

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

CHRISTOPHER MCINTYRE,)	
)	
Employee/Grievant,)	DOCKET No. 16-11-657
v.)	
)	DECISION AND ORDER
DEPARTMENT OF SERVICES FOR CHILDREN,)	
YOUTH AND THEIR FAMILIES,)	
)	
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 2, 2017 at the Delaware Commission of Veterans Affairs Hearing Room, Robbins Building, 802 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Paul R. Houck, Jacqueline Jenkins, Ed.D, 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

Deborah L. Murray-Sheppard
Board Administrator

Christopher McIntyre
Grievant, *pro se*

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

BRIEF SUMMARY OF THE EVIDENCE

The Department of Services for Children, Youth and Their Families (“DSCYF”) offered 10 documents, and the Board admitted into evidence nine documents marked for identification as Exhibits A-J (exhibit I excluded at prehearing). DSCYF called one witness Phalishia “Stacy” Kincer, Labor Relations Officer, DSCYF.

The Employee/grievant, Christopher McIntyre (“McIntyre”), offered, and the Board admitted into evidence 14 documents marked for identification as Exhibits 1 – 14 (exhibit number 12 excluded at prehearing). McIntyre testified on his own behalf.

FINDINGS OF FACT

McIntyre, supervisor of special education, DSCYF, since August 6, 2001, applied for the Principal (Superintendent) position when it was posted on January 12, 2016.¹ The posting stated the position would be responsible for the statewide management of DSCYF education programs, including residential and non-residential programs for youth involved in behavioral health treatment and/or juvenile justice rehabilitative services. The posted job requirements stated:

1. Applicant must be certified or certifiable by the State of Delaware, Department of Education as Superintendent or Assistant Superintendent.
2. Minimum of five years teaching experience and minimum of two years full time administrative experience as building principal or central office leadership position.
3. Experience with high-risk youth.
4. Working knowledge of transition needs services for youth as they return to community school and reach adulthood.

¹ McIntyre has applied three times for this position and each time a woman was selected to fill the vacancy.

Pursuant to 14 Del. Admin. C. §§ 1593 – 3.1, a superintendent or assistant superintendent must: (1) hold a valid Delaware Initial, Continuing, or Advanced License; or a Limited Standard, Standard or Professional Status Certificate issued by the Department of Education prior to August 31, 2003; (2) meet the requirements as set forth in 14 DE Admin Code 1505 Standard Certificate; and (3) satisfy the additional requirements in this regulation. The Superintendent or Assistant Superintendent, pursuant to 14 Del. Admin. C. §§ 1593 – 4.1.1, must satisfy one of the following *additional* education requirements:

1. A doctoral degree from a regionally accredited college or university in educational leadership; or
2. A master's or doctoral degree from a regionally accredited college or university in any field and one of the following: (1) the successful completion of an approved Superintendent program pursuant to 14 DE Admin. Code 1595 Certification Program for Leaders in Education; or (2) holding a Standard Certificate Certified Central Office Personnel or a Standard Certificate Special Education Director; and (3) successful completion of nine graduate level credit hours from a regionally accredited college or university in educational leadership or the equivalent in professional development approved by the Department of Education.

Pursuant to 14 Del. Admin. C. §§ 1592 – 3.1, Certified Central Office Personnel must: (1) hold a valid Delaware Initial, Continuing or Advanced License; or a Limited Standard, Standard or Professional Status Certificate issued by the Department of Education prior to August 31, 2003; (2) meet the requirements set forth in 14 DE Admin. Code 1505 Standard Certificate; and (3) satisfy the additional requirements. Certified Central Officer Personnel must satisfy one of the following additional requirements:

1. A master's or doctoral degree from a regionally accredited college or university in educational leadership; or
2. A master's degree from a regionally accredited college or university in any field and one of the following: (1) the successful completion of the Certification Programs for Leaders in education; or (2) holding a standard certificate school principal. Each must also successfully complete an additional nine graduate level credit hours in educational leadership.

DSCYF received from the Office of Management and Budget (“OMB”) a referral list with sixteen names and the Agency interviewed seven applicants including McIntyre and Debra Thompson, who was the successful candidate for the position. The hiring panel was comprised of Karryl McManus, Alison McGonigal, Betsy Fleetwood, Kendall Wicks, Sr. and Carla Penny. The panel asked each applicant seven questions and interviewed them over the course of two days. The panel selected Thompson based on her possessing skills and knowledge in the area of educational leadership. The panel found McIntyre not appropriate for the position based on his failure to possess strong knowledge of current educational practices that would be applicable to Delaware.

According to McIntyre, on or about October 2016, Kincer made a comment concerning a “Mr. Silver Sack” overhead by other employees. McIntyre assumed the comment concerned him and his appearance. Three weeks later Kincer repeated the comment at a retirement party of another employee. Kincer explained that the term used was “Salty Sack” and that the term was part of a story concerning unusual last names told by another employee, which was later repeated in a group of employees who found the story humorous. The term was not directed to or about McIntyre.

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.

Merit Rule 2.1 provides:

Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors is prohibited.

McIntyre contends he is the best candidate for the position as he currently holds all necessary certifications. McIntyre, in his appeal, states that Thompson fails to meet the minimum job requirements and claims discrimination based on age and sex.

Discrimination

The Board concludes as a matter of law that McIntyre did not establish a prima facie case of either age or sex discrimination. In order to establish a prima facie case of age or sex discrimination McIntyre must show: “(1) he was a member of a protected class...; (2) he was qualified for the desired promotion; (3) he suffered an adverse employment decision, i.e. he was passed over for the desired promotion; and (4) his employer’s refusal to promote him occurred under circumstances that give rise to an inference of discrimination.” *Thomas v. Dept. of Transportation*, MERB 13-03-587 (12/27/13) citing *McClement v. Port Authority Trans-Hudson*, 505 Fed.Appx. 158, 2012 WL 5863424, at p. 3 (3rd Cir., Nov. 30, 2012).

McIntyre’s assertion that the previous three selected applicants were women with no other evidence concerning the process of selection in those cases nor whether the selectees failed to meet the minimum qualifications fails to provide adequate support for the fourth element of a discrimination claim. Similarly, Kincer’s alleged remark with no testimony from anyone else who heard it fails to show any discrimination because the remark was not a slur against McIntyre. The Board finds Kincer’s testimony of the events surrounding the remark to be credible. McIntyre presented no evidence that DSCYF has a culture or environment biased against men or

older individuals. Finally, Kincer did not serve on the hiring panel and had no say in the selection decision.

Promotion/Job Requirements

McIntyre failed to meet his burden to prove that Thompson, the selected candidate, did not meet the job requirements. There were four job requirements detailed in the vacancy announcement. Based on Thompson's application, she met numbers two through four. Thompson served as a principal at the Avon Grove Charter School and she worked as an Alternative Educator Grades 7 & 8 for the Oxford Area School District. McIntyre argued "at risk" means working with children who fall within Title I funding. The Board finds no evidence of this requirement in the vacancy announcement nor did McIntyre provide any evidence or testimony to that effect. Therefore, the Board holds as a matter of law that Thompson met all four job requirements.

Lastly, the first job requirement requires an applicant must be certified *or certifiable* by the Delaware Department of Education as a Superintendent or Assistant Superintendent (emphasis added). McIntyre argues Thompson does not meet this qualification. However, the Board finds that while Thompson was not certified, she was certifiable. Thompson holds the necessary requirements for the Standard Certificate required for the Superintendent certification. In addition, while Thompson does not currently hold a Certified Central Office Personnel certificate – one of the additional requirements for the Superintendent certification – she is certifiable as she has met the education requirements for that certificate as well. Thompson has completed all the necessary paperwork for a Standard Certificate School Principal and she has completed nine graduate level credit hours in educational leadership as part of her doctoral studies.

The Board holds that without evidence or testimony to the contrary it must rely on its own

expertise and experience plus the documentary evidence to establish the meaning of certifiable. The Board finds that McIntyre's opinion of Thompson's background fails to meet his burden of proof. McIntyre provided no evidence or testimony from Human Resources regarding the certification process. The Board finds as a matter of law that McIntyre failed to meet his burden, as there was no evidence of discrimination nor any proof that the selected candidate did not meet the job qualifications.

ORDER

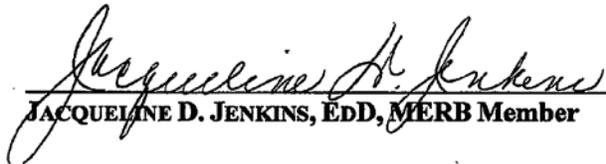
It is this **23rd** day of **February**, 2017, by a unanimous vote of 4-0, the Decision and Order of the Board to dismiss McIntyre's appeal. The Board finds the Grievant failed to provide sufficient evidence DSCYF violated Merit Rules 2.1 and 18.5 when it promoted Debra Thompson rather than McIntyre to Superintendent.



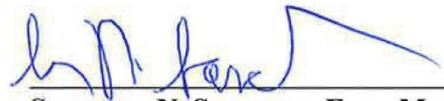
W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER