



4-8-2011

TENNESSEE DEPARTMENT OF
CORRECTION, Department/Petitioner, vs.
HEATHER LANG, Grievant/Respondent.

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

IN THE MATTER OF :)	
)	
TENNESSEE DEPARTMENT OF CORRECTION,)	
<i>Department/Petitioner,</i>)	DOCKET NO. 26.05-109755J
vs.)	
HEATHER LANG,)	
<i>Grievant/Respondent.</i>)	

INITIAL ORDER

This contested administrative case was heard in Nashville, Tennessee, on April 8, 2011, before J. Randall LaFevor, Administrative Judge, assigned by the Secretary of State and sitting for the Civil Service Commission. Mr. Bryce Coatney, Staff Attorney for the Tennessee Department of Correction, represented the State. The Respondent was represented by her legal counsel, Mr. Greg King.¹ 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 Grievant did not file a Proposed Order. The Department’s document was filed on August 24, 2011, and the matter was declared ready for determination on August 28, 2011, the document filing deadline.

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 Correction (“TDOC” 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:

¹ After the hearing was concluded, the Grievant made various accusations of impropriety against her counsel, resulting in a fundamental dispute between them, requiring her counsel to withdraw from further representation. The Grievant announced that she would proceed *pro se* from that point.

FINDINGS OF FACT

1. The Grievant was employed as a psychiatric social worker at the Charles Bass Correctional Complex (CBCX), an institution operated by the Tennessee Department of Correction. She began her employment there in July 2008 and was dismissed from employment in July 2010, upon the Commissioner's determination that she was guilty of insubordination and violation of Departmental policies.

2. As required upon accepting employment with the Department, the Grievant executed an oath of office committing to abide by the Department's regulations, and signed for receipt of a copy of the Department's Code of Conduct.² The Code of Conduct provides, in pertinent part, that "[e]mployees will conduct themselves in a manner that creates and maintains respect for their work sites, fellow employees and visitors, the Tennessee Department of Correction, and the State of Tennessee."

3. During her tenure with the State, the Grievant was inclined to work independently, and depicted herself as being knowledgeable and conscientious about her work. She was often dismissive of her supervisor's ability in the workplace, and sought to go above him in the management hierarchy when she felt it necessary, to accomplish what she thought was important.³

4. In late January 2010, the Grievant began pressing complaints about the management of the program where she worked. She invested considerable time preparing lengthy memoranda and electronic messages to the prison administration in an effort to show that she had too many work assignments and too little training to complete the duties expected of her.⁴ She blamed this circumstance on her immediate supervisor, whom she depicted as incompetent and corrupt.⁵

² Exhibit 1, § W2-3

³ See ,e.g., Exhibit 1, §W 9-7. See also § W9-6, email correspondence string from 11/18/09 through 11/30/09, and materials following, generally

⁴ Ibid

⁵ Ibid, § W9-1

5. In pressing this complaint, the Grievant stated that her supervisor had once made her uncomfortable when he counseled her about the need for modesty in her workplace attire, claiming that he had mentioned hearing of complaints about her underwear or seeming lack thereof. The Grievant claimed that the supervisor had caused embarrassment to other women in the workplace the same way.⁶ The Department of Correction reviewed these complaints, and then began a formal investigation by its Internal Affairs Division, when the Grievant asked that her allegations about the mention of her underwear be treated as a complaint of sexual harassment.

6. It is not the place of this tribunal to revisit the claim of harassment, or the Grievant's contention that she consequently became a victim of retaliation, except to note that the Department gave the Grievant more than a reasonable opportunity to substantiate the allegations she made, and that she failed to do so at every turn.⁷ The Grievant meanwhile seems to have regarded the truth of her allegations as being self-evident from what she had to say about matters, either in the memoranda she sent to her superiors from time to time, or in her response to investigative interviews.

7. The Grievant otherwise seems to have expected her superiors or the investigators to root out the evidence of what she was saying, to give account to her of their efforts, and to deliver up specific information to her that she thought was relevant.⁸ When these expectations were not met, as matters went along, the Grievant became increasingly adverse in her stance toward prison administration. She would ultimately characterize the lack of outcomes that she expected, and the growing alienation of some of her co-workers, as evidence of the administration's desire to retaliate against her for having complained in the first place.⁹

8. Early in this episode, when the Grievant was removed from immediate contact with her supervisor, her work-related correspondence with him took on a strident and demanding tone, and went to great length to outline obstacles to completing her assigned

⁶ Ibid

⁷ Exhibit 1 §§ W9-4, W9-6

⁸ Ibid, §§ W9-4, W9-5, W9-7

⁹ See, e.g., Ibid, § W9-5, ll 69-72, § W9-7, p. 3, last full par.

tasks.¹⁰ It appears that the Deputy Warden stepped in as intermediary between the Grievant and her supervisor, concerning the disposition of the Grievant's work in the program. The Grievant in turn routinely attempted to resort to still higher authority whenever she wished to question the Deputy's decisions.¹¹ The record indicates that the Grievant thereafter increasingly engaged in questioning her work assignments and trying to go around the chain of command to be heard on such matters.¹²

9. Pursuant to the Internal Affairs investigation, Agent Donna Clark interviewed the Grievant about the alleged harassment. Agent Clark assumed responsibility for the case after a previous agent stepped aside, because the Grievant complained about his methods. On April 6, 2010, Agent Clark questioned the Grievant about the alleged sexual harassment incident, the existence of other alleged victims, and the Grievant's emerging complaints that management was retaliating against her for her advocacy efforts on behalf of an inmate named Jimmy Young.¹³ The Grievant had no specifics to provide to Agent Clark about how she had been harassed, beyond the alleged mention of her underwear, or in what way she had suffered acts of retaliation.¹⁴ Ultimately, the Grievant abruptly terminated the interview, claiming that Agent Clark was not supportive of her, and stating that she believed Agent Clark to be making an effort to skew the investigation against her. The Grievant terminated the interview, and walked out despite Agent Clark's warning of disciplinary consequence for her actions.

10. The Grievant later sought to make amends with Agent Clark, but Agent Clark declined to interview her further.¹⁵ Apart from that effort, the Grievant characterized Agent Clark's behavior toward her as retaliatory, and she contemplated filing a complaint against Agent Clark.¹⁶

¹⁰ Ibid, email correspondence between 2/10 and 2/18/10

¹¹ Ibid, email correspondence dated between 2/18/10 and 3/04/10

¹² Ibid, email correspondence dated between 3/4/10 and 3/22/10, See also *ibid*, § W9-7,

¹³ The Grievant was a therapist for the inmate from August 2009 to February 2010. In December 2009, she reported certain complaints the inmate made about staff misconduct toward him, and she there described in some detail her own efforts to address these complaints. The record reflects that prison administration began directing her to wind down this effort on 2/2/10, as the inmate neared transfer to another institution. See Exhibit 1, § W9-6; memoranda and electronic correspondence from 12-1-09 through 2-3-10.

¹⁴ Exhibit 1, §W9-4, generally

¹⁵ TR 43, ll 1-9; TR 124, ll 18-25

¹⁶ TR 125, ll 11-14, See also TR 58, l. 24 through TR 59. l. 2

11. On April 12, 2010, less than a week following her walk-out from the interview with Agent Clark, a threatening message was recorded on the Grievant's office voice mail. The occurrence was treated as possibly related to the ongoing investigation into the Grievant's original complaint. Internal Affairs Agent Joe England was assigned to manage this aspect of the investigation, independently and exclusive of the underlying case concerning the alleged sexual harassment.¹⁷

12. The disciplinary proceeding against the Grievant began with the Warden's Notice of Intent, issued on April 15, 2010. The charges against the Grievant were derived, at the time, from Agent Clark's investigation. The charges focused on the Grievant's behavior toward Agent Clark, and on her violation of policy requirements while advocating on behalf of inmate Young.

13. At the same time, Agent England subsequently went forward with his part in the larger investigation and contacted the Grievant for an interview.¹⁸ From that interview, Agent England took note of the Grievant's focus of concern on inmate Young, and determined to have a closer look at the inmate. Young's prison record at that time reflected that he had become the subject of a different investigation, regarding a cellular phone found in his cell at the prison in Tiptonville. Agent England was able to examine that phone and identify it as the source of the threatening message left on the Grievant's voice mail.¹⁹ [However, it has never been determined who actually placed the call, or for what purpose.²⁰]

14. The Grievant was ultimately dismissed from employment in July 2010. Certain Policies of the Department of Correction were cited as the basis for her dismissal.

- a. TDOC Policy 305.03 governs relations between employees and inmates. The policy provides in pertinent part that employees are to conduct themselves in a strictly professional manner toward inmates, and that employee interaction with inmates is to be limited to such conduct as is necessary to fulfill the

¹⁷ TR 50, II 3-13,

¹⁸ TR 50 II 23-25 through TR 51 II 1-9; Exhibit 1, § W9-5

¹⁹ TR 52, II 2-16

²⁰ TR 54 – 57, e.g.

employee's duties. When an Inmate reports a concern to an employee that the employee cannot adequately process, the inmate's concern is to be referred to the employee's immediate supervisor. Employees are obligated to report offender interactions that are contrary to policy when they observe such observations, including any instances of inmate mistreatment.²¹ The evidence presented in this matter by or through the Grievant herself makes considerable reference to her efforts to act as an advocate for inmate Jimmy Young – in his several roles as an informant, as an alleged victim, and as a mental health patient.²² The Grievant essentially made the inmate's various complaints her own task to resolve, and in doing so she departed from what the policy required of her. The Grievant's testimony and memoranda describe inmate Young as a key informant against an officer who was bringing drugs into the prison, as an informant regarding a rape incident within the prison, and as a victim of sexual harassment by a female officer. In a memorandum of record, the Grievant describes an effort spanning some ten days, to problem-solve with the inmate about the harassment allegation – including advice and direction she gave to the inmate about how to redirect the alleged perpetrator – before she actually reported the allegation. She later gave Young a copy of her treatment notes about him, citing her concern that the record of his several reports would get lost.²³

- b. TDOC policy, #113.52 governs the use and disclosure of the inmate's health record. The policy directs that copies of the inmate's health record are not to be released directly to the inmate. It is not disputed that the Grievant gave inmate Young a copy of his mental health treatment record when he was transferred out of CBCX to the prison in Tiptonville.²⁴ The Grievant maintained that Young would need copies of his therapy notes in the event that he was released to parole. Because she was a release planner, the Grievant maintained, it was her duty to provide inmate Young with these

²¹ Exhibit 1, § W6-5

²² Note 12, *supra*. See also Exhibit 1, § W9-7

²³ TR 116, ll. 11-15, Exhibit 1, § W 9-6, memorandum of Lang, dated 12-1-2009

²⁴ See, e.g. TR 114, ll. 23-25

records. In her testimony in this matter, she urged that another TDOC policy, #113.82,²⁵ required this of her. The Grievant was questioned in depth about the policy during the hearing of this matter. She was unable to specify how her therapy notes for the inmate were exempt from treatment as part of the health record, or where the policy directed a treatment professional to give an inmate his therapy notes. The Grievant instead urged that mental health records are not “health records”, and thus would not fall within the restriction of the foregoing policy #113.52.²⁶ That contention is without merit, however, in light of the Department’s further policy that establishes the content of the inmate health record. This policy makes quite clear that the inmate health record includes mental health treatment records.²⁷

- c. TDOC Policy 107.02 governs the conduct of investigations by the Department’s Internal Affairs Division. Pursuant to the policy, Department employees are required, upon request, to cooperate with Internal Affairs Agents in the conduct of authorized investigations. The duty of cooperation includes participation in interviews and the provision of truthful testimony. The policy provides that an employee’s failure to cooperate and participate constitutes insubordination. It is not disputed that the Grievant walked out on an interview with an Internal Affairs agent, being conducted in the course of an authorized investigation, or that she was warned against doing so, as being a matter of insubordination. The Grievant contends that Agent Clark screamed at her in the process. Agent Clark denies such conduct. Whether or not this occurred would have no bearing on whether the Grievant’s action was insubordinate. The record is clear that no screaming occurred before the Grievant walked out.²⁸

15. Throughout the hearing, as well as in pre-hearing and post-hearing conferences, the Grievant’s statements, conduct, and behavior indicated that she was unable to grasp

²⁵ Received as Exhibit 2 to the proceeding

²⁶ TR 143-45, e.g.; TR 156-60, e.g.

²⁷ TDOC Policy 113.50, §§ IV.B. and VI.E., exhibit filed April 12, 2011

²⁸ Exhibit 1, §W 9-4, Exhibit 10 [late filed], audio recording of April 6, 2010 interview

the significance of various issues involved in her case. Her testimony was riddled with inconsistencies and emotional outbursts. Overall, she gave the impression that she was continuously attempting to justify her actions, and to concoct explanations for her inappropriate behavior. In light of her demeanor and obvious lack of candor during her hearing testimony, it was concluded that her testimony was not credible.

CONCLUSIONS OF LAW

1. A career service employee who has completed probation has a property right in her job. *See* T.C.A 8-30-331(a). The Tennessee Civil Service Commission has jurisdiction to make the ultimate determination upon any disciplinary action against a career service employee. T.C.A. 8-30-108(2).

2. Tennessee's Uniform Administrative Procedures Act contemplates that there should be "full disclosure of all relevant facts and issues" in a contested case proceeding before a State agency. *See* T.C.A. 4-5-312(b). *See also* T.C.A. 4-5-313 (1). The agency is to render findings of fact and conclusions of law based only upon the record of the contested case proceeding and on matters officially noticed therein. *See* T.C.A. 4-5-314(d). All evidence relevant to the challenged action is appropriate for consideration. *See* Opinion No. 84-282, Office of the Attorney General, State of Tennessee, 1984 WL 186368 (Tenn.A.G.).

3. A career service employee may be suspended, demoted, or dismissed from employment whenever just or legal cause exists. *See* Tenn. Comp. R. & Regs. 1120-10-.02 Grounds for such disciplinary action, in pertinent part, may include the following:

- Inefficiency or incompetency in the performance of duties
- Failure to maintain satisfactory and harmonious working relationships with the public and fellow employees
- Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination).

(Tenn. Comp. R. & Regs. 1120-10-.05)

4. 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.)

5. The Grievant’s behavior in this matter represents a pattern of conduct that is inconsistent with her oath of office and the code of conduct applicable to her office. The evidence in this case provides ample proof that the Grievant, while giving lip service to the adherence to Department policy, regularly and repeatedly failed to adhere to policies bearing upon her work responsibilities.

6. Her boundaries with an inmate patient were questionable. She gave inadequate regard to protocol for handling the inmate’s complaints. She gave no regard to policy restricting his access to the record of his treatment, and she paid inadequate attention to the policy governing the scope of her duties as a release planner. The Grievant was frankly rude and insubordinate toward her supervisor. The fact that she had a complaint against him, regardless of its potential merit, did not justify her behavior. The Grievant in turn became insubordinate toward senior administrators in her chain of command when these officials were not supportive of her or did not take the actions she wanted them to take. Having an obligation to cooperate with an internal investigation and submit to interview therein, the Grievant walked out on it and sought to blame the investigators for not following policy and not conducting a proper investigation.

7. Only the suspiciously coincidental receipt of a death threat on the Grievant's voice mail served to delay an inevitable disciplinary consequence for this pattern of behavior. While the evidence does not indicate that the threat was actually credible, given its source and attendant circumstances, it is worth of note that it was received soon after the Grievant's act of defiance toward an ongoing Internal Affairs investigation, and served in effect to side-track the investigation for a time.

8. It is likewise concerning that the Grievant has given less than due regard for the Orders of this tribunal, or the conduct expected a party to its proceedings. Despite reasonable continuances, the Grievant failed to prepare for the hearing, and ultimately caused unwarranted delay in the hearing and disposition of this matter. The Grievant has failed to appreciate the subject matter of this proceeding and address it properly, instead attempting to prosecute a case against the Department of Correction that is beyond the scope of jurisdiction for this tribunal.

9. The Petitioner's case regarding the Grievant is quite clear, and the Grievant herself has furnished much of the evidence. She consistently failed to understand and failed to comply with operational procedures governing her work. She regularly questioned her work assignments, and appears to have expended more time and effort to do so than would likely have been required to perform the work that was asked of her. These circumstances nominally speak to inefficiency or incompetency in the performance of duties.

10. The Grievant was at times rude toward and disrespectful of others, superiors and colleagues alike. This behavior speaks to her failure to maintain satisfactory and harmonious working relationships in the workplace, and to insubordination, where the behavior has been exhibited with superiors. The Grievant's behavior in all respects concerning her efforts to discredit her supervisor, and in all of her persistent effort to challenge the authority of the officials for whom she worked, is plainly insubordinate in character.

11. There is nothing in the Grievant's entire course of dealing toward the Department and toward this tribunal that would reasonably suggest that she will be inclined to correct these behaviors if given the opportunity. Applying the 'lowest appropriate' standard of T.C.A. 8-30-330 (c), then, no measure of discipline less drastic than termination would serve to correct the problem presented by this employee – that she will not follow procedure, will not perform all of the necessary duties of her title and her program, and will not function in the workplace without causing discord and without challenging the authority of those who are charged with responsibility for managing. Termination of this employee's service is thus appropriate, whether as a consequence for her behavior, or because the good of the service requires it, pursuant to T.C.A. 8-30-326. It may be judicially noticed that the work of the Department of Correction is critical to public safety. The Grievant's behavior toward that work is disruptive and serves to impede the Department's effort to meet its public obligation.

12. 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 Correction has met its burden of proof, and has established by a preponderance of the evidence that the Grievant, Heather Lang, 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, 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 6 day of September, 2011

J. Randall LaFevor, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 6 day of September, 2011



Thomas G. Stovall, Director
Administrative Procedures Division