

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	DOCKET No. 13-10-596
v.)	
)	
DEPARTMENT OF SERVICES FOR)	DECISION AND ORDER
CHILDREN, YOUTH AND THEIR FAMILIES/)	
DIVISION OF YOUTH REHABILITATIVE)	<i>PUBLIC DECISION (redacted)</i>
SERVICES,)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:30 a.m. on April 3, 2014 at the Commission on Veterans Affairs, Robbins Building, 802 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Dr. Jacqueline Jenkins, 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

Gary W. Aber, Esquire
on behalf of the Employee/Grievant

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Services for Children, Youth and Their
Families/Division of Youth Rehabilitative
Services

BRIEF SUMMARY OF THE EVIDENCE

The Department of Services for Children, Youth and Their Families, Division of Youth Rehabilitative Services (“YRS”) offered and the Board admitted into evidence thirteen documents marked for identification as Exhibits A-M with portions of Exhibit B and Exhibit E redacted pursuant to the Pre-Hearing Order. At the Board’s request, YRS produced the felony and misdemeanor flow charts used by the agency to conduct a suitability review (marked for identification as Exhibit N).

YRS called four witnesses: Tanya Banks, Assistant Superintendent of the Ferris School; Alyson McGonigal, Deputy Director of YRS; Thomas Spell, Superintendent of the Ferris School; and Nancy Dietz, Director of YRS.

The employee/grievant offered and the Board admitted into evidence eight documents marked for identification as Exhibits 1-8.

At the close of the agency’s case, the grievant moved for judgment as a matter of law. The Board granted the motion. ¹

FINDINGS OF FACT

Prior to her termination on September 18, 2013, the grievant worked as a Youth Rehabilitation Program Manager (paygrade 18) at the Ferris School, a maximum security facility for juvenile offenders. The grievant had worked at YRS for twelve years.

According to the Office of Management and Budget class specifications, the essential functions of a Youth Rehabilitation Program Manager are:

¹ In granting the motion for judgment as a matter of law, the Board did not impermissibly shift the burden of proof. As a matter of practice in disciplinary cases, the Board believes that the agency has the burden of going forward and so the Board asks the agency to present its case in chief first. To meet the grievant’s ultimate burden of proof, the grievant can rely on the evidence presented by the agency without having to put on her case in chief.

- * Administers and directs the operation of a 30 bed youth population to include a behavior management system and facility operations.
- * Oversees and directs staff who provide assessment services and program development and implementation.
- * Provides clinical input and supervision in treatment plan development and implementation.
- * Determines placement, classification, referral for special programs, aftercare and discharge for youths based on input from Treatment Team (Alternatives, Probation/Parole, Education, etc.).
- * Participates with other administrative and management staff in the development of intermediate and long range program plans for treatment services both within the institution and in the community in order to meet the needs of youth and their families.
- * Oversees the preparation of reports on the progress and behavior of youths. Prepares reports and maintains records on facility's activities.
- * Administers and instructs staff in the normative culture system.

On September 16, 2012 (a Sunday), the grievant was shopping at a ShopRite in Pennsylvania. While she was using a self-scan aisle to pay for groceries and clothes, a loss prevention agent at the store noticed that she had not scanned all of the items before putting them in her bags. The loss prevention agent followed her out of the store and apprehended her. The loss prevention agent called the police. A police officer issued the grievant a Non-Traffic Citation for taking "possession and conceal[ing] merchandise worth \$129.98" and failing "to pay for merchandise."

The grievant pled guilty to one count of retail theft before a Magisterial District Judge on September 16, 2012. The judge fined the grievant \$200.00 and imposed costs of \$139.00.

The grievant changed her mind and appealed to the Court of Common Pleas. After a trial

on December 6, 2012, the Court of Common Pleas found the grievant guilty of one count of retail theft and fined her \$200.00 and imposed costs of \$289.00. Under Pennsylvania law, retail theft “constitutes a: (1) Summary offense when the offense is a first offense and the value of the merchandise is less than \$150.” 18 Pa. Stat. §3929(b)(1).

YRS has a written policy requiring employees to self-report any law enforcement contact: “Employees have the responsibility to immediately inform their supervisor of any criminal investigations, arrests, indictments, or convictions of themselves” DYRS Policy # 3.2 (effective 1/19/10) Section II.B.1.a. *See also* Departmental Policy # 305 (effective Dec. 22, 2002), Section II.B. **Duty To Report** (“Each employee shall immediately inform their Supervisor/Manager of the following: Criminal convictions, arrests, investigations or indictment of themselves”).

According to the grievant, she reported the arrest in Pennsylvania to the incumbent Superintendent of the Ferris School, Annette Miller. Alyson McGonigal, who investigated the incident a year later, testified that she talked with Miller on July 18, 2013 and Miller confirmed that “she was aware” of the grievant’s law enforcement contact but told her “not to worry about it” because it was only a summons or citation not an arrest which would show up in the Delaware Criminal Justice Information System (“DELJIS”).

On July 15, 2013, a Youth Rehabilitation Counselor (Betsy Wiggins) received a copy of an article published in the Norristown, Pennsylvania *Times Herald* on September 24, 2012 from an allegedly anonymous source. The article reported that the grievant “was cited for retail theft Sept. 16 [2012] after she attempted to take \$129.96 worth of merchandise from the Shoprite on East Germantown Pike without paying for it.”

Wiggins gave the article to Thomas Spell, Annette Miller’s successor as Superintendent of

the Ferris School. Spell ran a Google search to verify the authenticity of the article and downloaded another copy from his computer. According to Spell, he left a copy of the article he downloaded in the mail box of the Assistant Superintendent, Tanya Banks, but did not put a note on it.² Banks conducted an investigation and interviewed the grievant on July 16, 2013. Banks had the grievant write the following statement:

On September 17, 2012 this writer notified Annette Miller who was then the Ferris School Superintendent of a criminal arrest for retail theft in the state of Pennsylvania including the final disposition of a \$200.00 fine and a Charge Summary Violation which is a class S in the state of Pa. Class S in the state of PA is described as an offense less than a misdemeanor and categorized as a citation.

Pursuant to 31 *Delaware Code* Section 309, the Department of Services for Children, Youth and Their Families promulgated regulations in 1991 (revised in 2002) for criminal history record checks (“Delacare Regulations”). The Delacare Regulations require a criminal background check for all persons who work in residential child care facilities. The agency conducts a background check as part of the initial employment application. After hire, the agency is notified by DELJIS when an employee has been arrested for a crime in Delaware.

The Delacare regulations prohibit employment of a person convicted of certain crimes (for example, crimes of a sexual nature or involving children).

For other criminal convictions, the DSCYF Criminal History Unit conducts a suitability review, focusing on (but not limited to) crimes involving physical harm or death; weapons, explosive devices or threat of harm; public indecency and obscenity; reckless endangerment; cruelty to animals or deviant behavior; or drug offenses.

² According to Spell, he can no longer locate the original “anonymous” copy of the newspaper article which is unfortunate because it might show who downloaded the article and when.

In conducting a suitability review, the DSCYF Criminal History Unit uses a flow chart, one for felony crimes, and another for misdemeanor crimes. Under the flow chart for misdemeanor crimes, a Class A misdemeanor conviction in the last five years may make the person unsuitable for employment.

The DSCYF Criminal History Unit did a suitability review of the grievant for her retail theft conviction in Pennsylvania. According to the YRS Director, Nancy Dietz, the DSCYF Criminal History Unit's recommendation was that the grievant was suitable for employment.³

Dietz then consulted with DSCYF Human Resources which apparently overruled the recommendation of the Criminal History Unit and deemed the grievant unsuitable for employment.⁴

As a Youth Rehabilitation Program Manager, the grievant must be an authorized user of DELJIS in order to access the agency's case management system. On a daily basis, DELJIS cross-references all arrests in Delaware with the names of authorized users of the system. If there is a match, the Executive Director of DELJIS may suspend the user's access privileges pending the

³ The Board did not have the benefit of the Criminal History Unit's written recommendation or testimony from the person who conducted the grievant's suitability review. *Compare with Bowen v. DSCYF*, MERB Docket No. 11-02-504 (Jan. 27, 2012) (agency offered into evidence the Decision Making Protocol with flow-charts for suitability reviews and called the reviewer, Ivonne Bernal, Criminal History Specialist, to testify).

⁴ It may be that the Criminal History Unit did not believe that the misdemeanor flow chart for a suitability review applied because the grievant was convicted of the summary offense of retail theft under Pennsylvania law, not a misdemeanor. The Board believes that it was appropriate for YRS to analyze the nature of the grievant's crime under Delaware, not Pennsylvania law. *See Fletcher v. State*, 409 A.2d 1254, 1255 (Del. 1979) ("The best and most just method of determining those deserving of such punishment is to look at the prior conduct of the defendant as it relates to felonies in the Delaware Criminal Code, rather than to rely on technical classifications in other jurisdictions over which our legislature has no control.")

The Board believes that the courts in Delaware would regard the grievant's crime of retail theft in Pennsylvania as the functional equivalent of the Class A misdemeanor crime of shoplifting in Delaware. *Compare* the elements of 11 *Del. C.* Section 840 with the elements of 18 Pa. Stat. §3929(a).

disposition of the criminal charge, but the user has a due process right to an administrative appeal.⁵ DELJIS would only know about arrests made in Delaware, not an out-of-state arrest. At some point (the Board does not know exactly when), Dietz notified DELJIS of the grievant's Pennsylvania conviction for retail theft.

By letter dated August 5, 2013, Dietz informed the grievant of the agency's intent to terminate her. Dietz based her decision on the grievant's failure to report the crime. "While the [Superintendent Annette] Miller acknowledged that she advised you not to worry about it as the Department would receive notice, you never provided Ms. Miller, as required by policy, the official court disposition. You merely advised her that you paid a fine."⁶

The pre-termination letter also cited the grievant's "failure to adhere to Department and Division policies and to be free from criminal activity" which "seriously compromises your ability to remain in a leadership position of a program responsible for providing rehabilitative services for adjudicated youth."

The grievant requested and the agency held a pre-termination meeting on September 11, 2013. By letter dated September 18, 2013, the Secretary of the Department of Services for Children, Youth and their Families (Jennifer B. Ranji) terminated the grievant.

YRS Director Dietz testified that she took a number of factors into account before recommending that the grievant be terminated, including: (1) her personal need to trust the grievant in her position as a Program Manager; (2) the importance of the grievant being seen as a

⁵ It is not clear to the Board whether the grievant was able to exercise her right to appeal the suspension of her DELJIS access privileges.

⁶ The Board notes that the agency's self-reporting policies do not prescribe the manner in which an employee must report a law enforcement contact to a supervisor (orally or in writing), nor do they specifically say that an employee must provide the actual court records (including final disposition). The Board considers it inconsequential that the grievant reported her arrest and conviction for retail theft to the agency head (Annette Miller) rather than her immediate supervisor.

role model for juvenile offenders; (3) concerns about the grievant's credibility if she were called to testify in court; (4) the risk of theft at the Ferris School; and (5) the grievant's potential loss of DELJIS access privileges.⁷

The grievant cited two comparators (who both signed written waivers authorizing the agency to produce their disciplinary records to the grievant). To protect the privacy, the Board assigned them code names: C1 and C2.

On October 24, 2011, the YRS Director (Carlyse Giddings) notified C1, who was a Youth Rehabilitation Counselor, of intent to terminate for stealing art supplies worth \$214.00. The agency entered into a Last Chance Agreement with C1 and his union. The agency suspended C1 for thirty days without pay and ordered him to reimburse the Ferris School for the cost of the art supplies he stole.

On August 8, 2008, the YRS Director (Richard Shaw) notified C2 of intent to demote him from his position as a Program Manager, paygrade 18, to a Youth Rehabilitative Treatment Supervisor, paygrade 15 and to suspend him for thirty days. Among the long litany of C2's disciplinary and performance issues, the letter cited:

[A] Written Reprimand for unacceptable use of a State-issued Cellular telephone . . . resulting in charges to the State of Delaware for which you agreed to pay.

In January 2008 you used the state issued super card to purchase gasoline for your personal vehicle on four separate occasions.

You were arrested on June 17, 2008, for the felony arrest of THEFT – \$1000 or GREATER. Pursuant to DSCYF Policy #305, staff is required to report felony arrests immediately. You failed to report your arrest to your

⁷ The Board notes that Dietz did not mention any of these factors in the pre-termination letter, and the grievant may not have had a full and fair opportunity to respond to them at the pre-termination meeting.

superior. On June 19, 2009, you failed to report the arrest of a subordinate supervisor to superiors.

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 Board concludes as a matter of law that YRS did not have just cause to terminate the grievant.

“The United States Supreme Court stated in *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957), that a state cannot exclude a person from any occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. A state may, however, establish qualifications so long as they ‘have a rational connection with the applicant’s fitness or capacity’ to practice the particular occupation.” *Reagan v. Delaware Association of Professional Engineers*, 1989 WL 64144, at p.3 (Del. Super., June 5, 1989) (quoting *Schwartz*, 353 U.S. at 238-39).

The issue, then, is whether the grievant’s conviction for retail theft in Pennsylvania has a rational connection with her fitness or capacity to work as a Youth Rehabilitation Program Manager at the Ferris School. The factors considered by the YRS Director Dietz did not provide the Board with that rational connection because they would also apply to the grievant’s two comparators who were not terminated.

The agency presented scant evidence as to how often and under what circumstances the

grievant is called to testify in court. Dietz mentioned that the grievant might be called as a witness to an incident at the Ferris School. But the comparators – C2 and C1 – might also be called to testify about an incident at the school. Even though they were not arrested and convicted for their thefts, their credibility would be just as compromised as the grievant's because the defense would be entitled to their personnel or disciplinary records for impeachment purposes. *See State v. Watson*, 846 A.2d 249 (Del. Super. 2002) (ordering production of Internal Affairs case file in which the officer's truthfulness was questioned about the accuracy of his report of an automobile accident).

The Board understands the importance of role models for youthful offenders. However, the Board believes that should apply to all of the staff at the Ferris School, be they a Program Manager like the grievant, or a Treatment Supervisor like C2, or a Youth Rehabilitation Counselor like C1.

The Board does not believe that the grievant posed any greater risk of theft to state property at the Ferris School than C2 or C1. The grievant's theft occurred in another state at a grocery store. C2 and C1 stole state property and yet the agency allowed them to keep their jobs.

The Board understands the importance of the trust an agency head needs to have in her management team. But Dietz did not explain why she could trust C2, who is a supervisor, even though his track record was far worse than the grievant's.⁸

YRS tried to distinguish C1 and C2 because neither of them was arrested after being caught stealing and convicted of a crime. But that raises the question in the eyes of the Board, Why not? Why did the agency not press criminal charges against two employees who stole state property?

⁸ Dietz mentioned in passing several other areas where she believed the grievant's conviction for retail theft might have an adverse effect on her ability to perform her job: hiring employees; investigating employee misconduct; therapeutic programming. The Board does not see any rational connection between the grievant's offense and her fitness to perform those job functions.

The agency's Code of Ethics requires that "Division employees must remain free from criminal activity." If ShopRite had decided not to press charges against the grievant but only required her to pay for the merchandise, she would still have engaged in criminal activity like C2 and C1, but only she lost her job. ⁹

The grievant worked for twelve years at YRS. The agency did not introduce any evidence of unsatisfactory job performance or prior disciplinary action, and none was cited in the pre-termination letter. The agency terminated the grievant for one misdeed. In contrast, the agency only demoted and suspended C2 for misuse of a state cell phone and a state credit card and an arrest for felony theft, even though C2 had three written prior reprimands and a three-day suspension in his record.

The Board concludes as a matter of law that YRS did not have just cause to terminate the grievant because the penalty of termination was not appropriate to the circumstances.

ORDER

It is this **16th** day of April, 2014, by a unanimous vote of 4-0, the Decision and Order of the Board to grant the grievant's appeal. As the remedy, the Board orders YRS to reinstate the grievant as of September 18, 2013 but to demote her from Youth Rehabilitative Program Manager to Treatment Specialist, paygrade 11, effective September 18, 2013. The Board suspends the grievant without pay for the period September 18, 2013 to December 31, 2013.

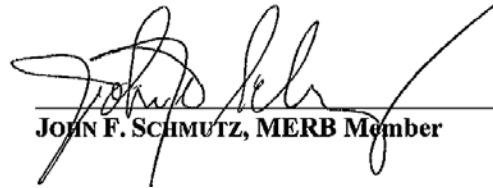
In calculating back pay from January 1, 2014 to the date of payment, the grievant should

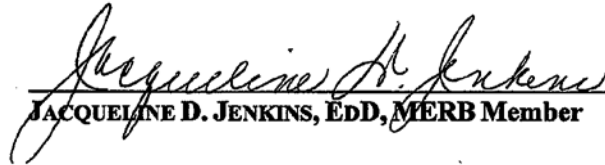
⁹ The only significant distinction between the grievant and the two comparators is that DELJIS did not suspend their access privileges because the agency decided not to have them arrested. YRS did not sufficiently explain how the grievant could not perform the essential functions of her job without access to criminal history record information. And there is no way of knowing if DELJIS would have permanently revoked her access privileges after the disposition of her criminal case in Pennsylvania.

receive either the top of the range of salary for a paygrade 11, or 15% less than her former salary, whichever is higher. The agency should deduct from the amount of back pay any wages or benefits from employment the grievant received during that time, including unemployment compensation.

The agency's counsel is to report back to the Board in writing within thirty calendar days of the date of this Order regarding the agency's compliance with this Order.


MARTHA K. AUSTIN, MERB Chairwoman


JOHN F. SCHMUTZ, MERB Member


JACQUELINE D. JENKINS, EDD, MERB Member


PAUL R. HOUCK, 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: **April 16,** 2014

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel