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Department of Correction, Petitioner, Vs. Larry Mitchell, Grievant.

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

IN THE MATTER OF: **Department of Correction,** **Petitioner,** **Vs.** **Larry Mitchell,** **Grievant.**	**DOCKET NO: 26.05-111056J**

INITIAL ORDER

This matter came to be heard on the August 29, 2011, at the West Tennessee State Penitentiary (WTSP) in Henning, Tennessee, before Steve R. Darnell, Administrative Law Judge, assigned by the Department of State, Administrative Procedures Division, and designated to sit for the Tennessee Civil Service Commission. The Department of Correction (hereinafter "Department") was represented by attorney Teresa Thomas. The Grievant was present for the hearing and not represented by counsel. The transcript of the hearing was filed of record on September 22, 2011. The parties were allowed 30 days after the filing of the transcript, or October 22, 2011, to file post hearing briefs and proposed orders. No post hearing materials were filed and the record in this case closed on October 22, 2011.

ISSUES FOR DETERMINATION

1. Did the Department prove, by a preponderance of the evidence, that Grievant assaulted a co-worker on October 4, 2010?

2. Was termination the proper disciplinary action for Grievant's conduct?

SUMMARY OF DETERMINATION

The Department has shown, by a preponderance of the evidence, that Grievant slapped his co-worker on October 4, 2011. Grievant was previously disciplined with a seven (7) day suspension for shoplifting at Wal-Mart. Given his prior disciplinary history and the severity of this conduct, termination was the proper disciplinary action. This conclusion is based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On October 4, 2010, Corporal Kenneth Edwards was pushing a cart loaded with chain used as inmate restraints near the intake area at WTSP.

2. As he moved past Grievant, he inadvertently contacted the rear of Grievant's boots with the cart.

3. Grievant turned and slapped Edwards in the face. Grievant admitted he slapped Edwards.

4. The incident was reported to the warden of WTSP. Grievant was immediately placed on leave and advised by letter that disciplinary action was being initiated against him for his conduct.

5. At the conclusion of Grievant's disciplinary hearing on October 6, 2010, he was terminated.

6. Grievant has appealed his termination to the fifth level prompting the current hearing.

7. On February 15, 2008, Grievant was given a seven (7) day suspension for "conduct unbecoming a state employee" and for violation of the "code of conduct" and his "oath [as a] correctional employee." This suspension resulted from his arrest at Wal-Mart for shoplifting.

8. Grievant has failed to prove, by a preponderance of the evidence, that Edwards provoked Grievant's behavior or that his behavior was in anyway justified.

9. The Department properly terminated Grievant for his conduct on October 4, 2010.

CONCLUSIONS OF LAW

1. In a fifth step level hearing, an administrative law judge presides to take proof and render an initial order which is subject to review by the Civil Service Commission. T.C.A. §4-5-301.

2 It is a de novo proceeding, and no presumption of correctness attaches to the action of the agency. Big Fork Mining Co. v. Tennessee Water Quality Control Board, 620 S.W. 2d 515, at 521 (Tenn. App. 1981).

3. The burden of proof rests with the agency and the agency must prove by a preponderance of the evidence that: 1) the Grievant acted or failed to act as the agency alleges; 2) the Grievant's action constitutes a disciplinary offense; and 3) the recommended discipline is appropriate for the given offense. Id. at 520. **Some instances of misconduct require an elevated level of discipline, even if the employee has no history of prior disciplinary action.** Berning v. State, 996 S.W.2d 828, 830 (Tenn. App. 1999).

4. The Department bears the burden of proof in this case. The standard of proof is a preponderance of the evidence. TN. Department of State, Administrative Procedures Division, Rule 1360-4-1-.02(3)(7).

5. Preponderance of the evidence simply means "the greater weight of the evidence or that, according to the evidence, the conclusion sought by the party with the burden of proof is the more probable conclusion." Id.

6. **PURPOSE (Rule 1120-10-.01)**
To establish standards for the application of disciplinary procedures which will assure fairness and uniformity among agencies and institutions subject to the provisions of these rules.

7. **POLICY (Rule1120-10-.02)**
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. An executive service employee serves at the pleasure of the appointing authority.

8. **MINIMUM DUE PROCESS (Rule1120-10-.03)**

(1) Career employees have a "property right" to a position in the classification in which they currently hold career status. Therefore, no suspension, demotion, dismissal or any other action which deprives a regular (career) employee of his "property right" will become effective until minimum due process is provided as outlined below.

(2) Minimum due process consists of the following:

(a) The employee shall be notified of the charges against him. Such notification shall detail times, places, and other pertinent facts concerning the charges and should be in writing.

(b) The notification will provide for the employee to have a predecision discussion with an appropriate manager and will state the mechanism through which such a discussion may be arranged. The employee should be given a reasonable period of time to prepare to answer charges and present information which might influence the manager's decision.

(c) The manager conducting such discussions must be an appointing authority or manager who has direct access to an appointing authority for this purpose.

(d) The meeting outlined above shall be for the purpose of allowing the employee to present information to the manager regarding the disciplinary action under consideration.

(e) The discussion shall be informal. The employees shall have the right to present written statements of witnesses or any other information with regard to the charges. Attendance and participation by persons other than the manager and the employee shall be at the discretion of the manager.

(f) If the employee declines the opportunity to have the discussion or present information, the provisions of this section are deemed to have been met.

(3) The commission shall determine as a preliminary matter to the merits of a grievance, a Grievant’s allegation that he or she was denied minimum due process.

9. **EXCEPTION TO MINIMUM DUE PROCESS (Rule 1120-10-.04)**

When an employee is acting in a dangerous or otherwise threatful manner and must be removed from the workplace immediately, it is not necessary to provide "minimum due process" prior to removal. Minimum due process must be provided after removal as soon as practicable. The employee, in this case, may be placed on leave or on immediate suspension without pay.

10. **CAUSES FOR DISCIPLINARY ACTION (Rule 1120-10-.05)**

Causes for disciplinary action fall into two categories.

(1) Causes relating to performance of duties.

(2) Causes relating to conduct which may affect an employee's ability to successfully fulfill the requirements of the job.

11. **EXAMPLES OF DISCIPLINARY OFFENSES (Rule 1120-10-.06)**

The following causes are examples of those considered for disciplinary action and should not be considered the only causes of action.

(1) Inefficiency or incompetency in the performance of duties.

(2) Negligence in the performance of duties.

(3) Careless, negligent or improper use of State property or equipment.

(4) **Failure to maintain satisfactory and harmonious working relationships with the public and fellow employees.**
(5) Habitual improper use of sick leave privileges.
(6) Habitual pattern of failure to report for duty at the assigned time and place.
(7) Failure to obtain or maintain a current license or certificate or other qualification required by law or rule as a condition of continued employment.
(8) **Gross misconduct or conduct unbecoming an employee in the State service.**
(9) Conviction of a felony.
(10) Willful abuse or misappropriation of State funds, property or equipment.
(11) Falsification of an official document relating to or affecting employment.
(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.**
(13) Trespassing on the property of any State officer or employee for the purpose of harassment.
(14) Damage or destruction of State property.
(15) **Acts that would endanger the lives and property of others.**
(16) Possession of unauthorized firearms, lethal weapons, alcohol or illegal drugs on the job.
(17) **Brutality in the performance of duties.**
(18) Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination).
(19) Reporting to work under the influence of alcohol or illegal drugs, or partaking of such on the job.
(20) Sleeping or failure to remain alert during duty hours.
(21) Betrayal of confidential information.
(22) Garnishment of wages for more than one indebtedness.
(23) Political activity prohibited by T.C.A. Title 2, Chapter 19 (The Little Hatch Act)
(24) **For the good of the service as outlined in T.C.A. 8-30-326.**
(Emphasis added).

12. **PROGRESSIVE DISCIPLINARY ACTION (Rule 1120-10-.07)**

(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. The supervisor will meet privately with the employee to:

(a) Review with the employee exactly what is expected on the job and why.
(b) Explain to the employee how he has not met requirements and why present conduct or performance is unacceptable.
(c) Allow the employee to give reasons for his actions or failure.
(d) Make suggestions for correction.
(e) Record the date of the discussion and other necessary information for future reference.
(f) Written follow-up to the discussion may be forwarded to the employee but is not required. Written follow-up to an oral warning should not be construed as a written warning as described below and will not become part of the employee's official personnel file.

(3) Written Warning. The supervisor will meet with the employee and:

(a) Review the points covered in the oral warning, if an oral warning(s) was administered. The employee will be told that a significant change in his present conduct or performance must be made.

(b) Tell the employee he will receive a letter covering the significant points of the discussion to include:

1. What has been expected and how these expectations have not been met.
2. Suggestions for improvement.
3. Indication that failure to improve will lead to further disciplinary action.

(c) Review with the organizational unit head the contents of the letter prior to its delivery to the employee by the supervisor.

(d) A copy of the written warning may be placed in the employee's official personnel file in the agency personnel office at the discretion of the appointing authority. Any written warning which has been issued to an employee shall be automatically expunged from the employee's personnel file after a period of two (2) years from the date of the letter; provided, that the employee has had no further disciplinary actions with respect to the same area of performance, conduct, and discipline.

(4) Suspension Without Pay.

(a) After minimum due process is provided, a suspension without pay may be issued by the appointing authority for one (1) to thirty (30) days. No employee may be suspended without pay for disciplinary purposes for more than thirty (30) days in any consecutive twelve (12) month period. Suspensions with or without pay of more than thirty (30) days may be issued pending the outcome of an investigation or legal action with approval of the Commissioner.

(b) Before issuance, a written notice of the suspension without pay will be prepared. The notice will contain an account of the circumstances which led to the decision to issue the suspension, the beginning and ending dates of the suspension and information to the employee concerning his rights of appeal as outlined in Chapter 1120-11 of these rules. A copy of the notice will be placed in the employee's official personnel file and a copy will be sent to the Department.

(5) Dismissal.

(a) After minimum due process is provided, an employee may be dismissed by the appointing authority from his position for unacceptable conduct or performance of duties.

(b) Before an employee is dismissed, a written notification detailing the circumstances leading to the decision to dismiss will be prepared. The notice will indicate the effective date and inform the employee of his rights to appeal as outlined in Chapter 1120-11 of these rules. A copy of the notice will be placed in the employee's official personnel file and a copy will be sent to the Department.

(c) Before an employee can be dismissed, he must be given ten (10) calendar days paid notice. During the notice period an employee will not be required to report for duty. The employee's accumulated annual leave balance may be used during this notice period only if dismissal was for gross misconduct.

(6) Transfer or Demotion. If it is determined by the appointing authority that an employee's ability to satisfactorily perform his duties is beyond the capabilities of the employee or the employee has been compromised by notorious conduct to the extent that he is ineffective in his position, the employee may be demoted or transferred to a position that is more appropriate after minimum due process has been provided.

13. **GRIEVANCE/PURPOSE (Rule 1120-11-.01)**

To provide clear, orderly and expedient procedures through which all career or permanent employees of the State service may process bona fide complaints or grievances.

14. **GRIEVANCE/POLICY (Rule 1120-11-.02)**

(1) Career and permanent employees will be given every opportunity to resolve bona fide complaints or grievances through established procedures. Every reasonable effort will be made to resolve complaints at the lowest possible step in the procedure.
(2) Employees using this procedure will be entitled to process their complaints or grievances without fear, interference, discrimination, or reprisal.

15. **GRIEVANCE/RESPONSIBILITY (Rule 1120-11-.03)**

(1) The Commissioner will be responsible for providing and maintaining the basic standards and guidelines for implementing this rule chapter.
(2) Appointing authorities will be responsible for the proper effectuation of this rule chapter throughout their respective agencies. Modification of these procedures may be made in order to satisfy unusual circumstances within an agency if such modification is approved by the Commissioner.
(3) Appointing authorities will be responsible for ensuring that all employees and supervisory personnel are aware of the provisions of this rule chapter.

16. **GRIEVANCE/BASIC STANDARDS (Rule1120-11-.04)**

(1) A complaint or grievance must be filed at the appropriate step in the grievance procedure within fifteen (15) workdays (Monday - Friday, 8:00 a.m. - 4:30 p.m.) of the action which is the basis for the grievance, otherwise it will be considered untimely and invalid.
(2) Although no standard grievance forms are provided, agencies may develop and make available such forms to employees. No grievance may be denied because a standard form adopted by an agency has not been used.
(3) A grievant may represent himself at any step in the procedure.
(4) At the informal hearing before the appointing authority, an attorney or a representative of an employee may speak on behalf of the employee.
(5) Legal counsel may represent a grievant before the Civil Service Commission, which is the final step of this procedure. The grievant and the agency may have counsel present at discussions prior to the final step. The presence of other observers at discussions prior to the final step of this procedure is at the discretion of the manager or supervisor in charge of that discussion.
(6) Grievants may present grievances during business hours or other mutually agreeable hours as work situations may require. Grievance discussions held during the scheduled off-duty hours for a grievant, witness, or representative will be considered the same as overtime work. Grievants or employees who are required to appear as witnesses or representatives will not be required to use leave for such periods and shall be reimbursed for travel and other expenses in accordance with the comprehensive travel regulations.
(7) Grievances concerning suspension without pay must be appealed to the lowest management level in the organization with authority to overturn the suspension.

(8) Grievances concerning dismissal should be appealed directly to the appointing authority, warden, or superintendent.
(9) Grievances concerning alleged discrimination prohibited by T.C.A. 8-50-103 or T.C.A. 4-21-401 may be appealed directly to the appointing authority, warden, or superintendent through this procedure. If the aggrieved is unsatisfied with the decision, the grievance and the appointing authority's response may be appealed to the Commission within thirty (30) days or the Tennessee Human Rights Commission as provided in T.C.A. 8-50-103(b).
(10) Grievance decisions should be communicated in writing directly to the grievant in a timely manner as outlined in Chapter 1120-11-.05. Certified or registered mail is mandatory if a decision must be mailed. Hand delivered grievance decisions should include a written heading indicating "Hand Delivered" with a place for a signature.
(11) Grievances must be expressed in reasonable terms. Each grievance submitted should contain:

(a) the basis for the grievance;
(b) the settlement or corrective action desired by grievant; and
(c) sufficient facts or other information to begin an investigation.

17. **GRIEVANCE/PROCEDURES (Rule 1120-11-.05)**

The appropriate entrance step is determined by the grievant's relative level in the organization. Procedures shall not be more than five (5) steps to finality as follows:
(1) Step I - Grievant's immediate Supervisor (verbal)

(a) Verbal discussion with supervisor within fifteen (15) workdays of cause.
(b) Supervisory investigation and fact finding.
(c) Decision clearly communicated to grievant within five (5) workdays of discussion.

(2) Step II - Next Appropriate Higher Level of Management (written)

(a) Written grievance submitted to appropriate manager within ten (10) workdays of receipt of Step I decision.
(b) Informal discussion or hearing of facts and allegations.
(c) Investigation, fact finding, and written decision communicated to grievant within ten (10) workdays of discussion.

(3) Step III - Next Appropriate Higher Level of Management (written)

.(a) Written grievance and prior step decision submitted to next appropriate manager within ten (10) workdays of receipt of decision from Step II.
(b) Informal discussion or hearing of facts and allegations with witnesses and documentation.
(c) Investigation, fact finding, and written decision clearly communicated to grievant within ten (10) workdays of discussion.

(4) Step IV (written)

(a) Written grievance and prior step decision submitted to the appointing authority or designee within ten (10) workdays of receipt of decision from Step III.
(b) Informal discussion or hearing of facts, allegations, and testimony by appropriate witnesses as determined by the appointing authority or designated representative as soon as practical. Whenever possible, the fourth step hearing shall be conducted by a manager who had no input to or involvement in the original decision to discipline.
(c) Investigation, fact finding, and written final agency decision communicated to grievant within ten (10) workdays of discussion.

(d) The appointing authority shall have full authority to overturn, reduce, or alter any disciplinary action based on information gathered at the step IV hearing including reinstatement of leave and awards of backpay, if appropriate, which may be offset by income earned from alternative employment or unemployment insurance payment received.

(5) Step V (Formal - Career Employee only)

(a) Written grievance and all relevant documentation shall be submitted within thirty (30) days of receipt of decision from Step IV to:

Secretary, Civil Service Commission
Tennessee Department of Personnel
Second Floor, James K. Polk Building
Nashville, TN 37243-0635

(b) Hearings will be held pursuant to T.C.A. §8-30-328 and the Uniform Administrative Procedures Act.

(6) The time limits set herein may be extended not in excess of six (6) months by written agreement between the manager involved and the employee. Failure of management to proceed within established time limits entitles the grievant to proceed to the next step in this procedure.

(7) Hearings conducted at Step V will conform to the model rules of the Secretary of State for contested cases and the Department hereby adopts Secretary of State Rule 1360-4-1 in statutory compliance.

18. **GRIEVANCE/SCOPE OF PROCEDURE (Rule 1120-11-.06)**

(1) The Commission will serve as the final step for all grievances by career employees.

(2) The agency appointing authority will serve as the final step for all grievances by permanent employees.

19. **GRIEVANCE/GRIEVABLE MATTERS (Rule 1120-11-.07)**

(l) Disciplinary suspension or demotion.

(2) Disciplinary dismissal.

(3) Involuntary geographical transfer of an employee or official duty station more than fifty (50) miles. Distance will be determined by drawing a circle, with a 50 mile radius, centered on the previous official duty station

(4) Non-compliance with an approved reduction in force plan by an appointing authority.

(5) Prohibited political activity as outlined in T.C.A. Title 2, Chapter 19 ("The Little Hatch Act").

(6) Coercion of an employee to "waive" his right to consideration on a certificate of eligibles.

(7) Performance evaluations under certain circumstances to the fourth step.

(8) Other matters within the discretion or control of the appointing authority or the Commission.

20. **GRIEVANCE/EXCEPTIONS & NON-GRIEVABLE MATTERS (Rule1120-11-.08)**

(1) Actions that affect employees who are not career or permanent employees.

(2) Actions that affect an employee serving an initial probationary period.

(3) Normal supervisory counseling.

(4) Non-selection for promotion when the appointment was in compliance with these rules and the Act.

(5) Verbal and written reprimands.

(6) Performance award decisions.
(7) Actions resulting from suggestions adopted by the State Employee Suggestion Award Board.
(8) Actions resulting from reductions in force when an approved reduction in force plan was followed.
(9) Shift, post, and overtime assignments.
(10) Reasonable work assignments outside those normally associated with the employee's assigned job classification.
(11) Salary range assigned to classification.
(12) Classification of position.
(13) Denial of leave requests except as provided for in T.C.A. §§8-50-801 and T.C.A. 8-50-110.
(14) Matters relating to internal agency or program management which are based on discretionary decision making.
(15) Demotions during subsequent probation, if such demotion is to the job classification from which the employee was promoted and at a salary rate no lower than the salary rate had the promotion not occurred.
(16) Agency rules or policies which do not conflict with statutes or rules of the Department of Personnel.
(17) Any other matter over which an appointing authority or the Commission has no control or jurisdiction or is without the authority to grant requested relief.

21. **GRIEVANCE/TECHNICAL ADVICE AND ASSISTANCE (Rule 1120-11-.09)**

(1) Technical questions regarding this rule may be resolved by referring questions to the agency personnel section.
(2) Unresolved technical questions to an agency personnel section may be resolved by referring such to the Department of Personnel, Employee Relations Division.
(3) Disputes over grievability may be resolved by an agency's appointing authority or by the Commissioner. The Civil Service Commission may review such determinations and, at its discretion, take whatever action it deems appropriate.
(4) The intent of this policy is to legally, efficiently, and fairly resolve bona fide complaints, and grievances. The initiation of a grievance should not be considered as a negative reflection against an employee, supervisor, or agency management, but should be considered as an effort to communicate and seek resolution of work related problems.
(5) Management should consider grievances objectively, fairly, and expeditiously while maintaining a helpful, cordial, and professional attitude throughout the process of redress.

Grievant’s actions violated multiple rules of the Department Human Resources. Grievant’s conduct of striking a fellow employee is unacceptable and cannot be tolerated in any work environment. But is especially inappropriate in the prison environment where self-control must constantly be exercised. Assault on a co-worker was proper justification for the Department to ignore the minimum progressive discipline and act higher up the progressive

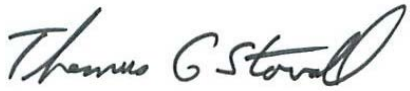
discipline hierarchy. Termination was the only appropriate disciplinary action, and the Department's decision is upheld.

IT IS THEREFORE ORDERED that the Department's decision to terminate Grievant from his employment is fully **UPHELD**.

Entered this the _____ day of _____, 2011.

_____
Steve R. Darnell
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 1st day of December, 2011.



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Thomas G. Stovall, Director
Administrative Procedures Division