

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

IN THE MATTER OF William Post
Grievant,

v.

STATE OF DELAWARE
Department of Corrections
Agency

DOCKET NO. 95-07-44

FINDING OF FACT

CONCLUSION OF LAW

OPINION AND ORDER

BEFORE Burns, Vice Chairperson, Bowers, Fullman and Green, Members of the Merit Employee Relations Board, constituting a lawful quorum of the Board pursuant to 29 Del Code, Section 5908(a).

And now on this 18th day of April, 1996, the above-referenced matter being before the Board on November 30, 1995, the Board makes the following Findings of Fact and Conclusion of Law; to wit:

SUMMARY OF EVIDENCE

1. Roy Lawler was sworn and testified that he is a Personnel Officer II for the Department of Corrections and serves as the recruitment and selection unit supervisor. Mr. Lawler testified that he ranks the applicants and has the responsibility to make sure the application procedure is conducted properly, including the preparation of the position announcement, the evaluation of the application, and the computation of the local training and experience rating used for ranking purposes when no written exam is offered.

Mr. Lawler testified that the personnel office in the Department of Corrections rated each applicant and issued the certification list. Mr. Lawler testified that Mr. Kearney was ranked as acting warden while filling the deputy warden slot, as he was ranked on the position that was being filled. Mr. Lawler testified that the training and experience information is not used until a person meets the minimum qualifications.

Mr. Lawler testified further that a person must meet the minimum qualifications in order to be rated or to make it to a certification list. Mr. Lawler testified that he used Mr. Kearney's resume to evaluate Requirement #1 --- the positions of Lieutenant, Staff Lieutenant and Captain; used the educational and personal paragraph for Requirement #2, and the interactions as Investigation Officer with State and local police, the Attorney General's office, the Public Defender's office and the Medical Examiners office, as well as contacts with clergy, the DE National Guard and the State Office of Information Systems to satisfy Requirement #3.

2. On cross-examination, Mr. Lawler testified that he used the applications only to review against the minimum qualifications, and never goes to the personnel file and that, in the present case, he rated the applications approximately two years ago. Mr. Lawler testified that his usual practice is to read an application until a person has met the minimum qualifications, but that he could not recall exactly how far he read Mr. Kearney's application. Mr. Lawler testified that he utilizes the Minimum Qualification Rating Guide prepared by the State Personnel Office and, as the rater or evaluator, felt that Mr. Kearney met the minimum qualifications for the position. Mr. Lawler testified that he worked in Personnel for the Department of Finance before joining the Department of Corrections, and that the State Personnel Office designs the system for rating. Mr. Lawler testified that six persons made it to the certifications list, and that it is not unusual for different people to make the certification list.

3. On examination by the Board, Mr. Lawler testified that the top five with ties make it to the certification list, and applications are evaluated prior to training and experience determination. Mr. Lawler testified further that the personnel department does not check on accuracy of the applications, as that is done by the interview committee.

4. William Post was sworn and testified that he and not Mr. Kearney developed the Lifers Program with the help of the inmate population. Mr. Post testified that Mr. Kearney was a staff sponsor but was not involved in the program development, and was not involved in the Chronic Care Program, according to the list of names that he had. Mr. Post testified that the chapel was constructed by the inmates with donated materials, and that the chaplain directed the services.

Mr. Post testified with regard to #3 of the position vacancy that the investigative officer investigates complaints within the prison compound, and that the warden acts in official

capacity with outside agencies. Mr. Post testified that his writing sample was submitted with his application and was labeled "required writing sample" and that he also included a typed resume.

5. On cross-examination, Mr. Post testified that he did not know if the person who typed the list of staff names on the Chronic Care Program left out any names.

6. On examination by the Board, Mr. Post testified that, in his opinion, the chapel construction was not a program and the typed resume was not a writing sample. Mr. Post testified that as a counselor supervisor he conducted interviews and sat on interview panels.

7. On re-direct, Mr. Post testified that when he was reviewing a candidate that he knew, two other persons who did not know the candidate also sat with him on a review panel. Mr. Post testified with regard to the requirement that each candidate develop and implement a program, the program that Mr. Post developed was the Lifers Program and Mr. Kearney was not involved in developing or implementation of the program.

8. On recross, Mr. Post testified that Wayne Faircloth, Stan Taylor and Noreen Renard sat on the panel that interviewed all of the candidates for the Warden II position and that two members had interviewed on previous promotions for Mr. Kearney. Mr. Post testified that he believed, as a procedural requirement, that experience, seniority and personnel records should have been considered as a promotional requirement.

9. On re-cross, Mr. Post testified that he had no social relationship with the interview panel, but that Messrs. Kearney, Faircloth and Taylor hunt together and are involved at times on fishing trips.

10. On re-direct, Mr. Post testified he believed that the merit rules had been violated as seniority had not been taken into consideration.

11. The Grievant rested.

12. The State moved to dismiss based on grievant's failure to make a prima facia case of a violation of Merit Rule 13.0100, Parts (1) (2) or (3). The Board granted the motion as it regarded Parts (2) and (3), but found that the grievant had made a prima facia case based on minimum qualifications requiring the State to respond.

13. Stanley W. Taylor was sworn and testified that he was the Acting Commissioner of the Department of Corrections, and was the Chief of the Bureau of Prisons for the two years prior, with the direct responsibility of supervising the wardens at the Sussex Correctional Institute. Commissioner Taylor testified to the minimum requirements of the position of Warden II, and detailed the active involvement of Mr. Kearney on the Lifer's Tier Program. Commissioner Taylor testified that the inmates were interested in getting the tier going as a program, and then Captain Kearney talked to Commissioner Taylor about security concerns with all of the lifers together in one tier. Commissioner Taylor testified while Mr. Post worked on the program considerations. Capt. Kearney worked on the security considerations and reported to Commissioner Taylor frequently.

Commissioner Taylor testified about the Chronic Care Program which was designed to give psychological, psychiatric and medical care to special populations, and that Captain Kearney got involved after the program floundered for its first six months, and that Capt. Kearney conducted orientation training of the security staff and played a role in the implementation of the program.

Commissioner Taylor testified about the chapel construction and Mr. Kearney's role as staff lieutenant/special projects coordinator was responsible for coordinating the construction of the chapel in the nine month schedule.

Commissioner Taylor testified that the investigating officer assignment was originally filled by him, and work with outside agencies regarding assaults on staff, discovery of contraband and escapes by inmates.

Commissioner Taylor testified that he assigned Capt. Kearney the task of updating the inmate manual at SCI, and that Capt. Kearney designed the lesson plans to implement emergency response by the National Guard and/or the State Police if they were called into the facility.

Commissioner Taylor testified that the applications with resumes were attached to the certification list, and that he knew the applicants for a minimum of fifteen years, and he has no

problems with the ability to write of both Mr. Post and Mr. Kearney. Commissioner Taylor testified that the statements in the applications are true and correct and he believed that the minimum qualifications were met of Mr. Kearney in his application and selection for the position.

14. On cross-examination, Commissioner Taylor testified that Capt. Kearney was the first individual who approached the Warden about the Lifer's Tier, and that Capt. Kearney played a role in its creation.

Commissioner Taylor testified regarding the Chronic Care Program that the Program was developed professionally, but that the Program never got off the ground as the inmates were difficult to work with. Commissioner Taylor testified that it was necessary to bring a high-ranking individual into the program and Capt. Kearney served that essential role installing the security controls and implementing the Program by working with the Program directors. Commissioner Taylor characterized this work as more than just advising.

With regard to the chapel, Commissioner Taylor testified he believed the construction project was a program as it took inmates with poor work ethics and required them to report at a scheduled duty time, perform a full day of work and also care and maintenance of assigned tools. Commissioner Taylor testified that this was the first and only time that private and public staff constructed a building inside a state prison.

Commissioner Taylor testified that the investigative officer was not a program but a duty assignment, and that Mr. Kearney developed the inmate manual, which was not a program but a guidebook that the inmates follow. Commissioner Taylor testified that the training of the National Guard was a program that was implemented by Mr. Kearney that had not been done before.

Commissioner Taylor testified that report writing is part of basic training and, by nature of his experience, he believed that Mr. Kearney had the necessary qualifications, and it was not discussed at the interview.

15. On examination by the Board, Commissioner Taylor testified that he had working knowledge of both Mr. Post and Mr. Kearney and, on occasion, one would come and talk to the warden about issues or programs that the other may not know about.

Commissioner Taylor testified that he was not surprised when he reviewed the applications to see that both applied, and that all six on the certification list were interviewed for the position. Commissioner Taylor stated that he was the warden for two years at SCI and that he was involved in the promotion of Mr. Kearney to Captain.

Commissioner Taylor testified that when the Department makes a decision about one of the highest-ranking positions, a panel is selected of high-ranking individuals, as was done in this case by selecting Wayne Faircloth, Personnel Administrator and Noreen Renard, Chief of Commanding Supervision and that Commissioner Watson made the final selection.

16. The Agency rested.

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.

FINDINGS OF FACT

1. The grievant, William Post, met the minimum qualifications for the position of Warden II.
2. The successful candidate, Richard Kearney, met the minimum qualifications for the position of Warden II.
3. The interview panel had sufficient information to evaluate and rank the candidates.
4. Mr. Kearney's 2 1/2 page written attachment to his application, outlining his employment, was a sufficient writing submission as required by the job posting as required to the application.
5. Mr. Kearney had sufficient experience developing programs at a correctional facility as evidenced by his work in developing the Lifer's Program, restarting the Chronic Care Program; coordinating the Chapel construction project into a meaningful program for inmate workers to learn job skills and discipline; and implementing the training program for emergencies conducted for the Delaware National Guard.

CONCLUSION OF LAW

The grievant did not meet his burden under the Merit Rules to show, by a preponderance of the evidence, that the successful candidate did not meet the minimum qualification of the position of Warden II, as required under Merit Rule 13.0100 (1) and, therefore, the grievance is dismissed.

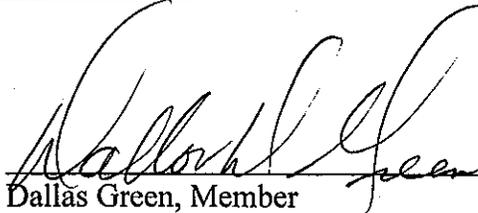
ORDER

The grievance is dismissed.

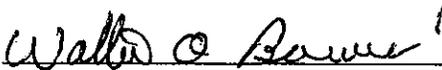
IT IS SO ORDERED



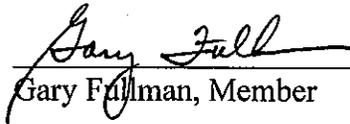
Robert Burns, Vice Chairperson



Dallas Green, Member



Walter Bowers, Member



Gary Fullman, Member

APPEAL RIGHTS

29 Del. C. §5949 provides that the grievant 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 grievant. 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: _____

April 18, 1996

JFB:jlt

Distribution:

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Grievant's Representative

Agency

Agency's Representative

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