

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

<b>DONALD FINNEY,</b>	)	
	)	
Employee/Grievant,	)	
	)	<b>DOCKET No. 19-11-741</b>
v.	)	
	)	
<b>DELAWARE DEPARTMENT OF</b>	)	
<b>TRANSPORTATION,</b>	)	<b>DECISION AND ORDER</b>
	)	<b>ON REMAND</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 May 6, 2021, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904. Pursuant to Governor John Carney’s 27<sup>th</sup> Modification of a State of Emergency Declaration, the Board also provided a teleconference line for participation.

**BEFORE** W. Michael Tupman, Chair; Paul R. Houck, Victoria D. Cairns, Jacqueline D. Jenkins, and Sheldon N. Sandler, Esq. Members, the full Board.

**APPEARANCES**

Ilona Kirshon (*via teleconference*)  
Deputy State Solicitor  
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  
on behalf of the Department of Transportation

## **PROCEDURAL HISTORY**

In the spring of 2019, the Department of Transportation (“Agency”) promoted a candidate to an Engineer Program Manager II position. In April Donald Finney (“Grievant”), who had unsuccessfully applied for the position, grieved the promotion. He asserted the Agency had violated Merit Rules 2.1, Discrimination, and 18.5 through its abuse of discretion and discrimination in the hiring process. The grievance progressed through Steps 1, 2, and 3 of the merit grievance process set forth in Merit Rule 18. After receipt of the denial of his grievance at Step 3, on November 20, 2019 the Grievant advanced his grievance to be heard by the Board. The hearing was scheduled for March 5, 2020.

On February 6, 2020, the Grievant filed a motion to amend his grievance to also allege violations of Merit Rules 7.1 and 18.1. Specifically, he alleged Agency management had retaliated against him for having filed an earlier grievance by contacting an individual involved in that prior proceeding as a reference and had interfered with his right to a fair promotional process by not contacting all of the pre-employment references he provided with his application. The Agency opposed the Grievant’s motion to amend. The parties were afforded the opportunity to submit written argument on the application of Superior Court Civil Rule 15 regarding amendment of pleadings. The Board repurposed the March 5, 2020 hearing to consider the Grievant’s Motion to Amend his grievance.

On March 20, 2020, the Board issued a Decision and Order denying the Grievant’s Motion to Amend. Subsequently, the Board convened a hearing on the merits on July 2, 2020 and issued its Decision and Order denying the grievance on July 22, 2020.

The Grievant appealed the decision to the Superior Court on August 21, 2020. In an opinion dated February 1, 2021 the Court affirmed the Board’s decision in part, reversed in part, and remanded in part.

The Court found the Board should have granted the Grievant's motion to amend his grievance to include the additional alleged violations of the Merit Rules 7.1 and 18.1. It concluded that because the Board found that any prejudice to the Agency would be minimal, it committed "reversible legal error by failing to grant the Grievant leave to amend his MERB appeal pursuant to Superior Court Civil Rule 15(a)." The Board was directed to conduct a Rule 15(c) analysis to determine whether the amendment of the grievance should relate back to the date on which the original appeal to the MERB was filed.

The Court further found the Board committed an abuse of its discretion when, during the hearing on the merits, it excluded the Grievant's testimony which was intended to impeach the testimony of the Hiring Manager, finding this evidentiary ruling significantly prejudiced the Grievant.

In order to reconsider the merits of this grievance as directed by the Court, the full Board convened on May 6, 2021, for the express purpose of:

- 1) Receiving legal argument on reconsideration of the Grievant's motion to amend the original grievance; and
- 2) Receiving the Grievant's testimony concerning what he recalled of the Hiring Manager's testimony during the Step 3 hearing about her process for selecting (and/or ignoring) references to be checked.

### **BRIEF SUMMMARY OF THE EVIDENCE**

Prior to the hearing, each Board member received and reviewed the Superior Court Decision and Remand Order, the documents the parties filed with the Court<sup>1</sup>, and the entire record of the MERB proceedings below. The Board incorporates by reference the Brief Summary of the Evidence in its prior Decision and Order in this case.

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<sup>1</sup> Including the Grievant's Notice of Appeal and the responsive written argument filed by the parties' at the Court's request.

During the hearing on the Superior Court's Remand, the Board heard testimony from the Grievant concerning his recollection of the Hiring Manager's testimony during the Step 3 hearing. The Board also heard limited rebuttal testimony from the Hiring Manager concerning her recollections of the Step 3 hearing. The Board received and considered oral argument from the parties on the legal issues referred back to the Board by the Court.

### **FINDINGS OF FACT**

The Board incorporates by reference the Findings of Fact in its prior Decision and Order in this case with the following additions:

Following the interviews of candidates, the hiring panel was unable to reach a unanimous decision as to whether the Grievant or the other finalist should be selected. One member of the panel requested follow-up to determine if the supervisor who had signed off on the Grievant's 2017 Performance Review, in which he was rated as "Exceeds Expectations", would still rate his performance as exceptional in 2019.<sup>2</sup> To assist the panel in reaching a decision, the Hiring Manager was directed to reach out to the immediate supervisor of both candidates (Schilling) and to his supervisor (Canning), both of whom were in a position to have knowledge of each candidate's current performance. Canning had also been the "reviewer"<sup>3</sup> on the 2017 Performance Review the Grievant submitted during his interview. In order to be fair and consistent, the Hiring Manager asked identical questions about each candidate and used a DHR Employment Reference Check Questionnaire form to record the responses.

The Grievant testified that during the Step 3 hearing, the Hiring Manager testified she checked the references for the two finalists. He believed this testimony was substantively different

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<sup>2</sup> July 2, 2020 Transcript at pages 17-18.

<sup>3</sup> Richard Fain was the Evaluator on Mr. Finney's 2017 Performance Review. Soon after he signed the evaluation on January 29, 2018, however, Mr. Fain retired from State service.

from her testimony before MERB, wherein she stated the interactions she had with Schilling and Canning were not pre-employment reference checks. He further testified that she testified at the Step 3 hearing that she did not contact Finney's listed reference, Richard Fain, because he had been gone from the agency for too long.

The Hiring Manager testified she did not recall testifying at Step 3 that Fain had been "gone too long". She further testified that she did not recall stating that her contacting Schilling and Canning were pre-employment reference checks.

### **CONCLUSIONS OF LAW**

The Grievant sought to amend his original grievance to assert a claim under Merit Rule 18.5(2)<sup>4</sup> of a violation of "any of the procedural requirements in the Merit Rules", specifically Merit Rule 7.1.

The Agency did not show that it would suffer any prejudice to warrant denying the motion to amend, and since the new claim arguably arises out of the same transaction or occurrence (the promotion), the Board grants the motion to amend and will relate it back to the date of the filing of the original grievance (otherwise, it would be time-barred). However, the Board concludes as a matter of law that the Grievant did not meet his burden to prove, on the merits, that the Agency violated Merit Rule 7.1, and therefore his claim under Merit Rule 18.5(2) must also fail.

Merit Rule 7.1 provides:

7.1 Objectives of Examinations. The test used in the examination process shall 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. Achievement, aptitude, other written tests, performance tests,

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<sup>4</sup> Merit Rule 18.5: 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.

physical agility and medical tests, oral interviews, evaluations of training and experience, reference checks and other tests will be used, singly or in combination, as determined by the DHR Secretary, and after consultation with the appointing authorities where appropriate.

Chapter 7 of the Merit Rules sets forth the procedures for screening<sup>5</sup> and ranking<sup>6</sup> applicants in order to develop an eligibility list<sup>7</sup> which includes qualified candidates for a posted position. Merit Rule 7.1 requires the evaluation process 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.” It states that a variety of tools, including reference checks, may be used “singly or in combination” to fairly assess the relative capacities of the applicants.

Merit Rule 7.1 is not prescriptive. It identifies tools that may be used in the screening and ranking of applicants in order to develop the eligibility list. It is not applicable to the interview and selection process, which is conducted among candidates who make it to the referral list.<sup>8</sup> However, even if this Rule were to be deemed applicable to the interview and selection process, it does not mandate which references must be contacted, nor does it place a limitation on the hiring panel or manager as to when or why information may be solicited or from whom it may be sought. The Rule clearly states that the list of factors (achievement, aptitude, other written tests, performance tests, physical agility and medical tests, oral interviews, evaluations of training and

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<sup>5</sup> Merit Rule 19, Definitions

“Screening”: the process by which applicants are evaluated for a position in the Merit System. The screening may consist of, but is not limited to, oral, written, or performance tests, or a rating of the candidate’s training and experience.

<sup>6</sup> Merit Rule 19, Definitions

“Ranking”: when there are greater than 30 qualified candidates for a job posting, candidates are scored based on a rating of their education, training and experience, and written exams if applicable, against a set criterion and placed on a referral list in order of scoring results.

<sup>7</sup> Merit Rule 19, Definitions

“Eligibility List”: a list of qualified candidates from which a referral list is issued.

<sup>8</sup> Merit Rule 19, Definitions.

“Referral list”: the list of finalist candidates eligible to fill a vacant position.

experience, reference checks and other tests) will be used, “singly or in combination.”

Rule 7.1 is not applicable to post-interview reference checks. The absence of a violation of Rule 7.1 eliminates the alleged violation of Rule 18.5(2). Even if Rule 7.1 were to apply, there is no mandate in the Rule that the agency must use all of, or only, the references supplied by the candidate.

As for the second issue on remand, the Board concludes as a matter of law that the additional testimony provided by the Grievant on remand regarding the Step 3 hearing was inconclusive at best, and did not in any way impeach the credibility of the Hiring Manager's testimony before the Board. After the Grievant testified, the Hiring Officer testified as a rebuttal witness and the Board found her testimony to be highly credible as to why she contacted the first and second level supervisors of both finalists.

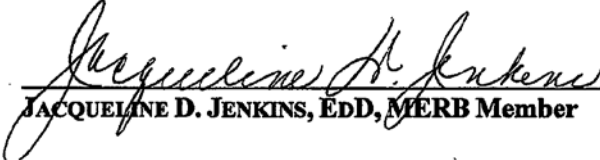
Having reviewed and considered the entire record in this case, including the testimony and argument on remand, the Board finds the Grievant did not provide sufficient evidence to conclude that the Agency violated Merit Rules 7.1 and/or 18.5 in the promotional process for the Engineer Program Manager position in the spring of 2019.

**DECISION AND ORDER**

It is this 7<sup>th</sup> day of **July, 2021**, by a unanimous vote of 5-0, the Decision and Order of the Board to deny Finney’s appeal.

  
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W. MICHAEL TUPMAN, MERB CHAIR

  
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PAUL R. HOUCK, MERB Member

  
JACQUELINE D. JENKINS, EDD, MERB Member

  
VICTORIA D. CAIRNS, MERB Member

  
SHELDON N. SANDLER, ESQ., MEMBER