

there was no connection with the grievant's voluntary demotion in 1996. The appellant, pursuant to Merit Rule No. 21.0230, was designated as the moving party. This is the Board's Decision and Order based upon the evidence presented at the hearing.

SUMMARY OF THE EVIDENCE

The exhibits introduced into evidence were made part of the record and considered by the Board in making its decision. The Board heard sworn testimony from appellant Eldora Tillery, Rafael Williams, Elizabeth Neal, Pamela Minor, Faith Levy, and Alan Machtinger.

Eldora Tillery testified as the first witness in the hearing. Tillery has worked with the Department since 1982. Since 1996, she has been employed as a Social Services Specialist. Prior to 1996, she worked as a Classification Officer I. Appellant was promoted to that position in March, 1987 after interviewing for the job.

Prior to 1996, appellant was disciplined due to mistakes and problems in her performance as a Classification Officer I. Appellant stated that, when initially promoted to the Unit, there were four other staff members in the unit, including two Classification Counselors and a Classification Officer II. Appellant testified that the unit was downsized in 1991 and she was the only remaining staff person. As the unit was downsized, the work volume remained the same and the prison population increased. In February, 1996, appellant under duress accepted a voluntary demotion from her Classification Officer I position. The prison kept adding more programs and special assignments for her and she had difficulty keeping up with the job responsibilities. Tillery received a write up for failing to properly complete a prisoner release form. Deputy Warden Rafael Williams began meeting with appellant in November, 1995 about her performance in the classification department. Appellant asked for additional staff but Williams indicated that there was sufficient staff. Appellant was essentially doing the work of a

Classification Officer I and a Classification Officer II. Tillery also performed the duties of a Transfer Officer when the unit was downsized in 1991. In 1987, there was an actual position for Transfer Officer but the position was eventually eliminated.

At the time of the voluntary demotion, appellant did not believe that Deputy Warden Williams understood the demands of her job. Appellant had filed a grievance for additional staff. There were meetings with the Deputy Warden and Warden Sherese Brewington-Carr. After she did not get the help needed, appellant agreed to accept the voluntary demotion.

In 1994, Warden Elizabeth Neal had discussions with appellant about her job performance. Neal did not impose any discipline. At these meetings, Tillery was always told she was not keeping up with the work volume. Neal wanted another person to manage the unit. On November 28, 1994, Neal intended to move the appellant to another position. She was not going to demote her. Neal had given appellant a letter stating that she was not performing in her job and would be reassigned. Neal did not believe that Tillery was performing her job as expected. However, on that day, eight inmates escaped from Gander Hill and Neal never took the action of reassigning appellant.

In 2000, there were new duties for the Classification Officer I position that was posted. The position was part of a new diagnostic unit that would include a Classification Officer I position, a Classification Officer II position, a counselor, and a secretary. This was the staffing in place when appellant was first promoted to Classification Officer I in 1987.

Elizabeth Neal, who now works at the Plummer Center diagnostic center as the Director of Classifications, was on the interview panel. The other two panelists were Pam Minor and Faith Levy. Appellant introduced the interview scoring sheets from the three panelists. Question #9 asked the candidates to "[I]ist three Level V facilities and one Level IV facility and explain

the custody and security levels at each.” Appellant received a score of “1” from each of the three panelists on this question. Appellant believed that she gave more information than was on the three panelists’ answer sheets. Question #10 asked the candidates the following: “In accordance with the Delaware Code, who has veto power? Describe in specific terms how the process works?” Appellant received a “1” on this question. Appellant did provide an accurate response to this question and did explain the process. The three answer sheets from the panelists did not accurately reflect her answer to Question #10. Appellant did give what is labeled answer “b” for Question #10, namely she correctly identified the commissioner/designee and wardens as having veto power over all committee and board decisions. Appellant contended she should have received 3 points for this answer. Question #2 asked for the classification committees and/or boards on which the candidate had participated and the length of service. Appellant has served on the MDT and ICC boards, and observed the IRCB and IBCC.

During the interviews, each panelist took turns asking the questions. The panel did not tell appellant how candidates would be scored. Appellant had to write a narrative as part of the interview. About a month after the interview, appellant received notification that she did not get the job. Appellant then filed a grievance.

On cross-examination, appellant stated that she agreed to the voluntary demotion in 1996 under duress. She was afraid that she would be fired if she did not take the demotion. Appellant did file a grievance which she lost. Even though she took the voluntary demotion, appellant was able to maintain her salary but not her paygrade. Rafael Williams was the acting warden at the time of the voluntary demotion. Elizabeth Neal had left Gander Hill in February, 1995.

Appellant’s problems with Williams started in 1995. In 1996, she was disciplined for making an error. She also received counseling to improve her performance. Appellant needed more staff in

the position and explained that need to Williams. Appellant stated that Neal did not participate in any disciplinary action.

On redirect, appellant explained that prior to the demotion, she was counseled by both Williams and Neal about her job performance. In response to questions from the Board, appellant indicated that the union represented her during the course of events in 1996. There were meetings held to try to obtain more help for appellant in the unit. Appellant was threatened with termination. The counseling sessions involved a series of errors committed by the appellant.

The Department called Rafael Williams as its first witness. Williams is the Warden at Gander Hill. Williams has known the appellant for approximately eighteen or nineteen years. In 1996, appellant accepted a voluntary demotion from her position as Classification Officer I. At the time of the demotion, Sherese Brewington-Carr was the Warden and Williams was the Deputy Warden at Gander Hill. Appellant's immediate supervisor was Frances Cockroft. Fran Cockroft reported directly to Williams. They had talked to appellant about her performance. Williams also talked to Stan Taylor about the appellant's performance. Appellant was assigned for extra training but after about a year, the appellant's performance did not improve. Williams stated that appellant demonstrated bad performance in her classification, transfer, and paperwork duties. At the time of the voluntary demotion, Williams stated that appellant was not performing competently and he was fearful of even moving her down to the position of Inmate Class Counselor. Appellant now works as a Social Services Counselor. In a February 7, 1996 memorandum, appellant notified Williams of her acceptance of the voluntary demotion. Williams requested that appellant keep her salary as part of the voluntary demotion. Elizabeth Neal left Gander Hill in February, 1995 and was not present in 1996 when appellant accepted her

voluntary demotion. Williams explained that only Warden Brewington-Carr, Fran Cockroft, and himself were involved in the voluntary demotion.

On cross-examination, Williams stated that Fran Cockroft reported to him. Sheresse Brewington-Carr became the warden in April or May of 1995. Neal did not have any meetings with appellant about her performance. Williams did have discussions with Neal about appellant's performance as a Classification Officer I and they did discuss removing Tillery from the position. Howard Young, the head of special training, did provide additional training for appellant. Appellant was doing "okay" in her special training sessions. Overall, Williams explained that the prison was not satisfied with appellant's work.

Williams has worked at Gander Hill for nineteen years. At one time, there was the job of Transfer Officer in the facility. The job was eventually eliminated and some of the duties were assigned to the Classification Officer position and to other positions. In 1987, Williams believed there was a Classification Counselor in the unit. In 1995, Williams did not offer Tillery any other position. Williams intended to terminate Tillery if she did not accept the voluntary demotion.

On redirect, Williams stated that appellant had performance problems for a long period prior to 1996. Williams decided to take action in 1996. He did not recall disciplinary action prior to 1996. Appellant was replaced by Ms. Bryant who was able to perform the position of Classification Officer. In response to Board questions, Williams stated that he did meet with Neal about Tillery's competence. As a result of that meeting, Williams instructed appellant's supervisor to monitor appellant more closely. Williams did not recall the unit ever being downsized. Williams did recall that Tom Carroll was a Classification Officer in the unit who at one time worked with Tillery. On recross, Williams stated that he did discuss Tillery's poor

job performance with Neal. They did not discuss actually removing Tillery from her job.

Elizabeth Neal testified as the next Department witness. Neal is currently the Director of Correctional Treatment Services for the State. She has held this position since June, 1995. Neal has previously participated on interview panels. Neal's primary responsibility is to hire staff for the newly created reception and diagnostic centers. The new position of Inmate Classification Officer I differs from the Classification Officer I position previously held by appellant. The new position requires more intense diagnostic work, more assessment of offenders, and use of the new objective assessment method for classification.

The new position was posted and a cert list was generated. The interview panel for the Classification Officer I position received a cert list of thirteen candidates who were minimally qualified. The other panelists were Faith Levy and Pam Minor. Faith Levy reports directly to Pam Minor for day-to-day operations. The panel interviewed about five persons from the cert list. About a week before the interviews, Neal drafted a set of questions based on established documents, policies, and procedures available to anyone in the Department. No other panelist participated in drafting the questions. The panelists took turns asking the questions to the candidates. The panelists compared their scores at the end of the interviews. They did have the applications from the candidates available before the interview. At the beginning of the interview, Neal read a brief introductory statement about MPJCF and told the candidate to be very precise in answering the questions.

In scoring Tillery's interview answers, Neal gave her 1 point for Question #9. Tillery did list three Level V facilities and one Level IV facility. However, appellant failed to give any explanation about the security and custody levels. There are a range of security levels at each institution. Tillery also scored 1 point on Question #10. Neal explained that appellant correctly

stated that the Commissioner and Warden have veto power but failed to give any description of the process. In scoring the appellant's answers, Neal did give consideration to Tillery's prior work as an Inmate Classification Officer I. During the interview, Neal did not hold any bias against appellant.

Tillery's overall score on the interview was a 32. The established minimum score was 40 out of 50. The panel felt that a candidate needed a minimum score of 40 in order to satisfactorily perform the job. If a candidate had reached the minimum score, the panel would have looked at historical information in the candidate's master file. None of the candidates reached the minimum score. At that point, the panel did not look at the master files. The cert list was returned and the panel asked for another cert list. After receiving a second cert list, they again interviewed the candidates. Tillery did interview in June, 2000 but did not get the position.

Neal had known Tillery since approximately 1976. Neal left Gander Hill in February, 1995. Prior to that date, Tillery reported to Fran Cockcroft who reported to Neal. There was documentation about the need for improvement in Tillery's performance as a Classification Officer. There was ongoing coaching and counseling to try to get Tillery to meet acceptable performance standards. Neal was aware of appellant's voluntary demotion in 1996 but was not consulted about the matter.

On cross-examination, Neal explained that there will be a Reception and Diagnostic Center at all of the major institutions. In 1994, Neal did meet with Fran Cockcroft regarding the appellant's job performance. There had been about a two year period of concern about Tillery's performance. Neal did not remember both a Classification Officer I and a Classification Officer II in the Classification Unit Treatment Center at the same time. Neal submitted an annual budget for the facility and never gave up an authorized position in treatment services. Neal worked

vigorously to increase the unit. In each budget cycle, Neal would request more staff in the treatment unit because they were understaffed. Neal did recall Tillery had asked for additional staff in the unit.

Neal stated that Faith Levy had been a Classification Officer I for a few months before the interview. Pam Minor had not worked as a Classification Officer I. On Question #2, Neal wrote down appellant's list of classification committees and boards on which she participated. Neal originally gave appellant 3 points on Question #3 but changed the score to 4 points after discussions with the other panelists. Regarding Question #9, Neal felt that Tillery should have named the actual Level IV facilities instead of simply answering "Community-WR." On Question #10, the appellant incorrectly stated that the Administrator of Classification has veto power. Neal stated that this information is available in the Department of Corrections and the Bureau of Prisons policy manuals. In 1994, she did talk to Rafael Williams about Tillery's job performance. The situation never reached the point where the prison administration decided to take disciplinary action. Neal did definitely write counseling notes to try to improve Tillery's performance. Neal did not recall any intention to remove Tillery from her position on November 28, 1994. Neal did consider appellant's past performance in scoring questions that should have been more fully answered.

In response to Board questions, Neal stated that each candidate was asked at the end of the interview if he or she wanted to add to any of the responses. The appellant's lack of performance in 1994 was not due to downsizing. Neal stated that appellant's exhibit #2 did not accurately reflect the appellant's job duties. Neal also stated that she never had four people in that unit. As Warden, Neal stated she did not ever recall a time when there was sufficient staff at Gander Hill. Neal did recall that the classification unit was decentralized in 1989 under

Warden Howard Young.

Pamela Minor testified as the next witness for the Department. Minor is currently employed as a Correctional Counselor Supervisor. She is the direct supervisor for Faith Levy who is a Classification Officer II. The new Reception Diagnostic Unit ("RDU") will intake all new offenders and do the initial classification. Previously, the interviews occurred through the treatment unit. Minor worked with Levy and Elizabeth Neal to interview the candidates for the Classification Officer I position. Ms. Neal organized the panel and sent the letters to the candidates. Minor received the list shortly before the start of the interviews on February 9th.

Minor stated that Neal oversees the RDUs throughout the State. The three panelists took a lot of notes during the interviews. They did not discuss the candidates' scores until the end of the day. The State applications were briefly reviewed before the interview. Each panelist did put down their own score. Minor did consider appellant's experience in the interview process. Appellant received a score of 38 which was higher than the others but still below the cutoff score of 40.

On Question #2, Tillery listed a number of classification boards on which she had served or had contact. Minor did give Tillery the maximum 5 points for this answer. Appellant did serve on the Multidisciplinary team and the Institutional Classification Committee. Appellant was a presenter before the IRCB and observed the IBCC. Appellant did not chair any of the committees. The scoring guide provided that a person would receive the maximum 5 points if she "[s]erved on at least three different boards and chaired at least one."

On Question #9, appellant listed three Level V facilities-Gander Hill, Webbs, and DCC. The appellant did not describe the various security levels for each facility. For a Level IV facility, appellant answered Community-WR. Appellant failed to mention the name of the actual

Level IV facility. Minor believed that Tillery gave an inaccurate answer to Question #10 because the Class Administrator does not have veto power. She also inaccurately stated that the IRCB did not have veto power. At the end of the interviews, no candidate reached the minimum score of 40.

On cross-examination, Minor testified that there was a second round of interviews from the second cert list. In June, the panel called back two persons for second interviews before making a final selection. The panel followed the same scoring process for both interviews. Minor explained that the RDU performs duties previously assigned to the Classification Treatment Unit. There now are two units in the prison performing two tasks. When Minor first arrived at Gander Hill, Tillery was the only Classification Officer I. Minor first moved to Gander Hill in 1985. Minor stated that she recalls Tom Carroll and support staff working with appellant in the classification unit.

Minor stated that Elizabeth Neal put together the interview questions. The information to answer the questions was available in the prison guidelines and brochures. With regard to appellant's interview, Minor expected appellant on Question #10 to describe the veto process. Minor stated that this information is available in the prison's brochure. On Question #9, Minor expected appellant to name the different facilities and the different levels. At the end of the interview, the panel asked candidates if they had anything to add to their answers. The panel scored the candidates at the end of all of the interviews. There was a discussion among the panel on Question #2 about whether presenting material before a classification board was the equivalent of "serving" on a board. Minor was not sure if a narrative was written by each candidate.

On redirect, Minor stated that she marked down the scores for the candidates at the end of

all of the interviews. Minor was surprised that Tillery did not reach the minimum score of 40. On Question #9, Minor would have expected Tillery to answer the question but the appellant only gave an incomplete answer. She gave Tillery a score of 1 point on Question #9. Minor did think that Tillery knew the answer to Question #9 because she was familiar with the different facilities. On recross, Minor explained that all of the panelists were present when they scored the candidates at the end of the day. The panelists first scored all the candidates and then discussed the answers. The panelists did not discuss the Likert scale referenced at the bottom of the answer sheet. Minor stated that there was no competitive examination for the persons considered for the Classification Officer I position.

In response to Board questions, Minor stated that she did encourage appellant to apply for the Classification Officer I position. Minor stated that Tillery is a reliable employee who comes to work on time and takes pride in her work. Minor did not ask Tillery if she had anything to add to Question #9 because she did not want to coach her. There are differences in the skills required for the new Classification Officer I position in the RDU as compared with the former position held by appellant. The new RDU will review all new inmates within fifteen days. The RDU will do more "hands-on" work in the classifications. The Classification Officer I will be responsible for interviewing and providing orientation for the candidates/offenders. On the morning of the interviews, the panel agreed to use 40 as the cutoff score for candidates. Minor has supervised appellant since November, 1999. Minor asserted that it was not customary to score each candidate immediately after each interview. The panelists did assign a numerical score for each candidate before going into discussions with the others. Minor did not recall a narrative as part of the scoring process. When a narrative is used in the interviews, it is usually not scored.

Faith Levy testified as the next Department witness. Levy currently works at Gander Hill

as a Classification Officer. She is the person who would supervise the candidate hired for the Classification Officer I position. Levy was one of the three panel members with Pam Minor and Elizabeth Neal. They discussed the questions on the morning of the interviews. The applications from the candidates were in the room with the panel. Each applicant met the minimum qualifications in order to make the cert list. The panel agreed that 80% would be the minimum score to consider a candidate. The panel scored the candidates after completing all the interviews. The interview consisted of ten questions designed to judge the candidate's experience and knowledge of the classification procedure. Tillery performed less than expected at her interview in light of her experience at Gander Hill. Levy did not recall large disparities in the scoring by the panel members. The panel members did discuss the answers given by the candidates.

On Question #2, Levy explained that the classification committees review recommendations for the movement of inmates. Tillery had served on two classification committees and observed another. Levy gave appellant a maximum score of 5 points on this question which was a "generous score." On Question #9, Levy stated that appellant named three Level V facilities but did not name a Level IV facility. Tillery gave an incomplete answer to this question. Levy believed that Tillery also gave an incomplete and incorrect answer to Question #10. Levy stated that each candidate was asked after each question if he or she wanted to add anything to their answer.

On cross-examination, Levy stated that Elizabeth Neal was on the interview panel that initially hired her in 1991. Levy started as a Correctional Counselor and worked with appellant. Levy was not sure if Tom Carroll worked as a Classification Officer II. Regarding the interviews for the RDU position, Levy stated that the panelists agreed on a minimum score of 40

and discussed the "anticipated answers" before the interviews. Levy stated that the panelists had discussions prior to writing the scores for each candidate. On Question #9, Levy maintained that appellant did not name a Level IV facility. Level IV facilities are Sussex Community Correctional Center and Mordecai Plummer Community Correctional Center. Levy did not recall asking the candidates to write a narrative. If a narrative had been used, the panel would have reviewed the narrative and added it to the score. Levy was aware of appellant's 1996 voluntary demotion but did not discuss it with Minor or Neal during the interview process.

On redirect, Levy declared that the applications for each candidate were in the room during the interviews. She did not recall any writing sample requirement for the candidates. On recross, Levy stated that Pam Minor reports to Deputy Warden Rafael Williams. Elizabeth Neal is in charge of monitoring the treatment statewide and she oversees the RDUs. Neal monitors and implements training statewide. Levy was on the second panel but did not recall if Tillery interviewed a second time.

In response to questions from the Board, Levy stated that each candidate was given an opportunity to add to their answers. Levy explained the difference between the former Classification Officer I position held by appellant and the new position in the RDU. The new RDU position handles intake assessments and has more responsibility for interviewing and obtaining information. The new Classification Officer I also must appear before boards. The former Classification Officer I position was more of an administrative job. The panel members did discuss the interview answers before scoring the candidates.

On rebuttal, appellant testified that the panel did not ask her after each question if she wanted to add to her answer. She was asked at the end of the process if she wanted to add anything. By that point, she was confused by all the questions and did not add anything. On

Question #9, appellant explained that there are now three Level IV facilities. In her answer, she used the term "Community/Work Release" which is a common term used in the prison system for a Level IV facility. On Question #10, appellant maintained that she did list Gander Hill as a Level V facility and stated that she gave all of the security levels for the institution. Appellant stated that there was a writing sample for both interviews and she gave both samples to Elizabeth Neal.

On cross-examination, appellant stated that she did give the names of the Level IV facilities in response to Question #9. In response to Board questions, Tillery stated that she did reapply for the Classification Officer I position but was not hired. Appellant declared that the same interview questions were used for the first and second interviews. On further questioning by the Department, appellant agreed that the questions for the second interview were a little different than the first set of questions.

Alan Machtinger was called to testify as a Board witness. Machtinger is employed in the Human Resources division of the Department of Corrections. Machtinger stated that Tillery is currently a Social Services Specialist with a Paygrade 8. She is well off the pay scale for the Social Services Specialist position. Her salary is within the pay range for the Classification Officer I position which is a Paygrade 13. Tillery would have received a 5% pay increase if she had been selected for the Classification Officer I position.

THE LAW

29 Del. C. §5918. Promotions.

The rules shall provide for promotions, giving consideration to the applicant's qualifications, performance record, seniority, conduct and where practicable, to the results of competitive examinations....

29 Del. C. §5931(a)

(a) The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final 2 steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The Director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules....

Merit Rule No. 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 specifications. 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 OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following Findings of Fact and Conclusions of Law which it deems follow therefrom:

1. Appellant Eldora Tillery has been employed by the Department of Corrections since 1982. From 1987 through February, 1996, appellant worked as a Classification Officer I at Gander Hill Prison. Since February, 1996, appellant has been employed as a Social Services Specialist.

2. Appellant agreed to a voluntary demotion in February, 1996 in which was demoted from a Classification Officer I to her current Social Services Specialist position. The appellant agreed to this demotion under duress, after being threatened with termination by then Deputy Warden Rafael Williams. The Board does not find that the appellant was demoted due to her failure to adequately perform the duties of a Classification Officer I. Rather, the record indicates

that appellant was placed in a position in which she did not have sufficient staffing. The prison population increased in the years up to 1996 and the Department continued to add to appellant's work duties without providing any additional staff. The Board notes that Elizabeth Neal testified that she never had sufficient staffing while Warden at Gander Hill.

3. The decision to demote appellant in 1996 was made primarily by then Deputy Warden Rafael Williams. The Board finds that Elizabeth Neal as Warden in 1993 and 1994 expressed dissatisfaction with appellant's work as a Classification Officer I. The Board finds that Neal had ongoing discussions with Williams about Tillery's performance. The Board also accepts appellant's testimony that prior to the Gander Hill prison escape in November, 1994, Neal intended to formally transfer Tillery out of the Classification Unit because she wanted someone else to run the unit.

4. In 2000, the Department posted a notice to interview for the position of Classification Officer I in the new Reception and Diagnostic Unit ("RDU"). Appellant applied for the position and made the cert list sent to the interview panel. The interview panel consisted of Elizabeth Neal, Pam Minor, and Faith Levy. Elizabeth Neal is now the Director of Correctional Treatment Services for the State and is primarily responsible for hiring staff for the reception and diagnostic centers.

5. The current Classification Officer I position differs to some degree from the former position held by the appellant. The Classification Officer I position in the RDU would have more responsibilities for interviewing and orientation based in part on a new objective classification assessment method.

6. Elizabeth Neal was the person primarily responsible for operation of the interview process. Neal drafted the questions that were asked of the candidates. Neither of the other two

panelists drafted the questions and they did not view the questions until the morning of the interviews on February 9, 2000.

7. The interview questions drafted by Neal were not tailored to finding the best qualified candidate for the position of Classification Officer I. Instead, Neal testified that she obtained the questions and the anticipated answers from established documents, policies, and procedures available to anyone in the Department. The interview questions were essentially a test of knowledge of general internal working procedures of the Department and did not directly relate to a fair evaluation of the merits of the candidates for the Classification Officer I position.

8. The Board further finds that the panel arbitrarily agreed that the minimum score for all candidates should be forty. There is no evidence in the record about how or why this number was selected, nor is there any evidence why someone with a lower score would not be able to competently perform the duties of Classification Officer I.

9. Based on her interview answers, appellant received a score of 32 from Elizabeth Neal, a score of 35 from Faith Levy, and a score of 38 from Pam Minor. Appellant's composite score was 35. Appellant scored the highest of all candidates interviewed on the cert list.

10. During the interview process, the panel did not ask candidates to elaborate on their answers until the end of all of the questions. The panel was not sure of the grading to be used on Question #2 which asked candidates to identify which classification boards and committees on which they had served. The panelists were not sure if observing a panel was sufficient to constitute "serving" on a board. On this question, appellant received only three out of a possible five points from Neal but received the maximum score of 5 points from Levy and Minor.

11. On Question #9, appellant received a score of 1 from all three panel members. This question required appellant to list three Level V facilities and one Level IV facility and to

explain the custody and security levels at each. The Board finds that the appellant did properly identify three Level V facilities and one Level IV facility. Appellant used the phrase "Community/Work Release" to identify a Level IV facility which is a term commonly used in the prison. The Board finds credible the appellant's testimony that she did in fact identify the three Level V facilities and one Level IV facility along with the custody and security levels. The appellant was very convincing in testifying that she certainly knows the custody and security levels at Gander Hill since she has worked there for many years. The Board accepts as credible the appellant's testimony that the answer sheets of the three panelists do not accurately reflect her complete answer.

12. On Question #10, the appellant received a score of 1 from all three panel members. The Board accepts as credible the appellant's testimony that the answer sheets of the three panelists do not accurately reflect her complete answer. Appellant convincingly testified that she did state who has veto power under the Delaware Code and did describe the process.

13. Panelist Minor testified that she believed that Tillery knew the answer to Question #10 in light of her prior experience but still scored the answer a 1.

14. The panelists did not score any of the candidates until after the completion of the interviews. The interview process was rushed as the panel interviewed one candidate after another. The panel members did not thoroughly review the applications in the room prior to the interview of each candidate. At the end of the interview process, there was discussion among the panel members about the appropriate scores for the candidates.

15. The interview sheet indicated that the scoring was based on the Likert scale and that individuals could be rated a 2 or 4 if deemed appropriate on a particular answer. The Board finds no evidence that the panel members discussed or understood the Likert scale or the scoring

method outlined on the last page of the interview sheet.

16. The Board finds credible appellant's specific recollection of writing a narrative at the end of the interview and giving it to Elizabeth Neal. Appellant stated that she wrote a narrative for the this interview and for a subsequent interview and gave both documents to Neal. The Board notes that there was no account from the Department as to what ever happened to this written narrative or if it was scored.

17. At the beginning of the interviews, the candidates were told not to assume that the panel members knew anything about the candidate or the candidate's experience. This statement was presumably made to encourage the candidate to be forthcoming. Despite this statement, each of the panel members stated that they specifically considered appellant's prior experience in assessing the completeness of her answers.

18. The Board finds that the panel member Elizabeth Neal participated on this panel despite her prior unfavorable views of the appellant from 1993 and 1994. The Board finds that Neal's participation on this panel was unduly influenced by her prior contact with the appellant and prevented the appellant from being fairly considered for this promotion. The Board finds that Neal was the catalyst for the series of events that eventually lead to appellant's voluntary demotion in 1996. Neal had meetings and counseling sessions with Tillery over a two year period and had made a decision, that was not carried out, to move her out of the Classification Officer I position in 1994. Given this prior background, the Board finds that Neal was biased against appellant in the operation of this promotional process. The Board finds that Neal did not want Tillery to work as a Classification Officer I in 1994 and was predisposed not to hire Tillery into the new RDU in 2000. The Board specifically notes that Neal admitted during her testimony that she at a minimum considered appellant's prior performance in scoring appellant's

answers. During her cross-examination, Neal responded as follows:

Q. You testified that when asked as to whether or not you took her past performance into consideration, you stated, in general, you took her past performance into consideration, but only in the area that she should have known more specifically the answers to these questions; is that correct?

A. Yes. And whatever was in the information that we got from her.

19. After all the interviews, the panel scored the candidates and concluded that none had achieved the minimum score of forty. The panel considered no other factors before returning the cert list and asking for another cert list. Appellant's composite score of 35 was the highest of all the interviewed candidates. The remaining candidates achieved scores of 27.3, 15.3, 13.0, 15.0, 21.3, and 29.

20. The Board concludes that the Department committed a gross abuse of discretion in the promotion process for the Classification Officer I position in violation of Merit Rule 13.0100(3). The numerous factors previously cited in the Board's findings prove by a preponderance of the evidence that the Department did not conduct a fair promotion process designed to hire the most qualified candidate, and in doing so, committed a gross abuse of discretion. The Board concludes that the appellant did not receive full and fair consideration for the posted position of Classification Officer I. Some of the factors previously identified by the Board are as follows: i) the Department relied exclusively on a defective oral questionnaire containing a scoring system that was not properly known to the panelists; ii) the panelists chose an arbitrary number as the minimum acceptable score for the candidates; iii) the interview panel contained a member who was biased against the appellant and considered the appellant's past performance in evaluating her answers. These factors along with the previous findings convince the Board that appellant has proven that a gross abuse of discretion occurred in this case.

In addition, the Board also notes that under both Merit Rule 13.0100 and 29 Del. C.

§5931(a) the employing agency is required to consider an applicant's qualifications, performance record, seniority, conduct, and where practicable, the results of a competitive examination. The Department did not consider any factor in this promotion process other than the candidates' scores on a defective oral questionnaire. For example, the Department did not review the appellant's qualifications, performance, conduct, or eighteen years of experience with the Department. The Board concludes that this promotion process that is in violation of the mandatory requirements of §5931(a) and Merit Rule 13.0100, in conjunction with the other deficiencies previously identified in the Board's findings, amounted to a gross abuse of discretion by the Department.

21. Merit Rule 13.0100(3) provides that no grievance may be maintained concerning a promotion except where there has been a gross abuse of discretion in the promotion. In the instant case, there was no actual promotion as a result of the Department's actions. The Department did not select a candidate as a result of this first interview process. The Department obtained a second cert list and conducted a second set of interviews from which it hired a candidate apparently in June, 2000. The Board finds that the Department can be found in violation of Merit Rule 13.0100(3) if there is a gross abuse of discretion in the promotion process. The Board believes the intent of the Merit Rules and specifically Merit Rule 13.0100(3) was to permit an employee to grieve a wrong committed by an agency in the promotion process. The Board does not find the Department should be shielded from any sanction in this case simply because it did not actually promote anyone as a result of the initial promotion process. The Board finds that the actions of the Department prevented the appellant from receiving a promotion for the position of Classification Officer I. The Board finds that the appellant was qualified for the posted position in light of her prior experience and her score on the oral

interview conducted by the Department. The Board finds there were minor, insubstantial differences between the appellant's prior Classification Officer I position and the new Classification Officer I position in the RDU.

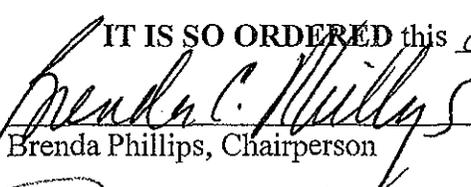
22. Under 29 Del. C. §5931(a), the Board has the authority to remedy a misapplication of title 29, chapter 59 or the Merit Rules by granting back pay, restoring any position, benefits or rights denied, placing employees in a position wrongfully denied, or otherwise making employees whole. The Board has found in this case that the Department did misapply the promotion provisions under §5918 and Merit Rule 13.0100(3). The issue becomes what is the appropriate remedy for this violation. While the Department did not hire a candidate for the position from the first round of interviews, the Board is convinced from the evidence that appellant was sufficiently qualified for the posted position. The appellant also scored higher than other than any other candidates. The issue is complicated by the fact that the Department did hire a candidate around June, 2000 from the second cert list. There has been no issue raised about the qualifications of this candidate and the Board is not inclined to displace this presumably qualified employee after an already significant period of time in that position. The Department does have broad equitable powers under §5931(a) to impose a remedy to make the successful grievant whole. See Brice v. State, Del. Supr., 704 A.2d 1176 (1998). In this case, the Board accepts the Department's evidence that appellant's current salary as a Social Services Specialist is already well within the salary range for the Classification Officer I position. This appears to be in part due to the Department's decision to permit appellant to maintain her salary when demoted in 1996. The Department's evidence did demonstrate that the appellant would have received a 5% pay increase if she had received the promotion to the position of Classification Officer I. On this record, the Board concludes that in order to make the appellant

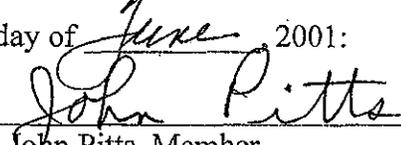
whole under §5931(a), the Department shall pay appellant a 5% increase in salary effective March 3, 2000. This appears to be the date on which the appellant was notified that she did not receive the promotion.

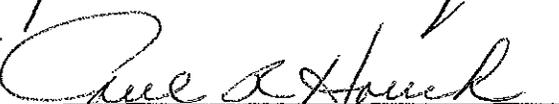
ORDER

For the foregoing reasons, the grievance of Eldora Tillery is upheld based on a violation of Merit Rule 13.0100(3). The appellant is awarded a 5% increase in salary effective March 3, 2000.

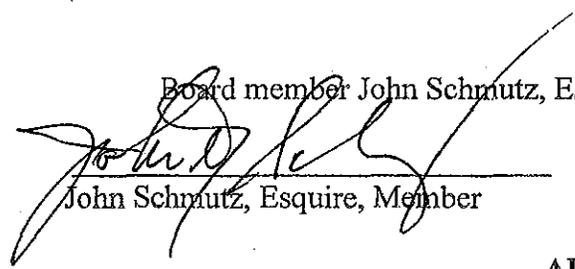
IT IS SO ORDERED this 29th day of June, 2001:


Brenda Phillips, Chairperson


John Pitts, Member


Paul Houck, Member

Board member John Schmutz, Esquire dissents from this Board's decision.


John Schmutz, Esquire, Member

APPEAL RIGHTS

29 Del. C. §5949(b) provides that 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 in 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 also 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 thirty (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 purpose 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: _____

9/7/01

Distribution:

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-Pat Bailey, Delaware Public Employees Council 81

Agency's Representative

-Deputy Attorney General Ilona M. Kirshon