BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

EDWARD T. STEVENS, Employee/Grievant, v. DEPARTMENT OF HEALTH AND, SOCIAL SERVICES, Employer/Respondent.	))))))))))	**DOCKET No. 08-11-433** **DECISION AND ORDER**

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 September 17, 2009 in the Delaware Room at the Public Archives Building, 121 Duke of York Street, Dover, DE 19901.

BEFORE Martha K. Austin, Chair, John F. Schmutz, and Jacqueline Jenkins, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Jeffrey K. Martin, Esquire
on behalf of Employee/Grievant
Edward T. Stevens

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services (DHSS) offered and the Board admitted into evidence the DHSS trial book with eighteen exhibits (A-R).

DHSS called three witnesses: John Thomas Murray, Deputy Director of the Division of Long Term Care Residents Protection (DLTCRP); Kenneth E. Thompson, Investigative Administrator; and Francis T. Monaghan, III, Investigative Section Chief.

The employee/grievant, Edward T. Stevens (Stevens), offered and the Board admitted into evidence Stevens' trial book with seven exhibits (1-7). Stevens testified on his own behalf and called one witness, Vincent P. Meconi, former Secretary of DHSS. [1]

FINDINGS OF FACT

DLTCRP hired Stevens as an Investigator I in 1999. Until his termination in 2008, Stevens' principal job responsibility was conducting criminal background checks on applicants for employment at nursing homes and other long term care facilities.

Each applicant must complete a Criminal History Record Request Form and submit fingerprints. The form states: "I hereby grant a full release for the employer to request and

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[1] At the start of the hearing, the Board *sua sponte* raised the issue of the Board's jurisdiction to hear the case. Stevens filed a dual appeal of his termination by DHSS to the Director of the Office of Management and Budget and the Board pursuant to Merit Rule 12.9. The grievance was never heard by the Director. According to the parties, they agreed to waive that step and go directly to the Board. As a matter of law, the Board is not certain whether the Merit Rules permit that. However, the parties stipulated on the record that they would not raise this jurisdictional issue in any appeal to the Superior Court so the Board proceeded to hear the grievance on the merits.

obtain any records or information contained on my criminal history record."

The investigator sends the fingerprints to the State Bureau of Identification (SBI) to run through SBI and Federal Bureau of Investigation databases to see if the applicant has any criminal convictions. The Investigator then reviews the criminal history record to see if the applicant has any disqualifying criminal convictions under DHSS regulations. SBI provides the criminal history record in a DOS format. Stevens had a practice of double-checking the SBI DOS criminal history record by accessing a DELJIS internet format, which contains additional information such as motor vehicle violations and a section "Cautions, Notices, Comments."

After a background check is completed, the investigator turns the file over to an administrative assistant to generate a form letter (there are up to 20 variations) to send to the employer enclosing a copy of the criminal history record with a notation whether the applicant is qualified or disqualified from employment under DHSS regulations. DLTCRP Guidelines provide: "If the information to be forwarded does not fit one of our standard letters (1) Ken Thompson or Tom Murray will determine how we will notify the employer or draft the letter."

On January 1, 2000, Stevens signed a verification that he had read and understood Directive No. 1 of the Delaware Criminal Justice Information System (DELJIS) which strictly regulates the dissemination of criminal history record information. Stevens also signed a Confidentiality Agreement to verify he would comply with DHSS Policy

Memorandum No. 5 (dated Nov. 8, 2000) regarding client confidentiality. Stevens acknowledged: "I understand that violation of the privacy rights of individuals through unauthorized discussion, disclosure, dissemination, or access to personal information could make me subject to Department disciplinary action as well as civil and/or criminal penalties." Stevens also signed a Biggs Data Center Non-Disclosure Agreement agreeing "not to disclose confidential DHSS information unless authorized."

By letter dated March 15, 2004, Stevens sent a letter informing an applicant that the FBI report "reveals charges of immigration violation." The letter gave the applicant until March 25, 2004 to advise about the disposition of those charges or "you will be considered potentially disqualified to work in a nursing home or other facility licensed under Title 16, Del. C. Ch. 11."

Stevens' immediate supervisor (Kenneth Thompson) verbally counseled Stevens about that letter. According to Thompson, federal immigration violations do not disqualify an applicant from employment with a long term care facility. By disclosing that information to the employer Stevens, violated the DHSS client confidentiality policy. Thompson, however, did not discipline Stevens.

Stevens' 2005 Performance Review shows that he conducted 3,100 criminal background checks that year. The reviewer noted that Stevens "is thorough in the review of the applicant backgrounds. He is slightly below the assignment to completion day's average of investigators on new criminal backgrounds." The reviewer noted some performance

deficiencies in the length of time it took Stevens to perform criminal background checks. The overall performance rating, however, was "Meets Expectations."

Stevens' 2006 Performance Review shows that he conducted 2,878 criminal background checks that year. The reviewer noted that Stevens "is the most thorough investigator in the review of applicant backgrounds." The reviewer again noted some performance deficiencies in completing background checks in a timely manner, but the overall performance evaluation was "Meets Expectations."

In 2007 Stevens expressed concern to his immediate supervisor (Kenneth Thompson) that some investigators were sending employers the DELJIS internet rather than the SBI DOS version of the applicant's criminal history record. Stevens was concerned that the internet form might disclose confidential information in the comments section (like mental patient or drug user) which was not relevant to a criminal background check for employment at a long term care facility. By e-mail dated April 11, 2007, Thompson advised all of the investigators that before sending out a DELJIS internet form to the employer they should review the remarks and comments section to black out any references to matters the employer did not need to know. At the bottom of the e-mail Thompson wrote: "Thanks to Ed [Stevens] for heading this off for us before it got ugly."

In March 2008, Stevens was conducting a criminal background check on an applicant ("JP") for employment at Gilpin Hall. The applicant had an extensive criminal history record and, according to Stevens, in the Comment section on the SBI DOS format was a notation

"Gloves on." Stevens interpreted that to mean the applicant could pose a safety risk because of a medical condition. Stevens then checked the DELJIS internet format and saw in the Cautions, Notices, Comments section "Defendant states that she is HIV positive."

Being HIV positive is not a bar to employment in a long term care facility, and JP did not have any disqualifying criminal convictions. Nevertheless, on March 14, 2008 Stevens called the Nursing Home Administrator at Gilpin Hall, Paul Smiley, and told him that JP was HIV positive. Smiley told Stevens that Gilpin Hall had already decided not to hire JP for other reasons.

Another investigator overheard Stevens' telephone conversation and reported it to their supervisors, Ken Thompson and Francis Monaghan, on March 17, 2008. On March 19, 2008, Thompson and Monaghan confronted Stevens and directed him to provide them with a written report about his telephone conversation with Paul Smiley by the close of business that day. Stevens printed out an e-mail to Thompson and Monaghan (which he was unable to send) and hand delivered it to them a while later. Stevens expressed concern in the e-mail that management "is moving from the inquiry stage to the accusatory stage ('We don't know if this is a violation of the law yet')" and asked for an extension of time "until I confer with Counsel on this matter."

By memorandum dated March 19, 2008, Monaghan notified Stevens that he had not provided the requested written report by the close of business so "you are being suspended with pay pending a review of this situation." Monaghan referred the matter to DELJIS to

investigate a possible criminal violation by Stevens of DELJIS Directive No. 1. By memorandum dated March 24, 2008, the DELJIS Security Manager advised Tom Murray that Stevens' DELJIS access "has been temporarily suspended due to an on-going investigation" by SBI.

The Director of DLTCRP, Carol Ellis, met with Stevens, Thompson, and Monaghan on March 28, 2008. By letter dated March 31, 2008, Ellis notified Stevens: "To follow up our meeting of Friday, March 28, this letter formalizes your placement on suspension without pay effective March 28, 2008. At that meeting you were provided with a copy of a memorandum from the DELJIS security manager suspending you from access to DELJIS or any information obtained from DELJIS."

By letter dated May 2, 2008, Ellis notified Stevens "that I am proposing your termination from your position as an Investigator I with the [DLTCRP]" because Stevens had violated the DHSS Client Confidentiality Policy and DELJIS Directive No. 1 by disclosing an applicant's HIV status to a potential employer. The letter also cited as grounds for termination: insubordination (failing to submit a written report to his supervisors by the close of business on March 19, 2008); and failure to complete criminal background checks in a timely manner.

By letter dated June 4, 2008, the DELJIS Security Manager notified Stevens and his supervisors: "The Executive Committee of the DELJIS Board of Managers reviewed your suspension of DELJIS on May 22, 2008. This letter is to serve as notification that you are

cleared of the violation from the DELJIS Board of Managers' perspective. This is an entirely separate body and does not impact your employer's decisions or actions. Your access with DHSS Long Term Care will need to be requested by the agency."

By letter dated June 20, 2008, the DHSS Secretary notified Stevens that he had accepted the recommendation of the Director to terminate Stevens. The Secretary expressed particular concern that Stevens had told his supervisors and the Director "that you would share information from a criminal history record if you considered it relevant, citing as an example a notation that an individual was armed and dangerous. At no time did you acknowledge that you were not at liberty to substitute your personal judgment for the confidentiality restrictions that apply to all Division employees granted access to confidential information. . . . [Y]ou continue to assert that your release of confidential information, contrary to policy, is within your discretion. Consequently the Department, through the Division of Long Term Care Resident Protection, is unable to carry out its obligation to protect confidential information under such circumstances."

CONCLUSIONS OF LAW

Merit Rule 12.1 provides:

> **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 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 parties did not raise the issue, but the Board had some concerns whether Stevens received notice and a pre-decision meeting prior to his suspension without pay on March 31, 2008 as required by Merit Rules 12.3 and 12.4. The Board does not have to resolve that issue because it concludes as a matter of law that Stevens did not commit all of the charged offenses and the penalty of termination was not appropriate to the circumstances.

The Board concludes as a matter of law that the evidence in the record did not prove that there was just cause for discipline for the offense of untimely reports. Stevens's supervisors noted in his 2005 and 2006 performance evaluations that there were problems with how long Stevens took to do criminal background checks, yet each time they gave him an overall evaluation of "Meets Expectations."

The Board concludes as a matter of law that the evidence in the record did not prove just cause to discipline for the offense of insubordination. Steven's supervisors directed him on March 19, 2008 to prepare a written report about his disclosure of an applicant's HIV status by the close of business that day. Stevens asked for an extension of time to consult with legal counsel because he was concerned about possible criminal charges and self-incrimination. The Board believes a charge of insubordination required Stevens' supervisors to have advised him that he would be disciplined if he did not prepare the report that day and that anything which might be self-incriminating in his report could not be used in any

criminal prosecution.

The Board concludes as a matter of law that the evidence in the record does not support the charge that Stevens violated DELJIS Directive No. 1. On June 4, 2008, the DELJIS Security Manager notified DLTCRP that based on DELJIS' investigation Stevens did not violate DELJIS Directive No. 1 by disclosing an applicant's HIV status to an employer. Yet the June 20, 2008 DHSS termination letter continued to cite to a DELJIS violation as a ground for termination.

The Board concludes as a matter of law that evidence in the record proved that Stevens violated the DHSS confidentiality policy when he disclosed an applicant's HIV status to the Nursing Home Administrator at Gilpin Hall. Stevens was well aware of the policy: he had received training and signed numerous acknowledgments that he would abide by it; and he had received counseling about what information could or could not be disclosed to an employer about an applicant. Nevertheless, Stevens disclosed an applicant's HIV status which was not a disqualification for employment because he believed the information presented a "safety" threat. This was after Stevens' immediate supervisor – prompted by Stevens – advised all investigators to black out any information in the comments section of the criminal history record (like mental patient or drug user).

The Board does not believe that the penalty of termination for this offense was appropriate to the circumstances. DHSS did not provide any evidence that it had terminated another employee for a single violation of the confidentiality policy. There was no testimony

that DHSS would have terminated Stevens if that was the only charged offense. DHSS based the penalty of termination on several charges – insubordination, violation of DELJIS Directive No. 1, and unsatisfactory job performance – which the Board concludes were not proven by the record.

In granting Stevens' appeal, the Board had some initial reservations about the remedy of reinstatement if Stevens were to continue to decide on his own to disclose confidential information about applicants to employers. Stevens assured the Board that he had learned his lesson and would comply with the DHSS confidentiality policy. From the testimony of the witnesses, it does not appear there is any lingering animosity between Stevens and his former supervisors which might disrupt the workplace.

The Board orders DHSS to reinstate Stevens to his former position, or, if that is not possible because the position has been filled or cannot be filled, to a comparable position with back pay and benefits from the date of his termination (June 20, 2008) to the effective date of reinstatement, **LESS**, any income or benefits (including unemployment insurance) which he received during that time.

ORDER

It is this 23rd day of September, 2009, by a unanimous vote of 3-0, the Decision and Order of the Board to grant Stevens' appeal. The Board orders DHSS to reinstate Stevens to the same or comparable position with back pay and benefits for the period June 20, 2008 (the date of his termination) until the effective date of his reinstatement, less any income or benefits he received (including unemployment insurance) during that period. If the parties are unable to agree on the amount of back pay and benefits, the Board will schedule a further evidentiary hearing on that issue.

Martha K. Austin
Chair

Jacqueline Jenkins
Member

John C. Schmutz
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.
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> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
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> (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.
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> (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: September 24, 2009

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