

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

JAMES D. DeCARLO,)	
)	
Employee/Grievant,)	
)	DOCKET No. 09-10-455
v.)	
)	
DEPARTMENT OF HEALTH AND)	
SOCIAL SERVICES,)	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 May 5, 2011 at the Public Service Commission Conference Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, Dr. Jacqueline Jenkins, 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

James D. DeCarlo
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 seven documents marked for identification as Exhibits A-C and F-I.

DHSS called four witnesses: Mark Monroe, Human Resource Specialist IV, Division of Management Services, Labor Relations Unit; ¹ Lavinia McGinty, Acting Director, Audit & Recovery Management Services (ARMS); Thomas Poe, ARMS Accountant; and Racquel McIntosh, ARMS Investigator/Supervisor.

The employee/grievant, James D. DeCarlo (DeCarlo), offered and the Board admitted into evidence seven documents marked for identification as Exhibits 2, 4-5, 9-11, and 13.

DeCarlo testified on his own behalf and called three witnesses: Owen T. Gillespie; Angel Raser; and Michael Rogers.

FINDINGS OF FACT

The Board watched two videos captured by surveillance cameras at the Biggs Building on January 23 and February 27, 2009.

The first video showed that on January 23, 2009 at 7:06 p.m. (the ARMS office closes at 4:30 p.m.) DeCarlo entered the building, walked into the ARMS unit area, and removed a bag of shredded documents from one of the two shredding machines in the hall. The ARMS unit has two shredders: a “strip” shredder which shreds paper into strips; and a “cross” shredder which reduces paper to

¹ DeCarlo challenged Monroe’s qualifications to testify as an investigator. According to Monroe, in the course of his career he has conducted over a thousand investigations (many with the military), and since 2007 he has conducted over a hundred investigations for DHSS. The Board found Monroe qualified as an investigator.

confetti. The “cross” shredder is used for confidential records and the video showed that DeCarlo removed a full bag from the “cross” shredder and then replaced an empty bag in the machine.²

According to DeCarlo, his supervisor, Racquel McIntosh, had earlier removed a number of old files from his office. He thought he later saw her shredding those files. According to DeCarlo, he went to the office on January 23, 2009 to recover the files to use in an earlier grievance before the Board. McIntosh testified that she never shredded any of those files and still has them to this day.

According to DeCarlo, McIntosh gave him permission in the fall of 2008 to remove shredded documents to use as packing material. McIntosh denied that she ever gave DeCarlo permission to do so.

Owen T. Gillespie works for the Delaware Industries for the Blind which provides contract housekeeping services to DHSS. Gillespie testified that his job is to gather tied bags of shredded documents from the ARMS unit and deposit them in a dumpster outside the building.

The second video shows that at 4:45 p.m. on Friday, February 27, 2009 DeCarlo entered the Biggs Building, walked into the ARMS unit area, and started looking through the open mail box outside the office of his supervisor, Racquel McIntosh. McIntosh was off work that day. DeCarlo riffled through the mailbox six times, twice removed a document, and then copied it on a photocopier down the hall.

According to DeCarlo, he removed two overpayments from McIntosh’s mail box to use as templates for his own investigative files until he received training. DeCarlo, however, was

² DeCarlo claimed that his Exhibit 2 – a color photograph of a clear plastic bag of shredded documents with remnants of his signature red file folders – was the bag he removed from the Biggs Building on January 23, 2009. The Board finds that it could not have been the same bag because he removed the bag from the “cross” shredder and the photograph depicts strip shredding.

scheduled for training in March. DeCarlo could not explain why he did not wait until the following Monday, when McIntosh was back in the office, to ask for her permission to copy and remove the two overpayments for personal training.

After an investigation, the Acting Director of ARMS (Lavinia McGinty) notified DeCarlo by letter dated June 4, 2009: “I am recommending that you serve a three (3) day workday suspension without pay for misconduct.” After a pre-decision meeting on July 8, 2009, the Deputy Director of the Division of Management Services (Charles E. Britton) notified DeCarlo: “I have concluded that your three (3) day suspension without pay is appropriate.”

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.

DeCarlo argued that he did not receive due process rights required by Merit Rule 12.5 because DHSS did not hold a pre-decision meeting within “15 calendar days after the employee has requested the meeting.” By letter dated June 4, 2009, DHSS notified DeCarlo of his proposed three-day suspension and advised that he had fifteen days to “request a pre-suspension meeting to respond to the proposed action.” DHSS held the pre-decision meeting on July 8, 2009.

DeCarlo did not provide the Board with evidence of the date he requested a pre-suspension

meeting so he did not prove that the fifteen-day time period in Merit Rule 12.5 had run before July 8, 2009. While an agency should endeavor to hold a pre-decision meeting within fifteen days of request, Merit Rule 12.5 does not provide that the agency cannot discipline an employee for misconduct if the pre-decision meeting is not held within fifteen days.

DeCarlo argued that he was denied due process because DHSS did not provide him with a copy of one of the three surveillance videos as directed by the Chair in the Pre-Hearing Order. DHSS explained that because of embedded proprietary software in that video it could not copy the video but allowed DeCarlo to view it. The Board accepts the agency's explanation, although it is not clear why the same proprietary software did not prevent DHSS from copying the other two videotapes.³ DeCarlo had access to all of the evidence introduced by DHSS against him at the hearing and was not denied due process.

The Board concludes as a matter of law that DHSS did not have just cause to suspend DeCarlo for removing the bag of shredded documents on January 23, 2009 in violation of the Department's Client Confidentiality Policy.

DHSS charged DeCarlo with violating three sections of that Policy:

II.A. Safeguarding of Information by the Department

1. Records Ownership: Records are the property of the Department.

...

3. Staff Access to Confidential Information: Department employees and agents shall only access confidential information that they have a legitimate need to know.

³ Because of a computer glitch, the Board was not able to watch the third video (from a different camera angle than the second video) of DeCarlo removing documents from his supervisor's mailbox on February 27, 2009. The Board believes that the third video would have been cumulative evidence and so the Board did not need to rely on it as a basis for its decision.

...

8. Record Removal: Records or parts thereof shall not be removed from Department offices unless prior authorization has been obtained.

The purpose of the Policy is to protect confidential client information such as names, addresses, and social security numbers as mandated by federal law. The bag of shredded documents which DeCarlo removed from the Biggs Building on January 23, 2009 did not contain any confidential client information. The ARMS unit uses a “cross” shredder reducing paper to confetti which cannot be reconstructed to reveal confidential client information. The shredded documents may still have been the property of DHSS while in the ARMS unit, but they were destined for an outdoor dumpster like any other trash. If DHSS still considered the shredded documents to be confidential, then it would have taken steps for a more secure means of disposal.

The Board concludes as a matter of law that DHSS had just cause to discipline DeCarlo for removing the two overpayments from his supervisor’s mail box, copying them, and taking them outside the building for personal use. He did not have permission to do so, and he did not even ask his supervisor for permission. Instead, on a day when McIntosh was out of the office and after work hours, DeCarlo rifled through her mail box six times, copied the two overpayments, and removed them from the building.

The Board concludes as a matter of law that the penalty of suspension for three days was not appropriate under the circumstances. DHSS imposed that penalty based on two violations of the Client Confidentiality Policy. The evidence in the record does not prove one of those violations. DHSS did not provide the Board with evidence of prior disciplinary action against DeCarlo, nor did DHSS cite his prior discipline in the suspension letter. DHSS did not provide the Board with any evidence of comparable discipline for other employees who committed a similar violation of the

Client Confidentiality Policy to warrant DeCarlo's three-day suspension. The Board also takes into account that DeCarlo did not disclose any confidential information in the two overpayments to a third-party.

The Board concludes as a matter of law that a one-day suspension is appropriate under the circumstances for DeCarlo's violation of the Client Confidentiality Policy by removing the two overpayments from his supervisor's mail box, making copies, and taking them from the building without permission.

DECISION AND ORDER

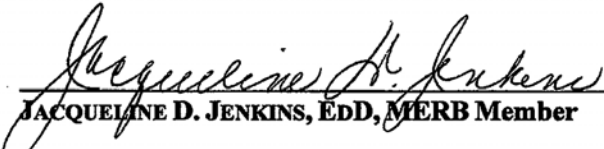
It is this **12th** day of May, 2011, by a unanimous vote of 3-0, the Decision and Order of the Board to grant DeCarlo's appeal in part and reduce his suspension to one day.



MARTHA K. AUSTIN, MERB Chairwoman



VICTORIA D. CAIRNS, MERB Member



JACQUELINE D. JENKINS, EDD, MERB 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's 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: **May 12, 2011**

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

OMB/HRM