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TENNESSEE DEPARTMENT OF CORRECTION, Petitioner, vs. JAMES GARY, Grievant

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

In the matter of:	)	
	)	
TENNESSEE DEPARTMENT OF CORRECTION,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Docket No. 26.05-106748J**
	)	
JAMES GARY,	)	
Grievant.	)	

INITIAL ORDER

This contested case came on to be heard on September 22, 2010, in Nashville, Tennessee before Administrative Judge Joyce Grimes Safley, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Civil Service Commission of Tennessee. Mr. Bryce Coatney, counsel for the Department of Correction, represented the Department of Correction. The Grievant, Mr. James Gary, was present and was represented by Mr. James Simmons, attorney, of the Hendersonville Bar.

The subject of this hearing was Grievant's appeal of the disciplinary action which demoted Grievant from his position as Correctional Captain with the Department of Correction to the rank of Correctional Sergeant. At the beginning of the hearing, the parties stipulated that the only issues to be determined in this matter were: (1) Whether or not Grievant was guilty of insubordination[1]; and, if so, (2) What is the appropriate discipline for Grievant.

[1] The Department's "Proposed Findings of Fact and Conclusions of Law" states that the issues are: "(1) Whether or not Mr. Gary was insubordinate; (2) Whether Mr. Gary meant his actions as punishment of inmate behavior; and (3)

The Department and Grievant presented this disciplinary matter as one of whether insubordination had occurred.

Given that the parties have stipulated to "insubordination" as being the offense with which Grievant is charged, this case raises due process concerns when the Commissioner states in her letter of February 19, 2010 to Grievant Gary: "You were demoted from Correctional Captain to Correctional Sergeant for *negligence in the performance of duties* and *conduct unbecoming a State employee*."

Rule 1120-10.06(18), *Department of Personnel Rules* defines "insubordination" as "the refusal to accept a reasonable and proper assignment from an authorized supervisor." Insubordination is not mentioned in the Commissioner's letter, although the Commissioner does state: "[Y]ou did not follow the directive from Warden Colson to stop [the] practice [of securing inmates to beds]. However, because both parties stipulated that the alleged offense of "insubordination" or "failure to follow Warden Colson's directive" was the issue to be determined at the contested case hearing, the undersigned is bound by the parties' stipulation and considers only whether or not Grievant was insubordinate as defined by the *Tennessee Department of Personnel Rules*.

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that the Department of Correction failed to meet its burden of proof, by a preponderance of the evidence, that Grievant violated Rule 1120-10.06(18) –

Whether Mr. Gary was simply utilizing security measures that were within his apparent discretion under the terms of the policy."

refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination). For this reason, no discipline is appropriate in this case.

Grievant shall be restored to his position of Correctional Captain, and shall be made whole with regard to any lost wages or benefits.

This decision is based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant Gary has been employed by the Tennessee Department of Correction for thirty-six (36) years. He has been stationed at the Knoxville Community Service Center, Knoxville, Tennessee; Morgan County Regional Prison; and the Lois DeBerry Special Needs Facility in Nashville.

2. At the time of the incident which precipitated disciplinary action against Grievant, Grievant Gary had worked as a shift commander at the Lois DeBerry Special Needs Facility for approximately ten years. In 1994 Grievant was promoted to sergeant and in 1995 Grievant was promoted to the rank of lieutenant. In 2008 Grievant was promoted to the rank of Correctional Captain.

3. Grievant entered his past twenty-one (21) annual employee evaluations into evidence at the hearing of this matter. On twenty (20) of the evaluations, Grievant's job performance was rated as "Exceptional", and one (1) evaluation Grievant's job performance was rated "Superior."

4. During Grievant's thirty-six (36) years of state service, Grievant has never received a negative employee evaluation. Nine letters of Commendation were entered into evidence as further support for Grievant's performing his job extremely well.

5. Grievant entered his "training record" into evidence, which documented that Grievant had participated in extensive training and continuing education.

6. The Lois DeBerry Special Needs Facility (hereinafter DSNF) houses maximum security inmates with severe mental health issues. Amongst the services it provides for the Department of Correction are acute and convalescent care, intensive mental health intervention, a therapeutic program for sex offenders, and housing for inmates whose treatment regimen is not manageable at other Department of Corrections prisons or facilities.

7. Because DSNF has inmates with severe mental illness, it has policies and procedures in place to deal with inmates whose mental illness or behavioral problems threaten themselves or others with harm, or damages property. Included in DSNF's policies and procedures is DSNF's and the Department of Corrections "Restraint Policy".

8. During June 2009, the following Department of Correction policy, in pertinent part, was in effect at DSNF:

POLICY 506.07 –Use of Force/Security Devices

***

V. POLICY: The use of physical force shall be restricted to instances of justifiable protection of others, protection of property,

prevention of escapes, and to ensure compliance with lawful orders, and then only as a last resort and in accordance with procedures outline in this policy.

D. Restraint Equipment

1. The use of restraint equipment is an application of force designed for the purpose of preventing the commission of an offense or self harm by violent or unruly inmates.

2. Instruments of restraint (such as handcuffs, leg irons, and four-point restraints) shall never be applied as punishment. ... It may also be used as a therapeutic measure to prevent self-mutilation, injury to others, or property damage when all other reasonable methods of control have been tried and failed.

3. When any security restraints are applied to an inmate *(except for therapeutic restraints)* and the inmate remains in a cell, the following shall occur:

   a. The application of the restraints must be authorized by the shift supervisor.
   b. Physical assessment shall be conducted by medical staff at the time of the application and every two hours thereafter, or more often, as needed.
   c. Continuance in restraints beyond eight hours requires the notification and approval of the Warden/Deputy Warden. Mental health shall be notified of the use of restraints for security purposes by the next business day in order to evaluate the inmate's mental health issues.
   d. Continuance of restraints beyond 10 hours requires the notification and approval of the Assistant Commissioner of Operations / designee.

e. An incident report in accordance with VI. [sections omitted] shall be prepared. […].

4. Before an inmate is placed in four-point restraint (both arms and legs secured), advance approval shall be obtained from the Warden/ designee […].Approval must also subsequently be obtained from the institutional physician or designee. When an inmate is restrained in a four-point position, the following minimum procedures shall be followed:

a. Direct visual observation must be continuous prior to obtaining an order from physician.
b. After approval, visual observation must be made at least every fifteen (15) minutes on an irregular schedule.
c. Restraint procedure guidelines must be approved by the institutional physician.

***

9. POLICY 506.07 H. (Eff. November 1, 2006) goes on to list "Security Equipment for Institutions" as: Restraint equipment/handcuffs/leg irons/waist chains; CN/chemical agents/launchers; Batons/riot sticks; Mattresses; Electronic Restraint Devices; and Specialty impact weapons/munitions.

10. On June 13, 2009, a Saturday, Grievant Gary was working the second shift at DSNF within the course and scope of his employment with TDOC as a Correctional Captain and shift supervisor. Grievant Gary sent out the following e-mail via the state e-mail system to DSNF employees on other shifts:

> Please review policy section (D) Restraint Equipment through (3) a, b, c, d, e.
>
> All inmates who are acting out due behavior problems such as beating on doors, taking pie flap, fluids, and refusing to uncover windows will be restraint (sic) to his bunk without mattress. Consistency among all shifts must take place in order for this to be effective.

11. Unit 7C was one of the units that Grievant Gary was responsible for during the second shift on June 13, 2009. Unit 7C housed a population of inmates who had severe mental health issues and not infrequently destroyed state property, assaulted other inmates and staff, and physically harmed themselves.

12. Grievant Gary did not work on Sunday, June 14, or Monday, June 15, 2009 because he was not scheduled to work on those days.

13. On June 14, 2009, the DSNF's Warden, Ronald Colson, saw the e-June 13, 2009 e-mail which had been sent out by Grievant Gary. On June 15, 2009, Warden Colson and sent the following e-mail out to DSNF supervisory staff:

> Subject: Re: Policy #506.07 Use of Force/Security Devices
>
> After a more complete review of the policy and discussion with other senior staff, we **will not follow** this procedure. Chris Aibangbee is working to prepare measures of dealing with inmates that act up, but we will do it through well measured procedures that medical and mental staff have reviewed and agreed upon. To restrain an inmate to his bunk for [the reason stated in Captain Gary's 6/13/09 e-mail] would in violation of TDOC Policy 506.07. (Emphasis in the original.)

14. On June 16, 2009 Captain Gary returned to his job at DSNF. Captain Gary received an e-mail from Warden Colson which stated:

> Captain:
> Deputy Warden Mathis and myself should have been copied on this [Captain Gary's e-mail of 6/13/09], we were not. The only reason I was aware of the directive is that I was asked by another shift commander if this was at my direction or the Deputy Warden's direction. Deputy Warden Mathis may have more to say regarding this.

15. Captain Gary responded to the Warden's 6/16/09 e-mail later that day with the following e-mail:

> Warden, I am sorry that I did not copy you and Mr. Mathis. Within Policy #506.07 it shows security and medical working hand in hand regarding the use of security restraint equipment. Dr. Mays and Dr. Glean have both said that they support security on the use of security restraint when it comes to inmates acting out due to behavior problems. Dr. Aibangbee, is working on a standard list of procedures as to what constitute an inmate should be 4-pointed for security reason. At the completion of this process it will be made available for Mental Health doctors and affective managers for review and require your approval. Today, Dr. Mays, Dr. Glean, Dr. Aibangbee, and I met regarding Policy #506-07 and they will be forwarding you documentation supporting there concerns.(Typos and other errors in the original.)

16. Of note, Captain Gary did not reference the June 15, 2009 e-mail to supervisory employees from Warden Colson, nor did he "reply" to it.

17. The next day (June 17, 2009) Warden Colson replied to Captain Gary's June 16, 2001 e-mail as follows:

> ***Were ok.***
> I have been working with Dr. Aibangbee, Mays, Lewis regarding the issues you addressed. (Emphasis added.)
> (Typos and other errors in the original.)

18. Captain Gary authorized restraints of inmates at DSNF during his shifts on June 18, 19, 20, and 23, 2009.

19. Captain Gary testified, credibly, that if he had received the June 15, 2009 e-mail from Warden Colson, he would not have authorized restraint usage on June 18, 19, 20, and 23, 2009.

20. Captain Gary further testified, credibly, that he did not receive Warden Colson's June 15, 2009 e-mail until June 24, 2009.

21. Deputy Warden, Gil Mathis, met with Captain Gary for an "informal discussion" on June 24, 2009 to discuss Captain Gary's use of restraints following Warden Colson's June 15, 2009 e mail. At that time Deputy Warden Mathis informed Captain Gary that the authorization of restraints on June 18, 19, 20, and 23, 2009 had violated Warden Colson's order contained in the Warden's June 15, 2009 email.

22. Thereafter, Deputy Warden Mathis drafted a memorandum which memorialized his meeting with Captain Gary. Deputy Warden Mathis noted in the June 24, 2009 Memorandum that Captain Gary had admitted that he wrote the June 13, 2009 email regarding restraints. The memorandum also states that Captain Gary stated at the meeting (on June 24, 2009) that he was aware of the Warden's June 15th e-mail which stated "we will not follow this procedure." Captain Gary replied that he was aware, *but then asked if Deputy Warden Mathis had a reply e-mail from Warden Colson "saying it was 'o.k. to use this procedure.' "* (Emphasis added.)

23. The evidence preponderates that the "back and forth" e-mails resulted in confusion and miscommunication.

24. Captain Gary credibly testified that he did not receive the June 15, 2009 email from Warden Colson which stated "we will not use this procedure [Policy #506.07 Use of Force/Security Devices] and was not aware of the June 15th email from Warden Colson until June 24, 2009.

25. The evidence preponderates that Captain Gary believed that the Warden's June 16, 2001 e-mail, which stated: "Were (sic) ok." meant that it was "o.k. to use this procedure [restraints]".

26. At the June 24, 2009 meeting, Deputy Warden Mathis informed Captain Gary that he was requesting a Due Process Hearing on the basis of TDOP Rule 1120-10.06 – Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination.)

27. The following day, June 25, 2009, Deputy Warden Mathis sent the following memorandum to Captain Gary, which changes the charge of "insubordination" and issues a "verbal reprimand" for TDOP Rule 1120-10.06 (2) –"Negligence in the performance of duties." The memorandum states, in pertinent part:

> On June 24, 2009, I met with you for an informal discussion [...].
>
> I met with Warden Colson and reviewed the documentation you provided to him concerning your actions. After review of this documentation, I am rescinding my Due Process recommendation and issuing you a Documented Verbal Reprimand.
>
> Therefore, you are being issued a "Documented Verbal Reprimand" for violation of TDOP Rules 1120-10-.06 Rule #2, negligence in the performance of duties. A copy of this warning will be placed in your supervisory file.

28. After meeting with Grievant Gary and hearing Grievant Gary's explanation, Deputy Warden Mathis rescinded the charge of "insubordination" and issued a "written warning" as discipline regarding the use of restraints.

29. Thereafter, the record is clear that Grievant Gary used no restraints on inmates.

30. Despite Warden Mathis issuing a "written warning" as discipline, Warden Roland Colson decided to pursue a disciplinary charge of "negligence", and imposed the severe discipline of demoting Grievant Gary from Correctional Captain to Correctional Sergeant.

31. It is judicially noted that such a demotion greatly impacts Grievant's salary and long-term pension benefits.

32. The Commissioner affirmed Warden Colson's "demotion" for the stated reasons that Grievant was negligent in the performance of duties and conduct unbecoming a State employee. However, the Commissioner's letter references incidents at General Hospital which the parties stipulated are not part of this civil service proceeding.

33. Neither Warden Colson nor Commissioner Ray were present at the hearing to offer testimony regarding their determination of any offenses committed by Grievant Gary, or to give insight into their determination that demotion was the appropriate discipline. Nor were either present to testify if the violations were mainly due to the incident at General Hospital or the other events referenced in the Commissioner's letter.

34. Grievant Gary's testimony was credible, and was given great weight in determining whether or not he committed the charged "insubordination". The events which led up to the charge are based upon unfortunate miscommunications via e-mails, without Warden Colson and Grievant Gary personally talking and understanding exactly what the other's respective e - mails actually meant.

35. A great deal of evidence was presented at the hearing, including incident reports, videos, etc., regarding individual inmates' violent behaviors with resulting restraints approved by Grievant (following Warden Colson's email regarding the use of restraints). Neither party disputed that the inmates' behavior was violent and presented threat of harm to themselves, others, or damage to state property. The issue which was in dispute was whether or not Grievant Gary restrained inmates to their bunks despite receiving an email from Warden Colson instructing to refrain from using restraints.

34. The State did not prove, by a preponderance of the evidence, that Grievant received a clear and unambiguous directive from Warden Colson to stop using restraints on inmates.

35. Grievant Gary did not commit "insubordination" or fail to follow a reasonable, clear order of Warden Colson's. Accordingly, no discipline is necessary.

CONCLUSIONS OF LAW

1. The Department bears the burden of proof in this matter to show that Grievant violated the *Department of Personnel Rules* regarding

"insubordination". The Department also has the burden of proof to show that the discipline it imposed was the appropriate discipline Grievant committed "insubordination" in violation of *Department of Personnel Rules*.

2. Rule 1120-10.02 of the *Rules of the Tennessee Department of Personnel* provides as follows:

> A career [civil service] employee may be warned, suspended, demoted or dismissed by his appointing authority *whenever legal or just cause exists.* The degree and kind of action is at the discretion of the appointing authority, but must be in compliance with the intent of the provisions of this rule and the Act. An executive employee serves at the pleasure of the appointing authority. (Emphasis added)

3. As defined by the *Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies,* Rule 1360-4-1-.02(7), "preponderance of the evidence" means the greater weight of evidence, or that, according to the evidence, the conclusion sought by the party with the burden of proof is the more probable conclusion.

4. The Commissioner's letter charges Grievant with the following violations: *Rules of the Tennessee Department of Personnel* (Revised May, 1999): Rule1120-10-.06(2) Negligence in the performance of duties, and Rule 1120-10-.06(8) Conduct unbecoming an employee in the State service. Additionally, the Commissioner's letter to Grievant also bases the violations on an alleged incident involving an inmate at General Hospital. The parties stipulated that any issues regarding an alleged incident at General Hospital were not the basis for this Civil Service proceeding, and should not be considered by the undersigned in this case.

5. At the contested case hearing of this matter, both parties agreed that "insubordination" with regard to the use of inmate restraints was the focus of the hearing. Accordingly, "insubordination" is the alleged offense considered by the undersigned.

6. T.C.A. §8-30-331 provides that civil service employees (who have successfully completed their probationary period) have a property right to their positions.

7. Because state of Tennessee civil service employees have "property rights" in their jobs, such employees must be afforded constitutional due process before the State may legally take an adverse action against an employee's job. Hinson v. City of Columbia, 2007 WL 4562886 (Tenn. Ct. App. 2007).

8. The requirements for "minimum due process" include proper notice. Sanford v. Tennessee Dept. of Environment, 992 S.W. 2d 410, 414 (Tenn. Ct. App. 1998), *App. for Perm. to Appeal Denied* (Tenn. 1999).

9. If a Grievant is not provided with adequate notice of the charges made against him or her, such a Grievant has been denied due process.

10. T.C.A. §8-30-331 states:

> **Minimum due process.---**(a) Employees who have successfully completed their probationary period have a "property right" to their positions. Therefore, no suspension, demotion, dismissal or any other action which deprives a regular employee of such employee's "property right" will be come effective until minimum due process is provided as outlined below.

11. T.C.A. §8-30-331(b) specifically provides:

Minimum due process consists of the following:

> (1) The employee shall be notified of the charges. Such notification should be in writing and shall detail times, places, and other pertinent facts concerning the charges.

12. Proper notice, for minimum due process purposes, has been defined as "notice reasonably calculated under all the circumstances to apprise interested parties of the claims of the opposing parties." Gluck v. Civil Service Commission, 15 S.W. 3d 486, 491 (Tenn. Ct. App. 1999), *App. for Perm. to Appeal Denied* (Tenn. 2000).

13. Procedural due process does not require "perfect, error free governmental decision-making". Qualls v. Camp, 2007 WL 2198334 *4 (Tenn.Ct. App. 2007). However, it does require affording a Grievant a "relatively level playing field in a contested case hearing". *Id.* at 4.

14. "Insubordination" is defined in Rule 1120-10-.06(18) as "the refusal to accept a reasonable and proper assignment from an authorized supervisor." In order for an employee to commit "insubordination", the employee must first receive a reasonable and proper assignment from an authorized supervisor.

15. Frankly, because part of the facts in the Commissioner's letter are excluded from consideration, and because the Commissioner's letter references "negligence" and "conduct unbecoming a state employee", when the parties at the hearing stated that the focus of this case is on "insubordination", the undersigned has some concerns regarding due process in this case. The "charges" seem to constitute a "moving target." However, due process concerns

were not raised as an issue at the hearing, so the undersigned will confine her inquiry to whether or not the Grievant was "insubordinate."

16. The Department has failed to meet its burden of proof that Grievant received a reasonable and proper assignment from Warden Colson, which Grievant then failed to accept and follow.

17. The evidence preponderates that the "back and forth" emails between Warden Colson and Grievant resulted in miscommunication. It is clear that Grievant believed Warden Colson's email which stated "Were (sic) okay" meant that Warden Colson was agreeing with Grievant's interpretation and application of the Department's "Restraint Policy".

18. It is undisputed that Grievant never again used restraints after Grievant actually received Warden Colson's original e mail and discussed the restraint policy with Deputy Warden Mathis.

19. As referenced earlier, Grievant's testimony was credible that he did not receive Warden Colson's original e mail regarding the use of restraints. Further, Grievant's testimony is credible that he would not have authorized using restraints if he had received Warden Colson's first email. Finally, Grievant's testimony is convincing that he believed Warden Colson was "okay" with Grievant's e-mail (regarding the use of restraints and Grievant's subsequent authorization of restraints) due to Warden Colson's e - mailing Grievant an e mail which stated "Were (sic) okay."

20. Warden Colson's two e-mails were ambiguous and confusing, and seemed to contradict each other. Because they were ambiguous and

confusing, they do not constitute a "reasonable and proper assignment from a supervisor" to a subordinate.

21. It is undisputed that a policy and procedure was in place at DSNI for using four point restraints on inmates who were placing themselves or others at risk of harm, or who were damaging or destroying state property. There was no showing that Grievant failed to follow the policy in effect at the time of his authorization of restraints.

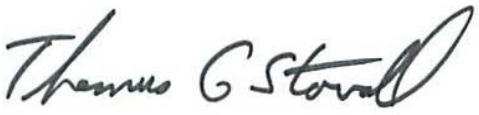
22. Assuming, *arguendo*, that Grievant should have followed up on Warden Colson's second e - mail to ascertain what Warden Colson actually wanted Grievant to do, Grievant's failure to "follow up" still does not rise to the level of insubordination.

The Department failed to meet its burden of proof in showing that Grievant committed acts of insubordination. Grievant's testimony was credible, and was accepted. No testimony was presented by Warden Colson or the Commissioner to contradict Grievant's testimony regarding the series of incidents and e - mails which formed the basis for this civil service case. Accordingly, no discipline is necessary.

Grievant is reinstated to his position as Correctional Captain. He shall be made whole with regard to lost wages and lost benefits. Grievant is the prevailing party in this case.

It is so ordered.

Entered and effective this 18th day of April, 2011.



Thomas G. Stovall, Director
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