

IN THE UTAH COURT OF APPEALS

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Irene Thomas,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Petitioner,)		
)	Case No. 20050071-CA	
v.)		
)		
Draper City and Appeal Board)	F I L E D	
of Draper City,)	(July 7, 2006)	
)		
Respondents.)	<table border="1"><tr><td>2006 UT App 287</td></tr></table>	2006 UT App 287
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Original Proceeding in this Court

Attorneys: Lauren I. Scholnick and Erik Strindberg, Salt Lake City, for Petitioner
Stanley J. Preston and Judith D. Wolferts, Salt Lake City, for Respondents

Before Judges Greenwood, McHugh, and Orme.

GREENWOOD, Associate Presiding Judge:

Petitioner Irene Thomas appeals her termination by Draper City, as affirmed by the Appeal Board of Draper City (the Board). On appeal, Petitioner argues that the Board's finding that she engaged in "serious misconduct" was error because it was not supported by substantial evidence. Petitioner also argues that the Board abused its discretion because the charges against her do not warrant termination. We affirm.

Petitioner first contends that the Board erred in finding that she engaged in serious misconduct because the Board's determination was not supported by substantial evidence. In making a factual finding, an appeal board must determine whether "the facts support the charges made by the department head." Lucas v. Murray Civil Serv. Comm'n, 949 P.2d 746, 758 (Utah Ct. App. 1997). A board's findings are reviewed under a substantial evidence standard and in light of the entire record. See id. Substantial evidence "is that quantum and quality of relevant

evidence that is adequate to convince a reasonable mind to support a conclusion." Id. (additional quotations and citation omitted). We employ a clearly erroneous standard in determining whether to overturn a board's factual findings. See Kelly v. Salt Lake Civil Serv. Comm'n, 2000 UT App 235, ¶15, 8 P.3d 1048.

In the instant case, we conclude that substantial evidence exists to support the Board's finding that Petitioner engaged in serious misconduct. First, there was sufficient evidence that Petitioner knew or should have known that software provided by Paul Despain, an outside vendor who provided computer consulting services for the City, was unlicensed and that the software was made operational by obtaining an illegal "key" from the Internet. Moreover, Despain stated that Petitioner knew or should have known that he had installed the unlicensed Veritas software and that the program was made functional by obtaining the key from an inappropriate source on the Internet. Further, Petitioner's argument that she was not aware of Despain's actions is countered by the existence of a letter from Petitioner's attorneys to the City conceding that "Despain told [Petitioner] what he had done."

Additionally, the Board considered evidence that Petitioner's "acts and omissions" went beyond the installation of the unlicensed Veritas software and the use of an unregistered key. In its findings, the Board referenced Petitioner's additional acts and omissions, including the fact that the City's Symantec anti-virus software was also unlicensed and the City was therefore not receiving automated updates. The Board also referenced Petitioner's initial refusal to cooperate with or provide network passwords to Corner Canyon Information Technology (CCIT), the City's new independent information technology consultants, until she was confronted by the assistant city manager. Based on these acts and omissions, the Board found that "[c]redible evidence was received casting doubt on [Petitioner's] ability and competence to perform the functions of her position as the City's IT Specialist."

After reviewing the entire record, see Lucas, 949 P.2d at 758, we conclude that the Board's findings were supported by substantial evidence. Petitioner's acts and omissions, including her refusal to cooperate with CCIT, as well as her "participation . . . or acquiescence] in the improper and inappropriate installation of unlicensed Veritas back up software, using a code . . . improperly obtained from a 'hacker's site' on the

[I]nternet," were enough that we cannot say the Board's findings were clearly erroneous. See Kelly, 2000 UT App 235 at ¶15. Consequently, Petitioner's argument on this issue fails.

Petitioner also claims that the Board's decision to support her termination was an abuse of discretion because the sanction imposed was unduly severe. "In determining whether the sanction of dismissal is warranted in this case, the [Board] must affirm the sanction if it is (1) appropriate to the offense and (2) consistent with previous sanctions imposed by the [City]." Ogden City v. Harmon, 2005 UT App 274, ¶16, 116 P.3d 973. On appeal, Petitioner does not argue that her dismissal was inconsistent. Hence, "the question of severity is of primary importance in this case." Id.

The City's Personnel Manual states that the detailed disciplinary process provides "general guidelines for routine correction actions," and provides the final decision maker with broad discretion in determining the punishment to be imposed. Draper City Personnel Manual § 5030(2)(a)-(c) (2003).¹ Further, the Personnel Manual provides broad discretion in terminating an employee without imposing any type of progressive discipline. See id. § 5030(3).

Therefore, to the extent Petitioner contends that the City's failure to follow its own progressive discipline policy was inappropriate, her argument is unavailing. See Lucas v. Murray Civil Serv. Comm'n, 949 P.2d 746, 761 (Utah Ct. App. 1997) ("Clearly, Murray City adheres to a progressive discipline policy; however, the rule does not mandate the use of progressive discipline in every situation.").

In Harmon, we stated that "Utah law has provided little guidance on the precise factors used to balance the proportionality of the punishment to the offense." 2005 UT App 274 at ¶18. However, we noted that "an exemplary service record and tenuous evidence of misconduct may tip the balance against termination." Id. Conversely, we explained that "dishonesty or a series of violations accompanied by apparently ineffective

¹Section 5030 of the Draper City Personnel Manual reads, in relevant part: "Some performance and behavior problems may be serious enough to warrant skipping one or more steps [of the corrective action plan] and may even call for immediate suspension or termination." Draper City Personnel Manual § 5030(2) (2003).

progressive discipline may support termination." Id. (citations omitted).

Given the Board's findings in this case, we conclude that Petitioner's termination was warranted and that the sanction was appropriate to the offense. For example, the Board found that during the period from December 2003 to late February 2004, the City's computer network "experienced several severe problems attributed to computer viruses." The Board further found that it had received credible evidence that the City's Symantec anti-virus software was unlicensed, so that the City was not receiving protection via automated updates. During the period the City was experiencing severe computer network problems, Petitioner was the City's Information Systems Administrator. Further, she had earned bachelor's and master's degrees in computer information systems. Consequently, Petitioner knew or should have known about the unlicensed software installed on the City's network. Moreover, she knew or should have known that Despain's use of a key obtained from a hacker's site on the Internet to make the software operational was inappropriate.

Petitioner relies heavily on testimony from former supervisors to support her argument that progressive discipline was warranted in her case. A review of the record indicates that at least one of Petitioner's former supervisors praised her work ethic and that Petitioner's supervisor at the time she was terminated confirmed that Petitioner had never been disciplined prior to her termination. However, the same former supervisor who praised Petitioner's work ethic also testified that she gave Petitioner lower evaluations because Petitioner would not delegate work. This supervisor also stated that she encouraged Petitioner to delegate more work to Petitioner's assistant in order to relieve some of Petitioner's workload. Similarly, the current supervisor also testified that Petitioner would not delegate work to her assistant, that she could be difficult to work with, and that she failed to follow his directions. Therefore, this evidence established that while Petitioner had some strengths, her performance was inadequate to assume she could successfully supervise and operate the City's computer network.

In light of the testimony and other evidence supporting the Board's findings, we find that the City's decision to terminate Petitioner was not an abuse of discretion. Petitioner's acts and omissions constituted serious misconduct under the City's policies and therefore "the [City] had discretion to order

termination rather than progressive discipline" in this matter. Lucas, 949 P.2d at 762. As a result, Petitioner's argument on this issue also fails.

We affirm.

Pamela T. Greenwood,
Associate Presiding Judge

I CONCUR:

Carolyn B. McHugh, Judge

I CONCUR IN THE RESULT:

Gregory K. Orme, Judge