BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

LEROY E. JETT, Employee/Grievant, v. DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Employer/Respondent.	))))))))))	**DOCKET No. 11-11-527** **DECISION AND ORDER**

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 June 7, 2012 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Dr. Jacqueline Jenkins, Acting Chair, Paul R. Houck, and Victoria D. Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

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

Deborah L. Murray-Sheppard
Board Administrator

Leroy E. Jett
Employee/Grievant *pro se*

Laura L. Gerard
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 seventeen documents marked for identification as Exhibits A-Q.

DHSS called two witnesses: Susan McLaughlin, former Director of the Treatment Access Center (TASC); and "MT," a former TASC client. [1]

The employee/grievant, Leroy E. Jett (Jett), testified on his own behalf and called two witnesses: The Honorable Robert B. Young, Judge, Superior Court of the State of Delaware in and for Kent County; and Pearl Copes, TASC Senior Case Manager.

Jett offered and the Board admitted into evidence eight documents marked for identification as Exhibits 1-5, 7, 8, and 11.

FINDINGS OF FACT

Prior to his termination on November 17, 2011, Jett worked as a Senior Social Worker/Case Manager at the TASC office in Dover.

TASC is the primary liaison between the Division of Substance Abuse and Mental Health and the criminal justice system. TASC assesses, refers to treatment, and provides case management services to offenders as they move through both the criminal justice and treatment systems. TASC provides services statewide to offenders coming through the Superior Court Drug Courts. TASC performs initial assessments on referrals by the Drug Court and provides treatment recommendations to the Court and attorneys.

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[1] The Board uses the client's initials, "MT," to protect her privacy. DHSS had planned to call two other witnesses: John Martin of Redwood Toxicology Laboratory, and Jaclyn DeLeonardis, TASC Social Worker/Case Manager. Jett stipulated that Exhibit H was the complete record of MT's urine screens for the period February-August 2011, so the Board decided that it did not have to hear Mr. Martin's testimony about Redwood's lab test results. After DHSS made a proffer as to the proposed testimony of Ms. DeLeonardis, the Board decided her testimony would be cumulative of the testimony already heard from Ms. McLaughlin.

One of Jett's clients was MT. In 2009, the Superior Court referred MT to the TASC program as a condition of her continued probation. Jett was MT's case manager. MT successfully graduated from the TASC program.

After MT violated her probation, on February 18, 2012 the Superior Court referred her back into the TASC program as a condition of her continued probation: "The defendant shall be evaluated for substance abuse and follow any directions for testing, counseling and treatment as recommended by TASC." On the sentencing order, the Court noted "Zero tolerance for any illegal drugs" and "Zero tolerance alcohol use."

MT remained Jett's client until August 24, 2011 when Susan McLaughlin, the Director of TASC, re-assigned her to another case manager (Jaclyn DeLeonardis). During the six months MT was Jett's client, she gave seven urine samples to TASC. She tested positive for THC (marijuana) six times. [2] Jett and MT appeared before Judge William L. Witham, Jr. for status conferences on June 23 and July 21, 2011. Both times, the Court noted on the docket sheet "Defendant in Compliance." Prior to each status conference, Jett wrote a report for the Court's review. [3]

MT's probation officer learned from her Facebook page that she had violated her probation by leaving Delaware and going to Virginia for four days (July 29 – August 1, 2011). He arrested her on August 4, 2011 for violating probation.

By e-mail dated August 4, 2011 (forwarded to Susan McLaughlin), the probation officer

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[2] TASC collected MT's urine samples on March 23, 2011 (430 ng/mL); May 27, 2011 (722 ng/mL); June 1, 2011 (946 ng/mL); June 29, 2011 (364 ng/mL); July 15, 2011 (259 ng/mL); July 27, 2011 (309 ng/mL); and August 3, 2011 (none detected).

[3] At Jett's request, the Board issued a subpoena to the Prothonotary for copies of those status reports. By letter dated May 30, 2012, the Chief Staff Attorney of the Superior Court objected to the subpoena citing confidentiality provisions of federal law and the Court's operating procedures. *See* 42 C.F.R. 2.13; Administrative Directive 2000-5.

reported to the Department of Correction:

> During the discussion and explanation of the arrest, and while in handcuffs, [MT] made comments that her TASC case worker, Mr. Jett, had been sexually harassing her during office appointments. She went on to state that Mr. Jett spoke about her not wearing certain clothing to office appointments due to it turning him on. In later comments, she stated that he does this to several girls, and that he told her he wanted to take her out to dinner. He allegedly discussed her wearing low cut tops and what it does for him.

Susan McLaughlin investigated MT's complaint. She and David Niessen interviewed MT in prison. McLaughlin then reviewed MT's case file which she retrieved from Jett's office. According to McLaughlin, the file only contained an intake sheet and two entries (February 18 and March 23, 2011) on the Progress Notes and did not contain a copy of MT's sentencing order or a 2011 assessment. According to McLaughlin, a case file should contain the sentencing order, urine screen results, any correspondence, and progress notes for every meeting between the case manager and the client. The TASC sign-in sheets provided by DHSS show that MT visited TASC twelve times over the course of May 11-August 8, 2011 but there were no progress notes for those dates.

McLauglin and Niessen then interviewed Jett. According to Jett, he used his computer to maintain progress notes and access urine screen reports which is why they were not in the paper file. According to Jett, his immediate supervisor was aware of this practice and regularly audited Jett's and other case managers' files.

McLaughlin did not interview other members of the TASC staff about inappropriate behavior by Jett towards other clients which they may have seen or overheard. McLaughlin did not follow up on MT's allegation that Jett had behaved inappropriately "to other girls."

By letter dated November 1, 2011, the Director of the Division of Substance Abuse and

Mental Health (Kevin A. Huckshorn) notified Jett that he was recommending Jett's dismissal for "violating CR001 Policy: Professional Behavior of Division Employees and dereliction of your job responsibilities." [4] The letter stated that on August 4, 2011 a client "filed a verbal complaint of sexual harassment against you. The client claimed that you commented regularly about her looks, her intelligence and the clothes she wore. The client also claimed that she received favorable treatment regarding drug testing."

The letter further stated: "When the client's file was reviewed, the following items were missing: 1) a copy of the court report, 2) progress notes, 3) drug tests, and 4) correspondence showing that she was in any treatment plan." In addition, "only seven (7) drug tests dated between March 23, 2011, and August 3, 2011, could be verified."

The Director concluded: "Your failure to enforce the client's supervision and urine testing requirements, as well as your failure to provide timely, appropriate and sufficient progress/treatment documentation is indicative of dereliction of your job responsibilities."

The Director cited a prior disciplinary action against Jett. "In July 2010, you were issued a one (1) day suspension for an inappropriate relationship with a female client. Your disciplinary record was taken into consideration when determining the appropriate discipline in this matter." [5]

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[4] That policy, "Professional Behavior of Division Employees," warns against "Boundary violation" and "Dual relationships." "'**Boundary violation**' refers to behavior having an exploitative or harmful effect on the consumer which may lead to consumer abuse. *Boundary crossing* occurs when a professional steps out of the traditional relationship in some way, but the action neither exploits nor harms the consumer." "'**Dual relationships**' are defined as multiple or overlapping relationships which refer to the existence of an additional role or roles between professionals and consumers in addition to the therapeutic relationship."

[5] DHSS provided the Board with a copy of the one-day suspension letter dated July 21, 2010. The letter does not shed much light on the alleged misconduct. The letter reads: "Dover Probation/Parole Officer Alison Justiniano stated that her client LB reported to her on April 27, 2010 details that could only have come from emails and conversation from Justiniano to you, regarding your client DC. Client LB said that she was given the information regarding your client DC. Client LB also provided a written statement suggesting an inappropriate relationship between you and DC. The result of that inappropriate relationship was sharing of information to your client DC as reference above." In addition to the one-day suspension, Jett had to attend "Professional Boundaries" training (2.5 hours on

Jett requested and DHSS held a pre-termination meeting on November 4, 2011. By letter dated November 17, 2011, the Secretary of DHSS (Rita M. Landgraf) notified Jett of his termination: "When you do not maintain professional boundaries, you are jeopardizing the client's recovery, which is one of the agency's primary missions."

By far, the most serious offense for which DHSS terminated Jett was MT's allegation of sexual harassment. MT testified that comments Jett made to her made her feel "uncomfortable" and "awkward." According to MT, Jett told her that she was "attractive" and "pretty." According to MT, Jett said she was "too intelligent to be in the system." According to MT, Jett had commented on her attire (shorts and low-cut tops) and said, "You're not going to be able to go into court looking like that."

MT explained that she did not tell Jett or anyone else at TASC that she was offended by his comments because "at first I didn't think much about it" and she felt that Jett was just trying to "boost my self-esteem." According to MT, she put up with Jett's comments because "I knew I had to get through it, to get off of probation, to get on with my life." MT explained that when she finally spoke out after her probation officer arrested her on August 4, 2011, "I was very upset, very angry. I'm already going to jail, so what's the worst that can happen if I tell."

MT also testified, however, that Jett treated her "with dignity and respect." She testified that he was a "very nice man" and she did not feel that he had acted "maliciously" and she had "never felt threatened." She denied that Jett ever asked her out to dinner. Jett was adamant that he did not act inappropriately towards MT in any way. He acknowledged telling her that she was attractive and too intelligent to be in the system but only to boost her self-esteem. Jett explained that he commented on MT's attire because he was concerned about its effect on other clients in the office (some of whom are registered sex offenders), and the wrong impression it might give

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July 13, 2010).

the judge when she appeared for status conferences. According to Jett, MT never told him that she felt uncomfortable or awkward around him and he was shocked when she made her allegations after she was arrested for violating probation.

In weighing the credibility of Jett and MT, the Board found Jett the more credible witness. The Board does not believe that MT was untruthful in what she said at the hearing. Rather, it is what she did not say. She did not say that Jett propositioned her or asked her out on a date or to dinner, or touched her inappropriately, or used foul or sexually demeaning language. Even MT agreed that it was good advice from Jett to dress more appropriately for court. Without anything more specific – other than Jett made her feel "awkward" and "uncomfortable" – the Board finds as a matter of fact that Jett did not sexually harass MT.

The pre-termination letter also stated that Jett gave MT "favorable treatment" for drug screening by not having her tested every week, and by not taking any action when she tested positive for marijuana. According to Susan McLaughlin, when the sentencing order notes "zero tolerance" the TASC policy is to test the client at least once a week. DHSS did not provide the Board with a copy of that policy or present evidence as to the practice of other case managers.

The Board found credible Jett's explanation why MT did not have more TASC drug tests. According to Jett, MT sometimes didn't show up for their appointment. Other times, she claimed to have a medical condition that made it difficult to urinate. [6] Other times, MT admitted that her urine was "dirty" after a drug screen by her probation officer.

The goal of the TASC program is to keep clients in the program even if they slip up so long as they are making progress. It is true that MT tested positive for marijuana six times over the course of March-July 2011. According to Jett, MT's probation officer had access to her

[6] DHSS suggested that Jett was derelict in accepting MT's claim at face value without contacting her doctor to verify her medical condition. The Board notes that doctor/patient confidentiality would preclude her doctor from providing such information.

TASC drug screening records but he did not arrest her until she violated her probation by leaving the state. According to Jett, in his status reports to the Court he disclosed her positive drug tests, yet in two status conferences (June 23 and July 21, 2011) the Court noted on the docket sheet "DEFENDANT IN COMPLIANCE."

Based on these facts in the record, the Board finds as a matter of fact that Jett did not give MT favorable treatment in her drug screening.

The third basis for Jett's termination was the dearth of documentation in MT's case file. According to Susan McLaughlin, when she pulled the file shortly after MT made her allegations against Jett, the file only contained an intake sheet and two entries in the progress notes, but no copy of the sentencing order or 2011 assessment. After McLaughlin re-assigned MT's case to another case manager, McLaughlin took the precaution of inserting a manila envelope in the file with the instruction that any new materials be placed in the envelope to preserve the condition of Jett's file at the time McLaughlin reviewed it.

Jett claimed that most of the required documentation was on his computer, but he did not provide the Board with any documents downloaded from his computer to prove his case. He may no longer have access to that computer; however, between his interview with McLaughlin and Niessen in August 2011 and his suspension on November 1, 2011, he had ample time to gather any available evidence to document his claim.

In evaluating the case file management issue, the Board is somewhat hampered by the lack of evidence in the record. The Board would have liked to have heard from other case managers about their file management practices. The Board would have liked to have heard from Jett's immediate supervisor (even though he has retired from State service) about his knowledge of Jett's filing practices and the supervisor's audits of Jett's files.

Nevertheless, based on the evidence in the record the Board finds as a matter of fact that

Jett's case file on MT was woefully deficient. The success of the TASC program depends on complete and accurate case management files, which can be audited by supervisors, and shared or re-assigned to other case managers if necessary. Complete and accurate case management files are necessary, to ensure treatment placement and measure progress to maximize the client's chances to graduate from the program successfully.

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 burden of proof in employee dismissal proceedings is well established in Delaware. When the State terminates a person's employment, the MERB presumes that the State did so properly. The discharged employee has the burden of proving that the termination was improper." *Avallone v. DHSS*, 14 A.3d 566, 572 (Del. 2011) (citing 29 *Del. C.* §5949(b) ("The burden of proof of any such appeal to the Board or Superior Court is on the employee.").

The Board concludes as a matter of law that Jett met his burden to prove that DHSS did not have just cause to discipline him for sexually harassing MT. Other than MT's testimony, the only evidence presented by DHSS to rebut his case was a prior one-day suspension "for an inappropriate relationship with a female client." DHSS did not provide the Board with any evidence as to the specific nature of that inappropriate relationship to show a pattern and practice

of sexually harassing clients.

The Board concludes as a matter of law that Jett met his burden to prove that DHSS did not have just cause to discipline him for giving MT favorable treatment for drug screening. MT's probation officer had access to the same drug screening results as Jett, yet the probation officer did not arrest her until after she violated her probation by going out of state. Jett made the Superior Court aware of MT's drug testing results at two status conferences yet the judge noted on the docket sheet that she was "in compliance" because she was making progress in other areas.

The Board concludes as a matter of law that Jett did not meet his burden to prove that DHSS did not have just cause to discipline him for failing to maintain MT's case file properly. However, the Board does not believe that a single instance of case file mismanagement warranted termination. There is no evidence in the record that DHSS had ever cited Jett before – in a performance evaluation or through disciplinary action – for case file mismanagement. [7] And Susan McLaughlin testified that, in her opinion, the condition of the MT case file – standing alone – would not warrant termination.

The Board must now consider the issue of remedy.

> [T]he General Assembly intended for the MERB to exercise broad remedial powers under section 5931(a), including the 'authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or *otherwise make employees whole*, ...

Avallone, 14 A.3d at 572 (citing 29 *Del. C.* §5931(a)). "Accordingly, we hold that the MERB is not limited to either wholly accepting or rejecting the discipline imposed by the appointing

[7] Susan McLaughlin testified that after reviewing the MT case file, she audited all of Jett's other client files and "updated" them. She did not say whether she found any of Jett's client files in the same condition as MT's.

authority." *Id.*

The Board believes that, under the circumstances, it is an appropriate remedy for DHSS to reinstate Jett to his former position as a Senior Social Worker/Case Manager at TASC because the single offense of case file mismanagement did not warrant termination. A majority of the Board also believes that it is an appropriate remedy to award Jett one half of his back pay and benefits because he did not meet his burden to prove that DHSS did not have just cause to discipline him for case file mismanagement.

ORDER

It is this **14th** day of June, 2012, by a unanimous vote of 3-0, the Decision and Order of the Board to reinstate Jett to his former position as a Senior Social Worker/Case Manager at the Treatment Access Center within thirty (30) days of the date of this Order, or, if no such position is currently available, to a comparable position until such a position becomes available. It is the decision of the majority of the Board to award Jett one-half of the back pay and benefits he would have earned between the date of his termination and the effective date of his reinstatement, minus any reductions required by law.

PAUL R. HOUCK, MERB Member

VICTORIA D. CAIRNS, MERB Member

JACQUELINE D. JENKINS, EDD, MERB Member

I respectfully dissent on the sole issue of remedy. While I vote in favor of reinstating Jett, I would not award him any back pay or benefits.

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.
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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: **June 14,**, 2012

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