



7-9-2010

TENNESSEE DEPARTMENT OF FINANCE &
ADMINISTRATION, DIVISION OF
INTELLECTUAL DISABILITIES SERVICES,
Petitioner, /Division vs. ELLIOTT PAYNE,
Respondent/, Grievant

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

IN THE MATTER OF:]	
]	
TENNESSEE DEPARTMENT OF FINANCE & ADMINISTRATION, DIVISION OF INTELLECTUAL DISABILITIES SERVICES,]	
<i>Petitioner/Division</i>]	
vs.]	Docket # 26.45-107112J
]	
ELLIOTT PAYNE,]	
<i>Respondent/Grievant.</i>]	

INITIAL ORDER

This contested administrative case was heard in Greeneville, Tennessee, on July 9, 2010, before J. Randall LaFevor, Administrative Judge, assigned by the Secretary of State, sitting for the Tennessee Civil Service Commission. Mr. Fredrick Zimmermann, Assistant General Counsel for the Tennessee Department of Finance and Administration, Division of Intellectual Disabilities Services (“DIDS”), represented the Petitioner. The Grievant, Elliott Payne, appeared *pro se*. Upon conclusion of the hearing, the matter was taken under advisement.

This contested administrative proceeding was a fifth-step disciplinary hearing that was convened at the Grievant’s request to consider the termination of her state employment with the Division of Intellectual Disabilities Services (“DIDS” or “the Division”). That sanction resulted from the Commissioner’s determination that the Grievant had engaged in conduct that was prohibited for the Division’s employees. Upon consideration of the pleadings, evidence, arguments of the parties, and the entire record, it is determined that the Grievant engaged in the prohibited conduct, as charged, and that the appropriate disciplinary response is termination of her state employment. This determination is based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Greene Valley Developmental Center (“GVDC”) in East Tennessee is a facility operated by the Division of Intellectual Disabilities Services, serving a population of disabled citizens. Due to their conditions, including Severe-to-Profound Mental Retardation and various

medical and physical disabilities, those individuals are particularly vulnerable, and require close continuous supervision and assistance.

2. Elliott Payne (“Grievant” or “Respondent”) was employed as a Developmental Technician (“DT”), a direct caregiver to the population served by GVDC, beginning in December 2004. She received appropriate training related to her job duties and responsibilities and the rules, regulations and directives that govern her conduct while on duty. In September 2009, she accepted a voluntary transfer of her duty station from Juniper Cottage to Pinewood Cottage, where she was required to provide a heightened level of care and assistance to service recipients who had greater physical disabilities and medical needs.

3. On November 20, 2009, the Grievant entered an open living area where GVDC service recipients were listening to music. Upon observing that one particular service recipient was really enjoying and physically responding to the music, she approached him, and said, “You really are a happy little fucker.” That statement was heard by other staff members, who immediately advised her that her language was inappropriate in such an environment.

4. During 2009, the Grievant received multiple disciplinary sanctions, based on both her poor work attendance, and incidents of staff misconduct.¹ Those sanctions included:

2009 ATTENDANCE SANCTIONS:

- **February 2009** – Oral Warning
- **August 2009** – Written Warning
- **November 2009** – One-day Suspension

2009 STAFF MISCONDUCT SANCTIONS:

- **July 2009** – Oral Warning for violation of DIDS Policy prohibiting cutting of a service recipient’s hair by an unlicensed person.
- **September 2009** – Oral Warning for Neglect of Duty – failing to re-position a service recipient as required by her service/treatment plan.
- **October 2009** – One-day Suspension for kissing service recipients in violation of GVDC Guidelines, Code of Organizational Ethics & GVDC’s Bloodborne Pathogen Exposure Control Plan.

¹ The Grievant also received a Written Warning in 2006 for Negligence in the Performance of Duty, failure to provide proper 1:1 supervision, for leaving the room of a service recipient who required “line of sight” supervision.

5. As a result of the November incident, and in light of her previous incidents of misconduct, the Grievant's supervisor and a GVDC administrator testified that they considered her behavior to be a reflection of her poor judgment. They also noted that the Grievant had failed to respond to previous attempts to correct her inappropriate interactions with the service recipients at GVDC, and believed that if not addressed now, her poor judgment could potentially result in even more significant harm to individuals served by the Center in the future.

6. Following a hearing convened by the Commissioner, the Grievant's employment with the Division was terminated effective January 16, 2010. The Grievant appealed the Commissioner's decision, and this hearing was scheduled to consider her appeal.

CONCLUSIONS OF LAW & ANALYSIS

1. The Division of Intellectual Disabilities 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. *See*, Rule 1360-4-1-.02(7), TENN. COMP. R. & REGS. In the instant case, that means that the Division of Intellectual Disabilities Services must prove, by a preponderance of the evidence, that the Grievant engaged in conduct prohibited for its employees, as described in Departmental Rules, Regulations, and Policies; and specific State Personnel Regulations, and that the Division imposed the appropriate disciplinary responses for that prohibited conduct.

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. As a State employee, the Grievant knew, or should have known, of the application of those *Rules* to her conduct. In this case, the Division charges that the Grievant violated the following provisions of those *Rules*:

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.

* * *

(6) Habitual pattern of failure to report for duty at the assigned time and place.

* * *

(8) [C]onduct unbecoming an employee in the State service.

* * *

(12) Participation in any action that would in any way seriously disrupt or disturb the normal operation of the . . . institution . . .

* * *

3. Rule 0940-2-3-.01, TENN. COMP. R. & REGS., *Rules of the Tennessee Department of Mental Health and Mental Retardation*, provides as follows:

The prevention and correction of staff conduct which interferes with the right of residents and patients to humane care and treatment . . . is of the highest priority at all facilities of the Department. All residents and patients in the facilities shall be treated with dignity, respect and consideration. Improper conduct of any kind and in particular any conduct which is abusive toward residents and patients is not tolerated. Any employee who engages in conduct covered by these rules shall be immediately disciplined in conformity with them. (Emphasis Supplied)

4. Rule 0940-2-3-.04, TENN. COMP. R. & REGS., *Rules of the Tennessee Department of Mental Health and Mental Retardation*, "Other Kinds of Mistreatment of Residents or Patients by Employees," provides as follows:

Employees shall not:

* * *

(e) Permit any kind of mistreatment of a resident or patient to any degree by failure to perform supervisory duties properly, or

* * *

(i) Otherwise fail to perform with respect to a resident or patient.

In addition, this same *Rule* provides that:

If an employee engages in conduct prohibited by this rule, the employee is guilty of conduct against the good of the service and the employee is subject to discipline, *including suspension or dismissal*. (Emphasis Supplied)

5. In the instant case, the Division proved that the Grievant violated its standards of conduct for Developmental Technicians when she addressed a service recipient with a profane term.

That crude expression demeaned the individual, and did not provide the level of “dignity, respect and consideration” that the Division requires of its employees. Such an action is clearly “Conduct unbecoming an employee in the service of the State.” As further provided by the Division’s Regulations, failure of an employee to live up to the required standards may be considered “conduct against the good of the service,” and “is subject to discipline, including suspension or dismissal.” The Grievant’s action on November 20, 2009, and her previous incidents of misconduct in the same year, caused the Grievant’s superiors to lose confidence in her competence as a Developmental Technician, and to question her judgment on the job. That concern was supported by the record.

6. Additionally, the Division proved that the Grievant repeatedly failed to report to her job at her assigned times. Throughout 2009, her job attendance was erratic and unacceptable. Her persistent and unpredictable absences resulted in her superiors’ inability to schedule other employees to adequately meet the needs of all service recipients in the Grievant’s cottage. During the year, she was sanctioned on three separate occasions, receiving progressive discipline, but her attendance failed to improve. Clearly, the Grievant’s “habitual pattern of failure to report” for her assigned duties “disrupted the normal operation of the institution,” as contemplated by the Department of Personnel Regulations.

7. 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. While the law prescribes implementation of progressive discipline for State employees, it also provides that disciplinary action must be administered at the step which is *most appropriate* 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.)

8. Throughout 2009, the Grievant failed to respond to the Division’s attempts to correct her behavior through progressive discipline. When the Division’s Commissioner considered the issue of punishment in this final incident, he had a wide range of options at his 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 [her] position for unacceptable conduct or performance of duties.” Rule 1120-10-.07(5)(a), TENN. COMP. R. & REGS. Without a doubt, the Grievant’s continuous misconduct was unacceptable, and warranted a significant sanction. The Grievant was employed as a Developmental Technician, a caretaker of mentally-challenged citizens of this state, a position that requires adherence to a high standard of conduct and behavior, especially in the presence of those in her care. Her behavior on November 20, 2009 failed to meet that standard, and jeopardized the welfare of the individuals residing at Greene Valley Developmental Center. It is also disturbing that, after hearing all of the evidence against her during the hearing, the Grievant still failed to appreciate the harm, or potential harm, that her conduct had caused to the service recipients under her care.

9. The Grievant attempted to minimize her unprofessional conduct with three specific arguments:

(1) First, she said that her conduct was not malicious, and caused no actual harm to anyone. A DIDS direct-care provider is required to act for the benefit of her clientele, not merely to avoid causing them harm, or to avoid acting with malice toward them. It appears that the Grievant failed to grasp the true nature of her employment.

(2) Second, the Grievant established that she had been awarded unemployment compensation benefits by the State following her dismissal from DIDS employment. She argued

that was proof that her termination was inappropriate. However, it is clear from a review of the Decision¹ issued by the Board of Review of the Tennessee Department of Labor and Workforce Development, that her argument is unfounded. First, the legal issues presented by the cases before the Board of Review and the Civil Service Commission are not the same. And, second, the Board's decision recites the fact that it was based on the failure of the employer's representative to appear at the hearing, so the Board heard no evidence of the Grievant's misconduct, and based its decision only on her side of the case.

(3) Third, the Grievant argues that termination of her employment was an overly-harsh sanction for the conduct she engaged in. This argument overlooks the fact that her employer had identified her job-related decision-making and attendance as problems well before the November 20 incident, and had attempted to address those problems throughout the year by imposing progressively more severe disciplinary sanctions. It was the Grievant's own failure to respond to less-severe sanctions that required her employer to terminate her employment as a last resort.

The Grievant's arguments are not well-founded, and fail to overcome the Division's argument in favor of termination of her employment.

10. In summary, the issues presented for consideration in this case are: (1) whether the Division has proven, by a preponderance of the evidence, that the Grievant engaged in conduct prohibited by *The Rules of the Tennessee Department of Personnel* and applicable Departmental Rules, Regulations and Policies; and (2) if so, whether the disciplinary sanction imposed by the Division's Deputy Commissioner was appropriate. With respect to both issues, the Division has met its burden of proof.

¹ See Hearing Exhibit #4.

Accordingly, IT IS HEREBY DETERMINED AND ORDERED that the Division of Intellectual Disabilities Services has met its burden of proof, and has established by a preponderance of the evidence that the Grievant, Elliott Payne, engaged in conduct prohibited by *The Rules of the Tennessee Department of Personnel* and applicable Departmental Rules, Regulations and Policies.

IT IS FURTHER DETERMINED AND ORDERED that the Grievant's dismissal from State employment, imposed as a disciplinary sanction, is appropriate, and was warranted by the facts presented at her hearing, and in consideration of her prior disciplinary record.

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

This Order is Entered and effective this 19th day of July, 2010.

J. Randall LaFevor, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 19th day of July, 2010.



Thomas G. Stovall, Director
Administrative Procedures Division