6-27-2011

TENNESSEE DEPARTMENT OF CORRECTION, Petitioner, vs. ALTHEA SWIFT, Grievant

BEFORE THE TENNESSEE
CIVIL SERVICE COMMISSION

TENNESSEE DEPARTMENT OF CORRECTION,	)	
Petitioner,	)	
	)	**Docket No.: 26.05-105115J**
v.	)	
ALTHEA SWIFT,	)	
Grievant	)	

INITIAL ORDER

This matter came before Mattielyn B. Williams, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, sitting for the Tennessee Civil Service Commission, on June 27 and 28, 2011. Staff Attorney Theresa S. Thomas, of the Tennessee Department of Correction, represented the State. Grievant Althea Swift was represented by Dr. Bede Anyanwu, Esq., of the Jackson bar.

The subject of this appeal is whether or not termination is the proper discipline for the Grievant's misconduct.

After due consideration of the record and arguments of the parties, it is **DETERMINED** that a thirty (30) day suspension is the proper discipline for the Grievant's misconduct.

This decision is based on the following:

FINDINGS OF FACT

1. Northwest Correctional Complex (Northwest) is operated by the Tennessee Department of Correction (TDOC) and houses close security inmates. Northwest Complex is a combination of a number of correctional facilities that used to be free-standing.

2. Grievant Althea Swift has worked for TDOC for eleven (11) years. Swift received excellent performance ratings. Lieutenant David Abel described the Grievant as a model employee.

3. At the time of her termination, Grievant worked in the Property Room at Northwest Correctional, which is one of the facilities of which Northwest Complex is composed.

4. In April 2009, Grievant began dating former Alderman and County Commissioner Robert Taylor, who is also the Father of Inmate Johnathan Taylor. During the April – June 2009 period in question, Inmate Taylor was housed at West Tennessee Correctional, one of the institutions within Northwest Correctional Complex.

5. Grievant did not inform Warden Tony Parker that she was dating a family member of an Inmate and secure his approval, as required by Policy.

6. Lieutenant David Abel and his staff routinely record telephone conversations of inmates. In the course of such recording, Lieutenant Abel and staff discovered three (3) telephone conversations of Inmate Taylor that included discussion with or greeting by Grievant Swift.

7. More specifically, on three (3) occasions when the Grievant was visiting the home of Commissioner Taylor, the Commissioner put "Althea" on the telephone line with the inmate for brief conversation. During one of the three (3) recorded conversations, Inmate Taylor inquired about how he might get a drug screen result changed. Grievant testified that she did not offer Inmate Taylor any specific advice on achieving that result, she simply told him to be careful.

8. Review of Exhibit 7, the termination letter to Grievant Swift of June 12, 2009 from Warden Parker, however, reveals that Grievant Swift said quite a bit more than just be careful.

> "During that conversation, the inmate made mention of having "it (the dirty drug screen) pulled," and you (Swift) said, "You should be able to. I don't know how they do it there, but …." And the inmate said, "They can log on and take care of that, to which you replied "Ahh, yea." The inmate advised you that he had to get "certain people's codes," to which you said, "Yea."

9. Grievant did not suggest to Inmate Taylor that he should not attempt to change a drug screen result. Similarly, Grievant did not signal the authorities that Inmate Taylor had inquired about how to change a drug screen result.

10. Proof at the hearing established that Grievant does not have the capacity to alter drug screen results, professionally. Such capacity is reserved for only one (1) or two (2) members of upper level management.

11. The fact that Grievant was apparently perceived as someone who could have helped an inmate change a drug screen test result illustrates why the

anti-fraternization policy covers not only the inmates themselves, but also the family members of inmates.

12. After initial hesitancy to admit the telephone conversations, Grievant admitted the conversations and did not deny initialing or signing papers regarding fraternization in pre-service training in 1999 and in 2001, early in her career with TDOC. However, Grievant explained that she thought the focus of the Policy was on not fraternizing with the inmates themselves, as opposed to family members of the inmates.

13. No evidence was presented to show that the general public or the inmate population as a whole is aware of the relationship between the Grievant and Commissioner Taylor.

14. It was clear that Grievant and Deputy Warden Brenda Jones had a social relationship with one another, including at church.

15. Grievant testified that she informed Deputy Warden Jones of her relationship with Commissioner Taylor. Deputy Warden Jones denies that she was informed. To reconcile the inconsistency in testimony, here, it is **DETERMINED** that the Grievant, more than likely, informed the Deputy Warden of her new boyfriend, at a minimum by being seen with him at church, but failed to indicate that the Commissioner was the father of an inmate within Northwest Complex.

16. Even if the Grievant had informed Deputy Warden Jones of her relationship with Commissioner Taylor and of Commissioner Taylor's son's incarceration in a formal

meeting, it is the State's interpretation of its own rules that approval only by the "Senior" Warden would suffice to avoid a violation.

17. Correctional Administrator (C.A.) for the West Region of TDOC Tony Parker was Warden Tony Parker at the time of Grievant's termination. Parker testified that the reason he felt termination was the appropriate discipline was that the Grievant did not inform him of the relationship, as required by Policy. C. A. Parker believed that Grievant Swift's ability to do her job was compromised beyond repair. Parker considered it unprofessional of Grievant Swift not to have alerted officials to Inmate Taylor's interest in getting a dirty drug screen reversed. C.A. Parker did admit that he did not believe that Grievant Swift was involved in a conspiracy to change Inmate Taylor's drug screen(s).

18. It was noted that in some states, relationships with family members are completely forbidden for correctional officers, whereas in Tennessee, the relationship simply must be disclosed and the Warden is able to approve or disapprove of the relationship.

19. Grievant was charged with violation of Policies 305.03 and 302.08. In 1999, some ten (10) years prior to May/June 2009, Grievant initialed Policy 305.03 as being read. In 2001, Grievant signed her Oath of Office, pursuant to Policy 302.08.

20. C.A. Parker could not identity even one (1) in-service training in which these two (2) policies were taught. On the other hand, there is an argument that the

policies and Oath are self-explanatory. Policies are available to employees on-line; many policies are available in employee break areas.

21. On Friday, June 12, 2009, a minimum due process hearing was held. Grievant Swift attended. Warden Parker believed suspension to be inappropriate because Grievant Swift had violated policy by fraternizing with an inmate's father and because Grievant Swift had not reported the inmate's intention to try to get a positive drug urine screen removed. Warden Parker no longer found Grievant Swift to be credible as a Correctional Officer.

22. Grievant contends that her termination was based on her race, African-American. Warden Parker is Caucasian. There was testimony that Northwest had terminated twenty-five (25) employees during Warden Parker's tenure as Warden. Of the twenty-five, four (4), or sixteen percent (16%), were African-American. The racial composition of the entire staff at Northwest was not disclosed. Without knowing the racial composition of the entire staff, it is **DETERMINED** that one cannot comment on whether 16 % appears excessive. Judicial notice is taken that the population of Tennessee is roughly 16% African-American.

23. Grievant raises constitutional issues which are **NOTED** for the record, but are not appropriate for discussion in the instant forum.

24. Grievant contends that minimum due process was not afforded. Grievant received written notice of the charges by letter of June 8, 2009. A due process hearing was held, with Grievant present, on June 12, 2009. By letter of June 12, 2009, Grievant

was informed of her termination and right to use the employee grievance procedure. Grievant did appeal her termination to George Little, TDOC Commissioner in 2009. By letter of September 2009, Commissioner Little affirmed Warden Parker's determination that termination was the appropriate penalty for Grievant's violation of Policy. Grievant did avail herself of the employee grievance procedure which resulted in the instant Level V hearing.

23. As shown in Exhibit 9, Grievant was found to be eligible for Unemployment Benefits because the proof showed that the Grievant

> "did not receive prior warning …" and did not engage in misconduct, with "misconduct" defined as "behavior that shows a willful disregard for the employer's interests, or deliberately violates or disregards the standards of behavior that an employer has the right to expect of the employee. … The employer has not shown that the claimant's conduct showed a wanton disregard for the interests of the employer in this matter. The evidence does not establish the claimant knowingly violated the employer's policies. …"

It is **NOTED** that misconduct is defined differently for Unemployment Benefit purposes versus for State Civil Service purposes.

24. Grievant Swift's demeanor at the hearing was one of embarrassment and remorse over the entire incident. Based on Grievant's demeanor when questioned about Policy 305.03, it is **DETERMINED** to be **CREDIBLE** that Grievant Swift did not realize the need to report and secure approval for a dating relationship with a father of an inmate in another facility.

CONCLUSIONS OF LAW

1. T.C.A. §8-30-331 and TDOP Rule 1120-10-.03 set forth the minimum requirements necessary for due process prior to the deprivation of the property right of a Civil Service employee. Grievant, here, was provided with written notice of the charges, a Level IV hearing, and provided further detail through both Warden Parker's letter of termination and Commissioner Little's letter affirming termination.

2. It is **CONCLUDED** that minimum due process was offered and pursued by Grievant. In addition, any deviations from due process at Levels I - IV are cured by the de novo Level V hearing.

3. As the Petitioner, the Tennessee Department of Correction bears the burden to show, by a preponderance of the evidence, that the Grievant violated Departmental and/or Civil Service policies and that termination is the proper discipline for such violation(s).

4. Exhibit 1, TDOC Policy 305.3, Employee/Offender Interaction, edition May 1, 2008, (Exhibit 5 is the May 15, 1997 version of Policy 305.3) prohibits fraternization with inmates and family members of inmates.

Section VI A indicates that:

> Employees shall conduct themselves in a professional manner when interacting with offenders.

Section VI C indicates that:

> Conversation with inmates shall be limited to that necessary as part of the employee's duties. …

Section VI F indicates that:

> Social relationships are also prohibited with relatives, family, and/or clearly identifiable close associates of such persons unless written approval is obtained from the … Warden for institutional employees …

5. It is **CONCLUDED** that TDOC met its burden of proof in showing that Grievant Swift violated Policy 305.3 by being unprofessional in not reporting Inmate Taylor's inquiry about how to change drug screen results, in having three (3) brief conversations with Inmate Taylor that were not related to Grievant Swift's duties, and in having a social relationship with the father of an inmate without approval for such from then Warden/now C.A. Parker.

6. TDOC Policy 302.08 concerns the Code of Conduct/Oath of a Correctional Employee. Exhibit 4 contains the Oath, signed by Grievant Swift,[1] which indicates that she will "execute the laws and regulations prescribed for the government of said agency or institution …"

7. Through failure to comply with Policy 305.03, it is **CONCLUDED** that TDOC met its burden of proof that Grievant failed to execute all regulations for the governance of a TDOC facility, pursuant to Policy 302.08.

8. In this particular matter, Grievant's primary relationship was with Commissioner Taylor. None of the three (3) conversations with Inmate Taylor were initiated by Grievant Swift. Grievant Swift, in no way, sought out Inmate Taylor; the phone calls were thrust upon her by virtue of Grievant Swift being at Commissioner Taylor's home.

[1] Was Althea C. Johnson when signed.

9. Grievant can be faulted for not declining to take the phone when requested by Commissioner Taylor, but given Grievant Swift's admitted lack of understanding of the Policy, it is not that surprising that Grievant Swift saw nothing wrong with speaking briefly with a potential relative who was incarcerated at a different facility.

10. Correctional institutions are unique places "fraught with serious security concerns." Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 1989 (1979). The position of correctional officer is recognized as a sensitive one. Reese v. Tennessee Civil Service Commission, 699 SW 2nd 808, 812 (Tenn. App. 1985). Policies and rules in a prison are present to ensure security and should not be taken lightly. Security is risked when employees choose to ignore the prohibition of entering into a social or nonprofessional relationship with an inmate.

11. Warden Parker (C.A. Parker), in his position as appointing authority at Northwest, was required to determine the most appropriate level of discipline to impose upon Grievant. T.C.A. § 8-30-330 (a) sets forth that 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 (c) provides that where corrective action necessary, the "supervisor must administer disciplinary action beginning at the step appropriate to the infraction or" (poor) "performance."

12. The instances in which termination should be the first discipline administered are rare when the employee's overall work performance has been excellent. In the Matter of Department of Correction v Rick Moore, Docket No. 26.05-12-0018J,

p.16, para. 11. Also, In the Matter of Department of Human Services v. Phyllis McDonald and Alice Lucas-Mason, Docket Nos. 26.11-12-0031J and 26.11-12-0033J, p.6, para. 2.

13. In Kelly v. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. Nov. 30, 1999), the Tennessee Court of Appeals clarified the requirements of progressive discipline under T.C.A. § 8-30-330, which provides that "supervisors are expected to administer discipline beginning at the lowest appropriate step." Id. at *4. The Court explained that:

> "[p]rogressive discipline does not require a supervisor to begin at the lowest level of discipline regardless of the nature of the employee's conduct. It simply means that the supervisor should impose the lowest appropriate punishment taking into account the nature of severity of the employee's behavior." Id. In addition, "supervisors have the discretion to determine what punishment fits the offense." Id.

14. Had the Grievant given Inmate Taylor advice about who to approach or how to get online to change a drug screen result, no doubt termination would have been proper. Yet, here we have an excellent employee who was in error about the extent (family) of coverage (any institution) of a Policy and who did not report Inmate Taylor's inquiry (not an actual change of a drug screen or well-developed plot to change one) about how to change a drug screen.

15. Both parties admit that the instant matter is a case of first impression. In the history of the Tennessee Department of Correction, no employee has been disciplined for fraternization with the family of an Inmate, as opposed to disciplined for fraternization with the Inmate him or herself.

16. Based on the above, it is **CONCLUDED** that the appropriate discipline for Grievant Swift's misconduct, as an excellent employee with no prior discipline, in this case of first impression, is a **THIRTY DAY SUSPENSION –** twenty (20) days for failure to disclose and obtain approval for her relationship with Commissioner Taylor, plus ten (10) days for failure to disclose to appropriate officials Inmate Taylor's inquiry about how to change a drug screen, coupled with failure to instruct Inmate Taylor that he should not try to get a positive drug screen changed.

17. Grievant is to be made whole, i.e. reimbursed for any and all lost wages, leave, longevity pay, and/or other compensation as a result of the termination assessed of her, less any compensation that the Grievant received by engaging in other employment during the period of her termination and less unemployment benefits received during that period.

18. As a successfully appealing employee, Grievant's reasonable attorney fees and costs are to be paid.

This Initial Order entered and effective this the ___ day of __December _, 2011.

Mattielyn B. Williams
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State this 21st day of December, 2011.

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Thomas G. Stovall, Director
Administrative Procedures Division