

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

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| GRIEVANT, |) | |
| |) | |
| Employee/Grievant, |) | |
| |) | DOCKET No. 17-07-673 |
| v. |) | |
| |) | |
| COURT OF COMMON PLEAS OF THE |) | DECISION AND ORDER |
| STATE OF DELAWARE, |) | |
| |) | <i>PUBLIC (redacted)</i> |
| Employer/Respondent. |) | |

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:50 a.m. on April 19, 2018 at the Public Service Commission Conference Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Paul R. Houck, Jacqueline Jenkins, Ed.D, Victoria D. Cairns, and Sheldon N. Sandler, Esq., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Stacey Cohee
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

M. Edward Danberg, Esq.
The Danberg Law Firm
on behalf of the Employee/Grievant

Kevin Slattery
Deputy Attorney General
on behalf of the Court of
Common Pleas

BRIEF SUMMARY OF THE EVIDENCE

The grievant, (“Grievant”), offered and the Board admitted into evidence nine documents pre-marked for identification as Exhibits 1-3 and 5-10. The Court of Common Pleas (“the Court”) offered and the Board admitted into evidence eleven documents pre-marked for identification as Exhibits A-K.

The Grievant testified on his own behalf and called one witness: Jane Kolson, Senior Planned Giving Advisor, The George Washington University).¹ The Court called two witnesses: The Honorable John K. Welch; and Stephanie Fitzgerald, Court Administrator.

FINDINGS OF FACT

The Grievant is employed by the Court as a Management Analyst III. His job responsibilities include managing the Living Disaster Recovery Planning System and the Continuity of Operations Plan.

The Honorable John K. Welch has been a judge on the Court of Common Pleas for twenty-two years. He attended college at The George Washington University (“GW”). According to Judge Welch, he had very little contact at work with the Grievant, other than to respond to a yearly e-mail to update his personal contact information (including his personal cell phone number) for the Living Disaster Recovery Planning System. Judge Welch was aware that the Grievant was also a GW alumnus from a brief encounter years ago.

According to Kolson, she has known the Grievant for around four years. The Grievant has been a “consistent, loyal donor to the university giving money every year” which is why

¹ The Board allowed Ms. Kolson to testify by telephone from Washington, D.C., in the presence of an attorney, Betsy Wanger, Esq., Associate General Counsel for The George Washington University.

Kolson targeted him for planned giving. Tr. at 124. Kolson asked the Grievant for the names of GW alumni in Delaware she might contact to solicit contributions and the Grievant mentioned Judge Welch.

On February 15, 2017, Judge Welch was driving on Silverside Road when he received a call on his cell phone (via BlueTooth for hands free driving). The caller, a young woman who identified herself as a GW student, asked if he would be willing to make a donation to the alumni fund. According to Judge Welch, he pledged \$50.00.

On April 11, 2017, at 2:59 p.m. Kolson e-mailed the Grievant, Subject: Update on Judge Welch: “I did indeed pass along the phone number for him that you gave me, and he was called during our February student phonathon. He pledged \$15 per month for 12 months = \$180. He made his February payment and has given nothing since then. What do you want to bet that he walks away from his remaining payments ??? I’m tempted to call and request a visit to discuss planned giving – although I ****know**** the chances of his agreeing to it would be very slight. Do you know if he is married and has kids?”

At 3:23 p.m. on April 11, 2017, the Grievant e-mailed Kolson providing her with personal details about the Judge’s private life, including his parents and relatives, the name and telephone number of the Judge’s secretary and the Judge’s state e-mail address. In the course of cutting and pasting the Judge’s e-mail address into that e-mail, the Grievant inadvertently provided a copy of the email to Judge Welch.

Judge Welch read the e-mail shortly afterwards and was “shocked.” Tr. at 70. He immediately e-mailed the Grievant asking, “Why are you sharing all my personal and family pedigree information with this lady? Who is Jane Kolson?” *Id.* Judge Welch had “no idea how [the Grievant] got all this.” *Id.* In addition to the unauthorized disclosure of personal details about his family, Judge Welch was offended that the Grievant and Kolson

“were taking bets” on whether he “would fulfill his pledge” to GW. *Id.* at 71.

Welch brought the matter to the attention of the Court Administrator and the Chief Judge. Welch also e-mailed Kolson to complain. Kolson called Judge Welch on his personal cell phone to apologize. He advised her that he had only pledged \$50 and had fulfilled that pledge but had never pledged the amount referred to by Kolson in her e-mail to the Grievant.

The Court Administrator, Stephanie Fitzgerald, conducted an investigation. By letter dated April 24, 2017, Fitzgerald notified the Grievant that the Court was proposing a two-day suspension for misconduct. The letter cited violations of the Judicial Branch Authorized Use Policy for the Communications and Computer Systems², and the Code of Conduct for Judicial Branch Employees.³ Fitzgerald wrote in her letter: “While you continue to contend that the information you provided to Jane Kolson at The George Washington University is part of the public domain, it is absolutely not part of your job responsibilities in functioning as the Management Analyst III for the Court of Common Pleas to provide this information to an individual working for an institution of higher learning regarding a charitable donation made by a Judge . . .”

Fitzgerald advised Judge Welch and the Chief Judge on April 25, 2017 of the proposed two-day suspension, both of whom felt that the Grievant’s misconduct should be a terminable offense. Judge Welch brought to Fitzgerald’s attention, for the first time,

² The Judicial Branch has adopted the Department of Technology and Information Acceptable Use Policy for Using State Computer and Communications Systems (“the Acceptable Use Policy”). The Acceptable Use Policy prohibits “Charitable solicitations unless sanctioned by the State of Delaware.” The Acceptable Use Policy also prohibits any “language that may be considered... offensive, insensitive or otherwise inappropriate.” Fitzgerald cited both of those sections of the Acceptable Use Policy in her letter to the Grievant.

³ Article VI.A. of the Code of Conduct for Judicial Branch Employees, cited by Fitzgerald in her letter to the Grievant, provides: “Judicial Branch employees shall endeavor at all times to perform their duties in a timely, impartial, diligent, and courteous manner, and shall apply their full time and energy to the business and responsibilities of their office during working hours.

the Grievant's apparent disclosure of Welch's personal cell phone number, which the Grievant may have obtained from the Living Disaster Recovery Planning System.

By letter dated April 26, 2017, Fitzgerald advised the Grievant that she was rescinding the proposed two-day suspension and re-opening her investigation based on this new information about Judge Welch's personal cell phone number. By letter dated June 15, 2017, Fitzgerald notified the Grievant of his proposed suspension for ten days without pay for his violations of the Acceptable Use Policy and the Code of Conduct for Judicial Employees.

The Board finds as a matter of fact that the Grievant provided Jane Kolson with personal information regarding Judge Welch in his e-mail of April 11, 2017, information which a person of ordinary sensibilities would consider to be an invasion of personal privacy. In addition, the Board finds as a matter of fact that the Grievant provided Kolson with Judge Welch's personal cell phone number.⁴ Kolson testified that the Grievant sent an e-mail to her on July 21, 2016 with a phone number for Judge Welch which she believed was Welch's home land line number based on what the Grievant had told her. She testified that Judge Welch's personal cell phone number (identified for the record by its last four digits) was added to a GW alumni database in July 2016, and that when she called Judge Welch on that number in April 2017 to apologize "I went into the database and there it was." Tr. at 147.⁵ Kolson also testified that there were no other telephone numbers in GW's database for Judge Welch. Tr. at 126.

⁴ The Court Administrator drew the adverse inference that the Grievant accessed Judge Welch's personal cell phone number from the Living Disaster Recovery Planning System. The Board is not willing to go that far. However, the Board does not believe it is necessary to prove where or how the Grievant obtained the number, only that he provided it to Kolson without Judge Welch's authorization.

⁵ Kolson suggested that the source of Judge Welch's personal cell phone number in the GW alumni database may have been put there by a third-party vendor, AlumniSynch. However, in looking at the metadata on the computer (to which the Board did not have access), she admitted that, "I don't know what all this jargon means." Tr. at 126. She also admitted that, "it doesn't say where the vendor got the number," so "I don't really know how it works." Tr. at 140, 142.

The Grievant testified that he did not provide Kolson or anyone at GW with Judge Welch's personal cell phone number, but the Board did not find him a credible witness because his testimony on this key point has changed over time. He initially told Stephanie Fitzgerald during her investigation that he did not remember which telephone number he gave Kolson or where he got it.

The Board's finding of fact about the source of Judge Welch's cell phone number provided to GW is further supported by Kolson's April 11, 2017 e-mail to the Grievant: "I did indeed pass along the phone number for him that you gave me, and he was called during our February student phonathon." That squares perfectly with Judge Welch's testimony that he received a call on his personal cell phone number from a GW student in February 2017 soliciting a contribution. The student got the cell phone number from Kolson who got it from the Grievant (even though Kolson may have believed it was a land line number because that is what the Grievant told her).

CONCLUSIONS OF LAW

Merit Rule 12.1 provides:

Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. "Just cause" means that management has sufficient reasons for imposing accountability. Just cause requires: showing that the employee has committed the charged offense; offering specified due process rights specified in this chapter; and imposing a penalty appropriate to the circumstances.

The Board concludes as a matter of law that the Court had just cause to suspend the Grievant for ten days without pay.

The Grievant acknowledged that his April 11, 2017 e-mail to Kolson was not work related and was inappropriate, but contends that his misconduct did not warrant discipline

beyond a written reprimand. According to the Grievant the information he provided to Kolson about Judge Welch was a matter of public record, and therefore there was no harm done in sharing that information with Kolson because it was already in the public domain. The Board strongly disagrees.

The U.S. Supreme Court has recognized a common law right of privacy “in avoiding the disclosure of personal matters.” *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (quoting *Whalen v. Roe*, 429 U.S. 589, 598 (1977)). The common law right of privacy “encompasses the individual’s control of information concerning his or her person.” *Reporters Committee*, 489 U.S. 749 at 763. “[D]isclosure of records containing personal details about private citizens can infringe significant privacy interests.” *Id.* “[O]ur cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public.” *Reporters Committee*, 489 U.S. at 767. “[T]he fact that an event is not wholly ‘private’ does not mean that an individual has no interest in the disclosure or dissemination of the information.” *Id.* at 771.

The Board believes that the Grievant violated Judge Welch’s common law right of privacy by disclosing personal information about himself and his family to Jane Kolson.

Right before the Board went off the record to deliberate, the Grievant’s counsel asked to make a motion to grant the grievance based on a Merit statute which provides: “If an investigation concludes that a merit employee has violated [the Department of Technology and Information’s acceptable use policy], any discipline resulting in the loss of wages must first be reviewed by the Office of Management and Budget prior to implementation of the discipline.” 29 *Del. C.* §5924.⁶ According to the Grievant, the Office of Management

⁶ Effective July 16, 2017, the General Assembly transferred the responsibilities of the Office of Management

and Budget did not review the matter prior to his suspension without pay, and therefore the agency cannot impose discipline and the Board must grant his grievance.

The Court objected to the timeliness of the motion because the Grievant did not raise the issue at the pre-hearing conference in order to allow the Court an opportunity to respond. The Board denied the Grievant's motion as untimely.

Even if prior review by OMB of the Grievant's discipline was jurisdictional in nature, the Court did not base its disciplinary action just on the DTI Acceptable Use Policy, but also on the Code of Conduct for Judicial Employees which requires employees "at all times to perform their duties in a timely, impartial, diligent, and courteous manner" and to "apply their full time and energy to the business and responsibilities of their office during working hours." As succinctly stated by the Court Administrator:

The disparaging e-mail conversation you engaged in and the inappropriate e-mail you sent on April 11, 2017 at 3:23 p.m. to Jane Kolson clearly demonstrates that your misconduct was in direct violation of the aforementioned tenet of the Code of Conduct for Judicial Branch Employees. The e-mail you sent was discourteous and since it was not your place to send such an e-mail, your full time and energy was not being applied to the business and responsibilities of your office during work hours.

The Board concludes as a matter of law that the Grievant's violation of the Code of Conduct for Judicial Employees is just cause for the ten-day suspension. The Board concludes as a matter of law that the ten-day suspension was appropriate to the circumstances given the Grievant's violation of the Code of Conduct for Judicial Employees.

and Budget/Human Resource Management to the newly-created Department of Human Resources.

DECISION AND ORDER

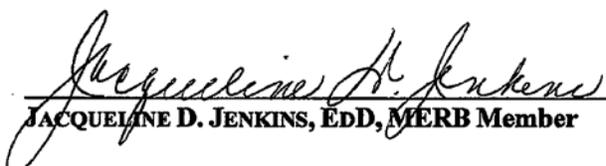
It is this **21st** day of May, 2018, by a vote of 5-0, the Decision and Order of the Board to deny the Grievant's grievance.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER