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TENNESSEE DEPARTMENT OF INTELLECTUAL AND DEVELOP- MENTAL DISABILITIES, Petitioner, vs. CONNIE HAYES, Grievant.

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

IN THE MATTER OF:	)	
	)	
TENNESSEE DEPARTMENT OF	)	
INTELLECTUAL AND DEVELOP-	)	
MENTAL DISABILITIES,	)	**DOCKET NO. 26.45-111706J**
Petitioner,	)	
	)	
vs.	)	
	)	
CONNIE HAYES,	)	
Grievant.	)	

INITIAL ORDER

This matter came to be heard on October 11-12, 2011, before Thomas G. Stovall, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Tennessee Civil Service Commission. The Department of Intellectual and Developmental Disabilities (DIDD) was represented by Fredrick Zimmermann, Assistant General Counsel. Jonathan Stephens, Staff Attorney for the Tennessee State Employees Association, represented the Grievant Connie Hayes. This matter became ready for consideration on March 7, 2012, upon the submission of the parties' proposed findings of fact and conclusions of law.

The subject of this hearing was the appeal filed by the Grievant over two disciplinary actions she received from DIDD, a three day suspension and the termination of her employment.

After consideration of the record in this matter it is determined that the Grievant's suspension and termination should be **UPHELD**. This determination is based on the following Findings of Fact and Conclusions of Law.

PROCEDURAL HISTORY

On March 4, 2010, Dr. Levy Harris, the former Chief Officer for Clover Bottom Developmental Center (CBDC), recommended the Grievant's termination. The Grievant appealed her termination which was ultimately reduced to a three day suspension after a Level III hearing. The Level IV hearing on the suspension was not conducted until January 6, 2011. By letter of February 9, 2011, Acting Commissioner Debra Payne upheld the three day suspension. The Grievant filed an appeal to the Civil Service Commission requesting a Level V hearing over this suspension on March 3, 2011. On February 11, 2011, the Grievant was notified by Dr. Stacey Dixon, the current Chief Officer of CBDC, that her employment was to be terminated due to excessive tardiness. The Grievant appealed her termination and the Commissioner upheld the termination on March 31, 2011, after a Level IV hearing was held. The Grievant filed an appeal to the Civil Service Commission requesting a Level V hearing over her termination on April 19, 2011. These two grievances were consolidated into one proceeding and are both addressed by this Order.

FINDINGS OF FACT

1. At all times relevant to this case the Grievant was employed by DIDD as a Developmental Technician Supervisor 1 at CBDC. At the time of her termination she had been employed by the State of Tennessee for approximately 31 years.

Suspension

2. Many employees at CBDC are from different African countries. This sometimes results in problems amongst the staff due to differences in their national origins. During the course of a staff meeting on November 18, 2009, the Grievant was overheard saying that some of the staff members had "tribal problems." She also referred to staff member Lakeisha Lewis as a

"little girl." On January 23, 2010, Ms. Lewis and the Grievant engaged in a verbal altercation. The Grievant called Ms. Lewis a "heifer," a "slut," and a "bald-headed bitch." The Grievant also called Ms. Lewis's mother a "slut." For these actions the Grievant received a three day suspension.

Termination

3. CBDC implemented a leave and attendance policy in 2006 that allowed for up to six occurrences of tardiness in a 12 month period before disciplinary action could be initiated. A grace period of six minutes after the scheduled starting time was allowed before someone could be considered late for work. During a given 12 month period, on the seventh occurrence of tardiness, the progressive disciplinary system called for an oral warning. On the eighth instance a written warning was authorized, on the ninth a suspension, and on the tenth such occurrence termination was appropriate.

4. When Dr. Dixon became the Chief Officer of CBDC in September, 2010, she quickly recognized problems with the existing leave and attendance policy for employees. She concluded that the policy was not in keeping with the State's own attendance rules. As a result, she implemented a new leave and attendance policy effective December 1, 2010. The six minute grace period was eliminated.

5. The Grievant was well into a disciplinary track for repeated violations of the old leave and attendance policy by being late for work at the time the new policy went into effect December 1, 2010. She received an oral warning on January 21, 2010, a written warning on July 20, 2010, and a one day suspension on September 22, 2010. In the 11 months of 2010 before implementation of the new policy, Grievant had 46 instances of tardiness. In the first six weeks

after implementation of the new policy she was late for work 10 times in December 2010, and an additional 10 times in the first two weeks of January 2011.

6. On January 15, 2011, the Grievant was 41 minutes late for work. This was the final infraction that convinced the Grievant's superiors that termination was appropriate.

7. At approximately this same time the Grievant submitted an application for "intermittent" Family Medical Leave Act (FMLA) leave to the Human Resources office at CBDC. The document was faxed to the HR office on January 17, 2011, which was a holiday. It was retrieved from the fax machine the next day by Darla Goad, an employee in the HR office. The application was signed by the Grievant on December 16, 2010. Attached to the application was a statement from her doctor dated December 23, 2010. The doctor's statement reflected his opinion that the Grievant would have occasional flare-ups of pain in the joints of her legs, elbows and knees and sometimes swelling of her feet. The doctor estimated that she would need to be off work twice a month due to these symptoms.

8. After obtaining the necessary signature of Rosalyn Stephens, the Grievant's Unit Director, Ms. Goad wrote a letter to the Grievant on January 31, 2011, giving her notice that the intermittent FMLA leave was approved. The Grievant never requested of Ms. Goad or Ms. Stephens that the January 15, 2011, tardiness be retroactively designated as FMLA, nor did she ever talk to either of them about that tardiness or the reasons for it.

9. The Grievant stated that she placed the FMLA application under the office door of Judy Gammons, the HR director, on January 1, 2011. Neither Ms. Gammons nor Ms. Goad saw this application. Ms. Goad was insistent that the first FMLA application she recalls obtaining was the one that came to her by fax on January 17, 2011.

9. By letter of January 25, 2011, the Grievant was notified by Ms. Stephens that she was recommending her termination. By letter dated February 11, 2011, Dr. Dixon agreed with the recommendation and confirmed the decision to terminate the Grievant.

RELEVANT LEGAL AUTHORITY

Department of Human Resources Rule 1120-10-.06 Examples of Disciplinary Offenses[1]

[Suspension]

(4) Failure to maintain harmonious working relations ships with the public and fellow employees;
(8) …conduct unbecoming an employee in state service:
(12) Participation in any action that would 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 mange;

[Termination]

(6) Habitual pattern of failure to report for duty at the assigned time and place;

CONCLUSIONS OF LAW

1. The Department of Intellectual and Developmental Disabilities has carried its burden of proof by a preponderance of the evidence that the Grievant's conduct violated the provisions of Rule 1120-10-.06 set forth above and the three day suspension and termination received by the Grievant were appropriate sanctions.

2. The Grievant's comments during the staff meeting on November 18, 2009, as well as the language she used to Ms. Lewis on January 23, 2010, were highly inappropriate and disruptive, unbecoming of a State employee and created disharmony in the workplace. There is simply no excuse for using such language to co-workers in the workplace. The three day suspension the Grievant received was clearly justified.

[1] The Rule numbers referenced are those cited in the letters of suspension and termination. The Rule numbers were subsequently changed by amendments effective May 31, 2011. The language of the relevant portions of the Rule was not amended.

3. In light of the Grievant's long disciplinary record relative to tardiness, the decision to terminate her employment after she was 41 minutes late to work on January 15, 2011, was appropriate. The Grievant was chronically late to work and had been disciplined on numerous occasions. She was tardy 46 times in the first 11 months of 2010, and was even late 20 times between December 1, 2010, when the new leave and attendance policy was initiated, and January 15, 2011.

4. The Grievant contends that her tardiness on January 15, 2011, which prompted her termination, should have been excused due to her FMLA coverage. This argument has no merit. The proof showed that her FMLA application was not received by the HR office until January 17, 2011, two days after her 41 minute tardiness on January 15, 2011. Moreover, at no time did she request that her FMLA application be made retroactive to January 15, 2011, nor did she ever offer her superiors an explanation for her tardiness that day.

5. Based upon the foregoing, it is hereby **ORDERED** that the Grievant's three day suspension and her termination be **UPHELD.**

This _____ day of _____, 2012.

_____
Thomas G. Stovall
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 9th day of March, 2012.

_____
Thomas G. Stovall, Director
Administrative Procedures Division