

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRUCE BURTON, RANDALL	§	
DOTSON, GUY FOWLER, MARK	§	
RISPOLI, ROLAND WILEY,	§	No. 622, 2013
JOHN ENDRES, THOMAS SECORD,	§	
and MICHAEL LITTLE,	§	
	§	Court Below: Superior Court
Appellants Below-	§	of the State of Delaware in and
Appellants,	§	for New Castle County
	§	
v.	§	No. N12A-11-001
	§	
	§	
STATE OF DELAWARE, MERIT	§	
EMPLOYEE RELATIONS BOARD,	§	
and DELAWARE DEPARTMENT	§	
OF CORRECTION,	§	
	§	
Appellees Below-	§	
Appellees.	§	

Submitted: January 29, 2014  
Decided: March 21, 2014

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

***ORDER***

On this 21<sup>st</sup> day of March 2014, it appears to the Court that:

(1) Appellants-Below/Appellants Bruce Burton, Randall Dotson, Guy Fowler, Mark Rispoli, Roland Wiley, John Endres, Thomas Secord, and Michael Little (collectively, “Appellants”) appeal from a Superior Court Opinion and Order affirming the decision of the Merit Employee Relations Board (“MERB”) in favor of the State of Delaware and the Delaware Department of Corrections (the

“Department”). Appellants raise two claims on appeal. First, Appellants claim that the MERB erred when it found that the Department could repost a job posting to include equivalent experience after it found that the Department violated Merit Rules. Second, Appellants contend that the MERB erred when it allowed a job candidate to remain in the position on a temporary basis after it found that he was not qualified for the position as posted. We find no merit to Appellants claims and affirm.

(2) In 2011, the Office of Management and Budget (OMB) posted an opening for a Correctional Security Superintendent at the James T. Vaughn Correctional Center. The job requirements for the position specifically mandated at least three years as a Correctional Lieutenant, at least two years as a Correctional Staff Lieutenant, or at least one year as a Correctional Captain. The requirements did not state that equivalent experience would serve to qualify a candidate. Appellants, who are all employed with the Department as a Correctional Lieutenant, Correctional Staff Lieutenant, or Correctional Captain, applied for the open position.<sup>1</sup> A selection committee (the “Committee”) received eighteen applications. After conducting interviews of each applicant, the Committee selected John Brennan. Prior to this promotion, Brennan held the position of

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<sup>1</sup> Appellant Little is a Legal Services Administrator and did not apply for the Correctional Security Superintendent position but stated that he would have if he knew that equivalent experience was sufficient to be considered.

Trainer/Educator III at the Department's Training Academy. Although Brennan is a sworn officer and holds the titular rank of Captain, he is not a Watch Commander, Shift Commander, or Unit Commander. It has been the policy of the Department to consider equivalent experience when selecting applicants.

(3) Following the announcement of Brennan's promotion, Appellants filed a grievance under Merit Rule 18.5. They alleged that the Department violated the Merit Rules by promoting a candidate who was not qualified. The MERB found the job requirements for the Correctional Security Superintendent did not include equivalent experience. As a result, Brennan was not qualified to apply for the position. The MERB ordered the Department to repost the position but allowed the Department to modify the position description with OMB to include equivalent experience. The MERB also allowed Brennan to remain as Acting Correctional Security Superintendent. But if Brennan reapplied for the position, the Committee could not consider his experience as acting superintendent. The Appellants appealed the decision of the MERB to the Superior Court, which affirmed.<sup>2</sup> This appeal followed.

(4) This Court's review of an administrative agency's decision is the same as the court below.<sup>3</sup> We review the decision of the MERB "to determine whether

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<sup>2</sup> *Burton v. Merit Emp. Relations Bd.*, C.A. No.N12A-11-001 (Del. Super. Ct. Oct. 18, 2013).

<sup>3</sup> *Kopicko v. State Dep't of Servs. for Children, Youth & their Families*, 846 A.2d 238, 2004 WL 691901, at \*2 (Del. 2004).

[it] acted within its statutory authority, whether it properly interpreted and applied the applicable law, whether it conducted a fair hearing, and whether its decision is based on sufficient substantial evidence and is not arbitrary.”<sup>4</sup> Substantial evidence is defined as “such evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>5</sup> Questions of law are reviewed *de novo*.<sup>6</sup> We also give judicial deference to “an administrative agency’s construction of its own rules in recognition of its expertise in a given field.”<sup>7</sup> Such construction will only be reversed when it is “clearly wrong.”<sup>8</sup>

(5) The MERB has the statutory authority to “exercise broad remedial powers” when resolving state employee grievances and complaints.<sup>9</sup> Included in this authority is the ability of the MERB to “make employees whole” following “a misapplication of any provision of . . . the [State of Delaware] Merit Rules.”<sup>10</sup> Further, “[t]he State has the exclusive right to manage its operations and direct employees except as specifically modified by [the Merit] Rules.”<sup>11</sup>

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<sup>4</sup> *Avallone v. State/Dep’t of Health & Soc. Servs. (DHSS)*, 14 A.3d 566, 570 (Del. 2011) (alteration in original) (quoting *Hopson v. McGinnes*, 391 A.2d 187, 189 (Del. 1978)).

<sup>5</sup> *Stanford v. State Merit Emp. Relations Bd.*, 44 A.3d 923, 2012 WL 1549811, at \*3 (Del. 2012) (quoting *Avallone*, 14 A.3d at 570).

<sup>6</sup> *Avallone*, 14 A.3d at 570 (citing *Person–Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009)).

<sup>7</sup> *Stanford*, 2012 WL 1549811, at \*3 (quoting *Ward v. Dep’t of Elections*, 977 A.2d 900, 2009 WL 2244413, at \*1 (Del. 2009)).

<sup>8</sup> *Id.* (quoting *Ward*, 2009 WL 2244413, at \*1).

<sup>9</sup> *Avallone*, 14 A.3d at 572.

<sup>10</sup> 29 *Del. C.* § 5931(a).

<sup>11</sup> Del. Merit R. 1.4.

(6) Appellants argue that the MERB erred when it allowed the Department to repost the Correctional Security Superintendent position with an experience-equivalency provision in the posting. Although Appellants agree that the MERB properly found that Brennan was not qualified for the position, they argue that the Department should not be allowed to modify the position before reposting it.

(7) Appellants' arguments lack merit for two reasons. First, Appellants fail to provide any authority that precludes the MERB from resolving their grievance in such a manner. Without a modicum of contrary authority, Appellants fail to demonstrate that the decision of the MERB is erroneous, let alone clearly wrong. Second, Appellants do not provide any authority that would prohibit the Department from modifying the position description. Rather, the Department may modify the position requirements to include equivalent experience under OMB procedures. Because the decision of the MERB is merely requiring the Department to repost the Correctional Security Superintendent position, there is nothing to suggest that allowing the Department to revise the description is arbitrary or capricious.

(8) Appellants dispute this conclusion and contend that current hiring policy no longer includes the ability to hire based on equivalent experience. The MERB specifically made a factual finding that equivalent experience may qualify a

candidate for a promotion within the Department.<sup>12</sup> Because this finding is based on substantial evidence,<sup>13</sup> it will not be disturbed on appeal. Therefore, Appellant's claim that MERB could not allow the Department to repost the position after revising the position description is without merit.

(9) Appellants next argue that the MERB erred when it allowed Brennan to remain in the Correctional Security Superintendent position on an acting basis while the Department reposted the position. The Superior Court found that Appellants waived this argument because they did not raise it at the MERB hearing. But Appellants argue that they could not have raised it because they could not have foreseen the MERB decision. The record demonstrates that the Appellants' grievances sought to require the Department to reconsider their applications through a reposting of the position. At no point did Appellants request that the MERB remove Brennan from his position. Thus, Appellant's second claim is waived for failure to raise it in the MERB proceeding.<sup>14</sup>

(10) Even if Appellants' second claim were not waived, it is nonetheless without merit. Merit Rule 10.1 specifically provides that "[l]imited term appointments are permitted when a Merit vacancy exists that is not of a continuing

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<sup>12</sup> *Burton v. Dep't of Corrections*, No. 12-03-540, at 4 (Del. Merit Emp. Relations Bd. Oct. 3, 2012).

<sup>13</sup> The Department introduced evidence of seven candidates qualified for a position based on their equivalent experience from 2008 through 2011. Further, the Department selected two candidates for positions based on their equivalent experience.

<sup>14</sup> *See* Sup. Ct. R. 8 (providing that "[o]nly questions fairly presented to the trial court may be presented for review").

nature, but is projected to exceed 90 days.”<sup>15</sup> Although the Merit Rules also require a candidate for promotion to meet the job requirements,<sup>16</sup> the MERB invalidated Brennan’s promotion. Instead, he is serving in that position as *Acting* Correctional Security Superintendent. Because this decision is not a promotion and because the MERB has broad discretion to resolve grievances between employees and the Department, Appellants’ second claim lacks merit.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice

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<sup>15</sup> Del. Merit R. 10.1.

<sup>16</sup> Del. Merit R. 10.4.