

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

GRIEVANT,)	
)	
)	DOCKET No. 15-05-627
v.)	
)	DECISION AND ORDER
DEPARTMENT OF HEALTH AND SOCIAL)	
SERVICES/DIVISION OF SUBSTANCE ABUSE)	
AND MENTAL HEALTH/TREATMENT)	<i>(Public - redacted)</i>
ACCESS CENTER,)	
)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on December 3, 2015 in the Delaware Commission of Veterans Affairs Hearing Room, at the Robbins Building, located at 802 Silver Lake Blvd., Suite 100, Dover, DE 19904.

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

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

John F. Brady, Esquire
on behalf of the Grievant

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

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services/Division of Substance Abuse and Mental Health/Treatment Access Center (“TASC”) offered and the Board admitted into evidence without objection eleven (11) exhibits marked for identification as A-K. TASC called six witnesses: Cathy Leyden, Senior Social Worker/Case Manager Supervisor; Kay Baker, Counselor; Angela Murray, Case Manager; Melissa Smith, Deputy Director; Alan Grinstead, Bureau Chief, Department of Correction, Bureau of Community Correction; and William Wharton, DHSS Human Resource Specialist.

The employee/grievant (“Grievant”), offered and the Board admitted into evidence without objection two (2) exhibits marked for identification as 1 - 2. The Grievant testified in his own behalf.

FINDINGS OF FACT

Prior to his termination on September 5, 2014, the Grievant was employed as a Senior Social Worker/Case Manager with TASC, which required him to have a security clearance issued by the Department of Correction (DOC) in order to perform essential functions of his position. As part of his work, he was required to attend meetings at DOC Probation offices, communicate with DOC staff and provide case management services to incarcerated and other clients in the criminal justice and substance and mental health treatment systems.

On May 14, 2014, the Grievant learned that he had not been selected for a DOC Division of Probation and Parole position for which he had applied and been interviewed. The Grievant was anxious because he had not received any notification following the interview. At the advice of a co-worker, the Grievant called someone at DOC to inquire as to whether he should

come to Dover the next day for orientation. During the telephone conversation, the co-worker heard the Grievant ask, “Why was I not notified?”

After ending the call, the Grievant told this co-worker he was “livid” that DOC had not called to let him know he had not been selected for the position. The co-worker also testified he said, “I guess I need to get my list together”, and that when questioned about what kind of list, he responded, “my hit list.” The co-worker testified that she told the Grievant this was not funny. The Grievant admitted it was a bad joke.

His co-worker also testified the Grievant had discussed his past with her, including answering the door with a loaded gun when he lived in New York City (where he had worked as a Probation and Parole Officer).

A second coworker testified that during the day of May 14, 2014, the Grievant appeared to be very stressed and anxious. She overheard the Grievant’s comments about a hit list. The second co-worker contacted the office supervisor¹ later in the day after the Grievant had left at approximately 3:30 p.m. Prior to contacting their supervisor at approximately 5:30 p.m., a group of coworkers saw a Facebook message posted by the Grievant discussing the incident where he stated “I was not accepted, yet again, however this time I am not devastated, or upset, I am beyond livid, wrath would not even describe my feelings now.”²

The supervisor contacted TASC management as well as DOC and related the incident as it had been reported to her by the group of co-workers. Based on testimony presented during this hearing, it is unclear what information was related to DOC by TASC management about the incident. It does not appear, however, that the Grievant’s admission that the statement was a bad joke was ever communicated to DOC.

¹ The supervisor was not working in the Georgetown office on May 14, 2014.

² The Facebook posting was removed shortly after it was posted.

TASC employees in Senior Social Worker/Case Manager positions perform approximately 80 percent of their duties at DOC facilities and are required to maintain DOC security clearances.

On May 15, 2014, the supervisor sent the Grievant a certified letter stating that as of that date he was placed on paid administrative leave based on the comments he made to his coworkers. The letter further stated he was required to complete an assessment with a representative from the State of Delaware's Employee Assistance Program ("HMS") and that he must comply with any recommendations. The Grievant was also notified he was prohibited from entering any TASC office building for any reason while on paid administrative leave. In addition, DOC requested the return of the Grievant's badge and determined that he could not contact or come to any DOC facility.

Consistent with DHSS' policy, the Grievant was returned to work on May 30, 2014, after being cleared by HMS. His supervisor testified she met with the Grievant at that time to discuss the incident. The Grievant provided a written statement to his supervisor concerning the circumstances surrounding his conduct and statements on May 14, 2014. The Grievant admitted he "made several unfortunate remarks which may have included that I was so angry that I could kill someone and that I even had a 'list.' These remarks were made in a poor attempt to vent my frustration and caused my co-workers a great deal of concern and alarm."

Following his return to work, both TASC and DHSS Labor Relations officials made multiple attempts to have the Grievant's security clearance reinstated by DOC. On June 13, 2014, DOC's Bureau Chief of Community Corrections sent a letter to TASC confirming that as a result of the Grievant's behavior "on or about May 15, 2014", he was prohibited from entering DOC Probation and Parole offices and any other DOC institutions and facilities. While DOC

Policy 8.48 provides a hearing to appeal any revocation of security clearance by a Warden, that policy is limited to the Bureau of Prisons. The Bureau Chief testified that the Community Corrections Division does not have a similar policy or procedure. He also testified that even if the Grievant were making a joke, it was inappropriate and still raised serious concerns for DOC.

TASC attempted to allow the Grievant to continue his case manager responsibilities. Other employees, however, had to assist him with his caseload because he was denied access to DOC facilities and could not communicate with Probation and Parole employees who came to or called the TASC office. Eventually, all casework had to be reassigned and the Grievant was given more clerical tasks, e.g., monthly checks and assessments in the office. The Grievant could no longer perform the essential functions of a case manager.

In a final effort to assist the Grievant, from June through August, the Division of Substance Abuse and Mental Health (“DSAMH”), in which TASC is an agency, attempted to find other positions that were pay grade 11 and which performed functions similar to those performed by TASC Senior Social Worker/Case Managers. While surveying other divisions within the Department, it was found that only TASC had Senior Social Worker/Case Manager positions. The only similar position identified (based on required skills, knowledge and abilities) was Psychiatric Social Worker. However, while the Grievant met the education requirement for that position, there were no available positions in Sussex County (where the Grievant worked). According to a DHSS Labor Relations officer, moving an employee out of the county of their current work assignment creates a hardship. He testified that the Grievant could no longer perform the essential functions of his position and DHSS could not find another comparable position for him in another DHSS agency in Sussex County.

On August 11, 2014, the Grievant’s supervisor sent a letter formally recommending his

termination for failure to adhere to the Delaware Health and Social Services Beliefs and Principles and violation to the State of Delaware's Workplace Violence Policy, which had resulted in his clearance with the DOC being revoked. According to the DHSS Beliefs and Principles:

DHSS promotes an environment of mutual respect for all people so that everyone, both employees and clients/customers, has the ability to achieve his or her very best. This is predicated on the belief that each individual has value. DHSS celebrates and promotes the value of diversity in an effort to build trust, harmony and understanding among all who are employed by or come in contact with the Department and its programs.

The State Workplace Violence Policy states:

Employees are prohibited from making threats or engaging in violent activities. Threats or acts of violence include conduct against persons or property that is sufficiently severe, offensive or intimidating to alter the conditions of state employment, or to create a hostile, abusive or intimidating work environment for one or more employees, customers, or business partners.

The State policy defines workplace violence as:

... all threats or acts of violence on state property, as defined in the policy scope, regardless of the relationship between the State and the individual involved in the incident. Examples include but are not limited to: aggressive or hostile behavior that creates an objective reasonable fear of injury to another person or subjects another individual to emotional distress; and threatening to harm an individual or his/her family, friends, associates, or their property.

On September 5, 2014, the Grievant's employment was terminated by the Secretary of the Department of Health and Social Services, who noted that although he had no prior discipline, the severity of his actions and resulting loss of his DOC clearance were sufficient to support dismissal.

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 majority of the Board concludes as a matter of law that the Grievant committed the charged offense, that he was granted the specified due process rights under the Merit Rules, and that termination in this instance was the appropriate penalty based on the circumstances.

The Grievant expressed to a coworker his anger at having being passed over again for a job with Probation and Parole. In his anger, he stated he was going to have to get his hit list together. Other coworkers overheard this statement and were concerned for their safety as well as for DOC employees based on the Grievant’s access to firearms and their knowledge of his prior mental health issues. In addition, after leaving for the day the Grievant posted an angry message on Facebook about not being offered the job. Finally, the Grievant himself admits in a written statement dated May 30, 2014, that he made unfortunate remarks that may have included he was so angry he could kill someone and that he even had a list. While the Grievant’s intent may have been to vent his frustration at being passed over for a position, the Board finds as a matter of law it is clearly a violation of the DHSS Beliefs and Principles and the State Workplace Violence policy.

His supervisor conducted a pre-termination hearing at the Grievant’s request on August 27, 2014. She found no reason to overturn the recommendation for his dismissal and the recommendation was sent to the Secretary of the DHSS who reviewed and upheld the decision. The Board finds as a matter of law, the Grievant received the specified due process rights under

the Merit Rules.

Due to the nature of his comments, TASC informed DOC who, in turn, revoked the Grievant's security clearance to enter and work in DOC facilities. As TASC Senior Social Workers/Case Managers oversee clients who are in the criminal justice system in 80 percent of their cases, it is an essential function of the position. While it is unclear what exactly TASC communicated to DOC at the time of the incident and after he was cleared by HMS, DOC refused to reinstate the Grievant's clearance.

The ability to grant the security clearance necessary to work in DOC facilities rests solely within the discretion of DOC. Once it was clear the Grievant would not be able to perform the essential functions of his job because he could not access DOC facilities, the Division of Substance Abuse and Mental Health ("DSAMH"), in which TASC is an agency, attempted to find him a position but could not identify any comparable positions in the county where he worked.

Consequently, the majority of the Board finds as a matter of law that termination was justified because it was the only available option. The Grievant made concerning statements which violated both department and state policies and those statements led to DOC revoking his security clearance, which made it impossible for him to perform the essential functions of his position.

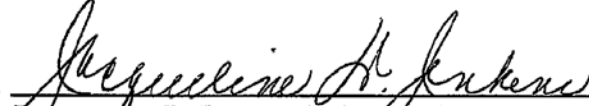
ORDER

It is this **31st** day of **March**, 2016, by a vote of 3-1, the Decision and Order of the Board to deny the Grievant's appeal.

By a vote of 3-1, the Board finds TASC had just cause to terminate the grievant when he

made statements in violation of Department and State policies concerning the workplace and causing alarm to DOC who revoked his security clearance. Consequently, he was no longer able to perform the essential functions of his position.


MARTHA K. AUSTIN, MERB Chairwoman


JACQUELINE D. JENKINS, EDD, MERB Member


VICTORIA D. CAIRNS, MERB Member

I respectfully dissent. I believe the penalty of discharge was too harsh as the Grievant was permitted to return to work and posed no threat in the workplace for more than three months prior to his termination.


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 1, 2016**

Distribution:

Original: File

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Agency's Representative
Board Counsel
MERB website