

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

GREGORY FULLER,)	
)	
Employee/Grievant,)	
)	DOCKET No. 14-04-605
v.)	
)	DECISION AND ORDER
DEPARTMENT OF SERVICES FOR CHILDREN)	
YOUTH AND THEIR FAMILIES/ DIVISION)	
OF YOUTH REHABILITATIVE 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 July 17, 2014 at the Public Service Commission Conference Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, Victoria D. Cairns, Paul R. Houck, Dr. Jacqueline Jenkins, and John F. Schmutz, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Paula A. Fontello
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Tasha Marie Stevens, Esquire
on behalf of the Employee/Grievant

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Services for Children, Youth and their
Families

BRIEF SUMMARY OF THE EVIDENCE

The Department of Services for Children, Youth and their Families (DSCYF) offered and the Board admitted into evidence twelve documents marked for identification as Exhibits A - L.

DSCYF called five witnesses: Dr. Aileen Fink, Psychology Manager; Division of Management Support Services; Perry Phelps, Chief of the Bureau of Prisons, Department of Correction and former Warden of James T. Vaughn Correctional Center; Karen Smith, Human Resource Specialist III, Department of Services for Children Youth and Their Families; Alison McGonigal, Deputy Director, Division of Youth Rehabilitative Services.

The employee/grievant, Gregory Fuller (Fuller), offered and the Board admitted into evidence twenty two documents marked for identification as Exhibits 1-22.

Fuller testified on his own behalf and called three witnesses: Alison McGonigal, Deputy Director, Division of Youth Rehabilitative Services; Annette Miller, Former Superintendent, Ferris School; and Chris Setzar, Superintendent, Stevenson House.

FINDINGS OF FACT

Fuller is a Social Service Administrator for the Division of Youth Rehabilitative Services (YRS). In June of 2008, Fuller moved into his current position as a social service administrator as the result of an agreement from a DOL complaint. Prior to his current position from July 2005 until June 2008, Fuller served as the assistant superintendent at Stevenson House Detention Center in Milford, Delaware. From August 2004 until July 2005, Fuller previously served as the superintendent at the Ferris School for Boys.

On April 26, 2013, the Office of Management and Budget (OMB) posted an opening for the position of Youth Rehabilitation Institution Superintendent, pay grade 20, for two locations on the campus at 1825 Faulkland Road, Wilmington, Delaware: Ferris School and Residential

Cottages.

Fuller applied for the promotion. OMB reviewed all of the applications and sent a referral list of twelve qualified candidates to YRS. The list included Fuller, Thomas Spell (Spell), Raheem Perkins (Perkins) and nine other candidates.

YRS conducted one round of oral interviews. The interviews for the two positions were conducted at the same time because YRS was looking for similar qualifications from the candidates, they were both critical positions to fill, and the candidates could apply for one or both of the positions. The members of the interview panel were: Alison McGonigal (McGonigal), Dr. Aileen Fink (Fink), Judge Michael Newell, Warden Perry Phelps (Phelps), Mark Farley (Farley), and Vicky Kelly. YRS was aware that one of the candidates, Spell, is the sibling of the YRS Division Director, Nancy Dietz (Dietz). Part of Farley's role in the interview process was to ensure a fair and equitable process and that no improper information was considered. Spell was a current YRS employee and had been employed at YRS before Dietz became the Division Director. Dietz was not part of the hiring process.

The panel interviewed eight candidates on June 14, 2013 using a form list of seven questions. The questions were conducted in a round table format providing the opportunity for each panel member to ask a question followed by any follow up questions. At the end of the interview, the candidates were given the opportunity to pose questions to the panel. Each member of the panel completed a form for each candidate including written notes next to each question. The panel did not rate the answers or rank the candidates.

At the conclusion of the interview process during a round table discussion, the panel reached consensus on two candidates. The panel unanimously recommended Spell and Perkins for the positions. The panel limited its recommendation to only two candidates and did not rank order or recommend any of the other candidates for the positions. The recommendations were forwarded to

the Cabinet Secretary who ultimately made the decision.

According to McGonigal, Fink, and Phelps, the interview panel all agreed that Spell and Perkins were the two most qualified of the eight candidates. According to McGonigal, YRS was shifting towards kid-focused services with positive youth outcomes and looking for transformational leaders with the ability to change the culture and improve staff morale in both positions. Clinical skill with treatment background was specifically identified as a need for the successful candidate for the Residential Cottages, as well as operation and security experience. Operational and management administration was identified as a critical need for the successful candidate for Ferris. McGonigal testified that YRS was at a turning point and was focused on moving forward with best practice, evidence-based programming and becoming treatment and performance focused.

Performance reviews that were provided by the candidates were available to the panel for review. Spell was the assistant superintendent of Ferris for a year and a half or more and was serving as the acting superintendent of Ferris at the time of the interviews. Mr. Perkins was the acting superintendent of the Cottages. McGonigal also explained that there were significant issues occurring within the Ferris School that had been brought to the Governor's attention and the acting superintendents were selected from the secure tier supervisory chain for consistency.

McGonigal indicated that Spell was a calm influential leader and had shared experiences from the police department and within Ferris School and had presented the ability to inspire teens to change course and implement more efficient business practices. McGonigal testified that Perkins demonstrated leadership abilities with various teams through his years of service at YRS. Both Spell's and Perkins' interview responses focused on community outreach and relationships with the courts and other partners. Fuller's responses were very task focused and focused heavily on his experiences within the Department of Correction and the military. The

panel members concurred that at the end of the interview process there were only two viable candidates for the positions and Fuller was not selected.

Fuller claimed that Merit Rule 18.5 was violated due to a violation of 2.1 (discrimination) and a gross abuse of discretion. Fuller claims YRS discriminated against him based on multiple reasons¹ under Merit Rules 2.1, specifically based on retaliation. Fuller was also concerned with nepotism; specifically that one of the selected candidates is the sibling of the current Division Director. Additionally, Fuller raised concerns with the process and asserted that his qualifications, performance records, and seniority were not considered.²

Fuller did not present any direct evidence of intentional discrimination. Fuller relied on his 2008 grievance and settlement and that Phelps was on past interview panels where he was not selected. Fuller provided testimony regarding his past conflicts with Phelps in their working relationship. Fuller asserted that the inclusion of Phelps and McGonigal on the interview panel created a bias.

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.

Fuller does not dispute that the successful candidates for the two positions of Youth

¹ Although Fuller raised his race and gender as a basis for discrimination during the grievance process below, Fuller did not address issues of race or gender discrimination during the MERB hearing and failed to establish evidence to support this claim. It was undisputed that Spell is a 49 year old white male and Perkins is a 37 year old black male. Thus, the candidates selected were diverse in age and race. During the MERB hearing, Fuller focused on claims of nepotism and retaliation and made one comment regarding age.

² Any alleged flaws in the process cannot amount to a “gross abuse of discretion” under Merit Rule 18.5. “[T]he gross abuse of discretion must occur in the actual choice of one candidate over another. . . . [I]t does not apply to an aspect of the promotion process as opposed to the actual promotion.” *Department of Correction v. Justice*, C.A. No. 06A-12-006-RBY, at p. 7 (Del. Super., Aug. 23, 2007) (original emphasis).

Rehabilitation Institution Superintendent (Spell and Perkins) met the job requirements. Fuller believes that he was the most qualified candidate because he previously served as superintendent at Ferris for eleven months (August 2004-July 2005) and assistant superintendent at Stevenson House (2005-2008), he completed the State's Supervisory Development Program, and that he has 22 years of State service.

There is perhaps no principle more settled in this area of the law than that promotion and non-promotion of employees within a department or agency of Government is a matter of supervisory discretion. *Schur v. Department of Transportation*, No. 09-01-439, at 4 (Mar. 19, 2009). The issue under Merit Rule 18.5 is not whether the person promoted was the best or most qualified candidate. The issue is whether the person promoted was qualified. It is undisputed that both Spell and Perkins met all of the job requirements for the position of Youth Rehabilitation Institution Superintendent.

Merit Rule 2.1 - Discrimination

The Board concludes as a matter of law that Fuller failed to establish a prima facie claim of retaliation. As to the assertions of discrimination, there was no credible evidence presented that the action taken was in retaliation for the 2008 grievance or for any other improper purpose. Under these circumstances the Board unanimously concludes that the action of the appointing authority should be upheld and the grievance appeal denied.

Fuller asserts that he was discriminated against in retaliation for a 2008 grievance and settlement. Although the term "retaliation" does not appear in Merit Rule 2.1, this Board has held that for an employer to retaliate against an employee's exercise of protected activity is discrimination based on a non-merit factor. *Hilferty v. DOS*, No. 07-12-406, at 10 (Aug, 27, 2008).

The evidence presented does not support Fuller's claims. To establish a prima facie case of retaliation, Fuller must show (1) that he engaged in a protected activity; (2) he suffered adverse employment action; and (3) and that there was a causal connection between the two. *Miller v. State*, 2011 WL 1312286, at 12 (Del. Super.); *Hilferty* (Supra.) at 10.

The only protected activity alleged by Fuller is that he filed a discrimination charge in 2008. There is a five year temporal gap between his filing the charge and this promotional process. The 2008 grievance is too remote in time to infer any causal connection and Fuller failed to present any credible evidence to support the claim. *Id.* Based on the evidence presented, the 2008 grievance was not discussed during the interview process and did not impact the interview process. Fuller provided testimony regarding his concerns with one of the members of the interview panel, Perry Phelps and a past working relationship; however, based on the evidence Mr. Phelps did not hold any animosity towards Fuller, any animosity between the two was one sided on the part of Fuller, and their past relationship was not discussed during the interview process.

Gross Abuse of Discretion

The Board concludes as a matter of law that YRS did not commit a gross abuse of discretion in selecting Spell and Perkins 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).

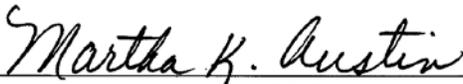
Fuller contended that YRS committed a gross abuse of discretion in choosing Spell because

the YRS Division Director is his sister and because the panel did not conduct the interview process perfectly. The Board concludes that Fuller failed to establish that the selection of Spell was the result of nepotism and the record supports that both Perkins and Spell were qualified and selected unanimously by the interview panel based on their credentials and the interview process. There is no evidence that sibling relationship between Spell and the Division Director influenced the selection process.

The Board concludes as a matter of law that Fuller did not meet his burden to prove that YRS grossly abused its discretion in selecting Spell and Perkins rather than Fuller for the Youth Rehabilitation Institution Superintendent. There is no evidence in the record of any bad faith by YRS in selecting Spell and Perkins. Both candidates met all of the job qualifications and were unanimously selected as the two candidates to recommend for the open positions. The decision to promote Spell and Perkins was not so far beyond the bounds of reasonable judgment as to suggest bad faith on the part of YRS. It was reasonable for YRS to consider Perkin's and Spell's background and responses to the interview questions in making the selection. By all accounts, the interview panel considered all the information provided and Spell and Perkins were recommended for the positions based on the unanimous vote of the panel members.

DECISION AND ORDER

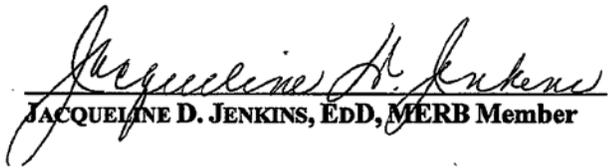
It is this 14th day of October, 2014, by a unanimous vote of 5-0, the Decision and Order of the Board to deny Fuller's appeal.



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

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: October 14, 2014

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel
MERB Website