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DEPARTMENT OF JUSTICE
DOVER, DELAWARE
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BEFORE THE MERIT RELATIONS BOARD

OF THE STATE OF DELAWARE

LISA GREENE, Employee/Grievant, v. DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES, Employer/Respondent.	)))))))))))	**DOCKET No. 07-03-385** **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 10:30 a.m. on April 23, 2008 at the Margaret M. O'Neill Building, 410 Federal Street, Suite 213, Dover, DE 19901.

BEFORE Brenda J. Phillips, Chair, John F. Schmutz, Joseph D. Dillon, and Martha K. Austin, Members, 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

Roy S. Shiels, Esquire
on behalf of Lisa Greene

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Department of Services for Children, Youth and their Families

SUMMARY OF THE EVIDENCE

The Department of Services for Children, Youth and their Families ("DSCYF") attached to its motion to dismiss: (1) Step Three Grievance Decision dated September 21, 2006 (*In the Matter of Anthony Travaglini*); and (2) Lisa Greene's appeal to the Board dated March 21, 2007.

The Board did not hear any witness testimony, only legal argument from counsel on the State's motion to dismiss the appeal for lack of jurisdiction.

FINDINGS OF FACT

The parties did not dispute the following sequence of events as outlined in the State's motion to dismiss and the Step 3 decision.

In March 2006, Lisa Greene ("Greene"), a probationary employee in the Division of Management Support Services at DSCYF, applied for a promotion to the position of Senior Fiscal Administrative Officer. Another DSCYF employee, Anthony Travaglini, also applied for the position. When Greene got the promotion, Travaglini filed a grievance. As a result of that grievance, DSCYF rescinded Greene's promotion and started the process over.

The second time, the interview panel recommended Travaglini for the promotion. The Division Director did not accept that recommendation and he interviewed Greene and Tavaglini with the Deputy Director. The Division Director then promoted Greene to the Senior Fiscal Administrative Officer position.

Travaglini grieved again. The Step 3 Hearing Officer decided that DSCYF grossly abused its discretion in promoting Greene because of procedural flaws in the promotional process:

- By limiting the position to Merit candidates only, the Department restricted the applicant pool and, by necessary inference, reduced the likelihood that it would have a larger number of potentially qualified individuals that met the high expectations set for the position from which to choose.

- Greene's most recent job performance is presumed to be "Meets Expectations." The Department was apparently not aware of this as it relied upon Greene's presumed higher Review rating as a basis for concluding that her Performance record was superior to that of [Travaglini].

- While it is entirely appropriate for the Department to have considered Greene's accomplishments in making the selection decision, it was not appropriate to consider the *quality* of that service in assessing the seniority component of Merit Rule 10.4. Rather, the quality of Greene's service should have been considered in the context of her "qualifications" or "performance." Seniority, by definition, refers "to total length of employment" under Merit Rule 19, not the quality of employment. Thus, [Travaglini] should have been rated higher in terms of seniority.

The Hearing Officer directed DSCYF to remove Greene from the Senior Fiscal Administrative Officer position and promote Travaglini to the position as "the only meaningful remedy" for these violations of the Merit Rules.

CONCLUSIONS OF LAW

In her appeal to the Board, Greene claims: (1) she had a right to a hearing before DSCYF demoted her from the position of Senior Fiscal Administrative Officer; and (2) the Step 3 Hearing Officer did not have authority to remove her from that position without affording her a hearing.

A. Demotion

Merit Rule 12.4 provides: "Employees shall receive written notice of their entitlement to a pre-decision meeting in dismissal, demotion for just cause, fines and suspension cases." Greene did not receive a hearing before DSCYF complied with the Step 3 Hearing Officer's directive to remove her from the Senior Fiscal Administrative Officer position and promote Travaglini to the position. As a matter of law, the Board concludes the removal of Greene from that position was not a "demotion" as that term is used in Merit Rule 12.4. Merit Rule 12.4 is concerned with a demotion only as discipline for employee misconduct.

The courts in Delaware have not yet addressed this issue, but the courts in other jurisdictions have held that when an employer rescinds a promotion because the promotional process was flawed, or the person was not qualified for the promotion, the employment action does not amount to a demotion.

In *Leonard v. Department of Health & Human Services*, 73 Fed.Appx. 422, 2003 WL 21911240 (Fed. Cir., Aug. 8, 2003), HHS rescinded Leonard's promotion "because the document that was used by the official selecting the candidates was not consistent with the Qualifications Standards Handbook of the Office of Personnel Management." 2003 WL 21911240, at p.1. Leonard argued that HHS demoted her when it returned her to her previous position. HHS argued that Leonard was not qualified for the promotion because it required one year of specialized experience in the next lower grade, experience Leonard did not have. "As such, the government contends that Ms. Leonard's appointment was an administrative error and that, because she was never validly promoted, the agency need not treat the rescission of her promotion as a reduction in grade or pay." *Id.* at p.2.

The Federal Circuit agreed. "Ms. Leonard did not experience a reduction in grade or pay if she was not validly appointed to the higher grade in the first place." 2003 WL 21911240, at p.2. "Because Ms. Leonard was not validly promoted . . . the agency was not required to apply adverse action procedures to the rescission of her promotion." *Id.* at p.3.

In *Green v. City of Memphis*, 2004 WL 1592815 (Tenn. App., July 15, 2004), police officers who competed unsuccessfully for a promotion sued and a court invalidated the promotional test. As a result of the court ruling, the city rescinded the promotions of the successful candidates. The city code provided for a right to a hearing before a demotion, but the Court of Appeals of Tennessee held that "the return of the Plaintiffs to their former rank did not constitute a demotion because the change occurred not as a result of misconduct or disciplinary action, but rather due to what had been an invalid promotional process originally." 2004 WL 1592815, at p.2.

In *Bowling v. Natural Resources & Environmental Protection Cabinet*, 891 S.W.2d 406 (Ky. App. 1995), the Kentucky Personnel Board ordered the agency to rescind the promotion of an employee (Alsip). On an employee candidate disposition form, the agency wrote that it promoted Alsip because he had "more job-related experience (time) within the [agency]." The state civil service law required the agency to consider seniority based on total months of state service, not just seniority within the agency. The Court of Appeals of Kentucky held that the rescission of Alsip's promotion was not a demotion for purposes of the state personnel law. "The result of the Board's ruling is that Alsip's promotion to administrative secretary was void *ab initio*." 891 S.W.2d at 411. Alsip could not be demoted from a promotion "that was made illegally." *Id.*

In *Appeal of Austerlitz*, 437 A.2d 804 (Pa. Cmwlth. 1981), the police department rescinded promotions after a successful challenge to the selection procedures. The civil service law provided that a police officer could not be demoted without a hearing, but the Commonwealth Court of Pennsylvania held that "a person can be demoted only from a position to which he is entitled." 437 A.2d at 806. *See also Municipality of Penn Hills v. Municipality of Penn Hills Personnel Board/Civil Service Commission*, 487 A.2d 1048, 1050 (Pa. Cmwlth. 1985) ("all that is being done is removing appellees from a position in which they were promoted not in accordance with the law. Under such circumstances, the civil service protections are not applicable").

Even if the Merit Rules did not require a hearing before DSCFY rescinded Greene's promotion, Greene argues that she had a due process right to a hearing under the Fourteenth Amendment of the U.S. Constitution. The parties vigorously debated whether Greene had any property interest in the Senior Fiscal Administrator Officer position so as to trigger the protection of the Due Process Clause of the Fourteenth Amendment.[1] The Board, however, does not believe that it has jurisdiction to decide such a constitutional claim.

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[1] Even if the Board had jurisdiction to decide Greene's constitutional claim, the Board notes that the overwhelming weight of legal authority holds she did not have a protected property interest under the Due Process Clause in a promotion to which she was not entitled in the first place. *See Whalen v. City of Atlanta*, 539 F. Supp. 1202, 1206 (N.D. Ga. 1982) (police officers, "having failed to score the minimum 70% on the examination, were not authorized to have their names on the promotion list and thus the promotions they received were void from the beginning. It follows that plaintiffs, having no property right in their promotions, cannot claim constitutional protection for them."); *Andreucci v. City of New Haven*, 917 F. Supp. 146, 148 (D. Conn. 1996) ("plaintiffs never had any legitimate claim of entitlement in their former positions under state law, as their promotions were held to be unlawful from the start"); *Greene*, 2004 WL 1592815, at p.4 (city code "does not create property interests in the Plaintiff's promotion to sergeant as a result of an invalid test"); *Bowling*, 891 S.W.2d at 411 ("Failure by the Cabinet to hire in compliance with [the state personnel law] rendered null and void the property rights.").

"'The State Personnel Commission [now the Board] is a creature of statute. 29 *Del. C.* Ch. 59. Its power and authority are derived exclusively from the statute, and its power therefore extends only to those cases which are properly before it in compliance with the statutory law.'" *Cunningham v. Department of Health & Social Services*, Civ.A. No. 95A-10-003, 1996 WL 190757, at p.2 (Del. Super., Mar. 27, 1996) (Ridgely, Pres. J.) (quoting *Maxwell v. Vetter*, 311 A.2d 864, 865 (Del. 1973)).

By statute, the Board's jurisdiction is limited to "the redress of an alleged wrong, arising under a misapplication of any provision of [Chapter 59 of Title 29 of the *Delaware Code*], the merit rules, or the Director's regulations adopted thereunder." Greene has not alleged that DSCYF violated any Merit statute or Merit Rule or regulation by not affording her a hearing before rescinding her promotion. Indeed, Greene's counsel made it clear that her claim was based solely on constitutional due process, not on any Merit statute or Merit Rule or regulation.

The Board does not believe that the Merit statutes or the Merit Rules give the Board jurisdiction to decide a grievance based solely on an alleged constitutional violation, rather than on a violation of the Merit statutes or Merit Rules. [2] "Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973). *See also Petition of Franklin Builders, Inc. v. Sartin*, 207 A.2d 12, 17 n.3 (Del. Super. 1964) ("There is doubt as to the power of an Administrative Agency, such as the Zoning Board of Adjustment, to determine

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[2] The Board notes that there may be cases where a constitutional violation is also a violation of the Merit Rules. For example, a violation of the anti-discrimination provisions of Merit Rule 2.1 might also violate the Equal Protection Clause of the Fourteenth Amendment.

constitutional questions."). That is why the courts do not require exhaustion of administrative remedies for constitutional claims. "The interest in encouraging the use of administrative expertise is not implicated when a constitutional violation is alleged, because such allegations are particularly suited to the expertise of the judiciary." *Adkins v. Rumsfeld*, 389 F. Supp. 579, 588 (D. Del. 2005).

The Board concludes as a matter of law that it does not have jurisdiction to decide Greene's Fourteenth Amendment procedural due process claim.

B. Step 3 Hearing Officer's Authority

Section 5931(a) of Title 29 of the *Delaware Code* provides that the "Director or 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."

Merit Rule 10.9 provides: To resolve litigation issues, grievances, or disputes between agencies about the placement of employees, the Director may move employees from one position to another position for which they qualify in the same or lower paygrade within the Merit System without competition." In order to resolve the Travaglini grievance, the Step 3 Hearing Officer (as the Director's designee) moved Travaglini into the Senior Fiscal Administrative Position causing Greene to move to a lower paygrade.

Greene claims that the Step 3 Hearing Officer did not have authority to move her because Travaglini was not "wrongfully denied" the position "under a misapplication" of the Merit statutes

or Merit Rules. 29 *Del. C.* §5931(a). The Hearing Officer, however, found that Travaglini did not get the promotion because DSCYF failed to explain why it posted the position as "Merit Only" restricting the applicant pool (a violation of Merit Rule 6.1); erroneously credited Greene with a superior performance evaluation (a violation of Merit Rule 10.4); and gave Greene greater credit for seniority when Tavaglini had longer length of employment in classified positions (a violation of Merit Rule 10.4).

The Board concludes as a matter of law that the Hearing Officer had legal authority to direct the removal of Greene from the position of Senior Fiscal Accounting Officer and promote Travaglini in order to resolve his grievance because DSCYF violated the Merit Rules in promoting Greene and wrongfully denied Travaglini the promotion.

Greene also claims that the Hearing Officer did not give her notice and an opportunity to intervene in the Step 3 grievance in violation of her constitutional right to procedural due process. For the reasons explained earlier, the Board does not believe that it has statutory jurisdiction to decide that constitutional due process claim. The Board has jurisdiction only to redress grievances involving a violation of the Merit statutes, Merit Rules, or regulations, none of which provide for a right to notice and intervene in another employee's grievance process. [3]

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[3] The Board notes that some state personnel laws provide a right to notice and intervention in another employee's grievance process. *See, e.g.*, W.Va. Code §18-29-3(u) ("Upon a timely request, any employee shall be allowed to intervene and become a party to a grievance at any level when that employee claims that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties."). Although not required by Delaware law, the Board believes that it would be the better practice of Human Resource Management to provide such notice.

DECISION AND ORDER

It is this 15th day of May, 2008, by a vote of 3-1, 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

I Dissent. I am troubled that Ms. Greene did not have notice and an opportunity to intervene and be heard in the Step 3 grievance of Anthony Travaglini.

John F. Schmutz, 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.
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> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
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> (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, 2008

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