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TENNESSEE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES vs. GREG GREENE, Grievant

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**BEFORE THE CIVIL SERVICE COMMISSION OF THE
STATE OF TENNESSEE**

IN THE MATTER OF:

**TENNESSEE DEPARTMENT OF
MENTAL HEALTH AND
DEVELOPMENTAL DISABILITIES**

DOCKET NO: 26.15-110433J

v.

GREG GREENE
Grievant

INITIAL ORDER

This contested case was heard in Nashville, Tennessee, on July 19, 2011, before Ann M. Johnson, Administrative Judge, assigned by the Secretary of State to sit for the Civil Service Commission of the State of Tennessee. Richard R. Prybilla, Assistant General Counsel with the Tennessee Department of Mental Health and Developmental Disabilities, represented the Department. The Grievant was present and represented himself, waiving legal counsel.

The subject of this hearing was the Grievant's appeal of the termination of his employment by the Department of Mental Health and Developmental Disabilities ("State" or "MHDD"). At the conclusion of the hearing, both parties were allowed thirty days after the filing of the transcript to submit post-hearing briefs. Neither party filed a brief, and the record closed on September 31, 2011.

After a review of the record and the arguments of the parties, it is determined that the State properly terminated the employment of the Grievant, and that action should be upheld. This decision is based upon the following.

SUMMARY OF THE EVIDENCE

Witnesses for the State included the following: Shirley Watkins, RN Program Nurse Supervisor; Kay Brown, RN 4 Program Nursing Supervisor; and Margie Dunn, Human Resource Director. The Grievant Greg Greene testified on his own behalf.

Nine documents were admitted into evidence:

- EXHIBIT 1 ATP Worksheets;
- EXHIBIT 2 Written Warning, February 21, 2010;
- EXHIBIT 3 Letter, April 3, 2010;
- EXHIBIT 4 Dismissal Letter, July 14, 2010;
- EXHIBIT 5 Letter, August 18, 2010;
- EXHIBIT 6 Letter, October 15, 2010;
- EXHIBIT 7 Time and Attendance Policy;
- EXHIBIT 8 Employee Evaluation, 2007; and
- EXHIBIT 9 Edison Report – Days Absent.

FINDINGS OF FACT

1. The Grievant Greg Greene worked as a technician for the Middle Tennessee Mental Health Institute (MTMHI) for a number of years.
2. On July 14, 2010, the Grievant was notified by letter that the Department of Mental Health and Developmental Disabilities intended to terminate his employment with the hospital.
3. The State asserted that the Grievant violated MTMHI Policy 601.01, Time and Attendance, during the months between January and June of 2010, and that he had a pattern of excessive absences even before this time period.

4. During the first six months of 2010, the Grievant was absent from his job for over sixty days.

5. The Grievant exhausted his accumulated leave balances, including sick leave, annual leave, and compensatory time; additional absences were coded as leave without pay status.

6. In the month of January of 2010, the Grievant did not appear for his scheduled shift, and was coded as leave without pay, on the following days: 4, 5, 6, 7, 8, 11, 15, 19, 20, 21, 22, 25, 26, 27, 28, and 29.

7. In the month of February, 2010, the Grievant often did not appear for his scheduled shifts, and was coded as leave without pay, on the following days: 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 16, 18, 19, 22, 23, 24, and 25.

8. The Grievant's excessive absences resulted in disciplinary actions by the MTMHI. By letter dated February 21, 2010, the Grievant was issued a written warning containing the following explanation:

You received a letter dated January 4, 2010 from Margie Dunn, Human Resources Director, informing you that you were in a Leave Without Pay status for a major portion of the month of December and that you were expected to return to work no later than January 8, 2010. You returned to work on January 11, 2010 and worked January 13th and 14th called out on January 15th and worked January 16th. You called in the remainder of the month and the first two weeks of February saying you had back problems. It's obvious that your attendance has not improved. You have developed a habitual pattern of failure to report for duty at the assigned time and place. This is an unacceptable practice and will not be tolerated.

The intent of this warning is to impress upon you the seriousness of this matter and clearly warn you that failure to improve your attendance will result in further progressive disciplinary action, up to and including dismissal.

EXHIBIT 2.

9. A second disciplinary action, a suspension of three days, was imposed by letter dated April 3, 2010. After listing the continuing absences, the letter states, “There is no doubt you have a pattern of abuse in your leave history.” Again, the Grievant was warned: “This action is intended to impress upon you the seriousness of this matter and to clearly warn you that any future infraction of this nature will result in further disciplinary action, up to and including separation.” EXHIBIT 3.

10. In spite of these warnings, the Grievant continued with the pattern of excessive absences from his scheduled shifts.

11. Frequently the Grievant called in to say he was sick shortly before his shift was scheduled to begin. This last minute notice made it difficult or impossible for the hospital to fairly and adequately distribute the work load of caring for patients.

12. Kay Brown, Program Nursing Supervisor, attempted to work with the Grievant when he called in to inform the hospital that he would not be present for work. During such a call Ms. Brown would frequently offer an alternative shift: “What I tried to do a lot of times was to get him to adjust, you know, his schedule. Well, if you can’t come in this morning, can you come in this afternoon or night shift?” There is no indication that the Grievant accepted these offers.

13. Ms. Brown adjusted the Grievant’s shift assignments to provide him more flexibility and make it easier for him to come to work, but the Grievant’s habitual absentee pattern continued.

14. Even before 2010, the Grievant had a history of failure to appear for his assigned working shifts. In 2007, he had unacceptable ratings for adherence to work requirements, and specifically excessive absences.

15. The Grievant admitted that he was guilty of the offenses charged, and that he could not contest the evidence presented by the State.

16. However, the Grievant further stated that he is now a changed man, and asked for another chance to perform his job, promising that the excessive absences would not recur.

RELEVANT LAW

1. The State, as the party “seeking to change the present state of affairs,” has the burden of proof under Rule 1360–4–1–.02(7) of the Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies, TENN. COMP. R. & REGS. ch. 1360–4–1 (June 2004 (Revised)), to prove by a preponderance of the evidence that the discipline imposed was appropriate under state law and regulations.

2. Policy Number 0601.01, Middle Tennessee Mental Health Institute, “Time and Attendance,” contains the following language in III. A(2):

Sick leave rights are based on the assumption that the employee has earned the hours before they are used and has them available in their sick leave account at the time they are used.

3. Policy Number 0601.01, III, Procedures, B(2) Attendance, contains the following provisions:

Employees working schedules which are arranged to provide coverage for 7 days per week, 24 hours per day, are expected to notify their supervisor at least two hours in advance if they will be absent or late for work. This is critical so that supervisors will have opportunity to rearrange staffing, so that patient care is not compromised.

4. Policy Number 0601.01 III. B(6) includes suggested disciplinary actions for violation of the policy:

Disciplinary Action Protocol: Employees who have demonstrated a record of unexcused, unscheduled absences shall be subject to disciplinary action.

- First level: Oral warning
- Second level: Written warning
- Third level: Three day suspension without Pay
- Fourth level: **Termination**

If an employee has demonstrated significant effort to improve their attendance and has had no unexcused unscheduled absences for at least six months since the Third Level action, the supervisor may recommend a suspension without pay for five days instead of recommending termination.

Emphasis in original.

5. T.C.A. Section 8-30-330 contains the following relevant provisions:

(a) The supervisor is responsible for maintaining the proper performance level, conduct, and discipline of the employees under the supervisor's supervision. When corrective action is necessary, the supervisor must administer disciplinary action beginning at the lowest appropriate step for each area of misconduct.

. . .

(c) When corrective action is necessary, the supervisor must administer disciplinary action beginning at the step appropriate to the infraction or performance. Subsequent infractions or poor performance may result in more severe discipline in accordance with subsection (a).

6. Progressive discipline steps are outlined and described in Department of

Personnel Rule 1120-10-.07, which states, in relevant part:

- (1) The supervisor is responsible for maintaining the proper performance level, conduct and discipline of the employees under his supervision. When corrective action is necessary, the supervisor must administer disciplinary action beginning at the appropriate step as described.
- (2) Oral Warning.
- (3) Written Warning.
- (4) Suspension Without Pay.

(5) Dismissal.

7. The Rules of the Tennessee Department of Personnel provide the overall policy for imposing disciplinary action in Rule 1120-10-.02:

POLICY. 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, but must be in compliance with the intent of the provisions of this rule and the Act. . . .

ANALYSIS and CONCLUSIONS OF LAW

The State has carried its burden of proof to show by a preponderance of the evidence that the Grievant committed the violations with which he is charged and that the discipline imposed is appropriate. Over a period of several months, the State imposed increasingly severe disciplinary penalties for these types of infractions, including a written warning and a suspension without pay. Each disciplinary letter strongly emphasized the importance of correcting the excessive absence pattern of behavior and the possible consequences, including termination, of a failure to do so. In spite of these repeated warnings, the behavior continued and even escalated.

On several occasions the Grievant candidly acknowledged that he failed to meet his obligations to come to work as scheduled. Furthermore, the evidence showed that the Grievant's frequent and unplanned absences caused problems at the hospital. Each staff member is vital to maintain appropriate nursing coverage and to ensure that all patients receive consistent care. When one staff member frequently fails to come to work and to perform the responsibilities for which he was hired, the entire staff is at a disadvantage in attempting to rearrange schedules and provide adequate coverage for each shift.

The Grievant spoke eloquently and at length, acknowledging his failures and pledging to improve if he were provided another chance. Although the Grievant's situation evokes sympathy, it is not within the purview of the Administrative Judge to make such a decision, particularly when the Grievant is clearly guilty of the offenses with which he was charged and the disciplinary action is appropriate for those violations. Instead, the hospital supervisory staff has the discretion to determine such matters: "The supervisor has discretion to determine what punishment fits the offense." *Berning v. State*, 996 S.W.2d 828, 830 (Tenn. App. 1999). *See, also* Rule 1120-10-.02: "The degree and kind of action is at the discretion of the appointing authority, but must be in compliance with the intent of the provisions of this rule and the Act." In light of the Grievant's failure to improve his behavior, even after multiple, less severe discipline, the supervisor could reasonably conclude that termination was the only option.

Accordingly, based upon the evidentiary record and the relevant law, it is determined that the Grievant violated MTMHI Policy Number 0601.01, Time and Attendance. It is also determined that dismissal is the appropriate disciplinary action for the violations, and is hereby **upheld**.

This Initial Order entered and effective this 7th day of December, 2011.

Ann M. Johnson
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 7th day of December, 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' and 'S'.

Thomas G. Stovall, Director
Administrative Procedures Division