**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD**

**OF THE STATE OF DELAWARE**

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| JOHN H. DOWELL, JR., | ) | |
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| Employee/Grievant, | ) | |
| | ) | **DOCKET No. 08-11-432** |
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| DEPARTMENT OF SERVICES FOR CHILDREN, | ) | |
| YOUTH AND THEIR FAMILIES (DSCYF), | ) | **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 6, 2009 in the Delaware Room at the Public Archives Building, 121 Duke of York Street, Dover, DE 19901 and continued on September 3, 2009.

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

**APPEARANCES**

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

Jeffrey K. Martin, Esquire
on behalf of John H. Dowell, Jr.

Kevin R. Slattery
Deputy Attorney General
on behalf of DSCYF

## BRIEF SUMMARY OF THE EVIDENCE

The employee/grievant, John H. Dowell, Jr. (Dowell), offered and the Board admitted into evidence his trial book with eleven exhibits (1-13; Exhibits 10 and 13 were blank). Dowell testified on his own behalf and called one witness: Richard Shaw, Deputy Director of the Division of Youth Rehabilitative Services. The parties provided the Board with a Stipulation Regarding Witness Testimony of Terry Patton and Luis Ortiz.

The employer, Department of Services for Children Youth and their Families (DSCYF), offered and the Board admitted into evidence a trial book with seven exhibits (A-G). The Board also admitted into evidence a CD-rom containing Internet logs and a spreadsheet analysis (Exhibit H). [1] The parties provided the Board with a Stipulation in Lieu of Testimony of Corporal Nancy Skubik.

DSCYF called three witnesses: Susan Jones, DSCYF Human Resources Manager; Glenn Wright, Senior Telecommunications Technologist, Department of Technology and Information (DTI); and Michael Land, DSCYF Network Telecommunications Technologist III.

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[1] Dowell objected to Exhibit H on the ground that he could not be sure it was the same data previously provided to him by DSCYF.

## FINDINGS OF FACT

Prior to his termination on October 21, 2008, Dowell had worked at DSCYF for over 28 years. For the last ten years, he was the Food Services Director.

Dowell's primary job responsibility was to oversee purchasing (*e.g.*, food and supplies) for the Ferris School. To deal with budget cut-backs, Dowell negotiated bulk purchases and other discounts with vendors, saving the State tens of thousands of dollars, for which he received a commendation from the DSCYF Secretary.

Dowell voluntarily took on the responsibilities as the American Correctional Association (ACA) Manager and was instrumental in the Ferris School's receiving national recognition during an ACA audit. Compliance with ACA standards entitles DSCYF to receive federal funds ($30,000 per month) for nutrition.

DSCYF witnesses acknowledged that Dowell was a hard-working and reliable employee with no history of job performance problems. His last performance evaluation for the period January 1-December 31, 2007 rated him "Distinguished," the top ranking.

Prior to his termination, Dowell did not have any disciplinary history in his 28 years working for DSCYF.

According to Dowell, as Food Services Director he had little contact with students at Ferris except for one cooking class he taught. His office was in the back of the building near the loading dock and was not accessible by students. According to Dowell, he always locked the door to his office when he was away, and only a maintenance man had a key.

On July 31, 2008, the Delaware State Police executed a search warrant at Dowell's home and seized a State-owned laptop computer where they found an e-mail he had opened containing child pornography. Later that day, the State Police arrested Dowell at work and charged him with possession of child pornography (a Class D felony). As a condition of bail, the Court ordered Dowell not to have contact with anyone under the age of 18.

Because of Dowell's arrest and no contact order, DSCYF suspended him with pay. On December 30, 2008, Dowell pled guilty to one count of misuse of computer system information (11 *Del. C.* §935 – a Class A misdemeanor). Dowell paid a fine and the Court placed him on probation for one year, but the Court did not impose any restrictions on contact with minors. In July 2009, Dowell's probation officer recommended his early discharge from probation.

After Dowell's arrest, DSCYF investigated to see if he had used his desktop computer at work for inappropriate purposes. DSCYF asked DTI to pull the Internet logs for Dowell's IP address for six months (February-July 2008). Michael Land and Hal Miller from the DSCYF Management Information Services analyzed the logs. Land analyzed the months of March, May, and July; Miller analyzed the months of February, April, and June.

Land and Miller both operated on the instruction that any website other than (1) Weather Bug (a weather station operated by DSCYF), (2) the DSCYF website, or (3) any official State of Delaware website was not work related. Land and Miller, however, did not operate on uniform protocols for determining the time spent by Dowell on any one website.

Land and Miller turned over the results of their analysis to Susan Jones. She tallied up the time intervals they determined Dowell spent on non-work related websites. By Jones' tally, over the course of the six months (97 work days) Dowell spent 280 hours and 58 minutes visiting non-work related websites. With permission from DTI, Jones accessed a number of those websites and found what she considered were inappropriate materials.

By letter dated September 8, 2008, the Director of the Division of Youth Rehabilitative Services ( Richard Shaw) notified Dowell of his recommendation to terminate Dowell "for documented abuse of the State's time and resources and violation of the State's Acceptable Use Policy."

> On June 3, 2003 and again on March 20, 2008, you signed an Acknowledgment Statement certifying that you "have read and agree to abide by the guidelines set forth within the State Acceptable Use Policy" and that you "fully intend to comply with this policy realizing that I am personally liable for intentional misuse or abuse of the State's computer and information systems." Given the aforementioned results of our investigation, you have clearly misused and abused the State's communication and computer systems, in addition to the exorbitant misappropriation over an extended period of time of the State's work time pursuing questionable non-work related activities.

Dowell requested and had a pre-decision meeting on October 7, 2008. By letter dated October 21, 2008, the DSCYF Secretary (Harry Smith, III) notified Dowell that the Secretary had accepted the "recommendation to terminate your employment with the Division of Youth Rehabilitative Services upon receipt of this letter."

At the hearing, Dowell stipulated that the sixteen websites listed in his notice of termination letter were sexually explicit. He testified that they were blogs and described them as "personal diaries of different people who lived the kind of life I lived." He testified that he accessed some of those blogs around four times a week, usually in the morning to see if there were any new entries from the night before. Dowell acknowledged during his testimony that the blog entries he read were sexually explicit. Dowell acknowledged that he averaged around fifteen minutes each day visiting these sexually explicit websites and that he had been doing so for "a couple of years."

The DTI Internet logs for Dowell's IP address showed that he accessed each of those sixteen sexually explicit blogs between 3-16 times over a six month period (February 1-July 31, 2008).

Dowell testified that many of the websites he visited while at work were job-related. He managed fifteen other employees who had "Super Cards" to purchase on behalf of the State and he used the Internet to monitor their purchases and bank account balances. Dowell also testified that in his position as Food Services Director at Ferris he often used the Internet to purchase supplies from such vendors as Boscovs, Panniers Paper Company, and Cisco.

## 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.**

Dowell does not claim that DSCYF denied him due process required by Merit Rule 12. He received written notice of intent to terminate on September 8, 2008 with the reasons for the proposed action. He received a pre-decision meeting on October 7, 2008.

The Board must first decide whether Dowell committed the offenses charged in the September 8, 2008 intent to terminate letter: (1) "abusing the State owned computer and network, spending hours online while at work, surfing inappropriate websites"; and (2) "frequent[ing] websites that contained pornographic materials" in violation of "the State Acceptable Use Policy." [2]

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[2] The intent to terminate letter also charged Dowell with frequenting "questionable websites well after normal work hours." At the hearing, DSCYF acknowledged that this charge was unsubstantiated because it did not take into account a 4-5 hour time zone differential (Greenwich Mean Time).

## A. Personal Use of State Computer

The DTI Acceptable Use Policy provides:

> *Personal Use*
>
> While State systems are intended for primarily business/instructional purposes, limited (incidental and occasional) personal use may be permissible when authorized by your management and it does not:
>
> – Interfere with your work responsibilities or business/instructional operations.
>
> – Involve interests in personal outside business and/or other non-authorized organizations and activities . . .
>
> – Violate any of the standards contained in this Code or other State of Delaware policies.
>
> – Lead to inappropriate costs to the State (excessive personal surfing, utilizing streaming services such as listening to music or watching video, and downloading of music and video files are *specifically forbidden*.)

The Policy does not define or list by way of example what constitutes "incidental and occasional" personal use, but the Policy prohibits "excessive personal surfing," one of the charges for which DSCYF terminated Dowell.

DSCYF calculated that from February 1 through July 31, 2008, Dowell worked 97 days and spent 280 hours and 58 minutes on inappropriate websites averaging over 2.5 hours

a day. Dowell did not dispute that some of the websites he visited on his State computer while at work were not job related, but he claims he only spent 17 hours and 10 minutes on non-work related websites. Glenn Wright from DTI testified that Dowell's calculation was flawed because Dowell added up the time (usually seconds) it took the system to download a particular website, which does not equate to how long he spent on the website.

DSCYF's methodology, however, was also flawed for two reasons. First, Land acknowledged that he did not know what Dowell's job responsibilities were as Food Services Director so Land did not know whether websites other than official State websites might be job-related. For example, Dowell testified that in the course of his work he used the Internet to check bank account balances, monitor credit card purchases by other employees, and purchase goods from a variety of vendors. The number of unique websites DSCYF considered to be non-work related (1,966 vs. 43 work related) was vastly overstated.

Second, Wright testified that there was no way of knowing from analyzing Dowell's Internet logs how long he spent on any one website because some sites have automatic refreshers. Or, Dowell could have downloaded the site briefly, minimized the screen, and then turned his attention to work-related business or left the office.

The Board concludes as a matter of law that the evidence in the record does not show that Dowell committed the charged offense of "spending hours online while at work" for non-job related purposes.

## B. Sexually Explicit Websites

The DTI Acceptable Use Policy provides that inappropriate use of the Internet includes "Sexually explicit, harassing or pornographic sites."

On March 20, 2008, Dowell signed an Acknowledgment Statement: "This is to certify that I have read and agree to abide by the guidelines set forth within the State Acceptable Use Policy. As an employee of the State of Delaware, I fully intend to comply with this policy realizing that I am personally liable for any intentional misuse or abuse of the State's communications and computer systems."

Dowell's intent to terminate letter listed sixteen inappropriate websites. Dowell stipulated that these sites contained sexually explicit blog entries. Dowell testified that he accessed those sexually explicit sites while at work almost every day over the course of February 1-July 31, 2008, averaging fifteen minutes a week, and he had accessed sexually explicit sites from work for several years.

The Board concludes as a matter of law that Dowell violated the DTI Acceptable Use Policy by using his State computer to access sexually explicit websites while he was at work. The Board must then decide whether the penalty of termination was appropriate to the circumstances.

"Choice of penalty is within an administrative agency's discretion if it is based on substantial evidence and not outside its statutory authority. To find abuse of discretion, [the Board] determines whether the agency's chosen penalty is 'so disproportionate to the offense

in light of all the circumstances as to be shocking to one's sense of fairness.'" *P. Wilson Exterminating Co. v. Delaware Department of Agriculture*, Civ.A.No. 00A-08-012, 2001 WL 755374, at p. 1 (Del. Super., June 27, 2001) (Silverman, J.) (quoting *Pusey v. Delaware Alcoholic Beverage Control Commission*, 596 A.2d 1367, 1371-72 (Del. Super. 1991), *aff'd* 720 A.2d 559 (Del. 1998)).

The federal Merit Systems Protection Board "has held that discipline, including removal, is warranted for the misuse of government equipment and time arising from an [employee's] personal use of a government computer during business hours, particularly when, as here, the [employee] used the agency's computer to view material of a sexually explicit nature." *Baldwin v. Department of Veteran's Affairs*, 109 M.S.P.B. 392, 398 (2008) (citations omitted).

In *Thompson v. State Civil Service Commission*, 863 A.2d 180 (Pa. Cmwlth. 2004), the Pennsylvania State Civil Service Commission affirmed the termination of a program manager (Thompson) who worked for the county agency on aging. The Internet logs showed that Thompson viewed sites depicting nudity for roughly fifteen minutes per day. The agency's acceptable use policy prohibited employees from accessing sexually explicit websites even on personal time. "Thompson was aware of the Agency's computer use policies prohibiting personal use of the internet during work hours and electronic communications displaying offensive or explicit language or images." 863 A.2d at 184. The court held that this evidence proved "just cause for his removal." *Id.*

A majority of the Board concludes as a matter of law that the penalty of termination was appropriate for Dowell's violations of the Acceptable Use Policy. The Policy prohibits access to sexually explicit sites. Dowell signed an acknowledgment that he had read and understood and would comply with the Policy. Dowell stipulated that he visited sixteen sexually explicit sites over the course of February 1-July 31, 2008 on an almost daily basis and averaged at least fifteen minutes per week reading sexually explicit blogs. In light of the number of sexually explicit sites visited and the frequency of the visits over a period of time, a majority of the Board does not believe that the penalty of termination "was so disproportionate to the offense in light of all the circumstances as to be shocking to one's sense of fairness." *P. Wilson Exterminating*, 2001 WL 755364, at p.1.

## ORDER

It is this 17th day of Sept, 2009, by a vote of 4-1, the Decision and Order of the Board to deny Dowell's appeal.

Martha K. Austin
Chair

Joseph D. Dillon
Member

Jacqueline Jenkins
Member

John C. Schmutz
Member

Paul R. Houck
Member

I concur in part and dissent in part.

I concur with the majority of the Board that the evidence in the record proved that Dowell violated the Acceptable Use Policy by accessing sexually explicit websites using his State computer while at work.
I dissent with the majority of the Board because I do not believe that the penalty of termination was appropriate to the circumstances.

## 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: September 18, 2009

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