



10-20-2010

TENNESSEE DEPARTMENT OF
CHILDREN'S SERVICES, Department/,
Petitioner, vs. KELVIN STARKS, Grievant/,
Respondent

Follow this and additional works at: http://trace.tennessee.edu/utk_lawopinions

 Part of the [Administrative Law Commons](#)

This Initial Order by the Administrative Judges of the Administrative Procedures Division, Tennessee Department of State, is a public document made available by the College of Law Library, and the Tennessee Department of State, Administrative Procedures Division. For more information about this public document, please contact administrative.procedures@tn.gov

BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

TENNESSEE DEPARTMENT]	
OF CHILDREN’S SERVICES,]	
<i>Department/Petitioner,</i>]	
vs.]	DOCKET # 26.43-103583J
]	
KELVIN STARKS,]	
<i>Grievant/Respondent.</i>]	

INITIAL ORDER

This contested administrative case was heard at the Wilder Youth Development Center in Somerville, Tennessee on June 23, 2010 and October 20, 2010 and in Nashville, Tennessee on March 14, 2010, before Margaret R. Robertson, Administrative Judge, assigned by the Secretary of State and sitting for the Tennessee Civil Service Commission. Ms. Dana Schmidt, Assistant General Counsel for the Tennessee Department of Children’s Services (“Department”), represented the State on June 23 and October 20, 2010, and Ms. Kristi Faulkner, also Assistant General Counsel for the Department, substituted for Ms. Schmidt thereafter. The Grievant was represented throughout the matter by his legal counsel, Mr. Roger Stanfield, Esq., of the Madison County bar. Upon the conclusion of the hearing, the matter was taken under advisement. Final post-hearing orders and documents were received by the Administrative Procedures Division by May 17, 2011, the record was closed, and the matter was declared ready for consideration, making the Initial Order due by August 15, 2011.

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 Children’s Services for engaging in certain prohibited conduct, including *(1) Violation of TDCS Workplace Harassment Policy #4.20 and Tennessee department of Human Resources Rule 1120-10-.06(1) Inefficiency or incompetence in performance of duties; (8) Gross misconduct or conduct 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 agency, institution, department or any other segment of the State service, or that would interfere with the ability of management to manage and (24) For the good of the service as outlined in T.C.A. 8-30-326.* 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. The Grievant was employed by the State of Tennessee, Department of Children's Services, from September, 2000 until his termination in May, 2009. He began employment as a Children's Services Officer, at the Wilder Youth Development Center ("WYDC") in Somerville, Tennessee. In 2004, he was promoted to Corporal and in 2006 he received a promotion to Lieutenant, skipping the rank of Sergeant. In that position, he had responsibility for all lower officers working the first shift. Later he was promoted to Administrative Lieutenant, working under Captain Howell. He was Administrative Lieutenant to Captain Howell at the time Ms. Jean Reyes was hired to work at WYDC. Lt. Starks is a tall, heavily built man whose physical presence itself could readily be perceived as intimidating.

2. The Wilder Youth Development Center is a secure institution operated by the Tennessee Department of Children's services to house and school juvenile delinquents in state custody who, either because they are at risk from violence or because they pose risks to others, need to be in secure custody. The facility maintains dormitories and a separate isolation and control unit to house the students as needed. Children's Services Officers (CSOs) provide direct supervision, instruction, guidance and protection of the residents.

3. CSOs operate on three shifts. According to the chain of command, a CSO is supervised by a corporal, who in turn is supervised by a sergeant. A lieutenant is the supervisor of each of the three shifts. He makes out the schedule for the staff, conducts briefings, interprets policy and procedure and monitors for compliance by the staff. The lieutenant is also responsible for the JPP, the Job Performance Plan for each employee on his shift, the interim and annual evaluations, and staff accountability in their management of the students. The shift lieutenants are supervised by the Administrative Lieutenant, who reports to the Captain, who reports to the head of the institution.

4. Lt. Starks received training more than once in diversity issues and avoidance of sexual harassment. In the course of his employment at Wilder as a supervisor, he was the subject

of four separate complaints in which he was accused of sexual harassment. The fourth complaint is the subject of this hearing. The first two complaints were investigated by Internal Affairs, which rendered a conclusion that the investigation did not sustain the allegations. The third complaint was apparently otherwise resolved, although the details were not presented at hearing. Regardless of whether there was merit to any of the prior complaints, it is clear that Lt. Starks was aware that he was periodically perceived as engaging in sexual harassment of his subordinates and that he should make a significant effort to take steps to avoid creating that impression.

5. Lt. Stark admitted to having two intimate relationships with subordinates which he testified began when he and they were co-workers and continued after the promotions which made him their supervisor at some level. One relationship was with CSO McKinney, which continued to the present. Lt. Starks was also apparently married during some or all of this period of time. He did not consider these relationships with co-workers problematical as an employment issue, even after his promotions, because he regarded them as consensual and did not think they in any way interfered with the operation of the institution. He considered them private and no one else's business. If anyone at Wilder suspected these relationships, he doubted they had proof, although his relationship with CSO McKinney was sufficiently public that he facilitated the sale of Ms. Jean Reyes' truck to CSO McKinney and granted Ms. Reyes permission to leave her post early to go to make CSO McKinney's car payment on a different vehicle on her way home.

6. Jean Reyes was hired as a CSO at Wilder on December 3, 2007. Ms. Reyes had previously been employed as a foster parent through the Department of Children's Services. She testified that she had just begun fostering an infant at the time of the application to Wilder, but notified Wilder officials that she would relinquish the infant in favor of employment at Wilder if that was necessary. Ms. Reyes lived in Martin, Tennessee, 110 miles from the location of Wilder in Somerville.

7. Ms. Reyes had periodic contact with Lt. Starks from the outset of her employment at Wilder and began a diary some time prior to January 12, 2008 to record what she perceived as inappropriate behavior on the part of Lt. Starks toward her. She testified to the entries, read some aloud during her testimony and submitted the diary as an exhibit. She recorded on a date prior to January 12, 2008, that Lt. Starks had asked her whether his looking at

her body made her uncomfortable and whether her lips were as soft as they looked. According to her entry, each time she looked in his direction, he would lick his lips and blow kisses. She records that she became so uncomfortable that he observed her hands tremble and allowed her to go home early because she seemed so nervous.

8. On January 12, 2008, Ms. Reyes recorded, and later testified, that Lt. Starks called her cell phone to say that he was worried about her; his wife had stepped out of the house; so he was calling her to check on her because she had not looked so good when she left. She replayed the recorded call from her cell phone at the hearing.

9. Ms. Reyes recorded on February 29, 2008 that Lt. Starks had called her into his office to ask if he could kiss her lips to see if they were as soft as they looked. She wrote that she told him she was a child of God and asked permission to return to her post if he was finished talking to her.

10. Ms Reyes recorded that on March 2, 2008 Lt. Starks called her cell phone while she was en route to the Correction Training Academy in Tullahoma and left a message for her to the effect that he expected a call from her after her arrival to let him know her room number. On March 3, 2008, he called her cell phone again several times, but she ignored the calls. She wrote that in the last call he left a message saying thanks for letting him know about her arrival in Tullahoma. She construed the message as sarcastic because she had not returned any of his calls.

11. Shortly thereafter, Ms. Reyes wrote, Lt. Stark called her hotel room in Tullahoma. When she answered, she reported that he said "So I have to hunt you down. I had to call the front desk to find out your room. Why are you avoiding me? Why are you being mean?" Ms. Reyes' testimony and the copy of the journal vary in some details on this call. In her testimony she stated that he asked who the woman was who was in the room with her. She denied the presence of another party to him, but testified that a fellow female student at the academy was actually present. In the written account, she asked Lt. Stark when she would receive the letter which assigns her post after graduation from the academy and sets out her schedule with days off. She wrote that he warned her he could change the contents of the letter if she was not sweet while they were in Tullahoma, and that she would receive the letter when they returned. She said she hung up the phone and cried. She wrote that she stayed awake all night, fearing he would come to her door.

12. Lt. Starks acknowledged that he made calls to Ms. Reyes during this time, but portrayed them as legitimate concern for her well-being. His testimony that after she expressed distress to him that he had not provided the documentation of her posting, he got someone to fax it to him and placed it under her windshield is not only unprofessional but tends to corroborate her testimony. At best, his testimony reveals him as oblivious to the impressions he conveyed.

13. Ms. Reyes recorded that the next morning, March 4, 2008, she contacted Captain Howell and told him what Lt. Starks had said to her about the letter. She said she told Capt. Howell that she thought she would have to quit because of Lt. Starks. According to her journal, Capt. Howell told her to unpack and complete her training so that she could graduate. He committed to speak to Lt. Starks about the matter and assured her there would be no retaliation.

14. She recorded that later on March 4, 2008, she saw a letter held under the windshield wiper of her truck. She went down to retrieve it and discovered it was the letter containing her post assignment that Lt. Starks had told her was in Somerville and would not be given to her until they returned.

15. She recorded that on March 12, 2008, when both had returned to work from Tullahoma, Lt. Starks called her cell phone. She answered "by mistake" and heard him tell her that he was sorry for things in Tullahoma, and warned her that he had seen her approached by a female employee of Wilder whom she should not believe. She told him the other employee was interested in her vehicle and did not mention him.

15. She recorded that on March 20, 2008, Lt. Starks informed Corporal Jenkins that Ms. Reyes was not aggressive enough with the students, and that Corporal Jenkins came to her to report that Lt. Starks said she was too shy for the job.

16. She recorded that on March 21, 2008, Lt. Starks came to Dorm 6, where he had posted her that morning, and told the students they had his permission to rap. She had already told them not to rap, because rapping sessions could get out of hand. She recorded that when they began to rap, Lt. Starks left the building. Then the students began to curse and bang on furniture and would not stop when she directed them to stop. She felt he deliberately created an incident in which he could say that she was not aggressive enough for the job.

17. She recorded on March 22, 2008, that, when she reported for work, Lt. Starks was doing the morning briefing. She was upset because she had understood from Capt. Howell that Lt. Starks was no longer her supervisor. She then went to Superintendent Bayless and reported

all her concerns about her treatment from Lt. Starks. Supt. Bayless generated a memo to Steve Hovies and Keith Waldron dated March 21, 2008 at 4:30 pm which summarized Ms. Reyes' allegations that Lt. Starks had encouraged students to rap to give her trouble, that he had sexually harassed her during the Tullahoma trip by his phone calls to her and by locating her room number, and that he had done other inappropriate things since she began work at Wilder. She reported to Supt. Bayless that she had saved two of his messages on her telephone. His e-mail stated he had instructed her to write a statement of her complaint and to avoid discussion of the matter at the post. He also wrote that he had contacted Lt. Starks and instructed him that other than roll call, he (Starks) was not to have contact with Ms. Reyes, go on her dorm nor discuss this assignment with anyone until further notice. He recorded that Lt. Starks said to him that he understood his instructions and said that he would follow them. Supt. Bayless asked Mr. Waldron to have his office investigate the complaint.

18. On March 22, 2008, Lt. Starks led a security detail to investigate the absence of a weight pin for weight-lifting equipment which appeared to have been taken from the gym. Ms Reyes had been assigned that morning to dorm 6 by Lt. Starks, and had been one of two CSOs and the coach monitoring the students. CSO Remus Williams was the other CSO.

19. CSO Remus Williams was watching some of the students playing basketball on the playing court, while other students were in the weight room with the coach. According to CSO Williams, there are two landings from which officers can monitor the students while they are in the gym area. He was stationed on one of the landings where he could observe the basketball court. He directed CSO Reyes to stand on the other landing, which looked into the weight room, where the remainder of students were with the coach. CSO Williams testified that CSO Reyes, who was frequently assigned to work with him, stayed very close to him and did not go to the other landing. His assessment of her in testimony was that she was reticent with the students and did not catch on quickly to job requirements. He testified that he verbally mentioned concerns about her progress several times to his immediate supervisor and to Lt. Starks, but does not recall when he made these comments or whether they were written down by the person to whom he reported them. He does not recall seeing any students put at risk or harmed by CSO Reyes.

20. At some point the coach stepped away from the weight room to go into his office, and then returned. When the students had returned to the dorm, it was discovered that one of the

metal pins that controls the number of weights activated on the equipment was missing. There was concern that the device could possibly be used as a weapon. Lt. Starks was advised of the situation and led a party to investigate. The officers were successful in their search of the dorm to find the missing pin hidden in the floor of a student's room in a recess under the carpet. The possible significance of this incident to the matter at hand was two-fold. Ms. Reyes construed it in light of her concern that Lt. Starks was engaged in a campaign, after the Tullahoma incident and the filing of the complaint, to make her appear incompetent. In his testimony, Lt. Starks took offense to the suggestion that Supt. Bayless's memorandum dated the day before the weight pin incident, in which the superintendent recorded that he had already had a conversation with Lt. Starks directing him to avoid contact with Ms. Reyes, was already known to him at the time of the weight pin incident, and in any case argued that it would not apply in these circumstances because, as second in command regarding security, his need to oversee the search was more important than Ms. Reyes' feelings in this incident.

18. Lt. Starks' testimony overall differed in interpretation and in detail from that of Ms. Reyes, but confirmed that repeated direct contacts between them, in person and by telephone, did occur over the course of her employment. Lt. Starks denied that inappropriate contact occurred, but acknowledged that he was alone with Ms. Reyes on more than one occasion, which he described as at her request. On one occasion, he said she wished to speak to him confidentially concerning learning that she was under investigation for child abuse of a previous foster child. As someone else was in his office when she came to him, he led her into a more private room and shut the door. He explained their physical contact at that meeting by saying that he patted her on the shoulder and she leaned against him while in distress. He denied kissing her forcibly or otherwise at any time. He did not deny calling her while she was at training school in Tullahoma but portrayed the reasons for the calls as concern for her. When she expressed distress to him at not receiving the letter containing her post assignment upon graduation, which he had told her was still in Nashville, he arranged for someone to fax it to him in Tullahoma and placed it on the windshield of her vehicle. He disputed the existence of all telephone calls Ms. Reyes did not play from her phone at the hearing. Ms. Reyes stated that she had changed phones during the course of events, and some of the calls had been saved to the now discontinued phone. He considered the calls she did replay to be innocuous at best, including his reference to taking the opportunity when his wife was not present to call her.

25. Ms. Yolanda Jackson performed the investigation of Ms. Reyes' complaint concerning sexual harassment and creation of a hostile environment by Lt. Starks.¹ After interviewing witnesses, including Lt. Starks and Ms. Reyes, she prepared a nine page investigative memorandum reporting her findings and conclusions.

26. Ms. Jackson had two uncomfortable and inappropriate experiences with Lt. Starks herself while conducting the investigation. In the first instance, she was interviewing someone in a closed office when Lt. Starks attempted to open the door despite her verbal protestations. Lt. Starks later testified he was unaware that she was in the closed office conducting an interview about the complaint against him when he attempted to enter, and that the office in question was his own, to which he had a key. When Ms. Jackson continued to protest his presence at the interview, he went away.

27. The second inappropriate interaction is less easily explained. On her first visit to Wilder in regard to this investigation, Ms. Jackson had interviewed Lt. Starks regarding this complaint. On her second visit to Wilder to interview witnesses about this complaint, when she saw him at the facility, she let him know that she did not need to speak with him again. She thought it possible that he had come in although not scheduled for duty because he may have understood that she might need to speak to him again. When she and a co-worker departed Wilder after that visit, a car followed her down the road leading to the interstate, flashing its lights at her. She did not know who was following her and signaling her, but it made her very uncomfortable. She drove to a public gas station as a safety measure before pulling over. Lt. Starks pulled up beside her and got out. He told her he wanted to talk to her, but he did not reference the investigation directly. Instead, he suggested they go to lunch together. She declined. It was her impression that he was slow to grasp that she was refusing to go to lunch with him. She had lunched with him in a group on an earlier occasion when she was at the

¹ She had interviewed him concerning two prior complaints and had administered the diversity and sexual harassment training he attended. From her experience with him, in training, she knew that the policy and its implications had been explained to him and he had not indicated any confusion about the meaning of the policy.

facility in her role as trainer, but recognized it was very inappropriate to fraternize with him when she was in the process of conducting an investigation of which he was the subject. She attempted to explain this to him.

28. CSO Reyes was subsequently terminated from her employment at Wilder, effective May 16, 2008. The record is ambiguous regarding the factual basis on which she was terminated. The Notice of Termination, dated May 16, 2008, states that the action is being taken because she had been unsuccessful in completing her initial probationary period. When one is terminated within the probationary period, one has no appeal or grievance rights regarding the termination action. The termination notice also states she is eligible for rehire.²

29. Prior to issuance of the Notice of Termination, on or around May 7, 2008, Ms. Reyes was given two written records of oral warnings concerning matters that occurred reputedly on March 20 and March 22, 2008. Both memoranda indicated that they issued directly from Lt. Starks, who was not Ms. Reyes' immediate supervisor. Intermediate level supervisors were not noted on the two documents. Neither memorandum contained an actual date of issuance under Lt. Starks' name although there is a specific line for the date of issuance.

30. One oral warning pertained to lateness for roll call. It cited only lateness on March 20 and 22, 2008, although it referenced that she had been counseled in the past about attendance and punctuality. Corporal Jonas Jenkins testified that he served as corporal over the school at Wilder during Ms. Reyes' employment there. He testified that he had observed her to be late frequently, which he attributed to the distance she had to travel from home to work. He did not attach great significance to her tardiness in his testimony. His name appeared nowhere on the memorandum. No other evidence was presented, and there was testimony that no documentary evidence existed that would prove that she was frequently late. No oral or written warnings were issued in regard to tardiness until after Ms. Reyes filed her complaint against Lt. Starks, and just before the expiration of her probationary period, upon the completion of which she would first obtain a property right in her employment there and the right to contest adverse disciplinary decisions.

² This court does not have jurisdiction over the matter of Ms. Reyes' termination. That action is relevant only so far as events associated with it may have relevance to the nature of Lt. Starks' actions toward her in the context of her harassment complaint against him.

31. The second oral warning concerned the exercise pin incident on March 22, 2008. It alleged that Ms. Reyes and her co-worker, Rufus Williams, were “engaging in idle conversation while sitting together on the landing along with the coach. After you all left the gym, it was reported to the coach . . . that 1 of the pens (*sic*) from the weight room was missing. . . . You and your coworker could not adequately supervise students sitting together in this location, while they were occupying the weight room and the gym floor, especially while you were engaged in this idol (*sic*) conversation.” No evidence was presented as to whether the coworker also received discipline for the same incident. Ms. Reyes’ impression of both oral warnings was that they were initiated in retaliation for her complaint. She also believed that her reassignment from her prior post in the control center to managing students in Dorm 6, which she identified as a dorm of aggressive students, was a form of intimidation and retaliation. (Certainly if one wishes to utilize the probationary period to train an employee to be successful or to take corrective action if needed, one would not wait until toward the end of the probationary period to identify problem areas and take corrective action. It would be more efficient to do so earlier in the training period if called upon to do so.)

32. Ms. Reyes also received her only documented work evaluation, termed an interim evaluation, near the close of her probationary period. The resulting document indicated that the evaluation conference took place on May 7, 2008 and was signed by Cpl. Jenkins, Capt. Howell and Supt. Bayless on May 15 or 16. Ms. Reyes signed the document but did not record the date of her signature. All categories on the evaluation were marked Marginal or Not Applicable except attendance and punctuality, which was marked Not Acceptable. The overall evaluation was rated Marginal. On every rating item, the box “Employee Disagrees” was checked, even though many items within a category, and a number of entire categories, were rated as “Does Not Apply.”

33. Cpl. Jenkins testified it was he who performed the interim evaluation with Ms. Reyes at the direction of Sgt. Moore. He believed supervisory responsibility for Ms. Reyes had been shifted to him within the prior 30 days. DCS policy calls for an interim job performance plan review within 30 days after a change of supervisor. When he performed the interim review, the rating numbers for each item were not circled, but he testified he discussed performance concerns with her. He agreed the interim review was not an actual evaluation. He also did not look to see if she had had any oral warnings or other discipline before the date of the interim

evaluation. He did not participate in the decision that was made to terminate the employment of Ms. Reyes. He said that, based upon his observation of her performance, he would have given her additional opportunity to improve before taking that action.

34. Supt. Bayless received a letter dated May 14, 2008 from the Department of Children's Services' Office of Child Safety, pursuant to DCS Rule 0250-7-9-.07, notifying him that Ms. Reyes had been identified as an alleged perpetrator of child abuse in an indicated report that DCS investigated. Related DCS rules require that when an individual is indicated as a potential threat to the safety of children in DCS custody, the organizations with which the indicated individual is associated must ensure the safety of children in its care. CSO Reyes was still within her probationary period in her position at Wilder at that time, which would have expired on June 2, 2008. The Notice of Termination was issued on May 16, 2008.

35. On January 29, 2009, Ms. Jackson filed her Memorandum detailing the results and conclusions of her investigation of Ms. Reyes' charges of sexual harassment and creation of a hostile work environment against Lt. Starks. The report concluded that Lt. Starks made at a minimum at least one call to the complainant with sexual innuendos, had some interaction with the complainant at the Academy that upset her, left the post assignment on her windshield, asked complainant about a conversation between she had with a female coworker regarding the sexual harassment charge, and had engaged in some inappropriate touching. The report concluded that these actions were inappropriate. Based upon the testimony and evidence she received, Ms. Jackson concluded that the complained of behavior did occur, was severe and pervasive in nature and had the effect of creating an intimidating, hostile or offensive work environment for the complainant.

36. Lt. Starks received a due process hearing on April 22, 2009. After the hearing, Supt. Bruce Bayless concluded that Lt. Starks subjected his subordinate employee, Jean Reyes, to sexual harassment and caused a hostile environment for her. He noted this was the fourth investigation of complaints of sexual harassment by Lt. Starks of his subordinate staff since his employment at Wilder. Supt. Bayless concluded that Lt. Starks' actions had severely damaged the integrity of his position as a DCS lieutenant at Wilder. He recommended termination effective May 11, 2009. Lt. Starks appealed this decision, which resulted in the present Level V hearing.

37. Ms. Reyes also filed a similar complaint with the U. S. Equal Employment Opportunity Commission (EEOC), which rendered a Determination Letter dated March 11, 2001, in which it was determined there was reasonable cause to believe the charge is true.

CONCLUSIONS OF LAW & ANALYSIS

1. The Tennessee 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 specified Departmental Policies and Procedures, and that separation from state employment is the appropriate disciplinary response to his conduct. The Level V hearing is conducted de novo. The Department must meet its burden from evidence admitted at the Level V hearing.

2. The Department asserted that the Grievant's actions with regard to Ms. Reyes, a CSO subordinate to him, during the less than six months of her employment with Wilder, violated various Departmental Policies and Procedures. The Department generated those Policies and Procedures to define acceptable institutional security and personnel practices, and distributed them to its security personnel 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 identified provisions in the Department's rules policies and procedures.

3. The Department proposed termination as the appropriate discipline in this matter based upon charges that the Grievant engaged in certain prohibited conduct which violated

provisions of Department policies and state Department of Human Resources regulations, including *TDCS Workplace Harassment Policy #4.20*; *Tennessee Department of Human Resources Rule 1120-10-.06(1) and (2) Inefficiency or incompetence in performance of duties; (10) Gross misconduct or (11) Conduct unbecoming an employee in the state service; (15) Participation in any action that would in any way seriously disrupt or disturb the normal operation of the agency, institution, department or any other segment of the State service, or that would interfere with the ability of management to manage and (27) For the good of the service as outlined in T.C.A. 8-30-326.*³

4. First, the Department alleged that the Grievant engaged in a violation of *TDCS Workplace Harassment Policy #4.20*, which prohibits the harassment of any employee based upon any of a number of factors, including sex. The fact that the alleged offender meant no harm or was teasing will not excuse conduct that violates the policy by its employees. The policy also prohibits any form of retaliation directed against an employee who complains about harassment or participates in an investigation of harassment. The corrective action for anyone who engages in conduct prohibited under this policy includes, but is not limited to, mandatory participation in counseling, training, and disciplinary action up to and including termination and/or changes in job duties or location.

5. In the instant case, it was established by credible testimony of Ms. Reyes and to some extent, of the Grievant, as well as the recordings of Grievant's calls to her, that Grievant, her supervisor in the chain of command three levels above her, showed an inordinate and unwelcome interest in her, made suggestive and overt sexual advances toward her, and after she filed a sexual harassment complaint against him, suddenly initiated negative evaluations and disciplinary action against her, in some cases newly producing disciplinary memoranda for actions reputedly having occurred a month earlier and not previously discussed as disciplinary actions with her. Grievant's denial of any inappropriate intent, and his argument that the record lacks corroboration of the events Ms. Reyes testified happened when they were alone on the telephone do not negate the weight of Ms. Reyes' testimony, his own admissions of events that occurred which concur in part with her testimony, and relevant testimony of other witnesses, including that of Ms. Jackson with respect to her own experience with him. The sudden negative

³ The numeration of these charges differs from that contained in the pleadings because the contents of **Rule 1120-10-.05 Examples of Disciplinary Offenses** were renumbered in the May, 2011 revision of the Rule. Otherwise they are the same.

evaluations and disciplinary actions, occurring just after the sexual harassment complaint and just before the end of her six month probationary period are more likely than not to be retaliatory actions. If such feedback was intended to improve her performance before the end of her probationary period, it would have been instituted earlier in her tenure. The repeatedly unwelcome and inappropriate personal attentions and abrupt change in evaluation and discipline after the complaint was filed are direct violations of the Department's Policy, and warrant "appropriate corrective action." That certain events occurred is clear from the degree of congruence of the testimony of the Grievant and Ms. Reyes although their respective testimony differed in factual details and interpretation. There is no doubt that the Grievant projected the significance of those events in a different light from Ms. Reyes, and possibly sincerely believes his own interpretation. However, Grievant has been investigated three times previously for sexual harassment and causing a hostile workplace, and has been given training on these subjects more than once. As a supervisor in such high command, it was incumbent on him even more than on more subordinate officers to conduct himself in a way that would not give rise to such allegations, even if he did not intend the adverse effect. Some evidence, such as the recorded telephone calls, is clearly suggestive or inappropriate. The preponderance of evidence is that his behavior in this matter did cross lines and became sexual harassment, and that he has been unable, despite previous sexual harassment complaints and training, to recognize the inappropriateness of his behavior and to correct it or refrain from it. In addition, Grievant's very demeanor is sufficiently forceful and assertive that a reticent person, such as Ms. Reyes is portrayed in the evidence and appeared to be in the hearing, would feel pressured by his persistent attentions because they were personal. The interest he took in her and the attentions he paid, by his own testimony, were personal rather than employment-related until after she filed the complaint. Given their limited acquaintance, his direct attentions appear inappropriately personal between a supervisor at his level and a CSO. Also, the testimony of Ms. Jackson regarding her own experience with Lt. Starks corroborates the social aggressiveness and lack of appropriateness of his behavior with regard to social boundaries which a reasonable person might fairly interpret as suggestive or hostile. The Department has met its burden to show that Grievant violated the *TDCS Workplace Harassment Policy #4.20*.

6. Second, the Department alleged that the Grievant violated *Tennessee Department of Human Resources Rule 1120-10-.06(1) Inefficiency and/or (2) Incompetence in performance*

of duties. The Department argued that Grievant's alleged threat to change Ms. Reyes' work assignment if she was not "sweet" or because she filed an EEOC claim proved he was inefficient or incompetent in the performance of his duties. While this behavior supports a claim that he behaved in a retaliatory manner, it strains to fit the plain meaning of inefficiency or incompetency in performance. Therefore these charges are not sustained.

7. Third, the Department met its burden to show that the Grievant's conduct constituted a violation of *Rule 1120-10-.06 (10) Gross misconduct and (11) Conduct unbecoming an employee in the state service.* Grievant's admissions and Ms. Reyes' testimony regarding instances of sexual harassment and retaliation support a conclusion that Grievant violated these provisions.

8. Fourth, the Department met its burden to show that Grievant violated (27) *Participation in any action that would in any way seriously disrupt or disturb the normal operation of the agency, institution, department or any other segment of the State service, or that would interfere with the ability of management to manage.* Grievant's unwelcome personal attention to Ms. Reyes, and his direct involvement in the direction of an employee presumably appropriately supervised by two other people at different levels below him in the chain of command disrupted the normal operation of the facility. The effect of his attentions on Ms. Reyes disrupted her ability to do her best on the job. To the extent that she was too reticent or otherwise was not meeting expectations, the failure to use the appropriate channels to identify and provide a program of improvement for her deficits also impaired the functioning of the facility. Furthermore, Grievant's awareness that his personal relationships with two other CSOs and the other investigations of him for sexual harassment were known in the institution and his intentional disregard for the likelihood that such knowledge or belief could adversely affect his authority and ability to supervise and should be addressed or prevented from occurring is a violation of this provision. Grievant reasserted in the hearing the statement attributed to him by other witnesses, that he intended to be himself regardless.

9. 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 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).

10. The Grievant had been employed by the State for about nine years at the time of the events in this matter, and had received positive evaluations and rapid promotions, which speak well of his administrative abilities success with students in these positions of responsibility. However, the Grievant had been the subject of no less than three sexual harassment complaints before the complaint generated by the events of this matter. In spite of the fact that Department investigations failed to sustain two of the complaints and the third complaint was retired in some undisclosed manner, the Grievant was clearly on notice that his pattern of behavior was susceptible to being interpreted and portrayed as sexual harassment before the investigation of the fourth complaint substantiated the allegations against him. He had received training in how to avoid harassing behavior, but defiantly insisted upon “being himself” instead. As a supervisor, and as an individual with an imposing physical presence, he bore the responsibility to ensure that his actions and communications with subordinates were free of bias and harassment. His actions in this matter which preceded the complaint demonstrated that he had not learned to behave correctly toward subordinate women employees. His actions after the complaint was filed in this matter are retaliatory.

11. When the Commissioner considered the issue of discipline 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 the second in command in security at the institution, 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 residential students whose safety and control he supervises on a daily basis. Sexual harassment and retaliation for reporting harassment are serious violations of policy and rule. Wilder is a secure juvenile delinquent treatment and rehabilitation program. Security at such an institution is a serious matter. Such actions by a Security 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)

12. 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 of Children’s Services’ (or the Department of Human Resources’) Rules, 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 Children's Services has met its burden of proof, and has established by a preponderance of the evidence that the Grievant, Kelvin Starks, 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 in this matter, 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 15th day of August, 2011.

Margaret R. Robertson
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 15th day of August, 2011.



Thomas G. Stovall, Director
Administrative Procedures Division