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Tennessee Board of Probation & Parole, v., Petitioner, DENNIS COLEMAN, Grievant.

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BEFORE THE TENNESSEE
CIVIL SERVICE COMMISSION

IN THE MATTER OF:	)	
	)	
Tennessee Board of Probation	)	
& Parole,	)	
Petitioner,	)	
	)	**Docket No.: 26.41-110812J**
v.	)	**Judge Rob Wilson**
	)	
DENNIS COLEMAN,	)	
Grievant.	)	

INITIAL ORDER

This administrative case was heard on May 23, 2011, in Nashville, Tennessee, before Rob Wilson, Administrative Judge, assigned by the Secretary of State and sitting for the Civil Service Commission for the State of Tennessee. Attorney Amanda Fisher represented the Petitioner, Board of Probation and Parole. Attorney Jonathan Stephens represented the Grievant, Dennis Coleman. This administrative proceeding was convened at Grievant's request and arose from Petitioner's five day suspension without pay of Grievant's employment.

Upon consideration of the technical record, the evidence, the arguments submitted by the parties, and the entire record, it is determined that Petitioner's suspension of Grievant's employment was the appropriate measure based on Grievant's actions. This determination is based on the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Grievant is employed as a Probation Parole Officer 2 (PPO2) with the Board of Probation and Parole (BOPP). Grievant is assigned to a BOPP field office located in Dyersburg, Tennessee. Grievant's supervisor is Probation Parole Manager (PPM) Shirley Bester.

2. On May 2nd, 2010, Grievant administered a drug screen to a juvenile who was not under the supervision of the Board of Probation and Parole. The juvenile is the grandson of the Grievant's neighbor, Martha Hill. The juvenile's birth mother is deceased and the father and stepmother (Susan Johnson) have custody of the juvenile. Just prior to the drug screen, the juvenile ran away from his father's house to Ms. Hill's house. Grievant administered the drug test to the juvenile during non-duty hours.
3. Grievant administered the drug screen to the juvenile on Sunday, May 2, 2010, at about 10:00 p.m. Grievant administered the drug test in Ms. Hill's house and Ms. Hill, the juvenile, and the juvenile's stepfather, were present at the time. Grievant was aware that none of the people present for the drug test were the legal guardians of the juvenile.
4. Ms. Hill provided a plastic cup from her kitchen for the juvenile to use during the drug test. The juvenile then went to the restroom and provided a sample and Grievant stuck the expired 2004 drug stick in the cup and nothing happened. As a Probation Parole Officer, Grievant is aware of the proper steps to take when administering a drug test. The drug testing procedures are in place to ensure the reliability of the test. However, Grievant did not follow proper procedures during the test. Grievant did not observe the juvenile giving the urine sample and he did not ensure that any objects or materials that could have been used to adulterate the sample were removed. Furthermore, neither of the juvenile's legal guardians were present for this test.
5. During his testimony, Grievant frequently characterized the drug test as a "fake drug test" and stated that this test by no measure could have been considered a real drug test. Anytime an expired drug test is used, it will give an invalid result. Despite the fact that the drug test was unreliable and could not properly be used to detect the presence of drugs in the urine,

Grievant told the juvenile, Ms. Hill, and the stepfather that the test was negative. However, Grievant did not inform the juvenile, Ms. Hill, or the stepfather that the drug test was unreliable because the drug test stick was expired. Grievant acknowledged that the reason that nothing showed up on the drug test stick was because the test was dysfunctional and he admitted that he allowed the family to rely on an unreliable drug test when he told them the drug test was negative. Grievant simply stated that he "told the grandmother what she wanted to hear." Grievant stated that after the drug test, the juvenile was not returned to his legal guardians that night and the juvenile was still at Ms. Hill's house when Grievant left. Grievant acknowledged that people under the influence of drugs can be a danger to others and to themselves. By telling the family that the juvenile's drug test was negative, the family relied on this negative drug test and this placed the family and the juvenile in an unsafe position. Grievant admitted that the juvenile could have been under the influence of drugs and the unreliable expired drug test would not have detected it.

6. Grievant could not explain why the family would ask him to do the drug test or why Ms. Hill or the stepfather could not have administered the drug test instead of Grievant. Grievant admitted he could have given the drug screen to Ms. Hill or the stepfather so they could do the test but Grievant chose not to.

7. Grievant stated that the drug test was more of a read on the boy's attitude about the idea of the drug screen than it was an actual screen. However, when asked why he still completed the test after the juvenile took the plastic cup and agreed to give the urine sample, Grievant had no explanation except to say that they had requested it.

8. On the morning of May 7th, 2010, the juvenile's stepmother called the Dyersburg BOPP field office, during work hours, and spoke to PPM Shirley Bester. The caller identified herself as

Susan Johnson and stated that the juvenile was her stepson. Ms. Johnson stated that an officer that lived on Fort Hudson Road had given her stepson (a runaway) a drug test for the juvenile's grandmother, Ms. Hill. Grievant is the only BOPP officer that lives on Fort Hudson Road. According to PPM Bester, Ms. Johnson wanted the officer to call Investigator Choates at the Obion County Sheriff's Department. The stepmother was clearly aware that Grievant is a Probation Parole Officer because she called the BOPP office looking for the officer that lives on Fort Hudson Road.

9. Based upon this phone call, PPM Bester spoke to Grievant and told him to call the Investigator. Grievant stated that he called the Investigator after he was instructed to do so. The Investigator was looking into the runaway status of the juvenile and the juvenile was involved in a family court matter in Obion County.

10. On May 7, 2010, just five days after the drug test, Grievant submitted a two-page typed memorandum to PPM Bester, concerning this incident. In that memorandum, Grievant admitted to giving the drug screen to the juvenile and using a State drug screen. Grievant went into detail about how he came into possession of that drug screen. Grievant reported that he found two old 2004 drug test sticks the day before the drug test while he was cleaning out his truck. He further stated that BOPP discarded the test sticks in Lauderdale County when they expired and he brought them back to Dyersburg for disposal. Grievant stated that two of the test sticks came out of the bag and lodged under the driver's street in his truck. According to Grievant, the drug sticks were subjected to intense summer heat for several years.

11. On August 6, 2010, Petitioner notified Grievant of the intent to suspend his employment for five days due to his violation of the Agency's Code of Ethics, his inefficiency or

incompetency in the performance of duties, negligence in the performance of duties, careless or improper use of State property or equipment, conduct unbecoming an employee in the State service, willful abuse or misappropriation of State funds, property or equipment, 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 his acts that endangered the lives and property of others. This decision was based upon the phone call from Shirley Johnson and Grievant's admission to acts that violated BOPP policies and procedures.

12. After being notified of his suspension, Grievant submitted an addendum to his May 7, 2010, statement. Grievant submitted this addendum on August 9, 2010, more than three months after he submitted his first statement on May 7, 2010. In that addendum and for the first time, Grievant changed his story and denied using State property to conduct the drug test on the juvenile. Rather, Grievant claimed that the expired drug tests were most likely his own personal drug tests that he bought several years prior for the purpose of doing voluntary tests on home healthcare workers. Grievant did not tell anyone that he believed the drug test was not State property until after he received notification that Petitioner was going to suspend his employment for five days.

13. Even if Grievant had used his own personal drug test and not State property to conduct this test, his actions would still be a violation of BOPP policy. Gary Tullock, the BOPP Director of Field Services, affirmatively testified that the act of conducting the drug test on a non-offender was enough to merit the five day suspension, even if Grievant used his own test. BOPP employees have no legal authority to drug test people that are not under the supervision of BOPP.

14. Grievant is familiar with the BOPP Code of Ethics Policy 202.01 and has received training on it every year. Director Gary Tullock testified that all BOPP employees are obligated to follow the BOPP Code of Ethics Policy #202.01.
15. Director Tullock stated that Grievant's five day suspension was appropriate and that Grievant violated BOPP policy and engaged in conduct that would endanger the safety of others. Furthermore, Director Tullock stated that even if the drug screen belonged to Grievant, the five-day suspension was warranted.

CONCLUSIONS OF LAW

The Board of Probation and Parole (BOPP), as the party that initiated these proceedings, is the Petitioner and has the burden of proving this matter by a "preponderance of the evidence." A "preponderance of the evidence" means the "greater weight of the evidence," or the more probable conclusion, based on the evidence presented. Rule 1360-4-1-.02(7), Tenn. Comp. R. & Regs. The burden of proof is usually assigned to the party seeking a change of the status quo. Rule 1360-4-1-.02(7), Tenn. Comp. R. & Regs. In applying that standard to this case, BOPP must prove, by a preponderance of the evidence, that BOPP appropriately suspended Grievant's employment as a Probation Parole Officer 2 (PPO2) for his violation of Rule 1120-10-.06, Tenn. Comp. R. & Regs. (1999), and his violation of the BOPP Code of Ethics Policy #202.01.

Petitioner has proven by a preponderance of the evidence that Grievant's suspension was warranted. It is clear from the evidence that Grievant was properly suspended for violating the Rules of the Department of Human Resources under Rule 1120-10-.06, Tenn. Comp. R. & Regs. (1999), and the BOPP Code of Ethics Policy #202.01.

The Tennessee Department of Human Resources has promulgated rules that list certain conduct by State employees that might lead to disciplinary action, up to and including

termination. Specifically, Rule 1120-10-.06 lists the following as specific examples of conduct that is prohibited of State employees: "(1) Inefficiency or incompetency in the performance of duties; (2) Negligence in the performance of duties; (3) Careless or improper use of State property; (8) …conduct unbecoming of an employee in the state service; (10) Willful abuse or misappropriation of State funds, property or equipment; (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 (15) Acts that would endanger the lives and property of others." Rule 1120-10-.06, Tenn. Comp. R. & Regs. (1999).

It is clear from the evidence that Grievant violated the BOPP Code of Ethics. The policy provides that: "The Board has resolved to abide by and require Agency employees to abide by the highest standards of professional conduct… Likewise any violation or appearance of violation or attempt to cause a violation of the public trust is prohibited." Section (VI)(A)(1) states: "This policy shall be interpreted and enforced to protect the public interest… It is further intended that the public trust in the conduct of the Board and its employees be ensured by conduct being above reproach… (b) Any conduct that would create a justifiable impression in the public's mind that the public trust is being violated is prohibited."

As a Probation Parole Officer and under the BOPP Code of Ethics, Grievant was held to a high standard both on and off duty. Grievant's conduct in administering an unreliable drug test to a juvenile who was not under BOPP supervision was a violation of the public's trust. Grievant allowed the juvenile and his family to rely on a negative drug test result that was completely invalid. This not only placed the juvenile in danger, but it also endangered the safety of Ms. Hill, the stepfather, and the general public. Grievant's actions in regards to the manner in which he

administered this drug test were improper. None of the juvenile's legal guardians were present for this test and the juvenile was a runaway and under the supervision of the Obion County Court. Grievant did not follow proper procedure in any manner. The juvenile could have used something to adulterate the sample and Grievant would not have known.

Grievant argued that he engaged in this conduct off-duty. This argument is without merit. The Code of Ethics policy does not specifically limit its application to conduct of officers while on-duty. For instance, as Director Tullock stated, an officer could bribe someone or commit a criminal act off-duty and that would still be a violation of the BOPP Code of Ethics. As stated above, Grievant was not on duty when he administered the drug test and that fact has not been disputed by the Petitioner. However, Petitioner has successfully proven that an officer's conduct off-duty may constitute a violation of BOPP policy and that the BOPP Code of Ethics is not limited to on-duty activities. The Court of Appeals opined in *Travis v. City of Memphis Civil Service Commission*, 671 S.W.2d 849 (Tenn. App. 1984) that when an employee engages "in an ... activity during non-duty hours... that is... inconsistent (and) incompatible ... with his duties, functions and responsibilities" it does interfere with the performance of the employee's job duties and can be a violation of Agency rules. The *Travis* case held that the employee was acting inconsistently off-duty with his job responsibilities. *Id.* Similarly, the fact that Grievant was off-duty does not obviate his obligations under the BOPP Code of Ethics. Grievant's conduct was inconsistent and incompatible with the Agency's mission and with Grievant's duties, functions, and responsibilities as a BOPP officer.

Grievant's contention that the drug test was "more of a read on the boy's attitude" is inconsistent with his actions. If the test really was just a "read" on the juvenile's attitude then Grievant should not have allowed the test to be completed. Another inconsistency is that

Grievant stated the juvenile wanted to take the drug test. Therefore, it could not just be used as a "read" on the boy's attitude if he was already willing to take the test. By "telling the grandmother what she wanted to hear," as Grievant stated at the hearing, Grievant's conduct was certainly not above reproach and was a violation of the public's trust. At the beginning of his testimony Grievant stated that there was no way he would tell the family that it would be a valid drug test. However, Grievant openly admitted that he did in fact tell them that the drug test was negative and did not tell them that the result was unreliable. Grievant's testimony was full of contradictions and not credible.

Grievant's contention that he actually used his own drug tests is without merit. Just five days after the drug test, Grievant submitted the May 7, 2010, written memorandum detailing the source of the drug screen. At that point, no one had even asked him the source of the drug screen yet he described the source of the drug test in detail. Grievant was in the best position to observe his own behavior and the events while they were still fresh in his mind. It was only after Grievant learned that he was in trouble that Grievant changed his story. Grievant's assertion that the drug tests were his personal sticks is not credible. However, regardless of the source of the drug screen, Grievant still administered this drug test to a juvenile who was not under BOPP supervision and in such a manner as to violate the BOPP Code of Ethics.

Grievant's assertion that no one knew he was a BOPP officer is also not credible and contradicted by his own testimony. Grievant knew Ms. Hill for at least ten years. Grievant stated that the juvenile specifically asked for him to come over because Ms. Hill told the juvenile she was going to give him a drug test. However, Grievant stated that the juvenile would not have known that he had access to a drug screen. Grievant contradicted himself throughout the hearing and even admitted that Ms. Hill believes he is a police officer. Grievant admitted that Ms.

Johnson must have known he was a BOPP officer because she called the BOPP office looking for him. Moreover, Director Tullock stated that even if the family did not know that Grievant was a BOPP officer, his actions still constituted a violation of the Code of Ethics because he administered a drug screen to a non-offender in a manner that endangered the juvenile, his family, and the rest of the community. His conduct was unbecoming an employee in the State service. The intent to suspend letter clearly states that Grievant should not have performed a drug test on any person that is not under the supervision of the Board of Probation and Parole.

Director Tullock stated that Grievant was in violation of the DOHR Rules by not adhering to his duty as a BOPP officer to comply with the BOPP Code of Ethics. Additionally, Grievant's actions endangered the lives and property of others. Director Tullock stated that when using an expired drug test, the one thing that you can guarantee is that the drug test is unreliable. Grievant admitted that the juvenile could have been high on drugs and the unreliable test would not have been able to detect it. Grievant relayed false information to the family and the juvenile and allowed them to rely on a negative drug test result when the juvenile could have been using drugs. Director Tullock characterized Grievant's actions by saying: "It's a dangerous thing it's almost like playing with somebody's life." Clearly, Grievant's actions were not in compliance with the BOPP Code of Ethics. Grievant's conduct was certainly not above reproach and constituted a severe violation of the public trust.

The issues presented for consideration in this matter is whether or not Petitioner has proven by a preponderance of the evidence that Grievant's suspension was warranted.

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. (1999). As stated in the

Rules, "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. (1999).

The severity of Grievant's conduct cannot be discounted. In considering the issue of punishment in this case the Appointing Authority had a wide range of options. Rule 1120-10-.07, Tenn. Comp. R. & Regs. (1999). Suspension without pay from employment was one of those options. Rule 1120-10-.07, Tenn. Comp. R. & Regs. (1999). Pursuant to that regulation, "After minimum due process is provided, a suspension without pay may be issued by the appointing authority." Rule 1120-10-.07(4)(a), Tenn. Comp. R. & Regs. (1999). The Grievant's failure to adhere to the BOPP Code of Ethics and his conduct relating to the unreliable drug screen warranted his five-day suspension without pay and was the appropriate level of discipline.

Petitioner has proven that Grievant's actions were in violation of the Rules of the Tennessee Department of Human Resources and the BOPP Code of Ethics. Accordingly, Grievant's five-day suspension is hereby upheld.

This Order entered and effective this 21 day of September, 2011

_____
Rob Wilson
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 21 day of September, 2011

Thomas G. Stovall, Director
Administrative Procedures Division