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BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

CHARLES DODSON,	)	
Appellant,	)	
v.	)	**DECISION AND ORDER**
	)	
STATE OF DELAWARE	)	**Docket No. 05-12-346**
DEPARTMENT OF CORRECTIONS,	)	
Agency.	)	

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

APPEARANCES:

For the Appellant: Charles Dodson, Pro Se

For the Department: Kevin Slattery
Deputy Attorney General
Carvel State Building
820 N. French Street
Wilmington, DE 19801

NATURE OF THE PROCEEDINGS

This matter came before the Merit Employee Relations Board ("MERB" or "Board") for an evidentiary hearing on November 29, 2006 pursuant to Merit Rule 18.5 following a Step 3 decision by the State Personnel Office adverse to Charles Dodson (hereinafter "Appellant" or "Mr. Dodson").

The Appellant has grieved a decision by the Department of Corrections (the "Department") based upon the Department's failure to select him for a lateral transfer to a position in the Department's court and transportation unit. Appellant argued that he was one of the top scoring candidates and that he should not have been disqualified from the position based on his interaction with a female panel member after the interview had concluded.[1]

In response, the Department agreed that Appellant was the second highest ranking candidate after consideration of all of the relevant merit factors; however, he was not recommended for the transfer because he hugged the female panel member who indicated that she was offended by his conduct. Mr. Dodson shook hands with the male members of the panel. The Department contended that the hug occurred at the conclusion of the formal interview process and that it was appropriate for the interviewers to consider Mr. Dodson's conduct while he was still in the interview room. The State submitted that the position that Mr. Dodson applied for is a very public position in which the individual interacts directly with court personnel including judges and must act appropriately.

[1] Appellant alleged violation of Merit Rules 2.2, 7.1, 7.3, 7.4 and 7.7.2.

In addition, Mr. Dodson had been previously disciplined for inappropriate similar conduct.[2] The State argued that the Department must have the discretion to determine which employees should be in which positions and must be permitted to make the assessment on overall conduct in the scheme of the transfer process.

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. The State submitted a binder of documents which was marked as State's Exhibit 1, Tabs A-L. The Board heard sworn testimony from Corporal Charles Dodson, Major Timothy Radcliffe, Lieutenant Michael Merson, Warden David Hall, Lieutenant Donna Mitchell and Alan Machtinger.

Charles Dodson was sworn and testified that he did not believe the interview panel should have considered his conduct of hugging Lieutenant Mitchell (the female panel member) after the interview had concluded as a basis to disqualify him for the position in the court and transportation unit. Mr. Dodson went on to explain why he hugged Lieutenant Mitchell stating that he has known her for five to ten years and they had always hugged when they saw each other.

He spoke to her after he was told that he had not been selected and she told him she did not have a problem with the hug but everyone else did. He stated that he has been employed with the Department since 1978 and did not believe that the one past incident in which he engaged inappropriate conversation with a female cadet about the sexually explicit names of drinks

[2] The State explained that the prior conduct was not relevant to Mr. Dodson's scoring since it occurred more than 2

should have been a factor in the decision. He acknowledged that his conduct in that incident was inappropriate and submitted that he accepted his punishment. He stated that he would never repeat that type of behavior in the Court setting.

On cross-examination, Mr. Dodson stated that he would not hug the Governor or a judge and agreed that he knows where to draw the line as to when a hug is appropriate or not. He disagreed that he engaged in the hug during the formal interview and stated that it occurred after the interview as he was leaving. He did not wait to hug Lieutenant Mitchell in the hallway because he thought she was staying in the room for the next interview. He only hugs his friends and people he has a history of hugging. He and Lieutenant Mitchell used to play softball ball and go out to clubs together. He has always hugged her since they have known each other socially. Their last social interaction was about a year ago when they last worked together. Lieutenant Mitchell is the higher ranking officer. He recalled that he probably stated something to the effect of "give me a hug." Lieutenant Mitchell was standing at the time.

Major Timothy Radcliffe was sworn and testified that he is employed by the Department in the court and transportation K-9 training unit and the correctional emergency response team. He oversees the unit but the warden makes the final supervision calls. Major Radcliffe was a member of the interview panel in August of 2005 for the position in the court and transportation unit. The other members of the panel were Lieutenant Mike Merson and Lieutenant Donna Mitchell. Major Radcliffe identified the certification list for the position and stated that he developed and got approval for the formal interview questions and reviewed each candidate's personnel file to determine factors such as commendations, discipline and attendance. Major Radcliffe testified as to the scores given to each of the four candidates

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year's prior to the interview. It was relevant to the interviewers to the extent that it was perceived as similar conduct.

including Corporal Dodson. Corporal Dodson would have been ranked second after the interviews and consideration of his seniority had he not been disqualified due to the hug.

Major Radcliffe stated that he prepared the report of the committee that was submitted to the Warden Dave Hall not to recommend Corporal Dodson for one of the three available positions in the court and transportation unit, all of which were filled by lateral transfer. Major Radcliffe read the following excerpt from the memo:

> The interview panel does not recommend your approval of lateral transfer candidate Charles Dodson. At the conclusion of the interview, Corporal Dodson approached Lieutenant Mitchell and gave her a hug. He stated that he felt that because of his history with her at Gander Hill she should hug him. This caused alarm to Lieutenant Mitchell. When Corporal Dodson left the room, Lieutenant Mitchell stated that she felt very uncomfortable with what had just occurred. Lieutenant Merson, COAD Representative Sergeant Pat Sulecki and myself all felt that his actions were inappropriate. Corporal Dodson has a documented history of this type of inappropriate behavior.

Major Radcliffe next identified a copy of Corporal Dodson's April 22, 2002 disciplinary letter for the incident with the cadets and read into the record the finding that Corporal Dodson made sexually explicit comments while taking cadet I.D. photos which were determined to be offensive and inappropriate for the workplace.

Major Radcliffe recounted his recollection of the hugging incident. Corporal Dodson shook everyone else's had other than Lieutenant Mitchell's. After Corporal Dodson left the room Lieutenant Mitchell turned to the rest of them and shrugged. As the Chair, Major Radcliffe asked her what her concern was and she told him that she was very uncomfortable with what had just occurred and felt it was inappropriate. Sergeant Sulecki, the COAD representative agreed.[3] After further discussion, Lieutenant Mitchell stated that she did not want to have Corporal Dodson referred for discipline under the Department's sexual harassment policy but was

[3] Sergeant Sulecki was on the State's witness list, however, the parties stipulated that he would testify that he believed the hug was inappropriate and that it was not necessary to call him.

comfortable with recommending that he not be accepted for lateral transfer if that was the interview panel's recommendation. The panel voted unanimously not to recommend Corporal Dodson for lateral transfer. The panel was aware of the past disciplinary incident in 2002.

Major Radcliffe described the duties of a court and transportation officer including their interactions with attorneys and judges, male and female. There have been complaints and investigations in the past about court and transportation officers' comments and behavior. As a result, they really look closely to make sure they have a good fit for the position of transportation unit corporal.

Major Radcliffe testified that he spoke with Lieutenant Mitchell and she disputes Corporal Dodson's testimony that she told him she was not offended by the hug. Major Radcliffe concluded by stating that Corporal Dodson was a top candidate for the position and it was Lieutenant Mitchell's reaction to the incident and request for disqualification that led to his non-recommendation by the panel.

Lieutenant Michael Merson was sworn and corroborated Major Radcliffe's testimony surrounding the interview and the panel's recommendation not to recommend Corporal Dodson due to the Lieutenant Mitchell's reaction to Corporal Dodson's conduct. His recollection of what Corporal Dodson said to Lieutenant Mitchell was to the effect of "I need to give you a hug for our time at Gander Hill, our experience at Gander Hill." The panel was unanimous in its decision and the union representative concurred. He added that he had just gone through an incident with an employee who had complaints filed against him so the sensitivity of the court and transportation unit position was fresh in his mind. He only became aware of Corporal Dodson's prior discipline because Major Radcliffe brought to the panel's attention that Corporal Dodson

had prior similar acts in his file. Under Department policy, the discipline would have disqualified him had it not been more than two years old.

On cross-examination, Lieutenant Merson agreed that Corporal Dodson had never exhibited any inappropriate behavior when he worked as a staff training relief officer in the court and transportation unit when Corporal Dodson was mandated to work there due to striking officers and overtime reductions.

On examination by the Board, Lieutenant Merson stated that the hug was inappropriate because Lieutenant Mitchell was Corporal Dodson's superior officer regardless of whether it was at the end of the interview because it was not the end of the selection process. He crossed the line because, even though Lieutenant Mitchell knew him socially, she found the hug offensive. The potential existed for it to carry over into work.

Warden David Hall was sworn and testified that he is a warden with the Department and the unit manager for the transportation unit. He held the position in 2005 and is the person who makes the final decision on the positions within his facility. He received Corporal Radcliffe's memo from the panel and had a follow up conversation with him shortly thereafter to determine whether Corporal Dodson should be removed from the selection process. In determining to support the recommendation he considered that Lieutenant Mitchell was offended, the other panel members and the union representative believed the conduct was inappropriate, and the highly visible sensitive nature of the position.

Prior to finalizing the decision, he sought the recommendation of their director of human resources, Alan Machtinger who agreed with the panel recommendation. The prior disciplinary record of the same type of behavior reinforced his decision.

On cross-examination, Warden Hall agreed that he did not have any documented instances of similar behavior while Corporal Dodson worked overtime in Warden Hall's unit.

On examination by the Board, Warden Hall stated that he believed the hugging incident was inappropriate enough to disqualify Corporal Dodson because it was supported by other documentation of previous types of encounters with other employees.

Lieutenant Donna Mitchell was sworn and testified that she works for the Department in the central violation probation center and was on the interview panel in 2005. She stated that she knew Corporal Dodson and at the end of the interview everyone was standing to shake hands and she extended her hand. Corporal Dodson reached around to give her a hug and said something like "no, I want to get a hug from you." Afterward she was asked by one of the panel members how she felt about the hug and said that she didn't think it was appropriate because she was one of the interviewers. She thought that she might have been offended because the other people on the panel might have believed she was going to show favoritism. She could not recall if there was discussion of any disciplinary action being taken. All of the panel members were in agreement not to support Corporal Dodson for the position because of the inappropriateness of the hug during an interview. She stated that she did not specifically recall speaking to Corporal Dodson at some point after the interview and telling him that she was not offended by the hug.

On cross-examination, she agreed that she and Corporal Dodson sometimes hugged as a form of greeting since they have known each other. She agreed that she never felt that Corporal Dodson was making sexual advances when he hugged her. She was not offended by Corporal Dodson just giving her a hug. She was offended because she felt that the hug was inappropriate in the context of the interview because the panel might have thought that she had already chosen him as her pick because of the hug.

On examination by the Board, Lieutenant Mitchell stated that she did not see the memo sent by Major Radcliffe on behalf of the committee before it was sent out. She reiterated that she did not take the hug as a sexual advance or harassment; she just did not believe that it was appropriate for the professional interview setting.

Alan Machtinger was sworn and testified that he is the director of human resources for the Department. His office is consulted to sign off on whether the selection process was appropriate for most promotions or transfers. In this case Major Radcliffe and Warden Hall asked for his advice on the decision to reject Corporal Dodson for the position in the court and transportation unit. He believed that they were on safe ground in their decision because the court and transportation unit is one of the most public things they do and hugging someone in an interview is the worst thing anybody can do and is wholly inappropriate. He also believed that Corporal Dodson's comment that "I don't shake hands with women; I hug them" was more important to his decision than whether or not the lieutenant was offended. Mr. Machtinger took the comment as the type of habitual behavior that they could anticipate from Corporal Dodson. The decision was reinforced by prior issues regarding sexual misconduct. He concluded that if Corporal Dodson was permitted to go out into the Courts and engaged in the same behavior it would be their fault because they were aware of it and allowed it. Nothing suggested to him that Corporal Dodson knew how to distinguish when a hug was appropriate and when it was not.

Mr. Machtinger believed that the decision was a discretionary job-related decision that did not violate the Merit Rules. A different standard is applied in deciding whether to select someone as the most appropriate candidate as opposed to disciplining someone who is already in a job. All of the other candidates that were interviewed were qualified for the job.

On cross-examination, Mr. Machtinger agreed that there was only the one other incident, for which he received a five-day suspension, in Mr. Dodson's 28 year career.

Charles Dodson was recalled to answer Board questions and stated that he has worked in the court and transportation unit since September 9, 2005. His five-day suspension occurred in 2002. He has not been cited for any other unbecoming behavior since that time. He did not see his behavior as sexual harassment because he always looked at Lieutenant Mitchell as a friend. He recognizes now that he probably used poor judgment giving a hug in the interview setting.

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. 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 concludes that the Department committed a gross abuse of discretion in violation of Merit Rule 18.5 in its decision not to select Mr. Dodson for a lateral transfer to the Department's Court and Transportation Unit. The evidence established that the female member of the panel was not offended because of a belief that the conduct was sexual in nature. She did not believe that it was. She was offended to the extent that she was concerned that the other members of the panel would interpret the conduct in regard to her ability to render an impartial decision because of her acquaintance with Corporal Dodson. The Board finds that the interview

panel placed undue emphasis on the hug due to the past conduct of the defendant inferring that it had a sexually offensive context when that was not how Lieutenant Mitchell interpreted the hug.

In fact, the record in this case established that Corporal Dodson had worked as a relief officer in the court and transportation unit before the interview took place and has worked there since without incident. With the exception of the incident in 2002, the testimony established that there have been no instances of harassing or sexually inappropriate behavior by Corporal Dodson. The Board agrees that Corporal Dodson failed to use good judgment in hugging Lieutenant Mitchell, who was also his friend, in the interview context. However, the hug was not similar to the past conduct in that it was not sexually offensive or directed at Lieutenant Mitchell because she was a woman and the other panel members were men.

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 Board is not inclined to displace any of the three other candidates who received lateral transfers and have held those positions since 2005. The record reflects that they were also qualified for the transfers they received. The Board finds that appropriate and fair remedy is to place Corporal Dodson in the next available court and transportation unit position.

ORDER

For the foregoing reasons, the grievance of Charles Dodson is **Granted**.

Mr. Dodson is to be placed in the Court and Transportation Unit as a Corporal at the first available opening.

IT IS SO ORDERED this 28th day of February 2007:

Brenda C. Phillips, Chairperson

John F. Schmutz, Member (Dissenting)

Joseph D. Dillon, Member

Paul R. Houck, 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: Mar. 1, 2007

Distribution:
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Agency's Representative
Kevin Slattery, Deputy Attorney General
Board Counsel