

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	DOCKET No. 11-09-523
v.)	
)	DECISION AND ORDER
DEPARTMENT OF LABOR/DIVISION OF)	
VOCATIONAL REHABILITATION,)	[Public Redacted Decision]
)	
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 September 19, 2013 at the Commission on Veterans Affairs, Robbins Building, 302 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Dr. Jacqueline Jenkins, Victoria D. Cairns, and Paul R. Houck, 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

Employee/Grievant
Pro se

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of Labor

BRIEF SUMMARY OF THE EVIDENCE

The Department of Labor (DOL) offered and the Board admitted into evidence twelve documents marked for identification as Exhibits A-K and M. ¹

DOL called two witnesses: W. Marc Young, Deputy Director, Disability Determination Services (DDS); and Fran Lipsky-Burns, DDS Casework Supervisor.

The employee/grievant (Grievant) testified on her own behalf and called one witness: Elisha Carr.

FINDINGS OF FACT

The Grievant worked as a Disability Determination Adjudicator I until her termination on August 17, 2011. She had worked at DDS since September 29, 2008.

DDS adheres to the Department of Technology and Information (DTI) Acceptable Use Policy to protect the State's communications and computer systems. Under the heading, "Protection and Integrity of Data," the DTI policy requires users: to protect "data and information communicated over internal or public networks (for example, the Internet) to avoid compromising or disclosing nonpublic State information or communications"; and to protect "data and information by not auto-forwarding State e-mail to non-authorized individuals."

The DTI Acceptable Use Policy requires every network user to read and understand the policy and sign an acknowledgment statement. The Grievant signed acknowledgment statements on April 12, 2011; April 29, 2010; November 17, 2009; and November 13, 2008.

¹ The agency's Exhibit D was an e-mail string which ended at 10:28 a.m. on June 10, 2011. During the hearing, the Board asked the grievant to produce the complete e-mail string which ended at 11:49 a.m. on June 10, 2011 (marked for identification as Grievant Exhibit 1).

According to Marc Young, the Deputy Director of DDS, all DDS employees receive annual training. Young conducted an all-day training session on April 12, 2011. One segment of his power point presentation was “Security Awareness/Update/PII.” (“PII” is short for “Personally Identifiable Information”) The Grievant attended the training session.

DDS processes disability claims for the Social Security Administration (SSA) using a secure SSA network to protect the confidentiality of personally identifiable information. The SSA defines personally identifiable information as any “information which can be used to distinguish or trace an individual’s identity, such as his/her name, social security number, biometric records etc., *alone, or when combined* with other personal or identifying information which is linked or linkable to a specific individual such as date and place of birth, mother’s maiden name, etc.” (Emphasis added.)

SSA policy provides: “Email that contains PII can only be sent 1) to email addresses that are secure or 2) to a non-secure email address only if the PII is contained in an encrypted attachment.”

On May 6, 2011, Marc Young sent an information security bulletin by e-mail to all DDS employees. The bulletin emphasized that “All employees must protect the personal information entrusted to us. As a general rule, do not send or forward e-mails containing PII. If your job duties require you to send emails containing PII, you must take steps to protect PII, including: 1) ensuring that the recipient of the email is authorized to receive the PII, and 2) sending the PII in a secure manner.” E-mail can be sent in a secure manner to “an internal email address: All mail from an SSA email address to another SSA email address is secure.” To send an e-mail to an external address, the employee must make sure “that the email recipient is authorized to receive

the PII.” If the recipient is “a secure email partner, PII must be in an encrypted attachment and you must provide the password to the addressee by phone or in person, not by email.” The security bulletin listed several examples of “violations of PII policies and procedures” including: “Forwarding unencrypted documents that include claimant information, such as workload listings, to your personal, non-ssa gov email account.”

According to Marc Young, on June 1, 2011 he sent by e-mail to all DDS employees an SSA bulletin, “Frequently Asked Questions on Safeguarding Personally Identifiable Information at the Social Security Administration.” According to the Grievant, she did not receive that e-mail, but she did not dispute receiving Young’s May 6, 2011 information security bulletin.

Over the course of June 9-10, 2011, the Grievant exchanged several e-mails with Fran Lipsky-Burns regarding a client (identified by name and case number in the subject line of each e-mail). The e-mails discussed the client’s medical condition.

The Grievant continued the e-mail string at 10:25 a.m. on June 10, but the discussion turned to a different topic:

A few months ago, when I asked you to not call me Brenda via email, it was talk among the doctors that I play the race card. Thus this seems to be an escalating issue. Prior to that email, Dr. Borek would come to my office! Or I could come to his! It was never an issue!

I understand his position because if I heard something similar I would be taken aback and apprehensive! However, I never started this! Someone in this office gossiping wrong has. This needs to be corrected and alleviated immediately.

At 10:28 a.m. on June 10, 2011, the Grievant forwarded the e-mail string to her personal Comcast e-mail address. At 10:28 a.m., The Grievant also forwarded the e-mail to Patrick Ferry

(the DDS Social Security Administration Coordinator) and Marc Young with the message: “I meant to forward email to you. So here we go.” At 11:47 a.m. on June 10, 2011, Young responded: “I’ll look into it.”

At 11:49 a.m. on June 10, 2011, Young forwarded the e-mail to Andrea Guest with the message: “Read this from the bottom up when you get a chance.” According to Young, he became concerned when he saw that the first two e-mails containing confidential information about a client had been forwarded to a Comcast e-mail address. Young asked the Grievant’s supervisor, Fran Lipsky-Burns, to check with the Grievant to see if it was her personal e-mail address. The Grievant confirmed that the Comcast e-mail address was her personal e-mail address.

According to Young, he immediately notified the Social Security Administration of a potential breach of confidentiality by the Grievant. According to Young, SSA was looking into the matter but did not take any action to suspend or revoke the Grievant’s access to the SSA system.

By letter dated July 14, 2011, the DOL Secretary (John J. McMahon, Jr.) notified the Grievant that she was “being placed on administrative leave with pay pending dismissal for violating “HIPAA [Health Insurance Portability and Accountability Act], SSA [Social Service Administration], and DDS rules and the State of Delaware Acceptable Use Policy.”

The Grievant requested a pre-decision meeting. The Director of the Division of Unemployment Insurance (W. Thomas McPherson) held the pre-decision meeting on August 8, 2011. By letter dated August 11, 2011, McPherson notified the Grievant: “Your submittal of a Division of Vocational Rehabilitation client’s case information from work to your personal home

email account was an unacceptable and egregious action. Accordingly, it is my recommendation to the Secretary of Labor that you be terminated.”

By letter dated August 17, 2011, Secretary McMahon terminated the Grievant.

According to the Grievant, when she forwarded the e-mail string to her personal e-mail address on June 10, 2011 she did not realize that the beginning of the string contained confidential client information. She only intended to forward the later e-mails raising the issue of office gossip and its adverse impact on her working relationships with doctors. That is why she forwarded the e-mail to Marc Young, who responded “I’ll look into it.”

The Board finds as a matter of fact that the Grievant violated SSA and DDS policy by forwarding a client’s personally identifiable information to a non-secure, unauthorized e-mail address.

The Board found credible the Grievant’s explanation that she only intended to forward the e-mail to her personal email address to have a record that she raised the issue of office gossip with Marc Young. She did not try to hide the fact that she forwarded the e-mail to her personal e-mail address but rather forwarded that e-mail to Marc Young. However, the Board cannot excuse her negligence in being careless with this e-mail string.

According to the Grievant, the e-mail did not contain personally identifiable information because it did not contain the client’s complete profile (social security number, date of birth, mother’s maiden name, etc.), only the client’s name and case number. The Board does not find that explanation credible. The Board agrees with the Grievant that she is “an intelligent woman,” who should know that disclosure of any one of those direct identifiers would be an invasion of the client’s personal privacy.

The Grievant attended the all-day training session on April 12, 2011 and one of the power point slides cited as examples of personally identifiable information, “Person’s name, Date of Birth, SSN, Bank account information, address, Health records.” It is only a matter of common sense that each one of those direct identifiers is personally identifiable information, not just the combination of all of those identifiers. ²

According to the Grievant, other DDS employees had breached client confidentiality but DDS did not terminate them. According to Marc Young, there had been problems with some DDS employees sending a confidential questionnaire to the wrong disability claimant, and with some DDS employees sharing their passwords. According to Young, DDS disciplined those employees with written reprimands and, in one case, a one-day suspension.

The Board finds as a matter of fact that the Grievant did not present any evidence of disparate treatment of similarly situated DDS employees.

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.

² According to the Grievant, she never received encryption training. According to Marc Young, in her position she did not need to know how to encrypt data. The fact remains that if the Grievant did not know how to encrypt data, then she should have refrained from sending any PII to an external account.

The Board concludes as a matter of law that the Grievant committed the charged offense. She forwarded confidential client information to a non-secure, unauthorized e-mail address. However, the Board concludes as a matter of law that the penalty of termination was not appropriate to the circumstances.

In some cases, the Board has decided that progressive discipline is not required or appropriate before termination. For example, in *Grievant v. DNREC*, MERB Docket No. 12-04-541, at p.8 (Oct. 31, 2012), the Board decided that progressive discipline did not have “the usual application in the context of a zero-tolerance workplace violence policy.” *See also Carty v. Justice of the Peace Courts*, C.A. No. N11A-04-016-CLS, 2012 WL 1409529, at p.9 (Del. Super., Jan. 9, 2012) (“JP Court was within their authority to discharge [the grievant] for this one incident.”).³

The Board does not understand the rush to judgment after the Grievant forwarded the e-mail string to Marc Young on June 10, 2011. The Grievant did not have any prior incidents of this nature and no one even talked with the Grievant right after Young became concerned about a possible breach of client confidentiality.

In Young’s April 12, 2011 power point presentation, one of the slides informed DDS employees that “Misuse of SSA systems and claimant data by DDS personnel = reprimand, suspension, or loss of job per state regulations/law.” The Board believes that a reprimand or suspension should have sufficed to correct the Grievant’s behavior. The Board was not

³ In *Carty*, a court clerk arranged for the release of a defendant who had turned himself in on a *capias*. The grievant was not “authorized to take it upon herself to make a decision, whose power was vested in a judicial officer, to release a defendant.” 2012 WL 1409529, at p.4. “Carty used her power and position to get [the defendant] ‘out of the back door’ knowing full well of his prior *capiases*.” *Id.*

persuaded by Young's explanation that termination was in order because "I didn't know for sure that she would not do it again" and his fear of possible sanctions by the Social Security Administration. The SSA had not yet decided if the Grievant's breach warranted termination of her access, which would have been a legitimate ground for DDS to terminate her employment because she was no longer qualified for the job. Young's concern that SSA might terminate her access was premature and speculative.

Young also felt that termination was warranted because of the Grievant's "cavalier attitude." According to Young, "she didn't think it was a serious matter." The Grievant denied that she was "cavalier in my attitude" and testified that "I took it seriously." The Grievant may have appeared cavalier to Young, but only because she did not fully understand why her action violated policies until she received the notice of intent to terminate letter on July 14, 2011.

The Board was not persuaded by Young's distinction between breaches by other DDS employees, which he called "inadvertent," and the Grievant's breach which he called "deliberate." The Grievant may have knowingly forwarded an e-mail to her personal e-mail address, but the Board does not believe that she intended to forward the personally identifiable information contained in the first two e-mails. Her intention – albeit negligent – was to forward the later e-mails regarding office gossip to Marc Young for him to address.

There is no evidence in the record to show that the Grievant forwarded the e-mail string to anyone outside DDS. As the Grievant testified, "I sent it to my home, not to send it to anyone else."

For all of these reasons, the Board concludes as a matter of law that the penalty of termination for the Grievant's single offense was not appropriate to the circumstances. That

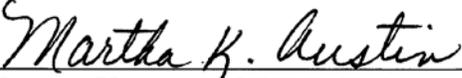
leaves the issue of remedy. The Grievant told the Board that she was not seeking reinstatement because of her health and the emotional distress of her termination. The Grievant asked the Board to order DDS to accept her letter of resignation and to purge her personnel file of all records pertaining to her termination. She also asked the Board to award compensation in an unspecified amount.

The Board is inclined to award those remedies but the Board does not have the necessary data to calculate an amount of back pay. The Board directed the parties to try to negotiate a settlement. As for the amount of back pay, the Board notes that DOL may deduct any unemployment benefits,⁴ any other remuneration she received (from working or otherwise), and taxes. DOL may also factor out the “amount of pay reasonably attributable to the delay in the matter caused by [the grievant’s]” several requests to the Board for a continuance. *Office of the Auditor of Accounts v. Ford*, No. 2100287, 1987 WL 18111, at p.1 (Del. Super., Oct. 2, 1987). DOL may also take into account any periods when the Grievant was unable to work at all because of her health, but must factor that against any accrued sick time or eligibility for family medical leave she had at the time of her termination.

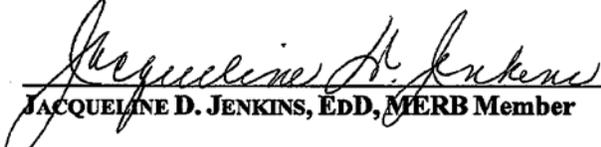
⁴ The Board can take judicial notice that the Unemployment Insurance Appeal Board denied the Grievant’s claim for unemployment benefits. *See Grievant v. Department of Labor*, C.A. No. N12A-02-011-PLA, 2012 WL 3518122 (Del. Super., Aug. 8, 2012). The Board notes that the “just cause” standard for unemployment insurance benefits is not the same as the “just cause” standard for discipline under Merit Rule 12.1. The just cause standard for unemployment insurance requires a showing of willful and wanton misconduct. Under Merit Rule 12.1, the Board need only decide whether the employee committed the charged offense and whether the penalty was appropriate to the circumstances.

DECISION AND ORDER

It is this **24th** day of September 2013, by a unanimous vote of 5-0, the Decision and Order of the Board to grant the Grievant's appeal but without awarding a remedy at this time. The Board will retain jurisdiction over the issue of the appropriate remedy while the parties try to negotiate a settlement. Counsel for DOL is to notify the Board in writing within sixty (60) days of the date of this Decision and Order: (1) whether the parties have reached a final settlement which includes the Grievant's voluntary dismissal of her appeal; or (2) whether the Board needs to schedule a further evidentiary hearing on the issue of remedy. Since the time-line for back pay will continue to run, DOL should have an incentive to try to resolve this matter as soon as possible.


MARTHA K. AUSTIN, MERB Chairwoman


JOHN F. SCHMUTZ, MERB Member


JACQUELINE D. JENKINS, EDD, MERB Member


PAUL R. HOUCK, MERB Member


VICTORIA D. CAIRNS, MERB Member