2000 WL 703672
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Superior Court of Delaware.

Carl MCILROY, Plaintiff Below-Appellant,
v.
DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Defendant Below-Appellee.

No. C.A. 99A-06-001 HDR.
|
April 17, 2000.

Upon Appeal from a Decision of the Merit Employee Relations Board. Affirmed.

Attorneys and Law Firms

Roy S. Shiels, of Brown, Shiels, Beauregard & Chasanov, Dover, Delaware, for Plaintiff Below-Appellant.

James J. Maxwell, Deputy Attorney General, Department of Justice, Wilmington, Delaware, for Defendant Below-Appellee.

ORDER

RIDGELY, President J.

***1** This 17th day of April, 2000, upon consideration of the briefs of counsel and the record in this case, it appears that:

(1) This is an appeal by Carl McIlroy ("McIlroy") from a decision of the Merit Employee Relations Board ("Board") determining that McIlroy would be made whole by the reposting and refilling of a position that was subjected to an improper pre-selection. The issue in this case is whether the Board was in error in determining its remedy, and whether it was required to award McIlroy backpay.

(2) In 1995, McIlroy held a position as a Field Investigator within the Department of Health and Social Services in the Division of Management Services Audit and Recovery Group. His immediate supervisor, Fred J. DeCusatis ("DeCusatis"), announced his resignation on October 10, 1995 and resigned on October 31, 1995 from the position of Field Investigator Supervisor. DeCusatis reported to Nelson Faulkner ("Faulkner") who in-turn reported to William Garfinkle ("Garfinkle"). Previously, McIlroy had taken part in a grievance against Garfinkle concerning unfair treatment, and according to DeCusatis, Garfinkle never forgot the individuals who had brought the grievance against him and always held it against them.

Soon after announcing his resignation, DeCusatis began training Faulkner on a necessary computer program that DeCusatis designed so Faulkner could take over until the position was filled. Garfinkle, however directed DeCusatis to terminate this instruction of Faulkner and to begin instructing Felix Dobrzynski ("Dobrzynski), stating that Dobrzynski was the proper person for the job. Dobrzynski was a Field Investigator within the Department who was hired after McIlroy. It was generally understood among the workers that the person being trained would get the job. Although McIlroy requested to sit in with DeCusatis during the interim, Garfinkle rejected this request. McIlroy was eventually allowed to train with DeCusatis on October 30 th and 31. st Before the position was filled, Dobrzynski had begun performing some of the duties associated with the position.

As advertised, the position required someone with supervisory experience. McIlroy testified that he had supervisory experience as a Chief of Police for a Delaware municipality. He also testified that Dobrzynski's previous position as a Corporal in the Delaware State Police is not a supervisory one. However, Dobrzynski testified that his previous position with the State Police did entail supervisory duties. When McIlroy interviewed for the position on December 18, th he was told that the position would not have the supervisory component. At that time, McIlroy was a paygrade 10 and DeCusatis's paygrade was 13 prior to leaving the position of Field Investigator Supervisor. There were at least 16 qualified applicants, including McIlroy and Dobrzynski, and any of these applicants could have been selected for the position. Ultimately, Garfinkle removed himself from the decision process and Dobrzynski was selected for the position.

***2** (3) McIlroy grieved his non-selection through the merit system process which led to a hearing before the Board on April 15, 1999. He argued that Dobrzynski was not qualified for the position because he lacked supervisory experience, and that Dobrzynski was improperly pre-selected for the position. Additionally, McIlroy was not selected due to an

effort on behalf of Garfinkle to retaliate for participating in the prior grievance against him. The Department contended that Dobrzynski was qualified for the position whether or not supervisory experience was required. However, due to the recent reorganization of the unit, supervisory experience was not required. Furthermore, the Department contended that any pre-selection or retaliation against McIlroy was eliminated because Garfinkle stepped back from the decision process.

The Board determined that although Dobrzynski was an innocent party, he was improperly pre-selected for the position. Additionally, the Board determined that retaliation was a substantial factor for McIlroy's rejection. Since some of the minimum qualifications posted were no longer necessary to fill the position, the Board determined that Merit Rule No. 7.0200, which requires that notices shall contain all pertinent information about the positions being filled, was violated. Consequently, the Board unanimously concluded that the position, as reorganized with the proper and objectively drafted qualifications, be promptly posted and fairly filled. McIlroy, thereafter, filed this appeal.

(4) An employee has the right to appeal the decision of the Board to the Superior Court on the question of whether the Board acted in accordance with law.[1] On appeal the function of the Superior Court is to determine whether the decision below was supported by substantial evidence and free from legal error.[2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] If there is substantial supporting evidence for the Board's decision and no mistake in law, the decision will be affirmed.[4] This Court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[5] It merely determines if the evidence is legally adequate to support the Board's factual findings.[6]

1 29 *Del. C.* § 5949.

2 *General Motors Corp. v. Freeman,* Del.Supr., 164 A.2d 686, 688 (1960); *Johnson v. Chrysler Corp.,* Del.Supr., 213 A.2d 64, 66 (1965).

3 *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.,* Del.Supr., 636 A.2d 892, 899 (1994); *Battista v. Chrysler Corp.,* Del.Super., 517 A.2d 295, 297 (1986), *app. dism.,* Del.Supr., 515 A .2d 397 (1986).

4 *Longobardi v. Unemployment Ins. Appeal Bd.,* Del.Super., 287 A.2d 690, 692 (1971), *aff'd,* Del.Supr., 293 A.2d 295 (1972).

5 *Johnson v. Chrysler Corp.,* Del.Supr., 213 A.2d 64, 66 (1965).

6 29 *Del. C.* § 10142(d).

(5) On appeal, McIlroy contends that the remedy imposed by the Board does not make him whole as required by 29 *Del. C.* § 5931.[7] Since Dobrzynski began receiving pay at a higher rate upon being improperly selected for the position, McIlroy contends that he is entitled to back pay in order to be made whole as required by 29 *Del. C.* § 5931. Thus, McIlroy contends that his pay status is not, but must be, made equal to Dobrzynski in order to be made whole. Although this would require some additional payment by the agency, he argues it is appropriate because it was the improper selection procedures engaged in by the agency which lead to the grievance.

7 29 *Del. C.* § 5931(a) states "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 wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules."

***3** (6) In response, the Department contends that McIlroy never requested the remedy that he seeks now, but has raised this issue for the first time on appeal to this Court. Additionally, it contends that the Board found that the wrong done was a denial of the opportunity for any qualified candidate to be fairly considered for the position. It contends that the Board is not required to grant McIlroy all remedies he requests, but it has the discretionary authority to choose from a variety of authorized remedies to make whole an employee who has been wrongfully denied an opportunity. The Department argues that because the Board did not determine that McIlroy was entitled to the position, but rather he and others were denied a fair opportunity to compete for the position, McIlroy is made whole by being given the fair opportunity to reapply.

(7) The cases McIlroy cites in support of his argument are distinguishable. They deal with situations where the administrative agency denied having authority to award backpay or to award an employee a certain position.[8] The State, in those cases, argued that the administrative agency did not possess the authority to remedy the wrong admittedly suffered. For example, in *Worsham*[9] the administrative agency determined that appellants were entitled to be reassigned to the position they desired but that it did not have authority to grant such a request.[10] There were no disputes about what would make employee whole but whether the Commission had the authority to issue such a remedy. Since the Court concluded that the Commission did have the authority to issue the remedy, as a matter of law, this Court allowed the remedy sought.

8 *Brice v. State of Delaware Department of Correction,* Del.Supr., 704 A.2d 1176 (1998); *State of Delaware Department of Correction v. Worsham,* Del.Supr., 638 A.2d 1104 (1994).

9 *Worsham,* at 1106.

10 *Id.*

The situation here is different. The Board determined that Dobrzynski was improperly pre-selected for the position and that McIlroy and others were not given proper consideration for the position. The remedy ordered by the Board is supported by substantial evidence and free of legal error. Therefore, the decision of the Board requiring the Department to correctly post and properly fill the position is *AFFIRMED.*

IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 2000 WL 703672

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