

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

DONALD FINNEY,)	
)	
Employee/Grievant,)	
)	DOCKET No. 19-11-741
v.)	
)	
DELAWARE 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 July 2, 2020 at the Delaware Public Service Commission, 861 Silver Lake Boulevard, Dover, Delaware 19904.

BEFORE W. Michael Tupman, Chair, Sheldon Sandler, Esq., Jacqueline Jenkins, and Paul Houck, Members; a quorum of the Board under 29 *Del. C.* § 5908(a).

APPEARANCES

Carla A.K. Jarosz
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Anthony Delcollo, Esq.
Offit Kurman
on behalf of the Employee/Grievant

Allison McCowan
Deputy Attorney General
Legal Counsel to the Delaware Department of
Transportation

BRIEF SUMMARY OF THE EVIDENCE

The Employee/grievant, Donald Finney (“Finney”), and the Delaware Department of Transportation (“DelDOT”) jointly offered into evidence eighteen (18) exhibits marked for identification as Exhibits A-R. After the prehearing, the parties withdrew Exhibit Q as duplicative. The Board admitted all seventeen (17) remaining exhibits into the evidence. Finney offered an additional three (3) exhibits into evidence pre-marked for identification as Exhibits 1-3. The Board excluded Exhibit 3 in the Pre-Hearing Order.

Finney called three witnesses: LaTonya Gilliam (“Gilliam”), Alastair Probert (“Probert”), and Kevin Canning (“Canning”). Finney also testified on his own behalf. DelDOT did not call any additional witnesses.

The parties jointly submitted a series of stipulated facts to aid the Board.

FINDINGS OF FACT

On January 26, 2019, DelDOT posted an anticipated vacancy for an Engineer Program Manager II position in the North District. The posting listed a closing date of February 1, 2019. Finney and the successful applicant, John Garcia (“Garcia”), both applied for the position. Finney is Asian-American. Garcia is Hispanic. Both were found to be qualified and were interviewed by a diverse hiring panel. The hiring panel was composed of: Gilliam, Assistant Director for the North District; Probert, Assistant Director for the South District; and Brian Urbanek (“Urbanek”), Assistant Director for Statewide Support Services. Gilliam was the hiring manager.

The hiring panel conducted interviews on March 11, 2019. Candidates had the option, but were not required, to bring additional information or documents to their interview which they wished to share with the panel. Finney brought his performance review for the time period of

January 1, 2017 to December 31, 2017 (“2017 Review”).¹ Finney’s overall performance was rated “Exceeds Expectations” on his 2017 Review. Garcia did not bring any additional documents to his interview. The hiring panel asked Finney and Garcia the same eighteen (18) questions and each member of the hiring panel took notes summarizing each candidate’s answers.² After the hiring panel completed the interviews, they were split on whether Finney or Garcia was the best choice for the position. Gilliam and Urbanek believed Garcia was the best choice for the position. Probert believed the two candidates were evenly matched. DelDOT requires hiring panel selections to be unanimous. In order to attempt to resolve the split, the hiring panel decided to have Gilliam contact Finney’s current supervisor to inquire about his more recent job performance.

As part of his application, Finney provided DelDOT with a “Pre-Employment Reference Release Form”³ listing the following three references:

- Brian Schilling (“Schilling”). Finney’s current supervisor. DelDOT requires applicants to list their current supervisor as a reference. Schilling completed Finney’s 2018 performance review and rated Finney’s job performance “Meets Expectations.”
- Rich Fain (“Fain”). Finney’s supervisor until the end of 2017. Fain completed Finney’s 2017 Review and rated Finney’s job performance “Exceeds Expectations.” Finney applied to be promoted into Fain’s position when Fain left DelDOT at the end of 2017, but Schilling was selected for the position instead. Finney grieved DelDOT’s decision to promote Schilling instead of Finney. The Board in its decision in *Finney v. DelDOT*, MERB Docket No. 18-08-696 (Nov. 2, 2018), unanimously voted to deny Finney’s appeal.

1 Joint Exhibit F. Although the Stipulation of Facts provided by the parties stated that Finney brought both his 2017 Review and his 2018 performance review for the time period of January 1, 2018 through December 31, 2018 to his interview, the testimony before the Board was that Finney only provided his 2017 Review to the hiring panel.

2 Joint Exhibits J and K.

3 Joint Exhibit C.

- Mark Alexander (“Alexander”). Director of Maintenance and Operations at DelDOT.

Schilling was also listed on Garcia’s “Pre-Employment Reference Release Form.”⁴ Garcia’s other two references were Canning and Matt Lichtenstein.

Gilliam telephoned Schilling and Canning and asked each one the questions from the Department of Human Resources Employment Reference Check Questionnaire (“Questionnaire”) for Finney.⁵ Since both Schilling and Canning were listed on Garcia’s reference list, on the same phone call, Gilliam asked Schilling and Canning the same questions from the Questionnaire for Garcia as well.⁶ Schilling and Canning both rated Finney as either good or fair in several categories and noted that they would like to see him more involved in operations. For Garcia, Schilling and Canning rated Garcia as either good or excellent in the same categories and cited no weaknesses, problems or issues. After considering Schilling and Canning’s responses to the Questionnaire questions along with the candidates’ interviews, the hiring panel unanimously selected and received permission to hire Garcia for the position. The hiring panel did not consider Finney’s race, color or his prior grievance in making their decision.

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

4 Joint Exhibit E.

5 Joint Exhibit L.

6 Joint Exhibit M.

non-merit factors is prohibited.

Finney does not dispute that Garcia met the job requirements for the position. Finney alleges DelDOT violated the second two subparagraphs of Merit Rule 18.5 by: discriminating against him because of his race, color and in retaliation for having filed a previous grievance over a promotion; and by grossly abusing its discretion in requesting references from Canning, who was not on Finney's reference list, but not contacting Fain, who was on Finney's list.

Merit Rule 2.1 - Discrimination

The Board concludes that DelDOT did not violate Merit Rule 2.1 by discriminating against Finney because of his race or color. Finney bore the burden of establishing a *prima facie* case of discrimination. To do so, he must show that: (1) he was a member of a protected class; (2) he was qualified for the promotion; (3) he did not get the promotion; and (4) his employer's refusal to promote him occurred under circumstances that give rise to an inference of discrimination. *McClement v. Port Auth. Trans-Hudson*, 505 Fed. Appx. 158, 162 (3d Cir. 2012).

Finney established the first three elements of a *prima facie* claim of discrimination: is in a protected class (Asian-American); and the parties stipulated that he was qualified for and did not get the promotion. However, Finney is unable to establish the final factor: that DelDOT's refusal to promote him to the position occurred under circumstances that give rise to an inference of discrimination. Finney offers as evidence of discrimination only his own hearsay testimony regarding two jokes allegedly made by Canning in 2015, which Canning denies; his belief that there are no other Asian-American persons in an equivalent level position at DelDOT; and a report titled "State of Delaware Department of Transportation (DelDOT) Maintenance & Operations Inclusive Culture Assessment"⁷ dated September 2017 and offered without comment.

⁷ Grievant Exhibit 1.

The Board finds that the alleged isolated comments made four years prior to Finney's interview for the position were insufficient to give rise to an inference of discrimination because they were unsubstantiated hearsay; made over four years prior to Finney's interview for the position; and were not made by any member of the diverse hiring panel. Nor did the Board find persuasive Finney's stand-alone assertion regarding his status as the only Asian-American person in DelDOT management or Grievant's Exhibit 1 which was dated more than 2 years prior to Finney's interview for the position.

The Board concludes that DelDOT did not violate Merit Rule 2.1 by retaliating against Finney for filing a prior grievance. "The term 'retaliation' does not appear in Merit Rule 2.1, but the Board believes that for an employer to retaliate against an employee's exercise of a protected activity is discrimination based on a non-merit factor." *Tucker v. Family Court of the State of Delaware*, MERB Docket No. 13-01-578 at p. 7 (Sept. 11, 2013). (internal citations omitted). Finney bears the burden of establishing a *prima facie* case of retaliation. To do so, Finney must establish that he engaged in a protected activity; that DelDOT took an adverse employment action against him; and that there is a causal connection between Finney's protected activity and the adverse employment action. *Bloom v. Department of Health and Social Services*, MERB Docket No. 12-02-537 at p. 6 (July 24, 2012) citing *Moore v. City of Philadelphia*, 461 F.3d 331, 340-341 (3d. Cir. 2006). It is undisputed that Finney engaged in a protected activity by filing a grievance when he was not promoted to replace Fain in early 2018. See *Finney v. Delaware Department of Transportation*, MERB Docket No. 18-08-696 (Nov. 2, 2018).

It is also undisputed that DelDOT's failure to promote Finney may be an adverse employment action. DelDOT does dispute the final factor: a causal relationship between Finney's 2018 grievance and his failure to obtain the position. The Board finds that Finney is unable to establish a causal relationship because the decisionmakers for the two positions were different and

there is no evidence that Finney's 2018 grievance was discussed during the interview process or biased the references Canning and Schilling gave for Finney.

Finally, the Board concludes that DelDOT's hiring process for the position did not violate any of the procedural requirements of the Merit Rules as there are no procedural requirements under the Merit Rules pertaining to what references may be checked for a candidate or when.

Gross Abuse of Discretion

The Board concludes that DelDOT did not commit a gross abuse of discretion in the promotion. The Merit Rules do not specifically define gross abuse of discretion. The Board has held that "[g]ross abuse of discretion is a high standard akin to reckless indifference or is found where there is an extreme departure from the ordinary care normally given to a situation." *Badley v. Department of Health and Social Services, Division of Developmental Disabilities Services*, MERB Docket No. 15-10-639 at p. 6 (June 6, 2016) citing *Richard D. Smith v. DOT*, MERB Docket No. 05-04-327 at p. 10 (April 3, 2007).

Both Finney and Garcia were qualified for the position and were interviewed by a diverse hiring panel. They were asked the same questions at their interview and each panel member noted their answers. After completing both interviews, two members of the hiring panel, Gilliam and Urbanek, believed Garcia to be the stronger candidate. Gilliam believably testified that although Finney had a good interview, Garcia's interview was better. Probert testified that he believed Finney and Garcia were evenly matched and wanted additional information. Gilliam testified that DelDOT requires its hiring decisions be unanimous. No specific DelDOT policies or procedures were produced on what steps a hiring panel may take to resolve a split decision. Gilliam contacted Schilling, who is the current supervisor for both Finney and Garcia, and Canning, Schilling's supervisor. Gilliam asked Schilling and Canning the same questions regarding each candidate, using the questions in the Department of Human Resources Employment Reference Check

Questionnaire. Finney conceded that it was not a gross abuse of discretion for Gilliam to contact Schilling or Canning. But Finney argued that it was unfair for Gilliam not to additionally contact Fain to obtain a balanced perspective.

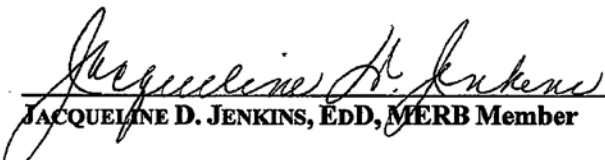
The Board disagrees and holds that Gilliam did not abuse her discretion by not contacting Fain for a reference. Finney brought the 2017 Review signed by Fain to his interview. Fain left his position as supervisor shortly after completing the 2017 Review, and therefore would be unaware of Finney's job performance after that point.

ORDER

It is this **22nd** day of **July, 2020**, by a unanimous vote of 4-0, the Decision and Order of the Board to deny the grievance. The Grievant did not provide the Board with sufficient evidence that DelDOT violated Merit Rule 18.5 when it promoted John Garcia rather than Finney to Engineer Program Manager II in the North District.



W. MICHAEL TUPMAN, MERB CHAIR

PAUL R. HOUCK, MERB Member

JACQUELINE D. JENKINS, EDD, MERB Member

SHELDON N. SANDLER, ESQ., MEMBER