BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

WAYNE A. TAYLOR, Employee/Grievant, v. DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH, AND THEIR FAMILIES, Employer/Respondent.	)))))))))))	**DOCKET No. 08-01-411** **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 10:00 a.m. on April 22, 2009 at the Margaret M. O'Neill Building, 410 Federal Street, Suite 213, Dover, DE 19901.

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

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Wayne A. Taylor
Employee/grievant *pro se*
and Patricia A. Bailey, AFCSME
Council 81 Representative, Local 3384

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

BRIEF SUMMARY OF THE EVIDENCE

The employee/grievant, Wayne A. Taylor ("Taylor"), offered and the Board admitted into evidence without objection six exhibits: Delaware Employment Link features and transition procedures (A-1); Letter dated March 14, 2007 from Susan Jones to Taylor (A-2); e-mail dated July 27, 2007 from Mary A. Long to Taylor (A-3); Confirmation of Employment Application Submission dated July 31, 2007 (A-4); Taylor's State of Delaware Employment Application (Posting #KO7:74) (A-5); and Taylor's State of Delaware Employment Application dated July 31, 2007 (A-6).

Taylor testified on his own behalf and called one witness, Miles Shockley.

The Department of Services for Children, Youth, and Their Families ("DSCYF") offered and the Board admitted into evidence without objection six exhibits: e-mail from Jane Hahn to Taylor (S-1); Job Posting No: KO7:74 (S-2); Job Posting #072407-MDDV03-370500 (S-3); Referral List for Youth Rehabilitation Counselor III (S-4); e-mail dated July 31, 2007 (same as S-1 except with header) from Jane Hahn to Taylor (S-5); and Delaware Employment Link Applicant User Guide

(S-6).

DSCYF called two witnesses: Susan Jones, Human Resource Officer; and Jane Hahn, Human Resource Specialist, Office of Management and Budget, Human Resource Management.

FINDINGS OF FACT

Taylor works as a Youth Rehabilitation Counselor ("YRC") II at the Stevenson House Detention Center in Milford, Delaware.

In February 2007, the Office of Management and Budget, Human Resource Management ("HRM") posted an open position for YRC III at the Stevenson House. Taylor applied for the position. By letter dated March 14, 2007, Susan Jones advised Taylor that "Your application has been evaluated and we wish to notify you that you qualify for the above classification." Ms. Jones also advised Taylor that HRM "is about to launch the Delaware Employment Link (DEL). The enclosed communication will explain how the implementation will affect you."

The enclosure to the March 14, 2007 letter [1] stated:

> You may be asking how this affects you as an applicant. Our records show that you have applied for positions in our current application process. When you applied, you were advised that your application would remain on register for one year from the date of the application. Effective with the implementation of DEL on March 24, 2007, registers will no longer be maintained and your application will no longer be valid for one year. However, during the transition period from March 24, 2007 to June 30, 2007, any application that you submitted to postings prior to March 24, 2007 will remain on those registers until the agency completes the hiring process that started prior to March 2007.

On March 24, 2007, HRM launched a new on-line employment application system, Delaware Employment Link ("DEL"). DEL allows individuals to apply online at their convenience, anytime day or night using a computer at work, at home, or at a public library. DEL allows individuals to store their information in an application-on-file to use when applying for several job vacancies at the same time or future jobs. But the individual must copy information

---

[1] Taylor testified that he never received the enclosure. However, he admitted it into evidence (A-1) and relied on Miles Shockley's interpretation of the transition procedures in the enclosure to claim that DSCYF violated Merit Rule 8.2.1 by not filling the vacant YRC III position at Stevenson House from the original certification list.

in the application-on-file into an application for a particular job posting.

According to Ms. Hahn, HRM took many steps to enure that State employees were aware of the implementation of DEL and how to use it prior to the launch date, including e-mails and paycheck inserts. HRM posted an Applicant User Guide on its website, and trained human resource managers around the State. According to Ms. Hahn, at the request of an agency she also provided classroom training to employees, but she did not receive a request from the Stevenson House.

According to Taylor, he was interviewed for the YRC III position but then did not hear back. According to Ms. Jones, DSCYF returned the certification list to hold the position open because of settlement negotiations in litigation involving another employee. Those negotiations were unsuccessful.

On July 27, 2007, HRM re-posted the open position of YRC III at the Stevenson House. By e-mail dated July 27, 2007, Mary S. Long advised Taylor that "the YRC position at Stevenson House has been re-posted. If you are still interested in this position, you need to re-apply on-line."

On July 31, 2007, Taylor applied for the position using DEL. According to Taylor, he did not receive any training on DEL, and he did not have regular access to a computer at work so he filled out the application during his thirty-minute lunch break. Unfortunately, Taylor only filled out the application-on-file. He did not separately apply for the YRC III position.

DEL generated an automatic Confirmation of Employment Application Submission to Taylor on July 31, 2007 which stated: "Thank you for your employment application for Application-on-File #AF0000-000000-010101. . . . The filing deadline for this job is Open. As

a way to verify your e-mail address, we will send you an e-mail notice reconfirming receipt of your application. If you do not receive an e-mail from us in the next day, please contact us at jobs@state.de.us."

According to Ms. Hahn, the automatic confirmation only confirmed that Taylor had filed an application-on-file, not an application for the YRC III job vacancy, as indicated by the file number which is different than the job posting number. Ms. Hahn explained that for an application-on-file (which does not have a deadline like a job posting), the DEL system indicates the deadline as "Open" rather than the deadline for the job posting. If Taylor had applied for the YRC III job vacancy, the confirmation would have referenced the job posting number with the deadline of August 2, 2007.

Ms. Hahn sent Taylor a follow-up e-mail as "confirmation notice that we have received your application for Application-on-File AF0000-000000-010101. . . . Please note that this application will not be used for any current opening, but is only for your practice or to maintain an application-on-file to copy into an application for an actual job opening. If you want to review your application or submit an application for a job opening, please return to the Current Employment Opportunities at http://www/jobaps.com.de/."

Unfortunately, Taylor thought the two confirmations he received meant he had applied for the YRC III position. Because he did not properly apply for the position using DEL, he did not make the referral list (formerly called a certification list).

CONCLUSIONS OF LAW

Merit Rule 8.2.1 provides:

> **Any candidate whose name appears on a referral list may be considered to fill the vacancy for which the list was requested. Should the list be unsatisfactory, it may be returned and subsequent lists may be requested, provided the reasons for rejection accompany the returned list.**

Taylor claims that DSCYF violated Merit Rule 8.2.1 in two ways. First, he claims DSCYF did not have a satisfactory reason for returning the certification list after he first applied for the YRC III position in February 2007. Second, he claims that DSCYF should have used that same certification list after HRM re-posted the position on July 27, 2007 because the hiring process which started prior to March 2007 was not completed.

The Board does not interpret Merit Rule 8.2.1 to allow the Board to substitute its judgment for the agency's in deciding whether the reason for returning a certification list is satisfactory. The rule only requires the agency to provide a reason why it believes the list is unsatisfactory, and DSCYF did that. According to Ms. Jones, the agency returned the list because it wanted to hold the position open in order to settle litigation with another employee.

The Board concludes as a matter of law that DSCYF did not violate Merit Rule 8.2.1 when it returned the original certification list for the YRC III position at Stevenson House.

The Board also concludes as a matter of law that DSCYF did not violate Merit Rule 8.2.1 by not filling the YRC III vacancy from the original certification list. Once DSCYF returned the certification list, the hiring process began anew and HRM re-posted the position on July 27, 2007. Taylor did not make the referral list because he did not properly re-apply for the position. He

filled out an application-on-file, but not an application for the YRC III position. Consistent with Merit Rule 8.2.1, DSCYF considered the two individuals on the referral list and selected one of them for the YRC III position at Stevenson House. [2]

---

[2] Though not well articulated, Taylor appears to believe that if he had received individual training on the DEL system, or if the confirmations he received were not misleading, he would have successfully re-applied for the YRC III position, made the referral list, and might have gotten the promotion. The Board believes that Taylor bears some responsibility for his unsuccessful application by not using the available tools to practice (like the DEL Applicant User Guide) and by not asking for help from a human resource manager. At the very least, Ms. Hahn's e-mail to him on July 31, 2007 should have raised a red flag: "Please note that this application will not be used for any current opening, but only for your practice or to maintain an application-on-file to copy into an application for an actual job opening."

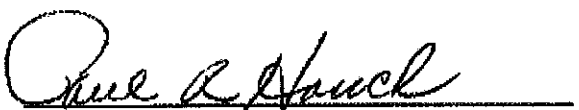
ORDER

It is this 21st day of May, 2009, by a vote of 4 – 1, the Decision and Order of the Board to deny Taylor's appeal.

BRENDA C. PHILLIPS, MERB Chairwoman

JOHN F. SCHMUTZ, MERB Member

MARTHA AUSTIN, MERB Member



PAUL R. HOUCK, MERB Member

DISSENTING

JOSEPH D. DILLON, 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 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 26, 2009

Distribution:
Original: File
Copies: Grievant
Agency's Representative
Board Counsel

L:\MERB.taylor.DSCYF.wpd