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**STATE OF TENNESSEE
CIVIL SERVICE COMMISSION**

IN THE MATTER OF:

Marty Dylan Lee

DOCKET NO: 26.43-104325J

INITIAL ORDER

This contested administrative case was heard on April 29th, 2010, in Nashville, Tennessee, before Rob Wilson, Administrative Judge, assigned by the Secretary of State, and sitting for the Civil Service Commission for the State of Tennessee. Ms. Dana Schmidt represented the Agency, The Department of Children’s Services (“DCS” or “the Agency”). The Grievant, Marty Dylan Lee, was represented by his legal counsel, Mr. Keith Grant. Upon conclusion of the hearing, the matter was taken under advisement, pending submission of the parties' Proposed Findings of Fact and Conclusions of Law.

This administrative proceeding was a fifth-step disciplinary hearing, convened at the Grievant’s request, to consider the termination of his state employment by the Department of Children’s Services for engaging in certain prohibited conduct, including *(1) negligence in the performance of duties; and (2) Gross misconduct or conduct unbecoming an employee in the State service.*

Upon consideration of the evidence and arguments of counsel, and the entire record, it is determined that no discipline is appropriate in this matter, and the decision to terminate Grievant's employment is overruled. This determination is based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Grievant, Marty Dylan Lee, was employed as a Children's Services Officer (CSO) with Taft Youth Center (Taft) from October 15, 2005 through June 15, 2009. During that period of time Mr. Lee received no disciplinary actions other than the one giving rise to this appeal. Mr. Lee's most recent evaluation resulted in Mr. Lee receiving all "5s" on a five point scale.
2. On January 26, 2009, student C.M. was located in the programmatic wing of Taft¹. C.M. was ordered to be placed on active suicide watch, which involved him being transported to another cell to have his regular gown replaced with a paper gown. When the CSOs arrived to transport C.M., broken tile was found in C.M.'s room and he was observed placing the broken tile to his neck.
3. CSO Lee removed the tile from the student's hand while in route from his room to Room A, the room assigned to C.M. while on suicide watch.
4. Two other CSOs, Jason Bickford and Justin Higdon were also working at Taft on the day in question. CSO's Lee, Higdon and Bickford escorted the student down the

¹ The programmatic wing contains students who are unable to be included in the general population due to disruptive behavior.

hall². Although there were no physical altercations during the escort, the student was yelling and being generally disruptive.

5. Pursuant to standard procedure, C.M.'s regular jumpsuit was to be taken away from him and replaced with a paper gown with which C.M. would not be able to harm himself. However, when C.M. reached his room and was given his gown, he refused to comply with the instructions of the CSOs by refusing to remove his jumpsuit and put on his paper gown. Ultimately C.M. became agitated and started pacing around the room with his fists clenched. Mr. Lee recalled that C.M. at this time started backing into the room, swinging his arms and talking in an aggressive tone of voice. After receiving several orders to remove the jumpsuit and continuing to refuse to comply, C.M. swung at CSO Bickford. Mr. Lee stated that CSO Bickford had done nothing to provoke this assault by C.M. Mr. Lee testified that it was at this time that he pulled his mace can out although he did not immediately use it. At approximately the same time CSO Higdon moved to put the student into a "Standard Arm Assist" to prevent him from hurting anyone. CSO Higdon was unable to get him into this hold but did get a hold on C.M.'s right arm. C.M. continued to flail his arms around and kick, presumably attempting to assault CSOs Higdon and Bickford.

² At the time of the incident, CSO Justin Higdon was a three year employee at Taft. Mr. Higdon was also terminated due to this incident. He was employed with the Sequatchie County Sheriff's Department at the time of the hearing. CSO Jason Bickford is apparently still employed by the Department but was not present at the hearing.

6. CSO Lee, who had been standing at the doorway, then entered the room and warned C.M. several times that if he did not stop he would be maced. Rather than cease resisting, C.M. told CSO Lee that he would have to mace him. After warning C.M. at least three times that he would use mace if he did not cease his assaultive behavior, Mr. Lee maced C.M. using 1.42 grams of mace³.

7. C.M. only settled down *after* CSO Lee maced him. Mr. Lee recalls that C.M. continued cursing but did cease his assaultive behavior and began complying with the officers' orders. It was at this time that the student took his paper gown and began putting it on. The CSOs then obtained the jumpsuit and exited the room.

8. According to CSO Higdon, the whole incident occurred over a time span of less than two minutes. On cross examination, CSO Higdon acknowledged that he could have restrained the student by himself. However, CSO Higdon testified that he and the other CSOs were trying to keep from hurting C.M. while also attempting to prevent C.M. from hurting himself or the CSOs.

9. CSO Higdon testified that he had been instructed to use mace before physical intervention. Investigator Creason confirmed that mace was to be utilized early in this type of situation and stated that Mr. Lee should have pulled his mace earlier during the incident. However, CSO Higdon stated that it was not possible for him (CSO Higdon) to get to his mace quickly enough in this situation due to the actions of C.M. In any case,

³ CSO Lee testified that this amount was less than the average 2 gram usage. Investigator Creason testified that he did not have any concerns about the amount of mace used.

Mr. Creason stated that if everything happened as the CSOs reported it, there was no violation and, thus, no reason for the Grievant's termination.

10. After the incident CSO Lee called for medical assistance for C.M. John Saylor, a nurse at Taft, treated C.M. for exposure to mace and for an abrasion to his neck. Although his testimony was not entirely clear, Mr. Saylor indicated that the abrasion on C.M.'s neck possibly was not the kind that would have been caused by forcibly removing the student's jumpsuit because with such an occurrence one would normally see carpet type burns.

11. Exhibit 6 reveals that after this incident C.M. continued his disruptive behavior and was threatening to kill the CSOs, their families and "anyone else he can think of." C.M. subsequently stated that he would have CSO Bickford and CSO Higdon kicked out of the unit by the next day. C.M. continued to cause problems throughout the evening and, eventually moved on to using racial epithets toward black students in the ward.

12. As to documenting the incident, Mr. Creason acknowledged that Mr. Lee prepared the appropriate written documentation subsequent to the incident. CSO Lee filled out a form entitled "Children's Services Use of Mace" (Exhibit 4), and a "Disciplinary Report/Notice of Hearing" (Exhibit 7). Further, Mr. Lee filled out the "Witness' version" section of Mr. Bickford's "Accident/Incident/Injury Report" (Exhibit 2) and the "Witness' version" section of the student's "Accident/Incident/Injury Report" (Exhibit 9). Although the statements in Exhibits 2, 7 and 9 are condensed versions of the incident, Mr. Creason ultimately acknowledged that they were not inconsistent with each other or Exhibit 4.

13. Although C.M. did not testify despite being called at his home, Mr. Creason testified that C.M. had admitted to lying to the nurse when he advised him that he was hit several times in the back of the head. C.M. advised Mr. Creason that he was only hit one time.

14. Ted Martinez was the Executive Director of Residential Operations with the Tennessee Department of Children's Services at the time of the incident giving rise to this matter. In his position Mr. Martinez oversees the State of Tennessee's five Youth Development Centers and nine State operated group homes. Mr. Martinez did not conduct the investigation, did not interview witnesses and did not investigate whether or not there were other students who might have witnessed the events. Additionally, Mr. Martinez acknowledged that at facilities such as Taft, the staff deals with "very difficult students" and can often be put in "very difficult situations." Upon cross-examination Mr. Martinez acknowledged that if attempts were made by Children Services Officers ("CSOs") to deescalate a student, and those attempts failed, the use of mace on a student would be appropriate.

15. David Creason is the Regional Special Investigator for the Internal Affairs Division and investigated the incident giving rise to this matter. Mr. Creason also acknowledged that the students at Taft generally have behavioral issues to the point of becoming aggressive. Mr. Creason acknowledged that as a CSO, one would experience children fighting in a facility and being aggressive. Mr. Creason believed that CSOs receive "some training through the academy" in a three week program at the academy

and that he believed this training covered how to handle aggressive and/or violent behavior of students.

16. Mr. Creason took statements from the four CSOs involved almost a full month after the incident occurred. These statements were all substantially the same. Mr. Creason testified that it is easier to tell the truth than to tell a lie. He also acknowledged the fact that Mr. Bickford's statements matched up despite being given almost a month apart, which "indicates a stronger possibility" that these statements were trustworthy.

17. Mr. Creason acknowledged that he basically made a credibility call between the student involved and the officers and determined that all four officers were not telling the truth but that the student was telling the truth. Mr. Creason made this determination despite the fact that the statements given by the officers were consistent, even over a period of time, and despite the fact that the student had previously lied to medical staff about what happened during the incident.

CONCLUSIONS OF LAW

1. The Department of Children's Services is the Petitioner in this matter, the party that initiated the proceedings, and as such, is assigned the "burden of proof." The burden of proof is the duty imposed upon a party to establish, by a preponderance of the evidence, that an allegation is true, or that an issue should be resolved in favor of that party. A "preponderance of the evidence" means the "greater weight of the evidence," or "the more probable conclusion, based on the evidence presented." The burden of proof is generally assigned to the party seeking to change the present state of affairs with regard

to any issue. Rule 1360-4-1-.02(7), TENN. COMP. R. & REGS. In the instant case, that means that the Department of Children's Services must prove, by a preponderance of the evidence, that the Grievant engaged in conduct prohibited for State employees, as described in Rule 1120-10-.06, TENN. COMP. R. & REGS., or that he violated the Administrative Policies and Procedures of the Department of Children's Services, and that separation from state employment is the appropriate disciplinary response.

2. *The Rules of the Tennessee Department of Personnel, Disciplinary Action, Chapter 1120-10, TENN. COMP. R. & REGS, describe certain prohibited conduct for State employees that may result in disciplinary action being taken against them.*

1120-10-.06 EXAMPLES OF DISCIPLINARY OFFENSES. The following causes are examples of those considered for disciplinary action and should not be considered the only causes of action.

(2) Negligence in the performance of duties.

(8) Gross misconduct or conduct unbecoming an employee in the State service.

3. A career employee can be terminated only for cause. Tenn. Comp. R. & Regs. 1120-10-.02 states:

A career employee may be warned, suspended, demoted or dismissed by his appointing authority whenever just or legal 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 service employee serves at the pleasure of the appointing authority.

4. It was the Department's burden to show, by a preponderance of the evidence, that CSO Lee's actions merited termination.

5. The Department of Children's Services has not met its burden in this matter. The agency's decision is based on an initial finding by David Creason that the alleged victim in this matter, a Taft student in the programmatic wing, gave an accurate account of the events as they transpired and that the four guards involved did not give accurate accounts of the incident. However, the facts, as illustrated above, show that the guards' versions of the incident were consistent, even given that approximately one month transpired from the incident until the time the CSOs were interviewed by Mr. Creason. The evidence further revealed that the alleged victim had previously provided false testimony to another employee at Taft. Regarding the testimony of CSOs Lee and Higdon, both of whom testified in person at the hearing, it is CONCLUDED that both witnesses were credible and gave consistent versions of the events of January 26, 2009.

Of considerable significance in this matter is the fact that the alleged victim chose not to testify despite being notified by the State of the hearing and being called at his home. Such begs the question of why, if he was telling the truth previously regarding the incident, did he choose not to testify in this matter? Whatever the answer may be, because the student refused to testify the Department was simply unable to present any testimony at the hearing from someone who actually witnessed the incident in question and who could rebut the otherwise credible testimony of CSOs Lee and Higdon. Simply put, the State presented no evidence to establish that Mr. Lee committed the violations for

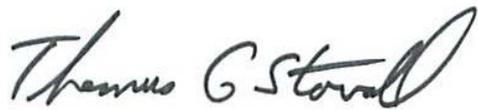
which his employment was terminated. Because the Department has failed to meet its burden, it is CONCLUDED that the termination of Mr. Lee's employment was improper and is REVERSED.

It is hereby ORDERED that the Grievant, Marty Dylan Lee, shall be reinstated to his previous position as an employee with the Tennessee Department of Children's Services and that he shall be awarded all back pay from the date of his separation until the date he is restored to his employment position. Further, pursuant to T.C.A. 8-30-328(f), the Grievant shall be awarded attorney fees and costs as the prevailing party in this matter.

This Initial Order entered and effective this 16th day of August, 2010.

Rob Wilson
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 16th day of August, 2010.



Thomas G. Stovall, Director
Administrative Procedures Division