

THE PINELLAS COUNTY
UNIFIED PERSONNEL SYSTEM BOARD

IN RE:

Appeal of Informal Grievance Hearing,

KAREN DARBY-MACK

Appellant,

v.

Appeal No. 13-04

PINELLAS COUNTY
DEPARTMENT OF
SAFETY & EMERGENCY SERVICES,

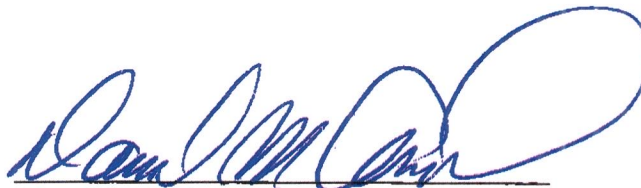
Appellee.

ORDER ON APPELLANT'S MOTION FOR RECONSIDERATION

On November 7, 2013, the Pinellas County Unified Personnel System Board convened and considered Appellant's Motion for Reconsideration. After a vote of 5 – 2, the Motion is denied.

IT IS SO ORDERED.

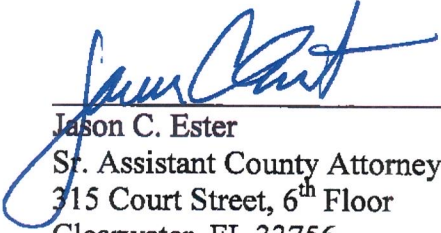
DATE: 19th of November, 2013.



Daniel M. Andriso, Chairperson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Findings and Decision has been furnished via email to Jan Andrew Press, Esq. at japress@aol.com and by hand delivery to Nancy Meyer, Assistant County Attorney, on this 19th day of November, 2013.



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Counsel for the Personnel Board

Cc: Peggy Rowe, Director, Human Resources
Bruce Moeller, Director, Public Safety Services
Jim Valliere, Employee Relations Manager, Human Resources
Jodi Sechler, Public Safety Services

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**THE PINELLAS COUNTY
UNIFIED PERSONNEL SYSTEM BOARD**

IN RE:

Appeal of Termination

KAREN DARBY-MACK,

Appellant,

v.

Appeal No. 13-04

PINELLAS COUNTY

DEPARTMENT OF

SAFETY & EMERGENCY SERVICES,

Appellee.

_____ /

APPELLANT'S MOTION FOR RECONSIDERATION

The Appellant, KAREN DARBY-MACK, ("Appellant"), by and through the undersigned counsel, pursuant to §11-1 of the Appeal Procedures of the Pinellas County Unified Personnel System Board ("Board"), respectfully submits this Motion for Reconsideration seeking modification or amendment of its Findings and Decision ("Decision"), and as good grounds therefore would state the proposed modification or amendment is based upon evidence previously presented and that the decision is based upon a mistake of law or fact.

ARGUMENT

The Board determined that Appellant had violated a rule prohibiting "handling", including reviewing, a relative's "run report" for her having read her deceased sister-in-law's EMS report relating the fatality. See rule at Appellee's EMS Manual § III Employee Standards at Appellee's Exhibit 38 and Appellant's Pre-Hearing Statement Appendix of Authorities ("Appendix"). As Appellant gleaned nothing new and shared nothing, she did not "disclose" confidential health information as defined by EMS Manual Rule 4.1 and Fla. Stat §112.313 (8)

(2012). (Arguably the definition of “use” under §4.3 was met as the report was subject to “examination”. See EMS Manual Rule 4.0 and Appendix.)

Appellant’s evidence clearly showed that notwithstanding the “handling” rule, a common practice at Appellee’s EMS department saw employees relying upon supervisors to access relative’s run reports for review. Further, at least one supervisor had subordinates do so on numerous occasions. Thus, as applied, the rule was not violated by Appellant. The Board mistakenly found this rule violated as commonly applied in practice and should modify or amend its Decision to a finding of no violation of Rule XXIV (J) (16) and (44) for Appellant handling her relative’s run report.

Appellee ignored its own memorandum on the Code of Federal Regulations (“CFR”) new rule permitting access to confidential health information by one “involved in the care” of a deceased relative. See memorandum at Appellant’s Exhibit 1. Appellant, under the unrebutted facts presented, showed that she was with the deceased relative when the relative died at the hospital and served as the family’s de facto representative in the days immediately following to find out more about what happened. Yet a majority of the Board surmised that the applicable CFR must exclude Appellant without any submission by Appellee to carry its burden of proof that such was the case. Thus, despite Appellee’s own memorandum, a majority of the Board mistakenly found no such exemption applicable to this case. As such, the Board should modify or amend its Decision to a finding of no violation of Rule XXIV (J) 16 and 44 for any CFR violation.

Granting a determination of a rule violation, Appellee failed to carry its burden of proof that Appellant committed “illegal” conduct; i.e., a clear law violation. Despite pointed questioning, Appellee’s witnesses could not cite a specific federal regulation, or federal or state

law directed to the individual, prohibiting the conduct upon which the disciplinary action was based. Presuming any such CFR violation, no such violation suffices as “illegal”. In any event, none was alleged or proven. Appellee cited its ethics code and manual, not any duly enacted law, as expressly broken. A majority of the Board mistakenly found there to be a law violation. As such, the Board should modify or amend its Decision to a finding of no violation of Rule XXIV (J) (16) and (44) for a lack of illegal conduct.

Appellee bootstrapped the unsupported allegation of “illegal” conduct as an opening to apply “zero tolerance” and terminate Appellant from employment. By contrast, how would an offense that constituted a crime or if not illegal, an act for tangible personal gain compare to the common violation found here for the application of “zero tolerance”?

Appellant showed and Appellee’s Director Bruce Moeller failed to rebut that Appellee never had applied “zero tolerance” discipline to any prior EMS HIPAA related rule or regulation, even where confidential health information was disclosed outside of Appellee’s internal operations. Appellant showed Appellee lacked guidance in the application of “zero tolerance”. See Appellee email at Appellant’s Exhibit 2. Appellant further showed Appellee’s Director Bruce Moeller failed to consider any lesser level of discipline, in contravention of its own rules, requiring “a consistent, progressive, and fair system of employee discipline”; where “[d]iscipline should be corrective and is not used to ‘get even’ for something that occurred. Because discipline is to be corrective, the disciplinary action taken must be applied consistently, must be appropriate for the offense...”. See Rule XXIV (B) at Appellee’s Exhibit 57.

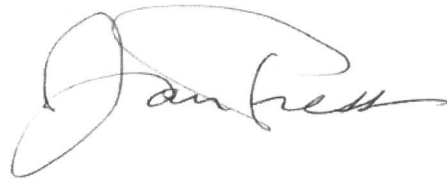
“Zero tolerance” was applied for the first time to an otherwise exemplary employee, for a common practice engaged in by rank and file and supervisory personnel alike, that had no impact outside the office. Thus, Appellee also violated Rule XXIV (J), directing that “all employees

receive similar treatment in like circumstances....The impact of the offense will be an important factor in determining the severity of the disciplinary action”. See Rule XXIV (J) at Appellee’s Exhibit 62.

Appellee’s Director, Bruce Moeller, admitted he ignored this rule’s concluding directive: “The totality of the employee’s work record and any mitigating circumstances should always be considered when making decisions regarding disciplinary action (emphasis added).” Appellee failed even to consider Appellant’s sterling work record spanning almost 20 years and the sudden, tragic, circumstances of her sister-in-law’s death which prompted the review of the run report in the first instance. “Zero tolerance” gave Appellee license to ignore its own rules and act without fundamental fairness. This termination was without proportion, not founded in precedent, unsupported by rule and ill-informed. A majority of the Board mistakenly found in law and fact that Appellee properly followed and applied its own rules in applying “zero tolerance”. As such, the Board should modify or amend its Decision to a finding that the discipline imposed was inappropriate and that a lesser measure such as suspension, as provided under the rules, be imposed. See Rule XXIV (J) (16) and (44) at Appellant’s Exhibit 63, 64.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by email this 2nd day of October, 2013 to: Jason C. Ester, Esquire, Sr. Assistant County Attorney, County Attorney’s Office, 315 Court Street, Clearwater, Florida 33756 and Nancy S. Meyer, Esquire, Sr. Assistant County Attorney, County Attorney’s Office, 315 Court Street, Clearwater, Florida 33756.

A handwritten signature in black ink, appearing to read "Jan Press", with a large, stylized loop at the beginning.

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