BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

BEVERLY A.Y. CARR,	)	
	)	
Employee/Grievant,	)	**DOCKET No. 09-01-438**
v.	)	
	)	**DECISION AND ORDER**
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,	)	
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:45 a.m. on December 3, 2009 in the Delaware Room at the Public Archives Building, 121 Duke of York Street, Dover, DE 19901.

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

Beverly A.Y. Carr
Employee/Grievant *pro se*

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

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services (DHSS) offered and the Board admitted into evidence without objection six exhibits (A-F). DHSS called three witnesses: Luvina Lacno, a nutritionist with the Women Infants and Children (WIC) Program; Roberta Lea, WIC Supervisor; and Jennifer Brown, another WIC nutritionist.

The employee/grievant, Beverly A.Y. Carr (Carr), did not offer any exhibits into evidence. Carr testified on her own behalf and called the same three witnesses as DHSS.

FINDINGS OF FACT

Carr works as a Nutritionist I for the WIC Program in the DHSS Division of Public Health.

In a performance review for December 4, 2006 – August 15, 2007 Carr's supervisors noted a number of deficiencies and put her on a performance improvement plan.

By letter dated October 26, 2007 Susan Keegan, WIC Program Manager, notified Carr of a proposed one-day suspension without pay for inappropriate conduct during a bi-weekly performance improvement plan meeting on September 20, 2007. According to Keegan's letter, Carr "raised [her] voice and began making accusations. You were told to lower your voice several times, but did not comply. At one point, you stood up and went to the doorway and loudly made accusations, which could be heard by staff and clients." In the letter

Keegan warned Carr: "This type of behavior is unacceptable and will not be tolerated. Your inappropriate behavior is in violation of the DHSS Beliefs and Principles doctrine. Please be advised that any future incidents of this nature or other misconduct will result in more severe disciplinary action, up to and including dismissal." [1]

On the morning of August 18, 2008 Carr was in her office talking with Jennifer Brown when Luvinia Lacno walked by. Carr asked Lacno to come into her office because she had something important to discuss. According to Brown, Carr asked Lacno why she was telling people that Carr was absent from work. According to Brown, this question upset Lacno and she became defensive. According to Brown, Carr told Lacno that if people asked where Carr was, Lacno should just tell them to ask Carr directly. [2] According to Brown, Carr and Lacno "were upset with each other" and Brown asked them to lower their voices. Brown felt this was a "personal conversation" and did not feel comfortable staying. Before leaving, Brown asked Carr and Lacno to shut the office door to keep the conversation private.

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[1] Carr requested and had a pre-suspension meeting on November 2, 2007 with her supervisors (Susan Keegan and Roberta Lea). By letter dated November 5, 2007 Keegan notified Carr: "Based on the information provided at the meeting, you did not offer any reasons why the proposed penalty is not justified or too severe." Carr did not grieve the one-day suspension under the Merit Rules.

[2] Apparently Carr had learned that Susan Keegan had seen Carr going to McDonald's when Keegan thought she should have been at work. Rather than questioning Carr directly, Keegan asked Lacno where Carr was. Lacno said she didn't know but "maybe she was in the bathroom."

Lacno testified that after the heated conversation with Carr, Carr apologized and "I accepted her apology." Lacno testified that as far as she was concerned the matter was closed and she put it out of her mind.

However, sometime in the next week Lacno decided to let her supervisor know about the heated discussion with Carr, but Lacno did not file a formal complaint or request disciplinary action. Lacno met with Roberta Lea on August 26, 2008 who asked for a written statement, which Lacno sent to Lea by e-mail dated August 27, 2008. Lea also asked Jennifer Brown and Carr for written statements. Carr's e-mail statement was brief: "I did not have a confrontation with Luvina. I did ask her a question and she answered it."

Lea completed a Disciplinary Investigation Report using an agency form in which she cut and pasted the e-mails she received from Lacno, Carr, and Brown. Lea did not interview any of the witnesses face-to-face even though Lacno's and Carr's versions of what transpired in Carr's office on August 18, 2008 were quite different. In response to questions from the Board, Lea was equivocal why she only recommended Carr for discipline and not Lacno when, according to Brown, both of them became heated and raised their voices. [3]

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[3] Lacno testified that Carr "screamed" at her and was "verbally abusive" and that Lacno felt "threatened." The Board had some issues with both Lacno's and Carr's credibility about the incident. The Board does not understand why, if Carr was so abusive and Lacno felt threatened, she did not just leave the room, and why Lacno waited over a week to report the incident to their supervisor. The Board believes that Carr tried to downplay how heated the conversation became on both sides. The Board relied mostly on the disinterested testimony of Jennifer Brown for what really happened.

By letter dated November 7, 2008 Lea notified Carr: "I am recommending a three (3) day suspension without pay for inappropriate conduct per Merit Rule 12.1 (Employee Accountability) and failure to follow DHSS' Beliefs and Principles" which state: '*Delaware Health & Social Services (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.*'" In deciding on the penalty Lea took into account Carr's "prior discipline. On October 26, 2007, you were issued a one day suspension for inappropriate conduct.

At Carr's request, she had a pre-suspension meeting on November 20, 2008. By letter dated November 24, 2008 Lea notified Carr: "Based on the information provided at the meeting, you did not offer sufficient reasons why the proposed penalty is not justified or is too severe." [4]

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 accounta-**

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[4] Carr appealed her three-day suspension to the Board under Merit Rule 12.9. In an earlier Decision and Order (dated March 5, 2009) the Board concluded as a matter of law that it had jurisdiction to hear Carr's direct appeal.

> **bility. 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.**

Carr does not claim that DHSS denied her specified due process rights.

In the November 7, 2008 pre-suspension letter Lea charged Carr with violating DHSS Beliefs and Principles (mutual respect for other employees): "On August 18, 2008 you confronted co-worker Luvina Lacno and accused her of being used as a spy by me. You stated to Ms. Lacno that you feel you are being targeted by your manager, Susan Keegan, and me. Your tone of voice was loud and your demeanor was such that Ms. Lacno inferred it as an attempt to intimidate her."

There is no question that a heated exchange took place between Carr and Lacno in Carr's office on August 18, 2008 when both of them raised their voices in anger. To that extent, the Board concludes as a matter of law that Carr committed the charged offense: lack of mutual respect for a co-worker. Lacno may have been partly to blame but that does not excuse Carr's behavior.

The Board, however, concludes as a matter of law that the penalty of a 3-day suspension was not appropriate to the circumstances.

The conversation between Carr and Lacno in Carr's office on August 18, 2008 was a private conversation between two co-workers. The conversation became heated and both

women raised their voices prompting Jennifer Brown to ask them to close the door. There is no evidence in the record that the conversation could be heard outside the office by staff or WIC clients, in contrast to the incident on September 20, 2007 which led to Carr's one-day suspension. The conversation ended on a positive note with Carr apologizing. Lacno accepting her apology and considered the matter closed.

The Board believes that management bears some responsibility for the friction between Carr and Lacno which contributed to the heated exchange in Carr's office on August 18, 2008. If the agency had concerns about Carr's absence from work, then it was incumbent upon management to require her to document her time, not to put co-workers in an awkward position by questioning them as to Carr's whereabouts.

The Board concludes as a matter of law that DHSS did not have just cause to suspend Carr for three days without pay because the penalty was not appropriate to the circumstances.

ORDER

It is this 17th day of December, 2009, by a unanimous vote of 5-0, the Decision and Order of the Board to grant Carr's appeal. DHSS is ordered to reimburse Carr for her three-day suspension (pay and benefits) and to remove any record of that suspension from her personnel file.

Martha K. Austin
Chair

Joseph D. Dillon
Member

Paul R. Houck
Member

John C. Schmutz
Member

Jacqueline Jenkins
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.
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> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
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> (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.
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> (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: January 8, ~~2009~~ 2010

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Agency's Representative
Board Counsel

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