{CONFIDENTIAL}

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF [redacted] Grievant, v. Department of Health & Social Services STATE OF DELAWARE Agency	**DOCKET NO. 96-02-82** **FINDING OF FACT** **CONCLUSIONS OF LAW** **OPINION AND ORDER**

BEFORE Katy Woo, Chairperson, Robert Burns, Vice Chairperson, Walter Bowers, Gary Fullman and Dallas Green, Members of the Merit Employee Relations Board, constituting a lawful quorum of the Board pursuant to 29 Del. C., § 5908(a).

AND NOW, to-wit, on this 26th day of June, 1996, the above-referenced matter being before the Board on May 2, 1996, the Board makes the following findings and conclusions and enters the following Order:

NATURE AND STATE OF PROCEEDINGS

The grievant, [redacted] an employee of the Division of Alcoholism, Drug Abuse and Mental Health, timely appealed from a decision of Neal McLaughlin, Division Director, Department of Health and Human Services, suspending her for three (3) days. The Board, pursuant to 29 Del. C. § 10004(b)(8) and, at the request of the grievant, entered into closed session for the hearing of an employee disciplinary case.

COPY

SUMMARY OF EVIDENCE

1. Linda Lord was sworn and testified that she is a contract nurse for the Department of Health and Human Services, Division of Alcoholism, Drug Abuse and Mental Health, and supervises [redacted] at the 801 West Street, Wilmington, DE site. Ms. Lord testified that on November 30, 1995, while at the 801 West Street location, she received a report about [redacted] possibly having a smell of alcohol on her breath.

Ms. Lord testified that she was within two feet of [redacted] office and, along with Ms. Humphrey, smelled alcohol on [redacted] breath. Ms. Lord testified that she spoke with Neil McLaughlin and Christine Stapleford by telephone, and both Mr. McLaughlin and Ms. Stapleford responded to the location.

Ms. Lord testified that she completed a report about the incident (State's Exhibit No. 1-3.) Ms. Lord testified that [redacted] appointments were canceled and a ride home was offered to [redacted] by Mr. McLaughlin.

Ms. Lord testified that she knew of two prior reports of [redacted] and the use of alcohol, but had no personal knowledge of the incidents. Ms. Lord testified that her concerns as a supervisor were that [redacted] duties involved administering medications and packing medications for self-administration by patients.

On cross-examination, Ms. Lord testified that Marlene M. Williams is also a supervisor of [redacted]. Ms. Lord testified that they were in [redacted] office for about ten minutes, and that [redacted] was cooperative and assisted in the scheduled supervision review, and had never seen [redacted] unable to perform her duties.

On re-direct, Ms. Lord testified that she was concerned about the situation, as a nurse has responsibility to patients concerning administering medications and she considered alcohol on a nurse's breath to be inappropriate professional behavior.

On re-direct, Ms. Lord testified that she did not remember if [redacted] hanged her schedule that day to have the supervisory review appointment.

On examination by the Board, Ms. Lord testified that she cannot remember the time of the incident, but believed it was before lunch, and that Mr. McLaughlin was present within a half hour of being notified. Ms. Lord testified that she was approximately 2-3 feet from [redacted] for about ten minutes. Ms. Lord testified that, due to the smell of alcohol, she felt [redacted] was impaired, but she was not stumbling. Ms. Lord testified that her conclusion was based solely on smell.

2. Sherry Humphrey was sworn and testified that she is the Quality Improvement Director for Department of Health and Social Services, Division of Alcoholism, Drug Abuse and Mental Health for three years. Her credentials include a Ph.D. in Human Resources, a MA in Communications, a M.Ed. in Counseling Psychology. She is also a Licensed Professional Counselor (LPCMH) in Delaware and Texas. She was trained in Albany, New York to do investigations of critical incidents.

Ms. Humphrey testified that she supervised [redacted] charts in accord with Medicaid requirements, but does not directly supervise [redacted] Ms. Humphrey testified that she went to 801 West Street on November 30, 1995 to set up appointments and to review charts, when Linda Lord approached her reference to her (Ms. Lord) concerns about [redacted] Ms. Humphrey testified that she met with [redacted] and Ms. Lord in [redacted] office, and was able to smell a very strong, almost overpowering odor of alcohol at approximately 1-2 feet away from [redacted] Ms. Humphrey testified that, after the meeting, Ms. Lord and she talked and then Neal McLaughlin was contacted, as well as Martha Austin. Mr. McLaughlin and Ms. Stapleford responded to the Center. Ms. Humphrey testified that she signed the incident report, State's Exhibit No. 1-3. Ms. Humphrey testified that she was not involved in the disciplinary action, but was advised that [redacted] s appointments were canceled or deferred to someone else. Ms. Humphrey testified that she had done an investigation in July, 1994 and that, at that time (11:00 AM) detected a strong odor of alcohol and reported it to Christine Stapleford by E-Mail and wrote a letter, State Exhibit 1-8, that was done at the same time, although the date of July 11, 1994 may be incorrect. Ms. Humphrey testified that she had

concerns that a nurse with alcohol on her breath had the possibility of impairment, and also, it does not portray a professional image; and, it was her responsibility to make the Center aware.

Ms. Humphrey testified that she has never seen [redacted] give injections, although she had received one complaint about [redacted]'s attitude with a patient.

On cross-examination, Ms. Humphrey testified that [redacted] had a professional demeanor in her interactions with her, and assisted the Center in developing a policy on Clozeril medication. Ms. Humphrey testified that she had never seen [redacted] in a clinical situation with patients.

On examination by the Board Ms. Humphrey testified that the complaint from a client (she did not have a date of occurrence) came when the client claimed he was scolded by [redacted] and reprimanded; but alcohol was not raised as an issue during that incident. Ms. Humphrey testified that she did not know if [redacted] was ever counseled about alcohol on her breath by a supervisor.

On re-cross, Ms. Humphrey testified that she is not a nurse, but has had to be confrontive with a client but did not use an abrasive tone, and that an abrasive tone was subjective in nature.

3. Sharon DiCamplis was sworn and testified that she is a case manager with Department of Health and Social Services, Division of Alcohol, Drug Abuse and Mental Health for approximately 20 years and is a co-worker with [redacted] Ms. DiCamplis testified that on November 30, 1995 she recalled that [redacted] appeared angry and threw her charts around at the team meeting and that she believed that [redacted] smelled of alcohol along with cologne and mouthwash in an attempt to cover up the smell of alcohol.

Ms. DiCamplis testified that there were other occasions where she detected behavior problems or smelled alcohol on [redacted] breath. Ms. DiCamplis testified that this had occurred more that 5 times prior to the incident of November 30, 1995.

On cross-examination, Ms. DiCamplis testified that she did smell alcohol on [redacted] breath on November 30, 1995 and, also that [redacted] came into the team meeting and slammed her charts down, but has not observed the smell of alcohol on other staff members.

On examination by the Board, Ms. DiCamplis testified that other people had been mad at work but had not slammed the charts down; and that generally, she detected alcohol on the breath of [redacted] in the morning hours along with cologne and mouthwash, but did not report these incidents.

On re-direct, Ms. DiCamplis testified that she never smelled alcohol on the breath of other workers.

4. Diane Steppi was sworn and testified that she is a registered nurse and has worked at 801 West Street since July, 1994. Ms. Steppi's job responsibilities include client care and general nursing care for clients of the division. Ms. Steppi testified that on November 30, 1995 she was at a team meeting where she observed [redacted] as being angry or irritated and that [redacted] slammed the charts down.

Ms. Steppi testified that she recalled smelling alcohol on [redacted] breath more than once prior to November 30, 1995 but not since that date.

On cross-examination, Ms. Steppi testified that people get upset due to the circumstances involved in the type of work but, to the best of her knowledge, not related to alcohol, and that she was not coached as to her testimony. Ms. Steppi testified that she did hear at times "give the difficult cases to [redacted]"

On examination by the Board Ms. Steppi testified that nothing at the meeting caused [redacted] to be angry or irritated as [redacted] came into the meeting late but she did not know why [redacted] was angry or agitated. Ms. Steppi testified that she did not smell alcohol on [redacted] breath that date. Ms. Steppi testified that there were other times she detected alcohol on the breath of [redacted] but she didn't recall [redacted] behavior on those days.

On re-direct examination, Ms. Steppi testified that she was not close enough to [redacted] to detect alcohol on her breath during the team meeting. Ms. Steppi testified that on other occasions co-workers have arrived late to meetings, but have usually entered the room quietly and that on occasion other co-workers would get upset but not due to the use of alcohol.

On re-cross examination, Ms. Steppi testified that she was never advised why [redacted] may have been in an irritable mood.

Upon examination by the Board, Ms. Steppi testified that her comment about hearing the comment, "Give the difficult cases to [redacted]" could have been made in jest.

5. Jane Collins was sworn and testified that she is the receptionist at 801 West Street since November, 1995 and is also a licensed practical nurse. On November 30, 1995 Ms. Collins testified that she smelled alcohol on the breath of [redacted] when [redacted] reported to work and, under the direction of Ms. Stapleford, she smelled [redacted] breath again at 1:00 PM and memorandized it as State Exhibit 1-3, 3rd page. Ms. Collins testified that on November 20, 1995, she smelled alcohol on [redacted] breath as well as at least twice a week since November 1, 1995 to March 1, 1996. Ms. Collins testified that she observed inappropriate behavior on the part of [redacted] with clients in that [redacted] ignored clients, was curt with them and gave rude answers in response to their questions. Ms. Collins testified that she did not observe similar behavior in other staff members when interacting with clients.

On cross-examination, Ms. Collins testified that she went into [redacted] office, went up to [redacted] smelled her breath, nodded as to the smell of alcohol, and walked out of the room.

Upon examination by the Board, Ms. Collins testified that she did not report the prior incidents of smelling alcohol on [redacted] breath when she arrived at work in the morning and it was primarily the smell of fresh alcohol. Ms. Collins testified that [redacted] behavior was different as compared to her colleagues.

6. Ms. Christine Stapleford was sworn and testified that she is the Director of Clinical Services for Delaware Health and Social Services, Division of Alcohol, Drug Abuse and Mental Health, and has been employed by the department for over 20 years, with the responsibility of overseeing the mental health services in New Castle County. Ms. Stapleford testified that she is also a registered nurse and the supervisor of Leah Booker, [redacted] supervisor.

Ms. Stapleford testified that on November 30, 1995 she was stopped by Mr. McLaughlin who asked her to go to 801 West Street facility due to a report of a smell of alcohol on [redacted] breath. Ms. Stapleford testified that, upon arrival, she met with [redacted] smelled alcohol on her breath, and questioned [redacted] who said that she had just returned from a doctor's office and that she had not been drinking alcohol. Ms. Stapleford testified that Ms. Jane Collins confirmed the smell of alcohol on [redacted] breath, and then [redacted] appointments were rescheduled and [redacted] went home. Ms. Stapleford testified that she, in conjunction with Melody Lasana, believed discipline was warranted. Ms. Stapleford testified that she reviewed the July 11, 1994 supervisory session and the February 10, 1995 reprimand and proposed a 3-day suspension for the current incident. Ms. Stapleford testified as to the previous attempts to get [redacted] to enroll in the S.T.E.P. program.

Ms. Stapleford testified that [redacted] did state that her partial plate could have an odor of alcohol and that her physical condition could cause an odor of alcohol and [redacted] produced a note, dated 11/30/95, from a doctor's office stating that there was no discernible odor of alcohol. Ms. Stapleford testified that her concern is for the clients who are receiving care from a nurse who appears to be under the influence of alcohol, and it reflects badly on the state and is a problem for [redacted] herself. Ms. Stapleford testified that she got reports from other staff but that [redacted] appears to be in a state of denial about the problem and that the entire situation has not been a pleasant experience for any of those involved. Ms. Stapleford testified that she has never seen [redacted] physically impaired, as evidenced by staggering or an unsteady gait.

On cross-examination, Ms. Stapleford testified that she recalled [redacted] saying she had been to the doctor that day, but advised her that this third occurrence that she smelled alcohol

and that [redacted] had to leave for the rest of the day, and that Marlene Williams was present as a representative of the team leader. Ms. Stapleford testified that Marlene Williams stated that she could not smell alcohol on [redacted] breath, but Ms. Stapleford testified that she did smell alcohol on [redacted] breath.

Ms. Stapleford testified that she never had seen [redacted] unable to function, nor had any patient filed any complaints regarding alcohol about [redacted] just the previously testified method used to deliver advice as nurses sometimes dispense bad news as a message, but the method has to be appropriate. Ms. Stapleford testified that she recalled discussing partial plate as the cause of the smell of alcohol on another date as well. Ms. Stapleford testified that she didn't recall [redacted] having any patient appointments that morning. Ms. Stapleford testified that she didn't recall saying "not my decision" but did recall saying that she must send [redacted] home. Ms. Stapleford testified that she didn't recall giving names of the people who had reported alcohol smell, and that she never discussed the incident with Ms. Booker.

Upon examination by the Board, Ms. Stapleford testified that she does not know if [redacted] entered the S.T.E.P. program, as this was the only report since November 30, 1995.

7. Melody Lasana was sworn and testified that she is a support senior administrator for the New Castle County Mental Health Clinic of Delaware Health and Social Services, including personnel administration. Ms. Lasana testified that on November 30, 1995, she was beeped by Sherry Humphrey and was advised that [redacted] had alcohol on her breath and asked what course of conduct was to be followed. Ms. Lasana testified that she spoke to Martha Austin only, reviewed the situation with her, and then contacted Neil McLaughlin and advised him that [redacted] should be relieved of her duties for the day and sent home. Ms. Lasana testified that she then called Sherry Humphrey back to advise her of what she had just told Mr. McLaughlin.

Ms. Lasana testified that she met with Ms. Stapleford and discussed with her as to the types of discipline available, the choice of the 3-day suspension; and assisted in the drafts of the pre-suspension letter. Ms. Lasana testified that she also prepared the suspension letter for Mr. McLaughlin.

Ms. Lasana testified that [redacted] never provided any explanation except a doctor's note that stated no smell of alcohol, but that note did not appear to be signed by a doctor.

On cross-examination, Ms. Lasana testified that at the pre-decision meeting on December 8, 1995, [redacted] gave her explanation as to the cause of the smell of alcohol as a medical condition.

8. [redacted] was sworn and testified that the accusation is not correct, as she does not consume alcohol at work nor prior to reporting to work, and has been a state employee for 25 years and a Licensed Practical Nurse for over thirty years. [redacted] testified she was the past president of the Delaware Licensed Practical Nurse Association and was formerly a member of the State Board of Nursing.

[redacted] testified that on November 30, 1995, at about 11:30 AM, after returning to her office, she met with Sherry Humphrey and Linda Lord to schedule supervisory review appointments.

[redacted] testified that she had gone to an emergency physicians appointment on the morning of November 30, 1995 to have a post-surgical chest wound drained. [redacted] testified that Ms. Stapleford was there when she returned to the office and asked to smell her breath. [redacted] testified that she asked Ms. Williams if it was possible to be irritable, but was not angry or agitated and submitted to having her breath smelled by an independent person. [redacted] testified that neither she or her supervisors use the breathalyzer machine that was on-site at the West Street location to obtain a sample. [redacted] testified that she called the surgeon's office back and they prepared a note.

[redacted] testified that she left the site at 1:30 PM.

[redacted] testified that she met with Christine Stapleford and Melody Lasana on 12/8/95 after receiving the notice of proposed suspension. [redacted] testified that those present at the pre-suspension meeting were Neil McLaughlin, Christine Stapleford, Melody Lasana and herself, and submitted the documents provided by her doctor's office.

On cross-examination, [redacted] testified that on November 30, 1995 she arrived at 801 West Street one half hour late and that she took compensatory time to account for the half hour, and met with Ms. Lord and Ms. Humphrey to schedule a supervisory session.

[redacted] testified that she asked the doctor's office to prepare the note and that she spoke with the same person who was in the office at the time of her appointment. [redacted] testified that she never spoke to Dr. Miller and that it was not his signature on the note. [redacted] testified that she never spoke with Ms. Gottlieb (the person who signed the note) about testifying here today.

[redacted] testified that she never sought out a physician to check if the smell of alcohol on her breath has a medical basis. [redacted] testified that she does not have a problem with alcohol and she did not speak to anyone about documenting that she had no problem with alcohol.

[redacted] testified that she deals with members of the public who have mental illnesses and that it is important that public trust and have confidence in her work as it would have impact on a patient who smells alcohol on the treater's breath by providing an avenue of distrust and lack of faith and, ultimately, adversely impacting a patient's trust of the care provider.

On examination by the Board, [redacted] testified that her only route was to bring this matter directly to the Board. [redacted] testified that she has serious health problems and is currently on medications. [redacted] testified that she would seek a second opinion for a medical case. [redacted] testified that she does consume alcohol on an irregular basis, primarily at social occasions. [redacted] testified that she didn't call Ms. Booker to testify because she didn't feel a need to do that.

[redacted] testified that Marlene Williams is not her supervisor as she has never been supervised by a non-nurse.

On re-cross examination, [redacted] testified that she did not consider the two different co-workers' opinions as two separate opinions like her own doctor's opinion with regard to the smell of alcohol on her breath on November 30, 1995.

THE LAW

29 Del. C. §5931. Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days. (29 Del. C. 1953, §5931; 55 Del Laws, c. 443, §6, 69 Del. Laws, c. 436, §7.)" Effect of amendments -- 69 Del. Laws, c. 436, effective July 14, 1994, rewrote this section.

MERIT RULES - Chapter 15 "EMPLOYEE ACCOUNTABILITY"

Merit Rule No. 15.1

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

Merit Rule No. 15.2

Employees shall receive a written reprimand where appropriate based on specified misconduct, or where a verbal reprimand has not produced the desired improvement.

Merit Rule No. 15.3

Prior to finalizing a dismissal, suspension, fine or demotion action, the employee shall be notified in writing that such action is being proposed and provided the reasons for the proposed action.

Merit Rule No. 15.4

Employees shall receive written notice of their entitlement to a pre-decision meeting in dismissal, demotion for just cause, fines and suspension cases. If employees desire such a meeting, they shall submit a written request for a meeting to their Agency's designated personnel representative within 15 calendar days from the date of notice. Employees may be suspended without pay during this period provided that a management representative has first reviewed with the employee the basis for the action and provides an opportunity for response. Where employees' continued presence in the workplace would jeopardize others' safety, security, or the public confidence, they may be removed immediately from the workplace without loss of pay.

Merit Rule No. 15.5

The pre-decision meeting shall be held within a reasonable time not to exceed 15 calendar days after the employee has requested the meeting in compliance with 15.4.

Merit Rule No. 15.6

Pre-decision meetings shall be informal meetings to provide employees an opportunity to respond to the proposed action, and offer any reasons why the proposed penalty may not be justified or is too severe.

FINDING OF FACT

1. [redacted] has been advised on two prior occasions that there was a problem with alcohol on her breath prior to the events of November 30, 1995.

2. On November 30, 1995 [redacted] did have an odor of alcohol on her breath at her workplace, 801 West Street, Wilmington, Delaware, as confirmed by the observations of Linda Lord, Sherry Humphrey and Jane Collins.

3. Progressive discipline had failed to provide the desired result in altering behavior so the level of discipline was appropriate in this matter.

4. The administration of the discipline action is in accord with the Merit Rules and Title 29, Chapter 59 of the Delaware Code.

CONCLUSION OF LAW

The Department of Health and Social Services, Division of Alcoholism, Drug Abuse and Mental Health had a sufficient factual basis establishing just cause under Merit Rule 15.1 to impose a three-day suspension to [redacted]

ORDER

The grievance of [redacted] is denied.

IT IS SO ORDERED

Katy K. Woo, Chairperson

Robert Burns, Vice Chairperson

Walter Bowers, Member

Gary Fullman, Member

Dallas Green, 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.

Mailing Date: July 2, 1996

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