

COPY

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

IN THE MATTER OF:)	
ROBERT J. WALLACE,)	DOCKET NO. 06-06-0358
Appellant,)	DECISION AND ORDER
)	
v.)	
)	
DEPARTMENT OF CORRECTION,)	
Agency.)	

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

APPEARANCES:

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NATURE OF THE PROCEEDINGS

This grievance appeal was filed with the Merit Employee Relations Board (“Board”) on June 8, 2006 following an adverse Step Three grievance decision. *See* Merit Rule No. 18.0. The grievance matter appealed was the Agency’s decision to not promote Mr. Wallace to a Correctional Lieutenant position in 2005. Approximately one year later, Mr. Wallace learned that another promotional candidate was successful in his grievance and promoted. On March 13, 2006, the Appellant filed his grievance regarding his denied promotion.

On May 17, 2007, the Board held a legal hearing on the Agency’s Motion to Dismiss, in which it argued the grievance was filed past the 14-day requirement in Merit Rule No. 18.6. Based upon the arguments presented at the Legal Hearing, the Board denied the Motion to Dismiss but reserved the right to consider additional or contrary facts presented at the evidentiary hearing on the issues of timeliness and knowledge.

The Hearing was conducted on August 22, 2007. All witnesses were sequestered and the Appellant proceeded as the Moving Party under Merit Board Rule of Practice No. 14(C).

This is the Decision and Order of the Board which, for the reasons stated below, concludes that the Appellant failed to establish, by a preponderance of the evidence to the satisfaction of the Board, that the Agency's decision to not promote the Appellant was a gross abuse of discretion in the promotion pursuant to Merit Rule No. 18.5(3).

RELEVANT MERIT RULES

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 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.

MERIT RULE NO. 18.6

Step 1: Grievants shall file, within 14 calendar days of the date of the grievance matter or the date they could reasonably be expected to have knowledge of the grievance matter, a written grievance which details the complaint and relief sought with their immediate supervisor. The following shall occur within 14 days of receipt of the grievance: the parties shall meet and discuss the grievance and the Step 1 supervisor shall issue a written reply.

SUMMARY OF THE EVIDENCE

Robert J. Wallace in sworn testimony stated he is a Sergeant at the Delaware Correctional Center ("DCC"), and sought promotion to Correctional Lieutenant in 2005. Once meeting qualifications and passing a test, a promotional candidate's name is placed on a certification list from which candidates are interviewed when positions open. He received a letter on April 30, 2005 denying his requested promotion. He learned later that four out of the eight candidates interviewed were promoted to Correctional Lieutenant. He did not know his position on the list of ranking or scoring of the eight candidates. He spoke with Deputy Warden Burris in May 2005, at which time she informed he was at the bottom of the list because of his absenteeism. He

did not see his score or know where his score fell in the ranking. Ms. Burris said he was at the bottom, so he assumed he was eighth in the ranking. He did not file a grievance at that time.

Approximately one year later, Mr. Wallace learned his score and ranking had been disclosed in a grievance hearing of another candidate who successfully grieved his denied promotion. Based on this information, the Appellant's grievance was filed March 13, 2006. Mr. Wallace later received a copy of the score sheet which showed he was fourth out of eight candidates. He had received a score of zero for reliability. Another candidate who had been promoted, Matthew Stevenson, also scored zero for reliability. Mr. Wallace believed Mr. Stevenson's scores were below his.

On cross-examination, Mr. Wallace acknowledged he had stated at the Legal Hearing that Ms. Burris said he scored eighth, but now testified she said he was at the bottom, which he thought meant last. In reviewing a copy of his score sheet (Agency Exhibit 1-H), Mr. Wallace testified that candidates do not see their score sheets, and he first saw this sheet soon before the May legal hearing. He may have told Captain Karl Hazzard that he won his dismissal and inquired about membership in Local 247, which is the supervisor's union. The Appellant disputed that he discussed with Capt. Hazzard about his attorney negotiating his back pay.

The May 2005 meeting with Ms. Burris was approximately five minutes, in which she explained he was rejected for absences and an AWOL. His grievance (Agency Exhibit 1-K) alleged a nonselection to lieutenant under Merit Rule 10.4. Mr. Wharton completed the grievance form, which Mr. Wallace signed. In reviewing the class specification for the Correctional Lieutenant position (Agency Exhibit 1-F) and the applied posting (Agency Exhibit 1-E), he agreed it would be difficult to perform principal responsibilities if one was absent a lot. He acknowledged the Agency's records (Agency Exhibit 1-G) showed he used 147 hours of sick leave in 2004, and 122 hours of sick leave in 2005.

On re-direct examination, Mr. Wallace did not receive any warnings about his attendance in 2004 and 2005, but met with Deputy Warden Burris in 2006 about his attendance; it was concluded Mr. Wallace's leave time was justified.

Alan Machtinger in sworn testimony stated he was the Agency's Director of Human Resources and Development in 2005. The process for filling a vacancy first involves a request

from Human Resources ("HR") for a certification list, and designating an interview panel which will consider all factors included in Merit Rule 10.4, including seniority, performance, attendance, discipline and commendations. The panel is not required to interview all candidates on a cert list. It will interview some candidates, and make recommendations to the warden who is free to make the final decision on promotion, provided the decision was made in accordance with Merit Rule 10.4.¹

A candidate learns through written notification that he has not been selected for promotion, and can file a grievance if not promoted. Based upon his experience, Mr. Machtinger believes this writing serves as notice that the candidate has a grievable matter and, to preserve time limits, a grievance will often be submitted first, followed by requests for information.

On questions by the Board, Mr. Machtinger testified that at several points during the process, such as the job announcement or when contacted for the interview, a candidate may be told to bring commendations or awards for consideration, but he did not know if that occurred with Mr. Wallace.

On re-direct examination, Mr. Machtinger acknowledged the posting (Agency Exhibit 1-E) stated that a candidate may take copies of evaluations, letters or training certificates to the interview. HR would not forward to the facility any commendations and awards submitted with an application.

On cross and re-cross examination, Mr. Machtinger acknowledged that if an employee is given incorrect information about a decision, that fact should be considered. If the interview panel had informed Mr. Wallace to submit copies of commendations later that day, the Appellant would be permitted to do so. Mr. Machtinger explained that each candidate starts with 10 points, from which points are deducted for occurrences such as sick leave, tardiness, unexcused absence and AWOL. All 10 points would be lost if there were 5 occurrences, as they count occurrences, not days. An occurrence could be one or more days of non-FMLA sick leave. Employee

¹ Mr. Machtinger testified that after August 2005, a policy was instituted that required facilities to follow a "rule of one," meaning that whoever scored the highest number of points would automatically be selected for the promotion. Because this policy occurred after the period of time in question from February through April 2005, the Board considers this information to not be relevant to the issue presented for its determination.

reliability would depend upon the circumstances of the absences. The process affords the interview panel and warden with the ability to look at the larger picture concerning attendance.

Karl Hazzard in sworn testimony stated he is a Correctional Captain at DCC and president of Local 247, whose members include lieutenants. Mr. Wallace inquired about joining the local because he won his grievance and his attorney was negotiating his seniority date and back pay. Capt. Hazzard offered a union card, but Mr. Wallace indicated he would wait pending receipt of his seniority date. Mr. Wallace had also mentioned he had won his timeliness issue before MERB.

Elizabeth Burris in sworn testimony stated she was a Deputy Warden II at DCC in 2004 and 2005, for which her responsibilities as the warden's designee include promotions for which she monitors vacancies, meets with the warden, deputy warden I and other senior staff, requests certification lists through HR, and oversees promotions. She delegates the certification lists from HR to a diverse interview panel, gives the proper form to follow in the selection process, receives the panels' recommendations, coordinates a meeting with the warden, deputy warden and herself to review the recommendations and make a final selection, forwards the final decision to HR, and follows-through to ensure a candidate is hired or promoted. Candidates are presented in ranked order by score. In addition to considering ranking or score, they consider a candidate's overall record, including discipline, attendance or any other reason a candidate would not be suitable for the requested position. The warden, deputy warden and she together, with the warden being the final authority, decide who is hired or promoted.

A Correctional Lieutenant is the first step in the supervisory series and responsible for overseeing subordinates, ensuring daily tasks and reports are accomplished, evaluating employees, assessing attendance, handling inmate concerns, and forwarding information up the chain of command. It is essential that a Lieutenant be present on the job and reliable. Frequent absenteeism means a break in the chain of command, which is detrimental to the safe and secure operation of the facility and management of the workforce and inmate population. An absentee is not well-informed on policies and procedure, some of which are updated weekly.

Identifying the posting for the position of correctional lieutenant (Agency Exhibit 1-E), Ms. Burris explained that after a position is posted, HR receives applications and provides a

certification list to the facility. Mr. Wallace was on the certification list for consideration as a Correctional Lieutenant. According to the ratings sheet used (Agency Exhibit 1-H), a candidate starts with 10 points and may lose points according to the chart on the sheet. The interview panel reviews a candidate's attendance. A candidate's reliability is higher for Lieutenant than a Correctional Officer. For the Correctional Lieutenant position, a candidate who had six or more occurrences of sick leave was rejected; those candidates acceptable for promotion had five or less occurrences of sick leave. This standard was in place before the review for this Correctional Lieutenant position. AWOL means an absence without leave, where one did not call in and did not show for work as scheduled. An AWOL was not acceptable for a candidate being considered for the Lieutenant position, and candidates with an AWOL were eliminated. At the time of this review, the Appellant had nine occurrences of sick leave and one AWOL.

No commendations were located in the Agency's personnel file for Mr. Wallace; however, the presence of commendations would not have changed the decision to reject because of Mr. Wallace's attendance. According to a summary (Agency Exhibit I-I), Mr. Wallace ranked fourth, but was rejected because of his attendance. Another candidate, Matthew Stevenson, scored zero for reliability, but was not rejected because he had five occurrences of sick leave and no AWOL; he would have been rejected if he had six or more occurrences or an AWOL. Each candidate was considered, and a memo was forwarded to HR concerning the selected candidate. Once HR informed the promotions were acceptable, letters were issued to those who had been promoted and not promoted, including Mr. Wallace (Agency Exhibit 1-J).

At Mr. Wallace's request, Ms. Burris discussed the matter on May 4, 2005, from 3:30 p.m. to 4:05 p.m. in her office. She typically reviews in detail with each candidate their results and offers advice on future improvement. She would not have told Mr. Wallace that he ranked eighth or was at the bottom, because that would have been factually untrue.

On cross-examination, Ms. Burris testified she and other facility senior staff members created the form at Agency Exhibit 1-H. There is emphasis on seniority, but more emphasis on reliability. The interview panel scores applicants on the criteria contained in the form; then, the warden, deputy warden and she meet to consider other issues, such as reliability. They had the panel's ranking scores (Agency Exhibit I-I), and assessed in greater detail the applicants for

selection. Their guidelines for selection included whether an applicant scored at least 16 or more points out of 30 possible points for the interview and rejecting an applicant if they scored less than half, and rejecting any candidate with six or more sick leave occurrences, with disciplinary action or with an AWOL. These guidelines are based upon precedent and practice. She believes these guidelines are applied for every cert list for the Lieutenant position, and each time the group sits, they review the candidates and decide based upon these standards. She explained the various reasons for rejection of applicants listed (Agency Exhibit I-I). She reviewed with Mr. Wallace his rating form (Agency Exhibit 1-H), and each category and scores. She did not show Mr. Wallace the scores of the other candidates. She told Mr. Wallace that he was rejected because he had more than six occurrences of sick leave and one AWOL. She did not tell him he was last.

FINDINGS OF FACT

The Board finds that the Appellant was reasonably expected to have knowledge of the grievance matter as of April or May 2005. Written notification of the Agency's rejection of the requested promotion to Correctional Lieutenant is evidenced by the April 26, 2005 letter from Deputy Warden Burris to Sgt. Wallace (Agency Exhibit 1-J). Sgt. Wallace testified he received this letter on or about April 30, 2005. Additionally, Sgt. Wallace and Deputy Warden Burris discussed the Agency's rejection on May 4, 2005. Sgt. Wallace was informed at that time that the basis for the Agency's rejection was because of his attendance. These facts are unrefuted. The parties presented different and disputed testimony as to whether Deputy Warden Burris verbally informed Sgt. Wallace that his score or ranking was at the bottom, or fourth out of eight candidates. The Board finds the testimony and evidence from the Agency's representatives to be convincing.

Assuming, *arguendo*, that the grievance was timely, the Board further finds that the evidence presented by the Appellant did not support a determination that the Agency's actions here amounted to a gross abuse of discretion in the promotion. The evidence showed that it was the Agency's precedent and practice to obtain scores by an interview panel based upon a scoring format sheet (Agency Exhibit 1-H), then followed by a discussion between the warden, deputy

warden and Deputy Warden Burris where precedential guidelines were applied. The evidence also showed that the Correctional Lieutenant position is the first line of supervisory correctional positions and as such, the category of reliability is very important to this position. The evidence presented showed the Agency followed its precedent and practice concerning guidelines in existence at the time of this review.

CONCLUSIONS OF LAW AND DISCUSSION

Under Merit Rule 18.6, a grievance must be filed within 14 days of the date of the grievance matter or within 14 days of the date an employee could reasonably be expected to have knowledge of the grievance matter. The issues presented require the Board to examine as to whether the March 2006 grievance was filed within 14 days of the date of the grievance matter or within 14 days of the date Sgt. Wallace could reasonably be expected to have knowledge of the grievance matter, and if the grievance was timely, whether there was a gross abuse of discretion in the promotion under Merit Rule 18.5(3).

The Board concludes that based upon the testimony and evidence presented and according to the facts of this case, the Appellant could reasonably be expected to have knowledge of the grievance matter as of May 4, 2005, and therefore, the grievance filed in March 2006 is untimely. The Appellant was a Correctional Sergeant, and applied for promotion to the position of Correctional Lieutenant. Following application and an interview, he received the Agency's rejection letter on or about April 30, 2005. At that time, he knew that his request for promotion had been rejected. He requested an opportunity to discuss the Agency's rejection, which occurred on May 4, 2005 with Deputy Warden Burris. He was informed that the reason for his rejection was due to attendance, specifically absences and an AWOL. At that time, the Appellant knew of additional information concerning the Agency's reason for its rejection. While he did not know or see his score or the scores of other candidates, the Appellant assumed that his score or ranking was eighth out of eight candidates and he decided not to file a grievance at that time.² Approximately one year later, he learned that he scored fourth out of the eight

² The Appellant initially stated he had been informed by Deputy Warden Burris during this discussion that he was eighth out of eight candidates. He subsequently testified Ms. Burris said he was at the bottom, and he assumed he was eighth. The Agency disputed this by presenting the testimony of Deputy Warden Burris, which the Board found

candidates, which prompted the filing of his grievance. Further, throughout the 2005 events, the Appellant had union representation through the correctional officer's local union with whom he could have asked questions, discussed the matter or sought representation. There is no evidence in the record that the Appellant did or did not do so.

If the Appellant did not know he had a grievable matter at the time of receiving the Agency's rejection letter on April 30, it is reasonable to expect that he had knowledge of a grievable matter following his May 4th discussion with Deputy Warden Burris because he knew his requested promotion was rejected and that attendance was the basis for the rejection. The Appellant knew of these circumstances leading to his grievance for failing to promote as of May 4, 2005.

Because the Board concludes the grievance filed in March 2006 was untimely under Merit Rule 18.6, it is not necessary to address the underlying basis of the Appellant's appeal in that there was an alleged gross abuse of discretion in the promotion. Merit Rule 18.5. However, the Board, in its discretion, chooses to address this substantive claim in order to have a complete record.

Under Merit Rule 18.5, grievances concerning promotions are permissible only where (1) it is asserted that 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. Here, the Appellant alleged there was a gross abuse of discretion concerning the Agency's failure to promote him to Correctional Lieutenant because the Agency considered attendance a second time after it had already considered this factor for ranking or scoring.

The term "gross abuse of discretion" has, in the Delaware Courts, been characterized on the level of bad faith or reckless indifference. *See, e.g., Leung v. Schueller*, 2000 WL 264328, at 11, n. 41 (Del Ch.) ("to infer bad faith the board's decision must be 'so grossly off the mark as to amount to 'reckless indifference' or 'gross abuse of discretion' "); *Kaplan v. Centex Corp.*, 284 A.2d 119, 124 (Del. Ch. 1971) ("in the absence of showing bad faith on the part of the directors or a gross abuse of discretion the business judgment of the directors will not be interfered with

to be credible and convincing.

by the courts"). The Board concludes that the evidence presented in the record did not show a gross abuse of discretion in the promotion here, and the Appellant has not met his burden of proof. The Appellant presented evidence that another officer, Matthew Stevenson, received a score of zero for reliability, as the Appellant had received, but was promoted to Correctional Lieutenant. However, this evidence was refuted by the Agency. The Agency presented evidence that Mr. Stevenson's reliability score of zero was based upon his five occurrences of sick leave and no AWOLs, which met the Agency's acceptable standard based upon precedent and practice, while Mr. Wallace had six or more occurrences and one AWOL. The evidence presented also showed the Agency consistently ranked its applicants based upon the scoring format sheets and further considered the ranked applicants based upon guidelines established by precedent and practice, including rejecting any candidate with six or more leave occurrences, with disciplinary action, less than 50 percent of the interview points available and AWOLs. The Agency provided credible testimony that the Correctional Lieutenant position, as the first line of supervisory correctional officers, requires reliability and availability. Deputy Warden Burris testified that the Appellant's number of sick leave occurrences and an AWOL comprised the basis for rejection of his application. This is a reasonable basis for not granting the requested promotion. The Board concludes that there was no evidence presented by the Appellant to dispute this or to show that the Agency acted here in bad faith or reckless indifference, so as to constitute a gross abuse of discretion in the promotion under Merit Rule 18.5(3).

ORDER

It is this 16th day of December, 2007, the Decision and Order of the Board that the Appellant's appeal for the failure to promote to Correctional Lieutenant be denied.

BY ORDER OF THE BOARD:

Brenda C. Phillips, Chairperson³

John F. Schmütz, Esq., Member

Joseph D. Dillon, Member

Martha Austin, Member

APPEAL RIGHTS

29 Del. C. § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board

29 Del. C. § 10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited

³ Chair Phillips dissented on the Board's vote and decision in this matter and therefore, her signature is not attached to this Decision and Order.

to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

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