

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

GRIEVANT,)	
)	
Employee/Grievant,)	DOCKET No. 22-06-835
)	
v.)	
)	
)	<u>DECISION ON THE MERITS</u>
DELAWARE DEPARTMENT OF STATE,)	
DIVISION OF PUBLIC ARCHIVES,)	[PUBLIC, REDACTED]
)	
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 January 18, 2023, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904. The hearing was closed to the public pursuant to 29 Del. C. §10004(b)(8).

BEFORE Jennifer Cohan, Chairperson, Victoria D. Cairns, Joseph A. Pika, III, Ph.D., and Dinah M. Davis-Russ, Members, a quorum of the Board under 29 *Del. C.* § 5908(a).

APPEARANCES

Victoria R. Sweeney
Deputy Attorney General
Legal Counsel to the Board

Employee/Grievant, *pro se*

Deborah L. Murray-Sheppard
Board Administrator

Laura Gerard
Deputy Attorney General
on behalf of the Department of
State, Division of Public Archives

PROCEDURAL BACKGROUND

The Employee/Grievant (“Grievant”) had two pending grievances against the Delaware Department of State (“DOS”), Division of Public Archives (the “Agency”) pending before the Board. At the Grievant’s request, and without objection from the Agency, the Board scheduled the grievances to be heard on the same day, *in seriatim*. A consolidated prehearing teleconference was convened and a single set of exhibits was admitted for the Grievant and a single set for the Agency. This decision results from the hearing on the first grievance which concerns a promotional opportunity.

At the conclusion of the Grievant’s presentation, the Agency moved for dismissal of the grievance. The Board granted the Agency’s motion.

BRIEF SUMMARY OF THE EVIDENCE

The Grievant offered forty-two (42) documents into evidence. After the prehearing conference, the Board admitted Grievant Exhibits 1–7, 9–12, 14–15, 19–27, 29–30, 33-34, 36-40 into evidence.

The Agency offered ten (10) documents into evidence related to the promotional grievance. At the prehearing conference, the Board admitted Agency Exhibits A–J into evidence, without objection.

The Grievant testified on his own behalf. The Board heard testimony from four (4) witnesses on behalf of the Agency: Stephen Marz, Director, Delaware Public Archives (“DPA”); Edward McWilliams, Manager of Outreach Services, DPA; Corey Marshall-Steele, Media Relations and Special Events, DPA; and Tamara Stock, Marketing and Exhibits, DPA.

FINDINGS OF FACT

The Grievant is employed as an Information Resource Specialist III, paygrade 11, at the Division of the Public Archives in the Public Service/Outreach section. He had been employed by the Agency since November, 2015. During his tenure he unsuccessfully applied for a supervisory position in 2019 and a managerial position in 2020 within the Agency. This grievance concerns his third application for a promotion within the Agency.

On November 19, 2021, the Agency posted an Information Resources Manager¹ vacancy in its Records Services section of the Agency.² The posting listed five job requirements including three years of archives experience; six months experience in grant management and control; three years of experience interpreting laws, rules, regulations, standards, policies and procedures; six months experience in staff supervision; and knowledge of contract management and control.³

Only two individuals applied for the position, including the Grievant and the Information Supervisor in the Records Services section. Both candidates were interviewed by a diverse hiring panel, which included Edward McWilliams, Corey Marshall-Steele, and Tamara Stock. The interview panel asked the same questions (which had been prepared and approved by Human Resources), in the same order for each candidate. The panel concluded the Grievant did not best meet the requirements for this managerial position, including relevant supervisory and grant and contract management experience. It concluded that the Information Supervisor had more experience overall and specifically within the Records Services section. The panel unanimously recommended the Information Supervisor for the position.

The DPA Director reviewed the hiring panel's recommendation and the Information

1 The position was referred to as the "Records Services Manager" by the witnesses.

2 There are two sections in the DPA: Public Service/Outreach, and Records Services.

3 Agency Exhibit A.

Supervisor from the Records Services section was promoted to the Information Resources Manager position on December 16, 2021. Thereafter the Grievant filed a grievance alleging a violation of Merit Rules 2.1 and 18.5.

CONCLUSIONS OF LAW

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 non-merit factors is prohibited.

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.

The Grievant conceded that the successful applicant was qualified for the position and met the job requirements.⁴ The Grievant alleged the Agency violated MR 18.5 by discriminating against him because of his race and asserted the Agency grossly abused its discretion in promoting the successful candidate. He further alleged the mentoring opportunities were provided in a discriminatory manner to employees who DPA management selected to “groom for leadership positions”. The Grievant asserted employees of color have been systemically excluded from these opportunities within the Agency.

The Board concludes that the Grievant did not meet his burden to establish that the Agency violated MR 2.1 by racially discriminating against him in the promotional process. The Grievant bears the initial burden of establishing a *prima facie* case of discrimination, which requires a

⁴ The Board appreciates the Grievant’s candor as the Agency failed to submit any documents related to the successful applicant (e.g., application, interview panel notes, etc.) thereby making it impossible for the Board to independently determine that the successful candidate met the requirements of the position.

showing that: (1) he was a member of a protected class; (2) he was qualified for the position in question; (3) he suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). There is perhaps no principle more settled in the merit rules (and employment law generally) than that promotion and non-promotion of employees within an agency is a matter of supervisory discretion.⁵ The Grievant established that he was a member of a protected class but did not establish that the Agency wrongfully failed to promote him or that the selection of the other candidate occurred under circumstances giving rise to an inference of discrimination.

The Board concludes the Grievant's allegation that he and other employees of color were excluded from mentoring opportunities was not established by the record. While the Board finds the lack of diversity in the Agency's workforce is concerning, uncontroverted testimony established that this is a problem in archives across the country. The Board suggests the Agency review its current practices in hiring and developing its employees, with a critical eye toward identifying unconscious biases.

The Board also concludes the Agency did not violate MR 18.5(3) by abusing its discretion during the promotion process. 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."⁶ The Superior Court, in reviewing a promotional decision made by the predecessor to the Merit Employee Relations Board⁷ defined "gross abuse

⁵ *Fuller v. DSCYF, YRS*, MERB Docket 14-04-605, (October 14, 2014).

⁶ *Badley v. Delaware Dep't of Health & Soc. Servs*, MERB Docket No. 15-10-639, at 6 (June 6, 2016) (citing *Richard D. Smith v. Delaware Dep't of Transp.*, MERB Docket No. 05-04-327, at 10 (April 3, 2007)).

⁷ This Board was preceded by the State Personnel Commission. The merit standards by which a promotion could be challenged through a grievance did not change when the Merit Employee Relations Board was

of discretion”:

Delaware Courts have explicitly stated that “[d]iscretion as applied to public officers, means the power or right to act in an official capacity in a manner which appears to be just and proper under the circumstances.” Our Courts “will not interfere with this power or right of public officials to act unless [the Court] is convinced that it has been abused. In order to constitute an abuse of discretion by public officials, the record must demonstrate that the exercise was unreasonable, and that the ground upon which the decision was based or reason shown therefore was clearly untenable.” When Delaware Courts have mentioned the phrase "gross abuse of discretion" it has been in the same breath as the term "bad faith." Specifically, the common law has stated that, at least in terms of the business judgment rule applicable in the corporate law, gross 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.” The Board has adopted such a standard in at least one grievance proceeding and... it has defined the standard as a high one, “akin to reckless indifference or where there is an extreme departure from the ordinary care normally given to a situation”.⁸

The record does not support the conclusion that the Agency acted in bad faith or with “reckless indifference” in not selecting the Grievant for the Information Manager position.

The record supports the conclusion that the successful applicant was selected because she had more experience and was serving as the supervisor in the section in which the vacancy existed. While it is understandable that the Grievant was disappointed that his third attempt at promotion was unsuccessful, the record does not support the allegation that any merit rules were violated in the selection process.

created in 1995. Chapter 13.0100 Promotion, “... No grievance may be maintained concerning a promotion except where: (1) the person who was promoted does not meet the minimum qualifications; (2) there has been a violation of Merit Rule 19.0100 (*Non-Discrimination Policy*) or any of the procedural requirements in the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.” April 25, 1987.

⁸ *Department of Correction v. Wilbur Justice*, C.A. No. 06A-12-006-RBY (Del. Super, August 23, 2007) at p. 9 (*Citations omitted*)

CONCLUSION

It is this **24th** day of **April, 2023**, by a unanimous vote of 4-0, the Decision and Order of the Board to grant the Agency's Motion to Dismiss and deny the grievance.



JENNIFER COHAN, MERB Chairperson



VICTORIA D. CAIRNS, MERB Member



JOSEPH A. PIKA, III, PH.D., MEMBER



DINAH DAVIS-RUSS, MEMBER