

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Jonathan Fritz,

Appellant,

v.

Case No. 09-SUS-10-0453

Montgomery County Board of Commissioners,

Appellee.

ORDER

This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the record and a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellee's ten day suspension of Appellant be **MODIFIED** to a three day suspension, since the only other discipline received by Appellant during his tenure was a written reprimand, pursuant to O.R.C. §§124.03 and 124.34.



Lumpe - Aye

Tillery - Aye

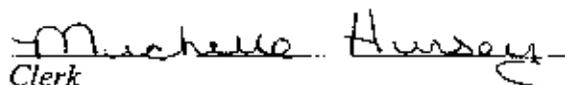


J. Richard Lumpe, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitute ~~(the original)~~ a true copy of the original order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, December 28, 2010.



Michelle Hursey
Clerk

NOTE: Please see the reverse side of this Order or the attachment to this Order for information regarding your appeal rights.

12-28-10
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**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

Jonathan Fritz

Case No. 09-SUS-10-0453

Appellant

v.

November 19, 2010

Montgomery County Board of Commissioners

Appellee

Marcie M. Scholl
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on July 27, 2010. Present at the hearing were the Appellant, Jonathan Fritz, represented by Ray A. Cox, Attorney at Law and Appellee Montgomery County Board of Commissioners designee Sue Curtis, Director of Stillwater Center, represented by Douglas A. Trout, Assistant Prosecuting Attorney.

The subject matter jurisdiction of the Board was established pursuant to sections 124.03 and 124.34 of the Ohio Revised Code.

Appellant Fritz was suspended from his position of Habilitation Care Supervisor for a period of ten (10) days, effective October 18, 2009. The pertinent part of the suspension order states as follows:

A pre-disciplinary meeting was held on September 18, 2009, to discuss your breach of confidential information and failure to use good judgment. You previously received a written reprimand dated August 4, 2009, for inappropriate behavior. Your continued behavior is unacceptable and thus cannot be tolerated. Further infractions will result in disciplinary action, up to and including removal. You are mandated to attend the Montgomery County Employee Assistance Program. Enclosed with this letter is a form that is to be presented along with this letter to the Employee Assistance Program Specialist and completed during your appointment. You are to provide this

documentation of your attendance to your supervisor on or before your return to work. By copy of this letter, management is instructed to set this appointment.

Appellant Fritz filed a timely appeal of his suspension.

STATEMENT OF THE CASE

Appellee's first witness was Michelle Pierce-Mobley, Human Resources Administrator of Stillwater, which is a residential facility serving approximately 100 residents. Ms. Pierce-Mobley has held her position for approximately twelve months. She explained that Stillwater is under the management of the Board of Commissioners and that the table of organization filters down from an Executive Director to the Operations Managers to the Professional Service Manager to the Habilitation Care Supervisors 2 and 1, ending with the Habilitation Care Providers.

Ms. Pierce-Mobley testified Appellant Fritz was supervised by Matt Hanley, a Habilitation Care Supervisor 2. As an Habilitation Care Supervisor (HCS) 1, Appellant Fritz was responsible for evaluating his employees as a first line supervisor. The evaluations are a team approach, where it is commented on by the supervisor first, then the supervisor's supervisor, the Executive Director and then two others so that there are five levels of review. The first draft is done by the employee's immediate supervisor and then forwarded to the supervisor's supervisor. Ms. Pierce-Mobley testified that the draft evaluations are not shared with the employee. The employee is not to see the evaluation until the director approves it, as it remains confidential until then.

Ms. Pierce-Mobley testified that the reason the evaluations are considered confidential is that there could be a conflict between management personnel and when the final product is created, management should speak with one voice. She stated that disagreements between managers should not be shared with an employee. Ms. Pierce-Mobley also testified that the agency has a history of negative race relations, as there had been allegations that the white leadership was discriminatory and one person who was very vocal about the alleged discrimination was Jamal Stevens. She testified race was interjected where it should not have been an issue. Ms. Pierce-Mobley stated Mr. Stevens was a Habilitation Provider who reported directly to Appellant Fritz.

On approximately September 11, 2009, Ms. Pierce-Mobley stated Mr. Stevens went to her office and was extremely upset. He had an email, identified as Joint Exhibit 1, from Mr. Hanley to Appellant Fritz regarding his performance evaluation. Ms. Pierce-Mobley testified that at this point, the evaluation was still under review and considered confidential. When she asked Mr. Stevens who he obtained the email from, he would not tell her.

Joint Exhibit 5 was identified by Ms. Pierce-Mobley as her recommendation for disciplinary action for Appellant Fritz as a result of the pre-disciplinary hearing she conducted. Ms. Pierce-Mobley testified Appellant Fritz denied sending the email to Mr. Stevens and stated he was completely unaware that it had been sent to Mr. Stevens. She stated Appellant Fritz argued that someone may have "hacked" his computer, but the IT section researched it and found that no breach of security had occurred on Appellant Fritz's computer, meaning that there was no evidence that the password was breached.

Ms. Pierce-Mobley identified Joint Exhibit 3 as a letter she wrote to Appellant Fritz, dated September 28, 2009, placing him on administrative leave with pay while the investigation was on-going. She explained that at that time, removal was recommended, but when Appellant Fritz's tenure was considered, it was decided to give him one more last chance and the Board of County Commissioners decided on the ten (10) day suspension. She identified Joint Exhibit 4 as a letter from Appellant Fritz to the Board of County Commissioners, dated September 29, 2009. She stated she received this in her mailbox. Joint Exhibit 6 was identified as the October 6, 2009 notification to Appellant Fritz of his suspension and Appellee's Exhibit 7 was identified as a memorandum Ms. Pierce-Mobley wrote to the file regarding the points Appellant Fritz made in his letter in Joint Exhibit 4. She testified that since this case came down to credibility, she wanted to point out that Appellant Fritz had been charged previously with excessive phone usage, which he adamantly denied until the phone records were produced and then he still didn't take responsibility. She also stated she felt it was bizarre that Appellant Fritz tried to tie his discipline to his birthday, so that is why she recommended that he be mandated to go to the Employee Assistance Program (EAP).

Joint Exhibit 8 was identified by Ms. Pierce-Mobley as the letter to Appellant Fritz telling him he must go to the EAP appointment and Joint Exhibit 9 was identified as the order of suspension. Joint Exhibit 10 was identified as the personnel action which processed the suspension and Joint Exhibit 14 was

identified as Mr. Stevens' performance evaluation. Joint Exhibit 15 was identified as Appellant Fritz's performance evaluation and Joint Exhibit 16 was identified as the standards from the County Personnel Manual which Appellant Fritz violated.

Ms. Pierce-Mobley testified that Appellant Fritz did not show any integrity and she opined that if he would have just admitted that he made a mistake and owned up to the trust placed in him, there would have been no reason for them to be at the hearing.

On cross examination, Ms. Pierce-Mobley testified that she relied on Mr. Stevens' word that it was Appellant Fritz who gave him the email. She stated she was not presented with any evidence to show that Mr. Stevens was not being truthful and that it came down to a judgment call. She confirmed that there is a place on the performance evaluation for Mr. Hanley to comment and he chose not to comment there but instead told Appellant Fritz to change the ratings that Appellant Fritz had given Mr. Stevens. When asked if the email wasn't considered to be a public record, Ms. Pierce-Mobley stated that that type of email would not be in Mr. Stevens' personnel file and that it would have been a public record only if Mr. Stevens knew about it to ask for it.

Appellee's next witness was Matthew Hanley, Appellant Fritz's supervisor and an employee of Appellee for approximately four and a half years. He explained that he reviews in excess of eighty evaluations and he makes substantive changes if he is aware of some issues or circumstances that the supervisor may not be aware of. He stated he asks the supervisor to make changes and he typically communicates those changes electronically. Mr. Hanley stated the communications are not sent to the employee. He testified that he does not change too many evaluations substantively. Mr. Hanley testified he did not recall talking verbally to Appellant Fritz about his email to him and stated he did not change the ratings. He felt his email would be inflammatory to Mr. Stevens and he never intended on Mr. Stevens seeing the email. Mr. Hanley stated he had no idea how Mr. Stevens received the email as Appellant Fritz was the only recipient of the email.

On cross examination Mr. Hanley confirmed that he changed Appellant Fritz's words on the evaluation for Mr. Stevens. He identified Appellant's Exhibit Q as the guidelines for performance appraisals.

Appellee's next witness was Jemel Stevens, a twelve or thirteen year employee of Appellee. He stated Appellant Fritz has supervised him for approximately four or five years and during that time, they have had their ups and downs and he has been disciplined during that time period.

Mr. Stevens testified in September 2009, he met with Appellant Fritz to go over his evaluation and Appellant Fritz told him there had been changes made to his evaluation and showed him where they were. He stated Appellant Fritz told him he could prove that Mr. Hanley changed the evaluation due to an incident that happened in cottage E. Appellant Fritz then showed him the email and he took it, folded it up and stuck it in his back pocket. He signed his evaluation on September 11, 2009 and that is the day that he received the email. He testified he forgot about the email until he went upstairs later in the day and saw Ms. Pierce-Mobley's door open so he asked her how Mr. Hanley could have changed his evaluation. Mr. Stevens testified Ms. Pierce-Mobley read and copied the email and he first refused to tell her where he got the email from as he did not want to get Appellant Fritz in trouble, but after Appellant Fritz alleged that someone "hacked" into his computer or broke into his office, he felt it was in his best interest to write a statement, which he identified as part of Joint Exhibit 5. He stated he would not have known that his evaluation had been changed and he was concerned as to how it could have been changed.

On cross examination, Mr. Stevens testified he felt like he had been "thrown under the bus" by Appellant Fritz when his union representative told him Appellant Fritz was alleging that he "hacked" into his computer or broke into his office.

Appellant Fritz testified he has been employed by Appellee for approximately ten years. He identified Appellant's Exhibit P as his position description. He described Mr. Stevens as a decent employee who meets the minimum standards by doing just enough but no more. He stated Mr. Stevens is hot tempered and loud, but harmless. He identified Appellant's Exhibits N and M as his evaluation for 2009 and Mr. Stevens' evaluation, respectively. Appellant's Exhibit R was identified as the evaluation of Mr. Stevens that he originally did, prior to the changes made by Mr. Hanley. Appellant Fritz testified that he did tell Mr. Stevens that he did not write the comments on the evaluation that had been changed.

Appellant Fritz testified that he may or may not have printed out the email from Mr. Hanley but he adamantly denied giving it to Mr. Stevens. He stated he did not talk to Mr. Stevens about the existence of the email. Appellant Fritz testified he is not "chummy chummy" with Mr. Stevens and stated the only reason he told him about the change was in case Mr. Stevens wanted to talk to Mr. Hanley about it and so he was aware of it. He testified that he feels he should be truthful with his employees. Appellant Fritz identified Appellants' Exhibits J and K as statements from two of his co-workers, with the one co-worker stating Mr. Stevens told her he did not get the email from Appellant Fritz. Appellant Fritz testified this is an important issue to him as he cares about his reputation.

On cross examination Appellant Fritz stated it was not a breach of confidentiality to discuss the changes Mr. Hanley made and he testified that he agrees that the emails are confidential. He maintains that he did not give the email to Mr. Stevens and that he did nothing wrong. Appellant Fritz stated Mr. Stevens lied about the situation and he does not know why.

FINDINGS OF FACT

After thoroughly reviewing the testimony of the witnesses and the documents admitted into evidence, I find the following facts:

1. At the time of his ten day suspension, effective October 28, 2009, Appellant Fritz had been employed for approximately ten years at Stillwater. His previous discipline consisted of a written reprimand in August, 2009 for inappropriate behavior.
2. As a HCS 1, Appellant Fritz is responsible for the daily operational oversight of the care of residents and supervising the care staff. He is also responsible for completing performance evaluations of his employees. One of his employees is Mr. Stevens.
3. Appellant Fritz completed a draft of Mr. Stevens' performance evaluation and sent it to his supervisor, Mr. Hanley. Mr. Hanley made changes to the comments of Appellant Fritz, notifying him of such in an email addressed to him and dated September 8, 2009.
4. Appellant Fritz met with Mr. Stevens and gave him his performance evaluation on September 11, 2009. During that meeting, Appellant Fritz told

Mr. Stevens that Mr. Hanley made changes to page 12 of his performance evaluation due to an incident in cottage E.

5. Mr. Stevens was in possession of the email from Mr. Hanley to Appellant Fritz regarding the changes made by Mr. Hanley. He showed a copy of the email to Ms. Pierce-Mobley, but initially did not tell her how he had received a copy of the email.
6. Appellant Fritz has denied giving a copy of Mr. Hanley's email to Mr. Stevens.
7. Eventually, Mr. Stevens wrote a statement, dated September 23, 2009, stating that he received Mr. Hanley's email from Appellant Fritz.
8. Appellant Fritz is aware of and has received a copy of the County Personnel Manual.

CONCLUSIONS OF LAW

In order for Appellee's ten (10) day suspension of Appellant Fritz to be affirmed, Appellee had the burden of proving by a preponderance of the evidence the allegations in the suspension order. Appellee has met that burden with respect to the allegation of a failure of good behavior, but has failed to meet its burden with respect to a breach of confidential information.

Appellee has argued that the release of the email from Mr. Hanley to someone other than Appellant Fritz, to whom it was addressed, is a breach of confidential information. Appellee has, however, failed to prove that such email was confidential. Joint Exhibit 16 is a page from the County Personnel Manual, titled "Personnel Records" which states under section II.B.1 the following: "Supervisors and/or appropriate department personnel are responsible for the confidentiality of any information maintained on their employees." Ms. Pierce-Mobley testified that the email in question would not have been in a personnel file, so it would appear that this particular rule or policy would not apply, since the title page is "Personnel Records". When asked whether or not the email would be considered a public record, Ms. Pierce-Mobley answered, essentially, that it was not a public record if Mr. Stevens did not know to ask for it. That is incorrect. Section 149.43 of the Ohio Revised Code is the statute which defines what is a public record and an email such

as one that is the subject of this appeal is not included as an exception to the public records law. Therefore, regardless of whether or not Mr. Stevens would have known about the email, the email itself is still considered a public record. There is no confidentiality that attaches to an email between a supervisor and a subordinate. It was not a lawyer-client communication and it does not fall into any other exception. It is the document itself which is defined as a public record. Whether or not someone knows of the existence of a document has no bearing on the designation of the document as being a public record.

Appellee has failed to prove that the email was a confidential document, and as stated above, the law specifically provides the opposite. Since the email is not a confidential document, had Appellant Fritz distributed it to Mr. Stevens, he cannot be charged with a breach of confidence. Appellee failed to introduce any evidence whatsoever that the email was a confidential document, other than the opinions of Ms. Pierce-Mobley, Mr. Hanley and Appellant Fritz, which, as established above, do not comport with the law.

While Appellee has a valid business reason for wanting the conversations between supervisors about subordinates to be private, saying an email is confidential when it is not, is not the proper way to ensure such privacy. Mr. Hanley could personally meet with his subordinates when he has a concern about another employee or he could make the changes to a performance evaluation in the section set aside for him to make comments. It was never explained why Mr. Hanley could not make his own comments instead of having Appellant Fritz change his. In the email from Mr. Hanley, (Joint Exhibit 1) he states, in the first paragraph:

I made a couple of last minute changes to Jemel's evaluation, after reading it I could not sign it because of a couple of statements that I know were not true. On page #10 I changed 'positive attitude' to read 'good attitude' and on page 12 I changed 'is very respectful' to 'works to be respectful'. The ratings stayed the same. Below is an E-mail that I received from Tamara regarding Mr. Stevens. The E-mail does not tell the whole story, I spoke to Shannon and Tamara on Friday in Michelle's office and I was less than impressed with Mr. Stevens (sic) attitude, actions and insubordinate behavior.

If it was Mr. Hanley who knew of an incident taking place with Mr. Stevens, then why didn't he write about it in his comment section instead of telling Appellant Fritz to

change his comments relative to an incident that he knew nothing about? Also, Mr. Hanley states in his email to Appellant Fritz that he "was less than impressed with Mr. Stevens (sic) attitude, actions and insubordinate behavior" yet in Mr. Hanley's comment section, he states:

Mr. Stevens has been a good employee this rating period. Jemel reports to work and works well with his peers and staff from other disciplines. Jemel maintains good relationships with his residents and their families and guardians.

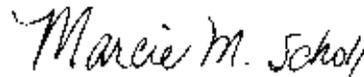
His comments certainly do not seem to reflect his opinion in his email. He makes no mention of the incident and states that Mr. Stevens has been a good employee. That contradicts his statements to Appellant Fritz that he "was less than impressed with Mr. Stevens (sic) attitude, actions and insubordinate behavior". It would appear that Mr. Hanley wanted Appellant Fritz to be the person that made the negative comments on the performance evaluation so he could make positive comments.

Appellee has the burden of proving by a preponderance of the evidence that Appellant Fritz gave the email to Mr. Stevens. Appellee did not prove that fact, as the evidence came down to Mr. Stevens' word against Appellant Fritz's word. If the evidence is equal, there is no preponderance of evidence. Appellant Fritz presented a letter from Candice Reid stating Mr. Stevens told her he did not get the email from Appellant Fritz. Appellee did not provide any evidence that Ms. Reid was questioned or was a part of their investigation. Assuming *arguendo* that Appellant Fritz did give the email to Mr. Stevens, he still cannot be charged with a breach of confidential information since it has been held that the email was not a confidential document. Appellee has failed in meeting its burden of proof with respect to the allegation that Appellant Fritz breached confidentiality.

Appellee also charged Appellant Fritz with a failure to use good judgment, or a failure of good behavior, as stated in the County Personnel Manual under the Discipline section, I.B.1.(n). Appellee has met its burden of proof with respect to this allegation. It was not proper for Appellant Fritz to tell Mr. Stevens that Mr. Hanley made changes to his evaluation. If Appellant Fritz had a problem with the changes he was told to make, he should have addressed those concerns with Mr. Hanley. Ms. Pierce-Mobley made a valid point that employees should not be put in the middle between two disagreeing managers. Appellant Fritz admitted telling Mr. Stevens of Mr. Hanley's change and in doing so, he created a situation where Mr.

Stevens became suspicious and talked with Ms. Pierce-Mobley. The whole incident that has resulted in Appellant Fritz's appeal was begun by Appellant Fritz telling Mr. Stevens of the changes. While Appellant Fritz testified that he felt he should be honest with his employees, he did not go about doing so in the best way, thus exhibiting a failure of good behavior. While Mr. Hanley was trying to make himself look good by having Appellant Fritz make negative comments on the evaluation, Appellant Fritz was trying to make himself look good by blaming the less than positive comments on Mr. Hanley. Once again, the issue was between Mr. Hanley and Appellant Fritz and Appellant Fritz used poor judgment in involving Mr. Stevens in his disagreement with Mr. Hanley.

Therefore, inasmuch as Appellee only proved by a preponderance of evidence the failure of good behavior on the part of Appellant Fritz and not a breach of confidentiality, it is my **RECOMMENDATION** that Appellee's ten (10) day suspension of Appellant Fritz be **MODIFIED** to a three (3) day suspension, since the only other discipline received by Appellant Fritz during his tenure was a written reprimand.



Marcie M. Scholl
Administrative Law Judge