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Case No. N12A-11-001 CHT

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Bruce Burton, Randall Dotson, Guy Fowler, Mark Rispoli, Roland Wiley, John Endres, Thomas Secord, and Michael Little	:	
Appellants,	:	C. A. No.: N12A-11-001(CHT)
v.	:	
Merit Employee Relations Board and State of Delaware Department of Correction	:	
Appellees.	:	

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OPINION AND ORDER

Upon Appeal From a Decision of the Merit Employee Relations Board

Submitted: June 7, 2013
Decided: October 18, 2013

Lance Geren, Esquire, FREEDMAN AND LORRY, P.C., Wilmington, Delaware; Attorney for Appellants.

Laura L. Gerard, Esquire, DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware; Attorney for Appellees.

TOLIVER, JUDGE

Before the Court is an appeal by Bruce Burton, Randall Dotson, Guy Fowler, Mark Rispoli, Roland Willey, John Endres, Thomas Secord and Michael Little ("Appellants") from a decision of the Merit Employee Relations Board. That which follows is the Court's resolution of the issues so presented.

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

On June 30, 2011, a job opening for the position of Correctional Security Superintendent ("CSS") within the Department of Correction was posted by the Office of Management and Budget. A candidate for this position would be responsible for institutional security work, including, administering the custody, security and discipline programs. The requirements for the position included, in pertinent part a minimum of three years experience as a Correctional Lieutenant, two years experience as a Correctional Staff Lieutenant or one year experience as a Correctional Captain. The advertisement or posting for this position did not state or otherwise

indicate that equivalent experience or position would be considered in determining eligibility for the position.

A committee comprised of Deputy Wardens David Pierce, Linda Valentino and Christopher Klein, along with Warden Perry Phelps was formed to select the most qualified candidate for the position. The committee received a list of nineteen applicants. Of the nineteen candidates, John Brennan, Donald Catalon and Christopher Senato did not have service in the ranks in question. However, the Committee felt that each of those individuals had experience which was the equivalent of that required for the position.

After interviewing each of the candidates, the Committee unanimously selected Mr. Brennan. Mr. Brennan held the title of Trainer Educator III and was responsible for all training activities in Central Delaware. The decision of the Committee was published on September 6, 2011.

On September 9, 2011, the Appellants filed grievances pursuant to 29 *Del. C.* §s 5914 and 5931 as well as Chapter 18 of the Merit Rules of the State of Delaware

and based on Merit Rule 18.5.[1] A hearing was held on October 20, 2011, before hearing officer Mike DeLoy pursuant to Merit Rule 18.7.

At this hearing, Appellants argued that the selection of Mr. Brennan was improper and that the position should be vacated. More specifically, they contend that the Department of Correction failed to adhere to the selection criteria for the position and Mr. Brennan did not meet the qualifications as published. As a result, they contend that the selection process should begin anew. The Department of Correction disagreed, arguing that Mr. Brennan was in fact qualified because he possessed experience equivalent to that possessed by those occupying the lieutenant, staff lieutenant and captain positions. Moreover, since 2008, at least seven individuals had been placed on referral lists for open CSS positions based upon the fact that they possessed

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[1] Merit Rule 18.5 provides: Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the job requirements; (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.

experience equivalent to that advertised as required for the position. The practice of using equivalent experience to meet expressly stated criteria was established practice in which the union representing the Appellants acquiesced.

On October 27, 2011, Mr. DeLoy agreed. He denied the grievance based on the past practice of allowing equivalent experience to be used to meet published criteria for job selection within the Department of Correction. Appellants then appealed Mr. DeLoy's decision to the next step of the grievance procedure pursuant to Merit Rule 18.7.

A hearing was held in response on January 24, 2012 before Hearing Officer Thomas J. Smith. Mr. Smith, in a decision rendered on March 6, 2012, held that Mr. Brennan did in fact meet the job requirements for the CSS position and denied the Appellants' grievances. The Appellants then appealed Mr. Smith's decision to the Merit Employee Relations Board via Merit Rule 18.9.

The Hearing

On September 26, 2012, the Board held a hearing on the matter. Captain Karl Hazzard, testified on behalf of the Appellants and Janet Durkee and Warden Perry Phelps testified on behalf of the Appellees. At this point in time, Janet Durkee served as director of human resources at the Department of Correction. Captain Hazzard was president of Local 247.[2] Warden Perry Phelps served as warden at the James T. Vaughn Correctional Center.

Captain Hazzard told the Board that although Mr. Brennan had the same pay grade as a captain, he was not considered as having the rank of a captain, nor did Mr. Brennan, according to Captain Hazzard, ever serve as or perform the duties of staff lieutenant, lieutenant or captain within the Department of Correction. In short, Mr. Brennan did not have the qualifications required for the position for which he was selected and the Department of Correction could not consider equivalent experience in

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[2] Local 247 is an employee labor organization which is affiliated with the American Federation of State, County and Municipal Employees, Council 81. Local 247 is the exclusive bargaining representative for merit employees of the Department of Correction.

lieu thereof to remedy the deficiency.

Warden Phelps testified that he served as chairperson of the selection committee that chose Mr. Brennan to fill the position at issue and that Mr. Brennan was the most qualified among those that applied for the position. Mr. Brennan, he testified, held the rank of captain as a trainer/educator. Lastly, Warden Phelps testified that the union had not objected to the use of equivalent experience to qualify for a position within the Department of Correction.

Ms. Durkee testified that the Department of Correction considers equivalent experience in filling vacancies within the department. She also stated that this has been the department's practice for at least the past five years. Lastly, Ms. Durkee testified that correctional captains and trainer educator III's are under the same pay scale and wear the same uniform.

The Board's Decision

On October 3, 2012, the Board issued it's opinion on the matter. The Board unanimously held that the position

should be re-posted within thirty days of the order. [3] Additionally, the Board held that Mr. Brennan should remain in the position as acting CSS until another candidate secured the position. Finally, the Board ruled that should Mr. Brennan re-apply for the position, his experience as CSS could not be considered, as he was not qualified for the position in the first place. However, his experience otherwise within the Department of Correction could be considered.

The Parties' Contentions

The appellants argue that the Board's decision was arbitrary for two reasons. First, they argue that the Board erred by allowing the Department of Correction to consider experience equivalent to the ranks listed as a prerequisite for the CSS job when re-posting that position. Second, the Appellants argue that the Board also erred by allowing Mr. Brennan to continue acting as the CSS when he was found to be unqualified for the

[3] All five members of the Board voted in favor of the decision.

position.

In response, the State argues that because the Appellants never requested that Mr. Brennan be removed pending the re-posting of the position, that contention should not now be heard on appeal. Additionally, the State argues that preserving the *status quo* pending the re-posting of the position in question is within the MERB's authority. Lastly, the State argues that the Merit Rules do not prohibit using experience equivalent to specifically enumerated criteria to qualify for a position within the Department of Correction. The State relies on Merit Rule 6.2, which requires only that "[j]ob postings shall contain all pertinent information about the positions being filled."

DISCUSSION

Standard of Review

This Court's review of a decision of the Merit Employee Relations Board is limited to a determination of whether there is sufficient substantial evidence in the

record to support the Board's findings, and that such findings are free from legal error.[4] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[5] It has been defined as "more than a scintilla and less than a preponderance".[6] An appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[7]

A review of the instant record does not result in the conclusion that the Board's decision was arbitrary or unreasonable.

First, there is no standard or restriction, judicially or legislatively imposed, which specifically limits the extent of the relief that the MERB can grant to remedy violations of the Merit Employee Relations Act. Indeed, decisions of the MERB should be given deference

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[4] *Employment Ins. Appeals Bd. of the Dep't of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

[5] *Oceanport Indus. v. Wilm. Stevedores*, 636 A.2d 892, 899 (Del. 1994).

[6] *City of Wilmington v. Clark*, 1991 WL 53441 (Del. Super. 1991).

[7] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

unless the relief granted is unreasonable.[8] That is not the case here.

To be specific, the testimony presented by Ms. Durkee and Warden Phelps provided substantial evidence in support of the MERB's decision. They testified that for the past five years, it has been the practice of the Department of Correction to consider equivalent experience and that Local 247 had not objected to that practice. Moreover, Merit Rule 6.2. only requires that all job postings contain all pertinent information about the position being filled. It does not in any way proscribe the use of equivalent experience in determining whether an applicant is qualified for a particular position.

Second, because the issue of whether Mr. Brennan could continue to occupy the CSS until the position was re-posted and filled anew, was not presented or otherwise raised before the MERB, it will not be heard for the first time before this Court. However, even if the issue

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[8] *Avallone v. Dept. of Health and Soc. Services* 2011 WL 4391842 (Del. Super. Aug.17, 2011).

were to be considered, the Board's decision would stand.

Simply put, there is no harm to or prejudice that might arise from that action. It has not been argued that Mr. Brennan has not performed the duties of the position or has done so in a manner prejudicial to the effective administration of the Department of Correction. In addition, the MERB specifically stated that the experience that Mr. Brennan gained while occupying the position could not be considered in determining whether he was eligible for the position after the remand from the MERB. Given this set of circumstances, the Board's decision is neither unreasonable or arbitrary, and is supported by substantial evidence in the record. Therefore, there is no reason for disturbing the Board's decision.

CONCLUSION

For the foregoing reasons, the Court concludes that the decision of the Merit Employee Relations Board must be, and hereby is, **affirmed**.

IT IS SO ORDERED.

TOLIVER, JUDGE

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CIVIL FORM COUNTER
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