

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

**IN THE MATTER OF
DANIEL J. WIDENER,**

Grievant,

v.

**STATE OF DELAWARE
DEPARTMENT OF CORRECTIONS**

Agency.

DOCKET NO. 99-08-188

DECISION AND ORDER

BEFORE Brenda C. Phillips, Chairperson, Dallas Green, and John F. Schmutz, Members,
constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES

For the Grievant:

Daniel J. Widener, *Pro se*
Patricia Bailey, Representative
AFSCME
296 Churchman's Road
New Castle, DE 19720-9530

For the Agency:

Ilona M. Kirshon, Esquire
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

PROCEDURAL HISTORY

This matter is before the Merit Employee Relations Board ("MERB" or "Board") on appeal from a fourth step grievance decision adverse to the Grievant under Merit Rule No. 21.0120. The Appellant contends that the Department of Corrections ("DOC") violated the Merit Rules by improperly pre-selecting an individual to fill a vacant position of Training Administrator I ("TA I").

COPY

The grievance appeal form was filed by Timothy E. Radcliffe as President of Local 247, the exclusive bargaining representative for the Grievant and certain other employees of DOC. Radcliffe filed the appeal on behalf of two union members, Linda Valentino and Daniel Widener, both of whom unsuccessfully sought the position of TA I. Because there were separate individuals involved the Board assigned separate docket numbers to each individual's grievance appeal and the appeals were administratively consolidated for hearing because of the apparent similarity of the grievances.

On January 6, 2000, the time set for the hearing of the consolidated grievances, Linda Valentino appeared with her attorney and requested the Board to separate the grievances for hearing purposes. The other Appellant, Daniel Widener, present with his union representative, agreed with Ms. Valentino's request for separate hearings. The DOC opposed separation of the hearings and contended that the administrative equivalent of judicial economy would be furthered by a single proceeding addressing the issue of whether or not the DOC had improperly pre-selected the successful applicant for the TA I position for which each Grievant had applied. After considering argument from the parties, the Board, by unanimous vote, agreed to conduct separate hearings for each Grievant with the appeals to be heard in order of the assigned docket numbers.

The evidentiary hearing concerning Valentino was scheduled for the next available date on the Board calendar and was conducted on April 6, 2000. The Board's determination of that appeal is the subject of a separate written decision and order dated May 24, 2000.

The grievance appeal of Mr. Widener was the subject of a hearing before the Board concerning a Motion filed on July 12, 2000, by the DOC to quash a *subpoena duces tecum* requested by the Grievant's union representative. The Board's resolution of that matter is the subject of a separate decision and order of the Board dated August 3, 2000. This is the Board's Decision and

Order on the grievance appeal of Daniel J. Widener based on the evidence presented at the evidentiary hearing which began on November 16, 2000 and was continued to January 4, 2001. When the Board convened on January 4, 2001 to hear the continuation of this matter the Board members present were Robert Burns, Vice Chairman, John F. Schmutz and Dallas Green constituting a quorum of the Board pursuant to 29 Del C. §5908(a). The Board Chairperson, Brenda Phillips, who heard the evidentiary presentation on November 16, 2000, was not available for the hearing on January 4, 2001. Prior to the presentation of evidence, the Grievant, through his union representative, requested a further continuance of his hearing so that the members, including the Chairperson, who were present for the November 16, 2000 hearing could hear the evidence presented. After discussion, the Board voted unanimously to grant Mr. Widener's further continuance request. The matter was rescheduled for April 5, 2001. A quorum of the Board was not able to meet on April 5 and the hearing was rescheduled to May 17, 2001. The hearing was not held on May 17 because of the hospitalization of Board member Dallas Green and the case was continued to the next available date. The Board convened on September 20, to conclude the evidentiary hearing. The quorum of the Board present on September 20, 2001 consisted of the Chairperson, Brenda C. Phillips, and Board members Dallas Green and John F. Schmutz and Deputy Attorney General Michael J. Rich advised the Board..

SUMMARY OF EVIDENCE

Alan Machtinger, after being sworn, testified that he is the Director of Human Resources and Development for the DOC, a position he has held since 1994. In that capacity he is also the supervisor of Anthony Powell, the Director of the Employee Development Center ("AEDC") (formerly known as the Training Academy). Mr. Machtinger stated that while he does on occasion

communicate with the Director of the EDC when instructors are hired he did not talk to Tony Powell about filling the TA I position concerning which Mr. Widener had filed this grievance. According to Mr. Machtinger, the EDC requests a list of eligible applicants (Cert List) from the Human Resources Department without his having to review or approve the list. He was aware of the vacancy created when David Hall left the TA I position but did not recall any conversations with Mr. Powell concerning the vacancy prior to the position being filled by Ronald Sauls. According to Mr. Machtinger, it was nearly automatic for the EDC to request a Cert List to fill a vacant position and the matter did not necessarily have to cross his desk. Mr. Machtinger stated that he did not oversee the selection of candidates for EDC positions and the last position he directly oversaw was the hiring of his secretary.

Alan Machtinger also explained that a Cert List is requested by the section administrator with the vacancy from the recruitment section which is headed by Ray Lawler. The vacant position is posted and a Cert List is prepared. According to Mr. Machtinger, not everyone on a Cert List must be interviewed. He testified that based upon a recent legislative change, at least five individuals must be interviewed. The hiring manager selects who gets interviewed and, for the TA I position for which Mr. Widener filed the grievance, the hiring manager was Richard Figurelle. Mr. Machtinger testified that Richard Figurelle had indicated to him the individual the interview panel had selected and, according to witness Machtinger, he concurred in the selection of Ronald Sauls to fill the vacant TA I position.

Mr. Machtinger reviewed and discussed four Cert Lists for EDC positions. List 1 (State's Exhibit No. 1) with an issue date of 04/17/97 was for the TA I position at the EDC where David Hall was the successful applicant. There were 15 names on the list; 11 people were interviewed and one

of the individuals on the list who was not hired was an EDC employee. Daniel Widener was one of the 11 interviewed. David Hall was the successful applicant and, at the time he was an employee of the Courts and Transportation section of the DOC.

List 2 (State's Exhibit No. 2) was for a Training Administrator II ("TA II") position. There were 18 individuals on the list and all 18 were interviewed. One of those interviewed was an EDC employee. Daniel Widener was interviewed for the position and Richard Figurelle who, at the time was a probation and parole section supervisor and not an EDC employee, was selected for the position. Figurelle had been an adjunct instructor at the EDC. According to Mr. Machtinger, adjunct instructors come to the EDC from a variety of other sections including Probation and Parole and the Correctional Officers series.

List No. 3 (State's Exhibit No. 3 and 3A) was identified as the Cert List for the TA I position concerning the present grievance. There were 15 individuals on the Cert List; according to Machtinger, at least 8 were interviewed; three were EDC employees all of whom were interviewed. The successful candidate was Ronald Sauls who was one of the three EDC employees.

List No. 4 (State's Exhibit No. 4) was a Cert list for a TA II position posted after Mr. Widener's grievance. Seventeen individuals were on the list; 9 were interviewed; there were 2 EDC employees on the list and the successful applicant was not an EDC employee. Mr. Widener applied for this position but was not selected for interview.

Janet Durkee, being sworn, testified that she is employed as a Human Resources III specialist with the DOC. Because of her position in the Human Resources department she was occasionally called upon to sit in on applicant selection interview panels. Ms. Durkee did not recall sitting in on the interview for the position filled by David Hall but stated that she was a member of the interview

panel for the TA I position ultimately awarded to Ronald Sauls. She did not recall who had asked her to sit on the interview panel. Ms. Durkee stated she was not familiar with the process for ranking individuals on the Cert List noting that was the responsibility of the Recruitment and Selection Section.

According to Ms. Durkee, the interview panel discusses the responsibilities of the position and what skills would be needed. Her first choice for the position was Ronald Sauls because she believed he had good demeanor and would better meet the needs of the growing training department. This was particularly necessary with the addition of four new training officers and someone with good management skills was needed. Ms. Durkee related that all of the interviewed candidates were discussed and she recalled there were about 8 of them but that there were three top applicants. Ms. Durkee did not recall there being any discussion of who would get the position prior to the interviews. After the interviews there was discussion of the top 3 candidates and Ms. Durkee did not recall who had led the discussion but thought it might have been Tony Powell. She recounted that she knew several of the applicants from having worked in the Human Resources section. She also noted that her husband was an employee in the Probation and Parole Section. Witness Durkee testified that the field was narrowed to three candidates, and that Ronald Sauls was selected because of his interpersonal skills which were the best of the three finalists. He had a reputation for being able to get along with people and he was energetic and a solid candidate with the type of personality to be a good leader. She stated that she recalled there was some concern about Valentino's interpersonal skills. She recalled that the information about personality and interpersonal skills came from Tony Powell and Rick Figurelle. Also her later review of the personnel files of the top three candidates showed Ronald Sauls had better interpersonal skills and, according to her recollection, the

review of the personnel file of Linda Valentino showed she had some problem with interpersonal skills and absenteeism. Ms. Durkee stated that she and Tony Powell had discussed Ms. Valentino's interpersonal skills and that because the decision was so close between Linda Valentino and Ron Sauls she reviewed the personnel files of each. She stated that the EDC was growing fast and there were several positions to be filled. According to Ms. Durkee, Ron Sauls was hired before all the positions were filled and the selection process for the TA I position considered that the successful applicant would need to be a leader. She recalled that she had seen Sauls before the interview in his work clothes. For the interview he had a suit on and he stated that he would have a team oriented management style if selected for the position. He had a good personality, good background, and good leadership skills with a good team approach.

As to Mr. Widener's interview, Ms. Durkee noted he had very good qualifications including instructor status in the military but she recalled that he seemed not to have done his homework for the interview for the TA I position. She also recalled that he did not seem aware of the growth and changes going on at EDC. She stated that for this TA I position they needed someone who could pick up the ball and run with it. Ms. Durkee explained that she is in the Human Resources Department and the EDC comes under that Department so she was aware of what was going on at EDC. At the time, Probation and Parole was adding academy style training and EDC training experience was a factor which tended to make a candidate more desirable. Ms. Durkee told the Board that no one sought to improperly influence her decision as a member of the panel and that a part of her role on the hearing panel as a Human Relations specialist was to make sure that nothing like that occurred.

Timothy Radcliffe being sworn testified that he was presently employed as a Captain with the Emergency Response Team with the DOC. He filed the grievance for both Valentino and Widener in his capacity as president of Union Local 247 of AFSCME. He recounted that he had also testified in the previous MERB hearing concerning the grievance of Linda Valentino. He stated that the basis of the grievances filed by Valentino and Widener was premised on the systematic pre-selection for positions. Mr. Radcliffe recalled hearing rumors about who was going to get different positions within the DOC and the rumors came true. He acknowledged that he did not hear any such rumors from management personnel and stated that he had told Linda Valentino that someone from EDC would get the TA I position. He denied telling her that Ron Sauls was going to get the job. He stated that it was common at the Department for rumors to fly and it was common for people to come to their union representative to complain and it was common to speculate about who will be hired. He stated he did not speak to anyone on the interview panel for the TA I position and did not have anything to do with the Cert List for the position. Mr. Radcliffe also stated that he had told Mr. Widener, who was a member of the union local, that someone from the academy (EDC) was going to get the TA I position. Mr. Radcliffe stated that it was a rumor. He acknowledged that working at the EDC gives an applicant skills to fill a training position. Mr. Radcliffe further testified that he had heard that Richard Figurelle was to get a Training Administrator position because the Training Academy was undergoing an increase in training for Probation and Parole. Mr. Radcliffe testified that he concluded that Figurelle would get the position from his knowledge of the needs of the academy. He also stated that it was common knowledge as to the names on a Cert List. It was not official but perhaps 90 percent accurate.

Mr. Radcliffe expressly denied telling Linda Valentino that if called as a witness in her grievance hearing that he would have a selective memory. He recounted that there were approximately four instances where he had heard rumors about union members getting positions in the Department. He recalled filing the grievance for Linda Valentino because she said that she was told that the successful applicant had more training than she did and that she was the one who had trained Ron Sauls, the successful applicant. He also recalled a conversation with Louise Layton when she had asked him what her chances were for the TA I position and he recalled telling her that he thought she was qualified but that she had backed herself into a corner with her position as range-master.

Linda Valentino, being sworn testified that she has been an employee of the DOC for over 17½ years and is presently a Trainer Educator III at the Employee Development Center (EDC). Ms. Valentino applied to fill the vacant position of TA I at the EDC. She testified that she was ranked as one of the top three applicants. She stated that she was told by Richard Figurelle that it was between Valentino and Sauls and that he liked Sauls more as Sauls was a fun kind of guy and that the selection was made on Saul's personality. Valentino testified that she had no disciplinary actions taken against her and that she is a specialist in interpersonal communications. She identified copies of her performance reviews for 1997 and 1998 and testified that there were no deficiencies and no unsatisfactory notations and no indications of problems with her interpersonal skills and she did not know where Janet Durkee found such information in her personnel file. Ms. Valentino recounted several incidents where she stated that she had heard that an individual was going to get a job and that individual had, in fact, been hired. Valentino stated her belief that someone from EDC was going to be hired to fill the TA I position. She acknowledged that EDC training gives someone an advantage

in applying for an EDC position and that people with training background are more desirable when filling EDC positions.

Louise Layton testified¹ that, as of April 6, 2000, she was employed by the DOC and was so employed for approximately 13 years with 8 years experience in training. Along with Linda Valentino and Ronald Sauls, she applied for the TA I position for which Sauls was ultimately selected. Layton testified that she was present during a conversation between Valentino and Radcliffe where he had said that if called as a witness in Valentino's grievance he would have "selective memory". Layton recounted her belief that improper pre-selection exists and that it is known in advance who will be selected to fill positions. She stated that it was known in advance that David Hall was going to be selected for the position of Emergency Response Team Commander and, when Richard Figurelle left his position as TA II at EDC, he had stated that he had the new position locked in but that they had to go through the formality of conducting interviews. Layton recounted that she had heard that an interview panel had selected a person for a position and had to remove him and replace him with another person. Layton could not specify where the information had come from. According to Layton she did not grieve her non-selection for the TA I position but she believed there had been pre-selection for the position.

Willis Anthony Powell was called as the Appellant's witness. However, the State also intended to call Mr. Powell as a witness so all direct and cross examination by both parties was conducted during Appellant's case. Mr. Powell, being sworn, testified that he is employed by the

¹The Appellant subpoenaed the appearance of Louise Layton to give testimony on his behalf. Ms. Layton did not appear and in lieu of an application for relief, the parties stipulated that Ms. Layton's sworn testimony given at the grievance hearing in the matter of the appeal of Linda Valentino on April 6, 2000 would be entered into evidence as Appellant's Exhibit No. 2 and read verbatim into the record by counsel for the Board.

DOC as a training administrator. He has been employed by the Department for twenty-four years of which thirteen have been in his present position. He reports to Alan Machtinger who is the person who gave him the cert list of candidates for the TA I position after the Department had received the written applications and had reduced the candidate pool to the persons to be interviewed. Even though he supervises Rick Figurelle and was a member of the interview panel for the TA I position which is being grieved, Rick Figurelle was the panel chair and it was he who reviewed the cert list and determined which of the candidates would be interviewed by the panel. The third panel member was Janet Durkee. Mr. Powell testified that he had no conversation at any time with Mr. Machtinger or any of the panel members relating to the candidates to be interviewed prior to the actual interviews. He and Mr. Machtinger did discuss the desirable qualifications for the successful candidate and outlined the goals for the candidate review process.

Mr. Powell denied that personnel employed in the EDC were favored over non-EDC personnel. He noted that Mr. Figurelle had come from Parole and Probation as opposed to EDC. Mr. Powell testified that in his position he engages in "employee development" and, as such, encourages trainers to apply for positions like TA I. He encourages departmental employees to apply for positions for which they are qualified irrespective of the division in which they work and did not favor EDC employees over any other departmental employees for this position.

Mr. Powell described the process followed by the panel for each interview. The three panel members agree in advance on the specific questions to be asked of each interviewee, the order in which the questions will be asked and the specific questions that will be asked by each panel member. The order of questions and who asks the questions is the same for each interviewee. After all of the interviews are completed, the three panel members privately rank the top three candidates after which

the individual lists are compared and the merits of the top three picks of each panel member are discussed among the panel members. In this case, all three panel members, Powell, Durkee, and Figurelle, had ranked Mr. Sauls as their first choice. As the panel chair, Figurelle had the final say as to who the successful candidate would be, subject to approval by Alan Machtinger.

State's Exhibits No. 5 and 6, Mr. Powell's interview notes for Mr. Widener and Mr. Sauls respectively, were admitted into evidence. Mr. Powell stated that his notes reflected his conclusion that Mr. Widener did not have an understanding of the trainer's role and did not demonstrate that he had adequately prepared for the interview based on the quality of his answers. Mr. Sauls had an outstanding interview and all three panelists agreed that Mr. Widener "interviewed horribly" and none deemed him qualified to be considered in the final cut.

Daniel J. Widener, being sworn, testified that he is employed by the DOC as a Senior Correctional Counselor and has served in that grade for five years, prior to which he was a Correctional Counselor. He was hired by the Department in June 1995 after he completed his military career. He had applied for the TA I position in 1997 and for the TA II position in 1998. He was interviewed both times but not selected either time. At the time he applied for the TA I position, which is the subject of this grievance, and prior to the panel interview, he heard that the position was going to be given to an instructor at the academy who he later (but prior to the interview) found out was Mr. Sauls. He testified that whenever a position was posted, it was generally known by departmental personnel who would get the job. He conceded that rumors and speculation surrounded all job postings.

When questioned about Mr. Powell's testimony concerning his interview responses, he did not dispute Mr. Powell's comments but believed his responses to have been more detailed than Mr.

Powell remembered. He believed that the panel failed to give sufficient credit to his extensive military experience as a trainer and did not give him an equal opportunity to obtain the position.

Mr. Widener attempted to introduce a statistical evaluation of the history of promotions and selections by the DOC based on his personal review of information provided to the union to which the State objected. The Chairperson permitted the State to *voire dire* Mr. Widener to determine the relevance and reliability of the proposed testimony. It was determined that the proposed testimony was not relevant and the State's objection was sustained.

Richard Figurelle, being sworn, testified that he is an operations administrator with Parole and Probation in New Castle County. Prior to that he had served as a TA II and had been an adjunct instructor for ten years. When he was promoted to the TA II position, the TA I position was open. Mr. Powell, as his supervisor, placed him on the interview panel and asked that he chair the panel based on his training and experience. His description of the process followed by the panel in reviewing the applications and conducting the interview mirrored the testimony given by Mr. Powell. He did note that the candidates' experience was important to the panel and working in the EDC would be helpful to a candidate.

He testified that Mr. Sauls' answers were thorough and specific during the interview and that he had a good grasp of the issues. Ms. Valentino did fairly well but was somewhat more tentative than Mr. Sauls. Ms. Layton did well but not as well as either Sauls or Valentino. Mr. Sauls was the first choice of all three panel members. Mr. Widener did not perform as well as the top three in his interview. He was good on some training issues but in general lacked the specificity that the top three candidates showed in their interviews. His military training was considered but did not override the deficiencies in his interview.

Mr. Figurelle acknowledged that he encouraged departmental employees to apply for the position. He said that rumors abound with any position and, in this case, there was a rumor that Ms. Valentino would get the job. He encouraged both Sauls and Valentino to apply. There was no effort by Mr. Powell or anyone to suggest that Mr. Sauls get the job or that it go to a person working in the EDC.

Ronald Sauls, being sworn, testified that he has been employed by the DOC for eighteen years. He has held the positions of correctional officer, staff training relief officer, field instructor, and, for the last two years, the position of TA I. He was the successful candidate for the position which is being grieved.

He first found out about the position when he saw the posting for the position. Mr. Figurelle, one of his supervisors, recommended that he apply for the position even though his focus was on returning to one of the facilities as a captain. He also talked to Louise Layton and they both decided to apply for the position. He did not talk to any of the panel members before or after the interview and only found out that he was the successful candidate through the formal notification process a couple of weeks after the interview. There was no cross examination. The Appellant conceded Mr. Sauls' eligibility for the position.

APPLICABLE MERIT RULE

MERIT RULE 13.0100 PROMOTION

Vacancies shall be filled by promotion wherever practical and in the best interest of the classified service.

Whenever a position is to be filled by promotion, the candidate shall meet the minimum requirements of the class specification. Consideration shall be given to qualifications, performance record, seniority, conduct and, where applicable, the results of competitive examinations.

No grievance may be maintained concerning a promotion except where:

- (1) the person who has been promoted does not meet the minimum qualifications;
- (2) there has been a violation of Merit Rule 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.

FINDINGS AND DISCUSSION

The Board again finds no compelling evidence of the improper pre-selection of Ronald Sauls for the position of TA I. Similarly, there is no compelling evidence to support an allegation of gross abuse of discretion in the filling of this position. There is no contention that the applicant selected for the position was not qualified for the position. Similarly, there is no allegation of improper discrimination in violation of Merit Rule No. 19.0100. Therefore, to establish a violation of Merit Rule No. 13.0100 the Appellant must establish by a preponderance of the evidence that there was a gross abuse of discretion in hiring Ronald Sauls. This is a heavy burden and Daniel Widener has not carried it.

The members of the interview panel were credible and testified convincingly that the process used to rank Mr. Sauls as the first choice candidate was a fair and reasoned consideration and that the final selection was based on merit. The decision between the two top ranking candidates was clearly a difficult decision for the panel.

The testimony established that the panel had a legitimate, credible business reason for selecting Ron Sauls over both Linda Valentino and the grievant. The grievant, who was not among the top three candidates, has not presented any convincing evidence to establish that the panel members were improperly influenced in their selection or that there was improper pre-selection of

Ronald Sauls for this position. The Board members hearing this case are convinced and find that the panel selection was fair and objective.

CONCLUSION

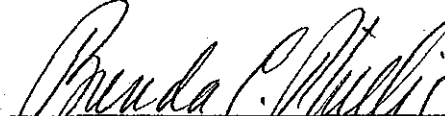
The Appellant has failed to sustain his burden to establish by a preponderance of the evidence that there was a violation of the Merit Rules by the improper pre-selection of the successful applicant for the position of T A I.

ORDER

The Board, by unanimous decision of the undersigned members, for the reasons stated above, denies the grievance, upholds the promotion action of the Department of Correction, and dismisses the appeal.

IT IS SO ORDERED.


BY ORDER OF THE BOARD this 18th day of October, 2001.



Brenda Phillips, Chairperson



Dallas Green, Member



John F. Schmutz, Member

APPEAL RIGHTS

29 Del. C. § 5949 (b) provides:

If the Board upholds the decision of the appointing authority, the employee shall have a right of appeal to the Superior Court on the question of whether the appointing authority acted in accordance with law. The burden of proof of any such appeal to the Board or Superior Court is on the employee. If the Board finds against the appointing authority the appointing authority shall have a right of appeal to the Superior Court on the question of whether the appointing authority acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the appointing authority. All appeals to the Superior Court shall be by the filing of a notice of appeal with the court within 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: 10/22/01 

Distribution:

Original: File

Copies: Grievant

Patricia Bailey

Agency's Representative

Merit Employee Relations Board