

minimum qualifications for the job and that non merit factors were used to deny him an interview.

The DOC contends that the Merit Rule relied on by Appellant is discretionary, not mandatory. Further, despite DOC's policy to interview 50 percent of the names plus one on the certification list, the statute applicable at the time of Appellant's application only required the employing agency to interview one person on the certification list.¹

SUMMARY OF THE EVIDENCE

Felice Lee Lepore, after being sworn, testified that he is employed in the DOC laundry department at the Smyrna, Delaware facility where he is a laundry supervisor. He is a 23 year employee of the DOC and is familiar with the position of Physical Plant Maintenance Mechanic I. He did not apply for the position but knew that one of the workers in his area had applied.

In January, prior to the interviews for the position, maintenance supervisor Elwood Lord walked into his office and engaged in an unsolicited conversation with him, Stanley Dill and Ed Gourley, advising them that Larry Brown was on the certification list but that he, Elwood Lord, guaranteed Brown would not get an interview or a position. Lord commented further that Mr. Brown smoked too much. Elwood Lord did not have the certification list in his hand at the time. Mr. Lepore understood Mr. Lord to be in the direct chain of command for the Physical Plant Maintenance Mechanic position and had heard that he was on the interview panel.

¹ The applicable statute, 29 Del. C. § 5921, was revised in July of 2000. Agencies of 200 or less must interview at least one person from the certification list. Agencies of 500 employees or more must interview a minimum of five people from the list.

On cross-examination, Mr. Lepore stated that Mr. Lord did not have any work in the laundry area, he just periodically stopped in to talk and to check on problems. Mr. Lepore did not recall anyone asking Mr. Lord about Mr. Brown. Mr. Lepore guessed that Mr. Lord brought the subject up because he knew Stanley Dill and Larry Brown were close. According to Mr. Lepore, Mr. Lord just brought things up a lot of times. No one initiated the conversation or pursued it further after Mr. Lord's comments.

Edward Gourley, after being sworn, testified that he is employed with the DOC in Smyrna, Delaware as a CO/Laundry Operator. He has been employed by the DOC for twenty-two years and had applied and been interviewed for the position of Maintenance Mechanic 1. He did not get the position.

Prior to, or around the time of the interviews, Edward Lord came into the laundry room's office and told Mr. Lepore, Mr. Dill and him that he had the certification list, that Mr. Brown's name was on it, but that he would not interview Mr. Brown because he was not a CO and smoked too much. Mr. Gourley did not request the information from Mr. Lord, he volunteered it. Mr. Gourley guessed that Mr. Lord told them because he felt they wanted to know because Mr. Gourley was also on the certification list.

On cross-examination, Mr. Gourley stated that the conversation occurred after the certification list came out. Mr. Lord did not comment on Mr. Brown's experience or anyone else on the list. At the time of the conversation Mr. Gourley had not been set up for his interview. He did subsequently get an interview but was not selected. He has not applied again. Elwood Lord was on his interview panel.

On examination by the Board, Mr. Gourley stated that Mr. Lord did not have the

certification list in his hand, that he just walked in and volunteered the information, and that Mr. Lord just had occasions of coming in and saying anything. Mr. Gourley did not know what Mr. Lord meant when he said Mr. Brown was not a CO. As far as he was aware, Mr. Brown was a Correctional Officer.

On further re-direct, Mr. Gourley clarified that he is a CO/Laundry Operator. He is not a Correctional Officer but is in the Correctional Officer series. On re-cross, Mr. Gourley stated that he understood the hiring would be done by an interview panel.

The Appellant, Larry Brown, was sworn and testified he has been an employee with the DOC for a little over 23 years. During that time he has been a Correctional Officer, a Unit Operations Clerk and currently hold a position as a Correctional Officer/Storekeeper.

Appellant held the position of Correctional Officer for 13 years. The position did not require him to be involved in Physical Plant Maintenance Mechanic duties. His experience in the Physical Plant Maintenance Mechanic area came from working in his own business for the past three years. He did not get his experience with the DOC. Appellant testified that he does all types of home maintenance including painting, laying cement blocks, fixing doors, windows, ceiling fans and electrical work. Appellant is currently licensed in the State of Delaware.

Appellant testified that he applied for the position of Physical Plant Maintenance Mechanic 1. In December of 1999, Appellant was notified by mail that he met the minimum qualifications for the position and that his name would remain on the certification list for a period of one year. (Appellant's Exhibit 1).² He received a training and experience rating of 100

² Appellant received two identical letters, one dated December 9, 1999, and the second dated December 14, 1999, which were marked as a single exhibit.

out of a passing score of 70 based on his application and the supplemental information he submitted in response to the DOC job posting. (Appellant's Exhibit 2).

Appellant stated that the position identified in the job posting is called a continuous position which means that it is frequently needed within the Department of Corrections. The position he applied for and as described in the job statement required completing basic repairs in several trades in which he had experience. Appellant testified that he met the minimum qualifications and has experience in the four bullet items listed on the posting including knowledge of operation methods and basic maintenance of power hand tools, landscaping or grounds keeping equipment and supplies, knowledge of basic methods and techniques in a variety of fields including carpentry, plumbing, painting or electrical, and that he has the ability to communicate effectively. In addition, Appellant has a high school diploma. The posting did not require a college degree or any trade school certificates.

Appellant testified that he applied for the position in December of 1999 and that the first position became open in March or April of 2000. He knew that interviews were taking place and learned at some point that someone else had gotten the job. He did not inquire as to why he did not get called for an interview since he understood that he had to wait until called.

On July 21, 2000, Appellant filed a grievance over not being interviewed for the position available in March, 2000, and a second position which had become available sometime in June or July. (Appellant's Exhibit 3). At that time, Appellant's name was still on the certification list, and he believed that he should have been called and interviewed.

Appellant decided to file his grievance after he saw a lot of brand new people hired off the street with no time with the Department walking around with maintenance uniforms and after

he talked to Mr. Dill and learned about the comment in the laundry room by Mr. Lord in the presence of Mr. Dill, Mr. Lepore and Mr. Gourley.

At the time the positions for which Appellant was not interviewed were available, Elwood Lord was the maintenance supervisor. Appellant had not worked with Mr. Lord in the past and the two did not know each other. Mr. Lord was on his interview panel. Appellant had never had a conversation with Mr. Lord prior to filing his grievance and never had a conversation with anyone in the chain of command of the Physical Plant Maintenance position in reference to Mr. Lord's comments.

Appellant testified that when he applied for the DOC position he was doing home maintenance repair work, was doing the fundamentals of the job posting and was seeking to become a business operator.

On cross-examination, Appellant testified that he submitted an application for the DOC position. (State's Exhibit 1). Appellant agreed that he did not list any licenses on the application and that his most current employment was listed as the records department. Appellant's experience at DOC between 1978 and present included working as an accounts payable/receivable technician, a unit operations clerk, and a Correctional Officer. Prior to accepting employment with the DOC in 1978 Appellant worked for Voshell Brothers Welding.

Appellant acknowledged that he did not list his home maintenance experience on his application and that the technical skills he reflected on his application were the skills he acquired working for Voshell Brothers Welding.

Appellant agreed further that the information he submitted to a supplemental questionnaire (State's Exhibit 2) likewise referred to his experience while working for Voshell

Brothers Welding during the years 1975 to 1978.

Appellant agreed that the documents identified as State's Exhibit 1 and 2 represented all the documentation he submitted for the position of Physical Plant Maintenance Mechanic 1.

On re-direct, Appellant stated that no occupational certificates or licenses were required for the position. Although he was doing home maintenance work, he was not doing it for a second agency that would have lent to listing the experience on the application or supplemental questionnaire. The experience he listed was based on the way the questionnaire was designed. The supplemental questionnaire did not ask whether he was currently performing the tasks indicated but whether he has performed them. As a result of his responses he was given a rating of 100% based on total points of 56, and was placed on the certification list.

On further cross-examination and re-direct, Appellant clarified that he started his business in July, 2000. Prior to that he was doing home maintenance projects for himself and neighbors but he did not have his business license yet. Finally, Appellant conceded that he did not list any more recent trade experience than what he acquired back in 1978.

Joseph Dudlek was sworn and testified that he is employed as the facility inspector at the Delaware Correctional Center. He is a Correctional Staff Lieutenant and the current union president of Local 247. About three years ago the Delaware Correctional Center underwent a 900 bed expansion requiring essentially a doubling of the maintenance staff. In the past year the number of physical plant maintenance employees has probably expanded by 10 or 12 employees the majority of which are entry level Plant Maintenance Mechanic I positions. Although not aware of the exact date the positions became available, he believes a number of the positions became available during the period Mr. Brown had his certification on the list.

Mr. Dudlek he has been on an interview panels and hired upward of 200 Correctional officers but has never sat on an interview panel reviewing certification list and applications for Physical Plant Maintenance Mechanic 1 positions.

Appellant, Larry Brown, was recalled to testify. Appellant was not CO, i.e., Correctional Officer during the time he was applying to become a maintenance mechanic. He was aware of one individual, Paul Sanders, who did get a position. Sanders had not previously worked in the maintenance department. Appellant had previous Correctional Officer experience but it was not a requirement of the job description.

On cross examination, Appellant stated that he knew Mr. Sanders but that he had not seen the application Sanders submitted and was not aware of any of the technical skills listed on the application. He only knew what Sanders told him which was that he used to do electrical work 23 years ago. He knew that Sanders had gotten a Physical Plant Maintenance Mechanic position but not from what certification list or when.

Roy V. Lawler was sworn and testified that he has been employed as a Human Resource Specialist III for the last 8 years at the Department of Corrections. He is the supervisor for the recruitment unit of the Department of Correction. His duties include supervision of the new hire, promotion and lateral transfer processes. He reviews the applications of people who want to work for the Department. People applying to DOC are not always applying to work on the cell block solely as Correctional Officers. There are Correctional Officer/ Storekeeper, and Correctional Officer/Mechanics. There are a wide variety of positions including administrative positions such as Unit Operations Clerk, Correctional Records Clerks and Accounting Technicians. To hold a position such as Correctional Officer/Mechanic the individual would go

through the same training a Correctional Officer would at the academy. The person is really a Correctional Officer with maintenance duties.

Mr. Lawler stated that he was familiar with the list process used by the State of Delaware. He stated that the list represents the top 15 names or 15 percent of everyone who have met the minimum qualification. Sometimes there is also an exam or supplemental questionnaire used in the ranking. When it is time to fill positions they issue names out of the certification lists.

Reviewing Appellant's Exhibit 2, Mr. Lawler stated that the purpose of listing minimum qualifications on the job posting is to give the applicant an idea of the information they need to provide to qualify for the position. Meeting the minimum qualifications does not mean an applicant is the best qualified or that they will be placed on the certification list.

Mr. Lawler stated that he was aware of Appellant's application for the maintenance position and identified State's Exhibits 1 and 2 as the materials used to rate an applicant. Appellant received a rating of 100 and was placed on the certification list. On a supplemental questionnaire 100 is the highest rating you can get unless you are a veteran or a disabled veteran. Appellant received a rating of 100 percent on the supplemental questionnaire based upon answering that he had performed the tasks listed. If the applicant indicates on the task verification section where they did the task they get credit for the response. Once someone is placed on the certification list, the list is issued out to the interviewing supervisor. The supervisors determine who will be called for an interview. The applications are sent out with the certification lists. For a maintenance position the information would be sent to Bruce Dickerson, the top person in maintenance and then he would filter it down to whoever is going to do the interview.

Mr. Lawler next identified the Department of Correction's internal policy which he authored regarding the number of people to be interviewed from a certification list (State's Exhibit 3). The policy calls for a supervisor to interview or contact at least more than half of the people on the list. If there are less than 10 people on the list DOC wants the supervisor to interview or contact all of the applicants on the list. Supervisors are given a copy of the memorandum along with the certification list and applications.

On cross examination, Mr. Lawler indicated that does sit on interview panel but did not sit on the panel for the mechanic positions. Mr. Lawler explained that CO is a designation for Correctional Officer that is placed before an individual's job title. Their primary objective is security but they have other duties as well related to their position.

An individual meeting minimum requirements may not make it onto the certification list if the score from the ranking device is not within the top 15 percent or 15 names. He did not personally rate Appellant's application. He agreed that there is nothing in the instruction memorandum or packet that talks about a supervisor having ex parte communications outside of the interview process. Although Merit Rule 10.0230 allows the supervisor to send back and reject an unsatisfactory list if reasons are given, there is no process for sending back a partial list. If they have made a selection from the list, then that list is not considered rejected. He agreed that although it is difficult to reject an entire list, it has happened. He also agreed that there may also have been times when the instructions concerning the total number of people to be interviewed have not been followed, contrary to his instruction. To his knowledge, the certification list was not sent directly to Elwood Lord but would have been sent to Bruce Dickerson to filter down.

On redirect, Mr. Lawler clarified that Title 29 of the Delaware Code, section 5921, provides for the appointment of a person among the highest 15 or 15 percent. It is the top 15 or 15 percent who are placed on the list. The DOC's internal guidelines determine how many people should be contacted for interviews.

On examination by the Board, Mr. Lawler stated that he did not know how many people were on the certification lists relevant to the two times in question for which Appellant was on the list. He also did not know if Mr. Lord was the interviewing supervisor but he may have been. Mr. Dickerson might have filtered it down to him. He really could not say how the list got to Mr. Lord. He clarified that the certification list represents the top 15 or 15 percent, whichever is greater, from everybody that applied and qualified. The supervisors are then required to interview or contact one more than half the people on the list. The policy is interview or contact. If a supervisor calls an applicant for an interview and that applicant fails to appear for the interview, the supervisor has made the effort to contact one more than half and has satisfied the requirement. However, under Delaware Code whoever Mr. Dickerson sent the list to would only need to determine at least one person to interview and would not be required to interview anyone else.

Terry Yoder, after being duly sworn, testified that he is the Superintendent of the Maintenance Section at the DOC. He has 21 years with the Department as of November. He is responsible for people who work in the maintenance areas including those in the position of Physical Plant Maintenance Mechanic I who report first to their foreman and then to him. The current foremen are William Crouch, day shift, and Kennett Rutledge, night shift. During the period in question, Elwood Lord was the day foreman but has since moved to another

correctional facility in Dover.

As the superintendent Mr. Yoder sometimes serves on interview panels and selects applicants for interviews at his facility. He sits on panels for all Maintenance Mechanics I, II or III's. At present they are only hiring I's due to the career ladder that requires everyone to start off as a Maintenance Mechanic I. During the last 2 years there have been a number of openings and he has been on a number of panels including those panels for the jobs for which Appellant applied. It was Mr. Yoder who picked the applicants from the certification list who would be interviewed.

Mr. Yoder described the process by which he received the certification list from his direct in line supervisor, Bruce Dickerson, and the information he received. His recollection is that there were 20 names on the certification list he received for the first position in question. Pursuant to the accompanying instruction sheet he was required to contact 50 percent, plus one more than 50 percent of the people on the list.

Mr. Yoder next identified State's Exhibit 2 as the job description posted for the Maintenance Mechanic I position and indicated that it is considered a semi-skilled position. The skills he was looking for when reviewing the applications included background and skills related to pipe fitting, plumbing, heating ventilation, air conditioning work, refrigeration, electrical work, etc.

Mr. Yoder reviewed Appellant's application, previously marked as State's Exhibit 1, and confirmed that it was that application that he reviewed when determining who to interview. Based on his review he determined that, of the applications reviewed, Appellant was the lowest qualified candidate. He testified as to several reasons including that Appellant had listed no extra

training in any trade field, he had no experience in any type of construction or trade field since 1978, and what he did primarily between 1975 and 1978 he did as a general laborer in a welding shop, a trade skill that is rarely needed at DOC.

Mr. Yoder testified that he reviewed all 20 applications for the position. Eleven people were interviewed and 3 were selected from the first certification list. Michael Newman was one of the 3 selected. Mr. Newman's application (State's Exhibit 4) reflected that he had had a certificate from Del Tech in heating and refrigeration in 1980 and that he went to Vo-Tech between 1972 and 1975 and received a certificate in carpentry. His application showed that he had been working since 1997 up to the time of his application for a company called General Landscape and Maintenance. At the interview Mr. Yoder learned that the work the applicant was doing was a federal contract doing maintenance at the Dover Air Force Base involving heating, ventilation and air conditioning. He also worked for another contractor at the Base by the name of Allied Painting and Maintenance. Mr. Yoder testified that he believed the candidate to be highly, maybe over qualified and he was selected as a new hire.

The next individual interviewed of the 3 selected for hire from the first certification list was Ronald Diem. Mr. Diem's application (State's Exhibit 5) reflected that he studied civil engineering/business management at Delaware Technical for a few months but did not get a degree. He also studied Criminal Justice at Wilmington College from 1978 to 1981 but did not get a degree there either. Mr. Yoder testified that from 1996 to present Mr. Diem's application showed that he worked for the DOC. The application also listed that from 1981 to present he had his own company, Diem & Son, Incorporated, which he maintained as a sideline while working at the DOC. Mr. Yoder believed Mr. Diem to be very, very well qualified. As a private

contractor he was involved in many different phases of different trade fields. Mr. Yoder also considered it a asset that the applicant had done some civil engineering work in the U. S. Air Force which involves a lot of construction work. In addition, he did well on the interview and was already a CO which Mr. Yoder considered a plus.

The third individual selected for a position was John Tuxward. Mr. Tuxward's application (State's Exhibit 6) listed that Mr. Tuxward had been a DOC employee since 1986 and that he was currently employed as a CO/ Stationary Fireman I. His duties included maintenance on boilers, water pumps, chemical feed pumps, oil pumps, compressors, changing filters and screens on oil pumps and keeping up with general safety conditions. Based on Mr. Tuxward's interview and application, he believed that the applicant was qualified in that he was already doing what the job required just under a different title. Mr. Yoder testified that he also noted that Mr. Tuxward had listed farming experience which tended to require a lot of maintenance work.

Mr. Yoder testified that all three of the individual were selected for Physical Plant Maintenance Mechanic I positions off of the February certification list. The same process was repeated during another round of interviews for another opening and Mr. Yoder stated that he was the one with the sole responsibility of deciding who would be called and that he makes his decision based on the applications as to who is most qualified to be interviewed. He does show the foreman who he has picked and lets them make recommendations or offer commentary but ultimately it is his decision. His recollection is that the first panel consisted of himself, Mr. Lord and Mr. Rutledge. The certification list was issued in February and the interviews took place in March. He usually gives the information about who he has selected to the other panel

members within a day or so. He did not recall any conversations with Mr. Lord about the selections and testified that they usually go along with what he does.

With regard to the second certification list issued in April of 2000, Mr. Yoder stated that there were 19 names on the list. Eight or 9 people were interviewed because some of interviews of people interviewed off of the previous certification list were still valid. Three individuals were selected for interviews. The first individual was Robert Anderson, Jr. Mr. Anderson indicated in his application (State's Exhibit 7) that he held an occupational license as a contractor registered in the State of Delaware. The application also reflected that Mr. Anderson had certificates in automotive air conditioning repair recovery and recharge. Although Mr. Yoder agreed that the application did not require certificates, he considered them a plus.

Mr. Yoder went on to state that meeting the minimum qualifications and getting on a certification list does not mean the individuals are equally qualified for a job. In reviewing applications he looks for training, education and experience. Mr. Anderson's application showed that from April 1998 until the time of the application he was a self employed contractor working on homes, building new homes, additions, improvements, etc. Prior to that he had worked as a roofer and a carpenter for a little less than 2 years. In addition to maintaining roofs, his application indicated that he could do minor electrical, plumbing installation and repair work and that he could operate and maintain hand and power tools and some heavy equipment. Mr. Yoder testified that he believed Mr. Anderson to be very qualified for the position.

Mr. Yoder next recalled the application of Kevin Rolph (State's Exhibit 8) and indicated that he was interviewed off the second certification list. Mr. Rolph's application reflected that he attended New Castle County Vocational Technical School from 1994 through 1997 and obtained

a certificate of completion in electrical classes 1 through 3. He had taken and passed the State licensing exam and included his license number on the application. From 1995 to the time of the application he was working for DiSabatino Maintenance Corporation as an electrician, general mechanic at the Hotel Dupont. Based on the application and interview, Mr. Yoder testified that he believed Mr. Rolph was actually over qualified. Mr. Rolph was selected for a position.

The third applicant selected from the April 2000 Certification list was Rodney Nixon. Mr. Nixon's application (State's Exhibit 9) indicated that he went to a vocational school in New Jersey from 1984 through 1989 and received a certificate. He also listed going to CC College and received a certificate there in 1997. He held an occupational license as a boiler operator and a certificate in electrical work. His most recent job experience was as an electrician as was the job before that. Based on his interview of Mr. Nixon and his application, Mr. Yoder determined that he too was really over qualified. Mr. Yoder testified that all 6 of the candidates selected had very recent, relevant trade skills. Appellant could not compare to them.

Next Mr. Yoder testified that he never supervised the Appellant, did not have a personal working relationship with him, and had absolutely no reason other than qualifications for not selecting him. Neither of the other two people on the panel indicated to Mr. Yoder that they had any personal reason for not wanting Appellant to be interviewed.

On cross examination, Mr. Yoder testified that the sole authority to select who is going to be interviewed is given to him by his boss, Bruce Dickerson, based on the belief that the superintendents should have more or less free reign to pick who they want to work with. He reiterated that although he allows the foreman who are going to work directly with the individuals to see who he has picked and comment, it is his ultimate call. He is also the person

responsible for picking the interview panel. He currently has two foremen at DCC and one in Dover. Typically one of the two at DCC is on the panel. The panel for the April, 2000, certification list consisted of Mr. Yoder, Bill Crouch and Rutledge. Mr. Yoder believed that at the time of the second panel, Elwood Lord had already transferred to the MCI facility in Dover but he could not be sure without looking at the records. Mr. Lord was on the first panel with him and Mr. Crouch.

Mr. Yoder acknowledged that he and two foremen who usually sit on the panel. He stated that when he gets the certification list he usually goes through it himself before telling the others he has it. However, its no secret and if asked he would tell them and/or show it to them.

Mr. Yoder denied that Elwood Lord or the other foreman saw the February or April certification lists prior to his selecting who was to be interviewed. They do not generally ask for the certification lists but they do ask to see the applications and he does show them if asked.

Mr. Yoder testified generally that he sometimes questions applicants regarding the information on their applications but not always. He could not recall specifically if he referred to the applications relevant to the February and April certification list interviews. The questions that are asked during the interview include a battery or series of questions asked of each and every candidate dealing with electric, HVAC, plumbing pipefitting and other questions involving the trade field. The questions were the result of the collaborative effort of the superintendents from the different regions of the DOC and have been in use for quite a while. The questionnaire is the same for the Maintenance Mechanic 1 job every time it comes up. There are approximately 30 questions and the applicants are given a score of 0 to 100 percent based on the answers to their questions.

Mr. Yoder testified that he has filled approximately 14 to 15 positions since the expansion of DCC. He denied that most of the positions came from the Correctional Officer series but did not know the number or where the positions were. He acknowledged that being a Correctional Officer was not required.

When questioned about Appellant's application, Mr. Yoder agreed that he did not find Appellant to be worthy of an interview compared to the other candidates he had to choose from on the certification list.

On further cross-examination with regard to the applications of Kevin Rolph and Rodney Nixon, Mr. Yoder acknowledged that the panel does sometimes refer to the applicant's application during the interview process if there is an unclear item but he could not specifically recall if he did in Mr. Nixon's case or not.

With regard to why he determined Mr. Tuxward to be more qualified than Appellant, Mr. Yoder emphasized Mr. Tuxward's experience and duties as a CO/Stationary Fireman and noted that he was essentially already doing the job he was applying for with them. In addition, he was already a CO and could be brought on board without having to wait 7 weeks for the training. He conceded, however, that he did hire people off the street if they were qualified. Mr. Anderson was someone who would have to go through the training. Mr. Yoder stated that only 2 of the 6 individuals hired, Mr. Tuxward, the CO/Stationary foreman and Ronald Diem, a Correctional Officer, were already working with the Department.

Mr. Yoder denied discussing Appellant with Elwood Lord. He acknowledged that he and Mr. Lord have been friends for many years, on and off the job. He denied any knowledge of any personal relationship between Appellant and Mr. Lord, or that he himself had any personal

interest in Appellant.

Finally, Mr. Yoder stated that he was on the interview panel when Mr. Lord's son was hired. Elwood Lord was not on the panel.

On re-direct, Mr. Yoder testified that he usually separates out the applications as to good, qualified candidates and the maybes and makes his final selection from that. Following receipt of the February certification list he made his selections, and gave the application to the other panel members with an indication of the ones chosen to interview and the ones that were not. At the point, Mr. Lord would have known who was going to be interviewed and who was not.

He acknowledged that 4 of the 6 candidates had to go through the 7 week training program but that fact did not deter his decision because the selections were based on merit.

On questioning by the Board, Mr. Yoder disagreed that it was difficult to distinguish Appellant from the 6 candidates selected for hire based on the applications alone. Those chosen had current trade experience. For example, the individual who was a roofer also had current construction experience related to what they do. And, Mr. Nixon, was chosen to interview because they want to hire electricians because they do a lot of electrical work.

He acknowledged that there is no training available in the maintenance section for individuals, like Appellant, with years of service to compete with individuals from the outside with more current experience. While he agrees it is tough, his job is to pick the most qualified candidates from the certification list based on his judgment.

Finally, Mr. Yoder testified that he was not aware of the comments attributed to Mr. Lord in the laundry room until he heard there was a grievance filed. He agreed that it was possible Mr. Lord knew Appellant was not going to get an interview based on his conversations with him after

his initial review.

On follow up by the State, Mr. Yoder agreed that it is possible for employees to work their way up at DOC in other areas in the department.

Mr. Brown was recalled by the State to testify as to whether he had been promoted since February of 2000 when he applied for the mechanic job. At that time Mr. Brown testified that he was a Unit Operations Clerk. Now he is a Correction Officer/Storekeeper. Due to an injury and disability pension his actual pay has fluctuated from a paygrade 7 to a 4 to a 7. He agreed that he has progressed to a Correction Officer/Storekeeper but he considers it a lateral move money wise.

Elwood Lord was sworn and testified that he is employed as a Correctional Officer/Physical Plant Maintenance Foreman at Morris Correctional Community Center (MCCC) as a result of a transfer. In February of 2000, he was a foreman at the Delaware Correction Center in Smyrna, Delaware. He was asked to participate on an interview panel for the position of Physical Plant Maintenance Mechanic 1 with Lieutenant Kenny Rutledge and Superintendent Terry Yoder, the Chair of the panel.

At some point after Mr. Yoder reviewed the February certification list and made his selections as to who to interview, he let Mr. Lord look over the certification list and job applications to see if there was anyone that he wanted to interview that Mr. Yoder had not picked. He looked over the materials and saw who Mr. Yoder had picked. That occurred about a day or so after Mr. Yoder had made his selections. He recalled looking at Appellant's application and determined that, although he had maintenance experience, he had not done any maintenance in 20 years. He did not feel that Mr. Brown was qualified to be interviewed.

With regard to the conversation in the laundry room about Appellant's application, Mr. Lord testified that he told Stanley Dill that they had received the certification list and had decided who they were going to interview. Mr. Dill asked him if they were going to interview Appellant and he said no. He denied offering any reasons and no one asked him any further questions. He recalled that Lee Lepore and Eddie Gourley were present.

He did not discuss any of the other people on the certification list because letters had not been sent out to the people they were going to interview. People being interviewed either receive a phone call or letter, those people not being interviewed do not.

Mr. Lord testified further that he had no personal relationship with Mr. Brown, they had never worked together, he had never supervised him or done his performance evaluations. He had never been in his chain of command. He stated that he had no reason not to like Mr. Brown. No one ever said anything to him about not interviewing Mr. Brown unrelated to his work. Ultimately the decision as to who got an interview was Mr. Yoder's.

Mr. Lord testified on cross-examination that he and Mr. Yoder talked over who was going to be interviewed but he denied any conversation with Mr. Yoder not to interview Mr. Brown. Mr. Lord acknowledged that he has known Mr. Brown for about 15 years and knew that he smoked.

On further questioning by the Board, Mr. Lord stated by the time he saw the certification list Mr. Yoder had already selected certain names. The only purpose for showing it to Mr. Lord was to allow him to add names or interview anyone Mr. Yoder had not selected. Mr. Lord did not add any names to be interviewed. Mr. Lord stated that he used to smoke. During the period in question he chewed tobacco.

With regard to the laundry room conversation, Mr. Lord stated that he was speaking to Stanley Dill. Lee Lepore and Eddie Gourley were also there but he was not talking to them. Stanley Dill asked Mr. Lord if they were going to interview Larry Brown and he said no. According to Mr. Lord that was the end of the conversation. He denied commenting that Mr. Lord smoked too much.

When questioned as to whether it was customary for those were are going to be part of an interview panel to discuss the results of the certification list outside of the panel, Mr. Lord responded that he did not know if it was customary or not. He felt they had made the selections as to who would be interviewed, so it really did not matter from that point on. He was unaware of any procedure concerning who they could discuss the matter with within the Department besides those involved in the process.

APPLICABLE MERIT RULE

10.0230

Any candidate who appears on a certified list may be considered to fill the vacancy for which the list was requested. Should the list be unsatisfactory, it may be returned and subsequent lists may be requested, provided the reasons for the rejection accompany the returned list.

FINDINGS AND DISCUSSION

The Board finds no compelling evidence to support the Appellant's argument that a violation of Merit Rule 10.0230 occurred or that non merit factors were used to deny him an interview. Similarly, there is no compelling evidence to support an allegation of gross abuse of discretion in denying Appellant an interview. There is no contention that the applicants selected

for interview from the certification lists on which Appellant's name also appeared were not qualified for the position of Physical Plant Maintenance Mechanic I. Therefore, to establish a violation of Merit Rule No. 10.0230 the Appellant must establish by a preponderance of the evidence that there was a gross abuse of discretion in denying Appellant an interview. The Board finds that Appellant has not met his burden.

Merit Rule 10.0230 is a discretionary rule. The rule provides that an applicant on the list may be considered to fill the vacancy. It does not mandate that every candidate receive an interview. Moreover, the statute in effect at the time of the certification lists which are the subject of Appellant's grievance only required an agency to interview 1 candidate from the list. 29 Del. C. sec. 5921. As amended in July 2000, the agency would now only be required to interview 5 candidates from the certification list to comply with the statute. Moreover, the evidence is undisputed that the Department of Corrections followed its internal guidelines and interviewed more candidates than required by the merit rules or statute with regard to both of the certification lists forming the bases of Appellant's grievance.

The Board found the testimony of Superintendent Yoder to be credible with regard to the process used to select applicants for interview based upon his judgment as to their respective qualifications as reflected on their individual applications. The Board is persuaded by Mr. Yoder's testimony that candidates were selected based upon merit involving their skills and recent trade experience applicable to the needs of the Department's maintenance section.

The Board heard considerable testimony detailing the qualifications of 6 candidates who were interviewed and ultimately selected for positions as compared to the qualifications reflected on Appellant's application. Appellant conceded that, while he has been doing maintenance work

over the years for himself and his neighbors, he did not reference that information on his application and that the experience he listed referred to a job he held over 20 years ago.

Moreover, he had not yet formally started his own business and, as such, Mr. Yoder could not have been aware of that information from the application standing alone. While this information may have come out had Appellant been given an interview, the fact of the matter is that the decision as to who would be interviewed was based on the applications and supplemental questionnaires. Based on Appellant's failure to include his more recent experience, the Board can find no abuse of discretion in Mr. Yoder's decision, as reflected by his testimony, to interview those individuals whose applications demonstrated more recent and relevant experience suited to the needs of the Department. There was, likewise, no evidence presented to show that Mr. Yoder had any personal bias or animus against Appellant or that he considered any non merit factors in determining not to interview Appellant.

The Board is also persuaded that the final decision as to who would be interviewed rested with Mr. Yoder and that he had already made that determination prior sharing the certification list information and applications with the foremen, including Elwood Lord. No evidence was presented that Mr. Lord made any comments to Mr. Yoder to dissuade him from interviewing Appellant. Mr. Yoder had already determined not to interview Appellant before Mr. Lord even knew that Appellant was on the February certification list. In addition, no evidence was presented that Mr. Lord made any comments or had any involvement in the interviewing decisions with regard to the second certification list at issue in April since he had by that time transferred to another facility.

It is undisputed that after the certification list came out in February, Mr. Lord made some

comment in the laundry area to other Department of Correction employees with regard to the fact that Appellant was not going to get an interview. Mr. Lord testified he was responding to a question asked by Mr. Dill. Mr. Lepore and Mr. Gourley testified that Mr. Lord said it was because Appellant was not a CO and smoked too much. Mr. Lord denies making those comments. The evidence is that some comment was made that Appellant was not going to be interviewed. However, the nature of the comment and resolution of the factual discrepancy are irrelevant to this Board's determination given our previous finding that Mr. Yoder had already determined not to interview Appellant for merit related reasons prior to Mr. Lord even knowing that Appellant was on the list. Therefore, even if he made the comment attributed to him it was not a factor used by Mr. Yoder to determine whether Appellant would be interviewed. While the Board finds it was probably inappropriate for Mr. Lord, as a member of the interview panel, to have made comments to other employees about who would be interviewed or not, the fact that he did so had no bearing on Appellant not getting an interview.

CONCLUSION

The appellant has failed to sustain his burden to establish by a preponderance of the evidence that there was a violation of Merit Rule 10.0230 in the determination not select him for interview from the certification lists for filling the position of Physical Plant Maintenance Mechanic I. The Appellant has also failed to sustain his burden with regard to establishing a gross abuse of discretion by the agency.

ORDER

The Board, by unanimous decision of the undersigned members, for the reasons stated

above, denies the grievance and dismisses the appeal.

IT IS SO ORDERED.

BY ORDER OF THE BOARD this 15th day of November, 2001.

absent
Brenda Phillips, Chairperson

[Signature]
John F. Schmutz, Member

John W. Pitts
John W. Pitts, Member

[Signature]
Dallas Green, 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.

29 Del. C. § 10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was

mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: November 19, 2001
jt

Distribution:

Original: File

Copies: Grievant

Patricia Bailey, Representative

Agency Counsel

Board Members

Board Counsel