

2. Mr. McDowell testified that he reviewed Mr. Jones' 1991 Employee evaluation (EPPA) in May of 1992, and that he did not note any deficiencies at that time. Mr. McDowell testified that he recalled a specific example of an assignment that Mr. Jones failed to complete during his tenure that caused Mr. McDowell to conclude that Mr. Jones exhibited weak management skills.
3. Mr. McDowell testified further that as Director of Administration, he was responsible for reviewing the Delaware Department of Transportation (DEL DOT's) affirmative action program before it was submitted to the Federal Highway Administration.
4. Mr. McDowell testified that the affirmative action policy of DEL DOT requires that department managers within the hiring authority consult with the affirmative action representative prior to making a final decision. Mr. McDowell testified further that it was an oversight that the affirmative action officer, Philip Fenimore was not directly consulted prior to Ms. Minner's selection.
5. Mr. McDowell testified that the selection of Ms. Minner was based upon the merits and qualifications as viewed by the three committee members. Mr. McDowell further testified that Mr. Jones exhibited a lack of flexibility in response to an interviewer's questions.
6. On cross-examination, Mr. McDowell testified as to the organizational structure of DEL DOT, the functions of the contract administration unit, and how Mr. Maher, the former contract supervisor, moved to the audit department. Mr. McDowell testified that the contract supervisor position was filled on a competitive basis by Ms. Minner.

7. Mr. McDowell testified as to the procedures he followed as the hiring authority for the DEL DOT. Mr. McDowell testified that he worked with the State Personnel Department in establishing the procedures for the selection of a Contract Administrator after the position was reclassified. Mr. McDowell testified that after he received the certification list, he asked the two other Divisions, Pre-Construction and Highway Operations, to recommend an interviewer to participate on the interview team. The certification list contained 5 names: Willie Jones, John Eustice, Barbara Minner, Dan Skeens and Bob Uhle.
8. Mr. McDowell further testified that James Lutrakowski and Michael Angelo were named to the interview panel, and they met to review the questions prepared by Mr. McDowell, and to choose who would ask each question.
9. Mr. McDowell testified that the questions were asked of all candidates and the responses were recorded. Each panel member reviewed the responses and individually ranked the 5 applicants.
10. Mr. McDowell testified that Mr. Jones was ranked below Ms. Minner by all members of the interview team.
11. Mr. McDowell testified that he reviewed the selection process with Ms. Fierstein, DEL DOT Personnel Administrator, to ensure the selection was in proper compliance. Mr. McDowell testified that he reviewed the affirmative action issues with Ms. Fierstein, and that he neglected to review them with Mr. Fenimore due to an oversight. Mr. McDowell testified that no one lobbied for Ms. Minner to get the position. Mr. McDowell testified that he met with

Secretary Anne P. Canby and reviewed the process and that she gave her approval to award the position.

12. Mr. McDowell testified that according to the DEL DOT Affirmative Action plan, that DEL DOT had a goal of hiring 1 female and 1 minority male in the Officials and Administrators unit, and that the position of Contract Administrator falls within that category.
13. Mr. McDowell testified that he sent out an award letter to Ms. Minner and non-selection letters to Mr. Jones and the other unsuccessful candidates. He further testified that he left the position of Director of Administration shortly after that time to return to a merit service position in Finance and Management and that the oversight in failing to review the process with Phil Fenimore was due to Mr. Fenimore being on duty in a Military Reserve Unit.
14. On re-direct, Mr. McDowell testified that he could not answer if DEL DOT had ever met their goal in hiring minority males in the Officials and administrators positions, and that he did have meetings with his staff to discuss EEO matters.
15. On examination from the Board, Mr. McDowell testified the EEO goals would have caused DEL DOT to go with one (1) candidate if there was a tie.
16. Gregory Chambers was sworn and testified that he investigated a discrimination charge filed by Mr. Jones in 1993. A copy of his finding indicating discrimination was introduced into the record. Mr. Chambers testified that the findings were agreed with by Dr. Harriet Smith and Mr. Thomas LoForo of the State Personnel Office. Upon cross-examination, Mr. Chambers testified that he reviewed the paper record, but did not talk to John

McDowell or the two other members of the interview panel and that he took into consideration that women are also under-representated in the Officials and Administrators category at DeIDOT.

17. Michael A. Angelo was sworn and testified that he is a road design engineer for DEL DOT and that he was selected by Ray Harberson to sit on the interview panel. Mr. Angelo testified that he had served on interview panels previously, had participated in the formulation of the questions, and that neither sex nor race had any bearing on his ranking of candidates. Mr. Angelo further testified that no one told him who to pick or select for the position, and that after the completion of the interview process, he ranked Ms. Minner first and Mr. Jones fifth. Mr. Angelo testified that he gave Mr. Jones pluses for currently supervising the DBE program, his degree in marketing and his managerial experience and minuses for little experience with both contract administration and professional services. Mr. Angelo testified that he gave pluses to Ms. Minner for her strengths in currently supervising contract administration and her work as project manager for the building renovations, as well as her legal background and her education in business administration management. Mr. Angelo testified that Ms. Minner's minuses were little experience with professional services, not especially strong in supervisory experience, and no experience with DBE.
18. On cross-examination, Mr. Angelo testified as to what he expected as an answer to a specific interview question, the differences between policy and statute, and how he decided which factors to give a minus or plus for.

19. James Lutrzykowski was sworn and testified that he was currently the Deputy Director of Highway Operations for DEL DOT and had worked for DEL DOT for almost 33 years. Mr. Lutrzykowski testified that he served on the interview panel, and was present at a meeting where the questions were divided among the panel members.
20. Mr. Lutrzykowski further testified that no one told him how to select a candidate and that neither race nor sex played any role in the manner in which the candidates were picked or ranked. Mr. Lutrakowski testified that he kept notes about the responses made by all candidates and that he ranked Ms. Minner first along with John Eustis with Mr. Jones fifth.
21. On cross-examination, Mr. Lutrzykowski testified as to the criteria he used in evaluating the candidates. Mr. Lutrzykowski testified that the decision to select a candidate had not been made prior to the interviewing process.
22. Abbey Fierstein was sworn and testified that she was the Personnel Administrator for DEL DOT. Ms. Fierstein testified as to the history of the positions of Contract Supervisor and Contract Administrator. Ms. Fierstein testified about the DEL DOT affirmative action goals, which included females and minorities in the category of Officials and Administrators, and her conversation with John McDowell. Ms. Fierstein testified that there were two opportunities presents that females were under-represented by 20% at DEL DOT and minority males were under-represented by 10% at DEL DOT, but only one position to be filled.
23. On cross-examination, Ms. Fierstein testified that both goals could not be met

because there was only one selection that could be made, and that she did not know if the Department ever met its goal in hiring minority males. Ms. Fierstein testified that in 1993, DEL DOT did hire females, exceeding the annual goal of 1 female, but did not meet its goal of hiring one minority male. Ms. Fierstein also testified as to the Department's recruitment program for minority males.

24. Barbara (Bobbi) Hettel-Minner was sworn and testified that she started with DEL DOT in 1980 in the Legal Department; and left DEL DOT in 1986 to work in the private sector. Ms. Minner testified that she returned to DEL DOT in 1989 as Executive Assistant to the Director of the Division of Highway Operations, and then moved to Executive Assistant to the Director of Administration. Ms. Minner testified further that she became contract supervisor in June, 1992, and applied for and was selected as Contract Manager in January, 1994. Ms. Minner testified that she did not lobby for this position, did not talk to any interview panel members prior to the selection for the position, and no one promise her the position. Ms. Minner testified as to the coordination between contract preparation and DBE issues, and that approximately 150 contracts per year are administered by the Contract Administration section.
25. On cross examination, Ms. Minner testified that Mr. Jim Smith, the previous Contract Administrator, trained her in competitive bid contracts for her position as Contract Supervisor. Ms. Minner testified that she did not write the article in the DEL DOT Dispatch employee newsletter that referred to her as being in charge of Contract Administration; and that she was never promised the

position of Contract Administrator.

26. Upon examination by the Board, Ms. Minner testified as to the job function she performed at DEL DOT and in the private sector from 1980 to 1995. Ms. Minner testified that she had expected to complete her bachelors' degree in Business Administration by the end of 1994, but she is still working on it at this date.
27. On re-direct, Ms. Minner testified that serving as the contract manager for the renovation of the DEL DOT Administration Building, along with a review by Widener University of the transfer credits has caused a delay in completing her degree.

THE LAW

29 Del. C. § 5931. Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final 2 steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongful denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within 90 calendar days of submission to the Board. Upon approval of all parties, the 90 days may be extended an additional 30 calendar day. (29 Del. C. 1953, § 5931; 55 Del Laws, c. 443, §6, 69 Del. Laws, c. 436, § 7.)"

Effect of amendments -- 69 Del. Laws, c. 436,

effective July 14, 1994, rewrote this section.

Merit Rule 13.0100 Promotion

Vacancies shall be filled by promotion wherever practical and in the best interest of the classified service.

Whenever a position is to be filled by promotion, the candidate shall meet the minimum requirements of the class specification. Consideration shall be given to qualifications, performance, record, seniority, conduct and, where applicable, the results of competitive examination.

No grievance may be maintained concerning a promotion except where:

- 1) the person who has been promoted does not meet the minimum qualifications;
- 2) there has been a violation of Merit Rule 19.0100 or any of the procedural requirements in the Merit Rules; or
- 3) there has been a gross abuse of discretion in the promotion.

FINDINGS OF FACT

1. The position of Contract Administrator for the Delaware Department of Transportation (DEL DOT) was posted in compliance with the applicable Merit Rules in the fall of 1993.
2. A certification list was provided by the State Personnel office of 5 applicants who met the minimum qualifications for the position as determined by the State Personnel office.
3. The certification list included the following applicants:
 - a. Barbara (Bobbi) Minner
 - b. Bob Uhle
 - c. John Eustice
 - d. Dan Skeens
 - e. William Jones
4. The hiring authority, John McDowell, established an interview committee

consisting of himself, James Lutrakowski and Michael Angelo, representing all three divisions of DEL DOT.

5. The interview committee reviewed and modified the questions prepared by Mr. McDowell and established who on the panel would ask each question.
6. Each candidate was asked the identical questions by the panel, and each panel member individually ranked the candidates, with John McDowell making the final selection.
7. The hiring authority reviewed with the personnel administrator the procedure followed in the selection process and his proposed selection.
8. The hiring authority failed to review the hiring process for this position with the DEL DOT Affirmative Action Officer, Phil Fenimore, due to Mr. Fenimore's Military Reserve obligations.
9. The hiring authority did discuss the affirmative action component of the hiring process with the DEL DOT Personnel Administrator, Ms. Fejerstein.
10. At the time of the hire (January 1994/Fiscal Year 1994) DEL DOT had a goal of hiring 1 female and 1 minority male in the Officials and Administrators category.
11. Since only one person could be selected to fill the position, only one affirmative action goal could be met by the hire.
12. The selection of Ms. Minner for the position achieved one of the DEL DOT affirmative action goals for FY 1994.
13. The hiring authority's selection for the position was ratified by the Secretary of Transportation.
14. Gregory Chambers, Affirmative Action Officer from Personnel Office

investigation concluded that the process utilized by DEL DOT was discriminatory against Mr. Jones.

15. Mr. Chambers' investigation was flawed because it did not include an interview with the hiring authority nor the interview panel members.
16. The hiring authority did not pre-select Ms. Minner for the position before the interview process was conducted.
17. The hiring authority made a legitimate exercise of discretion in choosing Ms. Barbara (Bobbi) Minner for the position of Contract Administrator.
18. The hiring authority did not discriminate against Mr. Jones in the selection process.

CONCLUSIONS OF LAW

The Grievance is denied due to a finding that all applicants on the certification list met minimum qualifications for the position, no violation of Rule 19.0100 or any of the procedural requirements of the Merit Rules and no gross abuse of discretion by the hiring authority pursuant to Merit Rule 13.0100. The choice made was a legitimate exercise of discretion in hiring for the position of Contract Administrator by the Department of Transportation.

ORDER

For the forgoing reasons, the Board dismisses the grievance of Willie Jones.

IT IS SO ORDERED

Katy Woo
Katy K. Woo, Chairperson

Robert Burns
Robert Burns, Vice-Chair

Walter O. Bowers
Walter Bowers