

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

DONALD A. FINNEY,)
Employee/Grievant,) **DOCKET No. 18-08-696**
v.)
DELAWARE DEPARTMENT)
OF TRANSPORTATION,) **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 October 18, 2018 at the Delaware Public Service Commission, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Victoria Cairns, and Sheldon Sandler, Esq., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Donald Finney
Employee/Grievant, *pro se*

Deborah L. Murray-Sheppard
Board Administrator

Kevin Slattery
Deputy Attorney General
on behalf of the Delaware
Department of Transportation

BRIEF SUMMARY OF THE EVIDENCE

The Delaware Department of Transportation (“DelDOT”) offered nine documents, and the Board admitted into evidence eight documents marked for identification as Exhibits A – H (Exhibit I was excluded at prehearing). DelDOT called one witness, Kevin Canning, (“Canning”), Assistant Director, Canal District Engineer, DelDOT.

The Employee/grievant, Donald Finney (“Finney”), offered, and the Board admitted into evidence two documents marked for identification as Exhibits 1 -2 (Exhibits 3 and 4 were excluded at prehearing). Finney called three witnesses: Kevin Canning; Shahin Taavoni (“Taavoni”), Central District Maintenance Engineer, Maintenance & Operations, DelDOT; Latonya Gilliam (“Gilliam”), North District Engineer, DelDOT; and Brian Urbanek (“Urbanek”), Assistant Director, Statewide Support Services, Maintenance & Operations, DelDOT. Finney testified on his own behalf.

FINDINGS OF FACT

On January 4, 2018, DelDOT posted an Engineer Program Manager II – Maintenance Engineer anticipated vacancy, open to DelDOT Merit employees only. The posting listed a closing date of January 10, 2018.

According to the posting, the job requirements included:

- Possession of a valid Delaware Professional Engineering License OR possession of a valid Professional Engineering license issued by a proper authority of a state, territory or possession of the United States, the District of Columbia, or a province or territory of Canada.
- Three years’ experience as a project engineer in Civil Engineering which includes managing engineering programs and projects.
- One year experience in staff supervision, which includes planning, assigning, reviewing, and evaluating the work of others.

Finney received notification his application met the requirements needed for the position.

Thereafter, DelDOT conducted interviews for eight selected applicants who were on the referral list, including Finney. The selection panel included two Caucasian males (Canning and Urbanek) and an African-American female (Gilliam). The panel asked each applicant seventeen (17) questions and each panelist made notes summarizing each applicant's answers. The panel narrowed the list of applicants down to three: Brian Schilling ("Schilling"), a Caucasian male and a Hispanic male. Finney was not included in the three finalists.

The panel members testified that Schilling was their unanimous choice for the position. The panel concluded from its review of his application and interview that Schilling supervised up to 25 employees and consultants while administering construction projects. In his current position as the Design Engineer in the North District, he supervises 10 to 12 employees and all of the maintenance projects in North District. The panel believe Schilling has the experience, energy and initiative to lead at the level required for this position, and had proven experience as a manager. Schillings' experience and thoughtful responses to the interview questions set him apart and made him the obvious choice. Overall, he had a very good interview and was well prepared in all areas.

Prior to being selected, Schilling served as the North District Design Engineer since 2015. Schilling supervised staff consisting of an engineer, technicians and consultant inspectors on multiple maintenance construction projects. He was responsible for ensuring compliance with designed plans, standards and details by contractors. Finney admits Shilling meets the minimum qualifications for the Engineer Program Manager II position.

Finney serves as the Assistant Maintenance Engineer for DelDOT Canal District Maintenance where he is responsible for overseeing in-house personnel and equipment including three Area yards, Facilities Maintenance, and the Equipment Shop. Prior to becoming an

Assistant Maintenance Engineer in 2014, Finney served as a Contracts Engineer in Canal District Maintenance.

CONCLUSIONS OF LAW

Merit Rule 18.5 provides:

Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the 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.

Finney contends he had reasonable answers for every question and, in some cases he believes he answered the question better than Schilling. Finney testified Canning told him he was not selected because he did not interview well; more specifically that Finney focused too much on his contracts experience and did not discuss his experience in Operations. This left the panel with the impression that Finney had no operations experience. Finney asserts he has worked at Maintenance and Operation in the Canal District for the past 18+ years and he has knowledge of both the contracts and operations aspect of the Maintenance Engineer position, as well as day-to-day issues.

Finney failed to meet his burden to prove DelDOT violated Merit Rule 18.5 when it promoted Schilling. Finney admitted Schilling met the minimum qualifications/job requirements for the Engineer Program Manager position. Finney offered no evidence and did not argue that the decision not to promote him violated MR 2.1.

Finally, Finney failed to show DelDOT committed a gross abuse of discretion when it chose Schilling for the position. Finney argued his direct experience in the district, 18 years and

nine months engineering experience outside of the department, education (M.B.A.) and interview should outweigh any other candidate that applied for the position. A mere claim or inference fails to establish the threshold DelDOT committed a gross abuse of its discretion which is "...akin to a reckless indifference or is found where there is an extreme departure from the ordinary care normally given to a situation." *In the Matter of Richard D. Smith*, MERB Docket No. 05-04-327 (2007) at 10.

The Board finds as a matter of law that Finney failed to meet his burden, as there is no evidence of discrimination or that Schilling did not meet the job qualifications. There is no evidence which supports the conclusion that DelDOT grossly abused its discretion in making this hiring decision.

ORDER

It is this **2nd** day of **November**, 2018, by a unanimous vote of 3-0, the Decision and Order of the Board to dismiss Finney's appeal. The Board finds the Grievant failed to provide sufficient evidence DelDOT violated Merit Rule 18.5 when it promoted Brian Schilling rather than Finney to Engineer Program Manager II – Maintenance Engineer.



W. MICHAEL TUPMAN, MERB CHAIR



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER