

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

DEBORAH THUMAN,

Complainant,

v.

PELRB No. 103-12

N.M. PUBLIC DEFENDER DEP'T.,

Respondent


ORDER

THIS MATTER comes before the Board on the Hearing Officer's Letter Decision granting Respondent's Motion for Summary Judgment. On a vote of 3-0 during the Board's regularly scheduled July Board meeting the Board voted to adopt the Hearing Officers Findings, Conclusions and Rationale as its own and ratify the grant of Summary Judgment resulting in Dismissal of the case.

WHEREFORE, IT IS HEREBY ORDERED:

Summary Judgment in favor of the Respondent is granted and the above-captioned action shall be and hereby is **DISMISSED**.

Dated: 7-13-12



Duff Westbrook, Chair



SUSANA MARTINEZ
Governor

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

THOMAS J. GRIEGO
Executive Director

Duff Westbrook, Board Chair
Wayne Bingham, Vice-Chair
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May 22, 2012

Deborah Lee Thuman
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Las Cruces, NM 88004

Miller Stratvert Law Offices
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Santa Fe, NM 87504-1986
Attn: Paula Maynes

Re: ***PELRB No.103-12; Thuman v. N.M. Public Defender Department***

Dear parties:

This letter decision is to address the Department's Motion for Summary Judgment filed herein on April 30, 2012. On April 10, 2012 a scheduling notice issued in this case which set deadlines for the filing of the Motion and the response thereto. In that letter Complainant was directed to file and serve her Response Brief no later than May 18, 2012. Both parties were reminded to observe the provisions of NMAC 11.21.1.10, NMAC 11.21.1.23 and NMAC 11.21.1.24.

Although Complainant's Response to the Summary Judgment Motion was mailed May 17, 2012 it was not received by the Director until May 21, 2012, three days after the deadline set for the Response to be filed. There was no fax filing made in this case that would have been able to be deemed an earlier filing. By operation of Rule NMAC 11.21.1.10 a document will be deemed filed when it is received by the director and since it was not received until three days after the deadline set in the scheduling notice it constitutes a late filing. Because of the late filing the Response was not considered. It should be noted that the Response did not include any counter-affidavits and consisted largely of a statement of Complainant's various qualifications for the job at issue. Even if accepted and considered despite the late filing the Response would not have made a difference in the outcome of the Motion for the reasons outlined below. With respect to the Motion I find and conclude as follows:

FINDINGS OF FACT:

1. The Department employs Deborah Thuman as an Attorney in its Las Cruces office and has done so since 1999. (¶10 of the Motion and ¶3 of the Complaint.)

2. Complainant's position is within a bargaining unit subject to a collective bargaining agreement affecting working conditions negotiated between AFSCME and the Department, which contract contains the following applicable provisions:
3. The Department's Deputy Chief, Mr. Eisenberg, demoted Ms. Thuman from a Public Defender 4 to a Public Defender 3 in June 2008 and suspended her from duty for 30 days without pay because of her failure to adequately represent her clients, her failures to supervise attorneys assigned to her and her inappropriate behavior toward her clients and Employees of the department. Ex. A; affidavit of John Stapleton.
4. Ms. Thuman's demotion and suspension are part of her permanent personnel record at the Department. Exhibit A, ¶6.
5. In October 2011, the Department posted a job vacancy for a Public Defender 4 position. Essential duties of the position include supervision of attorneys in the Las Cruces office and to represent clients in complex cases. The position was the same or similar to that held by Ms. Thuman prior to her demotion in 2008. Ex. A, ¶¶ 6 and 9; Ex. B ¶¶ 6, 13 and 17; Ex. C ¶¶ 6 and 10.
6. Ms. Thuman applied for the vacant Public Defender 4 position Ex. B ¶¶6, 13, 17 and Ex. C ¶¶6 and 10.
7. A panel comprising three employees of the Las Cruces Public Defender office was formed to interview applicants for the vacant position. Ex. A, ¶ 11, Ex. B ¶ 7, Ex. C ¶ 7.
8. The panel members were aware of Ms. Thuman performance history with the department. After reviewing applicants' applications, résumés, references, work history, disciplinary records and considering the applicants past successes or failures as supervising attorneys the panel members did not believe Ms. Thuman demonstrated adequate ability to successfully discharge the duties of the Public Defender 4 position. Ex. A, ¶ 14; Ex. B ¶ 17, 22-28; Ex. C ¶¶ 13-14 and 22-23.
9. The panel members concluded that someone other than Ms. Thuman was better qualified for the position and recommended that person for the vacant position. An offer was made and that person accepted the promotion.
10. Ms. Thuman filed the instant Prohibited Labor Practice Charge alleging that the Department violated the seniority provisions, Article 32 of the parties' CBA.

CONCLUSIONS OF LAW:

- A. Seniority provisions of the parties' CBA Article 32 apply only if competing candidates for a position "are substantially equally qualified".
- B. There remain no questions of law or fact in this case that require a full evidentiary hearing or such as would preclude judgment in favor of Respondent.

RATIONALE:

Granting a Motion for Summary Judgment is predicated on there being no material questions of law or fact that would preclude judgment in favor of the movant. See, *Cain v. Champion Window Co. of Albuquerque, LLC*, 142 N.M. 209, 164 P.3d 90 (Ct. App. 2007). Once the moving party has made a prima facie showing of the absence of a genuine issue of material fact, the burden shifts to the non-moving party to show a reasonable doubt as

to a genuine issue for trial on the merits. *Hansler v. Bass*, 106 N.M. 382, 743 P.2d 1031 (Ct. App. 1987). Complainant has the burden of proof in a Prohibited Practices proceeding. NMAC 11.21.1.22. In light of the allegations of Respondent's Motion for Summary Judgment and the affidavits supporting it there are no material issues of fact regarding the question of whether the Department violated the seniority provisions of the parties' CBA Article 32, and consequently whether it committed a prohibited labor practice (PPC) by violating the requirements of § 10-7E-19(H) which prohibits an employer's failing or refusing to comply with a CBA.

Before the Public Employee Labor Relations Board may reach the question of whether the Department committed a PPC by refusing or failing to abide by the seniority provisions of the CBA in this case it must first be established that Complainant is substantially equally qualified as the successful candidate for the promotion at issue pursuant to Article 32 of the applicable CBA. Unless that assertion is first established as a fact the seniority provisions of the CBA do not apply. On that threshold question of Complainant's qualifications it is management's assessment that is determinative in this case. Article 32 of the CBA also requires job related qualifications to be approved by the State Personnel Office and those qualifications include job "experiences" that are not only "appropriate to the occupation and job duties of the position" but those that are "necessary for the successful performance of the essential duties of the position." As a general proposition, it is the Department that has discretion to determine to whom a promotion shall be awarded. See, NMSA §10-7E-6(A). The Complainant has shown no other provisions of law or contract that would limit management's discretion in this matter. In this case it is management that has superior knowledge with regard to which of the competing candidates' job "experiences" are best suited to the job duties of the position and those that are "necessary for the successful performance of the essential duties of the position." To the extent Complainant's PPC invites this Board to re-weigh the qualifications of the competing applicants for promotion it must decline that invitation. Because this Board will not second-guess management's exercise of discretion in awarding the promotion to the person it judges to be best qualified based on facially neutral criterion Complainant cannot establish that she is substantially equally qualified much less that she is clearly more qualified than the successful candidate as she alleges. It follows logically that if Complainant cannot prove that she is equally as qualified then she cannot prove a violation of the CBA's seniority provisions. If she cannot prove a violation of the parties' CBA she cannot prevail on a claim premised on failing or refusing to comply with a collective bargaining agreement in violation of PEBA §19 (H).

RECOMMENDED DECISION:

Respondent's Motion for Summary Judgment is **GRANTED**. Complainant's Prohibited Practices Complaint should be and hereby is **DISMISSED**.

APPEAL:

An appeal must be filed within 10 work days of this opinion and otherwise comply with NMAC 11.21.3.20.

Issued this 22nd day of May 2012

A handwritten signature in black ink, appearing to read "Thomas J. Griego", is written over a horizontal line. The signature is stylized and cursive.

Thomas J. Griego
Executive Director
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, NM 87120

Cc: Sandy Martinez, SPO Labor Relations Director