

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

GRIEVANT,)	
)	
Employee/Grievant,)	<u>DOCKET No. 21-06-805</u>
)	
v.)	
)	DECISION AND ORDER
DEPARTMENT OF SAFETY AND HOMELAND)	
SECURITY, CAPITOL POLICE,)	[PUBLIC, REDACTED]
)	
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 January 4, 2023, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904. The hearing was closed to the public pursuant to 29 Del. C. §10004(b)(8).

BEFORE Jennifer Cohan, Chair; Sheldon N. Sandler, Esq., Victoria D. Cairns, Joseph A. Pika, III, Ph.D., and Dinah M. Davis-Russ, Members, the full Board.

APPEARANCES

Allison McCowan McMaster
Deputy State Solicitor
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Stephani J. Ballard, Esq.
on behalf of the Employee/Grievant

Lisa Morris,
Deputy Attorney General
on behalf of the Department of
Safety and Homeland Security

BRIEF SUMMARY OF THE EVIDENCE

The Employee/Grievant (“Grievant”) offered four (4) documents¹ into evidence, of which only one was admitted and marked as Grievant Exhibit 1.

The Department of Safety and Homeland Security, Division of Capitol Police (“Agency”), offered eleven (11) documents into evidence, all of which were admitted and marked as Agency Exhibits A – K.

The Grievant testified on his own behalf and called Capitol Police Chief Michael Hertzfeld as his witness. Three witnesses testified on behalf of the Agency: Lieutenant Thomas Paskevicius, Delaware State Police; Joseph Swiski, Chief of Administration, Department of Safety and Homeland Security (“DSHS”); and Nathaniel McQueen, Jr., DSHS Secretary.

FINDINGS OF FACT

The Grievant was employed as a Capitol Police Major at the time of his termination. He was one of six candidates who appeared before a Promotion Board comprised of two Police Chiefs and one Deputy Chief from other Delaware police agencies on August 8, 2019. The Promotion Board conducted a process, referred to by the parties as the Capitol Police Major Promotional Exam, which included:

... Capitol Police Divisional Directive No. 34 (“Promotion”) at Section 6.d advises candidates that the “context of the interview questions shall be standardized and are intended to analyze each candidate’s understanding of topics such as Delaware law, divisional directives and procedures, and principles of supervision. Furthermore, the oral interview board will rate each applicant on oral skills, appearance and demeanor.” In addition, Capitol Police Standard Operating Procedure No. D-23 (“Promotional Procedures”) advises candidates that interview questions will be derived from Title 11 of the Delaware Code, the

¹ The other three documents were copies of reported decisions involving the Courts’ interpretation and application of the Law Enforcement Officers Bill of Rights (“LEOBOR”), 11 Del. C. Chapter 92. As these documents have no probative value as evidence, they were not admitted into the record. Copies were, however, provided to the Board for its review prior to the hearing.

Delaware State Merit Rules, the Delaware Capitol Police Policy Manual, the Delaware Capitol Police Standard Operating Procedures Manual, and/or supervisory knowledge and principles of leadership and supervision. Study guides or materials were not provided to candidates.

...[T]he Capitol Police Major Promotional Exam administered on August 8, 2019 had two parts: (1) an in-basket exercise with two scenario questions, and (2) an oral exam before a three-member board comprised of [two Police Chiefs and one Deputy Chief]. Candidates were not permitted to bring any reference materials to the exam. Each candidate had approximately twenty (20) minutes to review and prepare notes in response to an in-basket exercise. Each candidate was then escorted to the oral boardroom where they were asked a series of ten (10) questions by the board members. Each board member had an interview evaluation form that contained the ten (10) questions. Seven (7) questions on the interview evaluation form had checkboxes on the answer key for the board's use during the interview.

After responding to the ten (10) questions, candidates were permitted to use their notes to respond orally to the two in-box scenarios. The first in-box scenario had seven (7) checkboxes on the answer key and the second in-box scenario had six (6) checkboxes on the answer key. At the conclusion of the oral in-basket exercises, each candidate gave an oral presentation concerning why the candidate was prepared for promotion and why the candidate should be selected. Along with the interview evaluation forms, the Board members had the opportunity to review any resumes or letters of recommendation that had been provided by the candidates.²

Delaware Capitol Police Standard Operating Procedures D-23, Promotional Procedures,

Section B, Promotional Process, states, in relevant part:

8. As the second phase of the promotional process the candidate will be interviewed by a three member board referred to as the "Promotion Board"
 - a. The "Promotion Board" will be seated by the Chief of Police and will have three senior police officers from other law enforcement agencies throughout the state. One command staff officer from Delaware Capitol Police maybe [*sic*] present in the room for the Promotional Board. He/she maybe [*sic*] present to answer any questions of the board members...
 - c. The members of the "Promotion Board" will be provided a pre-determined list of questions that has been approved by the DHR section and the Delaware Capitol Police that will be used to

² Agency Exhibit B, p. 2.

interview the candidates.

- d. The questions may be fact based, derived from the DE Code Title 11, State Merit Rules, Capitol Police Policy Manual and the Capitol Police Standard Operating Procedures Manual, and/or may be directed towards supervisory knowledge and principles of leadership and supervision.
- e. The “Promotion Board” will ask the same series of questions to each candidate and evaluate their demeanor, presence, oratory skills and responses for accuracy...
- h. Upon completion of the interviews the “Promotion Board” will review their evaluations and rank the candidate(s) from most successful to least successful.³

At the conclusion of the August 8, 2019 oral examinations of all six (6) candidates, the Promotion Board ranked the Grievant first. The Grievant and the three next highly ranked candidates were then interviewed by the Chief of Police on August 16, 2019. The Grievant was promoted to rank of Major shortly thereafter.

On or about August 28, 2019, a merit grievance was filed by one of the unsuccessful candidates which alleged a violation of Merit Rule 18.5.⁴ The grievance alleged the successful candidate (i.e. the Grievant in the matter before this Board) had received an unfair advantage in the promotional process by being provided with or obtaining advance notice of the questions and/or answers prior to the oral boards. A Step One decision was issued denying this grievance of the unsuccessful candidate, who advanced his grievance to Step Two.⁵

The Step Two hearing of the unsuccessful candidate’s grievance was convened by the DSHS Secretary’s designee on October 2, 2019. Following that hearing, the DSHS Secretary

³ Grievant Exhibit 5, p. 2-3.

⁴ 18.5 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.

⁵ Transcript (“TR”) p. 123-125.

ordered that an investigation be conducted because the Capitol Police Chief was implicated in the allegations made by the unsuccessful candidate.⁶ The Secretary directed that the Internal Affairs unit of the Delaware State Police (“DSP”) conduct an administrative investigation of the 2019 Capitol Police Major Promotional Examination.⁷ DSP Lt. Paskevicius was assigned to conduct the investigation.⁸

By email dated August 28, 2020, the Grievant (who had been promoted to Major a year prior) was notified of the administrative investigation and of the alleged violations of Merit Rule 18.5, Capitol Police Divisional Directive 34, Capitol Police General Rules of Conduct #10, #12 and #37.⁹ The Grievant was requested to schedule an interview with the investigator. The email summarized the basis for the investigation and the Grievant’s rights:

This investigation involves the Capitol Police Major promotional process that occurred in August of 2019. The Capitol Police Major Promotional oral boards took place on August 8, 2019 followed by the Chief’s Interviews that occurred on August 16, 2019. As a result of the process, you were promoted to a Capitol Police Major. It is alleged there was a gross abuse of discretion in the promotion and a violation of the procedural requirements of the Merit Rules. It is also alleged that for the Major Promotional process in August of 2019, you were provided with or obtained information concerning the oral board questions/answers prior to your oral board interview on August 8, 2019. As one of the candidates testing for Major, your actions allowed you to have an unfair advantage in the promotional process and endangered the integrity, fairness, impartiality, or security of the Major promotional process.

If you have any questions regarding the investigative process you may consult the Law Enforcement Officer’s Bill of Rights ...¹⁰

⁶ TR p. 125-126.

⁷ TR p. 167-168.

⁸ Agency Exhibit G.

⁹ Divisional Directive 34-G, Promotion System Integrity; Capitol Police General Rules of Conduct #10, Conduct Unbecoming; #12, Abuse of Position; #37, Dissemination of Information. Agency Exhibit F, p. 1.

¹⁰ Agency Exhibit F, p. 2-3.

The Grievant was interviewed by Lt. Paskevicius on September 22, 2020.¹¹

By letter dated April 8, 2021, the Grievant was notified by the DSHS Chief of Administration that he was recommending the Grievant be terminated, stating,

DSHS has completed its administrative investigation and determined that you had an unfair advantage in the Major promotional process and thereby endangered the integrity, fairness, impartiality, and security of that process.¹²

The letter specifically charged the Grievant with violations of Capitol Police Divisional Directive No. 34 and the Delaware Capitol Police General Rules of Conduct No. 10. It referenced the findings of the administrative investigation:

A comparison of your oral exam responses and your handwritten notes for the in-basket exercise shows a suspicious number of similarities to the exam answer key. ...[T]he exam answer key contained a total of forty-three (43) check boxes, and you answered them all correctly – earning you a perfect score of 100% (an almost 40% lead over the next highest scoring candidate). During your interview, you stated that you only studied Capitol Police Divisional Directives and Policies to prepare for the exam, however, a comparison of your oral exam responses and your handwritten notes of the in-basket exercise to Capitol Police Divisional Directives and Policies does not show these same similarities. In fact, to the extent that the Capitol Police Divisional Directives and Policies cover a particular question on the exam, the order and word choice contained within the Capitol Police Divisional Directives and Policies is different from the order and word choice contained on your exam and the answer key...¹³

The letter recommending the Grievant's termination also advised him of his rights under the merit system and the Law Enforcement Officers' Bill of Rights¹⁴:

Pursuant to Merit Rule 12.4, you are entitled to a pre-decision meeting before DSHS terminates your employment. The pre-decision meeting as outlined in Merit Rule 12.6 is an informal administrative meeting that allows you the opportunity to respond

¹¹ Agency Exhibit B, p. 3.

¹² Agency Exhibit B, p. 1.

¹³ Supra. at p. 3.

¹⁴ 11 Del. C. Chapter 92.

to the proposed discipline and offer any reasons why the proposed penalty many [sic] not be justified or is too severe. As it is an administrative meeting, nothing you say can or will be used against you in any criminal proceeding. During this period of fifteen (15) calendar days, you will remain on administrative leave with pay.

If you desire a pre-decision meeting please contact...[the] Chief of Administration at [phone number] or via email...

In the alternative, you may request a hearing be conducted by a board of three (3) officers or more under the auspices of the Delaware Criminal Justice Council pursuant to 10 *Del. C.* §9203 [sic].¹⁵

The Grievant requested a pre-decision meeting under Merit Rule 12, which was conducted on April 21, 2021. Following the pre-decision meeting and his review of the record, the DSHS Secretary found that "... termination is proper and appropriate based on the facts and the Department's recommendation." The Grievant was terminated on May 5, 2021.¹⁶

The Grievant filed a dual appeal to both DHR and the MERB under Merit Rule 12.9¹⁷ on May 13, 2021. DHR issued its decision denying the grievance on August 19, 2021. Thereafter, MERB attempted to schedule this hearing on multiple occasions while the parties first explored settlement options and then at the Grievant's request.

CONCLUSIONS OF LAW

Merit Rule 12.1 states:

Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. "Just cause" means that management has sufficient reasons for imposing

¹⁵ Supra., p. 7.

¹⁶ Agency Exhibit A.

¹⁷ 12.9 Employees who have been dismissed, demoted or suspended may file an appeal directly with the DHR Secretary or the MERB within 30 days of such action. Alternatively, such employees may simultaneously file directly with the DHR Secretary, who must hear the appeal within 30 days. If the employee is not satisfied with the outcome at the DHR Secretary's level, then the appeal shall continue at the MERB.

accountability. Just cause requires: showing that the employee has committed the charged offense; offering specified due process rights specified in this chapter; and imposing a penalty appropriate to the circumstances.

The Board finds the Grievant presented substantial evidence to call into question whether the Agency's conclusion that he engaged in conduct in violation of the Delaware Capitol Police General Rules of Conduct and Divisional Directives meets the standard of showing he committed the charged offense. The Grievant has had a long career in law enforcement in Delaware. During much of his career he worked with the current Capitol Police Chief. During the many years they have served together, the Grievant and the Chief have developed a shared approach to leadership and common language. The Grievant testified he applied for promotion to Major because he shared the Chief's vision for Capitol Police and wanted to support the Chief in attaining that vision.

The Chief developed both the examination and the answer key. There were two scenarios included in the "in-box exercise" which the applicants were required to review and then present to the Promotion Board¹⁸ their plan for addressing the issues raised in the scenarios. The Grievant testified one of two scenarios was very similar to an incident he and the Chief had handled together in the past. The Promotion Board concluded the Grievant's presentation addressed every element listed on the answer key they were provided.

The examination also included an oral exam before the Promotion Board in which each candidate was asked a series of ten (10) questions. The same questions were asked of each candidate. The answer key for this section also included checkboxes for answers to seven (7) of the ten (10) questions. Again, the Promotion Board concluded the Grievant hit every box with his answers.

¹⁸ The Promotion Board for this promotional opportunity was comprised of two Police Chiefs and one Deputy Chief from other Delaware Police Departments. All of the panel members were from agencies in New Castle County.

The curious coincidence of the Promotion Board evaluating the Grievant as “checking all the boxes” on the answer key provided by the Chief was the starting point for the investigation.¹⁹ It is reasonable that the Department of Safety and Homeland Security would initiate an administrative investigation (rather than an internal investigation which is initiated by the Police Chief) because it directly involved the Chief. At the conclusion of the investigation, the Grievant was notified:

... The totality of the documentary and other evidence gathered during the administrative investigation has led DSHS to the unfortunate conclusion that you cheated on this promotional examination. An officer who cheats on a promotional exam violates the public trust and tarnishes the integrity of this profession. Through your actions in connection with the Capitol Police Major Promotional Exam, DSHS found that you violated the Delaware Capitol Police Divisional Directive No. 34 (“Promotion”) and the Delaware Capitol Police General Rules of Conduct No. 10 (“Conduct Unbecoming”).²⁰

The investigating officer testified he found no evidence that anyone had either given the Grievant the questions and/or answer key or that he had improperly accessed the information prior to his oral examination.²¹

Other than the unexpected similarity of the Grievant’s answers to the answer key created by the Chief of Police, no evidence was adduced or presented which directly or indirectly linked the Grievant to having cheated on the exam. The Board notes that the Promotion Board did not express any concerns immediately following the oral examinations that one of the six candidates appeared to have had an unfair advantage. The Promotion Board did not assign percentages or “grades” to each candidate. The Promotion Board was required to evaluate each of the six

¹⁹ The Chief testified the members of the Promotion Board were instructed to “check” a box if the candidate said anything that could be considered approximating the keyed response. Identical wording was not necessary to check the box. TR p. 178

²⁰ Grievant Exhibit 1.

²¹ TR p. 86.

candidates based on their “demeanor, presence, oratory skills and responses for accuracy” and to then “rank the candidate(s) from most successful to least successful”.²²

The Board finds the Grievant presented enough evidence for it to conclude that the administrative investigation was inconclusive. The Grievant effectively challenged the Agency’s conclusion that he “had an unfair advantage in the promotional process because [he was] provided with or obtained information concerning the oral boards and answers some time prior to [his] oral interview on August 8, 2019”.²³ The Agency, therefore, fails on the first standard for just cause, namely showing that the Grievant committed the charged offense.

Having found the Grievant successfully challenged the Agency’s conclusion that he engaged in conduct in violation of the Agency’s policies and directives during the 2019 Major Promotional Exam, it is unnecessary to address whether the Board is required by statute to adopt the due process provisions established by LEOBOR in considering a merit system disciplinary grievance brought by a police officer. The Board does find in this case that the Grievant was provided the due process required by the merit rules, including notification of the investigation, a pre-disciplinary letter, offer and convening of a pre-decision meeting, notice of termination, and access to this grievance procedure.

The Board concludes as a matter of law that the Grievant carried his burden to establish that the Agency lacked just cause to terminate his employment. The Grievant is to be reinstated and compensated with backpay limited to the first five (5) months following his termination, as he was able to find work at a commensurate salary after that point.

²² Grievant Exhibit 5, p. 2-3.

²³ Agency Exhibit A.

ORDER

It is this **17th** day of **April, 2023**, by a vote of 4 - 1, the Decision and Order of the Board to grant the grievance.



JENNIFER COHAN, MERB Chairperson



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER



JOSEPH A. PIKA, III, PH.D., MEMBER

I respectfully disagree and would deny the grievance.



DINAH DAVIS-RUSS, MEMBER