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3-18-2011

TENNESSEE DEPARTMENT OF
CORRECTION, Petitioner, v. WENDY D.
SMITH, Grievant

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**BEFORE THE TENNESSEE
CIVIL SERVICE COMMISSION**

TENNESSEE DEPARTMENT OF)
CORRECTION,)
Petitioner)
v.)
WENDY D. SMITH,)
Grievant)

Docket No.: 26.05-103800J

INITIAL ORDER

This matter was convened as a contested case hearing in Henning, Tennessee, on March 18, 2011, before Rob Wilson, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Commissioner of the Tennessee Civil Service Commission. The Tennessee Department of Correction (the “State”) was represented by Teresa Scott Thomas, staff attorney. The Grievant, Wendy Smith, was present and was represented by attorney Jonathan Stephens.

The subject of this hearing was Wendy Smith’s demotion from the position of Correctional Lieutenant to the position of Correctional Corporal and subsequently Correctional Officer for violations of Department of Correction and Department of Personnel rules and policies.

Upon consideration of the entire record in this case, it is determined that the Grievant’s demotion was not warranted and should be reversed. This determination is based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Ms. Smith is a 16 year employee of the Tennessee Department of Corrections (“DOC”). She began her employment with DOC as a Corrections Officer I followed by Corporal and later Sergeant at the Minimum Security Complex where she supervised over 150 inmates. She had recently been promoted to Lieutenant prior to this disciplinary action.
2. During her employment at this facility Ms. Smith has had performance evaluations that were all fives. Ms. Smith has never been disciplined prior to this incident.

Charge of Violation of Employee/Offender Relationship

3. DOC charged Ms. Smith with violations of DOC policy and the Tennessee Department of Human Services (“DOHR”) policy related to her behavior in which DOC alleged that she had an inappropriate relationship and/or fraternization with Inmate Owens.
4. Ms. Smith stated that she was not overly friendly with Inmate Owens. Rather, she expressed her observation of Inmate Owens as one as similar to other inmates in which “I watch them just as much as they watch me.” Furthermore, she denied that she gave Inmate Owens any privileges that she denied to other inmates.
5. DOC alleged that Ms. Smith allowed Inmate Owens to come in contact with her, and that Inmate Owens massaged Ms. Smith’s shoulders. Ms. Smith denied that Inmate Owens put his hands on her shoulders and started to massage her shoulders. She was

aware of the DOC policy prohibiting such contact by an inmate. Additionally, she stated that if an inmate was to put his hands on her, then she would lock them up.

6. Two witnesses gave conflicting testimony regarding whether or not inmate Owens actually touched Ms. Smith. Both Unit Manager Wright and CCO Joyner saw the same incident but disagree as to whether there was any contact between Ms. Smith and Inmate Owens. Ms. Smith denied that she allowed Inmate Owens to touch her or that Inmate Owens did, in fact, touch her at any time.

Charge that Ms. Smith Arranged an Inmate Visit Inappropriately

7. DOC alleged that Ms. Smith arranged for a visit from Inmate Owens' father following his parole hearing that violated DOC and DOHR policy. Inmate Owens asked Ms. Smith for her advice on how to arrange a visit from his father following his parole hearing. Ms. Smith instructed him to write a letter stating his request. Ms. Smith took the letter to AWO Penny Tucker for her consideration because Inmate Owens addressed the letter to Ms. Tucker. Ms. Smith stated that AWO Tucker did not have any questions for Ms. Smith and approved Inmate Owens' request.

8. Ms. Smith believed that she followed correct procedure in this case because she had previously gotten visits approved by AWO Tucker.

9. Warden Henry Steward testified that he found AWO Tucker's handling of the parole visit request to be "inappropriate." Furthermore, Warden Steward stated that this request was suspect and he would have expected AWO Tucker to telephone or contact AWO Mills to discuss the request. Warden Steward said that AWO Tucker did not

discuss this request with AWO Mills. Warden Steward did not discipline AWO Tucker for her inappropriate actions in handling this request.

Charge that Ms. Smith Did Not Follow the Correct Procedure for Procuring Boots for Inmates King and Owens

10. DOC also alleged that Ms. Smith did not follow the correct policy when she procured boots for Inmate Owens. Ms. Smith testified that she followed the same procedure for procuring boots for two inmates, King and Owens, and various other cleaning items as she has done on previous occasions. She stated that she talked with AWO Mills in his office about each item on her list of materials to order. She told him that two inmates needed boots sized 13EEE because their current boots were worn out.

11. Warden Steward stated that Ms. Smith was not charged with a direct violation of the procurement process for her role in obtaining the boots for Inmate Owens. Rather, the Warden objected to Ms. Smith procuring boots for Inmate Owens because it was only two weeks prior to his parole. However, the Warden did not know when Inmate Owens was released on parole in relation to the date of the procurement request.

Charge that Ms. Smith Did Not Adhere to the Visitation Policy in the Housing Unit

12. DOC alleged that Ms. Smith violated DOC and DOHR policy when she allowed a minor to enter a restricted area during a visitation period. Ms. Smith admitted that she escorted a minor from the housing unit visitation area to the kitchen and obtained two small cartons of milk for him. She stated that the minor was crying in the visitation area and complained that he was hungry. She brought him into the kitchen and sat with him as he drank the milk. Immediately thereafter, she escorted him back to the visitation area.

There were not any inmates or any other individuals in the kitchen at the time she and the minor were in the kitchen. Ms. Smith said that the minor's mother allowed her to escort the minor to the kitchen. In retrospect, Ms. Smith stated that she may not have used the best judgment in the world, but it was her mothering instinct that caused her to act as she did.

13. Correction Officer Robert Fine testified that he was present in the housing unit visitation room at the time of the incident described above. He stated that he witnessed Ms. Smith and the minor leave the visitation area and go into a restricted area. He believed this activity to be a violation by Ms. Smith of DOC policy, and even though he stated that "it haunted me, made me sick," he didn't feel the need to immediately report it to his supervisor. He only reported it to another supervisor one week after the incident when the supervisor asked CO Fine to tell him if anything was wrong. CO Fine admitted that he was not disciplined as a result of observing the apparent violation of DOC policy and not immediately reporting it to his supervisor. Warden Steward also admitted that CO Fine was not disciplined as a result of this incident.

Conclusions of Law

1. DOC failed to employ the principals of progressive discipline pursuant to T.C.A. 8-30-330, Progressive Discipline, and Rule 1120-10-.06, Progressive Disciplinary Action, of the Tennessee Department of Human Resources. The uncontroverted testimony at the hearing was that Ms. Smith did not have any discipline prior to this incident. When corrective action is necessary, the supervisor must administer disciplinary action beginning at the lowest appropriate step for each area of misconduct.

T.C.A. 8-30-330(a). A demotion consisting of two pay grades from Lieutenant to Sergeant following the Level III by the Warden and then from Sergeant to Corrections Officer by the Commissioner following the Level IV hearing is completely contrary to the principals of progressive discipline.

2. There is not enough evidence to support the allegation of inappropriate contact or touching between Ms. Smith and Inmate Owens. DOC's only evidence on this issue was from two witnesses, Mr. Wright and Ms. Joyner, who were both in the same room at the time of the alleged touching incident and testified regarding any touching between Ms. Smith and Inmate Owens. Mr. Wright said he saw Inmate Owens put his hands on Ms. Smith's shoulders. CCO Joyner said that she never saw them touching. Ms. Smith denied that Inmate Owens ever touched her shoulders.

3. There is not enough evidence to support the allegation that Ms. Smith improperly arranged for a visit for inmate Owens' father following his parole hearing. DOC contends that Ms. Smith took the request to AWO Mills who denied it and she subsequently took the request to AWO Tucker who approved the request. Ms. Smith denied that she initially took the request to AWO Mills. Warden Steward testified that he found that AWO Tucker's handling of the request was inappropriate, but failed to discipline her. Grievant submits that she should not be charged with violating DOC and DOHR policy when AWO Tucker was not disciplined for similar violations. Furthermore, Ms. Smith stated that it was not unusual for her to take special requests to AWO Tucker as she had frequently done so in the past.

4. There is neither a DOC nor DOHR policy prohibiting the manner in which Ms. Smith procured the boots for Inmate Owens. Warden Steward also testified that Ms. Smith did not violate a specific procurement policy by her actions. Furthermore, Ms. Smith did not exhibit favoritism by ordering the boots for Inmate Owens because he had a legitimate reason for needing the boots due to his work assignment as a janitor and the worn out condition of his present boots. Additionally, Inmate Owens was not the only inmate that received replacement boots as Ms. Smith ordered the same boots for Inmate King. This charge should be dismissed for an absence of policy violation and a lack of evidence.

5. Ms. Smith testified that she did not use her best judgment when she escorted the minor to a restricted area during a visitation. For this one-time violation of the DOC rules Ms. Smith should receive a written warning. Relevant testimony established that Ms. Smith has no prior incidents of employee discipline and a written warning is the appropriate discipline for her misconduct.

Based upon the finding that Ms. Smith's demotion is not supported by substantial and material evidence that decision is REVERSED. Ms. Smith is hereby reinstated to the position and salary grade she held prior to her demotion by DOC. She is awarded back pay in the amount of the difference between her actual salary and the salary she would have received had she not been demoted, and reasonable attorney's fees per T.C.A. §8-30-328(e).

This Order entered and effective this 31st day of August, 2011.

Rob Wilson
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 31st day of August, 2011.

A handwritten signature in black ink, reading "Thomas G. Stovall". The signature is written in a cursive style with a large, looping initial "T".

Thomas G. Stovall, Director
Administrative Procedures Division