

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

STATE OF DELAWARE	:	
DEPARTMENT OF CORRECTIONS:	:	
("DOC"),	:	C.A. NO.: 06A-12-006 (RBY)
	:	
Appellant/	:	
Employer-Below ,	:	
	:	
v.	:	
	:	
WILBUR F. JUSTICE,	:	
	:	
Appellee/	:	
Grievant-Below,	:	
	:	
and the	:	
MERIT EMPLOYEE RELATIONS	:	
BOARD,	:	
	:	
Appellee.	:	

Submitted: May 18, 2007  
Decided: August 23, 2007

Kevin R. Slattery, Esq., Department of Justice, Wilmington, Delaware for Appellant.

Thomas S. Neuberger, Esq., Wilmington, Delaware for Appellee/Grievant-Below and Appellee.

*Upon Consideration of Appellant's  
Motion for Reconsideration of Decision  
of Merit Employee Relations Board  
REVERSED AND REMANDED*

**OPINION AND ORDER**

Young, J.

Employer-Below/Appellant ("Appellant"), State of Delaware/Department of Correction ("DOC"), appeals the November 29, 2006 decision of the Merit Employee Relations Board ("Board") granting relief to the Grievant-Below/Appellee ("Appellee"), Wilbur Justice. For the following reasons, the Board's decision is **REVERSED** and **REMANDED**.

**FACTUAL AND PROCEDURAL HISTORY**

On July 15, 2004, the Appellee, then a 22 year veteran of the DOC, submitted to the Human Resource office at the DOC an application for a position as the Community Work Program Coordinator at the Morris Community Correctional Center ("MCCC"). The application was misplaced and, as a result, the Appellee's name was excluded from the certification list of the minimally qualified candidates. Since the certification list functions as the list of candidates to be interviewed, the Appellee did not receive an appointment for an interview. On Friday, August 13, 2004, the Appellee went to the Human Resource office to speak with Senior Human Resources Technician Larry Klebart regarding the status of his application. On Monday, August 16, 2004, the Appellee, returned to the Human Resource office to follow the process. The Appellee was informed that his application had been misplaced; that he should have been on the certification list and called for an interview; that interviews were scheduled for that day and were, in fact, in progress; that he had been added to the list of interviewees, with an appointment at noon; and that, should Appellee desire, a new date for his interview could be arranged.

The Appellee was one of five people interviewed by the interview panel, which

consisted of Kent Raymond,<sup>1</sup> Michael Records<sup>2</sup> and Rosalie Jackson.<sup>3</sup> Following the interviews, the panel ultimately recommended Hansel Fuller to Vincent Bianco, a warden at the MCCC, who was responsible for the final hiring decision. The panel ranked the Appellee second.

Thereafter, on September 23, 2004, the Appellee filed a grievance according to the procedure outlined in the Merit Rules. The first portion of the procedure, the three step process outlined by Merit Rules 18.6 to 18.8, resulted in three decisions against the Appellee. On January 21, 2005, pursuant to Merit Rule 18.9, the Appellee appealed to the Board.

On August 3, 2006,<sup>4</sup> the Board held a hearing, at which testimony from Mr. Raymond, Mr. Records, Mr. Klebart, Alan Machtinger,<sup>5</sup> Mr. Fuller and Mr. Bianco was heard. At the hearing, the Appellee inferred that his membership in the Correctional Officers Association of Delaware, his position as Vice-President of that organization, the organization's attempt to unseat Governor Ruth Ann Minner and the organization's negotiations with the DOC, at which Mr. Machtinger was a part, played a role in his application's becoming lost; and, ultimately, his not receiving the

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<sup>1</sup> At the time, Mr. Raymond was the supervisor of the Community Work Program Coordinator at the MCCC.

<sup>2</sup> At the time, Mr. Records was the probation supervisor at the Central Violations Probation Center.

<sup>3</sup> At the time, Ms. Jackson was an administrative assistant at the MCCC.

<sup>4</sup> The hearing was originally scheduled for June 28, 2006, but was continued so that the Appellee could obtain legal counsel.

<sup>5</sup> At the time, Mr. Machtinger served as the Director of Human Resources for the DOC.

promotion.<sup>6</sup> While the Board concluded that there was no direct evidence that the Appellee's position in the union was a factor, it held that the DOC committed a gross abuse of discretion in the promotion process in violation of Merit Rule 18.5(3) by not postponing the Appellee's interview so he could "get on a level playing field with the other applicants." The Board supported its decision by citing: (1) inconsistencies in Mr. Klebart's testimony regarding the date on which he actually ran the certification list, and the information he gave the Appellee regarding the certification list; (2) the differences between copies of the Appellee's application that were presented to the Board, which the Board believed were an attempt by Mr. Klebart to cover up the loss of the application; and (3) the fact that the DOC did not reschedule all the interviews. The Board ordered that, to remedy this gross abuse of discretion, the DOC must repeat the interview process including all the previous candidates who want to be considered for the position, including Mr. Fuller who has held the position for almost three years.

Following the Board's decision, the Appellant filed this appeal.

#### **STANDARD OF REVIEW**

On appeal, the Court is charged with correcting the Board's errors of law and determining whether its findings of fact and conclusions of law are supported by substantial evidence.<sup>7</sup> Questions of law are reviewed *de novo*.<sup>8</sup> Substantial evidence

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<sup>6</sup> The Appellee accomplished this through his counsel's questioning of the witnesses as he did not testify at the hearing.

<sup>7</sup> *DeMarie v. Delaware Dep't. of Transp.*, 2002 WL 1042088, at \*1 (Del. Super.)(Applying the appellate standard for appeals from State agencies to an appeal from the Board).

<sup>8</sup> *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998)(citing *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994)).

has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>9</sup> In addition, substantial evidence is “more than a scintilla but less than a preponderance.”<sup>10</sup> This Court does not have the “authority to weigh evidence, determine the credibility of witnesses or make independent factual findings.”<sup>11</sup>

### DISCUSSION

Title 29, Chapter 59 of the Delaware Code creates the Merit System of Personnel Administration.<sup>12</sup> The purpose of this system is to provide “personnel administration based on merit principles and scientific methods governing the employees of the State in the classified service consistent with the right of public employees to organize under Chapter 13 of Title 19.”<sup>13</sup> As part of this system, the General Assembly created the Merit Employee Relations Board,<sup>14</sup> whose powers include the adoption of the Merit Rules<sup>15</sup> and the operation of a grievance system for redress of violations of the Merit Rules.<sup>16</sup>

In the case *sub judice*, the Appellant contends that the Board’s decision must

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<sup>9</sup> *Olney v. Cooch*, 425 A.2d 610, 614 (Del.1981)(quoting *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

<sup>10</sup> *Id.* (quoting *Cross v. Califano*, 475 F.Supp. 896, 898 (D. Fla. 1979)).

<sup>11</sup> *State v. Dalton*, 878 A.2d 451, 454 (Del. 2005)(citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

<sup>12</sup> 29 Del. C. § 5901 *et seq.*

<sup>13</sup> 29 Del. C. § 5902.

<sup>14</sup> 29 Del. C. § 5906.

<sup>15</sup> 29 Del. C. § 5914.

<sup>16</sup> 29 Del. C. § 5931.

be reversed because: (1) the Board committed legal error when it concluded that the DOC committed “a gross abuse of discretion in the promotion process” or, (2) assuming the Board committed no legal error, the Board’s decision was not supported by substantial evidence.

**I. The Board Committed Legal Error When It Held that the DOC Committed a Gross Abuse of Discretion in the Promotion Process.**

As to the first grounds for reversal, the Appellant claims that the Board’s interpretation of Merit Rule 18.5 constituted legal error. The Rule provides:

“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.”<sup>17</sup>

The Appellant maintains that Merit Rule 18.5 limits the scope of grievable complaints to three scenarios illustrated by the three subsections of the Rule. The Appellant asserts that 18.5(1) applies where the person who was promoted does not meet the minimum qualifications for the job; 18.5(2) applies where the State agency violated Merit Rule 2.1 or another one of the procedural Merit Rules; and 18.5(3) applies to a situation which the State agency actually selects one candidate over another.

For the purposes of this appeal, the Appellant focuses on distinguishing Merit Rules 18.5(2) and 18.5(3). As to Merit Rule 18.5(2), the Appellant argues that the plain language of the Rule indicates that it was meant to cover procedural violations by State agencies in the promotion process, which covers all violations of procedural Merit Rules. As to Merit Rule 18.5(3), the Appellant contends that the plain language

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<sup>17</sup> Delaware Dep’t of Admin. Serv., State Pers. Comm’n; Merit Relations Bd., Merit Rules, DE ADC 10 450 002, Ch. 18.5 (Westlaw) (2007).

of the Rule indicates that it was intended to cover only the "promotion," which means the actual selection of one candidate over another. The Appellant maintains that this is the correct interpretation, because the agency must comply with Merit Rule 2.1 or the procedural mechanisms established by the Merit Rules, whereas the agency has discretion in the choice of one candidate over another. Therefore, the Appellant urges the Court to find that the Board committed legal error when it held that "it was a gross abuse of discretion for the [DOC] not to postpone the interviews on their own initiative to give the [Appellee] an opportunity to get on a level playing field with the other applicants," because the Board applied the gross abuse of discretion standard to an aspect of the promotion process as opposed to the actual promotion. The Appellee responds by arguing that the faulty process was the problem, and that the process is part and parcel of the promotion, concluding that the Board correctly applied Merit Rule 18.5(3).

No case law, statute or Merit Rule explains the intended scope of Merit Rule 18.5(3). However, upon consideration of the appellate briefs and the Court's own reading of the Title 29, Chapter 59 and the Merit Rules, the Court concludes that the Appellant's interpretation is correct. Hence, the Board's ultimate holding constitutes an error of law. While there is no further explanation in the Merit Rules for what is meant by Merit Rule 18.5(3)'s reference to "in the promotion," the plain meaning comports with the interpretation advanced by the Appellant, which is that the gross abuse of discretion must occur in the actual choice of one candidate over another. The language is reinforced by reference to Webster's Dictionary, which defines promotion as "the act or fact of being raised in position or rank."<sup>18</sup> Furthermore, both

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<sup>18</sup> *Webster's Third New International Dictionary of the English Language Unabridged* 1815 (1964).

Title 29 Chapter 59 and the Merit Rules contain provisions on promotions.<sup>19</sup> These provisions contain an instruction to State agencies that consideration is to be given “to the applicant’s qualifications, performance record, seniority, conduct and, where practicable, to the results of competitive examinations.”<sup>20</sup> This indicates that, for the General Assembly and the Board, the sole focus of the term “promotion” is on the decision making process resulting in the choice of one candidate over another. Therefore, in originally adopting Merit Rule 18.5(3), the Board intended it to apply only to a gross abuse of discretion in the promotion, *i.e.*, the actual selection decision, not to other decisions that might require consideration at other points in the process which results in the ultimate promotion.

As the Court has held that Merit Rule 18.5(3) is intended to address only the actual selection of one candidate over another, Merit Rule 18.5(2) can be the only provision enabling an employee to file a grievance for a deficiency in the promotion process. Accordingly, the Court concludes that the Board’s decision constituted an error of law, and resulted in the Board exceeding its authority under Merit Rule 18.5(3).

**II. Assuming, *Arguendo*, that the Board Did Not Commit Legal Error, the Evidence Does Not Support a Finding of Gross Abuse of Discretion in the Promotion Process.**

Turning to the Appellant’s second ground for relief, the Court notes that, assuming, *arguendo*, that the Board did not commit the aforementioned error of law, its decision is, nevertheless, not supported by substantial evidence. No specific

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<sup>19</sup> See 29 Del. C. § 5918 and Delaware Dep’t of Admin. Serv., State Pers. Comm’n; Merit Relations Bd., Merit Rules, DE ADC 10 450 002, Ch. 10.4 (Westlaw) (2007).

<sup>20</sup> *Id.*

definition for “gross abuse of discretion” has been provided in Title 20 Chapter 59 or in the Merit Rules. However, Delaware Courts have explicitly stated that “[d]iscretion as applied to public officers, means the power or right to act in an official capacity in a manner which appears to be just and proper under the circumstances.”<sup>21</sup> Our Courts “will not interfere with this power or right of public officials to act unless [the Court] is convinced that it has been abused. In order to constitute an abuse of discretion by public officials, the record must demonstrate that the exercise was unreasonable, and that the ground upon which the decision was based or reason shown therefore was clearly untenable.”<sup>22</sup> When Delaware Courts have mentioned the phrase “gross abuse of discretion” it has been in the same breath as the term “bad faith.”<sup>23</sup> Specifically, the common law has stated that, at least in terms of the business judgment rule applicable in the corporate law, gross abuse of discretion occurs when the decision is “so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.”<sup>24</sup> The Board has adopted such a standard in at least one grievance proceeding<sup>25</sup> and, in another, it has defined the standard as a high one, “akin to reckless indifference or where there is an extreme departure from the ordinary care normally given to a situation.”<sup>26</sup>

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<sup>21</sup> *Caras v. Delaware Liquor Comm'n*, 90 A.2d 492, 494 (Del. Super.1952).

<sup>22</sup> *Id.*

<sup>23</sup> *Alinda v. Internet.com Corp.*, 2002 WL 31584292, at \*4 (Del. Ch.).

<sup>24</sup> *Id.*

<sup>25</sup> *In the Matter of Michael Edwards*, MERB Docket No. 05-06-328 (2006), at 24.

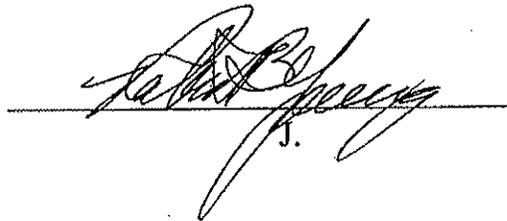
<sup>26</sup> *In the Matter of Richard D. Smith*, MERB Docket No. 05-04-327 (2007), at 10.

This standard, even as applied by the Board in this case, does not provide that a gross abuse of discretion occurs when hindsight determines that a better course of action was available. While the process may have been managed imperfectly, there is no evidence in the record that the DOC acted beyond the bounds of reasonable judgment by not postponing the Appellee's interview or all the interviews. It was uncontroverted that: (1) Appellee went to the interview after being informed by Mr. Klebart that they were already underway and (2) that, according to Mr. Raymond's recollection, he gave the Appellee an opportunity to postpone the interview but the Appellee elected to continue.

**CONCLUSION**

Accordingly, the Board's decision based on its error of law is **REVERSED** and the matter is **REMANDED** to the Board for findings of fact and conclusions of law consistent with the correct legal standard set forth in this opinion.

**SO ORDERED.**

A handwritten signature in cursive script, appearing to read "Robert B. Sperry", is written over a horizontal line. The signature is written in black ink.

RBV/sal

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Merit Employee Relations Board