

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

**In The Matter Of
NEAL EASTBURN
Grievant,**

v.

**State Of Delaware
JUSTICE OF THE PEACE COURTS
Agency**

DOCKET NO. 96-11-65

FINDING OF FACT

CONCLUSION OF LAW

OPINION AND ORDER

BEFORE Woo, Chairperson, 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 date, the 2nd day of May, 1996, the above-referenced matter being before the Board on April 18, 1996, the Board makes the following Finding of Fact and Conclusions of Law; to wit:

NATURE AND STATE OF PROCEEDINGS

The grievant, Neal Eastburn, timely filed an appeal of a Step 4 decision regarding his non-selection for the position of Physical Plant Maintenance Trades Foreman. Mr. Eastburn's appeal was based on two alleged violations of the Merit Rules;

(a) a violation of the non-discrimination policy under Merit Rule 19.0100 by alleging that the selection was race-based, and

(b) a violation of the promotional process under Merit Rule 13.0100 by alleging that the selected person did not meet the minimum qualifications of the position of Physical Plant Maintenance Trades Foreman.

SUMMARY OF EVIDENCE

1. Neal Eastburn was affirmed and testified that he is a constable with the Justice of the Peace Court, Paygrade 8 as of March 1, 1995. Mr. Eastburn testified that previously he was a security officer at the State Hospital and, at the time of his application for the physical plant Maintenance/Trades Foreman, he had fourteen years experience with the State.

Mr. Eastburn testified that it was his understanding that an applicant had to have experience with all of the minimum qualifications of the position, including experience in the trade fields. Mr. Eastburn testified that previously he was an electronic technician for his father at Expert TV Service, repairing televisions, video recorders and other electrical appliances. Mr. Eastburn testified he had completed courses at Delaware Technical & Community College in Basic Electric, Electronics and Solid State Systems, and at Expert TV served as a road technician and shop supervisor, performing and overseeing repairs and supervising technicians.

Mr. Eastburn testified that he also did painting and minor repairs at the rental apartment his father owned, as well as painting the showroom yearly.

Mr. Eastburn testified that he also worked as a part-time maintenance man at the Driftwood Club apartments, doing light carpentry and painting. Mr. Eastburn testified that he had experience with hand tools in repairing garage door openers and installing antennas, and experience in schematics and blueprint designs in repairing electronic equipment. Mr. Eastburn testified that he prepared estimates for customers who brought in appliances for repair, and used cost analysis techniques, time estimation and appropriate recordkeeping. Mr. Eastburn testified that he supervised two other electronic technicians for about two years.

Mr. Eastburn testified that he was aware of the principal accountabilities and saw no problems in performing those duties. Mr. Eastburn testified that the interviewer, Mr. Pini, discussed the job responsibilities with him, the delivery and cleaning duties, and the supervision responsibilities that were entailed. Mr. Eastburn testified that he applied for the position because it was two paygrades higher and was a better position. Mr. Eastburn testified that the

interview ran about 45 minutes, and that he asked questions about furniture repair, surplus review and a preventive maintenance schedule. Mr. Eastburn testified that Mr. Pini asked if he really wanted this job, as it was a lot of work. Mr. Eastburn testified that Ms. Lewis was really surprised by his application, as this caught her from left field.

Mr. Eastburn testified that Ms. Lewis sent him a note informing him of his non-selection, and it was read to him by his supervisor over the phone.

Mr. Eastburn testified that he grieved the decision because he didn't believe that Mr. Pitts had any skills trade experience, and had heard from various sources that Mr. Pitts did not have the experience he claimed, and that a lot of people had approached him expressing their shock that he didn't get the job.

2. On cross-examination, Mr. Eastburn testified his understanding was that applicants were to have some knowledge in all of the tasks. Mr. Eastburn testified that he made the cert list by the court for the position of Physical Plant Maintenance Trade Foreman, but that he had not supervised anyone since 1978 as a primary duty, but had given advise to new employee. Mr. Eastburn testified that he did electrical work on the side since 1978, but that he did not report this on his application for the position.

3. On re-direct, Mr. Eastburn testified that he has done the piecework jobs on the side since 1978, and did not intentionally mislead the State on his application.

4. On examination by the Board, Mr. Eastburn testified that he didn't know why Ms. Lewis was surprised by his application for the position, and was unsuccessful in contacting her about her concerns about Mr. Pitts. Mr. Eastburn testified that he gave the employment information about Mr. Pitts and DuPont to Mr. Nagle, but that he does not know if Mr. Nagle did anything about it. Mr. Eastburn testified that, during the interview, he felt he was dissuaded by Mr. Pini from taking the job, but that he was given the opportunity to ask questions about the position.

5. Eugene Schilling was affirmed and testified that he was hired by Neal Eastburn in 1975 as an apprentice television repairman at Expert TV and Repair, and apprenticed under Mr. Eastburn directly along with Ron Berway. Mr. Schilling testified that he worked under Mr. Eastburn for three years until 1978, and that Mr. Schilling eventually purchased the business from Mr. Eastburn's father in 1979. Mr. Schilling testified about Mr. Eastburn's work in rehabilitating plumbing, painting and electrical services at Mr. Eastburn's father's rental properties and the store.

6. Harry L. Pitts was affirmed and testified that he applied for the position of Physical Plant Maintenance Trades Foreman in February, 1995 while he was a custodian for the JP Courts. Mr. Pitts testified that the interview panel consisted of Ms. Anna Lewis and Mr. Donald Pini, and they questioned him about his experience regarding cleaning, painting, repairs and HVAC, and that the interview took approximately one hour.

Mr. Pitts testified that he met the minimum qualifications from his previous jobs experience, including his work at DNC (Domino's Distribution Center) full time, as well as Sunshine Cleaning as a floor buffer. Mr. Pitts testified that he cleaned the machines, including breaking down the machines and wiring the machines, and was trained by a Reginald Sutton on the job. Mr. Pitts testified that he was a dough maker for about a year and then started to learn about the machines, and received the training at DNC over a period of 1 year.

Mr. Pitts testified that he supervised two other workers at DNC and that he worked at DuPont at nights for Security, and that he was laid off in 1993, initially working for Spence Security and then Protection Technology in 1993. Mr. Pitts testified that he was terminated by Protection Technology due to an inability to verify his previous employment. Mr. Pitts testified he used DuPont because that was what they always used, and that he made \$6 to \$7 dollars per hour performing the security work. Mr. Pitts testified that in 1993 he listed the jobs that were most relevant to the job he was applying for.

Mr. Pitts testified that he was a bagger in a plastic bag factory and had worked for Action Security in the late 70's and Dover Electric in 1992 part time during the day, delivering

electrical supplies. Mr. Pitts testified that he was not an inside counter person, nor did he walk off that job without notice.

Mr. Pitts testified that his title was dough production maintenance, and that he started in 1989 and stopped working there in 1991. Mr. Pitts left the Domino's position when the sanitation department closed in 1991.

7. On cross-examination, Mr. Pitts started work for Domino's in 1989. Mr. Pitts testified that he made a mistake on his application. Mr. Pitts testified that he received the training at the end of 1989.

8. On examination by the Board, Mr. Pitts testified that he completed the Physical Plant Maintenance Trades Foreman checklist and that he received all of the training he checked off was at DNC in 1989 and 1990. Mr. Pitts testified he started as a custodian with the State in 1994 and his tasks included cleaning, painting, bathroom plumbing repairs, as well as building shelves and minor carpentry repairs. Mr. Pitts testified that three employees reported to him at DNC, and the planning and work aspects were the evaluation of and distribution of work to employees, and reviewing their progress, and that he was making more money prior to the employment with the State and that his last EPPA was satisfactory.

9. On re-direct, Mr. Pitts testified that he learned his trade skills at DNC and that his previous salary was \$13,400 with the State as a custodian.

10. On re-cross, Mr. Pitts testified that he worked 40 hours a week for Spence Security.

11. Anna Lewis was sworn and testified that she participated on the interview panel with Donald Pini, the incumbent in the position of Physical Plant Maintenance Trades Foreman. Ms. Lewis testified that Mr. Pini was Mr. Pitts supervisor, and completed the EPPA for Mr. Pitts in 1994. Ms. Lewis testified that she believed Mr. Pitts and Mr. Pini had a good working relationship but did not know the frequency of their interaction at work. Ms. Lewis testified the interview lasted approximately 20 minutes or so, and that she asked the questions that were included as Grievant #1, Exhibit "H." Ms. Lewis testified that both candidates performed

equally on the interview, and that both had similar EPPA's. Ms. Lewis testified that interview performance was a factor in selection, but could not quantify how many points were assessed for the different components as no rating was done to a skill. Ms. Lewis testified that a lot of the decision was based on Mr. Pini's evaluation, as there were two good candidates but only one position; and she had the equivalent of an outside reference from Mr. Pini for Mr. Pitts as his supervisor but did not contact Mr. Eastburn's supervisor for a reference. Ms. Lewis testified that she posted the position in-house following the policy of the Chief Magistrate to post positions initially in-house, and was not surprised by who applied for the position.

Ms. Lewis testified that she presumes when an application comes to her that the person is minimally qualified. Ms. Lewis testified that she did not verify employment or training, as that is not her task. Ms. Lewis testified that she had seen Mr. Pitts' 1993 job application, but did not specifically recall discussing the listed employers with Mr. Pitts. Ms. Lewis testified that she did not know how Mr. Pitts' 1994 application became attached to the 1995 application, but she normally doesn't review other applications but presumes she reviewed his 1995 application.

Ms. Lewis testified that the principal accountability that was important was the scheduling of on-going preventative or routine maintenance duties. Ms. Lewis testified that they try to fill positions with someone who filled their needs, and that the State Personnel Office established the job duties and requirements.

Ms. Lewis testified that she was not familiar with the affirmative action program, and that the last sheet of the application does not accompany the packet for interviews.

Ms. Lewis testified that there are between 200-300 Court employees, including approximately 20 supervisory positions as of February, 1995, including three minority females. Ms. Lewis testified that she knew there was a News Journal article about minority hiring in the court system, but she was not familiar with any report. Ms. Lewis testified that Mr. Pini wanted to see things done well, and would not inflate a candidate's performance. Ms. Lewis testified that the applicants were equal, and that there was one position and, based on Mr. Pini's experience with Mr. Pitts, and his experience with Mr. Pitts, Mr. Pitts was selected over Mr. Eastburn. Ms.

Lewis testified that Sandy Coleman forwarded the applications to her but did not know what Mr. Coleman's office did with the application prior to the cert list.

12. On cross-examination, Ms. Lewis testified that she is the Operations Manager for New Castle County and is the supervisor of the Foreman position and very familiar with the position's job responsibilities.

13. On examination by the Board, Ms. Lewis testified that the hours are now 9:00 PM until 5:00 AM, and that some work was performed while courts were opened, and was not familiar with any problems of Mr. Pitts that were referenced by the comments in the 1994 EPPA. Ms. Lewis testified that the responsibilities were statewide, and that there was some overtime work in the position. Ms. Lewis testified that no one forced or told them to hire Mr. Pitts, and that she based her decision to recommend Mr. Pitts based on her interaction with Mr. Pitts and Mr. Pini's recommendation. Ms. Lewis testified that she received a cert list and the applications, and the cert list is presumed to contain applicants who have met the minimum qualifications. Ms. Lewis testified that she has been New Castle County Operations Manager since 1989, and testified that Mr. Pitts has handled the job responsibilities, including the painting, maintenance and cleaning, as well as his willingness to do the tasks involved. Ms. Lewis testified that it was a joint decision to select Mr. Pitts, and it was based on the knowledge of Mr. Pitts as a known quantity. Ms. Lewis testified that she did review the applications and wasn't surprised to see two full-time positions overlapping, as many people work two full-time jobs simultaneously, and move from one position to another through no fault of their own.

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 whenever 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.

FINDING OF FACT

1. The hiring decision for the position of Physical Plant Maintenance/Trades Foreman was not based on race.

2. The hiring authority failed to exercise due diligence in investigating the background of Mr. Harry L. Pitts prior to certifying him as minimally qualified on the certification list.
3. The hiring decision was based on a presumption that all the names on the certification list were minimally qualified.
4. There was no bias by having the incumbent, who was the supervisor of the successful candidate, sit on the interview team as he was the person with the most knowledge about the job and its duties.
5. There was no pre-selection done for the position by the hiring authority.

CONCLUSIONS OF LAW

The Board finds no evidence that the hiring decision was race-biased, and the complaint as it regards Merit Rule 19.0100 is dismissed.

The Board finds that the individual selected, Harry L. Pitts, may not have met the minimum qualification, based on the failure of the Personnel Department to properly investigate the work history of Mr. Pitts. This finding is a violation of Merit Rule 13.0100 (2) as no evidence of the process by which an applicant was ranked as minimally qualified was presented. The integrity of the promotional aspects of the Merit System requires that a standardized procedure is followed in evaluating candidates as minimally qualified. A hiring authority must utilize due diligence in investigating and validating application information. The position posting must state the minimum qualifications and principal accountability of the position. The failure to conduct such a proper review requires that the position be reposted and the process begun anew.

ORDER

The grievance is maintained.

The incumbent is to be removed from the position effective fifteen (15) days from the day of the decision, and returned to his previous position and paygrade.

The position is to be reposted and the promotional process be redone for the position of Physical Plant Maintenance/Trades Foreman in accord with the Merit Rules.

IT IS SO ORDERED



Katy K. Woo, Chairperson



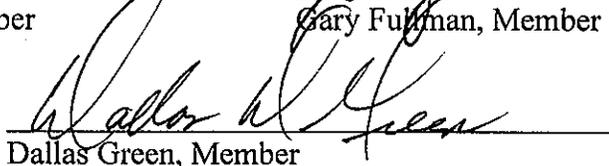
Robert Burns, Vice Chairperson



Walter Bowers, Member



Gary Fullman, Member



Dallas Green, Member

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: May 6, 1996

Distribution:

Original: File

Copies: Grievant

Grievant's Representative

Agency

Agency's Representative

Merit Employee Relations Board

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