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BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF: DAVID WISHOWSKY, Grievant, v. DEPARTMENT OF CORRECTIONS, Agency.	))))))))	DOCKET NO. 05-10-340 DECISION AND ORDER

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

APPEARANCES:

For the Grievant:
Ronald L. Stoner, Esquire
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Newark, DE 19711

For the Agency:
Kevin Slattery, Esquire
Deputy Attorney General
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PROCEDURAL HISTORY

This grievance appeal was filed with the Merit Employee Relations Board ("Board") on October 7, 2005 by Ronald Stoner, Esquire on behalf of the named individual after an adverse Step Three grievance decision. *See* Merit Rule No. 18.0.

In the Petition, it was alleged that the Grievant should have received a higher starting rate upon hire in April 2002 as a Probation Officer 1, pursuant to Merit Rule 4.4.2. The Grievant, instead, requested a higher starting rate upon promotion pursuant to Merit Rule 4.6, when he applied for a position as a Probation Officer 2.

The hearing was conducted on January 24, 2007, February 15, 2007 and March 8, 2007. This is the Decision and Order of the Board based upon the evidence and arguments presented at the hearing.

RELEVANT MERIT RULES

MERIT RULE NO. 4.4.2
Agencies may approve a starting rate up to 85% of midpoint where applicants' qualifications are clearly over and above those required as minimum by the class specification. Upon agency request, the Director may approve a starting rate higher than the 85th percentile if supported by documentation of the applicant's qualifications.

MERIT RULE NO. 4.6
Promotion. Upon promotion, employees shall receive either the minimum salary of the higher pay grade or an increase of 5%, whichever is greater. Agencies may grant a greater increase not to exceed the 85th percentile under the criteria in 4.4.2. The Director may approve a greater increase that exceeds the 85th percentile under the criteria in 4.4.2.

SUMMARY OF THE EVIDENCE

The Grievant, David Wishowsky, after being sworn, testified he was hired in 1979 as a trooper with the Delaware State Police, from where he retired in 2002 as a Master Corporal. He moved to Probation and Parole with the Agency because he liked working with people and counseling. While in his last year with the State Police, he began pursuing a master's degree in counseling. He was accepted as a probation officer, by which time he had completed 2 years of the 3-year master's degree curriculum. He was starting the internship and practicum portion of the master's curriculum. He was not familiar with the Merit Rules at the time he was hired with Probation and Parole in 2002 and was not aware of the possibility of starting at a higher salary rate under the Merit Rules when he was hired. Had he known at the time of his hire that he could request an advance salary, he would have done so based upon his 22 years of experience as a state trooper. He did not have a master's degree when he was hired in 2002. He understood that promotion from Probation Officer 1 ("PO 1") to Probation Officer 2 ("PO 2") was not automatic. He testified that the role of probation officers changed in the 1990's by including greater law enforcement responsibilities, and he believed that his experience and skills as a police officer assisted him in his role as a PO. When preparing for promotion to PO 2, he learned he had had an opportunity upon hire to request an advanced salary, and initially addressed this issue in January 2004 with Mr. Machtinger. He admitted he did not handle his request well because of his

unfamiliarity with the Merit Rules. In his letter to Mr. Machtinger, Mr. Wishowsky requested promotion to Senior Probation Officer, which would skip PO 2. He testified that Mr. Machtinger responded that the time to request a higher starting rate was at the time of hire. It is not necessary to hold a master's degree in counseling to become a Probation and Parole Officer, a PO 2 or a Senior Probation Officer. He currently holds the position of Senior Probation Officer. He feels the master's degree has been helpful with his caseload. A few months later after receiving Mr. Machtinger's response, he sent a letter to Mr. Grinstead requesting to meet to discuss a higher starting rate; he was getting ready to apply for PO 2. His request for a meeting was declined. Instead of debating the issue of starting salary at PO 1, he focused on his promotion request for PO 2. He received the promotion for PO 2, but his request for an advanced salary beyond the requested 85% was denied. He wants a higher starting rate for his superior qualifications from the time he was promoted to PO 2 to current. He believed there was a window of opportunity at time of promotion to request an advanced salary. He had learned about other employees who had received a higher starting salary of 10% higher than the norm at the time of their hire.

In response to questions on cross-examination, Mr. Wishowsky testified he was not personally aware of advanced salaries being given at promotion from PO 1 to PO 2, but believed it had been done at some level of promotion. He acknowledged Director Grinstead had issued a denial in March 2004, but thought he made a subsequent request included with his PO 2 request for promotion packet. He requested a pay classification of 110% of midpoint for PO 2 because he believed he had higher qualifications than any one else in the department that had received a higher starting rate. He subsequently changed his request from 110% midpoint to a 15 to 20% increase. He subsequently, in his Step 3 appeal to HRM, requested an additional 10% increase above the normal PO 2 increase, which is his current request for relief. Upon his promotion to PO 2, he received the standard 5% increase. He is requesting an additional 10% at the promotional level. Mr. Wishowsky testified he also filed a grievance about the effective date of his PO 2 promotion, which was resolved by being made retroactive in time for receiving a July 1 raise. He sought retroactivity back to December 2003, when he initially mailed his PO 2 application. He listed the names of 3 people whom he believed received 10% above the median

or 90%, that had less superior qualifications than he did. He acknowledged he made a number of mistakes in the processing of his grievance.

Alan Machtinger, who was sworn, testified as a witness for the Agency. He is the Director of Human Resources and Development for the Department of Correction, and held that position in 2003 through 2005. In referring to State Exhibit V, Mr. Machtinger testified the exhibit was a memorandum dated July 15, 2005, to the grievant to inform his grievance was time barred because it was not submitted within the time limitations of the Merit Rules. He did not inform the Grievant about pursuing his initial grievance at a Step 2 level. He testified that Director Grinstead had denied the request for an advanced promotional increase in a March 31, 2004 memorandum. He explained that an email from John Smart about processing Grievant's request for advanced salary, was based upon the Grievant independently contacting Mr. Smart without informing Mr. Grinstead what Grievant was doing. Mr. Smart considered this request to be a request for an analysis to determine whether or not a pay adjustment would be appropriate; Mr. Smart was not in a position to either deny or approve Grievant's request. Mr. Smart was not aware that Mr. Grinstead had already denied the request. Mr. Machtinger's letter to the Grievant, dated May 13, 2005, does not contain any reference to appeal time limits or starting a grievance at Step 2. He testified that when employees are promoted, they receive 5% of their current salary or 80% of midpoint for the new pay grade, whichever is greater. Anything above that is considered an advanced promotional increase. Anything beyond 85% of midpoint requires approval from the Director of OMB. In reviewing State Exhibit J, Mr. Machtinger testified that Grievant was seeking 110% of midpoint, which would be approximately 44% above his PO 1 salary. If Grievant's salary had been increased at 110%, this would have placed him in the number 1 position by a considerable amount out of all 73 PO 2's, and earning a greater salary than the person who has held a PO 2 position for more than 20 years. It is and was in 2002 the Agency's policy that it is the employee's responsibility to request an increased salary; the Agency, as a matter of policy, does not inform employees of this possibility. Of the 73 PO 2's, he was aware of none having been given advanced promotional increase when moving from PO 1 to PO 2. The Agency considers 2 criteria at PO 1 for an advanced starting salary: experience as a probation officer or parole officer, and a master's degree in criminal justice. The Agency

does not deviate from those 2 criteria. Mr. Machtinger testified that 2 of 3 individuals listed by Grievant had requested an advanced starting salary and met the 2 criteria; the 2 individuals were hired at 90% of midpoint whereas the 3rd did not receive an advanced starting salary. Having both criteria results in a 10% increase in an advanced salary, while having one criteria or the other will receive a 5% increase. The Grievant possessed neither of the 2 criteria when he was hired. While Grievant's qualifications were admirable, they did not qualify him for an advanced starting salary under the Agency's criteria.

In response to questions on cross-examination. Mr. Machtinger testified he was not aware of a written policy concerning the advanced starting process or the Agency's standard of criteria. Recognizing applicants bring a wealth of experience to these positions, the Agency values the 2 criteria where it is prepared to pay an advanced starting salary. This has been and is the Agency's practice. Mr. Machtinger is part of the grievance process with the Division of Probation and Parole. He made the determination that the Grievant's grievance was time-barred. He explained to the Grievant that the grievance should have been made at Step 1, which the Grievant later did, but failed to timely appeal the Step 1 decision. The grievance filed in May 2005 was considered to be deficient because the FOP Lodge had not signed-off on the grievance. He acknowledged that some action had been taken on Grievant's grievance on May 23, when he had previously informed that the matter was time barred and no hearing would be held. He did not know why a hearing was held, contrary to his prior email. Mr. Machtinger testified it has been a long standing practice of the Agency to not issue advanced promotional increases going from PO 1 to PO 2. There is no consideration of such requests when moving from PO 1 to PO 2. The reason for this is because the time period between positions is a relatively short one, less than 2 years, and is usually coincident with a probationary period. The merit rule affords the Agency with discretion.

Mr. Machtinger acknowledged there is no indication in any of the emails of any reference to a time bar, and he allowed the hearing to go forward.

Alan J. Grinstead, after being sworn, also testified as a witness for the Agency. He is the Director of Probation and Parole, which he held in 2003 through 2005. He testified the Agency looks at experience as a probation officer and a master's degree in criminal justice, if an

applicant requests a higher starting salary, which he believes has been the criteria during his 18 years with the Department of Correction. Promotion from PO 1 to PO 2 is a career ladder promotion. The Grievant's request for promotion to PO 2 was submitted to his direct supervisor in May 2004, which he received in October 2004 and included another request for an advanced salary. He felt he had responded to the Grievant's previous request for an advanced salary; therefore, he processed the request for promotion, but did not make any recommendations for an advanced salary. The request for promotion and grievance process was not followed properly here. He made the promotion to PO 2 retroactive to June because processing the Grievant's promotion had taken some additional time than was typical. The Grievant received a slightly higher salary when the State raises came in on July 1st. He has never received a request nor done an advanced starting salary with a promotion between PO 1 and PO 2.

In response to cross-examination questions, Mr. Grinstead testified that the master's degree in criminal justice provides some diversity that the Agency looks for. In reviewing the Agency's policy on career ladder promotional standards, he acknowledged there is no educational requirement from PO 2 positions to top positions as defined by the policy. He acknowledged that for purposes of promotion, the standard, according to the policy, was not solely limited to a degree in criminal justice. He explained the attempt with this policy was an attempt by the Agency to reward people who pursued degrees while being employed with the Agency and to reward employees what they were doing as probation officers as far as their education. He testified that the promotion from PO 1 to PO 2 is essentially time and grade. The Agency considers different degrees in relation to the number of years of work experience, for the purpose of promotion to SPO.

Mr. Grinstead acknowledged that a master's degree in criminal justice was the primary degree the Agency looked at, but would consider other related fields. He acknowledged that an employee with a degree could be promoted to SPO up to 2 years earlier than somebody without a degree, which in effect has getting advanced salary by the promotion at an earlier time. These requirements are not related to the criteria for getting an advanced salary.

FINDINGS OF FACT

The Board finds that the Grievant did not meet at the time of his hire the two criteria established by the Agency necessary for an advanced or higher starting salary. At the time of the Grievant's hire as a PO 1, the Agency looked for two criteria that it believed to warrant an advanced starting salary—probation officer experience and a master's degree in criminal justice. The Agency consistently applied these criteria. The evidence showed that two of three applicants the Grievant referenced had, in fact, received an advanced starting salary and possessed the two criteria at the time of their hire. Additionally, the Agency's unrefuted evidence showed that the promotion from PO 1 to PO 2 involved an increase of no more than 5% or 80% midpoint because the promotion was a "time in position" promotion. The Board finds the testimony and evidence from the Agency's representatives to be convincing.

The Board further finds the evidence presented by the Grievant did not support a determination that the Agency's action here was arbitrary and capricious. The evidence showed that the promotion from PO 1 to PO 2 was a "time in grade" promotion with a raise of 5%. The evidence showed the Agency consistently followed its policies concerning criteria at the time of hire for an advanced starting salary and for the 5% increased salary concerning promotion between PO 1 and PO 2.

DISCUSSION

Under Merit Rule 4.4.2, there is no requirement that a starting rate of up to 85% of midpoint must be approved where an applicant's qualifications are clearly over and above those required as minimum by the class specification. Rather, Merit Rule 4.4.2 provides for a discretionary process whereby it is possible for an agency to approve a starting rate for the salaries of applicants whose qualifications are clearly over and above a class specification's minimum requirements. It is clearly a discretionary activity and requires a series of approvals for implementation. First, the agency must make a preliminary determination that the applicants' qualifications are clearly over and above those required as minimum by the class specification. Second, the agency may then institute and forward a request to the Director who must either

approve or disapprove the request. If the Director, in the exercise of his or her discretion, approves the request, it must be supported by documentation of an applicant's qualifications.

With respect to a promotion, Merit Rule 4.6 provides a mandatory minimum increase, but also provides for a discretionary process where it is possible for an agency to approve a greater increase that is less under the qualification criteria set forth in Rule 4.4.2. Like 4.4.2, Merit Rule 4.6 also provides for a series of approvals that are discretionary. First, the agency must make a preliminary determination that the applicants' qualifications are clearly over and above those required as minimum by the class specification. Second, the agency may then institute and forward a request to the Director who must either approve or disapprove the request. If the Director, in the exercise of his or her discretion, approves the request, it must be supported by documentation of an applicant's qualifications.

The Grievant is a Probation and Parole Officer 2 and is either currently applying for or has applied for promotion to the position of Senior Probation Officer. When the Grievant was hired as a Probation Officer 1, he was hired at a salary of 80% at this level. After approximately one year, the Grievant believed that others had been hired at a higher starting salary; it was too late to grieve his salary then. When the Grievant was promoted to PO2 , he sought more than the usual raise of 80% of PO 2 level or 5%. The Grievant received 5%, which is the basis of his appeal.

The State first argues the issue of timeliness and moves to dismiss this appeal. The Board finds the Grievant did appeal within the appropriate time period, but sent his appeal to the incorrect person. The Board believes the Agency could have been more helpful in this regard.

The substance of the Grievant's appeal is on two grounds: (1) others received a higher starting salary, and (2) he is more qualified. First, based upon the evidence, the PO 1 to PO2 promotion at issue is a "time in grade" position promotion (See Grievant's Exhibit 7). In other words, no one receives more than 5% or 80% of midpoint, whichever is greater. Second, although the Grievant had 22 years of work experience with the Delaware State Police, it was not as a probation officer. Further, the Grievant did not have his master's degree in counseling until after his hire as a PO 1 officer. The evidence presented showed the Agency clearly and consistently looked for applicants possessing probation officer experience and master's degrees

in criminal justice at the time of hire. Testimony from the Agency showed that two of the three applicants the Grievant referenced who, in fact, received a higher starting salary at the time of hire did have probation officer experience and master's degrees. The third applicant did not receive a higher starting salary at the time of hire. Last, granting higher or advanced starting salaries or promotional increases of greater than 80% of midpoint or 5% is discretionary to the Agency, under Merit Rules 4.6 and 4.4. There was no evidence presented that the promotion between PO 1 and PO 2, at issue here, ever involved more than 80% or 5%.

The testimony in this case showed the two criteria that the Agency looked for at the time of hire concerning advanced starting salaries – probation officer experience and a master's degree in criminal justice—neither of which the Grievant possessed at his time of hire.

Last, a common reason for granting an increased salary is because there is a shortage of qualified personnel and higher starting salaries are required to attract qualified candidates. This is not such a case here.

ORDER

It is this 19th day of July, 2007, the Decision and Order of the Board that the Grievant's appeal of the advanced salary increase at PO 2 be denied.

BY ORDER OF THE BOARD:

Brenda C. Phillips, Chairperson

John F. Schmutz, Member

Joseph D. Dillon, Member

Paul R. Houck, 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 of 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 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: July 31, 2007

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