BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

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CIVIL DIVISION
DEPARTMENT OF JUSTICE
DOVER, DELAWARE

DAVID R. DEMUSZ,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 08-02-413**
v.	)	
	)	
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,	)	**DECISION AND ORDER**
	)	
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 August 7, 2008 at the Margaret M. O'Neill Building, Suite 213, 410 Federal Street, Dover, DE 19901.

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

APPEARANCES

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

Jean Lee Turner
Administrative Assistant to the Board

David R. Demusz
Employee/Grievant *pro se*

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Division of Health and Social Services

SUMMARY OF THE EVIDENCE

The Board admitted into evidence without objection one exhibit offered by the grievant, David R. Demusz ("Demusz"): Letter dated July 2, 2008 from Bernard Pepukayi, Deputy Legal Counsel, Office of the Governor, to Demusz enclosing June 30, 2008 Pardon by Governor Minner (A-1).

Demusz testified on his own behalf and called four witnesses: Kathleen Greer, Human Resource Technician at the Delaware Psychiatric Center ("DPC"); Captain William M. Gillen, Chief of Security at DPC; Milton Draper, a security officer at DPC; and Bill Carpenter, Jr., Division of Management Services ("DMS") Senior Human Resource Technician.

The Board admitted into evidence without objection nine exhibits offered by the Department of Health and Social Services ("DHSS"): Merit Rules 9.2 and 2.1 (S-1A); Letter dated January 1, 2008 from Michael R. Bundek to Demusz (S-1B); Letter dated February 11, 2008 from Mr. Bundek to Demusz (S-1C); State of Delaware Employment Application dated August 8, 2007 (S-1D); State of Delaware Employment Application received by the State Personnel Office on October 5, 2006 (S-1E); DHSS Terms and Conditions of Employment signed by Demusz on February 23, 2007 (S-1F); DHSS Terms and Conditions of Employment signed by Demusz on September 19, 2007 (S-1G); Letter dated September 9, 2007 from the Division of Long Term Care Residents Protection ("DLTCRP") to DPC enclosing Demusz' criminal history record (S-1H); and certified court records of Demusz' criminal convictions (S-1I).

DHSS called three witnesses: Roy Lawler, Human Resource Specialist IV at DPC; Michael R. Bundek, DMS Facilities Operations Director; and Francine Lawrence, Human Resource Specialist IV in the Labor Relations Department at DHSS.

FINDINGS OF FACT

On October 5, 2006, Demusz applied on-line with the State Personnel Office for a job as a security officer at DPC. The application form advised that "Before signing, please read the following statement carefully: Any false or substantive omission of information may be cause for rejection, or dismissal if employed by the State." In response to a question on the application "Have you ever been convicted of a felony or Class A Misdemeanor?", Demusz checked the box "No."

Demusz met with a Human Resource Technician (Kathleen Greer) to go over a DHSS Terms and Conditions of Employment form which he signed on February 7, 2007. Demusz initialed next to the box on the form which states: "I understand that any failure to disclose any information involving my criminal background may be grounds for rejection of my application and for immediate termination if employment has begun."

The DLTCRP is responsible for criminal background checks of DPC applicants and employees through the State Bureau of Identification ("SBI"). SBI runs the individual's fingerprints through a computer database (Criminal Justice Information System (CJIS)) and prints out any criminal history. The DLTCRP sends the SBI computer print-out to the DPC Human Resources Office with a cover letter stating whether there is any disqualifying conviction data.[1]

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[1] By statute, DHSS must "promulgate regulations regarding the criteria for unsuitability for employment, including the types of criminal convictions which automatically disqualify a person from working in a nursing home, ..." 16 *Del. C.* §1141(e). The disqualifying convictions are set forth in Section 6.0 of the DHSS regulations (Criteria for Unsuitability for Employment). *Del. Admin. Code* , Part 3000, subpart 3105.

DHSS regulations distinguish between criminal convictions (like felonies) which "automatically disqualify a person from working in a nursing home" and convictions which

At the time of Demusz' criminal background check, it was DPC's practice to rely on the DLTCRP cover letter; DPC did not independently review any attached SBI computer print-out to see if there were any non-disqualifying conviction data.

SBI ran Demusz through CJIS on February 7, 2007. Mr. Lawler testified that DPC received a letter from DLTCRP on February 13, 2007 stating that Demusz did not have any disqualifying conviction data. Consistent with DPC's practice at the time, Mr. Lawler did not review the SBI computer print-out attached to that letter.

DPC hired Demusz as a one-year probationary security officer on February 20, 2007. DPC assigned Demusz to the Mitchell Building which houses inmates from the Department of Correction.

In the summer of 2007, *The News Journal* started publishing a series of articles about alleged problems at DPC. In one article the newspaper reported that some DPC employees had felony convictions. In October/November 2007, the DPC Human Resources Office changed its practice of relying on the DLTCRP cover letters, which only state whether the applicant has a disqualifying criminal conviction. DPC began independently reviewing any attached SBI print-out for any criminal convictions. DPC also began a lengthy review of criminal background checks on file for over 500 employees.

On August 8, 2007, Demusz applied for a security officer position with DMS on the grounds of DPC. (There are two security units at DPC: one assigned to the Mitchell Building, the

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may be considered "in determining whether a person is suitable for employment in a nursing home" based on criteria such as: type and frequency of offense; length of time since the offense; age at the time of the offense; criminal record since the offense; and nature of the offense in relation to the type of job assignment.

other for campus security.) Next to the box on the application form which asked "Have you ever been convicted of a felony or Class A misdemeanor?", Demusz checked "No." The application stated: "Any misrepresentation or falsification may result in reject [*sic*] application, dismissal and disqualification of future applications."

On September 19, 2007, Demusz signed a DHSS Terms and Conditions of Employment form and initialed next to the box which states: "I understand that my failure to disclose any information involving my criminal background may be grounds for rejection of my application and for immediate termination if employment has begun." DMS conditionally hired Demusz as a campus security officer on October 1, 2007.

On October 3, 2007, the DPC Human Resources Office received a letter from the DLTCRP enclosing a copy of an SBI computer print-out with Demusz' criminal history. The letter stated: "**SBI and FBI show arrest and/or conviction data, non-disqualifying. . . .** [Y]ou may consider this individual for final employment status." [2] Mr. Lawler testified that he did not review Demusz' criminal history until several months later because he was swamped with the review of the criminal background checks of over 500 DPC employees, and he was giving a priority to those employees who worked in the buildings and had direct contact with patients,

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[2] The Board notes that the DLTCRP was correct in stating that Demusz' criminal background check did not contain any disqualifying crimes. Disqualifying crimes include any felony within the last five years, or any Class A misdemeanors included in 11 *Del. C.* Ch. 5 Subchapter II, Subpart A (Offenses Against the Person) if convicted within the last five years. *See Del. Admin. Code* Part 3000, subpart 3105, Section 6.0. Falsifying business records is a Class A misdemeanor but is not an offense against the person. Demusz' conviction for offensive touching was an unclassified misdemeanor. Demusz' 1999 conviction for assault third degree (a Class A misdemeanor) was not a disqualifying crime because it occurred more than five years before his initial DHSS employment application.

while putting employees like Demusz who worked on the grounds on the "back burner."

On December 19, 2007, Demusz was on duty at DPC when he saw another employee driving a vehicle the wrong way down a one-way street. According to Demusz, he asked the driver to turn around. When the driver refused the driver gunned his engine and tried to run Demusz over, forcing Demusz to jump to safety. Demusz wrote up an incident report which he submitted to his supervisor, Dominick Remedio. Demusz also filed a criminal complaint with the Delaware State Police for reckless endangerment.

Several weeks went by, and according to Demusz he was upset that DPC had not taken any action in response to the December 19, 2007 incident but let the driver (released by the court on unsecured bail) return to work. On January 8, 2008, Demusz called *The News Journal* and told the newspaper about the December 19, 2007 incident. An article appeared in the newspaper the next day about DPC and mentioned the incident. [3]

According to Mr. Lawler, the DMS Labor Relations Department did not receive Demusz' criminal background check until January 15, 2008. When Mr. Lawler reviewed the documentation, he discovered that Demusz had three criminal convictions: (1) a 2004 conviction for falsifying business records (11 *Del. C.* §871, Class A misdemeanor); (2) 1999 conviction for assault third degree (11 *Del. C.* §611, Class A misdemeanor); and (3) a 1999 conviction for

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[3] Demusz' immediate supervisor, Dominick Remedio, did not immediately forward the incident report to the DPC Human Resources Office. According to Francine Lawrence, when she read the article in *The News Journal* and first learned about the December 19, 2007 incident, she called Remedio to get a copy of the incident report. According to Ms. Lawrence, after an internal investigation, DHSS found the Demusz complaint was unsubstantiated based on a statement from a third-party witness. According to Demusz, the Attorney General's Office dismissed the criminal charge because some of the witnesses changed their statements and were not credible.

offensive touching (11 *Del. C.* §601(a), unclassified misdemeanor). Mr. Lawler notified Mr. Bundek, who checked Demusz' two employment applications and discovered that Demusz represented he did not have any Class A misdemeanor convictions. According to Mr. Bundek, "[t]hat's one of the first things we do when we get a [criminal background check] hit. . . . We do that all the time."

Mr. Bundek and Ms. Lawrence met with Demusz on January 16, 2007 and asked him about the discrepancies. At first, Demusz said he had a pardon for his misdemeanor convictions. He then modified his statement to say he was seeking a pardon. After further discussion, Demusz modified his statement again to say he was not sure what class misdemeanor certain offenses were. Mr. Bundek testified: "It appeared, at least to me, that [Demusz] wasn't being forthcoming and honest with his answers."

By letter dated January 17, 2008, Michael R. Bundek, the DMS Facility Operations Director, suspended Demusz with pay pending an internal investigation because "a Criminal Background Check (CBC) that was processed on you, revealed that you had serious infractions that may deem you not suitable for your position."

By letter dated February 11, 2008, Mr. Bundek notified Demusz "that you are being dismissed from your position as a Security Officer in the Facility Operations unit with the Division of Management Services (DMS) for falsification of your application."

> On your original application that was received by Applicant Services on October 6, 2006, it asked if you have ever been convicted of a felony or Class "A" Misdemeanor and you indicated that you had no convictions. On your application that was received by Applicant Services on August 8, 2007, it again asked if you have ever been convicted of a

> felony or Class "A" Misdemeanor and you again indicated that you had no convictions. Per the application that you submitted, it states: "Any false or substantive omission of information may be cause for rejection, or dismissal if employed by the State."

Demusz claimed he did not intentionally misrepresent his criminal history because he did not know that his convictions for third degree assault and falsifying business records were Class A misdemeanors. In rebuttal, DHSS introduced into evidence the certified Family Court record of Demusz' conviction for third degree assault which checked the box "Misdemeanor" and circled "A." The court record indicates that Demusz received a copy, but he said he did not notice those notations on the court record.

Demusz testified that he sought a pardon for his criminal convictions and in January 2008 the Board of Pardons recommended that the Governor pardon him. Governor Minner pardoned Demusz on June 30, 2008, more than four months after DHSS terminated him on February 11, 2008.

CONCLUSIONS OF LAW

Merit Rule 9.2 provides: "Employees may be dismissed at any time during the initial probationary period. Except where a violation of Chapter 2 is alleged, probationary employees may not appeal the decision."

Merit Rule 2.1 provides: "Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors is prohibited."

Demusz claims DHSS fired him in retaliation for exercising his First Amendment right to speak out about a matter of public concern (the December 19, 2007 incident when another employee allegedly tried to run him over at DPC). The Board has concluded "that for an employer to retaliate against an employee's exercise of a protected activity is discrimination based on prohibited non-merit factor." *Hilferty v. Department of State*, MERB Docket No. 07-12-406, at p.10 (Aug. 7, 2008).

The courts "analyze a public employee's claim of retaliation for engaging in a protected activity under a three-step process. First, plaintiff must show that the activity in question was protected. . . . Second, plaintiff must show that the protected activity was a substantial or motivating factor in the alleged retaliatory action. . . . Finally, defendant may defeat plaintiff's claim by demonstrating by a preponderance of the evidence that the same action would have been taken even in the absence of the protected conduct." *Watters v. City of Philadelphia*, 55 F.3d 886, 892 (3rd Cir. 1995) (citing *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)).

In *Mt. Healthy*, a school principal circulated a memorandum to teachers about dress and appearance. A non-tenured teacher (Doyle) told a local radio station about the memorandum; the radio station then reported the adoption of a dress code for teachers on the news. One month later, the school superintendent recommended to the school board not to rehire Doyle citing "'a notable lack of tact in handling professional matters which leaves much doubt as to [his] sincerity in establishing good school relationships.'" 429 U.S. at 282. "That general statement was followed by references to the radio station incident and to [an] obscene-gesture incident." *Id.* at 282-83.

The federal district court held that "Doyle's telephone call to the radio station was 'clearly protected by the First Amendment,' and that because it had played a 'substantial part' in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with back pay." 429 U.S. at 283. The U.S. Supreme Court, however, held the school board did not violate Doyle' s First Amendment rights if the board could prove "by a preponderance of the evidence that it would have reached the same decision as to [Doyle's] reemployment even in the absence of the protected conduct." *Id.* at 287.

> A rule of causation which focuses solely on whether the protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . . A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, ...

Id. at 286.

In *Watters v. City of Philadelphia*, *supra*, the manager of the Philadelphia Police Department's employee assistance program (Watters) was frustrated by the department's reluctance to implement reforms. A reporter for *The Philadelphia Inquirer* called Watters to talk about the employee assistance program. A few days later, the newspaper published an article with the headline "'Dispute puts counseling program for police in limbo.'" 55 F.3d at 890. After reading the article, the police commissioner summoned Watters to his office and told him "that he should not have talked to the reporter and that he was an abomination and unfit for public

service." 55 F.3d at 890. The police department then fired Watters.

The federal appeals court held that Watters' speech addressed a matter of public concern protected by the First Amendment. "Although Watters also may have had some personal motivation for speaking, his speech was not merely an extension of his individual grievances. It had been solicited by a newspaper reporter presumably because the problems it alleged about Police Department administration . . . ." *Id.* at 894. "The focus of the article went beyond the personal gripe of one employee, instead putting Watters' statements within the context of reporting on other problems facing the Department. Its lead was: 'As if the Police Department didn't have enough problems, crisis has come to its crisis counselors.'" *Id.*

The Board concludes as a matter of law that when Demusz told *The News Journal* about the December 19, 2007 incident at DPC he addressed a matter of public concern protected by the First Amendment. [4] Alleged employee-on-employee violence in the workplace – especially in a

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[4] In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the U.S. Supreme Court held the First Amendment does not protect the speech of a public employee made in the course of his or her official duties. "[W]hen public employees made statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes . . . ." 547 U.S. at 421. The Supreme Court, however, distinguished public employees "who make public statements outside the course of performing their official duties" such as "writing a letter to a local newspaper." *Id.* at 423. Demusz' call to the newspaper about the December 19, 2007 incident was not pursuant to his official duties as a security officer at DPC. In contrast, writing a report for his supervisor about the incident was part of Demusz' official duties as a security officer. *See Foraker v. Chaffinch*, 501 F.3d 231 (3rd Cir. 2007) (reporting a workplace safety issue up the State Police chain-of-command was not protected speech under the First Amendment). Demusz testified that after he reported the December 19, 2007 incident to his supervisor, co-workers retaliated against him by belittling him. For example, another security officer, Milton Draper, downloaded an outstanding warrant Demusz had for a traffic ticket and another employee posted it on a bulletin board. While the Board does not condone those actions, they were not retaliation for any speech protected by the First Amendment, and Demusz did not show that they were attributable to DHSS management.

facility like DPC caring for vulnerable patients – is an issue "of 'political, social, or other concern to the community.'" *Watters*, 55 F.3d at 894 (quoting *Rode v. Dellarciprete*, 845 F.2d 1195, 1201-02 (3rd Cir. 1988)). At the time, DPC was under intense media and regulatory scrutiny about various problems at the facility, and the newspaper article "went beyond the personal gripe of one employee, putting [Demusz'] statements within the context of reporting on other problems facing [DPC]." *Watters*, 55 F.3d at 894.

Whether Demusz' call to *The News Journal* on January 8, 2008 was a motivating factor in his termination is a more difficult issue. The Board will assume, for the sake of argument, that his call and the newspaper article reporting on the December 19, 2007 incident at DPC were a motivating factor for his suspension on January 17, 2008 and termination on February 11, 2008. *See Schwartzman v. Valenzuela*, 846 F.2d 1209, 1212 (9th Cir. 1988) ("Given 'the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision,' a jury logically could infer that Schwartzman was terminated in retaliation for his speech.") (quoting *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)).

The legal issue then is whether DHSS proved by a preponderance of the evidence it would have fired Demusz for misrepresenting his criminal history on his two employment applications even if he had not called *The News Journal*. "*Mt. Healthy* requires more than a showing that defendants *could* properly terminate an employee. It requires a showing that the employer *would have* terminated the employee in the absence of his protected activity." *Bradley v. Pittsburgh*

Board of Education, 913 F.2d 1064, 1075 (3rd Cir. 1990). [5]

"[T]he intent behind [the employee's] misrepresentation may be relevant to the question of whether the [employer] would have fired him for lying on his application." *Washington v. Lake County*, 762 F. Supp. 199, 202-03 (N.D. Ill. 1991), *aff'd*, 969 F.2d 250 (7th Cir. 1992). Demusz claims he did not intentionally misrepresent his criminal history when he checked "No" in his employment applications that he did not have any Class A misdemeanor convictions; he claims he was not aware that his convictions for third degree assault and falsifying business records were Class A misdemeanors. [6]

"A statement may constitute misrepresentation if it creates a false impression as to the true state of affairs and the actor fails to provide qualifying information to cure the mistaken belief." *Kowalski v. Unemployment Insurance Appeal Board*, 1990 WL 28597, at p.4 (Del. Super., Jan. 22, 1990) (Gebelein, J.). In *Kowalski*, the Superior Court held that the "record shows sufficient evidence for the [Unemployment Insurance Appeal] Board to have concluded that the erroneous information was wilful, not inadvertent, and to have concluded that the act was in violation of the employer's interest, and the employee's duties and expected standard of honesty." 1990 WL

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[5] At the hearing, DHSS argued that Demusz had the burden of proof because he was a probationary employee alleging discrimination under Merit Rule 2.1. As a general rule, that may be true, but in a "mixed motives" case like this DHSS has the burden to prove that it would have fired Demeusz even if he had not called *The News Journal*.

[6] Demusz also claimed he did not believe he had any Class A misdemeanor convictions because if he did the State would not have licensed him as a security guard. The criteria for licensing security guards in Delaware, however, are different than for hiring employees of long-term care facilities. *See* 24 *Del. C.* §1314 (an applicant for a security guard license cannot have a conviction for a misdemeanor involving moral turpitude, theft, or illegal drugs).

28597, at p.4.

In *Cross v. Unemployment Insurance Appeal Board*, 1985 WL 1888972 (Del. Super., Feb. 22, 1985) (Balick, J.), Delmarva Power & Light fired an employee for falsely stating in his employment application that he had never been convicted of a crime (he had a burglary conviction). The employment application stated above the signature line "that false or misleading statements in this application will be sufficient cause for termination or for dismissal if already employed." The Superior Court agreed with the Unemployment Insurance Appeal Board that the applicant wilfully made the false statement. "Although one can understand that you did not want to hurt your chances for getting a job, it is plain that your false answer to the question on the employment application was wilful, that is, intentional rather than inadvertent." 1985 WL 1888972, at p.1.

There is substantial evidence in the record for the Board to conclude that Demusz made intentional misrepresentations in his two DHSS employment applications about his criminal history record. On September 26, 2007 (ten days before filling out his first DHSS employment application), Demusz petitioned the Family Court to expunge his conviction for third degree assault (a Class A misdemeanor) because it prevents him from "obtaining employment with the State." The Family Court denied his petition on November 14, 2007, but by then Demusz had already misrepresented on his first DHSS employment application that he did not have any Class A misdemeanor convictions. [7]

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[7] Under Delaware law, criminal history records may be expunged only "if the person is acquitted, a nolle prosequi is entered by the State, or the charge is otherwise dismissed." *State v. Skinner*, 632 A.2d 82, 84 (Del. 1993) (citing 11 *Del. C.* § 4372). The courts cannot expunge an adult criminal conviction.

In 2007 – around the time Demusz applied for a job as a DMS security officer – he sought a pardon of his criminal convictions. Demusz knew he had to undergo another criminal background check after applying for a security officer position at DMS. The Board believes he sought a pardon because he was concerned – as stated in the pardon – that he " is employed in the Security Department at the Delaware Psychiatric Center, but is in danger of losing his employment."

The Board believes that Demusz knew or at least suspected that his criminal convictions might preclude his employment at DHSS and took steps first to expunge and then pardon those convictions. The Board concludes as a matter of law that when Demusz checked "No" on his DHSS employment applications that he did not have any Class A misdemeanor convictions he made an intentional misrepresentation because he was apprehensive that if he disclosed his criminal convictions he might not get the job.

DHSS argued that it would have fired Demusz when it learned about those misrepresentations even if he had not talked to *The News Journal* about the December 19, 2007 incident at DPC. According to DHSS, its policy and practice is to terminate any employee if the Department discovers, after hire, that the employee made a material misrepresentation or omission in the employment application.

In *Washington v. Lake County*, *supra*, a jailer hired by the county sheriff's office (Washington) falsely stated on his employment application that he had never been convicted of a criminal offense other than a minor traffic violation. At the bottom of the last page of the employment application above the signature line the application stated: "I agree that if any misrepresentation has been made by me . . . any offer of employment may be withdrawn or my

employment terminated immediately . . . ." 762 F. Supp. at 201.

The sheriff's office fired Washington for poor performance, and he sued for racial discrimination. The sheriff's office learned during the civil litigation that Washington had convictions for criminal trespass and third degree assault, and argued it would have fired Washington for falsifying his job application if it had known about the convictions prior to his termination.

The federal district court held that even if race were a factor in his termination, "it strains credulity to believe that the knowledge of Washington's prior convictions - particularly the assault conviction - would not have affected the hiring decision of the Sheriff's Department. Indeed, Washington' s assault conviction seems particularly relevant to the position for which Washington was applying. The Sheriff's Department would have a strong interest in knowing whether an applicant for a jailer position has a propensity for violence or excessive force - particularly because this position may involve contact with prisoners and perhaps the use of weapons." 762 F. Supp. at 203-04. [8]

"[E]ven if the Sheriff's Department would not have rejected Washington's application on the basis of the convictions themselves, they may have legitimately fired Washington merely for making a material misrepresentation (whether knowingly or not) on his job application. . . .

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[8] On appeal, the federal appeals court held that "the appropriate issue in an employment discrimination case where the plaintiff had lied on his application and was later fired for an unrelated reasons is whether the employer, acting in a [non-discriminatory] fashion, would have fired the employee upon discovery of the misrepresentation, not whether the employer would have hired the employee had it known the truth." *Washington v. Lake County*, 969 F.2d 250, 256 (7th Cir. 1992). The Board therefore will not consider the claim by DHSS that it would not have hired Demusz in the first place if it had known about the misrepresentation of his criminal history in his first employment application.

Washington agreed on his application form 'that if any misrepresentation has been made by me . . . any offer of employment may be withdrawn or my employment terminated immediately.'" 762 F. Supp. at 204.

In *Newborne v. University of Chicago Hospitals & Clinics*, 1999 WL 1129604 (N.D. Ill., Dec. 3, 1999), the plaintiff (Newborne) applied for a hospital position in 1985. On the application, Newborne checked "No" to the question: "Have you ever been convicted of a felony or misdemeanor?" Above the signature line, the application stated: "I certify that the information contained in this Application for Employment is true and correct to the best of my knowledge and belief and, in this connection, I understand and agree that any misrepresentation, omission or falsification of information herein requested constitutes grounds for immediate dismissal from any subsequent employment at [the Hospital]." 1999 WL 1120604, at p.1 n.2.

In 1995, the Illinois legislature passed the Illinois Health Care Work Background Check Act prohibiting a health care employer from hiring or employing "'any individual in a position with duties involving direct care for clients, patients or residents who has been convicted of committing or attempting to commit'" among other offenses, burglary, unless the employee or applicant obtains a waiver from the Illinois Department of Public Health." 1999 WL 1129604, at p.1 (quoting 225 ILCS 46/25).

"[I]n accordance with the Act, the Hospital initiated a criminal history check of Newborne and all of its other employees with duties involving direct care for patients." 1999 WL 1129604, at p.1. Newborne's criminal background check disclosed a 1982 conviction for burglary. A hospital representative met with Newborne to review his employment application "and directed his attention to his misrepresentation in response to the question of whether he had ever been

convicted of a felony or misdemeanor." 1999 WL 1120604, at p.1. The hospital representative directed Newborne to have a fingerprint check completed by the Illinois State Police to conclusively determine if, in fact, he had been convicted of burglary. "Pending the results of the fingerprint check, Newborne was transferred to a position that did not involve direct patient care." *Id.* When Newborne's fingerprint check confirmed his conviction for burglary, the hospital fired him. Newborne then sued for age discrimination.

The federal district court held that even if age were a factor in Newborne's termination, the hospital would have fired him anyway for falsifying his employment application. "The Hospital has a policy of terminating any individual whom it learns has falsified his or her employment application and has terminated all employees who falsified their employment applications from at least June 1991 to the present." *Id.* at p.2. "There is absolutely no evidence that [the decision to fire Newborne] was pretextual. In fact, on the contrary, the employment application that Newborne signed stated on its face that any falsification was 'grounds for immediate dismissal.'" *Id.* at p.3.

The record shows that DHSS has a policy and practice of terminating an employee who falsifies an employment application. That policy is incorporated into Demusz' two employment applications. The first application stated above the signature line: "Before signing, please read the following statement carefully: Any false or substantive omission of information may be cause for rejection, or dismissal if employed by the State." The second application stated: "Any misrepresentation or falsification may result in reject [*sic*] application, dismissal and disqualification of future applications."

That policy is also incorporated into the DHSS Terms and Conditions of Employment form which states: "I understand that my failure to disclose any information involving my criminal background may be grounds for rejection of my application and for immediate termination if employment has begun."

The record shows that DHSS enforced this policy consistently. Mr. Bundek testified that "one of the first things we go do when we get a [criminal background check] hit" is to review the employment application to see if there are any discrepancies. Mr. Lawler testified that as a result of his review of the criminal background checks of all employees at DPC (which started in fall of 2007), there were other employees like Demusz who "were dismissed as a result of their backgrounds."

Demusz argued that DHSS did not enforce the policy consistently because another employee at DPC (Frank Boston) had felony convictions yet was not fired. Mr. Lawler, however, explained that "[t]here were some employees who were grandfathered at the time in terms of the background checks" because criminal background checks "weren't required at the time that they were hired." In 1998, the General Assembly mandated criminal background checks of any "person applying for a position" in a long-term care facility. S.B. 303, *codified in* 16 *Del. C.* §1141(a)1). In 1999, the General Assembly mandated criminal background checks not only for job applicants but for a "current employee" or a long-term care facility "who seeks a promotion in the facility." S.B. 13, *codified in* 16 *Del. C.* §1141(b)(ii). The statute did not require a criminal background check of any current employee of a facility until such time as he or she

applied for a promotion or another job. [9]

Demusz did not produce any evidence to rebut the showing by DHSS "that it would have fired [him] for [his] application fraud." *Wallace v. Dunn Construction Co.*, 968 F.2d 1174, 1184 (11th Cir. 1992). He relies only on his own testimony that he thought other DHSS employees had lied on their employment application and retained employment with DHSS. "[H]owever, he offered no evidence whatsoever indicating that [DHSS] *knew* that an employee had lied on an application regarding any subject (let alone [criminal] convictions) and therefore failed to terminate that employee." 968 F.2d at 1184.

The Board concludes as a matter of law that DHSS met its burden to prove by a preponderance of the evidence that it would have fired Demusz for misrepresenting his criminal history on his two employment applications even if he had not called *The News Journal* to tell the newspaper about the December 19, 2007 incident at DPC.

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[9] In 2004, the General Assembly mandated criminal background checks for any "current employee" of a long-term care facility "who the Department has a reasonable suspicion has been convicted of a disqualifying crime since becoming employed." S.B. 64, *codified in* 16 *Del. C.* §1141(b)(1)d.

ORDER

It is this 24th day of September, 2008, by a unanimous vote of 4-0, the Decision and Order of the Board to deny the Grievant's appeal.

Brenda C. Phillips
Chair

John F. Schrautz
Member

Martha K. Austin
Member

Paul Houck
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.
>
> © 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: September 25, 2008

Distribution:
Original: File
Copies: Grievant
Agency's Representative
Board Counsel

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