

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

**IN THE MATTER OF
KARL D. HAZZARD, /**
Grievant,

v.

**DEPARTMENT OF CORRECTION,
Agency.**

DOCKET NO. 98-10-132 /

**DECISION ON MOTION TO
DISMISS**

BACKGROUND

This grievance appeal is filed with the Merit Employee Relations Board ("MERB" or "Board") on October 29, 1997 by Correctional Officer Karl D. Hazzard and arises out of his employment with the Department of Correction ("DOC" or "Department"). The appeal concerns Officer Hazzard's claim that he was improperly discriminated against in his unsuccessful attempt to be promoted to the position of Correctional Lieutenant. Officer Hazzard asserts that his non-selection for the position violates Merit Rule 13.0100 and Merit Rule 19.0100.

By motion dated May 26, 1998, the Department of Correction seeks to have the Board dismiss Officer Hazzard's appeal on the basis that it is a discrimination grievance and therefore a matter covered by the Union collective bargaining agreement and beyond the jurisdiction of the Board.

Officer Hazzard filed a written response to the motion to dismiss on June 17, 1998 and asserts that consideration of a grievance alleging discrimination is within the jurisdiction of the Board to hear

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and reiterating his claim that the Warden at the Delaware Correctional Center ("DCC") has a personal dislike for him, and the Grievant does not feel that he will be given a promotion while at DCC even if the panel members thought he was the best candidate due to the Warden's negative opinion of the Grievant.

DISCUSSION

The Department contends that Officer Hazzard's complaint is a discrimination grievance and that discrimination is a matter expressly covered in whole or in part by Article 14 of the collective bargaining agreement between the Delaware Correctional Officers Association ("DCOA") and the Department. The Department therefore contends that the appeal is outside of the jurisdiction of the Board to address under 29 *Del. C.* § 5938(d).

Merit Rule No. 1.0100 provides that in the event a subject is covered in whole or in part by a collective bargaining agreement the Merit Rules do not apply. *See also* 29 *Del. C.* § 5938(d).

Merit Rule No. 20.0210 provides that an employee who is in a bargaining unit covered by a collective bargaining agreement shall process any grievance through the grievance procedure outlined in the collective bargaining agreement. However, if the subject of the grievance is non-negotiable pursuant to 29 *Del. C.* §5938, it shall be processed in accordance with [Merit Rules] 20.0000 and 21.0000.

Under the existing statutory scheme, the Merit Rules take precedence in certain matters (including promotions), and the collective bargaining agreements may govern certain other matters (including some grievances).

For a grievant to establish a violation of Merit Rule No. 13.0100 concerning promotions, he or she must show:

1. the person who has been promoted does not meet the minimum qualifications;
2. there has been a violation of Merit Rule No. 19.0100 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 19.0100 provides:

Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline or any other aspect of personnel administration because of political or religious opinions or affiliations or because of race, national origin, age, sex, physical or mental disability, or other non-merit factors will be prohibited.

The DOC position is that the Board has no jurisdiction over this grievance because, although Officer Hazzard alleges a violation of Merit Rule No. 13.0100 concerning promotions, he does not allege that the persons promoted did not meet the minimum qualifications nor, according to the Department, does he allege a gross abuse of discretion. The Department asserts that his claim is therefore one of discrimination which is a subject covered by and specifically prohibited by the Delaware Correctional Officer's Agreement Article 14. The Department asserts that since it is a matter covered by the Agreement it is thus not governed by the Merit Rules and not properly before the Board.

This argument was considered and rejected by the Fourth Step Grievance Hearing Officer as too narrow a construction of Merit Rule No. 1.0100. The Hearing Officer also observed that to remove discrimination from the criteria which may be grieved within the Merit System would also

foreclose this grievant from a forum to consider his grievance since promotions outside of the bargaining unit (from Correctional Officer to Correctional Lieutenant) would not be covered by the Collective Bargaining Agreement.

It is well recognized that the Board has jurisdiction to hear grievances filed by an employee who is covered by a collective bargaining agreement only in certain limited instances. *Morris v. Department of Corrections*, Del. Super., 1998 WL 283478, Ridgely, P. J. (March 31, 1998) (Order). Promotions are one of those matters covered by the Merit Rules and where the Merit Rules control over a Collective Bargaining Agreement. *State Personnel Commission v. Howard*, Del. Supr., 420 A.2d 139 (1980).

The Board concludes that the present appeal is controlled by the provisions of § 5938(c) which provides that Merit Rules adopted or amended by the Board under 24 *Del. C.* § 5915 through § 5921 shall apply to any employee in the classified service represented by an exclusive bargaining agreement or covered by a collective bargaining agreement under Chapter 13 of Title 19.

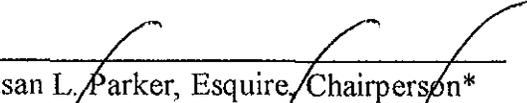
Merit Rule No. 13.0100 is adopted under § 5918 which addresses promotions. The Rule specifies the situations under which a grievance may be brought concerning the subject matter of promotions. Therefore, the Board has jurisdiction to hear and consider grievances regarding promotions including those which are based upon allegations of unlawful discrimination which happens also to be prohibited by Merit Rule No. 19.0100.

ORDER

This matter, being a promotional grievance, is within the jurisdiction of the Board, and therefore, by unanimous vote of the undersigned Board Members, the Motion to Dismiss is denied.

The matter will be set for hearing on the merits.

BY ORDER OF THE BOARD this 18th day of February, 1998.



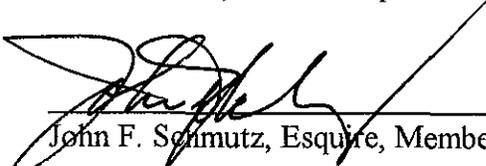
Susan L. Parker, Esquire, Chairperson*



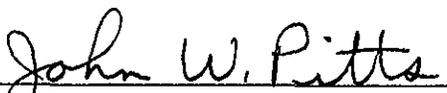
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Dallas Green, Member



John F. Schmutz, Esquire, Member



John W. Pitts, Member

*Recused - conflict with pending litigation against DOC within her law firm.

Mailing Date: Feb. 22, 1998


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