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TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES, Petitioner, v. DARREN BIVINGS, Grievant.

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

In the matter of:	)	
	)	
TENNESSEE DEPARTMENT OF	)	
CHILDREN'S SERVICES,	)	
Petitioner,	)	
	)	
v.	)	**Docket No. 26.43-109394J**
	)	
DARREN BIVINGS,	)	
Grievant.	)	

INITIAL ORDER

NOTICE OF DEFAULT AND DISMISSAL

This contested case came on to be heard on August 10, 2011, in Nashville, Tennessee before Administrative Judge Joyce Grimes Safley, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Civil Service Commission of Tennessee. Ms. Marjorie Bristol, counsel for the Tennessee Department of Children's Services (DCS), represented the Department or the State. The Grievant, Mr. Darren Bivings, received proper notice of the hearing, but was not present, nor was anyone present on his behalf.

It is noted that Grievant Bivings telephoned the undersigned on the day before the hearing to request that the hearing scheduled for the next morning be moved to Dandridge, Tennessee. This judge declined to move the hearing to Dandridge, Tennessee on such short notice, because witnesses were already traveling to Nashville, a court reporter was scheduled for the hearing in Nashville, and it would not be feasible to change the venue of the hearing on the evening before the scheduled hearing. Further, the specific reason that the

hearing was scheduled in Nashville, Tennessee was due to the Grievant's request that the hearing be held in Nashville, rather than Dandridge, Tennessee. Early on, during the pendency of this case, Grievant asked that the hearing not be held in Dandridge, Tennessee because "it was not a neutral place." Petitioner's last minute request to move the hearing to Dandridge, Tennessee was not well taken and was respectfully **DENIED**.

Grievant Bivings confirmed during the August 9, 2011 teleconference that he would be present at the hearing in Nashville, Tennesse the next morning.

On the morning of the scheduled hearing in Nashville, the Department's counsel and the Department's party representative were present and ready to proceed with the hearing as scheduled. Grievant was not present, nor was anyone present on his behalf. The Department moved that the Grievant be held in Default, and further moved that the Department be allowed to proceed with its proof in the absence of the Grievant.

Grievant had voiced his understanding at two different prehearing conferences that the hearing date in this matter was August 10, 2011. Emails sent to the parties by the undersigned also referenced the hearing date. Additionally, Grievant received the order entered August 1, 2011 which again stated the date and time of the hearing. Grievant acknowledged that he had received the Notice of Hearing with the August 10, 2011 hearing date. Grievant had actual notice of the hearing which was scheduled, and yet elected not to participate.

After the hearing had been conducted and concluded, the undersigned returned to her office and received voicemails from the Grievant requesting a continuance of the August 10, 2011 hearing for the stated reason that his grandfather was ill.

Grievant did not contact DCS's attorney as instructed on August 9, 2011 (the day before the hearing) to discuss the upcoming hearing. Nor had Grievant filed any pleadings or any other papers in preparation for the scheduled hearing.

Grievant received proper notice of the hearing. DCS's motion for default was **GRANTED** and DCS was allowed to proceed with its proof in this matter.

The subject of this hearing was Grievant's appeal of his termination from the Department of Children's Services. Grievant was terminated for allegedly violating the following Tennessee Department of Human Resources Rules, Tennessee Department of Children's Services Rules and Policies, and Mountain View Youth Development Center's Policies and Procedures: (1) TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-1--.06(3) –Careless, negligent, or improper use of State property or equipment; (2) TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-10-.06(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; (3) TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-10-.06(15) – Acts that would endanger the life and property of others; (4) TENNESSEE DEPARTMENT OF HUMAN

RESOURCES RULE 1120-10-.06(16) – Possession of unauthorized firearms, lethal weapons, alcohol or illegal drugs on the job; (5) Violation of TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES ADMINISTRATIVE POLICY 27.21, Contraband and Preservation of Physical Evidence ; and (6) TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES ADMINISTRATIVE POLICY 27.37 – DOE/Exclusion of Weapons.

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that DCS showed, by a preponderance of the evidence, that Grievant violated the following policies and procedures: (1) TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-1--.06(3) –Careless, negligent, or improper use of State property or equipment; (2) TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-10-.06(15) – Acts that would endanger the life and property of others; (3) TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-10-.06(16) – Possession of unauthorized firearms, lethal weapons, alcohol or illegal drugs on the job; (4) Violation of TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES ADMINISTRATIVE POLICY 27.21, Contraband and Preservation of Physical Evidence; and (5) TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES ADMINISTRATIVE POLICY 27.37 – DOE - Exclusion of Weapons.

DCS also showed, by a preponderance of the evidence, that considering all the circumstances, termination is the appropriate discipline in this matter.

Accordingly, considering all the facts and circumstances of this matter, it is **ORDERED** that the appropriate discipline in this matter is **TERMINATION.**

FINDINGS OF FACT

1. Mountain View Youth Development Center ("Mountain View"), located in Dandridge, Tennessee is a "hard-wire" juvenile offender facility operated by the Tennessee Department of Children's Services (DCS). The facility houses male juvenile felony offenders ages 13-19. Around half of the Mountain View residents are "violent offenders".

2. At all relevant times, Grievant Darren Bivings was employed as a Children's Services Officer ("CSO") with Mountain View Youth Development Center. As a CSO, Grievant was responsible for supervision and security of juvenile offenders placed in the Mountain View facility.

3. Grievant's personnel file was not offered as an exhibit by DCS.

4. In January, 2010, Mountain View Superintendent Phillip Ellis received an anonymous letter which stated that Grievant was selling contraband or "pirated" DVDs, counterfeit designer purses, and "pirated" or counterfeit CDs to Mountain View employees while on Mountain View's property, including Mountain View's parking lot.

5. Superintendent Ellis had a meeting with Steve Harrison, Security Manager at "Mountain View" and Grievant Bivings on January 27, 2010 to investigate the charges of Grievant bringing contraband and selling counterfeit/pirated goods on State property.

6. During the January 27, 2010 meeting, Grievant admitted selling such contraband/counterfeit goods while on Mountain View property.

7. During the meeting, Grievant was cautioned that selling pirated DVDs and CDs was a felony, and was instructed to "cease and desist" bringing such articles onto state property. He was warned if he continued selling such articles he would be terminated.

8. Mr. Steve Harrison, Mountain View's Security Manager, testified credibly that Grievant was warned during the January 27, 2010 meeting with him and Superintendent Ellis that he would be terminated if he did not quit bringing such goods onto State property and did not quit selling counterfeit/pirated goods.[1]

9. Despite the warning given to Grievant, Mr. Harrison believed that Grievant continued to bring such counterfeit/pirated items onto Mountain View property.

10. When questioned by DCS Internal Affairs investigators on February 23, 2010, Grievant refused to divulge the name of employees who had purchased the pirated/counterfeit items from him.

11. During the February 23, 2010, Grievant submitted his "resignation" from his job at Mountain View. The "Employee Resignation Notification" was completed and signed by Grievant Bivings. It cited his reason for resigning as "necessary for personal reasons."

12. On February 23, 2010, one of the investigators present at Grievant's interview contacted the Dandridge Police Department in order to

[1] It is noted that selling counterfeit goods or pirated goods is a violation of Tennessee's Criminal Code T.C.A.§39-14-152, T.C.A.§39-14-139.

search Grievant's personal vehicle, which was parked in the MVYDC parking lot.

13. Grievant Bivings' personal vehicle was searched by MVYDC personnel while the Dandridge Police Department witnessed the search.[2]

14. The search of Grievant Bivings' vehicle revealed the following: 16 pirated DVD's, four counterfeit Coach handbags, a box of live ammunition (bullets), and a hunting knife.

15. At some point after tendering his resignation, Grievant changed his mind about resigning his position, and informed his supervisors at MVYDC that he wished to "rescind" the resignation.

16. Thereafter, Superintendent Ellis informed Grievant that he was "terminated" because he had continued to bring contraband onto MVYDC property after being warned to cease and desist.

17. The Commissioner upheld Grievant's termination, following a Level IV Grievance Hearing, by a letter of termination issued on July 20, 2010.

18. Thereafter, Grievant timely appealed his termination.

CONCLUSIONS OF LAW

1. The Department of Children's Services bears the burden of proof in this matter to show that Grievant violated Tennessee Department of Human Resources Rules, DCS Policies, and Mountain View Facility Policies and

[2] As a State correctional facility, any vehicle on MVYDC property is subject to search without need for a search warrant.

Procedures. DCS also has the burden of proof to show that the discipline imposed, termination, was the appropriate discipline for any violation of such rules, policies, or procedures.

2. Rule 1120-10.02 of the *Rules of the Tennessee Department of Personnel* provides as follows:

> A career [civil service] employee may be warned, suspended, demoted or dismissed by his appointing authority *whenever legal or just 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 employee serves at the pleasure of the appointing authority.

(Emphasis added)

3. As defined by the UNIFORM RULES OF PROCEDURE FOR HEARING CONTESTED CASES BEFORE STATE ADMINISTRATIVE AGENCIES, Rule 1360-4-1-.02(7), "preponderance of the evidence" means the greater weight of evidence, or that, according to the evidence, the conclusion sought by the party with the burden of proof is the more probable conclusion.

4. The Petitioner, Department of Children's Services, charges Grievant with the following:

> (1) TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-1--.06(3) –Careless, negligent, or improper use of State property or equipment;
>
> (2) TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-10-.06(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;

(3) TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-10-.06(15) – Acts that would endanger the life and property of others;

(4) TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-10-.06(16) – Possession of unauthorized firearms, lethal weapons, alcohol or illegal drugs on the job;

(5) Violation of TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES ADMINISTRATIVE POLICY 27.21, Contraband and Preservation of Physical Evidence ; and

(6) TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES ADMINISTRATIVE POLICY 27.37 – DOE/Exclusion of Weapons.

5. T.C.A. §8-30-331 provides that civil service employees (who have successfully completed their probationary period) have a property right to their positions.

6. Because State of Tennessee civil service employees have "property rights" in their jobs; such employees must be afforded constitutional due process before the State may legally take an adverse action against an employee's job. Hinson v. City of Columbia, 2007 WL 4562886 (Tenn. Ct. App. 2007).

7. Grievant was afforded due process and timely filed his appeal of his termination.

8. Turning to the alleged charges against Grievant, it is determined that the Department of Children's Services proved, by a preponderance of the evidence, that Grievant violated TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-1--.06(3) –Careless, negligent, or improper use of State property or equipment. Grievant's selling counterfeit goods and pirated recordings are

criminal offenses. Grievant committed such offenses on State property, and targeted state employees for sales of such contraband.

9. The Department did not prove, by a preponderance of the evidence, that Grievant violated TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-10-.06(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. Grievant's conduct was illegal, however, no showing was made that his conduct interfered with the ability of Mountain View management to manage, nor was there any showing that there was serious disruption of the normal operation of Mountain View Youth Development Center. No testimony was presented which supported this charge.

10. The Department proved, by a preponderance of the evidence, that Grievant violated TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-10-.06(15) – Acts that would endanger the life and property of others. Grievant brought a hunting knife and a box of bullets with him to his work on State property. Weapons should not have been on youth development center property which houses violent juvenile offenders.

11. The Department also proved, by a preponderance of the evidence, that Grievant violated TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-10-.06(16) – Possession of unauthorized firearms, lethal weapons, alcohol or illegal drugs on the job and TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES

ADMINISTRATIVE POLICY 27.37 – DOE/Exclusion of Weapons. In Grievant's case, he brought a hunting knife and a box of bullets to work on State property.

12. The Department also showed, by a preponderance of the evidence, that Grievant violated TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES ADMINISTRATIVE POLICY 27.21, Contraband and Preservation of Physical Evidence.

13. Clearly, the Grievant brought contraband items onto State property in direct contravention of established rules and procedures. Bringing weapons onto MVYDC property could have compromised the safety and security of both employees and juvenile felony offenders at Mountain View. Further, it is difficult to see how Grievant would have the respect of juvenile felony offenders if it was known that he was selling illegal items to other Mountain View employees. Such acts undermined the authority he had as a correctional officer at Mountain View.

Appropriate Discipline for Grievant

14. Rule 1120-10-10.22 of the *Rules of the Tennessee Department of Personnel* provides as follows:

> A career [civil service] employee may be warned, suspended, demoted or dismissed by his appointing authority whenever legal or just 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.

15. The legal standard which constitutes "just cause" to terminate civil service employees is concisely stated in 67 C.J.S., *Officers and Public*

Employees, § 137, cited by the Court in Knoxville Utilities Board v. Knoxville Civil Service Merit Board, 1993 WL 229505 (Tenn. Ct. App. 1993), p. 10. "Just cause" is defined as follows:

> "Just cause" is a ground for removal. In this respect, "just case" implies a cause sufficient in law, and is any cause which is detrimental to public service. It may be established by a showing of conduct indicating that the employee lacks the competency and ability to perform the duties of his office.

Where lawful grounds for dismissal of a civil service employee exist, the character and work record of the employee involved is of no importance, and the fact that he has previously received a general rating of satisfactory does not bar his removal.

16. Rule 1120-10-.01(45) of the *Rules of the Department of Personnel* provides that 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.

17. Grievant's acts fall within the latter category of causes for disciplinary action.

18. Tennessee's Civil Service statutes and rules incorporate the doctrine of progressive discipline. Accordingly, state supervisors are expected to administer discipline beginning at the lowest appropriate step. Kelly v. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. 1999). Further, at least one court, in expressing approval of the progressive discipline system, has stated that the legislative mandate for progressive

discipline should be "scrupulously followed". Berning v. State of Tennessee, Department of Correction, 996 S.W. 2d 828, 830 (Tenn. Ct. App. 1999).

19. T.C.A. §8-30-330 sets forth the state's civil service progressive discipline system as follows:

> (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.
>
> (b) Any written warning or written follow-up to an oral 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; provided, that the employee has had no further disciplinary actions with respect to the same area of performance, conduct, and discipline.
>
> (c) When corrective action is necessary, the supervisor must administer disciplinary action beginning at the step appropriate to the infraction or performance. ***Subsequent infractions may result in more severe discipline in accordance with subsection (a).*** (Emphasis added.)

20. The Court in Berning v. State Department of Correction notes that the "key word in the statute [T.C.A. §8-30-330] is *appropriate"*. Berning v. State Department of Correction, 996 S.W.2d 828, 830 (Tenn. Ct. App. 1999), *Perm. to appeal denied* (Tenn. 1999). "The 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." Id. At 830, *quoting the chancellor's order with approval.*

21. An employee's prior conduct, both good and bad, along with his entire work history, can be considered when determining what the appropriate

disciplinary action should be. Kelly v. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. 1999).

22. An additional consideration for determining the appropriateness of the discipline to be imposed is whether the punishment imposed upon the Grievant is different than discipline used with other employees who have engaged in the same conduct. Gross v. Gilless, 26 S.W. 3d 488, 495 (Tenn.Ct. App. 1999), *Perm. to Appeal Denied* (Tenn. 2000). No evidence was presented by either DCS or Grievant regarding terminations of other employees for conduct such as Grievant's.

23. In determining whether or not termination is the appropriate discipline for Grievant, it is necessary to consider whether there is "just cause" to terminate Grievant.

24. Considering all the circumstances of this matter, including the previous warning Grievant had been given, it is determined that the Department of Children's Services has "just cause" for terminating the Grievant.

25. Due to the extremely serious nature of Grievant's position, which involves the security and safety of residents (juvenile felony offenders) and employees at Mountain View, and in light of the fact that Grievant had received a direct order in the past to "cease and desist" from bringing illegal goods (counterfeit items and pirated DVD's and CD's) onto State property, the evidence preponderates in favor of termination being the appropriate discipline.

It is ordered that **TERMINATION** is the appropriate discipline in this matter. The Department's decision shall be **UPHELD.**

It is so ordered.

Entered and effective this 17 day of October, 2011

Thomas G. Stovall, Director
Administrative Procedures Division