BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

JOHN W. THOMAS,	)	
	)	
Employee/Grievant,	)	**DOCKET No. 13-03-587**
	)	
v.	)	
	)	
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 December 19, 2013 at the Public Service Commission Conference Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, Dr. Jacqueline Jenkins, Paul R. Houck, Victoria D. Cairns, and John F. Schmutz, 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

John W. Thomas
Employee/Grievant *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of Transportation

BRIEF SUMMARY OF THE EVIDENCE

The Department of Transportation (DelDOT) offered and the Board admitted into evidence without objection eleven documents marked for identification as Exhibits A-K.

The employee/grievant, John W. Thomas (Thomas), offered and the Board admitted into evidence five documents marked for identification as Exhibits 2-5 and 9.

Thomas testified on his own behalf but did not call any other witnesses.

At the close of Thomas's case, DelDOT moved for involuntary dismissal of his appeal because he failed to prove a violation of Merit Rule 18.5. The Board granted the motion to dismiss.

FINDINGS OF FACT

Thomas works as an Engineering/Planning/Surveying Technician IV at DelDOT. He started working for DelDOT in 1996 as an EPS Technician III.

At a Staff Meeting in June 2011, DelDOT announced that "Paul Walsh plans to retire after 40+ years of state service. If you are interested in cross-training with him, please contact your supervisor."

On November 7, 2012, the Office of Management and Budget (OMB) posted a position at DelDOT for Hazardous Materials Supervisor. Thomas applied for the promotion as did Christine M. Edwards (Edwards), who was also an EPS Technician IV at DelDOT. Edwards started working for DelDOT in 1989 as an EPS Technician I.

OMB reviewed the applications and sent a referral list to DelDOT with the names of five candidates who met the minimum job requirements, including Thomas and Edwards.

DelDOT scheduled interviews of the five candidates on December 17, 2012. The three members of the interview panel were Joy Ford, Aaron Wieczorek, and Hany Fekry. Before the interviews, the candidates received a job interview outline. The outline stated: "Each candidate will be judged on the content of their application and on the answers given in this interview. All candidates will be asked the same questions."

All three members of the interview panel rated Edwards number one and rated Thomas number 2 among the five candidates interviewed. By e-mail dated December 19, 2012, the panel members explained their recommendation that Edwards get the promotion:

> Mrs. Edwards interviewed well and was unanimously chosen as the top candidate for [the position] by the panel. Mrs. Edwards answered the questions well and described her experience with Hazardous materials testing and supervision at the Department. She showed a thorough understanding of technical details regarding Hazardous materials and regulation as well as management of a section and coordinating site tasks. She demonstrated immense energy for the position and an interest in improving operations and management of the section. She holds numerous technical certifications and has taken several Departmental courses offered by Human Resources.

According to Thomas, the interview panel disregarded the job interview outline and did not focus on the candidates' job applications, in particular their education and prior work experience. Thomas has a Bachelor of Science in Construction from Louisiana State University, Agricultural and Mechanical College. Edwards took courses in civil engineering at Delaware Technical & Community College in 1988-89 and in 1997 but never obtained a degree. Before Thomas started to work at DelDOT in 1996, he had ten years of experience in the private sector as an iron worker, lead carpenter, construction superintendent, labor foreman, and assistant dry

dock superintendent. Edwards started to work at DelDOT in 1989 apparently right out of school.

The Board finds as a matter of fact that both Edwards and Thomas were qualified for the Hazardous Materials Supervisor position.

The Board finds as a matter of fact that Edwards had worked as an EPS Technician (rising from EPS Technician I to EPS Technician IV) since 1989 (23 years). The Board finds as a matter of fact that Thomas had worked as an EPS Technician (rising from EPS Technician III to EPS Technician IV) since 1996 (16 years).

The Board finds as a matter of fact that Edwards availed herself of the opportunity to cross-train with Paul Walsh before his retirement as the Hazardous Materials Supervisor but that Thomas did not.

The Board finds as a matter of fact that all three members of the interview panel rated Edwards the top candidate for the Hazardous Materials Supervisor position.

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 of the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.**

Thomas did not contend that Edwards, the successful candidate for the promotion, did not meet the job requirements. Thomas may feel that he was the better qualified candidate based on his education and his prior work experience. But the legal standard under Merit Rule 18.5 is not

who was the most qualified, but whether the person promoted was minimally qualified. The Board found as a matter of fact that Edwards was qualified for the position.

In his appeal to the Board, Thomas cited Merit Rule 18.5(2) (discrimination) and Merit Rule 18.5(3) (gross abuse of discretion).

Age Discrimination

The Board concludes as a matter law that Thomas did not establish a prima facie case of age discrimination. To establish a prima facie case of age discrimination Thomas must show: "(1) he was a member of the protected class, *i.e.*, over 40 years old; (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." *McClement v. Port Authority Trans-Hudson*, 505 Fed.Appx. 158, 2012 WL 5863424, at p.3 (3rd Cir., Nov. 30, 2012).

Thomas is 62 years old. Edwards is 43. The Board does not believe that it can draw an inference of age discrimination solely on the basis of an age differential. [1]

The only circumstantial evidence of age bias proffered by Thomas was that he had heard that one of his supervisors, Jim Pappas, had inquired when Thomas was retiring. The Board does not believe that it can infer age discrimination from that hearsay evidence. Pappas was not a member of the interview panel which recommended Edwards for the promotion. At most,

[1] DelDOT argued that Thomas could not establish a prima facie case of age discrimination because Edwards, like Thomas, was also in the protected class (over 40 years old). An employee can establish a prima facie case even if the person promoted was not outside the protected class but was "a significantly younger person." *Grosjean v. First Energy Corp.*, 349 F.3d 332, 335 (6th Cir. 2003). "Age differences of ten or more years have generally been held to be sufficiently substantial to meet the requirements of an age discrimination prima facie case." *Id.* at 336.

Thomas' circumstantial evidence amounts to a stray remark by a non-decision maker which cannot support a discrimination claim. *See Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 521 (3rd Cir. 1997) ("comments by those individuals outside of the decision making chain are stray remarks, which, *standing alone*, are inadequate to support an inference of discrimination").

Gross Abuse of Discretion

The Board concludes as a matter of law that DelDOT did not commit a gross abuse of discretion in selecting Edwards for the promotion.

The Merit Rules do not define gross abuse of discretion. "When Delaware Courts have mentioned the phrase 'gross abuse of discretion' it has been in the same breath as the term 'bad faith.' . . . [G]ross abuse of discretion occurs when the decision is 'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.'" *Department of Correction v. Justice*, C.A. No. 06A-12-006-RBY, at p.9 (Del. Super., Aug. 23, 2007) (citations omitted).

Thomas contended that DelDOT committed a gross abuse of discretion because DelDOT may have pre-selected Edwards. *See McIlroy v. DHSS*, C.A. No. 99A-06-001-HDR, 2000 WL 703672, at p.2 (Del. Super., Apr. 18, 2000) (special training given to a candidate for promotion to uniquely qualify him for the position). [2]

[2] The Board notes that at a Staff Meeting in June 2011 DelDOT advised all staff members that they could cross-train with Paul Walsh, the Hazardous Materials Supervisor, before he retired. Edwards availed herself of that opportunity. Thomas did not.

The only evidence Thomas proffered was a written comment by one of the members of the interview panel: "2 years ago Jim [Pappas] suggested [Edwards] would be a great candidate to lead the department in this position after Paul [Walsh] retires." The Board does not believe that is sufficient evidence of pre-selection. It only shows that one of Edwards' supervisors thought she was highly qualified, an opinion shared by the panel members after they interviewed her and the other candidates.

The Board concludes as a matter of law that Thomas did not meet his burden to prove that DelDOT grossly abused its discretion in selecting Edwards rather than Thomas for the Hazardous Materials Supervisor position. There is no evidence in the record of any bad faith by DelDOT in selecting Edwards. She met all of the job qualifications and scored well during her interview. The decision to promote Edwards was not so far beyond the bounds of reasonable judgment as to suggest bad faith on the part of DelDOT. It was reasonable for DelDOT to consider Edwards' 23 years of experience as an EPS Technician at DelDOT as compared to Thomas' 16 years of experience, and to value her time spent in the public sector over his time in the private sector. It was reasonable for DelDOT to take into account that Edwards took advantage of the opportunity to cross-train with Paul Walsh before he retired, while Thomas did not.

DECISION AND ORDER

It is this **27th** day of December, 2013, by a unanimous vote of 5-0, the Decision and Order of the Board to grant DelDOT's motion for an involuntary dismissal of Thomas' appeal.

Martha K. Austin
MARTHA K. AUSTIN, MERB Chairwoman

JOHN F. SCHMUTZ, MERB Member

JACQUELINE D. JENKINS, EDD, MERB Member

PAUL R. HOUCK, MERB Member

VICTORIA D. CAIRNS, MERB Member