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BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

JOSEPH F. SORIANO,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 06-10-370**
v.	)	
	)	
DEPARTMENT OF FINANCE,	)	
	)	**DECISION AND ORDER**
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 May 15, 2008 at the Margaret M. O'Neill Building, 410 Federal Street, Suite 213, Dover, DE 19901.

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

APPEARANCES

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DEPARTMENT OF JUSTICE
DOVER, DELAWARE

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

Jean Lee Turner
Administrative Assistant to the Board

Joseph F. Soriano *pro se*

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Department
of Finance

SUMMARY OF THE EVIDENCE

The Board admitted into evidence without objection six exhibits offered by the grievant, Joseph F. Soriano ("Soriano"): Letter dated April 12, 2006 from Soriano to Debra A. Cornier requesting a Step 1 grievance (A-1-1); Memorandum dated April 28, 2006 from Ms. Cornier to Soriano denying the Step 1 grievance (A-1-2); Memorandum dated May 5, 2006 from Soriano to Mary Jane Donnelly appealing the Step 1 grievance decision (A-1-3); Memorandum dated August 9, 2006 from Patrick Carter to Soriano denying the Step 2 grievance (A-1-4); Memorandum dated August 20, 2006 from Soriano to Dana Jefferson appealing the Step 2 grievance decision (A-1-5); and Step 3 grievance decision dated September 12, 2006. Soriano did not call any witnesses but testified on his own behalf.

During Soriano's cross-examination, the Board admitted into evidence three exhibits offered by the Department of Finance ("DOF"): January 9, 2006 job posting for Financial Management Systems Supervisor (S-1-1); Soriano's Employment Application dated January 9, 2005 (S-1-2); and Interview Scoring Sheets (S-1-3).

FINDINGS OF FACT

Soriano has worked in the Division of Accounting at the DOF for twenty-five years and has been in the Payroll Office since 1991. According to Soriano, he has extensive experience in payroll development, including system and tax updates. His current job classification is Financial Management Systems Specialist (paygrade 15) but his functional title is Security Administrator. In that role, he is responsible for facilitating user access to the Payroll Human Resource Statewide Technology ("PHRST") system.

On January 9, 2006, the DOF posted a position for Financial Management Systems Supervisor (paygrade 17). On January 9, 2006, Soriano applied for the position. In his application, Soriano stated that since December 2005 he had been the "Acting Payroll Development Lead" and that he had twenty-four years of experience "in governmental accounting and payroll" with "particularly strong skills in the development, testing and implementation of automated payroll/benefits/HR and accounting system changes and updates."

Soriano made the certification list. After two rounds of competitive interviews, the DOF selected another candidate (Tina Slater) for the Financial Management Systems Supervisor position.

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 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."

Soriano does not allege that the person promoted (Tina Slater) did not meet the minimum qualifications for the job, nor does he allege discrimination or any procedural violation in the promotional process. Soriano claims that the DOF grossly abused its discretion in promoting Slater because, in Soriano's words, he was the "best qualified" candidate.

Under the Merit statutes, 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).

After Soriano presented his evidence and rested his case, the DOF moved to dismiss the appeal because Soriano had not met his burden to prove that the DOF grossly abused its discretion in not promoting him to the Financial Management Supervisor Systems position.

At that stage in a hearing, the Board believes it has the authority to decide whether a grievant has met his or her burden of proof without hearing any evidence from the employer. *See Christman v. DHSS*, MERB (May 23, 2008). The Board is "empowered to weigh the evidence and decide where the preponderance lies." *Gary Realty v. Dudek*, Civ.A. No. 79A-MY-13, 1980 WL 318318, at p.2 (Del. Super., June 10, 1980).

The Board concludes as a matter of law that Soriano did not prove by a preponderance of the evidence that the DOF grossly abused its discretion in not promoting him. Soriano feels that he was the "best qualified" candidate for the position, but did not present any evidence in what way he was more qualified than the candidate selected.

Moreover, Merit Rule 8.2.3 provides that "[a]ny candidate whose name appears on a certified list may be considered to fill the vacancy." An employer therefore may "exercise [its] sound discretion and experience in selecting and appointing suitable candidates from a properly certified list." *In re Holt*, 127 N.Y.S.2d 671, 677 (N.Y. Sup. 1953).

In selecting from a certified list, an employer has broad discretion to select a candidate "in the best interests of the classified service" giving consideration "to qualifications, performance record, seniority, conduct and, where applicable, the results of competitive examinations." Merit Rule 10.4. Soriano did not offer any evidence that the DOF did not take those factors into account in deciding whom to promote.

Based on competitive interviews, all three interview panelists ranked Tina Slater higher than Soriano and the DOF gave great weight to those scores in deciding to promote Slater. "In making difficult hiring decisions in the dynamics of a workplace, the flexibility and discretion accorded to merit system agencies by the Legislature make personal interviews important and desirable." *Dyer v. North Dakota Department of Human Services*, 498 N.W.2d 160, 165 (N.D. 1993).

Soriano contended that the DOF's promotion decision was suspect because the Department initially said he did not get the job because of performance issues, but later shifted its rationale to focus on the superior qualifications of the candidate selected. While the Step One grievance decision referred to some "performance problems," the decision emphasized the results of the interview scoring process: "Each candidate who met the minimum qualification requirements for the job was interviewed and rated based on the approved rating scale and the candidate's responses to the interview questions. These ratings both individual and consolidated ratings were

given to the Division's personnel office for review and approval. The interview results clearly supported the selection of the candidate hired for the position." That remained the DOF's consistent position throughout the grievance process.

"[T]here is perhaps no principle more settled in this area of the law that promotion and non-promotion of employees within a department or agency of Government is a matter of supervisory discretion." *Crowley v. United States*, 527 F.2d 1176, 1184 (Ct. Cl. 1975). Accordingly, Merit Rule 18.5 only provides for grievances about promotions in three narrow categories, including "gross abuse of discretion." The Board concludes as a matter of law that Soriano did not meet his burden to prove by a preponderance of the evidence that the DOF grossly abused its discretion in not promoting him to the Financial Management Systems Supervisor position.

DECISION AND ORDER

It is this 5th day of June, 2008, by a unanimous vote of 3-0, the Decision and Order of the Board that the Grievant's appeal is denied.

Brenda J. Phillips
Chair

Martha K. Austin
Member

Joseph D. 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 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's 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: June 11, 2008

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