the plaintiff to prove the employer's stated reason is pretextual." 2007 WL 2310028, at p.6.

The Board concludes as a matter of law that DHSS offered legitimate, nondiscriminatory reasons why the Department promoted Nonnemacher rather than Pinkett to the position of Social Services Chief Administrator. Two members of the interview panel testified that, based on their review of the applications and the interviews, Nonnemacher was far and away the most qualified candidate, she received the highest interview scores because of her education and experience. For those reasons, Mr. Hill agreed that she was the most qualified candidate and promoted her.

Pinkett did not offer any evidence to prove that these legitimate, non-discriminatory reasons were a pretext to discriminate on the basis of her age. Indeed, all three of the interview panelists were over the age of 50 as was Harry Hill who made the decision to promote Nonnemacher. Frank O'Connor, Beth Laucius, and Mr. Hill all testified that they would never discriminate on the basis of age.

Based on this factual record, the Board concludes as a matter of law that Pinkett failed to meet her burden to prove that DHSS intentionally discriminated against her on the basis of her age.

3. Gross Abuse of Discretion

Pinkett claimed that DSS/DMAA has a policy or practice of favoring job applicants from outside the Division, and that is why Nonnemacher was promoted to Social Services Chief Administrator. Pinckett did not produce any evidence to support that claim. Mr. O'Conner testified that it was the Division's unwritten practice to give all in-house candidates who made the certification list (like Pinkett) an interview, but there was no hiring preference for candidates from within or outside the Division. Mr. O'Conner testified that the Division would consider hiring "anybody who was on the [certification] list."

According to Mr. Hill, in the last two years DSS/DMMA has hired twenty persons at paygrade 17 or higher, 16 from within the Division. The facts belie Pinkett's claim that the Division had a policy or practice of favoring new hires from outside the Division.

The Board concludes as a matter of law that Pinkett has not met her burden to prove that the promotion of Nonnenmacher to the position of Social Services Chief Administrator was a gross

abuse of discretion.

4. Seniority and Performance Record

Pinkett claims that DHSS violated Merit Rule 10.4 by not considering her seniority and performance record. Ms. Laucius acknowledged that the interview panel did not take those two factors into account, but testified that seniority was only one of many factors in evaluating the candidates "entire application and experience." Nonnemacher had 24 years of State service (compared to Pinkett's 34) but Nonnemacher's included extensive experience in fiscal and budget matters, first at OMB and then at DSYCF. According to Ms. Laucius, an applicant's longer years of State service might be a tie-breaker but never a dispositive factor.

Both Pinkett and Nonnemacher exceeded expectations on their most recent job performance evaluations. Ms. Laucius testified that even if the interview panel had considered those evaluations, it would not have affected the panel' s unanimous recommendation that Nonnenmacher was the best qualified candidate based on her education and experience.

The Board concludes as a matter of law that Pinkett has not met her burden of proving that the Division violated Merit Rule 10.4, at least not to warrant the relief she seeks (promotion to the position of Social Services Chief Administrator, back pay and benefit adjustment). Even if the interview panel had given Pinkett more points for her years in State service and reviewed her most recent job performance evaluation, it would not have changed the result.

ORDER

It is this 30th day of April, 2008, by a unanimous vote of 4-0, the Decision and Order of the Board that the Grievant's appeal is denied.

Brenda C. Phillips
Chair

John F. Schmutz
Member

Joseph D. Dillon
Member

Martha K. Austin
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 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 13, 2008

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