BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
Donald Hastings,	)	DOCKET NO. 06-06-357
Appellant,	)	**DECISION AND ORDER**
v.	)	
	)	
DEPARTMENT OF CORRECTION,	)	
Employer/Agency.	)	

BEFORE Brenda Phillips, Chair, Paul R. Houck, and Martha Austin, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES:

For the Appellant:
Lance Geren, Esquire
Freedman & Lorry
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Philadelphia, PA 19103

For the Agency:
Kevin Slattery, Esquire
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NATURE OF THE PROCEEDINGS

This grievance appeal was filed with the Merit Employee Relations Board ("Board") on June 8, 2006 after 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. Hastings to CO Physical Plant Maintenance Trade Mechanic III position. Mr. Hastings seeks promotion to this position and to be made whole.

The Hearing was conducted on October 24, 2007. The Appellant proceeded as the Moving Party under Merit 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.

SUMMARY OF THE EVIDENCE

Donald Hastings in sworn testimony stated he began employment in October 1996 as a Correctional Officer, and moved to Correctional Officer (CO) Trades Mechanic I in the Maintenance Department in November 2000. He understood that in 2001, promotion to Mechanic II required completion of another State application and approval of the promotional packet by an immediate supervisor and superintendent. He moved to Trade Mechanic II in early 2001. In February or March 2002, he learned that a new promotional packet was implemented, that required 288 hours for Mechanic II to Mechanic III, and 170 or 180 hours for Mechanic I to Mechanic II. He applied for position of Mechanic III. He identified Appellant Exs. 1 E and 1F as the class titles for Mechanic II and III, Ex. 1G as the minimum qualifications rating guide for promotional standards for Mechanic III, and Ex. 1H as the promotional packet he was provided and completed for his request for promotion to Mechanic III. The packet listed Ron Zawora as an immediate supervisor and Eric Smeltzer as the superintendent; he works with both men daily. He receives annual employee evaluations, completed by Mr. Zawora. The packet also listed Bruce Dickinson as maintenance manager; he does not work with him daily.

In reviewing Appellant Ex. 1H, Mr. Hastings identified where he handwrote his trade school training from 1988 to 1991, for the requirement of 288 hours of documented courses

completed. The hours he included equaled more than 288 hours. Mr. Hastings checked the listed promotional criteria of Mechanic II to Mechanic III, shown in Appellant Ex. 1H. He also provided a certificate of training for low voltage wiring and a certificate of recognition from Rheem, as part of his submitted packet.

In reviewing Appellant Ex. 2, Mr. Hastings identified a copy of his transcript from Sussex Technical High School, which showed he attended 170 sessions for a total of 510 hours. He received a letter from Joyce Talley, Bureau Chief for Bureau of Maintenance Services, denying his request for promotion to Mechanic III because of a lack of sufficient training hours. He was never informed what type of classroom hours would be approved for promotion. In reviewing Appellant Ex. 1G, Mr. Hastings testified as to his experiences for the promotional standards listed for Trade Mechanic III. He believed that he already performed many of the functions listed for Trade Mechanic III, and had done so for the last five years.

On cross-examination, Mr. Hastings testified that the promotional packet was in place for approximately 4 ½ years, and he knew of the promotional standards from Mechanic II to III for that time before submitting his application. No one informed him that the promotional standards would remain unchanged until he had reached the Mechanic III position. He explained his understanding of the required 288 hours. In speaking with shop co-workers, he thought it would take approximately 3 to 4 years through the apprenticeship program to accumulate 288 hours, with 2 nights a week, three or four hours per night. He did not sign-up for the apprenticeship program. In reviewing his school transcript, most of his training was in the area of carpentry.

On further examination, Mr. Hastings reviewed State Exhibit 1B, and acknowledged that that the Mechanic II position required 216 hours. He believed he had 1,005 hours of training. He explained in more detail about his training. Mr. Hastings testified that the Department did not provide any breakdown for accepted classroom training, and thought the promotional packet was vague on this point.

In response to questions from the Board, Mr. Hastings was unaware of anyone being promoted to Level III after February 5, 2002 without having an additional 288 approved hours of training. He believed the Department of Labor classes were the only ones on the plate.

On further examination, Mr. Hastings was aware of three people who were promoted to Mechanics III with 288 hours. Mr. Hastings testified that when he was first hired and promoted from I to II, only knowledge, abilities and skills, but no hours, were required.

Ronald Zawora in sworn testimony stated he is employed as Maintenance Foreman, Southern Region, Sussex Correctional Facility, in which he supervises 7 employees, including Mr. Hastings. He works daily with Mr. Hastings. Of the seven, three are Mechanic II's and four are Mechanic III's. He is familiar with the requirements for Mechanic III and believes Mr. Hastings is qualified to perform all of the functions of that level. In reviewing the promotional packet (Appellant Ex. 1H), Mr. Zawora checked the promotional criteria items listed for Mr. Hastings, based on his review of past work orders. He believes Mr. Hastings performs the same work as a Mechanic III performs.

On cross-examination, Mr. Zawora did not discuss with other supervisors about Mr. Hastings performing Mechanic III work. He does not review and approve listed course training on a request for promotion application; instead, Mr. Dickinson determines whether courses are Bureau Chief-approved or not. He did not believe there was a time frame for accumulating the 288 required hours. He is not responsible for approving listed courses or training; rather, that is Mr. Dickinson's job. It would not be an unusual situation for a request for promotion to be approved by him, be approved by Mr. Smeltzer and then reach Mr. Dickinson who declines to approve because it does not meet the bureau chief required course requirement. Of the four Mechanic IIIs, one was promoted under the new career ladder in 2002, while the other three had been promoted before the implementation of the 2002 new ladder.

On further examination, Mr. Zawora believed the one had enrolled in an approved program at Sussex Tech and took at least two years, perhaps three years, to complete.

In response to questions from the Board, Mr. Zawora testified that he informs his employees to contact Mr. Dickinson to verify approval before they take a training class. He believes Mr. Hastings has performed Mechanics III work for more than 30 days. He has assigned complex number III jobs to Mr. Hastings, who has completed them to his satisfaction.

Following the testimony of Mr. Hastings and Mr. Zawora and presentation of its exhibits, the Appellant rested.

The Department made a Motion to Dismiss on the basis that the Appellant did not meet the standard of gross abuse of discretion, as required under Merit Rule 18.5(3). In response, the Appellant argued that under Merit Rule 3.2, Mr. Hastings has performed the job functions of a Mechanic III for more than 30 days and therefore, is entitled to payment for that job.

FINDINGS OF FACT

The Board 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. Mr. Hastings' grievance matter concerned that he had not been promoted to the Trade Mechanics III position. Mr. Zawora, who is Mr. Hastings' immediate supervisor, had recommended and signed Mr. Hastings' requested promotion. However, Mr. Zawora also testified that he was not responsible for assessing and approving class training submitted as part of the requested promotion; instead, that responsibility rested with Bruce Dickinson. He also testified that it would not be an unusual situation for a promotion request to be recommended at his level and the next level up, and for the request to be declined for non-approved course training. Also, Mr. Zawora testified that he informs his employees to seek approval first from Mr. Dickinson before taking any classes or training. Mr. Zawora testified that there are currently four Trade Mechanic III's that he supervises, one of which had been promoted to Mechanic III since the Department had implemented the 2002 new career ladder requirements. No evidence was presented to show that others were promoted to Mechanic IIIs following the 2002 new career ladder without meeting the requirements. Mr. Dickinson is responsible for considering and approving, or disapproving, course training that is submitted as part of a promotion request, which he did so here.

CONCLUSIONS OF LAW AND DISCUSSION

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 in the promotion because the Agency failed to interview him again for a subsequent vacant Staff Lieutenant position.

The term "gross abuse of discretion" has, in the Delaware Courts, been characterized on the level of bad faith or reckless indifference. *Dept. of Corrections v. Wilbur F. Justice, et al.*, C.A. No. 06A-12-006, J. Young, op. at p. 9 (Del.Super. August 23, 2007) (unreported opinion); *see also 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' "). The Board concludes that the evidence presented in the record did not show a gross abuse of discretion in the Department's decision to decline Mr. Hasting's requested promotion from Mechanic II to Mechanic III. *Justice, supra* at pp. 6-8. The Appellant's application for promotion was considered. The evidence presented in the record showed that of the four Mechanic III's, only one had achieved this promotion after the new career ladder was implemented in 2002, and this person had acquired approved training. No evidence was presented in the record by the Appellant to show that this one person did not have approved training. The Board believes there was no gross abuse of discretion in declining Appellant's request for promotion. It is the conclusion of this Board, by unanimous vote, that no evidence was presented by the Appellant to show that the Department acted here in bad faith or reckless indifference when it came to the actual decision to decline Appellant's requested promotion. *Justice*, at p. 8.

ORDER

It is this 2nd day of April, 2009, the Decision and Order of the Board that the Appellant's appeal for promotion to Trade Mechanic III be denied.

BY ORDER OF THE BOARD:

Brenda C. Phillips, Chairperson

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

Mailing Date: May 1, 2009

Distribution:
Original: File
Copies: Grievant's Representative
Department's Representative