IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

LISA GREENE, Appellant, v. DEPARTMENT OF SERVICES TO CHILDREN, YOUTH and their FAMILIES, a State agency, and THE MERIT EMPLOYEE RELATIONS BOARD, Appellees.	:	C.A. No. 08A-06-005 WLW

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Submitted: August 18, 2009
Decided: November 24, 2009

ORDER

Upon an Appeal from the Decision of The Merit Employee Relations Board.
Affirmed.

Roy S. Shiels, Esquire of brown Shiels & O'Brien, LLC, Dover, Delaware; attorneys for the Appellant.

Kevin R. Slattery, Esquire of the Department of Justice, Wilmington, Delaware; attorneys for the Department of Services to Children, Youth and their Families.

WITHAM, R.J.

Introduction

Lisa Greene ("Greene") filed an appeal from the May 15, 2008 decision of the Merit Employee Relations Board ("MERB" or "Board"). Greene contends both that she had a right to a meaningful hearing before being removed from a promotion, and that the HRM Hearing Officer lacked authority to remove her from the promotion. The Board rejected both of Greene's arguments on appeal. On June 18, 2008, Greene filed this appeal claiming that (1) she had a right to notice and an opportunity to show that she was entitled to the position in question and (2) that the Hearing Officer lacked authority to give the position in question to Anthony Travaglini ("Travaglini").

Decision of the MERB

In March 2006, Greene applied for a promotion as a Senior Fiscal Administrative Officer ("SFAO" or "the promotion"). At the time, Greene was a probationary employee in the Division of Management Support Services at the Department of Services for Children, Youth and their Families ("DSCYF"). Travaglini, another DSCYF employee, also applied for the position. Greene ultimately received the promotion, prompting Travaglini to file a grievance. As a result of Travaglini's grievance, DSCYF voluntarily rescinded Greene's promotion and started the selection process over.

The second interview panel recommended Travaglini for the promotion. The Division Director, however, rejected this recommendation and, along with the Deputy Director, interviewed both Greene and Travaglini once again. Greene was again

given the promotion, prompting Travaglini to file another grievance.

Step 3 of the grievance process, as set forth in the Merit Rules adopted by the MERB, is a hearing before Human Resource Management (HRM). Greene received no notice of this hearing. Nevertheless, the Step 3 Hearing Officer, on September 29, 2006, concluded that DSCYF grossly abused its discretion in promoting Greene because of procedural flaws in the promotion-process. Specifically, the Hearing Officer concluded that the process was procedurally flawed because: (1) it limited the position to Merit candidates only, thereby restricting the applicant pool; (2) it relied on a higher job performance review rating for Greene than the most recent review provided; and (3) it considered the "quality" of Greene's service when assessing "seniority" under Merit Rule 10.4. The Hearing Office directed DSCYF to remove Greene from the position and promote Travaglini. The Hearing Officer determined that this was "the only meaningful remedy."

Greene appealed to the MERB on March 21, 2007. DSCYF filed a motion to dismiss Greene's appeal on January 25, 2008. Following a hearing on April 23, 2008, the Board issued its decision on May 15, 2008.

The Board concluded that Greene was not entitled to notice, pursuant to Merit Rule 12.4, because she was not dismissed or demoted. The Board determined that an employee cannot be "demoted" from a position acquired through a flawed promotion-process. The Board also determined that it lacked jurisdiction to decide Greene's constitutional claim that she had a due process right to a hearing under the Fourteenth Amendment. The Board noted that its jurisdiction is limited to redressing alleged

wrongs arising under the statute, the merit rules or the Director's regulations adopted thereunder.

The Board further determined that the Hearing Officer (as the Director's designee) did have authority to remove Greene from the promotion and replace her with Travaglini. The Board reasoned that DSCYF violated the Merit Rules in promoting Greene and wrongfully denying Travaglini the promotion. The Board noted that these procedural flaws afforded the Hearing Officer the legal authority to remove Greene.

Greene appealed the Board's decision to this Court. She raises two arguments on appeal: (1) that Greene had a right to a meaningful hearing before being removed from the promotion and (2) that the Hearing Officer lacked the authority to remove Greene from the promotion and replace her with Travaglini.

Standard of Review

The review of an administrative board's decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's findings of fact and conclusions of law.[1] Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] This Court will not weigh the evidence,

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[1]*Histed v. E.I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

[2]*Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

determine questions of credibility, or make its own factual findings.[3] This standard and scope of review applies to decisions of the Merit Employee Relations Board.[4]

Discussion

I. *Greene's Constitutional Claim:*

Greene contends that she was denied procedural due process when she was not given a meaningful opportunity to contest her removal from the promotion. As an initial matter, the Court must consider whether the Board was required to directly address this constitutional challenge. In its May 15, 2008 decision, the Board expressed its belief that it lacked jurisdiction to decide the constitutional claim.[5] The Board noted that, because its power and authority are statutory, it may only consider questions regarding compliance with the statutory law.[6] That is, the Board opined that it could not "decide a grievance based solely on an alleged constitutional violation, rather than a violation of the Merit statutes or Merit Rules."[7]

The Court finds, in the case *sub judice*, that the Board was not required to directly address this constitutional challenge. In *Adkins v. Rumsfeld*, the District

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[3] *Collins v. Giant Food, Inc.*, 1999 Del. Super. LEXIS 590 (quoting *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

[4] *See DeMarie v. Delaware Dept. of Transp.*, 2002 WL 1042088 (Del. Super.).

[5] *Greene v. Dept. of Servs. for Children, Youth and their Families*, MERB Appeal Docket No. 07-03-385 (May 15, 2008), *aff'g* Decision of Hearing Officer (Sept. 29, 2006).

[6] *Id.* at 7 (citation omitted).

[7] *Id.*

Court for the District of Delaware was asked to consider whether a plaintiff was required to exhaust all administrative remedies before raising constitutional claims in the District Court.[8] In concluding that the plaintiff was not, the Court noted that, "[t]he 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."[9] Similarly, the Ninth Circuit noted in *Downen v. Warner* that, "[r]esolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board."[10]

The State is correct that there appear to be no Delaware cases directly on point to guide the MERB. Nevertheless, as noted above, the Board was not required to directly address Greene's constitutional claim. Consequently, the Court will not remand this matter to the MERB to consider the constitutional due process issue. Instead, the Court will address Greene's constitutional claim *de novo*.

The requirements of procedural due process are invoked where an individual is deprived of "interests encompassed by the Fourteenth Amendment's protection of

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[8] 389 F.Supp.2d 579, 588 (D. Del. 2005).

[9] *Id.*

[10] 481 F.2d 642, 643 (9th Cir. 1973); *see also Franklin Builders, Inc. v. Sartin*, 207 A.2d 12, 17 n.3 (Del. Super. Ct. 1964) (expressing doubt that an administrative agency could determine constitutional questions).

liberty and property."[11] To have such a property interest, the individual must have more than an abstract need or unilateral expectation of it.[12] The individual must, instead, have a legitimate claim of entitlement to it.[13] A property interest is not created by the Federal Constitution, but instead by "rules or understandings [that stem] from an independent source such as state law."[14] The "hallmark of [a property interest] . . . is an individual entitlement grounded in state law which cannot be removed except 'for cause.'"[15]

Greene does not dispute the Hearing Officer's authority to "disallow the promotion." She does, however, contend that the Hearing Officer could not also subsequently prohibit her from competing for the position without an opportunity to first be heard. In other words, Greene contends that she had a protected right to compete for the promotion.[16]

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[11] *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972).

[12] *Id.* at 577.

[13] *Id.*

[14] *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

[15] *Logan v. Zimmerman Brush Co.*, 455 U.S. 430 (1982).

[16] It is worth noting that this argument, as set forth in Greene's Reply Brief, is slightly different from that set forth in Greene's Opening Brief. In her Opening Brief, Greene seemingly contends that she has a protected interest in the promotion itself, not in the right to compete for the promotion. That is, Greene averred in her Opening Brief that she had a right to a meaningful hearing prior to being removed from the promotion. Nevertheless, the Court considers here Greene's amplification of her position.

The State is again correct that there appear to be no State or Federal Delaware cases establishing a protected right to compete for a promotion. Nevertheless, the Tenth Circuit's decision in *Tiegen v. Renfrow*,[17] and the Eastern District of Pennsylvania's decision in *District Council 33, AFSCME v. City of Philadelphia*[18] are persuasive.

In *Tiegen*, the plaintiffs argued that they possessed, and were deprived of, a protected property interest in the right to be considered for a promotion.[19] They averred that the Colorado Constitution and state personnel statutes established a merit-based system for the appointment and promotion of employees.[20] The Plaintiffs asserted that this merit-based system formed the basis of the property interest.[21] The Tenth Circuit disagreed, noting that "it is well established that an entitlement to nothing but procedure cannot be the basis for a property interest."[22] Consequently, because "[p]laintiff's claimed entitlement to be considered for a promotion in accordance with the state system of merit is no more than a claim of entitlement to a

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[17] 511 F.3d 1072 (10th Cir. 2007).

[18] 944 F.Supp. 392 (E.D. Pa. 1995).

[19] *Tiegen*, 511 F.3d at 1080 (the plaintiffs alleged that they were denied promotional opportunities after being blacklisted).

[20] *Id.*

[21] *Id.*

[22] *Id.* at 1081.

fair process," no property interest was deemed present.[23]

Similarly, in *District Council 33*, the plaintiffs argued that the defendant city abused its authority and denied them an opportunity to compete for promotions.[24] The plaintiffs purported that the defendant city's Charter and Regulations created the alleged property interest.[25] The Court, however, concluded that the plaintiffs' argument failed to "alter the fact that the entitlement to which they lay claim is a procedure through which the true substantive benefit, employment at a higher level, is conveyed."[26] To this end, the Court noted that its research "revealed no case in which a property interest has been held to exist in a procedure."[27]

Greene, similar to the plaintiffs in *Tiegen* and *District Council 33*, attempts to establish entitlement to promotion-procedures instead of the true substantive benefit: the promotion itself. Similar to the Court in *District Council 33*, this Court's research also revealed no case in which a property interest has been held to exist in such a procedure. Consequently, Greene's claim that she was denied due process when she was not given a meaningful hearing prior to being denied of the opportunity to compete for the promotion must fail.

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[23] *Id.*

[24] *District Council 33*, 944 F.Supp. at 394 (plaintiffs argued that the city used its temporary appointment authority to bypass the promotional procedures provided in the Charter).

[25] *Id.* at 395.

[26] *Id.*

[27] *Id.* (citations omitted).

II. *The Step 3 Hearing Officer's Authority:*

Section 5931 grants the Director and the Board 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 . . . ."[28] Merit Rule 10.9 provides that, "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."[29]

In *Brice v. State*, the Delaware Supreme Court noted that Section 5931(a) grants the Board general authority to "make employees whole" where there has been a violation of the merit statute or merit rules.[30] In *Brice*, the Court was asked to determine whether the Board had jurisdiction to grant the appellant's request for attorney's fees.[31] The Court concluded that Section 5931(a) conferred upon the Board "ancillary equitable jurisdiction" to award attorney's fees in extraordinary cases.[32] Specifically, the Court noted that, "the enabling statute vests the Board with the authority to grant equitable remedial relief to a prevailing employee, e.g., '*restore* any

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[28] 29 *Del. C.* § 5931(a).

[29] *See* Merit Rules, Chapter 10 Other Appointments.

[30] 704 A.2d 1176, 1177 (Del. 1998).

[31] *Id.*

[32] *Id.* at 1179.

position' and 'place employees in a position they were wrongfully denied.'"[33]

In the case *sub judice*, the Court agrees that the Hearing Officer had the authority to replace Greene with Travaglini. The Board, in deciding that the Hearing Officer had such authority, agreed with the Hearing Officer that Travaglini was "wrongfully denied" the promotion.[34] Specifically, the Hearing Officer determined that there were sufficient irregularities to warrant reversing the third interview panel's decision and "reinstituting the decision of the second panel which, having considered the skill and ability of the candidates in the critical areas identified by the Department, recommended [Travaglini] to fill the SFAO position."[35] Greene appears to have ignored the conclusion of the second interview panel.

The Board, after reviewing the Hearing Officer's decision, concluded that the Hearing Officer had the requisite legal authority.[36] The Board's decision is supported by substantial evidence and free of legal error.

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[33] *Id.* (emphasis in original) (citation omitted).

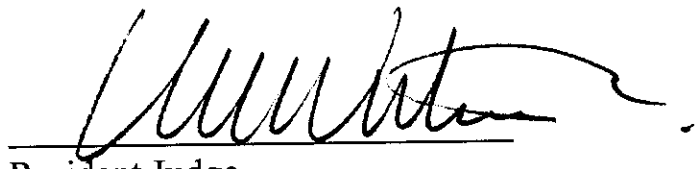
[34] *Greene*, MERB Appeal Docket No. 07-03-385 (May 15, 2008) at 9 ("[t]he Board concludes as a matter of law that the Hearing Officer had legal authority to direct the removal of Greene from the position of Senior Fiscal Accounting Officer and promote Travaglini in order to resolve his grievance because DSCYF violated the Merit Rules in promoting Greene and wrongfully denied Travaglini the promotion").

[35] *Greene v. Dept. of Servs. for Children, Youth and their Families*, MERB Appeal Docket No. 07-03-385 (Sept. 29, 2006) (Jerry M. Cutler, Hearing Officer).

[36] *Greene*, MERB Appeal Docket No. 07-03-385 (May 15, 2008) at 9.

Conclusion

For the foregoing reasons, the decision of the Merit Employee Relations Board must be AFFIRMED. IT IS SO ORDERED.



Resident Judge

WLW/dmh
oc: Prothonotary
xc: Order Distribution