

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

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| DAVID B. CARTER, |) | |
| |) | |
| Employee/Grievant, |) | DOCKET No. 10-03-471 |
| v. |) | |
| |) | DECISION AND ORDER |
| DEPARTMENT OF NATURAL RESOURCES |) | |
| AND ENVIRONMENTAL CONTROL, |) | |
| |) | |
| 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 3, 2011 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, 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

Roy S. Shiels, Esquire
on behalf of employee/grievant
David B. Carter

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Natural Resources and Environmental
Control

BRIEF SUMMARY OF THE EVIDENCE

The Department of Natural Resources and Environmental Control (DNREC) offered and the Board admitted into evidence twenty-four documents marked for identification as Exhibits A-X.

DNREC called seven witnesses: John A. Hughes, former Secretary of DNREC; David S. Small, Deputy Secretary; Susan M. Lee, Human Resource Specialist III; Lee Ann Walling, Chief of Planning; Charles Salkin, Director of Parks and Recreation; Constance C. Holland, Director of Office of State Planning Coordination; and Mary B. Parker, Human Resource Manager.

The employee/grievant, David B. Carter (Carter), offered and the Board admitted into evidence seventeen documents marked for identification as Exhibits 2-11, 13, 15-16, 18, 21-23.

Carter testified on his own behalf and called three witnesses: Gerard L. Esposito, former Director of Water Resources; Sarah G. Cooksey, Environmental Program Administrator; and William Meredith, Environmental Program Administrator.

FINDINGS OF FACT

Lee Ann Walling was Governor Ruth Ann Minner's Chief Policy Advisor in 2001-2002. Walling then worked as Deputy Director of the Delaware Economic Development Office (DEDO) from 2002 to 2005 before returning to the Governor's Office as Policy Advisor for Environment and Quality of Life. Prior to joining the Governor's Office in 2001, Walling was Deputy Principal Assistant at the Department of Finance (1996 to 1999) and Deputy State Treasurer (1999-2001).

When Walling rejoined the Governor's Office in 2005, she had wide-ranging responsibilities for land use planning and environmental issues and was the Governor's principal liaison with DNREC, the Department of Transportation, and the Department of Agriculture. Walling played a significant role in carrying out one of Governor Minner's signature programs, Livable Delaware.

On July 1, 2007, the Governor's Office and DNREC signed a memorandum of understanding to "loan" Walling to DNREC as a Policy Advisor in the Secretary's Office. Walling continued as a political appointee paid out of the Governor's budget. The memorandum of understanding listed extensive job responsibilities for Walling such as: "Liaison to the Office of the Governor and other state agencies on environmental issues" and "Coordinate on behalf of [DNREC] Livable Delaware and other land-use policy and planning initiatives and activities, including the Preliminary Land Use Service (PLUS)."

On October 1, 2007, DNREC asked the Office of Management and Budget (OMB) to critically reclassify an Environmental Program Administrator position to Chief of Planning. According to David Small, DNREC needed that position to bring together various programs with different points of view into "a single voice to be able to provide potential developers with the perspective from our agency on what the potential impacts of what they were proposing would be. . . . [A]nd so we were finding ourselves needing a position that could knit all of that together and basically have the capacity to present that overall perspective."

Walling was involved in drafting the Job Analysis Questionnaire (JAQ) for the position of Chief of Planning. On January 7, 2008, OMB approved the critical reclassification.

The job requirements for Chief of Planning are:

1. Experience in professional planning program administration such as overseeing and directing the development, implementation and evaluation of professional planning programs and services; planning and establishing short and long range program goals and objectives. Providing advice to other agency organizational units through consultation.
2. Experience in public policy administration which includes overseeing and directing the development, implementation and evaluation of public policies.
3. Experience in writing and defending proposed legislation

and regulations.

4. Experience in operations management which includes planning, directing, coordinating, controlling and evaluating multiple units typically through subordinate supervisors.

The position also has a selective requirement: Experience in analyzing legislation.

On February 5, 2008, OMB posted a merit position for Chief of Planning at DNREC. Walling and Carter applied. Both were qualified and placed on a certification list (along with three others) on February 27, 2008.

On February 7, 2008, OMB instituted a statewide hiring freeze so DNREC put the hiring process for Chief of Planning on hold. On July 21, 2008, OMB lifted the freeze for Chief of Planning and eleven other positions at DNREC. DNREC then moved forward with interviews of the five qualified candidates for Chief of Planning.

David Small appointed the three members of the interview panel: Charles Salkin; Phillip Cherry; and Constance Holland. According to Small, he selected the members for their “extensive experience in land use issues from various points of view both inside and outside of the agency.” Small thought their “expertise would lead to the selection of the best candidate for the job.”

On July 29, 2008, the interview panel interviewed four of the candidates from a standard list of questions. Cooksey was on vacation so the panel interviewed her on August 6, 2008. According to Charles Salkin, Walling was far and away the most impressive candidate based on her job experience and her interview. The panel ranked Walling number one and Sarah Cooksey second.

The panel did not rank the remaining three candidates. About Carter, the panel wrote in the Action Reason Comments: “Carter had less experience in analysis and development of state legislation and in public policy administration.” Salkin testified that during the interview Carter was critical of DNREC management policies, in particular Livable Delaware, which raised concerns

about his “being in charge of a team of specialized planners in the Secretary’s Office.”

The interview panel recommended to David Small that DNREC hire Walling as Chief of Planning: “Candidate interviewed extremely well, was articulate and knowledgeable on state planning issues and has excellent experience in legislative matters and with the Delaware Legislature. The candidate was the unanimous first choice for the position.” Secretary Hughes accepted the panel’s recommendation after review by Fiscal and the Affirmative Action Officer.

Carter contended that Walling did not meet the job requirements for Chief of Planning because she did not have experience in “professional planning program administration.”¹ According to Carter, Walling may have experience with “projects” but she did not have “program administration” experience. According to Carter, there is a difference between a “project,” which is short-term with a specific focus, and a “program,” which is long-term and has multiple objectives. The Board finds as a matter of fact that Walling met all of the job requirements for Chief of Planning. The Board does not believe that the distinction between “project” and “program” is tenable. The job requirements do not define “program,” but the dictionary definition is “a plan or procedure; a schedule or a system under which action may be taken toward a desired goal; a proposed project or scheme.” *Webster’s Third New International Dictionary* 1812 (2002). “Project” is defined as a “specific plan or design; scheme; a planned undertaking.” *Id.* By these definitions, the terms “project” and “program” are synonymous.

Even if the terms are distinct, the Board finds as a matter of fact that Walling had program

¹ Carter also contended that Walling did not meet one of the essential functions of the job: budget experience. The only reference to budget in the essential functions is the third bullet point: “Develop recommended course of action for public and private decisions in formal plans and policies including policy statements, budget allocations, regulations and/or legislation to affect and facilitate change and reach objectives.” The Board finds as a matter of fact that Walling had the required budget experience as Chief Fiscal Officer for the Division of Revenue, Department of Finance where she developed the department’s budget for three fiscal years.

administration experience by virtue of her oversight of the Livable Delaware agenda and her top-level management positions at the Department of Finance, the State Treasurer's Office, and DEDO. The Board believes that supervising an agency comprised of many programs qualifies as program administration experience.

Carter also alleged that DNREC pre-selected Walling for Chief of Planning. As evidence, Carter alleged: Walling assumed the title of "Acting Chief" without authorization; she contacted the Governor to expedite the critical reclassification; she helped draft the JAQ; Secretary Hughes told Gerald Esposito in January 2007 that "no other candidate was even close to being as qualified as Ms. Walling"; and Hughes told Sarah Cooksey in June 2007 "that Lee Ann Walling was coming to work for the Department as Chief of Planning."

The Board finds as a matter of fact that these allegations – even if true – do not amount to substantial evidence to infer that the application and interview process were a sham and that DNREC pre-selected Walling for Chief of Planning. The evidence is quite to the contrary.

The Board found credible the testimony of former Secretary Hughes that when he learned the Chief of Planning was to be a merit position he wanted to "select the best qualified applicant." Hughes told everyone involved to "do this cleanly, properly" according to "the merit system rules and regulations as to how you hire somebody." Mary Parker, another credible witness, testified that at a meeting in January 2008 with Hughes and David Small, Hughes made it clear that if Walling "is not the best candidate for the position, I will deal with my Boss." Charles Salkin, another witness the Board found credible, testified that he did not feel any pressure to rate Walling higher than the other four candidates. And Constance Holland, another credible witness, testified that no one suggested to her that Walling receive preferential treatment: "I would not have served on that [interview panel] if any of that had happened."

Carter alleged that Holland was predisposed towards Walling because, as the Governor's Chief Policy Advisor in 2001-2002, Walling hired Holland as Director of Office of State Planning Coordination and Holland reported to Walling. But Holland testified that Gary Patterson contacted her about the Director position, not Walling, and Holland only reported to Walling for eighteen months. Holland acknowledged that she and Walling have continuing professional contacts on land use issues, but there is nothing in the record to suggest that may have compromised Holland's fairness and objectivity. Indeed, one of the reasons David Small appointed Holland was that four of the five candidates were DNREC employees and Holland worked for another agency.

The Board did not find the testimony of either Sarah Cooksey or Gerard Esposito credible. Cooksey was an unsuccessful candidate for Chief of Planning and stands to gain if Carter prevails in his grievance and DNREC has to redo the selection process. By knocking out Walling, Cooksey – as the second ranked candidate – would be the frontrunner.

Esposito testified that on January 30, 2007 he warned Secretary Hughes about “potential controversy” over Walling because she was a “close associate of the Governor at the time” and other people were interested in the planning position. According to Esposito, Hughes responded that “no other candidate was even close to being as qualified as Ms. Walling.” At the time, however, Walling was being considered for a non-merit position in the Secretary's Office on loan from the Governor's Office, not a competitive merit position. As Hughes testified, after OMB had reclassified the Chief of Planning as a merit position on January 7, 2008, “everything changed” and he made it clear to everyone involved in the hiring process that DNREC would follow the merit system procedures to the letter and Walling would have to compete like any other candidate.

As for Walling's role in drafting the JAQ, the Board does not find it unusual for the person currently performing many of those job functions to be involved. Walling only provided the DNREC

Human Resources Office with a first draft. OMB was responsible for reviewing the draft and publishing the job requirements when it posted the position. The Board does not believe that Walling somehow was able to tailor the job requirements to her advantage without OMB scrutiny.

Cooksey testified that she questioned Mary Parker on June 12, 2008 after seeing an e-mail where Walling used the title “Acting Chief of Planning.” Cooksey was worried that Walling might have a competitive edge for “extra experience by Acting in the role.” Parker testified that Walling asked to use the Acting title to “describe what she was doing for anyone who contacted her. So I said if that’s what you’re doing, I don’t care.” Parker testified that the title did not give Walling any unfair advantage in the selection process and “she didn’t mention it in her application.”² The Board does not believe that Walling’s use of the title “Acting Chief of Planning” in any way proves that her getting the position was a done deal.

Carter placed great stock in an e-mail dated March 18, 2008 from Walling to Mary Parker inquiring about dates for a timeline Walling was working on about the critical reclassification. Parker advised that “We received approval [from OMB] on 1/7/08.” Walling e-mailed back: “I am taking my case to the Guv.” Walling testified that she gave a copy of the timeline to Governor Minner and her Chief of Staff, Mark Brainard. Walling noted in the timeline: “This process has taken almost a year, in spite of the Governor supporting the change, and ended with an OMB veto of an agreed-upon deal and the Secretary’s priorities.”

The Board does not see anything sinister in Walling’s trying to speed up the re-classification for the position of Chief of Planning. After all, if she were successful it would benefit not just her

² William Meredith claimed no one could use an “Acting” title because of the hiring freeze. But, as Parker explained, Meredith “confused acting with temporary promotions. He had someone who was temporarily promoted. He wanted to extend that temporary promotion and he wanted to continue to work someone out of class, and we told him that would no longer be permitted.”

but the four other candidates on the certification list as well. (Sarah Cooksey also testified about her frustration over the hiring freeze.) And when OMB released the Chief of Planning position from the hiring freeze on July 21, 2008, OMB released eleven other positions at DNREC, belying any suggestion that the Chief of Planning position received special treatment.

The Board finds as a matter of fact that the selection process for the position of Chief of Planning was fair and impartial and that Walling was the most qualified candidate.

CONCLUSIONS OF LAW

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.

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

The Board concludes as a matter of law that DNREC did not violate Merit Rule 18.5(1) because Walling met all of the job requirements for Chief of Planning.

The Board concludes as a matter of law that DNREC did not violate Merit Rule 18.5(2) because there is no evidence in the record of any discrimination against Carter.

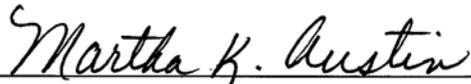
The Board concludes as a matter of law that DNREC did not violate Merit Rule 18.5(2) because there is no evidence in the record of any violation of the procedural requirements of the

Merit Rules. DNREC adhered to all of the procedural requirements for Recruitment and Application (Merit Rule 6.0), Screening and Ranking Applicants (Merit Rule 7.0), and Certification (Merit Rule 8.0).

The Board concludes as a matter of law that DNREC did not violate Merit Rule 18.5(3). There was no gross abuse of discretion in the promotion because the evidence in the record proves that Walling was the most qualified candidate for Chief of Planning.

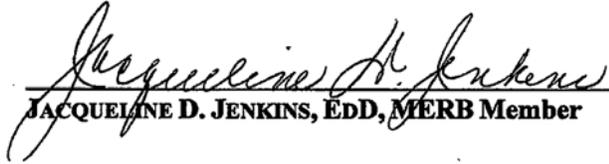
ORDER

It is this 15th day of February, 2011, by a unanimous vote of 4-0, the Decision and Order of the Board to deny Carter's appeal.


MARTHA K. AUSTIN, MERB Chairwoman


VICTORIA D. CAIRNS, MERB Member


JOHN F. SCHMUTZ, MERB Member


JACQUELINE D. JENKINS, EDD, MERB Member