



5-10-2011

TENNESSEE DEPARTMENT OF MENTAL
HEALTH & DEVELOPMENTAL
DISABILITIES, Department/Petitioner, vs.
EUNICE AKPOYOVWARE, Grievant/
Respondent.

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

IN THE MATTER OF:]	
]	
TENNESSEE DEPARTMENT OF]	
MENTAL HEALTH &]	
DEVELOPMENTAL DISABILITIES,]	
<i>Department/Petitioner,</i>]	
vs.]	DOCKET # 26.15-108635J
]	
EUNICE AKPOYOVWARE,]	
<i>Grievant/Respondent.</i>]	

INITIAL ORDER

This contested administrative case was heard in Nashville, Tennessee, on May 10, 2011, before J. Randall LaFevor, Administrative Judge, assigned by the Secretary of State and sitting for the Civil Service Commission. Mr. Richard R. Prybilla, Assistant General Counsel for the Tennessee Department of Mental Health, represented the State. The Respondent was represented by her legal counsel, Mr. John Ben Iwu. Upon conclusion of the hearing, the matter was taken under advisement, and the parties were instructed to submit Proposed Orders according to a designated schedule. The last of those documents was filed on July 29, 2011, and the matter was declared ready for determination.

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 Tennessee Department of Mental Health and Developmental Disabilities (“DMHDD” or “the Department”). That sanction resulted from the Commissioner’s determination that the Grievant had engaged in conduct that was unacceptable for the Department’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 Middle Tennessee Mental Health Institute (“MTMHI”) in Nashville, Tennessee is a facility operated by the Tennessee Department of Mental Health and Developmental Disabilities, serving a population of disabled citizens. Due to their conditions, those individuals are particularly vulnerable, and require close continuous supervision and assistance.

2. Eunice Akpoyovware (“Grievant” or “Respondent”) was employed as a Psychiatric Technician (“PT”), a direct caregiver to the population served by MTMHI, beginning in March 2005. In February 2010, she was assigned to work in Unit “A” on the night shift, generally from 11:00 PM to 7:00 AM. Her duties included sitting at a desk, monitoring the patients’ activities, and providing service to them as needed, or as instructed by the Charge Nurse and Nursing Supervisor.

3. On February 24, 2010, the Unit “A” Charge Nurse and Nursing Supervisor were making their rounds in the Unit when they saw the Grievant sitting at her desk wearing a hat. Since MTMHI Regulations¹ prohibit the wearing of hats while on duty, they stopped at the Grievant’s desk, and the Nursing Supervisor began to tell the Grievant that her attire was inappropriate, and that she would have to remove her hat. Before she could counsel the Grievant about her infraction, the Grievant cut her off, saying, “I’m cold!” She folded her arms across her chest, and stared ahead, refusing to make eye-contact with her supervisor. Each time her supervisor tried to engage the Grievant in counseling, the Grievant cut her off, repeating, “I’m cold!” The Grievant became progressively more agitated, abrupt and belligerent. After several unsuccessful attempts to counsel the Grievant, her supervisor left the area, and went back to her office to write up the incident.

4. Prior to the February 24, 2010 incident, the Grievant received other disciplinary sanctions, based on the same kind of argumentative and disrespectful interaction with her

¹ See MTMHI Policy & Procedures 0613.01.

supervisors:

(a) In June, 2008, the Grievant received a Written Warning for “Failure to Maintain Satisfactory and Harmonious Working Relationships,” and “Conduct Unbecoming and Employee in State Service.” following a verbal altercation with her supervisor related to her work assignment. That Warning placed her on notice that future infractions of a similar nature could result in a suspension or dismissal.

(b) In January, 2009, the Grievant received a three-day suspension after another verbal altercation and refusing to accept direction from her supervisor, in violation of regulations governing “Failure to Maintain Satisfactory and Harmonious Working Relationships” and “Conduct Unbecoming and Employee in State Service.” Again, she was advised that another similar infraction could result in termination of her employment.

5. As a result of the February 24, 2010 incident, and in light of her previous incidents of misconduct of an identical nature, the Grievant’s supervisor testified that she believed the Grievant had no intention of accepting supervision from her. The Grievant had failed to respond to previous attempts to correct her inappropriate interactions with her supervisors, and, if not addressed now, her poor attitude and refusal to accept supervision could impact the supervisor’s ability to do her job, and to supervise other employees, and could potentially result in harm to individuals served by MTMHI in the future.

6. Following a hearing convened by the Commissioner, the Grievant’s employment with the Department was terminated effective April 10, 2010. The Grievant appealed the Commissioner’s decision, and this hearing was scheduled to consider her appeal.

CONCLUSIONS OF LAW & ANALYSIS

1. The Tennessee Department of Mental Health and Developmental Disabilities 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 Department of Mental Health and Developmental Disabilities 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; or 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.

* * *

(4) Failure to maintain satisfactory and harmonious relationships with . . . fellow employees.

* * *

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

* * *

3. In the instant case, the Department proved that the Grievant violated its standards of conduct for Psychiatric Technicians when she refused to accept legitimate corrective supervision by her assigned supervisor. By belligerently arguing with her supervisor, cutting her off as she attempted to provide corrective supervision, and refusing to allow her to offer reasonable direction, the Grievant clearly failed “to maintain satisfactory and harmonious relationships with . . . fellow employees,” her supervisor in particular. The described abusive behavior directed toward her supervisor also qualifies as “Conduct unbecoming an employee in the service of the State.” [Although not specifically charged by the Department, it should be noted that, as further

provided by the Department'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 February 24, 2010, and her previous incidents of similar misconduct in the preceding years, caused the Grievant's superiors to lose confidence in her competence as a Psychiatric Technician, and to question her fitness for the job. That concern was validated by the record.

4. Previous disciplinary sanctions for the same kind of activity made it clear that continued infractions would not be tolerated by the Department. Documentation of those disciplinary actions included specific language putting the Grievant on notice that failure to correct her inappropriate response to supervision would result in more significant sanctions, up to and including termination of her employment.

5. 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.)

6. Throughout the years prior to the February 24, 2010 incident, the Grievant failed to respond to the Department's attempts to correct her behavior through progressive discipline. When the Department's Commissioner considered the issue of punishment in this final incident,

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 [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 Psychiatric Technician, a caretaker of significantly challenged citizens of this State, a position that requires adherence to a high standard of conduct and behavior. Her behavior on February 24, 2010 failed to meet that standard, and jeopardized the ability of the Grievant’s supervisors to address employee misconduct and maintain an orderly workplace. It is also disturbing that, after hearing all of the evidence against her during the hearing, the Grievant still failed to appreciate the inappropriateness of her conduct.

7. The Grievant attempted to minimize her unprofessional conduct with two specific arguments:

(a) First, she said that her conduct should have been excused because she was cold on that evening, and did not feel well. If she was experiencing problems, she could have discussed them calmly with her supervisor, and sought an accommodation if one was warranted. Instead, she chose to become belligerent, and argumentative, as she had in the past when dealing with her supervisors. That kind of response is unacceptable, and can lead to problems with employees throughout the unit, if left unaddressed. The Grievant’s attitude, as exhibited during the February 24 incident, as well as during her hearing, demonstrated a lack of her understanding of the essential nature of the employee/supervisor relationship, and an unwillingness to conform to the Department’s expectations of its employees.

(b) Second, 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 refusal to accept supervision as problems well before the February 24, 2010 incident, and had attempted to address those problems throughout the years by imposing progressively more severe disciplinary sanctions.

“Supervisors have the discretion on how to discipline an employee. . . dismissal is appropriate when a lesser disciplinary action will not end the behavioral problem.” *Sanford v. Tennessee Department of Environment & Conservation*, 992 S.W.2d 410, 414 (Tenn. Ct. App. 1998). 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 Department’s argument in favor of termination of her employment.

8. In summary, 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 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 Department’s Commissioner was appropriate. With respect to both issues, the Department has met its burden of proof.

Accordingly, IT IS HEREBY DETERMINED AND ORDERED that the Department of Mental Health and Developmental Disabilities has met its burden of proof, and has established by a preponderance of the evidence that the Grievant, Eunice Akpoyovware, 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 light of her prior disciplinary record.

AND, IT IS FINALLY 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 August, 2011.

J. Randall LaFevor, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 19th day of August, 2011.

A handwritten signature in black ink that reads "Thomas G. Stovall". The signature is written in a cursive style with a large, looped initial 'T'.

Thomas G. Stovall, Director
Administrative Procedures Division