BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

MARK EMIG,	)	
	)	
Employee/Grievant,	)	**DOCKET No. 15-01-618**
v.	)	
	)	**DECISION AND ORDER**
DEPARTMENT OF CORRECTION,	)	
	)	
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on October 1, 2015 in the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, Paul R. Houck, and Jacqueline Jenkins, Ed.D, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Mark D. Emig
Employee/Grievant, *pro se*

Kevin Slattery
Deputy Attorney General
on behalf of the Department of Correction

BRIEF SUMMARY OF THE EVIDENCE

The Employee/grievant, Mark Emig ("Emig"), offered, and the Board admitted into evidence seven documents marked for identification as Exhibits 1 - 7. Emig called Perry Phelps, the former Chief of the Bureau of Prisons and current Deputy Commissioner of Correction, as his witness and testified on his own behalf.

The Department of Correction ("DOC") offered, and the Board admitted into evidence eight documents marked for identification as Exhibits A-H. DOC called no witnesses.

At the close of the Grievant's case, DOC moved for an involuntary dismissal of the grievance, asserting Emig had failed to meet his burden to provide sufficient evidence to establish that a violation of Merit Rule 18.5 had occurred. The Board deliberated and then granted DOC's motion for dismissal.

FINDINGS OF FACT

Emig, Deputy Warden at the Howard R. Young Correctional Institute ("HRYCI")[1], has been employed by the Department of Correction for 28 years. Emig applied for the Warden IV vacancy at HRYCI when it was posted on May 1, 2014. The original posting had a closing date of May 7, 2014, but DOC extended the application date until May 14, 2014, because it had only received two applications by May 7. As a result of the one week extension, two additional applications were received, including that of the individual who was ultimately selected to fill the vacancy. Prior to being selected, the successful candidate served as the Warden of the Plummer Community Corrections Center and had 24 years of experience.[2]

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[1] There are four adult Level 5 correctional facilities in the State: HRYCI, James T. Vaughn Correctional Center, Baylor Women's Correctional Institution and Sussex Correctional Institution.

[2] There are five Level 4 community work release programs in the State: Plummer, Hazel D. Plant

The Grievant is Caucasian; the successful candidate is African American.

An interview panel was assembled to interview the applicants. Panel members were not provided with and did not have access to the applicants' personnel files. There was no dispute raised concerning the composition of the interview panel. The Chief of the Bureau of Prisons served on the interview panel. He testified he was the only individual who reviewed the personnel files of the candidates, consistent with prior practice.

Emig testified that many of the letters of commendation for his job performance from the prior HRYCI Warden and his evaluations were not considered by the full interview panel. The Deputy Commissioner testified that for any vacancy at a pay grade 13 or above, the personnel files are only reviewed by the decision-maker (in this case the Chief of the Bureau of Prisons). The Deputy Commissioner testified there is no point system and Merit Rule 10.4 does not require that the entire panel review the personnel files of the candidates. He also testified there was no predetermination of the successful candidate and that the panel's recommendation was unanimous.

Prior to his selection as HRYCI Warden, the successful candidate had applied for the Warden position at James T. Vaughn Correctional Center (JTVCC), but was not selected. In that process, the former Deputy Warden at JTVCC was the successful candidate. Emig testified he (similar to the current Warden at JTVCC) had served as Deputy Warden at HRYCI and had a similar amount of service in DOC as the JTVCC Warden had at that facility.

The Board finds as a matter of fact that Emig served as the Deputy Warden of HRYCI, worked for 28 years with DOC and was qualified when he applied for the Warden IV position at HRYCI.

Women's Treatment Facility, Webb Community Corrections Center, Morris Community Corrections Center and Sussex Work Release Center.

The Board finds as a matter of fact that the successful candidate served as the Warden of the Plummer Community Corrections Center, had 24 years of experience and was qualified when he applied for the Warden IV position at HRYCI.

The Board finds as a matter of fact that DOC extended the application period from one week to two weeks after receiving only two applications for the HRYCI Warden IV position.

The Board finds as a matter of fact that the interview panel did not review applicant's personnel files, but the Chief of the Bureau of Prisons did review them.

The Board finds as a matter of fact that staff from the DOC met with the local chapter of the NAACP, at their request, to discuss a correctional Major vacancy at HRYCI and to discuss diversity in the prisons, generally.

The Board finds as a matter of fact that the successful candidate for HRYCI was required to be visionary and to have training and experience to provide an evidence-based evaluation and review of DOC programs at HRYCI.

CONCLUSIONS OF LAW

Merit Rule 18.5 provides:

> **Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the job requirements; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements in the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.**

Merit Rule 2.1 provides:

> **Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or**

> **other non-merit factors is prohibited.**

Merit Rule 10.4 provides:

> **Promotion. Candidates selected for promotion shall meet the position's job requirements. Vacancies shall be filled by promotion wherever practical and in the best interest of the classified service. Consideration shall be given to qualifications, performance record, seniority, conduct and, where applicable, the results of the screening and ranking process.**

The Board finds as a matter of law that Emig failed to meet his burden to establish that DOC: 1) selected a candidate who was not qualified for the Warden IV position; 2) discriminated against Emig by preselecting an African-American candidate; 3) failed to follow proper promotional procedures established by the Merit Rules; and/or 4) exhibited a gross abuse of discretion in the promotional process.

Emig failed to provide sufficient evidence that the successful candidate did not meet the job requirements for Warden IV. While Emig argued that the candidate's statement in his application that he was responsible for 400 to 1,000 inmates at all security levels while working at the Plummer Center was overstated, this was not a job requirement for the Warden IV position. The Deputy Commissioner explained the interview panel was charged with looking for particular qualities and traits including, professionalism, vision and leadership. They were looking for a candidate with work experience in the community, courts, probation and law enforcement. Because of changes in State law, DOC is required to review and evaluate all programs offered in the prisons for effectiveness. Consequently, the successful candidate was required to have background, education and experience to meet that requirement.

The record does not establish that the successful candidate's education, experience and

training were below the posted job requirements for the position. The successful candidate has an undergraduate degree in sociology, a master's degree in public policy, and work experience as a police officer, investigator and college professor. He had also applied and was selected for various training courses, including: Executive Training for New Wardens, Strategic Planning, Correctional Leadership Development and Leadership in Crisis. According to his application, Emig does not have a college degree and had received training in Critical Thinking Skills in 1996 and Prison Security Audits in 2004. Emig testified that his facility has a limited budget for training and therefore he has not applied for training since 2000.

The fact that the successful candidate previously applied but was not selected for another Warden position lends no credence to the allegation he was not qualified for the HRYCI Warden IV position. While Emig may have more years of experience and the similarly situated JTVCC Deputy Warden was promoted to Warden, this does not lead to the conclusion that the successful candidate was not qualified for the Warden IV position. The record establishes that the successful candidate does have the necessary program planning and evaluation background (as well as varied law enforcement and teaching experience) DOC sought in the HRYCI Warden.

In order to establish a prima facie case of discrimination a grievant must show: (1) they were a member of a protected class, i.e. age, race, gender, sexual orientation; (2) they were qualified for the promotion; (3) they suffered an adverse employment decision; and (4) their employer's refusal to promote them occurred under circumstances that give rise to an inference of discrimination." *McClement v. Port Authority Trans-Hudson*, 505 Fed.Appx. 158, 2012 WL 5863424, at p. 3 (3rd Cir., Nov. 30, 2012).

Emig provided no evidence DOC discriminated against him or that an African-American candidate was preselected prior to the interview and selection process. The Deputy Commissioner testified that while a rumor has been circulated that the Warden of HRYCI must

be African American, there is obviously no validity to this rumor as the immediately preceding Warden was Caucasian.

The Board finds Emig failed to provide sufficient evidence DOC violated Merit Rule 10.4. DOC initially received only two applications and therefore held the vacancy open one additional week which yielded four applicants for the Warden IV position. This does not constitute a Merit Rule violation. Similarly, there is no requirement that the entire interview panel review the personnel files of the applicants. It is undisputed the personnel files of applicants were reviewed by the Chief of the Bureau of Prisons.

Finally, this Board has held in applying Merit Rule 18.5 to promotional challenges that "[g]ross abuse of discretion is a high standard akin to a reckless indifference or is found where there is an extreme departure from the ordinary care normally given to a situation." *In the Matter of Richard D. Smith*, MERB Docket No. 05-04-327 (2007), at 10. Delaware Courts have applied the business judgment rule's interpretation of gross abuse of discretion. *Department of Correction v. Justice*, C.A. No. 06A-12-006 RBY, at p. 9 (Del. Super., Aug. 23, 2007). "The business judgment rule may be rebutted in those rare cases where the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith. The decision must be egregious, lack any rational business purpose, constitute a gross abuse of discretion or be so thoroughly defective that it carries a badge of fraud." *Aldina v. Internet.com Corp.*, 2002 WL 31584292, at *4 (Del. Ch.).

The Board concludes as a matter of law that Emig did not meet his burden to prove that DOC grossly abused its discretion in selecting the successful candidate rather than Emig for the Warden position at HRYCI. The decision to promote the successful candidate was not so far beyond the bounds of reasonable judgment as to suggest DOC acted in bad faith. It was reasonable for DOC to consider that he had a different skill set and leadership style than Emig in

making its choice for Warden. Given the high standards necessary to establish a gross abuse of discretion, the record is not sufficient to conclude that DOC departed from the ordinary course of conduct in choosing between these high-level applicants.

ORDER

It is this **24th** day of **November**, 2015, by a unanimous vote of 3-0, the Decision and Order of the Board to grant DOC's motion for involuntary dismissal of Emig's appeal.

Martha K. Austin
MARTHA K. AUSTIN, MERB Chairwoman

Paul R. Houck
PAUL R. HOUCK, MERB Member

Jacqueline D. Jenkins
JACQUELINE D. JENKINS, EDD, MERB Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (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: November 24, 2015

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