

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

<b>DANITA ELLIS,</b>	)	
	)	
Employee/Grievant,	)	
	)	<b><u>DOCKET No. 20-09-780</u></b>
	)	
v.	)	<b>DECISION AND ORDER</b>
	)	<b>OF DISMISSAL</b>
<b>DEPARTMENT OF FINANCE,</b>	)	
	)	
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 March 18, 2021 at the Public Service Commission Conference Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

**BEFORE** W. Michael Tupman, Chair; Paul R. Houck, Jacqueline D. Jenkins, EdD, and Victoria D. Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

Ilona Kirshon (*by teleconference*)  
Deputy State Solicitor  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Danita Ellis (*by teleconference*)  
Employee/Grievant *pro se*

Michelle Whalen (*by teleconference*)  
Deputy Attorney General  
on behalf of the Dept. of Finance

## **BRIEF SUMMARY OF THE EVIDENCE**

The employee/grievant, Danita Ellis, offered and the Board admitted into evidence two documents marked for identification as Exhibits 1 and 7. Ms. Ellis testified on her own behalf and called two witnesses: Tosha Martin<sup>1</sup> (“Martin”), Tax Collection Manager, Department of Finance/Division of Revenue (“DOF/DOR”); and Diane Bourne (“Bourne”), Human Resource (“HR”) Specialist III, Department of Human Resources (“DHR”) who was assigned to DOF.

The Department of Finance offered and the Board admitted into evidence eight documents marked for identification as Exhibits A – G and I. At the conclusion of the Grievant’s presentation, the Agency moved for involuntary dismissal of the grievance based on Grievant’s failure to make a *prima facie* case of violation of Merit Rule 6.1 and 7.1. The Board granted the Agency’s motion.

## **FINDINGS OF FACT**

Ms. Ellis is employed as a Tax Auditor I by the DOF Division of Unclaimed Property, a Pay Grade (“PG”) 11 position. She applied for the position of Revenue Production Supervisor in the DOF Bureau of Tax Collections within the Division of Revenue, a PG 12 position. The applications for the Revenue Production Supervisor position were reviewed by Human Resource Specialist Bourne who created and provided a referral list to DOF Hiring Manager Martin. Because the referral list contained fewer than thirty (30) qualified applicants, the candidates were not ranked but listed alphabetically.<sup>2</sup> The referral list included all applicants

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<sup>1</sup> Ms. Martin was the Hiring Manager for the Revenue Production Supervisor position for which Ms. Ellis applied.

<sup>2</sup> Merit Rule 8.2 provides, in relevant part:

8.2.2 Referral lists must be rank ordered in accordance with procedures outlined by the DHR Secretary. In those circumstances where there are no ranking procedures in place and the number of qualified candidates is equal to or fewer than the maximum number to be referred, names may be referred in alphabetical order. In those instances, the appointing authority must be informed that the list is in alphabetical order.

who were determined to meet the minimum qualifications for the position, including Ms. Ellis and the successful candidate.

The DOF/DOR hiring panel included Hiring Manager Martin and two other panelists. Prior to interviewing the candidates, the panel reviewed the applications. Four candidates were interviewed for the Revenue Production Supervisor position, including Ms. Ellis.

The hiring panel took notes during the interviews and then met to discuss the candidates' relative qualifications and answers to the interview questions. The panel agreed on the three top finalists for the position and forwarded those names to HR Specialist Bourne. Ms. Ellis was listed as the panel's second choice for the position.

In DOF, the Hiring Manager makes the final decision on which candidate is offered the position. HR approves the decision, after reviewing the process to insure that the Merit Rules and DHR's hiring policies have been followed. HR Specialist Bourne determined appropriate processes had been employed in this case. The first choice candidate was offered and accepted the position.

On June 4, 2020, Hiring Manager Martin spoke with Ms. Ellis by telephone to advise her that she had not been selected for the Revenue Production Supervisor. During their conversation Ms. Martin encouraged Ms. Ellis to "aim higher" in her career aspirations as a means to encourage her to continue to seek promotion. Ms. Martin testified the successful candidate was a "better fit" for the position because she had direct experience in the functional area; understood the processes, equipment and computer systems used in the Tax Collection unit; and could quickly and effectively move into the position.

On or about June 18, 2020, Ms. Ellis filed a grievance alleging violations of Merit Rules 2.1, Discrimination, and Merit Rule 18.5, concerning promotional grievances. Her grievance was denied at Steps 2 and 3, and on September 15, 2020, she filed the instant grievance with the

Merit Employee Relations Board, in which she alleged violations of Merit Rules 6.1 and 7.0.

### **CONCLUSIONS OF LAW**

Merit Rule 6.1 provides:

**Recruitment. It is the policy of the State of Delaware to search widely and vigorously for the most qualified persons to fill positions in the classified service while providing equal employment opportunity and meeting the objectives of the State of Delaware Affirmative Action Plan.**

Merit Rule 6.1 refers directly to the process by which applicants are recruited to apply for State merit positions. Agencies are directed to cast a wide net and to “vigorously” seek the applications of the most qualified individuals for vacancies, within the confines of providing equal employment opportunity to all. There is no evidence to support the allegation that DOF did not recruit widely and vigorously to fill the Revenue Production Supervisor position.

Merit Rule 7.0, Screening and Ranking of Candidates, includes the use of examinations to “fairly measure the relative capacities of the persons examined to execute the duties and responsibilities of the positions concerned, or where appropriate, to learn to perform the duties and responsibilities thereof.” Merit Rule 7.1. It also states that any person applying for a vacant position is eligible for screening and ranking, and then goes on to describe the process for screening and ranking of candidates, notification to applicants of screening results, and allowing candidates to inspect screening and ranking results. Merit Rules 7.2 – 7.6. The rule concludes:

#### **7.7 Appeal After Screening and Ranking**

**Applicants who have been screened and ranked by training and experience may appeal to the DHR Secretary for review of their ranking to assure that uniform and appropriate procedures have been applied fairly...**

An applicant can appeal the screening results directly to the DHR Secretary, not to this Board.

Following any screening and ranking which occurs, a referral list is prepared and forwarded

to the hiring manager. Merit Rule 8.1. All persons on the referral list are deemed minimally qualified for the position based on their applications. Merit Rule 8.2.1. When the number of applicants on the referral list is less than thirty, they are not ranked but are listed in alphabetical order. Merit Rule 8.2.2. In this case, there were less than thirty applicants on the referral list; consequently, the list was organized in alphabetical order.

There is no evidence that Merit Rule 7.0 was violated. No examinations were performed in connection with the filling of the Revenue Production Supervisor vacancy. Both Ms. Ellis and the successful applicant were on the referral list provided to the hiring manager. Both were determined to be at least minimally qualified for the position and both were interviewed.

Actual selection of an applicant for a particular position may be based on a number of factors including experience in the subject area, possession of requisite skills, performance at the interview, and whether the applicant is a good fit. Human Resource Specialist Bourne testified that the interviewees were not formally ranked after the interview. If the hiring panel's first choice candidate had not accepted the position, another candidate could have been selected for the position or the position could have been reposted. It is well-settled that promotion and non-promotion of employees within a department or agency of Government is a matter of management discretion. *Fuller v. Department of Services for Children, Youth and their Families*, No. 14-04-605, at p. 6 (Oct. 14, 2014).

The Board concludes as a matter of law that Ms. Ellis did not meet her burden to prove that the Agency violated Merit Rules 6.1 and/or 7.0 in selecting another qualified candidate for the Revenue Production Supervisor position. Therefore, the Agency's Motion for Involuntary Dismissal is granted and the grievance is denied.

**DECISION AND ORDER**

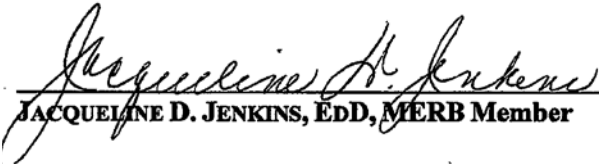
It is this **4<sup>th</sup>** day of **May, 2021**, by a unanimous vote of 4-0, the Decision and Order of the Board to grant DOF's Motion for an Involuntary Dismissal and to deny the grievance.



**W. MICHAEL TUPMAN, MERB CHAIR**



**PAUL R. HOUCK, MERB Member**



**JACQUELINE D. JENKINS, EDD, MERB Member**



**VICTORIA D. CAIRNS, MERB Member**