

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

ELISHA GRESHAM,)	
)	
Employee/Grievant,)	
)	DOCKET No. 12-11-572
v.)	
)	
DEPARTMENT OF NATURAL RESOURCES)	
AND ENVIRONMENTAL CONTROL,)	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 June 20, 2013 at the Public Service Commission Conference Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Paul R. Houck, Dr. Jacqueline Jenkins, and Victoria D. Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

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

Deborah L. Murray-Sheppard
Board Administrator

Elisha L. Gresham
Employee/Grievant *pro se*

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of
Natural Resources and Environmental
Control

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument on the motion by the Department of Natural Resources and Environmental Control (DNREC) to dismiss the grievance for failure to state a claim upon which relief can be granted as a matter of law.

FINDINGS OF FACT

The jurisdictional facts are not in dispute.

The employee/grievant, Elisha L. Gresham (Gresham), works for the Department of Health and Social Services/Division of Management Services as an Administrative Specialist II.

On August 4, 2012, the Office of Management and Budget posted a job opening at DNREC for the position of Support Services Administrator, Pay Grade 15. Gresham applied for the position.

On August 28, 2012, a panel comprised of two women and one man interviewed Gresham. On September 24, 2012, DNREC notified Gresham that she did not get the position.

On October 4, 2012, Gresham filed a grievance with Robert J. Zimmerman, DNREC Division Director.

By letter dated October 11, 2012, DNREC responded to the grievance: "The Interview Panel for Support Services Administrator was in compliance with Executive Order Eight as it was diverse in gender. In addition, the selected candidate was a minority which disputes discrimination on the basis of race or ethnicity. You did not present any claims that are covered by the Merit Rules. In addition, the Merit Grievance Process that you have requested, even if covered, is untimely since it is well beyond the time limit provided by the Merit Rules (as your

interview was on August 28, 2012).”¹

In her appeal to the Board, Gresham alleges that “DNREC Interview Panel failed to adhere to Executive Order Eight during an interview for a position of Pay Grade 15 or higher. DNREC’s HR & Chief Operating Officer failed to properly handle my claim under Executive Order Eight and the Merit Rules.”

CONCLUSIONS OF LAW

Merit Rule 19.0 defines a “Grievance” as a “merit employee’s claim that these Rules or the Merit system statute has been violated.” The Board’s jurisdiction is limited to remedy a “misapplication of any provision of [the Merit Statutes] or the Merit Rules.” 29 *Del. C.* §5931(a).

Gresham claims that DNREC violated Section 9(d) of Executive Order No. 8 (issued by the Governor on August 11, 2009) which requires “Agencies filling merit positions at paygrade 15 and above to use an interview team of at least three members. Such a team should be diverse in its composition.” According to Gresham (who is African-American) the interview panel was not diverse because none of the members was a minority.

¹ According to Gresham, she did not receive notice that she did not get the position until DNREC sent an e-mail to her personal e-mail address on September 24, 2012 and she filed her grievance with DNREC on October 4, 2012 within the fourteen days required by Merit Rule 18.6. However, the time limit to file a Step 1 grievance starts to run from “the date of the grievance matter or the date [the grievant] could reasonably be expected to have knowledge of the grievance matter.” Gresham’s grievance is that her interview panel was not diverse. She knew the composition of the interview panel when she was interviewed on August 28, 2012, so her Step 1 grievance was untimely.

In the motion to dismiss, DNREC also argued that Gresham’s exclusive remedy was to file an appeal to the Director of OMB “within ten (10) days of the rejection notice. Merit Rule 6.5 only applies when OMB rejects an applicant for one of eleven disqualifiers. OMB did not reject Gresham which is why she had an interview with DNREC.

There is no analogue to Section 9(d) of Executive Order No. 8 in the Merit Statute or the Merit Rules. While the Board encourages all agencies to strive for diverse interview panels for job applicants, neither the Merit Statutes nor the Merit Rules require it. Simply put: the Board does not have jurisdiction over a claim for a violation of Executive Order No. 8 which does not independently violate a Merit Statute or a Merit Rule.

According to Gresham, she stated a claim under Merit Rule 2.1 for discrimination based on her race. As evidence of intentional discrimination, Gresham cited the lack of diversity on her interview panel. But a lack of diversity on the panel is not even circumstantial evidence of intentional discrimination particularly when the successful candidate was also a minority.²

The Board concludes as a matter of law that it does not have jurisdiction over Gresham's appeal because she did not state a claim for a violation of the Merit Statutes or the Merit Rules.

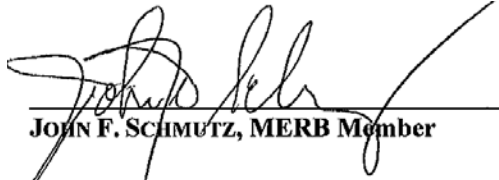
² Gresham did not challenge the qualifications of the successful candidate for the position at DNREC, nor, as a remedy, is she asking the Board to place her in that position. She is only asking for an apology from DNREC for failure to adhere to Executive Order No. 8. The relief requested further illustrates that Gresham is not claiming intentional discrimination based on her race under Merit Rule 2.1, but rather a technical violation of Executive Order No. 8.

DECISION AND ORDER

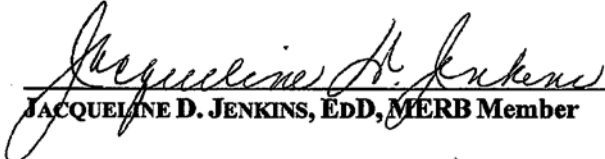
It is this 27th day of June, 2013, by a vote of 5-0, the Decision and Order of the Board to dismiss Gresham's appeal for failure to state a claim upon which relief can be granted.


MARTHA K. AUSTIN, MERB Chairwoman


VICTORIA D. CAIRNS, MERB Member


JOHN F. SCHMUTZ, MERB Member


PAUL R. HOUCK, MERB Member


JACQUELINE D. JENKINS, EDD, 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: **June 27**, 2013

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel

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