

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE /)
DEPARTMENT OF CORRECTION)

v. Appellant/Employer)

C.A. No. 07A-03-013 WCC

CHARLES DODSON,)

Appellee/Grievant)

AND THE MERIT EMPLOYEE)
RELATIONS BOARD,)

Appellee.)

Submitted: August 14, 2007
Decided: November 30, 2007

ORDER

Upon Appeal from the Merit Employee Relations Board. Remanded.

Kevin R. Slattery, Esquire, Department of Justice, 820 N. French Street,
Wilmington, DE 19801. Counsel for the Department of Correction.

Charles Dodson, 104 Paisley Lane, New Castle, DE 19720. *Pro se.*

Allison E. Reardon, Esquire, Department of Justice, 102 West Water Street,
Dover, DE 19904. Counsel for Merit Employee Relations Board.

CARPENTER, J.

This 30th day of November, 2007, after consideration of the appeal of the Department of Correction ("Appellant" or "DOC") from the February 28, 2007 decision of the Merit Employee Relations Board ("MERB" or "the Board") and upon review of the briefs and the record below, it appears to the Court that:

1. On August 31, 2005, the Appellee, Charles Dodson, interviewed for a lateral transfer from his position as a correctional corporal at the DOC Employee Training Center in Dover to a position in the Court and Transportation Unit ("CTU"). The panel interviewing the candidates for selection included Major Timothy Radcliffe, Lieutenant Mike Merson, and Lieutenant Donna Mitchell. Sergeant Pat Sulecki, a COAD¹ union representative was also present but did not participate in scoring the candidates. Despite having the second highest score after the interview process, Mr. Dodson was not recommended for one of three available positions at CTU. The reason given for not recommending Mr. Dodson was his behavior at the end of the interview, when he hugged Lieutenant Mitchell after shaking hands with the male members of the panel. On October 5, 2005, Mr. Dodson filed a grievance regarding the panel's decision to select other candidates. His grievance was denied at all steps of the merit system grievance process.²

¹ Correctional Officers Association of Delaware.

² The Step 3 grievance decision was issued on December 13, 2005.

2. Mr. Dodson then appealed to the Merit Employee Relations Board ("MERB") on December 20, 2005. On November 29, 2006, the MERB hearing was conducted, and although testimony differed slightly, it was generally agreed that Mr. Dodson shook hands with the male panel members and then said something to the effect of "give me a hug," or "I want to get a hug from you," before hugging Lieutenant Mitchell. After Mr. Dodson left the interview room, the panel members discussed the hug and all agreed it was inappropriate. Lieutenant Mitchell stated she felt uncomfortable and was concerned that the other panel members would view Dodson's conduct as reflective of an inability on her part to be impartial in the selection process.³ Mr. Dodson testified before the Board that while in retrospect hugging was inappropriate for an interview setting, he did so because he had known Lieutenant Mitchell for a number of years and they had hugged frequently upon seeing each other or saying goodbye.⁴ On February 28, 2007, the MERB concluded that based on the evidence presented to the Board, the DOC had committed a "gross abuse of discretion" in failing to recommend Dodson for one of the three available positions. The DOC's timely appeal to this Court followed.

³Record of the Merit Employee Relations Board, Docket No. 05-12-346 at 89-90; 92; (hereinafter "R. at ____").

⁴ Lt. Mitchell did not consider the hug as inappropriate sexual conduct and the potential sexual overtones of the Appellee's action was not a factor in the decision. *Id.* at 93.

3. The Board's decision is premised upon its finding that Appellant's conduct is controlled by Merit Rule 18.5. This rule, which establishes the basis for a grievance regarding the denial of a promotion, states:

Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the minimum qualifications; (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.

It is under this rule that the Board subsequently found that the DOC's decision was a gross abuse of discretion and issued its opinion in favor of the Appellee.

The Appellant argues that this rule does not apply as the Appellee was not being considered for a "promotion" but if selected his move to the transportation unit would simply be a lateral transfer. As such, the Appellant argues that the rule is not applicable and further asserts that MERB has no jurisdiction to even address the lateral transfer decision.

Unfortunately, in this appeal the Appellee has filed no response or brief and it appears that the Board's decision never addressed why they believed Rule 18.5 was applicable to this factual situation. This has put the Court in a very difficult position to appropriately address this legal issue. While admittedly there was some brief

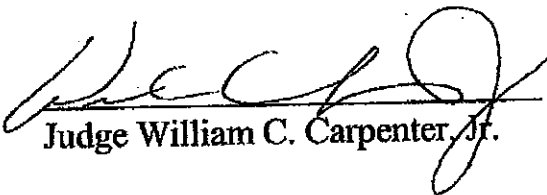
passing reference to the jurisdictional issue by the Appellant during the hearing,⁵ in fairness to the Board it was not an issue clearly argued and presented and the parties and the Board appear to have concentrated their arguments on the issue of whether the employer's conduct was a gross abuse of discretion without first addressing the jurisdictional issue at the administrative level.

Since the decision on the jurisdictional question would have ramifications far greater than this case and could potentially significantly limit the jurisdiction of the Board, the Court feels compelled to remand the case to the Board for greater clarification of its reasoning that Rule 18.5 applies to the facts of this case. While the Court is not requiring that additional testimony be taken, if the Board believes that such testimony is needed to help clarify the issues, they are free to do so. In addition, if the Board finds that the facts of this case indicate that the Appellee was being promoted thus making Rule 18.5 applicable, they should specifically articulate the basis of that decision including whether the changes in work environment, responsibility and supervision makes this matter a promotion in spite of the Appellee's lateral move due to his rank. In any event, the Board's decision should clearly and carefully set forth the legal basis for it to exercise jurisdiction over this dispute.

⁵ *Id.* at 110.

Based upon the above, this matter is remanded to the Merit Employee Relations Board for additional findings consistent with this Order, and the Court will retain jurisdiction to hear the appeal once a clarifying decision has been rendered by the Board.

IT IS SO ORDERED.


Judge William C. Carpenter, Jr.