BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

COPY

WILBUR F. JUSTICE,	)	
Appellant,	)	
v.	)	**DECISION AND ORDER**
	)	
STATE OF DELAWARE	)	**Docket No. 05-01-317**
DEPARTMENT OF CORRECTIONS,	)	
Agency.	)	

BEFORE Brenda Phillips, Chairperson, John F. Schmutz, Bernice Edwards, and Joseph Dillon, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. §5908(a).

APPEARANCES:

For the Appellant: Thomas Neuberger, Esquire
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For the Department: Kevin Slattery
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NATURE OF THE PROCEEDINGS

This matter came before the Merit Employee Relations Board ("MERB" or "Board") for an evidentiary hearing on June 28, 2006[1] and August 3, 2006 pursuant to Merit Rule 18.5 following a Step 3 decision by the State Personnel Office adverse to Wilbur F. Justice (hereinafter "Appellant").

The Appellant has grieved a promotional decision by the Department of Corrections (the "Department"). The Appellant alleged that the Department's failure to select Appellant for the position of Community Work Program Coordinator at the Morris Correctional Facility ("Morris") constituted a gross abuse of discretion in violation of Merit Rule 18.5. Appellant contends that the Department committed procedural violations by conducting interviews for the position without first giving him a fair opportunity to present his case. He contended that his application was "mysteriously lost" and that the interview panel improperly considered the successful candidates military experience and additional documentation without affording him the same opportunity for consideration.

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[1] At the initial scheduling of this matter the Board ruled that Thomas H. Ridgley the President & CEO of Public Service Professional Association Inc., could not appear before the Board in a representative capacity for Mr. Justice as Mr. Ridgley is not an attorney admitted to practice before the Courts and Agencies of this State. Board Rule 9(a) provides for appearances subject to the Rules of the Delaware Supreme Court. Mr. Thomas H. Ridgley is not a member of the Delaware Bar and as a non-attorney is not eligible for admission to practice before this Agency (MERB). (*See* Supreme Court Rule No. 72).

In addition, under present Delaware Court case law, any determination made by the Board where one of the parties is represented by a non-lawyer is very probably void. See Marshall-Steele v. Nanticoke Memorial Hospital Inc., 1999 WL 458724 (Del. Super.); See also, Hall v. State; 2000 WL 1211307 (Del. Super.)

The matter was continued to allow Mr. Justice to obtain counsel.

In response, the Department submitted that there was no gross abuse of discretion or procedural violation made in the promotional decision. The Department contended that the process complied with Merit Rule 10.4. The Department challenged Appellant's late presentation of procedural violations and contended that the issue at the previous steps in the process has always been that Appellant believes that his qualifications are superior to those of the selected candidate; not that there was any procedural violation.

The Department argued that the Appellant's application was not "mysteriously lost," only misfiled. When the issue was discovered Appellant was immediately placed on the certification list and interviewed for the position. The Department submitted that Appellant was on equal footing with the other candidates at the time of the interviews and that the interview panel was diverse and selected the best-qualified candidate.

The Appellant was designated the moving party. This is the Board's Decision and Order based upon the evidence presented at the hearing.

SUMMARY OF THE EVIDENCE

The exhibits introduced into evidence were made part of the record and considered by the Board in making its decision. Each party submitted a binder of exhibits identified respectively as State/Agency's Exhibit 1, Tabs A-J and Appellant/Grievant's Exhibit 1, Tabs 1-12. The Board heard sworn testimony from Kent Raymond, Michael Records, Larry Klebart, Alan Machtinger and Hansel Fuller.

Summary of Appellant's Case

Kent Raymond was sworn and testified that he was on the interview panel that interviewed Appellant in 2004. At the time Mr. Raymond was working at Morris as the Correctional Counselor Supervisor for the posted position. He learned the day of the interviews that Appellant was an add-on to the certification list. Five people were interviewed. Appellant was not the last person interviewed. Hansel Fuller was selected for the position and Appellant ranked second.

No personnel files were used during the interviews. The interviewers took notes of the questions they asked the candidates. During the interviews Mr. Fuller discussed his 20 plus year military career in the Air Force. His job application showed that he received a degree while in the military and stressed his military experience. Mr. Raymond stated that he did not see the Appellant's military awards or documents regarding his military training (Grievant's Exhibit 1, Tabs 3 and 4) at the time of the interview. Mr. Raymond agreed that the job description posted on July 7, 2004 (Grievant's Exhibit 1, Tab 5) allowed applicants to bring documents with them. Mr. Raymond agreed that if Appellant had taken documents to the interview he and the other interviewers would have looked at them and factored them into their decision.

Mr. Raymond agreed that Mr. Fuller's job application (Grievant's Exhibit 1, Tab 7) stressed his military career. His application showed that he started with the Department in 1997 and had 7 years experience with the Department when he was promoted. Mr. Raymond knew that Appellant had been with the Department since 1982 and had 22 years with the Department at the time he was considered for the promotion. He agreed that seniority was one of the factors that was supposed to be considered. Mr. Raymond also agreed that the minimum qualifications in the job posting (Grievant's Exhibit 1, Tab 5) did not mention educational requirements. He agreed

that Mr. Fuller emphasized in his application that he received a degree in 1996 (Grievant's Exhibit 1, Tab 7). Mr. Raymond stated that Mr. Fuller's education and military assignments were factored into the interviewer's discussions during the selection process about who was the most qualified candidate. Mr. Fuller's military background was considered a positive factor. There was no human relations person on the interview panel.

Five candidates were interviewed for the position and the candidates were eventually ranked. No points were assigned. The selection was made after consideration of all of the factors. The interviewers were looking for someone with good communication skills, good case management and prior computer skills were considered a plus. Mr. Raymond stated that the interviewers overwhelmingly considered Mr. Fuller the best candidate for the job. After looking at Appellant's seniority, performance, et cetera, they concluded that Mr. Fuller's overall qualifications far exceeded Appellant's seniority and performance based on the interviews as well. Mr. Raymond did not know the reason that Appellant was added on to the list of interviewees.

Mr. Raymond stated that he has served on other interview/selection panels where points were assigned. Those panels were interviewing for correctional officer positions. He has also served on other panels where points were not assigned. Points were required to be assigned for the uniformed correctional officer positions but not for the position at issue. The merit rules set forth the factors they had to consider. The merit rules did not require them to establish a point system. The interviewers were given a certification list and the groundwork from human resources for the interviews in terms of what was and was not required. They were not instructed to use points.

On cross-examination, Mr. Raymond stated that Mr. Fuller's military background was referenced in his application a total of three times. Mr. Raymond would not say that he stressed it during the interview. Appellant also mentioned his military background but did not say much about it as far as Mr. Raymond could recall.

Mr. Raymond testified that it is the interviewee's responsibility to bring any documents they want considered to the interviews. He believed that a couple of the interviewee's did bring documents. He did not recall if Mr. Fuller brought any documents to the interview. If they had been brought he would have considered them.

Mr. Raymond stated that Appellant never requested additional time to submit documents during the interview. He also never asked for the interview to be continued at any time during the process. Appellant was interviewed at 12:00 p.m. Mr. Raymond recalled that he received the call that Appellant was an add-on at around 9:15 a.m. that morning. Mr. Raymond stated that he would have given Appellant additional time to submit documentation if he had requested it and would, most definitely, have accommodated a request for a continuance of the interview if Appellant had indicated that he felt he had insufficient time to prepare.

Mr. Raymond did not believe that a human resource person was required to be on the panel. Mr. Raymond identified the other panel members as Mike Records, the probation supervisor at central violation of the probation unit, and Rosalie Jackson, an administrative assistant for the Morris Community Correctional Center. Mr. Records is a white male and Ms. Jackson is a black female. Mr. Raymond testified that the interviewers are not limited to looking just at minimum qualifications; education is something that they would consider.

On re-direct, Mr. Raymond reiterated that he believed some of the applicants did bring documents but he did not recall what actual documents were brought to the interview. He agreed

that he also did not see any of the Appellant's documents under Grievant's Exhibit 1, Tabs 1 and 2 at the time of the interview. Although he was not certain, Mr. Raymond believed that they did mention to Appellant that he could have additional time to prepare or to get documents. His recollection was that Appellant said to just go ahead with the interview. He agreed that there was no reference to having offered Appellant a continuance in the records. He stated that he was confident that the other panel members would have agreed to postpone the interview if Appellant had requested a continuance. All of the panel members wanted the whole process to be fair. He agreed that he did not discus it with the other panel members. None of them independently suggested a postponement.

On examination by the Board, Mr. Raymond stated that the decision to select Mr. Fuller was unanimous. Mr. Raymond stated that the position being filled determines whether experience or education is more important. For the position at issue, experience would hold more weight than education but education is considered as well. To his knowledge education is always considered. As far as Mr. Raymond's experience, no one from human resources has ever been on an interview panel that he has been on.

The main distinguishing feature between Mr. Fuller and the Appellant was communication skills. Mr. Fuller was more concise with his responses, insightful and able to articulate. He also had case management experience from Sussex County Boot Camp. In addition, his time in his current position as a classification officer at a very large complex was considered. Case management is a key component of the position that was being filled. Mr. Raymond clarified that the last time he was on a panel that did not use a points system was when he was on a panel for this same position in the year 2000.

The selection of the successful candidate and the weight given to the factors was reached through discussion amongst the panel members and consideration of such factors as seniority, performance, experience, et cetera.

Michael Records was sworn and testified that he is employed by the Department in the Central Violations Probation Center and held that position in 2004 when he was on the interview panel. He is currently a probation parole supervisor and has been with the Department for 15 years. He was present for Mr. Raymond's testimony and stated that he did not disagree with any of the statements made by Mr. Raymond. He agreed that the interviewers did not have any personnel files at the time of the interviews. He also agreed that he did not see any of the documents in Grievant's Exhibit 1 at the time of the Appellant's interview. He would have considered them if they had been presented.

Mr. Records stated that Mr. Raymond took the call that Appellant was going to be an add-on. They did not receive any information that day as to why he was being added on. He may have learned later but could not recall. He did not recall having any information about Appellant's file being lost or misplaced. He did not recall Appellant being told to rush over for a 10:00 a.m. interview. He did not specifically recall if Appellant stated that he was just back from vacation, but he may have mentioned it.

Mr. Records agreed that there was no human resources person on the panel. He has been on two promotional panels and he has never seen a human resources person there. No points were used on the panels that he served on. Everyone started with a clean slate going into the interviews. Mr. Records recalled seeing Mr. Fuller's resume but did not recall if he had it at the time of the interview or if Mr. Fuller brought it to the interview.

Mr. Records stated that he took notes during the interviews. He agreed that it was not a word for word record and that there were probably follow-up questions to the written questions that the interviewers asked the applicants. He did not recall if they asked specific questions of the applicants from the written applications. He agreed that there was no educational requirement listed in the job posting minimum qualifications. He agreed for the most part with Mr. Raymond that experience was more of a factor. He agreed that Mr. Fuller had seven years with the Department as opposed to Appellant's 20 plus years. Appellant's application (Grievant's Exhibit 1, Tab 6) does reflect that he had a part time job from 1996-2000 while working as a correctional officer with Vision Quest working in job placement. He also had 22 years of experience working on the line with inmates. Mr. Records agreed that Appellant could talk and relate to inmates. He believed Appellant was respected by the inmates. Appellant had no disciplinary history. Mr. Records could not recall Appellant saying anything about commendations regarding his ability to work with inmates but agreed the interview panel had no such documents in front of them at the time of the interview.

Mr. Records agreed that experience was an important factor in the selection decision. Mr. Fuller's experience outweighed Appellant's because he had four years as a senior correctional counselor and had further experience with classification. He had experience finding jobs for individuals leaving the boot camp program. His experience was part of his full-time employment which outweighed Appellant's part-time experience with Vision Quest.

Mr. Records did not know who had the job before it was posted or that person's level of experience.

Mr. Records agreed that one of the factors required under minimum qualifications for the position was knowledge of human behavior. He believed that Mr. Fuller's knowledge of human

behavior was reflected in his application in the course work Mr. Fuller listed. He agreed that Mr. Fuller did not have 22 years of experience working with inmates. He had 7 years working with inmates; 4 of which were working as a counselor.

On cross-examination, Mr. Records clarified that the question on the application related to experience in human behavior which required all applicants to describe applicable course work and/or experience. He agreed that education was absolutely a part of that and considered by the panel. Appellant never worked in the capacity of job placement or job counseling in connection with his employment at the Department; his only experience was in connection with his part-time job with Vision Quest outside of the Department.

Mr. Records agreed that while education was not listed as a minimum qualification for the position, they looked at everyone's education in viewing the qualifications for the position. He reiterated that the panel would have considered Appellant's military documentation and Department commendations if he had provided them. He never requested additional time to do so. Had he made such a request they would have accommodated him.

On re-direct, Mr. Records acknowledged that Appellant wrote in his application (Grievant's Exhibit 1, Tab 6) that he had "worked with very difficult, unmotivated individuals in various settings and possessed an abundance of knowledge and experience in working with a wide variety of diverse individuals which I can and have utilized various counseling theories, practices, techniques, vocational employment training, maintain and prepare written documents on Level 4 work release inmates, as well as level 5 work release inmates at Morris Correctional Work Release Center." He also wrote that he kept documentation that he submitted and presented on request for the courts, probation and parole, and other agencies and institutions with whom the inmates have obligations. He agreed that Appellant was explaining his experience.

Mr. Records stated that he did not recall the fact that Appellant was a sergeant in the Army coming up at the interview, it may have but he did not recall it. He agreed that Appellant did not submit a resume showing his Army training in managing people.

On further cross-examination, Mr. Records agreed that Appellant did not indicate his prior military service on his application (State's Exhibit 1, Tab C). He also did not recall Appellant discussing his military service during the interview. Based upon Appellant's application and interview, Mr. Records had no knowledge that Appellant was in the military.

On examination by the Board, Mr. Records testified that the interviewers received the applications at the time of the interview, not before. Applicants could bring additional documentation to the interviews. He believed Mr. Fuller brought his resume to the interview. He did not bring any other documents. He agreed that Mr. Fuller's degree was not in criminal justice but he considered the relevant education to be the coursework that Mr. Fuller listed in psychology and human behavior in addition to his four years as a counselor. He did note in Appellant's application that he had some education in criminal justice that was not completed. Mr. Records agreed that experience was a major component for his decision.

Mr. Records stated that the principal distinguishing feature between Mr. Fuller and the Appellant was the interview. Mr. Fuller was very much on the mark of every question he answered. He was very concise and answered the questions completely and fully.

The only documentation the interviewers had going into the interview was the application. If any additional information was considered it was brought by the applicant to the interview. Five people were interviewed.

Larry Bill Klebart was sworn and testified that he is a senior human resources technician for the Department and held that position in July of 2004. He has 11 years with the Department as of October 2006. He heard the testimony of the two previous witnesses.

Mr. Klebart is in the recruitment unit. The unit inputs applications, makes sure that applicants meet the minimum qualifications and compiles the certification lists ("cert lists"). Mr. Klebart identified the Community Work Program Coordinator position advertised in July of 2004 (Grievant's Exhibit 1, Tab 5). The position was posted by the Department's office of human resources and development, the unit Mr. Klebart works in. The offices are on McKee Road and Alan Machtinger is the Director. Mr. Klebart handles the processing of applications and promotions. Currently there are 22 people in the human resources unit on McKee Road. They are all on the same floor. He reports directly to Karen Nunn and only reports to Mr. Machtinger if she is not available. The recruitment office is small and there are 9 people in the unit.

The advertisement for the Community Work Program Coordinator position was posted and made public around July of 2004. To the best of his knowledge, Mr. Klebart did not do the minimum qualifications for the posting. The authorization to fill positions flows from State Personnel to human resources. They were authorized to fill the Community Work Program Coordinator position and his office did the posting. He did not know if Mr. Machtinger approved the position but stated that Mr. Machtinger would know what was posted and open. No postings are done without authorization.

Mr. Klebart identified the application filed by Appellant on July 15, 2004 (Grievant's Exhibit 1, Tab 6). He agreed the application was timely filed before the closing date of July 16, 2005. Mr. Klebart stated that he talked to Appellant on Friday, August 13, 2004. He thought

Appellant came to the office to check on the status of his application for the Community Work Program Coordinator position. He could not recall the specifics of the conversation after two years but believed he asked the Appellant if he put in an application and the Appellant stated that he had. He did not recall telling the Appellant that the interviews had not been scheduled but thought he might have said the certification list had not been issued yet. The cert list is a list of individuals who meet the minimum qualifications for the posting and can be interviewed. Interviews are not set up until the receiving unit gets the cert list.

Mr. Klebart stated that he ran a register. The register brings up the people on the list. The register has to match the cert list. He told Appellant that he was on the register but that he did not know where Appellant's application was. He stated that it had to have been somewhere in the office or Appellant's name would not have been on the register. Information is entered into computer databases and there are also paper applications for promotions and hires. Mr. Klebart was not able to find Appellant's paper application that day. He believes he told Appellant that they had his application but did not know where it was otherwise he would not be on the register. Mr. Klebart agreed that in his mind since no cert list had been issued there would not be any interviews scheduled.

Mr. Klebart recalled talking to Appellant the following Monday. He believed Appellant came in to the office and mentioned that he just back from vacation. The Appellant may have told him that he had heard that interviews had been scheduled. He agreed that if interviews were being done that meant that a cert list had issued because the receiving agency would not conduct interviews without a cert list. Appellant's information appeared on the register on Friday but he was not on the cert list when Mr. Klebart ran it on Monday.

Mr. Klebart explained that the information from the application is input into the computer and there are a number of screens. On Friday the information from Appellant's application was on the register. He attributed the fact that Appellant was not on the cert list to human error in creating the cert list by putting a check in a wrong box or something like that. Mr. Klebart stated that he was the one who printed the cert list and his signature is on it. Once they realized his name was not on it they found his application and wrote it into the bottom of the cert list. He could not recall if Appellant contacted him about not being on the cert list or if they happened to find it. He stated that Appellant may have contacted them.

Mr. Klebart remembered that Appellant showed him a copy of his date stamped application. The data was in the system. He remembered making a photocopy for his records. Somehow the original got misplaced. The normal procedure is that the application would have been put in a folder after it was stamped in by the receptionist with the opening and closing date for the position on the tab of the folder. As the closing date comes the applications in the file are reviewed for minimum qualifications. After the closing date the applications are checked, registers are run and then the cert list is issued.

Mr. Klebart believed that Appellant's application was probably misfiled when someone was checking the applications for minimum qualifications. He stated that they do at least four or five hundred applications a month. He believed it was either misfiled or got stuck to something else. Mr. Klebart testified that the folders are kept on the desk of whoever gets tasked to do the minimum qualifications review. After letters go out advising applicants that they are on the register, the folders are filed in the filing cabinets. When the cert list is done, copies of the application are made. He agreed that anyone in the office would have access to the files.

Mr. Klebart stated that the cert list went out but he did not know that interviews had been scheduled. Interviews are scheduled by the organization doing the interviews. Mr. Klebart recalled that he put together a cert list later in the day on Friday after he had talked to Appellant. He did not recall contacting the Appellant to tell him that the cert list had been prepared. On Monday he learned that the cert list was out there without Appellant's name and that interviews were being conducted. As soon as he realized that Appellant was not on the cert list he called Mr. Raymond and told him they had left a name off the cert list and faxed him the Appellant's application. He did not have anything to do with the scheduling. He never discussed postponing the interview with either Appellant or Mr. Raymond because of the fact that Appellant was an add-on. He did not know if all of the interviews could have been postponed.

Mr. Klebart testified that the original application was located in an inbox at around the time they discovered that Appellant was not on the cert list. He was not sure whether he faxed the original or the photocopy provided by Appellant to the interviewers. He explained that sometimes applicants fax copies of their application form to be used as originals making it hard to distinguish the original from a copy. If it is tan it is on the original form. Mr. Klebart identified the application at Grievant's Exhibit 1, Tab 6, as a copy of a copy by looking at the markings in the box indicated for personnel use only. He stated that the handwriting in the box with the date of 8-16-04 was his handwriting.

Mr. Klebart testified that the original application was found in his inbox. He believed it was the result of a mistake and that the application probably got attached to other applications handed to him. He stated that they are all human and do a lot of applications. He did not recall putting it in the inbox himself.

Mr. Klebart stated that there are probably 2400 to 2500 uninformed and non-uniformed employees in the Department. Postings for promotional positions are announced and people apply. Mr. Klebart stated that Mr. Machtinger would be aware of what postings are put out and who is being hired and promoted or not promoted since he is the supervisor of all of HR. Everyone learns how to prepare different cert lists. He believed Mr. Machtinger may have learned that Appellant filed an application on July 15, 2004 after they discovered the mistake. He stated that they usually notify him if something goes really right or wrong. He stated that Mr. Machtinger is a busy man but is probably kept informed on promotions in a round about way through the supervisors under him.

Mr. Klebart did not know who took the actual application from Appellant. The tracking system allows for looking at the last person who did something to the application not the first.

Finally, Mr. Klebart testified that he was aware that Appellant was the vice-president of the correctional officers union at the time. He had probably seen something on one of the bulletin boards at work with Appellant's name on it.

On cross-examination, Mr. Klebart stated that whether someone is a union officer is not a factor in consideration for promotions. The only thing he looks at is whether they meet the minimum qualifications. Mr. Klebart identified State's Exhibit 1, Tab C, as a copy of the original application submitted by Appellant because it had the date stamp of July 15, 2004 for human resources on it. The date of 8-16-04 is the date that Mr. Klebart marked that he had reviewed the application for minimum qualifications. He would not have backdated the time and date stamps. He reviewed the original for minimum qualifications on 8-16-04.

Mr. Klebart explained that the register and the cert list appear on different screens. Appellant appeared on the register. Generally when people put in an application, they get a letter

that they have been placed on the register. Appellant's name never left the register. Mr. Klebart prepared the cert list and signed off on it but Appellant's name never made it to the cert list until August 16, 2004 because his application was misplaced.

Mr. Klebart stated that there was nothing nefarious about the way Appellant's application was misplaced. He believed it was just a matter of being overloaded with work and the application was accidentally misfiled. There was no reason to keep him off the list. They would not do that to anyone.

On re-direct, Mr. Klebart testified that there are separate registers for every position resulting in hundreds of registers. Four or five people were on the register for the Community Work Program Coordinator position. Appellant should have received a letter acknowledging that he was placed on the register but it does not go out on the same date the application is received. It would go out when the applications were reviewed. He believed that Appellant was probably sent a letter that he was on the register at the same time he was put on the cert list for the interview. Mr. Klebart agreed that he has never seen the letter.

On examination by the Board, Mr. Klebart was asked to compare and explain several differences between State's Exhibit 1, Tab C, and Grievant's Exhibit 1, Tab 6.[2] Mr. Klebart explained that he made the notation "Kent Raymond 38-06-08" on Grievant's Exhibit 1, Tab 6, after he was told to contact Mr. Raymond to schedule an interview. The reference to 38-06-08 is the location of the interviews. Mr. Klebart could not explain why his initials "LK" appeared to be written differently in the personnel use only box on the two documents. Both documents are date stamped July 15, 2004.

[2] The State proffered that social security and identifying information is redacted from the State's exhibits for purposes of hearings before the MERB but agreed that the documents appeared to be two different documents.

Mr. Fuller's application was reviewed for minimum qualifications by Karen Nunn on July 20, 2004, and initialed by Mr. Klebart on July 21, 2004, the date he evaluated it. Mr. Fuller's application was received by fax on July 16, 2004. Mr. Klebart could not explain why the fax number did not appear on the first page of the copy in Grievant's Exhibit 1, Tab 7. The fax information does appear on the first page in State's Exhibit 1, Tab D. Mr. Fuller's application did not have a date stamp because it already had a fax date.

Mr. Klebart testified that interviews take place at whatever institution does the interviews. How much notice interviewees are given is up to the interviewers. The interviewers decide when and where they are going to do the interviews once the cert list is sent down. Mr. Raymond or someone in his unit would have set up the interviews.[3] Mr. Klebart agreed that the certification list (State's Exhibit 1, Tab E) shows that the other applicants were called on August 10th to set up their interviews for the 16th. Appellant was never called because his application was misplaced. Appellant's application was not reviewed until August 16th, the same day as the interviews. The notation "Received call from Mr. Klebart at 9:15 that Wilbur Justice should have been on the list" resulted from Mr. Klebart having found Appellant's application on August 16th.

The normal procedure is that applications are received by the closing date. The applications are evaluated and letters are sent out to applicants that they have been placed on the register. The agency then asks for a cert list and then copies of the applications are made and sent to the agency. In Appellant's case, the application was lost. It was not found until August 16th. Mr. Klebart was not sure if the application sent to the interviewers was the one he found or the date stamped copy Appellant brought in.

[3] The State proffered that State's Exhibit 1, Tab E, shows the notations as to when the interviews were set up.

On further re-direct, Mr. Klebart agreed that State's Exhibit 1, Tab E, shows that phone calls were made to applicants on August 10th to set up interviews. He did not know who made the notations on the document about the interviews. He disagreed that people were being called before the cert list had been prepared. He testified that the issue date of the cert list was 7-22-04. The notation indicates that it was run on July 22nd. It may not have been sent out that day. Sometimes they run them and hold them. Mr. Klebart stated that it was fair to say that the interview panel had the list on August 10th since they were calling to set up interviews. They did not call Appellant because he was not on the list.

Referring to State's Exhibit 1, Tab D, Mr. Klebart stated that Mr. Fuller's met the minimum qualifications for the position based on the check in the box marked "MQ". The box marked "VP" is a box that is checked if the applicant is eligible for Veterans preference. The "rater" is the individual who reviewed the application for minimum qualifications. "KN" indicates that Mr. Klebart's supervisor Karen Nunn reviewed the application. Her review was done on July 20, 2004. He also initialed the application on July 21, 2004. Mr. Klebart agreed that Mr. Fuller's application was reviewed for minimum qualifications within four days of having been received. He agreed that Appellant's was not and that it was possible that the application could have gotten lost in those first four days.

Mr. Klebart rated Appellant's application for minimum qualifications; he did not do all of the application ratings. He did prepare the cert list because it needed to be done. State's Exhibit 1, Tab D, indicates that the cert list was run on July 22, 2004. He believed he probably ran the cert list because he was the one who signed it. He agreed that he initialed Mr. Fuller's application the day before running the cert list in July according to the documents. He did not recall the reason he had the application to initial it.

Mr. Klebart agreed that he stated he was not the intake person who took Appellant's application, he did not recall being the person who processed it and he is not the person who lost it.

On examination by the Board, Mr. Klebart explained that the Veterans preference only applies to new hires; it is not applicable to promotions for existing State employees. The fact that Appellant had military experience was not relevant to the application from his standpoint of reviewing it for minimum qualifications.

Finally Mr. Klebart stated that he had no recollection as to why the two applications with his notations on it were different.

Alan Machtinger was sworn and testified that he is the director of human resources for the Department. He agreed that he was present for all of the earlier testimony. Mr. Machtinger testified that Appellant was sent an acknowledgment letter in response to his application. The letter was not sent out until August 19, 2004, three days after the interviews. Aside from the testimony he heard, Mr. Machtinger had no personal knowledge of why the acknowledgement letter did not go out in July.

Mr. Machtinger identified State's Exhibit 1, Tab E, as the certification list issued on July 22, 2004. He agreed that the list was similar to those regularly generated by his office. He agreed that Appellant was not on the certification list as printed. He had no personal knowledge, other than what the heard from the earlier witnesses, as to why he was not on the list.

Mr. Machtinger described the process for the preparation of certification lists. He stated that the warden or section administrator would make a request. In this case Warden Bianco made the request and it went to Karen Nunn, the supervisor in the group and selection section. She then arranges for the announcement, if necessary, or the issuance of a certification list. That list

would then goes back from her to the hiring manager who then lists the position numbers on the request for a certification list. Mr. Machtinger's office would know that the position numbers were vacant positions and they would take steps to issue a certification list.

The Community Work Program Coordinator already had a position number within the system because it was an existing position that became vacant. The manager at the worksite is the one who starts the process by contacting the people who work for Mr. Machtinger. Generally, that is done in writing. In July of 2004, Mr. Machtinger agreed that he had roughly 20 people working under him in human resources. He agreed with the earlier testimony that, except for a conference room, they all work on one floor in the same building known as the Administration building, headquarters.

Warden Bianco was the hiring manager that got the process started for the position of Community Work Program Coordinator. The request would have been made to Ms. Nunn. Mr. Machtinger would not have known that there was a vacancy for a promotion for Community Work Program Coordinator. The postings are circulated to all of the institutions and available on the Internet site. Copies of the applications are also available on the outside of their office but, unless he is informed about a posting, he would not be aware of each individual posting the goes out. Mr. Machtinger testified that he had no recollection of being aware of the Community Work Program Coordinator posting. He is not notified by e-mail when a position is posted.

Mr. Machtinger stated that there are 2612 positions in the Department. Not all of the positions are encumbered. At any given time there are 2300 or so employees working for the Department. Roughly 2000 of the positions are uniformed.

Mr. Machtinger stated he was not aware of the closing of the position on July 16th, the issuance of the certification list or the selection for the promotion for the Community Work

Program Coordinator position. He had no idea who was applying for the position when the cert list issued or who was selected.

Mr. Machtinger agreed that he heard the testimony that Appellant's application was lost or misplaced. He agreed that at the time, Appellant was the Vice President of the Delaware Correctional Officers Association and that they were in contract negotiations. Mr. Machtinger agreed that he eventually took the union to the Court of Chancery at roughly the same period of time as the promotional process. He denied having any knowledge of how Appellant's application got lost other than what he heard from the earlier witnesses. He initially learned in preparation for this grievance that Appellant's application had been lost. He did not know about it contemporaneously. He stated that he was on leave for much of the time period and someone else would have dealt with it. He was out for two weeks plus in mid-July to mid-August. He kept in touch with the office periodically during his absence by an occasional phone call. He was not at home and did not have e-mail access.

Mr. Machtinger stated that he has been in contract negotiations in one form or another since 1999 to present. If he is not available there are no contract negotiations. He has been to every negotiating session. Appellant was, and still is, a part of the contract negotiating team. Mr. Machtinger stated that if there was a negotiating session on Friday August 13, 2004, he was there. If there were negotiations on the 16th of August he would have been there because he is always there.

Mr. Machtinger denied that his staff informed him in connection with Appellant's July application that Appellant was seeking a promotion two steps above his pay grade. No one informed him verbally, orally or in writing. He stated that he has absolutely no recollection of being informed that Appellant was seeking a promotion two steps above his pay grade. He also

stated that he had no recollection of learning that Appellant was seeking a promotion as a result of his own access to documents in the office. He agreed that it was possible that someone could have told him and that he could have forgotten about it. He reiterated, however, that he has no recollection of it. He agreed that he has responsibility for 2600 positions and has lots of conversations with people. He agreed that it is fair to say he might have known something at a certain point in time and may have forgotten with the passage of time.

On cross-examination, Mr. Machtinger testified that that the contract negotiations had nothing to do with Appellant not getting the promotion. Mr. Machtinger stated that he deeply resented the implication. The Community Work Program Coordinator position is a pay grade 11. The highest pay grade is a 25. There are multiple hundreds of positions at pay grade 11 or above. He agreed that it would be fair to say that he would not be paying particular attention to an open position at a pay grade 11.

Mr. Machtinger explained that he obtained a copy of the acknowledgment letter sent to Appellant from Karen Nunn in response to a question from his counsel as to whether or not Appellant was informed about his placement on the register. A copy of the letter was introduced as State's Exhibit 2 without objection. Based on his experience as the director of human resources and the testimony concerning Appellant's misplaced application, Mr. Machtinger speculated that the letter did not go out until the 19th of August because Appellant did not get rated and placed on the cert list until the 16th of August. The letter went out immediately after that date notifying him that he had been placed on the register and the certification list. It is typical for the letter to go out once the applicant is placed on the cert list.

On further re-direct, Mr. Machtinger stated that he had no personal knowledge of how Appellant's application got misplaced.

On examination by the Board, Mr. Machtinger agreed that the acknowledgement letter would normally be on letterhead but the copy provided for the hearing was printed from the computer. Ms. Nunn would have to testify whether the copy that went to Appellant was on letterhead. He agreed that the letter did not go out until after Appellant was interviewed but stated that the timing made sense under the facts of this case because Appellant was not placed on the cert list until August 16th. Mr. Machtinger stated that he could not be sure if other applications were misplaced along with Appellant's because it is possible that it happened and no one complained. Of the people on the cert list, it appears that Appellant's application was the only one misplaced.

Mr. Machtinger denied having an adversarial relationship with Appellant as a result of the contract negotiations. He stated that he did not think that he had ever had more than two or three conversations with Appellant.

Summary of the Department's Case

Hansel Fuller was sworn and testified that he is currently filling the position of Community Work Program Coordinator at the Morris Institution. He will have been in the position for two years as of September. Mr. Fuller identified State's Exhibit 1, Tab D, as the application he submitted for the position of Community Work Program Coordinator. He submitted the application at the very last minute on the closing date of July 16th. He attached his resume to the application and faxed it to Mr. Klebart. After he faxed the application he followed up with a phone call to make sure it was received.

He was interviewed for the position on a Monday. He may have taken a copy of his resume that had also been faxed. He took no other documents with him to the interview. He stated that he had enough commendations in the Armed Forces to fill up three rows of ribbons.

As far as promotion in the military, he had five commendation medals and two meritorious service medals. He has no commendations to date from the Department.

Mr. Fuller did not take any documentation about his military commendations to the interview because he understood that the military preference only applied to initial application with the Department. The only reason he included the information in his resume was because, if he did not include it, he would not appear to exist or have any life experience before starting with the Department. As a result, he included the information from the time he started working as an operator at Bell Telephone to present.

On cross-examination, Mr. Fuller acknowledged having been present for all of the earlier testimony. He could not explain the apparent missing page 7 from his faxed copy of his application (State's Exhibit 1, Tab D). Mr. Fuller stated that he would have raised his military experience in the Air Force when he was asked to explain a little about himself. He did remember that his military experience was discussed.

On re-direct examination, Mr. Fuller stated that he has been a member of the union since he concluded his probationary period. He has not held any official positions.

On further cross-examination, Mr. Fuller stated that he is a member of Local 247. He agreed that has never been a member of the Correctional Officers Association of Delaware that campaigned against Governor Minner in 2004. He agreed that he has never been on the negotiating team for the contract for the correctional officers.

On examination by the Board, Mr. Fuller stated that his experience working with the very population served by the Community Work Program Coordinator made him particularly qualified for the position primarily because of his experience as a counselor at the boot camp. Mr. Fuller testified that he was instrumental in making the temporary boot camp program a

permanent part of the Department. Mr. Fuller stated that he was on the other side of the institution with the inmates and was the one who, reviewed their files, interviewed them, determined their level of probation in order to go out in the community and found placement for those individuals on Level 3 so that they could stay out in the community and not return to their previous environment. He assisted them with getting employment, housing and getting situated. He was very involved with the inmate population from the very beginning of his employment with the Department. He was doing essentially what the program coordinator does.

Mr. Fuller stated that he was with the boot camp program for nearly three years and went into the position as a senior counselor. He performed the roles of classification officer, social services specialist, and everything else for the 100 inmate case load. Mr. Fuller agreed that he has had no commendations from the Department in the seven years he has been employed or for his role at the boot camp but stated that that was not unusual. He stated that the majority of the Department is security and the focus of attention is on security. Although their role [non-security personnel] is jokingly called insignificant, Mr. Fuller testified that if you took that third out of the equation, the Department would come to a screeching halt. He stated, however, that "acknowledgement, for better or worse, doesn't come."

Mr. Fuller stated that while his military experience was discussed there were not a lot of questions or a great deal of focus on it. The greater focus was placed on his case load management at the boot camp and his subsequent case load management as a classification officer at Gander Hill.

Mr. Fuller testified that his last minute decision to apply was at the encouragement of a co-worker. He had applied for other jobs but kept getting told he did not have enough time in service. When the Community Work Program Coordinator position came up his co-worker

thought he was perfectly qualified and urged him to apply. Since he always had his application prepared and ready to go, he went ahead and faxed it to the central office. He did not know why fax page number 7 was missing from his application. It was not his military records because he did not send those with his application. No one told him his application was incomplete otherwise he would have re-sent it. He agreed that most of his experience has been on the job training and that his degree is in an unrelated field. Mr. Fuller reiterated that, although he did not get earlier promotions for which he applied, he broke out of the mold and got the promotion. He also commuted from Georgetown to Wilmington for four years to break out of the mold when he took the classification officer posting which was a promotion to a pay grade 13. He actually took a pay grade reduction to a pay grade 11 for the Community Work Program Coordinator position although the pay was pretty equal. He stated that after four years of commuting his body was feeling it and it was time for a change.

Alan Machtinger was recalled to the stand in the Department's case. He explained that there are two kinds of positions, positions that have multiple choice examinations and those positions that have what is called a rating of training and experience. Register may contain hundreds or dozens of names. The certification list is comprised of the top 15 people or the top 15 percent. If there are fewer than 15 people, by Merit Rule, they all make the certification list and there is no ranking or a rating of training and experience. The Community Work Program Coordinator position was a rating and training type of position. All of the applicants came in at the same level because there was no evaluation of training and experience beyond determining that that met the minimum qualifications. If there had been a multiple choice exam, the applicant who received the highest score would have been ranked as number 1 and the remaining

applicants ranked based on their exam scores until they had 15 on the cert list. There was no multiple choice exam for the Community Work Program Coordinator position.

Mr. Machtinger testified that subsequent to this interview process, and unrelated to it, the Department has implemented a policy with a point scheme to evaluate factors such as performance, interview and seniority applicable to positions that are a pay grade 11 and below. If the interview were conducted today the point scheme would apply. Mr. Machtinger disagreed that the prior evaluation was subjective because it was often very objective. However, he stated that it varied from interview panel to interview panel and institution to institution. By way of example, when attendance is evaluated the same number of points will be deducted for everyone instead of varying by institution.

Mr. Machtinger stated that there are 110 beds in the boot camp for offenders. He could not say how many inmates were there at the time of the promotional interview. He stated that there are 1800 inmates at the Young facility. He deferred to Warden Bianco on the number of inmates at the Morris Institution.

On cross-examination, Mr. Machtinger agreed that the point scheme he discussed is now in Policy 9.24 and assigns 25 points for interviews, 25 points for seniority, 20 points for education, training and experience, 10 points for commendations and discipline, 10 points for attendance and 10 points for performance. Mr. Machtinger stated that the interview part of the process is always going to be subjective. He believed the rest of the process has been objective but that the policy will add consistency between and among institutions.

Mr. Machtinger agreed that the posting for the position did not list the [Merit rule] factors but did list the three areas necessary to demonstrate minimum qualifications. He agreed that the posting permits an applicant to bring objective documentation to the interview to support the

three areas. He stated however, that applicants need to explain their qualifications in the application in order to get rated as minimally qualified or they will never get to the interview process. Both Appellant and Mr. Fuller were rated as minimally qualified. Mr. Machtinger agreed that the Appellant would have had the opportunity to submit evaluations, letters of reference and training certificates at the interview. He agreed that the documentation referenced in Grievant's Exhibit 1, Tabs 1-4, were the types of documents that would have been proper for the interviewers to consider in their evaluations.

Mr. Machtinger had no personal knowledge of what the interviewers told the Appellant on the day of the interview. He heard Mr. Raymond testify, however, to the best of his knowledge, he told Appellant he could reschedule the interview but Appellant never asked to do so. Mr. Machtinger stated that he was not the person to ask whether the interviews could have been postponed when Mr. Klebart discovered that Appellant was not on the list.

On further examination by the Board, Mr. Machtinger testified that evaluations are taken into consideration in the interviews. Evaluations are supposed to be done annually but if an evaluation is not done, the employee is presumed to be satisfactory.

Vincent Robert Bianco was sworn and testified that he is the Warden 3 assigned to the Morris Community Correctional Center and he is also responsible for the Central Violation Probation Center in Smyrna.[4]

Warden Bianco testified that he has been with the Department for over 29 years. He knew Appellant from his work as a correctional sergeant at the Morris Correction Center. He was a lateral transfer from Gander Hill around the time of the Morris expansion in 1998/1999. He

[4] Warden Bianco was permitted to testify over Mr. Neuberger's objection. The Board had previously approved the State's motion to add Warden Bianco to the witness list on June 28, 2006 at the initial proceedings in this matter.

crossed paths on one occasion with Mr. Fuller when he went to a boot camp graduation but did not believe he spoke to him. He knew his face after they hired him.

Warden Bianco was the hiring agent and his signature appears on the certification list. He had the final decision with regard to the candidates. He based his decision on the report and recommendation of Kent Raymond who was the supervisor for the position and the chair of the interview panel. He agreed with the recommendation after Mr. Raymond explained how well Mr. Fuller did in the interview and reported that Mr. Fuller's communication skills both in writing and orally far exceeded the other candidates. In addition, based on Mr. Raymond's report, Mr. Fuller had a great deal of practical experience as a case manager at the boot camp and Gander Hill.

Warden Bianco described Appellant as an excellent employee who serves as a sergeant and shift commander. He confirmed that Appellant has the respect of the inmate population. He maintains control without a great deal of paperwork and write-ups. He rarely sees a program violation with Appellant's name because he communicates with the inmate population and lets them know what is expected of them. Warden Bianco described him as a man of few words so he was not surprised that Mr. Fuller won out the interview panel with his ability to present himself orally and in writing.

Warden Bianco stated that he did consider the candidates experiences in making his decision. He acknowledged that Appellant had a number of commendations in his file and a great deal of years of service. He noted, however, that the commendations and service were in the area of security. He did not believe that would mean that he would necessarily be a good counselor. Being a good counselor requires specific skills that Mr. Fuller demonstrated both in his application and interview that Appellant did not. He reiterated that Appellant is a good

employee and that he is glad that he is with the Department but he did not know that Appellant would make a good counselor and be able to perform the tasks that were required of the position.

Warden Bianco denied that Appellant's position with the union had anything to do with Mr. Fuller's selection. No such directive has ever come to him from a supervisor concerning any employee in his 29 years with the Department. If it did he would be looking for someone to talk to about it.

Warden Bianco oversees approximately 183-186 inmates at Morris. Including the violation center, there are 400 to 420 inmates between the two facilities on any given day.

On cross-examination, Warden Bianco reiterated that he did have some concerns with Appellant's ability to perform some of the tasks and responsibilities of the position that would require good oral and written communication skills such as communication with employers, the Department of Labor, and selling the product of the inmate population. He agreed that there was no written document that corroborated Appellant's lack of communication skills.

Warden Bianco did not recall if he ever received a written report from any member of the interview panel on the selection process. At the end of the interview process the panel recommended Mr. Fuller and he accepted that recommendation. He did not do any independent evaluation of the candidates. He relied on Mr. Raymond's verbal report. He did not recall if there was also a written report but did recall meeting with Kent Raymond and receiving an oral report. He did not follow up the meeting with a memo or an e-mail. Mr. Fuller was selected because of his communication skills and case management experience and the fact that he was basically doing the job.

Warden Bianco recalled seeing the copy of Appellant's application that was attached to the certification list he received at that close of the interviews. He did not know about

Appellant's work with Vision Quest until he saw the application. His understanding was that Appellant was involved with mentoring juveniles at Vision Quest.

Warden Bianco agreed that Appellant communicates to the inmates what is expected of them and they obey. He stated that Appellant does a wonderful job as a custodial member of the Department in managing the inmate population. He did not believe that being a good security employee means that you can successfully translate into a treatment role which is what the community work program job is. That was the panel's judgment that was communicated to him and he stands by the decision that they hired the right man.

In regard to whether Appellant could motivate inmates to restart their lives, Warden Bianco again emphasized that the Community Work Program Coordinator position involves more than just dealing with individuals one on one. He stated that it involves group speaking, selling the client to the community, interrelating with the Department of Labor, computer work and a myriad of other things. He believed that motivating an employee as it relates to security and treatment are two different things.

Warden Bianco agreed that he understood that Appellant is currently the president of the union and was the vice-president in 2004. He agreed that would require him to deal with members of the union on an ongoing basis and he assumed Appellant has the respect of his membership. He agreed that, recently, he deals with members of the public and administration at the Department. He has never personally had problems communicating with Appellant on the few occasions he has dealt with him as the union president.

On final examination by the Board, Warden Bianco stated that Appellant works directly with the inmates but not on a case management level. Appellant works supervising the inmate population while in the facility. There is separate treatment staff at the facility headed by

counselor supervisor Raymond and the line is very definitive. Appellant's primary tasks and responsibilities revolve around security. He does not serve as a Community Work Program Coordinator, nor has he ever done that job in the Morris Community Correctional Facility.

THE LAW

29 Del. C. §5918. Promotions.

The rules shall provide for promotions, giving consideration to the applicant's qualifications, performance record, seniority, conduct and where practicable, to the results of competitive examinations....

Merit Rule No. 10.4
Promotion. Candidates selected for promotion shall meet the position's minimum qualifications. Vacancies shall be filled by promotion wherever practical and in the best interest of the classified service. Consideration shall be given to the qualifications, performance record, seniority, conduct and, where applicable, the results of competitive examinations.

Merit Rule No. 18.5
Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the minimum qualifications; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements in the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board heard a considerable amount of testimony about the circumstances surrounding the selection of the successful candidate for the position of Community Work Program Coordinator. It is undisputed that both Appellant and the successful candidate, Mr. Fuller, met the minimum qualifications as posted. The real issue in dispute is whether the Appellant received fair consideration in view of the circumstances leading up to the interview.

The evidence established that Appellant filed a timely application for the position of Community Work Program Coordinator. On Friday August 13, 2004, Appellant inquired about the status of his application and was informed that he was on the register but that his actual application was missing. Appellant spoke with Mr. Klebart who informed him that the certification list had not issued. Mr. Klebart did not recall telling the Appellant that the interviews had not been scheduled. Appellant spoke with Mr. Klebart again on Monday morning, August 16, 2004, after learning that interviews had been scheduled for that date. On Monday Mr. Klebart confirmed that a cert list had been issued without Appellant's name on it and immediately called and had Appellant placed on the cert list. He then faxed Appellant's application to the interviewers. Appellant was placed on the interview list and interviewed around 12:00 p.m. It was unclear if the application that was faxed was the copy provided by Appellant or the original Mr. Klebart stated he located in his inbox that morning after Appellant came in.

The evidence established that the other candidates were contacted on August 10, 2004 to schedule their interviews before Appellant inquired about his application. There was no evidence to establish that Mr. Klebart knew the interviews had been scheduled when Appellant contacted him on Friday. However, Appellant was provided with incorrect information when he was told on Friday that the certification list had not issued. The evidence established that Mr. Klebart ran the certification list on July 22, 2004, and the interviewers had it at least as early as August 10th. The date on the certification list contradicted Mr. Klebart's testimony that he ran the cert list later on Friday after speaking to Appellant. In addition, if he had run the cert list on Friday the Board questions why he did not make sure that Appellant's name was on the cert list since he had just spoken with him that day and confirmed that he was on the register.

It is clear that Appellant's original application was misplaced. As a result, Appellant was not placed on the certification list for timely notification of the interview date. Mr. Klebart was the person responsible for processing the applications and the Board is concerned about discrepancies in the copies of Appellant's application in State's Exhibit 1, Tab C, and Grievant's Exhibit 1, Tab 6 and whether the differences resulted from an attempt to cover up the mistake. Mr. Klebart knew of Appellant's concerns about the status of his application but did nothing to follow up until Appellant appeared in his office on Monday morning after having learned he was not on the cert list. Mr. Klebart testified that he did not know that the cert list had issued; however, the documentation showed that he was the one who ran the cert list July. The Board finds that there were a number of discrepancies in Mr. Klebart's testimony that raise questions about his credibility and the fairness of the process as it related to Appellant.

The Appellant inferred repeatedly throughout the examination of the witnesses that his role in the union was the reason for his misplaced application and the misinformation he was given about the cert list. The witnesses all emphatically denied that Appellant's role in the union played any part in the decision. There was no direct evidence that Appellant's position in the union was a factor.

Kent Raymond and Michael Records were members of the interview panel. Although he was not certain, Mr. Raymond's recollection was that Appellant was afforded the opportunity, under the circumstances, to have a continuance but elected to go forward. In addition, he and Mr. Records testified that the panel would have granted a request for a continuance if asked.

It is undisputed that no one from the Department suggested postponing the interviews. In view of the misplaced application and the misinformation given to Appellant about the cert list, the Board agrees with the Appellant that it was a gross abuse of discretion for the Department

not to postpone the interviews on their own initiative to give the Appellant an opportunity to get on a level playing field with the other applicants. Although the interviewers testified that communication and case management experience were the distinguishing factors between Mr. Fuller and the Appellant, the interviewers acknowledged that Mr. Fuller's military background was raised during the interview and was a positive factor. The Board believes that Appellant should have had the same opportunity to present information on his military and Department commendations and should not have been expected to walk in prepared for a last minute interview.

The Board concludes that the Department committed a gross abuse of discretion in the promotion process for the Community Work Program Coordinator position in violation of Merit Rule 18.5. The factors cited above prove by a preponderance of the evidence that the Department did not conduct a fair promotion process. The Department did not continue the interviews to allow Appellant adequate time to gather additional documentation in support of his application, particularly with regard to his military experience. The Board concludes that the appellant did not receive fair consideration for the posted position of Community Work Program Coordinator.

Under 29 Del. C. §5931(a), the Board has the authority to remedy a misapplication of Title 29, chapter 59 or the Merit Rules by granting back pay, restoring any position, benefits or rights denied, placing employees in a position wrongfully denied, or otherwise making employees whole. The Board has broad equitable powers under §5931(a) to impose a remedy to make the successful grievant whole. See Brice v. State, 704 A.2d 1176 (Del. 1998). The Board has found in this case that the Department committed a gross abuse of discretion. The issue becomes what is the appropriate remedy for this violation.

The Department hired Mr. Fuller and he has been in the position for almost two years. While the Board realizes that its decision may displace a presumably qualified employee after an already significant period of time in the position, the Board is persuaded that the only fair remedy is to repeat the interview process. The Board declines to order that the process be conducted under the point system now in place.

Therefore, the Board directs that the interview process be repeated with regard to the five candidates on the certification list in 2004 for the position of Community Work Program Coordinator to the extent that the previous candidates wish to participate. The interviews are to be conducted based on the applicants' circumstances as they existed on August 16, 2004 in regard to their qualifications including, but not limited to, employment, education, training and experience. No information after that date is to be considered as to any candidate.

ORDER

For the foregoing reasons, the grievance of Wilbur F. Justice is upheld by a vote of 3 to 1 and the Department is directed to repeat the interview process for the position of Community Work Program Coordinator as specified in the Board's Findings and Conclusions above.

IT IS SO ORDERED this 29th day of November, 2006:

Brenda Phillips, Chairperson

John F. Schmutz, Member (Dissenting)

Joseph Dillon, Member

Bernice Edwards, 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 authority acted in accordance with law. The burden of proof on 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 thirty (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 purpose 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: Dec. 1, 2006

Distribution:
Original: File
Copies: Grievant
Grievant's Representative
-Thomas Neuberger, Esquire
Agency's Representative
-Deputy Attorney General Kevin Slattery