BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

GRIEVANT,	)	
	)	
Employee/Grievant,	)	**DOCKET No. 15-12-644**
v.	)	
	)	**DECISION AND ORDER**
DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES,	)	
	)	**Public (redacted)**
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 September 15, 2016 in the Farmington-Felton Conference Room, at the Delaware Department of Transportation, located at 800 Bay Road, Dover, DE 19901. The hearing was closed to the public, pursuant to 29 Del.C. §10004(b)(8).

BEFORE W. Michael Tupman, Chair, Jacqueline Jenkins, Ed.D, Paul Houck, and Victoria Cairns, 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

N. Christopher Griffiths, Esq.
on behalf of the Grievant

Janice Tigani
Deputy Attorney General
on behalf of the Department of Services for Children, Youth and Their Families

BRIEF SUMMARY OF THE EVIDENCE

The Department of Services for Children, Youth and their Families ("DSCYF") offered and the Board admitted into evidence fourteen (14) exhibits, premarked for identification as Exhibits A-D, and F – O. Exhibit O included ten attachments. DSCYF called two witnesses: Karryl McManus ("McManus"), Director, Division of Management and Support Services; and Patricia Spratley, Human Resources Specialist, Division of Management and Support Services, ("Spratley").

The employee/grievant ("the Grievant") offered and the Board admitted into evidence fourteen (14) exhibits, premarked for identification as Exhibits 5-8, 10, 11, 13-19 and 23. In addition, at the hearing the Grievant sought to have a letter, dated September 5, 2014, to her husband entered into evidence. The Board overruled the Agency's objection and admitted the document. The Grievant testified on her own behalf, but did not call any other witnesses.

The Step 3 hearing officer dismissed two of the four original charges which were the basis for the Grievant's termination: Finding of Severe Emotional Abuse; and Use of Email Communications. The two remaining charges for consideration by the Board are: Failure to Report Allegations of Abuse and Investigation by the Division of Family Services (DFS); and Hiring of a Family Member.

FINDINGS OF FACT

The Grievant served as the Education Unit Supervisor for over two years at DSCYF where she managed the educational services for children in the juvenile justice facilities. In this position (the equivalent of a school superintendent), the Grievant directly managed the principals of four facilities,[1] and represented the DSCYF Secretary and Department on educational boards and at

[1] Stevenson House, Ferris School, Howard R. Young Correctional Institution, and the Terry Center.

school district meetings.

On October 14, 2014, McManus notified the Grievant that her position would be restricted, pursuant to DSCYF Policy #313,[2] to administrative duties in the Administration Building with no contact with children as a result of DSCYF being notified on October 10, 2014 of a pending investigation of an allegation of child abuse/neglect against her.

On October 30, 2014, DFS notified the Grievant of its intent to substantiate an incident which occurred on October 2, 2014 for abuse or neglect and to enter her on the Child Protection Registry at Level III. This decision followed a DFS investigation of an incident of abuse or neglect involving her adopted minor son. The Grievant was also notified that she had a right to request a hearing in Family Court before she was placed on the Child Protection Registry. The Grievant did file the request for hearing and DFS then filed a petition for substantiation in Family Court, which was still pending as of the date of the Board hearing.

The Division of Management and Support Services ("DMSS"), conducted a ten-month internal investigation from November, 2014 until August 2015. By letter dated August 3, 2015, McManus notified the Grievant she would be suspended with pay pending the completion of the internal investigation. The Grievant's access to the FACTS[3] system was be discontinued, she was not permitted to be at the worksite, could not use State email, conduct any work activity or have any interactions with clients, residents, contractors or employees of DSCYF.

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[2] Policy #313: Subsequent Arrests and/or Allegations of Child Abuse/Neglect, *in relevant part:*

…Any employee who is being investigated for abuse/neglect against a child may immediately be removed from having direct and/or unsupervised contact with children. If the findings of the investigation are unsubstantiated at Level I or Level II, the employee may be returned to his/her function without restrictions unless criminal charges are pending in which case such employee may be removed from the workplace or transferred/restricted to no unsupervised contact with children.

If the findings of the investigation are intent to substantiate at Level III or Level IV, the employee may be removed from the workplace or transferred from direct contact with children pending results of the substantiation hearing. If the employee is substantiated at Level III or IV, termination proceedings will ensue. If the child abuse/neglect substantiation is overturned or the Level reduced to Level 1 or Level II, the employee may be returned to duty and made whole, if applicable.

[3] The Family & Child Tracking System (FACTS) used by the Division of Family Services workers is an electronic system containing information regarding case visits, including case notes and other background information.

As part of its investigation, DMMS learned there had been two prior investigations of the Grievant's family concerning their adopted son which she had not reported to her supervisor. DMSS also learned that the Grievant's older son had been hired for a short-term, casual seasonal substitute teacher position at the Lewes Day Treatment Center – a position directly within the Grievant's chain of command. The Grievant did not notify Human Resources or her supervisor of the familial relations. It was also alleged that the Grievant had committed other policy violations.

The Grievant did not report to DSCYF an incident that occurred in January 2013, when her husband was substantiated for abuse, criminally charged and convicted for slapping their adopted son in the face leaving a hand print. A DFS investigator interviewed the Grievant and other members of her family, and a police officer conducted an interview of the Grievant and her husband at the police station as part of the criminal investigation. The Grievant also did not report to DSCYF an incident that occurred in June 2014 when her adopted son reported he was being singled out and treated differently than the Grievant's biological children when receiving discipline, being awarded privileges or having privileges taken away. Again, the Grievant and her husband were questioned by DFS and investigated about this allegation.

In May 2015, the Grievant submitted to the DMMS Deputy Director a Request to Fill two casual/seasonal substitute teacher positions in the Educational Unit to the DMMS Deputy Director. The requested position, its location and hours were determined to be justified for filling. One of the positions was for the Delaware Day Treatment program in Lewes. It was listed as a part-time position for the summer of 2015, which could be dropped or scaled back during the school year. The successful candidate would work every day and could be rotated between three facilities. The Grievant informed Spratley she knew of someone who was interested in the Lewes position. The Grievant later personally delivered her son's application to Spratley. The Grievant never

disclosed to Spratley or her supervisor that the applicant was her son. While it is not uncommon for family members to apply for positions, DSCYF keeps the current employee out of the entire hiring process for transparency purposes and requires the employee to notify their supervisor should a relative apply for a position. Three individuals served on the hiring panel: Takia Bell, Jordan Forsten and Lindsey Hudson Hubbs. Takia Bell (Principal/Hiring Manager) and Jordan Forsten knew of the familial relationship between the Grievant and her son. There were two candidates for the position. The panel chose the Grievant's son due to his education, prior volunteer experience at this site and because the other applicant was unavailable to start the job because he was out of the country for the majority of the summer. Spratley only learned of the familial relationship when she reviewed the Employee Personal Information Form supplied by the successful applicant and noticed the Grievant, his mother, was his emergency contact. DSCYF revoked the offer of employment due to her son's failure to meet the age requirement to work at the facility.

On October 15, 2015, McManus informed the Grievant of the recommendation that she be terminated from her Education Unit Supervisor position. Specifically, McManus stated the Grievant's failure to report the three separate incidents violated DSCYF's Policy No. 305 Conditions of Continued Employment - Standards of Conduct which requires *"Each employee must immediately notify their supervisor of any investigation of child abuse/neglect subsequent to initial employment,"* and DSCYF's Policy No. 313 Subsequent Arrests And/Or Allegations of Child Abuse Neglect, which states: *"Each employee shall have an affirmative duty to immediately inform their supervisor of any investigation of child abuse/neglect or entry onto the Child Protection Registry."* In addition, McManus cited the Grievant's decision to hire her son into a position under her supervisory chain-of-command and her direct involvement during various points of the hiring process violated the Department's hiring guidelines. The Grievant also

violated the employee conduct by failing to disclose to Human Resources or to her direct supervisor her son was an applicant, candidate, or selected candidate at any time during the course of the process. Specifically, the Grievant's actions violated DSCYF Policy No. 305 Conditions of Continued Employment – Standards of Conduct, which *requires employees to maintain high ethical standards and "endeavor to pursue a course of conduct that will not raise suspicion among the public that such State employee is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State or its government.*"

McManus informed the Grievant of her right to a pre-decision meeting in order to respond to the proposed action, which was held on November 9, 2015 with a recommendation to uphold the termination. On November 12, 2015, Secretary Jennifer B. Ranji notified the Grievant of her termination from DSCYF, Division of Management Support Services, effective immediately.

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 the Grievant committed two of the charged offenses: failure to report three investigations by DFS of her family for child abuse/neglect; and failure to disclose the hiring of a family member.

The Grievant contended that her husband – not the Grievant herself – was the subject of the first two DFS investigations. DSCYF Policy #305 and #313 both provide in pertinent part:

"Each employee shall have an affirmative duty to immediately notify their supervisor/manager of any criminal convictions, arrests, investigation or indictments of themselves or any investigation of child abuse/neglect or entry onto the Child Abuse Registration." According to the Grievant, these policies only required her to report a child abuse/neglect investigation in which she was the subject. She reads the qualifier "of themselves" in the first half of the sentence into the second half.

The two halves of the sentence, however, are in the disjunctive ("or") and not the conjunctive ("and"), so the second half of the sentence contemplates investigations not necessarily of the employee herself but which could adversely affect the agency. The Board believes that the policy might be impermissibly vague if interpreted to include ***any*** investigation of child abuse/neglect, without taking into account other factors such as the relationship between the employee and the subject of the investigation.[4] The term "investigation" may be "subject to some degree of interpretation," but the Board believes that it is "specific enough" for someone in the Grievant's position to know that it included an investigation of her husband for child abuse/neglect.[5]

The Grievant was well aware that DFS investigated her husband for alleged child abuse/neglect in 2013. Both DFS and the police questioned the Grievant and her husband about the matter, first at their home and then at Troop 4. The Grievant's husband was criminally charged and convicted of slapping their adopted son in the face. In 2014, the Grievant and her husband were again questioned by DFS during its investigation of another allegation of child abuse/neglect against her husband.

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[4] "'A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated behavior is forbidden . . . .'" *Sweeney v. Department of Transportation*, K10A-08-002, at p. 23 (Del. Super., April 6, 2013) (quoting *State v. Baker*, 720 A.2d 1139 (Del. 1998)).

[5] *Sweeney, supra*.

Whatever the outermost scope of the duty to report an investigation under the agency's policy,[6] the Board believes that the duty includes an investigation of an employee's husband residing in the employee's home who is a co-caretaker of the child. The Board is persuaded by the agency's concern that an employee's access to the FACTS system could result in disclosure of confidential information to a close relative who is the subject of an investigation and undermine the public trust in the integrity of investigations.

The Grievant contends that she could not have reported the third DFS investigation to her supervisor because she did not become aware of it until McManus informed her of the investigation on October 14, 2015. On October 2, 2015, the Grievant filed an Imperiling Family Relations petition with the Family Court and the Court ordered DFS to take custody of her adopted son. That same day, the Grievant and her husband met with a DFS investigator to fill out paperwork so DFS could "investigate allegations" (to use the Grievant's words at the hearing) in the IFR petition. The Board believes that investigation was within the scope of the Grievant's duty to report to her supervisor under the agency's policy.

The Board concludes as a matter of law that the Grievant violated DFS policy by failing to immediately report to her supervisor three DFS investigations of her or her immediate family.

The Board also concludes as a matter of law that the Grievant committed the charged offense of failure to disclose the hiring of her son. It is true, as the Grievant pointed out, that the agency did not have a written policy regarding that issue at the time. But the Board does not believe that an employer must have a written policy spelling out every conceivable type of workplace misconduct, particularly for senior managers like the Grievant. The Grievant tried to downplay her role in the hiring process, but she told Patricia Spratley in Human Resources that she had a candidate in mind for the casual/seasonal teaching position, personally gave Spratley a copy of his

[6] The Agency's reporting policy should be more clear, particularly if the agency intends to rely on it to impose the ultimate sanction of termination.

application and asked Spratley to review and approve it on the spot. The Grievant also was aware that two of the members of the hiring panel knew the candidate was her son, which could have influenced their recommendation.

The Board believes that the Grievant exercised poor judgment in not disclosing that her son was an applicant for a position under her chain of command. If she had, the agency could have designated someone else to review the hiring panel's recommendation, and to make any appropriate chain-of-command adjustments if the agency hired her son.

The Board concludes as a matter of law that the agency did not have just cause to terminate the Grievant because the penalty of termination was not appropriate to the circumstances. The agency imposed the cumulative penalty of termination for four offenses committed by the Grievant. Only two of those offenses can now support termination. The Board does not believe that those two offenses – separately, or cumulatively – support termination.

The Grievant's failure to report the first two DFS investigations only came to light during the investigation of the third incident, leaving no intervals for progressive discipline.[7] Had the Grievant been disciplined for the first incident, she would have been on notice that the agency's reporting policy was broader than she claims, and each succeeding violation would have warranted a more severe penalty.

The Board does not believe that the Grievant's failure to disclose that her relationship to her son during the hiring process was a terminable offense. There is no evidence in the record that the Grievant pressured or tried to influence the members of the hiring panel. If she had overruled their recommendation of another candidate or otherwise directly imposed herself in the hiring process, that might be another matter. It is unfortunate that she jeopardized her job (and the job of

[7] The Board does not understand why DFS did not report to DMSS that the Grievant was involved (at least as a witness) in the first two investigations. An agency relies on self-reporting at its own peril. It is better to have in place computer interfaces which automatically cross-reference the names of employees with DFS investigations.

her son) by not making a simple disclosure at the start. The irony is that the outcome would have been the same because her son was the only one of the two candidates interviewed who was available to start work right away.

ORDER

It is this **4th** day of November, 2016, by a unanimous vote of 4-0, the Decision of the Board to grant the Grievant's appeal in part and to deny her appeal in part. The Board orders the agency to reinstate the Grievant to her former position on or before October 15, 2016. As the appropriate penalty for the Grievant's offenses, the Board suspends the Grievant without pay and benefits from the date of termination, November 12, 2015, until the date of her reinstatement. The Board believes that such a severe penalty is appropriate given the Grievant's position as a senior manager, her longtime experience working at the agency, and a pattern of poor judgment regarding the disclosure of personal matters which could adversely affect the agency.

W. MICHAEL TUPMAN, MERB CHAIR

PAUL R. HOUCK, MERB Member

JACQUELINE D. JENKINS, EDD, MERB Member

VICTORIA D. CAIRNS, 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: **November 4, 2016**

Distribution:
Original: File
Copies: Grievant
Agency's Representative
Board Counsel
MERB website *(redacted, public copy only)*