

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

KEVIN MCBRIDE,)	
)	
Employee/Grievant,)	
)	DOCKET No. 17-09-678
v.)	
)	
DEPARTMENT OF HEALTH AND)	Order of Document Production
SOCIAL SERVICES,)	
)	
)	
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 February 1, 2018 at the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Suite 100, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Paul R. Houck, Jacqueline Jenkins, Ed.D, and Sheldon N. Sandler, Esq., a quorum of the Board pursuant to 29 *Del. C.* §5908(a).

APPEARANCES

Rae Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

G. Kevin Fasic, Esq.
Offit Kurman PA
on behalf of Kevin McBride

Kevin Slattery
Deputy Attorney General
on behalf of Department of Health and
Social Services

PROCEDURAL BACKGROUND

On or about September 29, 2017, counsel for the employee/grievant, Kevin McBride (“McBride”), filed a request with the Merit Employee Relations Board for a subpoena to be issued to the Department of Health and Social Services (“DHSS”) to provide documents relating to the top three candidates in a promotional process. McBride requested the following documents:

1. All applications, supporting documents (resumes, C.V.s, reference letters, etc.), questionnaires (including supplemental questionnaires) for the position in question.
2. All documents presented by or on behalf of the candidates prior to, during, or following the interviews for the position (performance reviews, etc.).
3. All three candidates’ state disciplinary records.
4. The last two performance reviews for each candidate (prior to the date of the interviews).
5. All versions of the referral list provided to the agency from the office that initially reviews and/or ranks the candidates and provides the referral list.
6. All notes, memoranda, records or related materials used in the ranking/referral process, and/or that were used or relied upon to create the referral list.
7. All standards, policies, guidelines, etc. used or relied upon to rank the candidates selected for the referral list.
8. All interview notes, documents, etc. used or relied upon by the interview panel.
9. All documents related to the narrowing of the referral list down to the 9 candidates selected for interviews.
10. All notes, correspondence, etc. by and between members of the hiring panel related to any of the 3 candidates.
11. All correspondence directed to any of the 3 candidates, either before, during, or after the interviews, from the interview panel and/or the hiring manager.
12. All copies of the job posting for the position in all forums (JobLink, internet, etc.).

13. All documents related to the creation of the position description, including the essential functions and the 5 job requirements, and including any rules, procedures, guidelines, or other controlling materials related to the position description.
14. Identification of the person(s) involved in the creation of the referral list.
15. All interview packets for the three candidates.
16. All documents related to the decision and implementation whereby Ms. Jiminez was provided with a higher salary than was posted for the position, including requests for and approvals for the same.
17. All emails from all State and/or private email addresses (including any text messages, instant messages, or other forms of social media communication through those methods) between Ray Fitzgerald, Wes Southall, and/or Gina Jiminez from September 1, 2016 to January 31, 2017 related in any way to the position in question, the applicants, their applications, grievances, Mr. McBride, or meetings involving any 2-3 of the named individuals.

On September 29, 2017, the Board issued a Subpoena Duces Tecum to Dr. Kara Odom Walker, DHSS Secretary, commanding the above-enumerated documents be produced on or before October 27, 2017 for review and inspection by the grievant's counsel. On October 27, 2017, DHSS' counsel filed a partial Motion to Quash, objecting to the documents requested in Paragraphs #3, #13, #14, #16 and #17. The Board received McBride's response to the Motion to Quash on November 3, 2017. DHSS filed a reply to McBride's response on November 7, 2017. All of these documents were provided to the members of the Board prior to its public hearing to consider the Motion on February 1, 2018.

BRIEF SUMMARY OF THE MOTION

The Board did not hear any witness testimony but heard legal argument by the parties on the Department's motion to quash the five numbered categories within the subpoena.

DHSS raises a general objection concerning McBride's request for information regarding the "top three candidates." McBride's request was verbally modified during the hearing. It is undisputed that one of the candidates was offered the position but declined to accept it.

Consequently, McBride is only requesting documents which relate to himself and the successful candidate.

DHSS objects to documents requested in ¶#3, which requests disciplinary records, asserting the records are not relevant to the Board's consideration of McBride's grievance. It argues personnel files (including disciplinary records) are confidential and protected from disclosure by Merit Rule 16.1. It also asserts that personnel records are not considered in determining whether applicants meet the minimum qualifications for a posted position and are not reviewed until after a candidate has been recommended for hire. McBride argues his disciplinary record and that of the successful candidate is highly relevant to the issue of wrongful selection because DHSS claimed the selection decision was "a close-call" and the disciplinary records may be a part of that decision-making process. McBride argues any sensitive information may be redacted and he does not foreclose a gross abuse of discretion argument.

DHSS objects to ¶ #13, which requests documents relating to creation of the Training/Education Administrator II position description. DHSS argues the documents are irrelevant and immaterial to the issue before the Board. McBride argues the information in these documents goes to the heart of his argument that the selected candidate failed to meet minimum qualifications.

DHSS objects to ¶ #14, which requests the person(s) identified in the creation of the applicant referral list be identified. DHSS argues discovery in cases pending before MERB is limited to document production, but McBride is seeking information similar to an interrogatory. McBride stated he intended to request "all documents which identify the person(s) involved in the creation of the referral list." DHSS stated the name is on the actual referral list, which was provided.

DHSS objects to ¶ #16, which requests documents be provided which related to the decision to provide the successful candidate with an advanced starting salary, asserting the

documents are irrelevant and immaterial to the issue before the Board as any such process would have arisen post-selection and post-offer. DHSS also argues personnel files, including payroll records are confidential and protected from disclosure by Merit Rule 16.1.

DHSS objects to ¶ #17, which requests emails and other electronic communications between the successful candidate and agency officials during the period of September 1, 2016 and January 31, 2017, which relate “... in any way to the position in question, the applicants, their applications, grievances, Mr. McBride or meetings involving any 2-3 of the named individuals.” DHSS argues the request is overbroad and seeks information that extends beyond the relevant time period in question. Specifically, DHSS objects to the production of any documentation beyond the December 9, 2016 offer of employment to the successful candidate. McBride argues the timeframe requested is narrow – before and after he was not promoted – and the documents are relevant to a pre-selection argument. DHSS stated it provided documents and emails from April through December 12, 2016 (when DHSS notified McBride he was not the selected candidate).

CONCLUSIONS OF LAW

The Merit Employee Relations Board, in considering a motion to quash a subpoena duces tecum, has previously held:

Superior Court Civil Rule 45 states, “On a timely motion, the Court shall quash or modify the subpoena if it: (i) fails to allow reasonable time for compliance; (ii) requires disclosure of privileged or confidential or other protected matter and no exception or waiver applies; or (iii) subjects a person to undue burden.” Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. *Humes v. Charles H. West Farms, Inc.*, 2006 WL 2242715 at *1 (Del. Super. Ct. July 14, 2006). Even if the initial request is inadmissible at trial, it may still be provided so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Id.*

According to the Delaware Rules of Evidence, relevant evidence means evidence having any tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Therefore, the Board must first determine whether the requested documents are relevant to the matter before the Board or reasonably calculated to lead to relevant evidence. If not, the Board may quash the request. If the request is relevant to the matter before the Board, it must look to the three bases for a motion to quash. The Board may quash or modify to request to relieve burden on the entity requested. ¹

The Board determines that the disciplinary records request contained in ¶ #3 is quashed. McBride's appeal to the Board challenges whether the selected candidate meets the minimum qualifications for the posted position. Consequently, relevant evidence is limited to documents concerning the minimum job requirements. Disciplinary records are not determinative of whether an individual meets the minimum job requirements nor is prior discipline a disqualifying factor during the pre-selection process.

The Board also quashes the request for documents "related to the creation of the position description, including the essential functions and the five job requirements, and including any rules, procedures, guidelines, or other controlling materials related to the position description". ¶ #13. In order to prevail on his grievance, McBride must establish by a preponderance of the evidence that the successful candidate did not meet the minimum qualifications of the posted, vacant position. Merit Rule 18.5² How the job description was developed (including the determination of the minimum qualifications) is not relevant to McBride's challenge. The Board reviews each qualification and makes a determination as to whether the successful candidate met the required qualification. "Because the MERB serves as the final administrative authority for correcting and compensating wrongs suffered by State employees in connection with their employment with the State, it is fully within the purview of the MERB to interpret job requirements

¹ *Jim Erlandson v. Department of Finance, Division of Revenue*, MERB Docket 15-03-623 (2015), p. 4-5

² Merit Rule 18.5: Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet job requirements; (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 in the promotion.

in a reasonable manner.” *The Family Court of the State of DE v. Scaturro, et al.*, 2011 WL 1225893 at * 5 (Del. Super. Feb. 28, 2011).

McBride withdrew his request in ¶14, that DHSS identify all persons “involved in the creation of the referral list” based on the agency’s representation that the individual’s name could be found on the referral list(s) which were provided in response to ¶#5 of the subpoena.

McBride also withdrew the request in ¶#16 for documents related to the decision and implementation of a higher starting salary for the successful candidate.

Finally, McBride withdrew the request in ¶#17 for emails between the successful candidate and others based on DHSS’s representation that it had, in fact, provided documents which included emails for the period of April through December 12, 2016.

McBride also argued that although DHSS provided references for the selected candidate, it redacted the names of persons whom McBride may want to subpoena. The Board finds the names of the references are irrelevant to its analysis of whether the successful candidate meets the minimum qualifications for the position.

DECISION AND ORDER

It is this 7th day of March 2018, by a unanimous vote of 4-0, the Decision and Order of the Board to grant the Department of Health and Social Services Motion to Quash the Grievant’s document requests in ¶ # 3, #13, and for the names of references for the successful candidate.



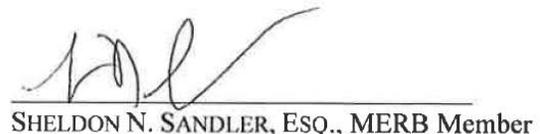
W. MICHAEL TUFMAN, MERB Chair



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



SHELDON N. SANDLER, ESQ., MERB Member