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TENNESSEE DEPARTMENT OF CORRECTION, Department/, Petitioner, vs. NICKOLAS BLANKENSHIP, Grievant/, Respondent

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

TENNESSEE DEPARTMENT OF CORRECTION,	]	
Department/Petitioner,	]	
vs.	]	**DOCKET # 26.05-107740J**
	]	
NICKOLAS BLANKENSHIP,	]	
Grievant/Respondent.	]	

INITIAL ORDER

This contested administrative case was heard at the Southeastern Tennessee State Regional Correctional Facility ("STSRCF") in Pikeville, Tennessee, on September 3, 2010, before J. Randall LaFevor, Administrative Judge, assigned by the Secretary of State and sitting for the Civil Service Commission. Mr. Bryce Coatney, Assistant General Counsel for the Tennessee Department of Correction, represented the State. The Grievant was represented by his legal counsel, Ms. Margaret Jane Powers. Upon the conclusion of the hearing, the matter was taken under advisement, and the parties were directed to submit their Proposed Orders by November 19, 2010. By that date, all post-hearing documents were received by the APD, the record was closed, and the matter was declared ready for consideration.

This contested administrative proceeding was a fifth-step disciplinary hearing convened at the Grievant's request, to consider the termination of his state employment by the Commissioner of the Department of Correction ("the Department") for engaging in certain prohibited conduct, including *(1) Violation of TDOC Policy #302.05, Employee Sexual Misconduct; (2) Violation of TDOC Policy #302.08, Code of Conduct/Oath of Correction Department Employees; and (3) Violation of TDOC Policy #107.02, Internal Affairs Operational Procedures.* Upon consideration of the evidence and arguments, and the entire record, it is concluded that the Grievant engaged in the prohibited conduct, as charged, and that the appropriate disciplinary sanction for those offenses is termination from state employment. This determination is based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT[1]

1. The Grievant was employed by the State of Tennessee from February 26, 2006 until January 22, 2009, as a Correctional Officer at the Southeastern Tennessee State Regional Correctional Facility ("STRCF") in Pikeville, Tennessee.

2. The Southeastern Tennessee State Regional Correctional Facility is a penal institution operated by the Tennessee Department of Correction, with a "close-security" designation.

3. On November 19, 2008, the Grievant was assigned to work in the facility's food services area at a Food Service Security Post. The Food Service Area at STRCF consists of offices, a kitchen, a food serving line, a serving area, a recycling area and storage rooms.

4. The duties of an officer at the Food Service Security Post include the following:

   a. Except when meals are being served to the inmate population, the officer of the post is responsible for making rounds to make security checks throughout the Food Service Area.

   b. The Officer's security checks consist of assuring that doors are appropriately secured and inmate workers are not out of place, that goods and materials in the food service area remain secure from theft, and that Food Service employees and inmates alike are not presented with or engaging in acts that threaten the security of the institution.

5. Leanna DeBord ("DeBord") is the Assistant Food Service Manager at STRCF, and was serving in that capacity on November 19, 2008. The Assistant Food Service Manager is stationed in the Food Service Area, and among her other duties, is the immediate supervisor of the Food Service Stewards.

[1] At the outset of the hearing, the parties submitted a document containing their Stipulation of Facts. These Findings are largely taken from those Stipulations, and were augmented, as warranted, with additional findings from the evidence that was admitted during the hearing.

6. Sharon Heck ("Heck") was a Food Service Steward at STRCF. On November 19, 2008, she was assigned to routine food preparation and distribution duties in the Food Service Area.

7. On November 19, 2008, STRCF was undergoing a "Code 50" lockdown exercise, requiring the confinement of all inmates to their cells. As a result, the inmates who are normally assigned to the Food Service Area, were not available to perform their regularly-assigned duties. Consequently, the Food Service Stewards and other facility food service employees had assumed extra duties that morning, and were busier than usual.

8. Around 10:00 a.m., during preparation for the mid-day meal, DeBord made her rounds of the food preparation stations, to make sure that the Food Service Stewards were performing their assigned duties. When she was unable to find Food Service Steward Sharon Heck in the kitchen or serving areas, she began looking for her.

9. When she opened the door to a small coat-room, adjacent to a food storage area, she found Sharon Heck on her knees in front of the Grievant, who was standing in the corner of the room, with his back to DeBord. It appeared to DeBord that the two were engaged in oral sex.[2] Surprised by her discovery, DeBord did not know how to react. She stood silently for a few moments before making her presence known. She then blurted out "Oh, my Lord." Heck immediately raised her head, then rose to her feet. The Grievant looked at DeBord over his shoulder as he zipped his pants.

10. DeBord left the two in the room, and returned to the Food Service Area office. After a brief discussion of the incident with the Food Service secretary, DeBord reported the incident to the Food Service Manager and the Human Resources office.

11. When he was notified of the incident, the facility Warden initiated an Internal Affairs investigation. As a part of that investigation, the Grievant and Heck both gave sworn statements to the investigator. The Grievant's statement was internally

[2] No other explanation was offered by the Grievant.

inconsistent with respect to his relationship with Heck, and his prior personal contact with her. As part of that statement, he acknowledged that he was aware of a prior allegation of sexual conduct between the two, and that he had met with her away from the facility to discuss that allegation and how they should respond to it.

12. Following a review of the Internal Affairs report, and the subsequent due process hearing, the Commissioner of the Tennessee Department of Correction terminated the Grievant's employment with the State of Tennessee, effective January 22, 2009.[3]

13. This hearing was convened to consider his appeal. During the hearing, the Grievant attempted to negate the Department's evidence by (1) challenging DeBord's credibility, and (2) offering testimony from other Food Service Area employees who were working on the date of the incident. Those attempts failed. First, Leanna DeBord presented herself as a highly credible witness, with no reason to fabricate such an account, and who appeared to try very hard to relate her observations in an accurate manner. Second, none of the other employees were able to testify that they could account for the whereabouts of Heck and the Grievant at the time that DeBord said she saw them in the coat-room. And, finally, the Grievant's demeanor during his own testimony, and denials of the allegations, led to the conclusion that he was a less-than-credible witness, unable to explain the inconsistencies in his earlier sworn statement, or to explain away DeBord's credible account of his misconduct.

CONCLUSIONS OF LAW & ANALYSIS

1. The Tennessee Department of Correction 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

[3] Sharon Heck's state employment was also terminated as a result of this incident. She did not appeal that action.

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 Correction must prove, by a preponderance of the evidence, that the Grievant engaged in conduct prohibited for State employees, as described in specified Departmental Policies and Procedures, and that separation from state employment is the appropriate disciplinary response to his conduct.

2. The Department asserted that the Grievant's actions on November 19, 2008 violated various Departmental Policies and Procedures. The Department generated those Policies and Procedures to define acceptable institutional security practices, and distributed them to its Correctional Officers to ensure that those practices would be followed throughout its institutions. All of the Departmental Policies and Procedures are issued in support of what the Department has designated as the "primary responsibilities" of a Correctional Officer assigned to its correctional facilities. It is concluded, as alleged by the Department, that the Grievant's actions violated the Department's security-related mandates.

3. First, the Department alleged that the Grievant engaged in sexual activity with another employee while on the job. Such activity is prohibited by a specific Policy that prohibits sexual misconduct by its employees. [*TDOC Policy #302.05*] That Policy defines sexual misconduct broadly, to include any "act of a sexual nature directed towards any individual by an employee, volunteer, visitor, or agency representative," and provides that any violation of the policy will result in "appropriate corrective action." In the instant case, it was established by credible testimony of an unbiased witness that the Grievant abandoned his assigned duties to engage in oral sex with another employee in a secluded room at the facility where he was employed by the Tennessee Department of Correction. That is a clear violation of the Department's Policy, and warrants "appropriate corrective action."

4. Second, the Department alleged that the Grievant violated its Code of Conduct. The Department has determined that, in order to maintain security in its institutions, Correctional Officers must act "in a manner that creates and maintains respect for their

work sites, fellow employees, visitors, the Tennessee Department of Correction, and the State of Tennessee." [*TDOC Policy #302.08 – Code of Conduct of Correction Department Employees*] By leaving his assigned security duties to engage in sexual activity with another employee, he failed to live up to that mandate. In her letter terminating his employment, the Commissioner found that the Grievant's actions were "intolerable and contrary to all the applicable policies of the department." That assessment accurately portrays the lack of respect that resulted from his actions. The Grievant clearly failed to live up to the Department's Code of Conduct.

5. And third, the Department alleged that the Grievant violated its Policy requiring that its employees cooperate with authorized Internal Affairs investigations. [*TDOC Policy #107.02 – Internal Affairs Operational Procedures*] Specifically, the Policy states:

> Upon request, all employees shall fully cooperate with IA agents conducting an authorized investigation, including but not limited to participating in interviews and *providing truthful testimony*. Failure to do so will constitute insubordination and shall result in disciplinary action, up to and *including termination*. [Emphasis added.]

Pursuant to that Policy, the Department has authorized termination of the Grievant's employment for his evasive and contradictory statement to the Internal Affairs investigator, and his subsequent testimony during his Level V hearing.

6. A State employee may be disciplined for (1) causes relating to performance of duty, or (2) causes relating to conduct which may affect an employee's ability to successfully fulfill the requirements of the job. Rule 1120-10-.05, TENN. COMP. R. & REGS. "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. . ." Rule 1120-10-.02, TENN. COMP. R. & REGS. Although the law prescribes implementation of progressive discipline for State employees, it also provides that disciplinary action must be administered at the step which is <u>most appropriate</u> for the misconduct. (*See*, *Tennessee Code Annotated* § 8-30-330; and Rule 1120-10-.07, TENN. COMP. R. & REGS.) As the courts have recognized in other cases dealing with these provisions,

> . . . the key word in the statute is 'appropriate.' . . . (T)he language of these provisions does not mandate application of discipline in a routine fashion without regard to the nature or severity of the behavior it is intended to address. The supervisor has discretion to determine what punishment fits the offense.

Berning v. State, 996 S.W.2d 828, 830 (Tenn. App. 1999).

7. The Grievant had been employed by the State for about twenty-one (21) months at the time of this incident, and had received high marks on his performance evaluations and the verbal support of his peers during the hearing, all of which weighs in his favor. However, the Grievant's blatant disregard of Departmental Policies and Procedures, and breach of institutional security on November 19, 2008, and the negative impact his actions had on the Grievant's relationship with his superiors, cannot be discounted. The STRCF Warden found that his actions were unacceptable for a Correctional Officer at his institution, and recommended termination of his employment.

8. When the Commissioner considered the issue of punishment in this case, she had a wide range of options at her disposal. (*See*, Rule 1120-10-.07, TENN. COMP. R. & REGS.) Dismissal from employment is one of those options. Rule 1120-10-.07(5), TENN. COMP. R. & REGS. Pursuant to that regulation, "After minimum due process is provided, an employee may be dismissed by the appointing authority from his position for unacceptable conduct or performance of duties." Rule 1120-10-.07(5)(a), TENN. COMP. R. & REGS. Without a doubt, the Grievant's conduct was unacceptable, and warranted a severe sanction. The Grievant was employed as a Correctional Officer, a position of significant responsibility that requires adherence to a high standard of conduct, and must command the respect and confidence of not only his peers and his superiors, but also the inmates whom he supervises on a daily basis. Physical security inside penal institutions is a matter of utmost concern; breaching that security by engaging in oral sex with a co-worker instead of performing his assigned institutional security duties, in violation of established Policies, Procedures and Orders, is a serious matter. Such an action by a Correctional Officer, charged with the responsibility to maintain safety, order and discipline inside the facility, is inexcusable. The Commissioner found that his actions were "intolerable and contrary to all the applicable policies of the department." She

further determined that the Grievant had demonstrated by his actions that he was "lacking in high moral character and cannot be entrusted to carry out the duties of a correctional officer in a prison setting." In this case, the egregious nature of the Grievant's action, the potential harm that could have resulted, the administration's inherent loss of confidence in and respect for the Grievant's judgment, and the negative impact of his conduct on the Department's mission, all weigh heavily in favor of dismissal from employment as the appropriate sanction. The courts have held that, when an employee's conduct results in loss of effectiveness in his/her job, or adversely affects the Department's ability to perform its mission, such a negative impact:

> . . . may in proper cases justify or require the discharge of public employees when their efficiency or usefulness in their positions has been seriously impaired by their own fault, by the fault of others, or by blameless misfortune.

Reece vs. Tennessee Civil Service Commission, 699 S.W.2d 808, 813 (Tenn. App. 1985)

9. The issues presented for consideration in this case are (1) whether the Department has proven, by a preponderance of the evidence, that the Grievant engaged in conduct prohibited by the Department's Policies and Procedures; and (2) if so, whether the disciplinary sanction imposed by the Commissioner was appropriate. With respect to both issues, the Department has met its burden of proof. The evidence presented during the hearing amply supported the Department's allegations of wrongdoing, and established a compelling argument in favor of termination of the Grievant's employment with the State.

Accordingly, IT IS HEREBY DETERMINED AND ORDERED that the Tennessee Department of Correction has met its burden of proof, and has established by a preponderance of the evidence that the Grievant, Nickolas Blankenship, engaged in conduct prohibited by the Department's Policies and Procedures.

IT IS FURTHER DETERMINED AND ORDERED that the Grievant's dismissal from State employment, imposed as a disciplinary sanction, was appropriate, and warranted by his conduct on November 19, 2008, and is therefore Upheld.

AND, IT IS FINALLY ORDERED that the Grievant's appeal of the Commissioner's decision to terminate his State employment is hereby DISMISSED.

Entered and effective this 10th day of December, 2010.

J. Randall LaFevor, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 10th day of December, 2010.

Thomas G. Stovall, Director
Administrative Procedures Division