BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF	)	
CHARLES BRICE,	)	
GRIEVANT.	)	
	)	**DOCKET NO. 95-06-41**
v.	)	
	)	**FINDINGS, OPINION AND**
STATE OF DELAWARE	)	**ORDER OF THE BOARD**
DEPARTMENT OF CORRECTIONS,	)	
AGENCY.	)	

BEFORE Vice-Chairman Robert Burns, Gary Fullman, Walter Bowers and Dallas Green, Members, of the Merit Employee Relations Board, constituting a lawful quorum of the Board pursuant to 29 Del. C. § 5908(a).

AND NOW, to-wit, this 5th day of September, 1996, the above-referenced matter having been before the Board for an evidentiary hearing on November 8, 1995, May 16, 1996, May 22, 1996 and for argument and deliberation on July 18, 1996, for the reasons set forth hereinafter, the Board makes the following findings and conclusions and enters the following Order:

APPEARANCES:

For the Grievant: David A. Boswell, Esquire
Schmittinger & Rodriguez
Brandywine Gateway Plaza, Suite 205
1300 North Market Street
Wilmington, Delaware 19801

For the Department: Alan Machtinger
Personnel Director
State of Delaware
Department of Corrections
80 Monrovia Avenue
Smyrna, Delaware 19977

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NATURE OF THE PROCEEDINGS

This is an appeal filed with the Merit Employee Relations Board under the grievance process pursuant to 29 Del. C. Ch. 59 and the Merit Rules because the time limits expired at the fourth step for a written response to the Grievant. (Merit Rules Nos. 20.034 and 20.035). The Grievant, a Correctional Officer with the Department of Corrections (hereinafter "Department" or "DOC"), submitted a timely application for the position of Correctional Officer/Automotive Mechanic I which was posting number 039-94 with a closing date of September 12, 1994.

The Grievant made the certification list and was interviewed for the position by three DOC representatives. A second round of interviews was conducted for the three individuals selected after the first interview. The Grievant was not selected to participate in the second interview which resulted in the selection of the nephew of a member of the first interviewing panel as the ultimately successful applicant. The Grievant timely filed his appeal after no action was taken on a request for a fourth step hearing in accord with Merit Rule 20.035.[1]

MOTION TO EXCLUDE MERIT RULE NO. 13.0100 EVIDENCE

Prior to the presentation of evidence, the Board was called upon to decide a motion from DOC regarding the presentation of evidence bearing on Merit Rule 13.0100 which deals with promotions. The Department took the position that there are three types of job announcements: intra-agency (also known as "in-house"); inter-agency (also called "Merit System only"); and public (also known as "open competitive") and that the provisions of the Merit Rules dealing with promotion (Merit Rule 13.0100) only apply where announcements are intra-agency or inter-agency. The Department contended that promotional employees such as the Grievant in this matter may not grieve under Merit Rule No. 13.0100 where there is an open competitive job announcement and that

[1] This appeal was the subject of a motion to dismiss filed by DOC on the basis that it was not timely filed from the date of the decision in the fourth step hearing. By Written Order dated May 16, 1996, the Board determined that it had jurisdiction of this grievance as a result of the timely filed appeal on June 27, 1996 and that such jurisdiction was not divested by virtue of a non-timely fourth step proceeding in which the Grievant participated. In the same Order, the Board ruled that it did not have the authority to award counsel fees and costs in any matter.

the intent of the Merit Rules is to limit Rule 13.0100 to only those circumstances where there is an in-house or inter-agency announcement.

By the unanimous vote of all members of the Board, and consistent with the Board's determination in prior proceedings (Docket No. 95-03-07), this position on the limited applicability of Merit Rule 13.0100 is rejected, and the Board will in this case hear and consider evidence presented concerning possible violations of said Rule. If a position is sought by a state employee for whom it would constitute a promotion, that employee may use the grievance procedure to maintain a grievance where:

(1) the person who has been promoted (or selected) does not meet the minimum qualifications; or,

(2) there has been a violation of Merit Rule No. 19.0100 or any of the procedural requirements in the Merit Rules; or,

(3) there has been a gross abuse of discretion in the promotion (or selection).

SUMMARY OF EVIDENCE PRESENTED

Prior to the presentation of sworn testimony, the Grievant marked and introduced a packet of exhibits identified as Grievant's Exhibit:

Department Posting #039-94, Correctional Officer/Automotive Mechanic I, at pay grade 8
GRIEVANT'S EXHIBIT NO. 1

Application of Correctional Officer Charles Brice dated September 9, 1995
GRIEVANT'S EXHIBIT NO. 2

Application of Jeremy Coleman dated September 23, 1992
GRIEVANT'S EXHIBIT NO. 3

Letter from A. Machtinger dated November 7, 1995
GRIEVANT'S EXHIBIT NO. 4

Memo from Barbara David to M. Custer dated 1/10/94
GRIEVANT'S EXHIBIT NO. 5

Application of Jeremy B. Coleman dated 9/1/94
GRIEVANT'S EXHIBIT NO. 6

Level I Interview Questions GRIEVANT'S EXHIBIT NO. 7

Certification List (redacted and amended to protect applicant confidentiality)
GRIEVANT'S EXHIBIT NO. 8

Scoring Sheet for Coleman GRIEVANT'S EXHIBIT NO. 9

Scoring Sheet for Brice GRIEVANT'S EXHIBIT NO. 10

Scoring Sheet for Cropper GRIEVANT'S EXHIBIT NO. 11

Scoring Sheet for Sestito GRIEVANT'S EXHIBIT NO. 12

Memo from Panel Member William Mason to F.E. Cristiano, his supervisor
GRIEVANT'S EXHIBIT NO. 13

SUMMARY OF THE EVIDENCE

Lloyd Woodrow "Bill" Mason, having affirmed that he would testify truthfully, stated that he is currently employed under special funds for prison industries and works as a Correctional Officer/Auto Mechanic II at Ferris Motor Pool and elsewhere in the state as assigned. Mason participated in hearing applications for the position of Correctional Officer/Auto Mechanic I during December, 1994. He was interested in hiring a mechanic, and prepared ten technical questions which were asked of each of the individuals who were interviewed by the panel. The interview panel selected three individuals.

Jeremy Coleman, one of the individuals interviewed, had the highest score and answered seven questions correctly. Coleman was selected for a second interview. Mason testified that when Coleman, who is not a mechanic but a seasonal/casual worker in the Ferris motor pool, scored the highest on the test, Mason became suspicious that Coleman had access to the test questions and answers. Coleman was working in the Ferris motor pool running parts to the shop when Mason's clerk was typing the questions and answers for the test.

In a memorandum (Grievant's Exhibit No. 13), Mason described the knowledge and experience of Coleman on motor vehicles as being minimal. Mason testified that despite his reservations about Coleman's knowledge and test answers, he recommended Coleman be selected over the Grievant, Officer Brice, as one of the top three individuals for the Correctional Officer/Auto Mechanic I position.

Mason stated that he did not keep notes on his interviews with the candidates. He just checked off the questions on the interview sheets but did not make notes. Mason initially testified that he could not remember what Officer Brice's automotive experience was and could not recall his background with inventory, scheduling, payroll and ordering supplies but was familiar with Jeremy Coleman's lack of background in these areas. Coleman, at the time of the job posting, was working for Mason in the Ferris Motor Pool and occasionally ordered parts and had worked on a few automobiles in the shop. Coleman originally worked for administrative services as a casual/seasonal employee on the mail run but had been sent to help Mason in the shop by getting parts and running the tow truck.

Mason testified that Coleman did not and was not allowed to supervise inmates, since he had not been through the Correctional Officer staff training program and was only a casual employee.

On cross-examination, Mason related that the interviews for the position were conducted by a panel of three including himself, his immediate supervisor, Mr. Cristiano, and Barbara David, the Bureau Chief's secretary, and that they had interviewed over ten applicants. Mason testified that Ms. David informed Officer Brice that in the position he might be assigned to work at different locations at different times and that he had to be flexible. Mason related that Brice did not like that and wanted the 8-4 shift at Ferris. Mason stated that they needed someone who would work with the Department and be flexible and that Brice's unwillingness to work at other locations did "kind of blow him out of the water on that part."

On cross-examination, Mason acknowledged that the position posting specified that the work location was in New Castle County. Mason insisted that during the interview he advised the candidates that on occasion they might be expected to work in either Smyrna or Georgetown. Mason also acknowledged that Officer Brice had expressed some surprise that the posting was

incorrect and "he didn't like it at all" and, according to Mason, stated that he was unwilling to work in the other counties. Mason testified that Brice was very unhappy with having to work anywhere except in Wilmington since that was only ten minutes away from his house.

Mason testified that, other than Officer Brice's old military motor pool experience, and his present practice of working on Corvettes at home, there was nothing else to suggest Brice had automotive experience. Mason stated that he was looking for an auto mechanic who could be trained as a correctional officer and not a correctional officer that could be trained as an auto mechanic.

One of Mason's top three choices was Penny Cropper whom he testified had actually worked on military vehicles. Another of his top three choices was Jeremy Coleman who Mason testified had worked as a casual employee for over a year in the position. Coleman, according to Mason, knew how to get parts for the shop and "he could have been trained as a mechanic."

Mason's first choice was Salvatore Sestito who was the only one of the candidates who was actually working as an auto mechanic at the time of the interview. Mason testified that it was not until after the interview that he learned that Sestito was the nephew of his immediate supervisor, Mr. Cristiano, who also was serving as one of the interview panel members.

Mason testified that he favored Sestito and Barbara David favored Jeremy Coleman. All three interviewers agreed that their top three candidates were Sestito, Coleman and Cropper, but could not agree on the ranking and for that reason, according to Mason, a second interview was scheduled. Mason also testified that he did not think that Coleman was qualified enough to be hired.

While Salvatore Sestito was Mason's first choice, he had only three correct answers on the ten question test Mason had prepared while Officer Brice had scored five correct answers. Jeremy Coleman with the highest score had seven correct answers. Mason attributed the low score by Sestito to nervousness and the fact that Sestito came late to the interview and was "rattled" and that perhaps Mason had gotten tired at the end of the interview day and after reading the questions to ten to twelve people perhaps was not reading the questions right.

As to Jeremy Coleman having made the highest score on the test, Mason testified that Coleman had answered the questions "too good, too quick" causing Mason to believe that Coleman had previously seen the answers on the computer. Mason testified in response to Board questions that he did not know Coleman personally outside of work. Coleman had worked in the shop previously for Mason, and Mason stated "I call him my son when he works with me." While working at the shop, Coleman has changed oil, changed brakes and parts on different state vehicles, and Coleman has told Mason that he had put brakes on his girlfriend's Mercedes.

As to his preference for Sestito over Brice, Mason testified that Brice had been assigned to C&T (Court and Transportation) for about nine years and was not as up to date with the newer cars as Sestito. Mason testified that he felt Sestito was the best auto mechanic.

The second witness for the Grievant, Karen Wilmore, a Corporal with the Department of Corrections, was sworn and testified that she became aware that Officer Brice had filed a grievance and inquired as to who was the successful applicant for the position.

When she learned that Salvatore Sestito had gotten the position, she told Sergeant Bospolle that she thought she could shed some light on this case because between June, 1994 and June of 1995 she had worked as a part time cashier at Wal-Mart in Dover with another Correctional Officer, Betty Ford. At the same time, Elaine Sestito also was a cashier at Wal-Mart. One evening around November of 1994, while on break from their cashier jobs, it came up in a conversation among the three women that Ford and Wilmore were also employed as Correctional Officers at Delaware Correctional Center. At that time, Elaine Sestito stated to Ford and Wilmore that her husband was going to be coming through the academy with the Department of Corrections and upon completion of the academy that he was going to have a job at the motor pool. Wilmore testified that she and Ford asked Ms. Sestito how it was that her husband was going to the motor pool right out of the academy. Wilmore testified that Ms. Sestito stated that Mr. Cristiano was Salvatore Sestito's uncle and was going to help him obtain the job in the motor pool.

Wilmore testified that she is not a friend of Officer Brice but has worked with him when she works overtime for the Court and Transportation Unit. She stated that Officer Brice had spoken to

Sergeant Bospolle to whom she had related the incident at Wal-Mart and thereafter Officer Brice contacted her about the incident.

Grievant's third witness, Thelma Joyce, a Correctional Officer, was sworn and testified that she has observed Jeremy Coleman in his active participation in supervising inmates. She has observed Coleman wearing a uniform and in the tow truck by himself with an inmate. Officer Joyce testified that it is Department policy that when you supervise inmates you must go through the staff training academy. There is a shorter course for others such as secretaries, teachers, and counselors who have less contact with inmates. Officer Joyce related that under Department policy seasonal employees are not to be in contact with and supervise inmates, because they do not go through the Staff Training Academy and are not to receive hazardous duty pay because they are not to be in contact with inmates.

On cross-examination, Correctional Officer Joyce distinguished between Level A and Level B hazardous duty pay. If you are in slight contact with inmates, you receive, $50.00 a month at Level B for that contact. You get a higher rate of pay ($100 per month) under Level A if you spend a larger amount of your time in contact with inmates. She was not aware that to receive hazardous duty Level B, it is not a requirement that one graduate from the academy.

Officer Joyce stated that she would not be surprised to learn that, under certain circumstances, inmates under staff supervision may be overseen by someone who was not a uniformed correctional officer.

Charles A. Brice was sworn and testified that he has been with the Department of Corrections since 1982 and that his application for the position of Correctional Officer/Auto Mechanic I was submitted on September 9, 1994. Months went by, and he had not received a reply whether or not he had made the certification list to qualify for an interview. In mid-November, he was on a negotiation team negotiating a contract with the union and management when he became aware of a new person at Ferris School wearing Khaki uniforms and supervising inmates. The individual had driven a tow truck to the courthouse in Wilmington where Officer Brice was located with a vehicle which had broken down. The individual was with an inmate, and the inmate had no

blue shirt on and was just wearing a tee-shirt. Brice asked who the individual was and was told that he was one of the new hires at the motor pool at Ferris School.

On November 29, 1994, Brice was interviewed for the position by Bill Mason, Barbara David, and Mr. Cristiano. He recounted that Cristiano had told him that the days off would be Sunday and Monday. He thought this unusual since inmates do not come out on Saturdays in any of the institutions. Cristiano then asked if Brice knew what the work hours would be. Brice replied that the hours at the motor pool are 6:00 in the morning to 2:00 in the afternoon. Then, Ms. David spoke up and said that was something she wanted to address and that the hours would be 8:00 to 4:00 and asked if he had a problem with that. Cristiano then asked if Brice knew the work location. Brice testified that he responded that the job posting is for Ferris School. Ms. David spoke up and, according to Brice, stated "The job posting is for Georgetown", and she asked Brice if he had a problem with that. Officer Brice stated that he replied that he did not have a problem with occasionally working in Georgetown since he was presently working the whole state.

Brice stated that Ms. David then asked him what type of experience he had, and he related that in the military he had thirteen years experience as operations chief running a motor pool where he had responsibility for ninety vehicles. Brice testified that he had worked himself up from more or less a general mechanic to Operation Chief at the motor pool. Brice testified that he was then asked by Mason if he could operate a tow truck, and Brice replied that he could and had operated tow trucks from 10 to 25 tons, but he was not familiar with the little one now being used by Mason. Brice recounted that he also told the interview panel that he has experience running a $7.5 million operation as a manager for A&P.

Brice testified that Mason read him ten multiple choice test questions and that he did not understand the way Mason was reading the questions and a couple of times asked Mason to repeat the questions.

In response to a question noting that the posting for the position stated: "Applicants must have experience performing routine maintenance repairs, such as lubrications, oil changes, etc., repairing or replacing alternators, wiper blades, fan belts, ball joints, spark plugs, lights, ignition system, clutches, brakes, etc." Brice testified that, with the proper equipment, he could do all of

that. He was not asked at the interview if he could do these things; was not asked about his security experience; and, with the exception of a question about keeping records, was not asked about whether he could perform any of the other principle accountabilities of the position.

Brice stated that at the conclusion of the interview, he felt that they had already made their decision on what they wanted to do.

Brice related that he learned that Jeremy Coleman was the boyfriend of Terry Outten's daughter and, at that time, he filed a grievance which went up to the third step which was to be a hearing before Terry Outten. A different hearing officer was requested and refused. Terry Outten conducted the hearing and stated that Jeremy Coleman had dated his daughter for two years but that they were not dating now. Brice stated that he understood that Barbara David, who was on the interview panel and is Terry Outten's secretary, is also very close to Jeremy Coleman and the family.

On cross-examination, Brice identified a grievance form (State Exhibit No. 1) he had filed on November 18, 1994 which was prior to the December 8, 1994 interview he received for the position of Correctional Officer/Auto Mechanic I. Brice explained that the initial grievance was the result of his not being informed from September 9, 1994 when he filed his application for the position whether or not he had made the certification list. Brice identified as State Exhibit No. 2, a copy of the reply from State Personnel Office informing him that he had been placed on the register for the position. Brice stated that he received this document after the first grievance had been filed and prior to the first interview in December, 1994.

Brice recounted that during the interview he had told the interviewer, Barbara David, that he worked in Court and Transportation and worked the whole state, but that his house was only three and one-half miles from the Ferris School. Brice insisted that Ms. David had stated that the posting was in Georgetown, and he referred during the interview to the posting and that it stated the position was in New Castle County. It was only explained to him that he was not to be assigned to Georgetown but might be working there from time to time after he raised the question.

Brice testified on cross-examination that he had stated during the interview that he had both experience as a mechanic and experience in running a motor pool. He also told them he had been working restoring Corvettes for the past five years and showed the interviewers the pictures.

In response to Board member's questions, Brice testified that at the time of the posting the Department had a seasonal employee (Coleman) filling the position and that when the position was actually filled (by Sestito) the seasonal worker was still retained at the motor pool. Brice's original grievance in November, 1994 was filed to grieve the fact that the Department had a seasonal employee in the position.[1] When he found out that another individual (Sestito) had gotten the position, he filed the second grievance.

James R. Morris was sworn and testified for the Grievant as the Area 2 union representative and grievance chairperson for the Court and Transportation Unit. He testified that Brice had approached him about a position for a Correctional Officer/Auto Mechanic I at the motor pool at Ferris School and had stated that he had never been interviewed for the position and that the Department was filling the position with a temporary seasonal person. Morris related that he filed the grievance in November on behalf of Officer Brice. Subsequently, Brice was notified that he was on the certification list and would be interviewed for the position, and the grievance was withdrawn on November 30, 1994. A second grievance was filed by Brice concerning this position on February 10, 1995 alleging a violation of Merit Rule 13.0100 and Merit Rule 19.0100.

Morris testified that Officer Brice is currently a Correctional Officer, pay grade 7, and the posted position was a pay grade 8 as a Correctional Officer/Mechanic and, thus, a promotion. The Grievant rested his case.

DEPARTMENT MOTION TO DISMISS DISCRIMINATION CHARGE

At the close of the Grievant's case, Alan Machtinger, the Personnel Director of the Department of Corrections representing the Department, moved for a dismissal from the charge of

[2] Counsel for the Grievant advised the Board that it was Grievant's position that the November grievance filed by Officer Brice was not pending before the Board for decision.

discrimination for failure of the Grievant to make a *prima facia* case of discrimination. The Board heard argument on and considered the motion, and by the unanimous vote of Chairperson Woo and Members Fullman, Green and Bowers voted to deny the motion. Merit Rule No. 19.0100 provides:

"Discrimination against any person in recruitment, examination, appointment training, promotion, retention, discipline, or any other aspects of personnel administration because of political or religious opinions or affiliations, or because of race, national origin, age, sex, physical or mental disability, or other non-merit factors will be prohibited." (emphasis added)

The basis for the denial of the motion is the finding by the Board that the Grievant has established a *prima facie* case that he was discriminated against in that he was not awarded the position on the basis of non-merit factors, including nepotism.

DEPARTMENT MOTION TO DISMISS AS UNTIMELY

On April 17, 1996, the Department filed a written motion to dismiss the grievance as not being timely filed. The appeal was filed by or on behalf of the Grievant on June 27, 1995 and was determined to have been timely by the Board in a written Order dated May 16, 1996.

DEPARTMENT OF CORRECTIONS PRESENTATION

The Department's first witness, Elaine Sestito, was sworn and testified that her husband, Salvatore Sestito, is currently employed by the Department of Corrections at Ferris Garage as a Correctional Officer Mechanic. Ms. Sestito recalled the conversation with Karen Wilmore while she was employed as a cashier at Wal-Mart concerning the position for which her husband was hired and testified that the conversation took place at the time when her husband had already been hired and while he was at the training academy. She stated that her recollection of the specifics of the conversation were vague and, to her knowledge, her husband's uncle did not exert any influence in his favor.

On cross-examination, Ms. Sestito stated that if Wilmore got the impression that her husband's uncle had something to do with his selection for the position that it did not come from her.

The second witness for the Department, Roy Lawler, was sworn and testified that he is a Personnel Officer within the Department of Corrections Personnel Office and has been for the last two and one-half years. He is the supervisor that approves any selection the Department makes.

Lawler testified that after the certification list had gone out for the position in controversy, Francesco Cristiano came to see him to let him know that one of the individuals on the list was his nephew. Cristiano wanted to know if that would be a problem, and Lawler testified that he advised Cristiano that it should not be a problem because there were going to be three people on the panel, including Cristiano. Lawler testified that he was not aware of any Merit Rule, statute, Department policy, or any other guidance in place at the time which would have precluded Mr. Cristiano from participating in the preliminary interviews.

Lawler read from selected portions of a document captioned "Mr. Charles Brice - General Management Potential - New Castle, Delaware - Delaware Plus Discount Foods, Inc.," a prior employment evaluation which Brice had included with his application and stated that he had reviewed thousands of applications and had never seen an application where someone submitted so much negative information about himself.

The thorough and detailed behavior and personality evaluation recommended Brice for employment, noted aspects that were negative as well as the positive. The evaluation, on the negative side, indicated that Brice tended to be overanxious, lacked clarity in presentations, and because of his communications skills could be misunderstood. His work style was described as not as organized and systematic as it could be.

Barbara David, Senior Secretary of the Bureau of Operation Services in the Department of Corrections, was sworn and testified that she served on the interview panel for the Correctional Officer/Auto Mechanic I position, because there was supposed to be someone from personnel on the panel but everyone was busy. Mr. Outten asked her to serve on the interview panel so that if there

were any personnel questions, perhaps she could answer them. She has served on interview panels ten to twelve times previously.

Ms. David testified that she knew Jeremy Coleman and that he used to indirectly report to her since he was a seasonal employee. She stated that she and Coleman were just friends on the job; that she had never visited his house; had no idea where he lived; and did not make any attempt to influence the panel so they would favor Coleman. She stated that all of the candidates were asked the same questions and that all panel members agreed that Penny Cropper should be one of the top candidates. Cropper had a willingness to go find answers which Ms. David stated was important in a small unit like the prison industry shops. Barbara David stated that the interview panel included Bill Mason, who is the automotive mechanic II that would be the supervisor of the Auto Mechanic I, and Francesco Cristiano, who is the fleet manager who supervised all the automotive mechanics.

Ms. David testified that Coleman was an attractive candidate, because he was already working in a casual/seasonal capacity at the Ferris motor pool and was familiar with the people involved. She recalled interviewing Salvatore Sestito and that he had quite a few questions since he was not and had never been a state employee and was therefore unfamiliar with the process. He was working as a mechanic at Willis Chevrolet below Smyrna, and according to David was probably more advanced than a lot of the mechanics presently employed by the Department. He had no problem with the fact that he might have to move around in the position based on the needs of the Department, and he was one of all three interviewers' top three choices.

Ms. David reviewed the same document regarding the profile of Officer Brice which was also reviewed by Mr. Lawler and was asked to read selected excerpts including: "However, in his eagerness to get things done, he tends to rush forward without thoroughly thinking through his approach;" "Further, his work style tends to be less organized and systematic than required of the job;" "In his haste he may occasionally run into an unanticipated problem;" "However, he tends to run the risk of being overanxious in his approach to a task in an effort to get as much work accomplished as possible;" "As a communicator Brice lacks adequate clarity in his presentation and thus runs the risk of being misunderstood by others. Further, he has poor written communication skills which are subject to spelling and grammar limitations;" "However, at times he will expect too

much too soon from his workers;" and "... Brice's work style lacks effective organization and overall he runs the risk of being too anxious in his desire to get things done."

Ms. David testified that all of these characteristics could cause problems while working as a Correctional Officer Auto Mechanic and that all information provided by Brice had been considered in the candidate selection process. She stated that Brice's experience as a Correctional Officer was considered but that it was more important that the individual hired be experienced as an auto mechanic since the Department could send him through the training course so he could become a Correctional Officer within six weeks.

Barbara David testified that she knew during the interview process that Francesco Cristiano was related to Salvatore Sestito but did not know the degree of relationship and was not influenced in her decision by that knowledge because Sestito was the only applicant then working as an auto mechanic. According to Ms. David, Francesco Cristiano did not try to influence either of the two other panel members and did not treat Sestito any differently than he treated any of the other candidates.

On cross-examination, Ms. David testified that she did not know why Coleman's application said that he had supervised inmates since he was technically not permitted to be supervising inmates. She also stated that she was not knowledgeable about auto mechanics but that it was obvious to her which candidates were or were not familiar with which filters to use, brakes, and those type of things. She testified that Sestito did not do well on the ten test questions but that it was very evident that he was very knowledgeable. Cropper and Brice both had military motor pool experience but David recalled that Brice's experience was back in 1959. She stated that she favored Coleman because he was familiar with what went on at the motor pool and had the contacts. She also favored Coleman because he had worked in the position for over a year and "He had served as a casual/seasonal employee for three years for the Department, and it would have been nice to have seen him to be able to become an auto mechanic."

Coleman, according to David, became a Department casual/seasonal employee when she had an opening for a position of a mail carrier as a one-half day job, and she hired him. David testified that the relationship which Coleman had with her supervisor's (Terry Outten) daughter had ended

being hired on the job. Ms. David also testified that she did not give Coleman the answers to the ten test questions and did not know how he would have gotten the questions and answers.

Ms. David testified that there is no formal hiring procedure for casual/seasonal employees and that it is common practice for one to hire acquaintances, friends, and relatives into casual/seasonal positions. She also testified that Coleman was qualified for the position or he would not have made the certification list. Her explanation as to why Bill Mason thought Coleman was not qualified was the result of a personality clash between the two of them.

Barbara David, on cross-examination, read from the military performance evaluation of Sgt. Brice which provided:

"Sgt. Brice's performance during the ADT period was excellent. He handled all assignments concerning the operations of motor pool and his professional knowledge of a technical vehicle is excellent, which resulted in his being able to anticipate problems of mechanical nature before they had become major problems. Sgt. Brice's personal appearance and fit of uniform is excellent and is in general health. Sgt. Brice is aware of Marine Corp. policies concerning human relations and conducts himself accordingly."

Barbara David admitted on cross-examination that both the skills in the motor pool as well as the managerial psychological evaluation from Discount Food, Inc. were both important and neither should be discounted.

Ms. David reviewed the 1993 EPA which Officer Brice had received which recorded an overall 6.54 score out a possible 7 and which under the Verbal Communication Section graded a 7 and commented that Officer Brice:

"Organizes and expresses thoughts, ideas and facts to inmates, staff, representatives of other public agencies and the public as applicable in a clear, concise manner. Answers and initiates telephone communications in a professional manner. Attains and/or provides routine assistance and/or information from and/or others."

"Officer Brice's verbal communication skills are noteworthy. Before speaking he's very calmly organized and expresses his thoughts and ideas to inmates and staff in a clear, concise manner, with much authority. I have had several judges, lawyers and court personnel pass on numerous favorable comments on this officer because of his professionalism and ability to adjust to difficult situations."

Brice also received a maximum score of 7 on the written communications section of the EPA. However, Officer Brice was not one of the top three candidates from the first interview panel for the Auto Mechanic I position which is the lowest position in the auto mechanic rating.

Barbara David stated that the second interview panel was made up of Terry Outten, Janet Knowle from Personnel and Dave Conley who is an automotive mechanic. This panel only interviewed the three individuals who had been selected by the first panel and made the final selection.

MAY 22, 1996 HEARING SESSION

Martha Custer, personnel administrator with the Department of Corrections, was called as a witness on behalf of the Department and was sworn. Ms. Custer testified that the position which is the subject of the grievance is one into which an individual can be hired and complete the training after being hired. While the classification specifications have specific skills, knowledge and abilities associated with the full performance of the job, some of those skills, knowledge and abilities could have been acquired through the Correctional Officer Training Academy. A person whose name appeared on the certification list would have been deemed to have been minimally qualified for the position, and since Officer Brice was interviewed, he was deemed to have been minimally qualified for the position. The State Personnel Department writes the job description and determines the minimum qualifications for the position. The applications come into the Department of Corrections personnel department, and it determines whether or not the candidate meets the minimum qualifications. That determination is made on the basis of the material submitted on the application.

Francesco Cristiano was sworn and testified that he is the fleet manager for the Department of Corrections, a position he has held since October, 1991. He has been with the Department since 1978. His current responsibilities are to maintain the two fleet vehicle repair and service locations, one of which is in the Delaware Correctional Center and the other is on the Ferris School grounds.

At both locations, they service vehicles using a Correctional Officer/Mechanic and inmates who are given an opportunity to learn auto repair and maintenance working on state vehicles and private vehicles operating under the umbrella of the Prison Industry Program.

Cristiano testified that his nephew, Salvatore Sestito, notified him when he made the certification list for the position. Cristiano testified that he spoke to his supervisor, Terry Outten, about the situation with his nephew being on the certification list, and Mr. Outten told him to check with Personnel and make sure everything is okay. Prior to the interview, Cristiano discussed the situation with Mr. Lawler in the Personnel Department and testified that Lawler told him that as long as there were others on the panel that it would be okay for Cristiano to participate on the interview panel. Cristiano testified that he asked Lawler to check and make sure that it was okay and that Lawler did so and told Cristiano that since the supervisor of the operation should be interviewing for the person best for the job, it was necessary for Cristiano to be there.

Cristiano further testified that he participated in the interview of all of the candidates of which there were nine or ten. All candidates were asked the same questions, and Cristiano testified that he reviewed everything each of the candidates submitted.

Cristiano recalled the interview with Penny Cropper and recalled that she had very good knowledge and experience to be a mechanic with good background in the military to perform light maintenance and repair on vehicles. She also had some inventory experience in preparing the type of reports for an automotive mechanic repair shop.

Cristiano testified that Mr. Coleman had some very light knowledge of being a mechanic. He had potential but had not had hands-on-training and did not meet the criteria to be a full mechanic, but he did quite well during the interview according to Cristiano.

Sestito, according to Cristiano, was asked the same questions as the other candidates. Sestito was an attractive candidate because he was working at Willis Chevrolet and was involved with diagnostic systems and has been involved in doing other mechanical and electronic work and has rebuilt engines. Sestito made each of the interviewer's top three.

Cristiano recalled the Brice interview and was asked about the 1981 psychological evaluation Brice had attached to his application. At the direction of Alan Machtinger, representing

the Department, Mr. Cristiano took each negative remark in the report and stated why that particular quality would be a liability in the position. Brice did not make any of the interviewers' top three.

Cristiano testified that he did not exert any influence in favor of Sestito and that Barbara David did not try to exert any influence in favor of Jeremy Coleman.

On cross-examination, Cristiano testified that his nephew, Salvatore Sestito, did not do well on the ten prepared questions but did better on the general questions and did a lot better explaining how to repair an engine. Cristiano testified that other questions were asked of candidates than the ten prepared test questions, such as: what type of work on engines have you done and what type of mechanical experience do you have.

Cristiano's ranking of the top three candidates was No. 1 Sestito; No. 2 Coleman; and No. 3 Corporal Cropper. According to Cristiano, Sestito was everyone's first choice.

Cristiano testified that he felt it was proper for a supervisor to sit in on an interview for a position under his supervision and that he did not make the other interviewers aware that Sestito was his nephew until after the selection was made.

Cristiano stated that the second interview panel was the result of an objection being raised to his nephew being one of the ones selected. Therefore, a second panel in which Cristiano did not participate was conducted to select the final candidate for the position, but Officer Brice was not a participant in the second round of interviews according to Cristiano, for the simple reason because he was not qualified to be a mechanic. Cristiano testified that he was unaware that Brice was certified as minimally qualified prior to the interview.

In response to Board members' questions, Cristiano testified that he believes in the merit system and that the choice made for the position was the best choice available. This was the first hire for this position, and there have not been other similar positions available, and this was the only interview Cristiano ever gave to anyone who he was to supervise. He stated that he told Sestito that the position was available and advised him to submit an application. He did not recall discussing with Sestito the process for getting the job, and he has told other people about job opportunities with the Department and elsewhere in the state.

Charles Terry Outten was sworn as the Department's final witness and testified that he has been with the Department since 1976 and presently is the Chief of Administration for the Department of Corrections service and for the last four years serving in the capacity of Bureau Chief of Operational Services.

According to Outten, Operational Services includes the logistical support operation for the warehouse, for ordering, purchasing, and delivery to all the institutions, as well as temporary warehousing, and includes all the statewide operations for Prison Industries which included the two auto garages, one of which is located at Ferris and the other at the Delaware Correctional Center. It includes wood shops, metal shops, painting, and statewide food service operations. The auto mechanics program is a part of the Prison Industries Program, and Outten selected the first interview panel for the position of Auto Mechanic I. The panel consisted of Francesco Cristiano, Fleet Manager; Bill Mason, who would be the immediate supervisor to the position; and, in the absence of someone from Personnel, Outten asked his secretary, Barbara David, to sit in on the interviews. She, according to Outten, was qualified to sit on the panel because of her familiarity with the Merit Rules and Regulations and state benefits. She has also supervised Correctional Officer positions. Mr. Outten testified that it was his idea to have two separate interview panels for this position. His reason was that time is important to him, and there were thirteen applicants, so he was looking for a pare down to the top three to help expedite matters. He testified, ". . . I asked that first interview panel to give me three individuals that would be suitable for the job." and that he intended to sit on the second interview panel himself.

Outten testified that Cristiano had revealed that Salvatore Sestito was his nephew, and Outten told Cristiano to let Personnel know. Cristiano approached Roy Lawler in Personnel, and Lawler indicated that there was no conflict if his nephew was not shown preferential treatment in the interview process and that Cristiano could sit on the interview selection panel.

Outten stated that he is familiar with Jeremy Coleman who was hired with the Department as a mail carrier on a part time basis and later moved to the Ferris location to help alleviate the Correctional Officer/Mechanics going out for parts and doing tow truck work. Outten testified that Coleman dated his daughter approximately a year and a half before he came to work for the

Department, and at the time he began working for the Department, they were no longer dating. Outten testified that he absolutely did not attempt at any point to exert any influence in favor of Mr. Coleman and that he had set it up that the same series of questions would be asked to each applicant to treat them all fairly. The applications were reviewed by each member of the interview panel.

Outten testified that he has not been involved with the selection of other Correctional Officer positions, because this is the only position that has become available under his administration. The position was not a general fund position but a special fund ("ASF" fund) which is paid from revenues derived from profits from working on vehicles under a state contract or private vehicles. Outten stated that the second interview panel consisted of himself, Dave Conley, and a lady from Personnel.

Outten attributed the second panel to a change in the Merit Rules and Regulations where the number of eligible individuals on the certification list was increased. There were thirteen individuals on this list, and Outten testified that he selected the process of paring that down to the top three and going from there. Outten made the final selection decision, and in response to the Board members' questions, explained that, while it did not take him any more or less time to be on the second interview panel than it would to have looked at the final three and made a decision, he, in his own mind, still had some concerns about Cristiano and the relationship with Sestito and that's perhaps why the second panel was done.

Outten explained that the second interview process was set up in advance, anticipating that there might be some effort to discredit Mr. Cristiano. That is why the second interview was set up from the "git go." It was not an after thought. Outten stated that he was not concerned that some of the individuals who did not make the cut after the first interview panel could have been influenced and eliminated by the same relationship with Cristiano which troubled him because there were three independent people voting in the selection process.

Outten testified that after the first interview, there was some discussion about having the second interview performed by employees of the Delaware Department of Transportation, but that never developed.

Outten testified that he told Cristiano that unless it was blessed by Personnel that Cristiano would probably be removed from the interview process. Outten admitted it was at that point that he decided that the interview would be for the top three, and there would be a second process. Outten acknowledged that it was possible that if he had thrown out the first interview and had it performed over with a fresh panel, that might have cured any problems and prevented the matter now before the Merit Employee Relations Board. Outten reiterated that he was looking for a fully qualified auto mechanic since there is a training program for correctional officers, but no training program for auto mechanics. Outten stated that he would excuse himself from the interview process if he had to decide on a relative being hired. He could not recall the timing of the discussions to possibly have personnel from another agency do the interviewing but thought it was probably after the first round of interviews and that maybe it was Mr. Machtinger who thought that something needed to be done about having DelDOT do the selection.

FINDINGS AND CONCLUSIONS

1. Charles Brice is a Correctional Officer in pay grade 7. During the first week in December, 1994, Brice was interviewed for the pay grade 8 position of Correctional Officer/Auto Mechanic I posted for New Castle County. The interviews were conducted by Lloyd "Bill" Mason, a Correctional Officer/Auto Mechanic II; Barbara David, Secretary to Terry Outten, Chief of Administration for the Department of Corrections, who for the last four years has served in the capacity of Bureau Chief of Operational Services; and Francesco Cristiano, the fleet manager who supervised all Department auto mechanics.

2. Bill Mason prepared a ten question test on general automotive knowledge which was given to each of the approximately ten applicants interviewed. The highest test score was seven correct by Jeremy Coleman, who Mason suspected of having had access to the questions and answers. The Grievant, Charles Brice, had the next highest test score which was five correct.

3. The interview panel selected three candidates: Jeremy Coleman, a casual/seasonal employee for the Department working in the Ferris motor pool; Penny Cropper, a Correctional

Officer with prior automotive experience in the military; and Salvatore Sestito, an employee of Willis Chevrolet, as the top three of the candidates interviewed. Barbara David's first choice was Jeremy Coleman because he had worked in the position for over a year, and he had served as a casual/seasonal employee for three years for the Department. He had also previously dated Terry Outten's daughter. Mason's first choice was Salvatore Sestito.

4. Salvatore Sestito, the ultimately successful candidate, came late to the interview, was flustered and scored only three correct on the ten question test. Sestito was the nephew of Francesco Cristiano, one of the initial interview panel members and the immediate supervisor of Bill Mason, another of the initial panel members. Bill Mason did not know at the time of the interview that Sestito was related to Cristiano, but Barbara David did. Sestito was one of the top three choices of each of the initial interviewers. Brice did not make the top three choices of any of the interviewers.

5. Charles Brice filed a grievance on November 18, 1994, which was prior to the interview he received for the position of Correctional Officer/Auto Mechanic I. The initial grievance was the result of Brice not being informed from September 9, 1994, when he filed his application for the position her or not he had made the certification list. Brice received a reply from State Personnel Office informing him that he had been placed on the register for the position after the first grievance had been filed and prior to his interview for the position.

6. Prior to the interview, Francesco Cristiano, at the direction of Terry Outten, met with Raymond Lawler, a personnel officer within the Department of Corrections, and was advised by Lawler that the fact that his nephew, Salvatore Sestito, was on the certification list would not be a problem since there were three persons on the interview panel.

7. A second interview panel for this position consisted of Terry Outten, Janet Knowle from Personnel, and David Conley, an automotive mechanic with the Department of Corrections. This panel only interviewed the three individuals who had been selected by the first panel and made the final selection of Salvatore Sestito to fill the position of Correctional Officer/Auto Mechanic I.

8. Charles Brice was included on the certification list and was qualified for the position of Correctional Officer/Auto Mechanic I.

9. The failure of the first interview panel to select Officer Brice as one of the three finalists was improperly tainted by pre-selection and was based on non-merit factors. The process produced as one candidate, Jeremy Coleman, the favored choice of Barbara David, who while he may have "paid his dues" as a casual/seasonal employee, was patently less qualified than Officer Brice. The evidence further establishes that Sestito who arrived late for the interview; was flustered; and had the lowest examination score was, despite the protestations by the Department to the contrary, treated preferentially.

10. At the time of the first interview, Officer Brice was known to have been a Grievant with respect to the position.

11. The testimony by Mrs. Sestito that the conversation with Correctional Officers Wilmore and Ford at Wal-Mart relating to the assistance to be given by the hiring of Salvatore Sestito by his uncle, Francesco Cristiano, took place only after Sestito had been hired is not as compelling as is the testimony of Officer Wilmore that the conversation actually took place in November, which was shortly before the first interview panel in December, 1994.

12. From the objective measure of the test given to each applicant, Officer Brice should have been at least one of the three finalists as the second highest scorer or the highest scorer on the examination if one discards the score of Jeremy Coleman who had access to the questions and answers.

13. Officer Brice has established by a preponderance of the evidence that he was discriminated against on the basis of non-merit factors in the selection process for the position and that the circumstances surrounding this particular selection process, despite the belated corrective efforts of the Department, resulted in a gross abuse of discretion.

THE LAW

29 Del. C. § 5931. Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The director and 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. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days. (29 Del. C. 1953, § 5931; 55 Del. Laws, c. 443, § 6, 69 Del. Laws, c. 436, §7.)" Effect of amendments -- 69 Del. Laws, c. 436, effective July 14, 1994, rewrote this section.

Merit Rule No. 13.0100 Promotion

Vacancies shall be filled by promotion wherever practical and in the best interest of the classified service.

Whenever a position is to be filled by promotion, the candidate shall meet the minimum requirements of the class specification. Consideration shall be given to qualifications, performance record, seniority, conduct and, where applicable, the results of competitive examinations.

No grievance may be maintained concerning a promotion except where:

(1) the person who has been promoted does not meet the minimum qualifications;

(2) there has been a violation of Merit Rule 19.0100 or any of the procedural requirements in the Merit Rules; or

(3) there has been a gross abuse of discretion in the promotion.

Merit Rule No. 19.0100 Non-Discrimination Policy

Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline or any other aspect of personnel administration because of political or religious opinions or affiliations or because of race, national origin, age, sex, physical or mental disability, or other non-merit factors will be prohibited.

ORDER

After full consideration of the circumstances involving this filling of the position of Correctional Officer/Auto Mechanic I, and by the unanimous vote of the undersigned members, the Board orders and directs that to make Officer Brice whole for the discrimination he has established by a preponderance of the evidence, he should be placed in the position effective February 1, 1995 with all back pay and benefits to that date. Attorney fees are not awarded consistent with the Board Order thereon dated May 16, 1996 in this matter. (Attachment A).

IT IS SO ORDERED:

Robert Burns, Vice-Chairperson

Gary Fullman, Member

Walter Bowers, Member

Dallas Green, Member

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

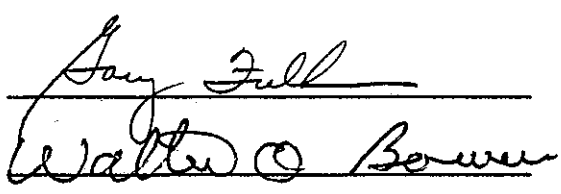
IN THE MATTER OF	)	
	)	
Charles Brice,	)	**Docket Number 95-06-41**
Grievant	)	
v.	)	
Department of Corrections	)	**MOTION TO DISMISS**
State of Delaware, Agency	)	
	)	
	)	

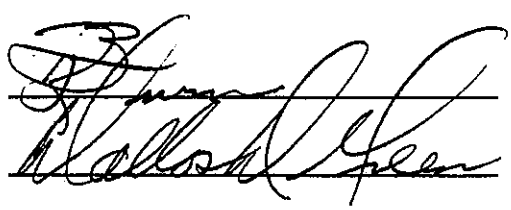
Before Burns, Vice-Chairperson, Bowers, Fullman and Green, constituting a quorum of the Board pursuant to 29 Del. Code Section 5908(a).

Firstly, before the Board is a Motion to Dismiss the matter as not being timely filed and grievant's response. A review of the file in this matter indicates that it was received by the Board on June 27, 1995 after no action was taken on a request for a fourth-step hearing in accord with Merit Rule 20.0350. Jurisdiction was thus conferred upon the Board as of that date, and was divested of the State Personnel Office. The subsequent fourth-step hearing did not divest the Board of jurisdiction. The State's Motion to Dismiss must be denied.

Grievant has raised the issue of attorney's fees in his response. The Board has no general or specific statutory authority to award attorney's fees and costs in any matter, as opposed to, for example, the Industrial Accident Board (authority to award attorney's fees codified as 19 Del. C § 2127.), nor are there any provisions in the Administrative Procedures Act for such an award.

IT IS ORDERED that the State's Motion to Dismiss is denied.





Original: File
Copies: Grievant
Grievant's Representative
Agency
Agency's Representative
Board
State Personnel Office (3 copies)

DATE MAILED May 16, 1996

ATTACHMENT A

APPEAL RIGHTS

29 Del. C. §5949 provides that the appointing agency shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the appointing agency. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

Mailing Date: September 9, 1996

MMT/jlt

Distribution:

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Grievant's Representative
Agency
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Katy K. Woo, Chairperson
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Dallas Green, Member
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