

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	DOCKET No. 12-11-573
v.)	
)	
DEPARTMENT OF TECHNOLOGY AND INFORMATION,)	DECISION AND ORDER
)	<i>PUBLIC (redacted)</i>
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 10:00 a.m. on June 26, 2013 at the Commission on Veterans Affairs Hearing Room, Robbins Building, 802 Silver Lake Boulevard, Dover, DE 19904.

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

APPEARANCES

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

Deborah L. Murray-Sheppard
Board Administrator

Roy S. Shiels, Esquire
on behalf of the employee/grievant

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Technology and Information

BRIEF SUMMARY OF THE EVIDENCE

The Department of Information and Technology (DTI) offered and the Board admitted into evidence ten documents marked for identification as Exhibits A-J.

DTI called three witnesses: Elayne Starkey, Chief Security Officer; Danka Prilepkova, Lead Security Administrator; and William Hickox, Chief Operating Officer.

The employee/grievant (the Grievant) offered and the Board admitted into evidence seven documents marked for identification as Exhibits 1-7.

The Grievant testified on his own behalf but did not call any other witnesses.

FINDINGS OF FACT

The Grievant worked as an Internet Security Officer at the Department of Transportation (DelDOT).

On August 27, 2010, Governor Markell issued Executive Order No. 20 to consolidate all statewide information technology functions in one agency (DTI) in order to reduce redundancies and costs and improve service delivery.

The consolidation of all statewide information technology functions in DTI did not occur overnight but was staggered over the course of the next several years while DTI conducted a detailed review of each executive branch agency.

By memorandum dated July 3, 2012, the Director of the Office of Management and Budget (OMB) and the Controller General approved the reallocation of six merit employees from DelDOT to DTI, including the Grievant. "Transfer of these positions will allow DTI human resources staff to maintain and update necessary PHRST records for these merit employees,

whose job functions have been consolidated within DTI. The positions will continue to be paid with DelDOT funding.”

Effective July 11, 2012, the OMB transferred six IT personnel from DelDOT to DTI, including the Grievant. The Grievant did not re-locate to a DTI facility but continued to work out of DelDOT and remained on the DelDOT payroll.

The Grievant was concerned about his merit status at DTI. By memorandum dated July 31, 2012, the OMB Director advised the Grievant: “[Y]our status as a merit employee remains unchanged. Although your position has been consolidated into DTI, you will continue to enjoy the same rights and protections as all other Merit employees. DTI will follow the Merit Rules, and members of my staff are available to offer guidance and assistance to them, if required. . . . DTI Human Resources will administer your benefits, such as leave and health insurance. DTI will provide notice to you regarding such things as an updated Performance Plan, your supervisor’s name, and how to request leave.”

In order to work for DTI, the Grievant had to undergo a criminal background check (CBC). The DTI Security Clearance Policy (effective Mar. 20, 2007) provides:

The Department of Technology and Information (DTI) is committed to safeguarding the State’s information assets against unauthorized use, damage, and loss. DTI requires all employees (full time, consolidated, part time, casual/seasonal, and temporary), contractors and vendors to pass a criminal background check completed by an authorized entity. The outcome of these checks determines hiring approval, system and facility access at DTI. If criminal history reports are not provided within the first 90 days in order for DTI to determine final security clearance, employment/contract may be terminated.

...

Consolidated staff – are individuals impacted by the IT Consolidation process as authorized by the Governor’s Executive Order 20. These individuals will be consolidated and managed under DTI utilizing originating department’s merit/HR rules, while remaining on the originating agency’s LAP report. As part of the consolidated reporting structure, all consolidated employees are required to comply with DTI’s policies, standards, and procedures.

By e-mail dated July 5, 2012, Don Burris, the Grievant’s former supervisor at DelDOT, advised the Grievant: “HR will provide a letter stating the transfer (you will remain a DelDOT employee reporting to DTI). You will be relocating to DTI after a background check is completed, in about two weeks. In the meantime, you will need to go over for your background check today.”

On July 12, 2012, the Grievant met with Danka Prilepkova to discuss his transition to DTI. Prilepkova gave the Grievant a copy of the DTI Security Clearance Policy. Prilepkova scheduled another meeting with the Grievant on August 3, 2012 to check on the status of his CBC but the Grievant cancelled the meeting. He cancelled another meeting scheduled for August 6, 2012 and did not respond to Prilepkova’s e-mails or voice mail.

William Hickox, the DTI Chief Operating Officer, met with the Grievant on August 10, 2012. Hickox asked why the Grievant would not undergo a criminal background check. The Grievant said that he “didn’t have anything to hide” and his objection was “philosophical in nature.” Hickox suggested that the Grievant comply with the CBC directive to protect his job and then he could grieve under the Merit Rules. The Grievant still refused a CBC even though Hickox warned that he could be disciplined if he did not comply.

By memorandum dated August 16, 2012, Elaine Starkey, the DTI Chief Security Officer, notified the Grievant: “As of today, Thursday, August 16, you still have not completed your CBC; therefore this written reprimand is being issued due to your insubordination.” Starkey gave the Grievant until August 17, 2012 to “[c]omplete the Criminal History Record Check Authorization Form and the Request for Security Clearance Form.”

According to the Grievant, he did not believe DTI had any authority to require a CBC because he was still an employee of DeIDOT and the DTI Security Clearance Policy did not apply to him. According to the Grievant, he did not believe he needed a CBC because he had worked in information technology at DeIDOT and never been required to have one. However, Elaine Starkey explained that, at DTI the Grievant would have access to the vast databases maintained by DTI which contain highly sensitive personal information.

The Board finds as a matter of fact that the Grievant was well aware – certainly by July 31, 2012 – that OMB had consolidated his position into DTI and that he now reported to DTI and was subject to all DTI policies including the DTI Security Clearance Policy. The Grievant tacitly acknowledged his change in status by submitting a leave request on July 27, 2012 using a DTI form.

The Board finds as a matter of fact that the Grievant repeatedly refused a CBC even though DTI warned that he might be disciplined if he did not comply with the DTI Security Clearance Policy.

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 his chapter; and imposing a penalty appropriate to the circumstances.

The Board concludes as a matter of law that DTI had just cause to reprimand the Grievant for insubordination.

The Board finds it implausible that the Grievant continued to believe that he was a DelDOT employee and not subject to the DTI Security Clearance Policy. His supervisor at DelDOT sent him an e-mail on July 5, 2012 advising the Grievant that he now reported to DTI and “you will be relocating to DTI after the background check is completed.”

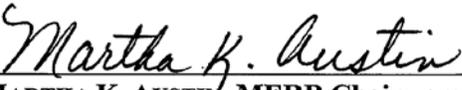
Any doubts the Grievant may have had should have been dispelled by the July 31, 2012 memorandum from the OMB Director: “Your transition to the Department of Technology and Information (DTI) supports the Governor’s initiative for consolidating information technology resources. . . . DTI Human Resources will administer your benefits, such as leave and health insurance. DTI will provide notice to you regarding such things as an updated Performance Plan, your supervisor’s name, and how to request leave.”

The Grievant testified that he did not believe he was a DTI employee because he had not fully transitioned. But his reasoning is circular. The Grievant could not fully transition as a DTI employee until he had a CBC and received security clearance. He could not complete the transition without the CBC, which he refused to have.

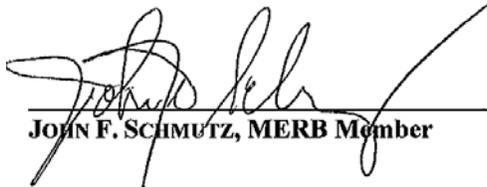
One may respect the Grievant's "philosophical" objection to a CBC, but he cannot nullify the DTI Security Clearance Policy based on his own personal convictions.

DECISION AND ORDER

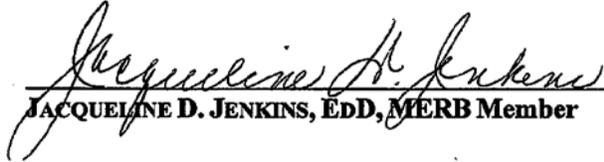
It is this **3rd** day of July, 2013, by a vote of 5-0, the Decision and Order of the Board to deny the Grievant's appeal.


MARTHA K. AUSTIN, MERB Chairwoman


VICTORIA D. CAIRNS, MERB Member


JOHN F. SCHMUTZ, MERB Member


PAUL R. HOUCK, MERB Member


JACQUELINE D. JENKINS, EDD, MERB 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.

(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 3,** 2013

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel