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James B. Welch

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**STATE OF TENNESSEE  
CIVIL SERVICE COMMISSION**

**IN THE MATTER OF:**

**James B. Welch**

**DOCKET NO: 26.41-100930J**

**INITIAL ORDER**

This contested administrative case was heard on July 10, 2009, in Nashville, Tennessee, before Rob Wilson, Administrative Judge, assigned by the Secretary of State, and sitting for the Civil Service Commission for the State of Tennessee. Mr. Samuel Knapper, represented the Agency, The Board of Probation and Parole (“BOPP” or “the Agency”). The Grievant, James B. Welch, was represented by his legal counsel, Mr. Phillip L. Davidson. Upon conclusion of the hearing, the matter was taken under advisement, pending submission of the parties' Proposed Findings of Fact and Conclusions of Law.

This administrative proceeding was a fifth-step disciplinary hearing, convened at the Grievant’s request, to consider the termination of his state employment by the Chairman of the Board of Probation and Parole for engaging in certain prohibited conduct, including *(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; (8) ...conduct unbecoming an employee in the State service; (12) Participation in any action that would in any way seriously disrupt or disturb the normal operation of the agency... or that would interfere with the ability of management to manage; (15) acts that would endanger the lives and property of others; and, (24) for the good of the service.*

Upon consideration of the evidence and arguments of counsel, and the entire record, it is determined that no discipline is appropriate in this matter, and the decision to terminate Grievant's employment is overruled. This determination is based on the following Findings of Fact and Conclusions of Law:

### **FINDINGS OF FACT**

1. James Welch was employed as a Probation/Parole Officer for the State. Mr. Welch's primary caseload consisted of the supervision of sex offenders.
2. Mr. Welch engaged in an online conversation through a series of emails with the daughter of a man whose parole was supervised by the Grievant. Mr. Welch was unaware that the person he was communicating with was the daughter of one of his parolees. The parolee's daughter identified herself only as "Lindsay." Lindsay knew that Mr. Welch was her father's parole officer.

3. The questions asked of Mr. Welch by Lindsay were clearly constructed to elicit a certain response. For example, on October 29, 2007, Lindsay emailed the Grievant and asked:

So what made you want to do this for a living? If you don't mind me asking? Are you going to intertwine this with your studies and help these individuals or are you looking in a different direction? So do you ever see a lot of these people and they must be really dumb to add you on MySpace if they are not supposed to be on MySpace! Seriously, how dumb can someone get? Do you think it would be better just to put them all away instead? I know I ask a lot of questions. Hehe this is how I learn all about stuff though, and my job isn't this interesting. I enjoy it, don't get me wrong though.

Mr. Welch's response to that email was:

Put them all away????? Welllllllll, that is a tough one. It won't ever happen so, we need someone to supervise them. It cost too much money to put them all away and then someday the law says we have to let them out.....Shooting them at sunrise is a better alternative for some of them.....LOL

4. Although most of the statements do not violate Departmental policy, all of the statements were elicited improperly by an individual with the sole goal of attacking the credibility of Mr. Welch.

5. The State presented evidence and testimony in an attempt to prove that due to his email dialogues with "Lindsay," Mr. Welch could no longer be effective as a parole supervisor, and furthermore, that Judges and other legal personnel would allow Mr. Welch's private email conversations with Lindsay to affect their rulings and opinions.

6. The State presented evidence in an attempt to prove unacceptable use of a computer. This evidence consisted of activity reports which purportedly showed the exact time a certain computer was in use or being remotely accessed. However, the evidence did not conclusively prove that Mr. Welch was the only person using the computer in question. The State also presented evidence to prove that Mr. Welch had pornographic pictures on his computer, but relevant testimony revealed that parole officers often store pornographic pictures on their computer to be used as evidence in sex offender cases.

#### **CONCLUSIONS OF LAW**

1. The Board of Probation and Parole is the Petitioner in this matter, the party that initiated the proceedings, and as such, is assigned the “burden of proof.” The burden of proof is the duty imposed upon a party to establish, by a preponderance of the evidence, that an allegation is true, or that an issue should be resolved in favor of that party. A “preponderance of the evidence” means the “greater weight of the evidence,” or “the more probable conclusion, based on the evidence presented.” The burden of proof is generally assigned to the party seeking to change the present state of affairs with regard to any issue. Rule 1360-4-1-.02(7), TENN. COMP. R. & REGS. In the instant case, that means that the Board of Probation and Parole must prove, by a preponderance of the evidence, that the Grievant engaged in conduct prohibited for State employees, as described in Rule 1120-10-.06, TENN. COMP. R. & REGS., or that he violated the

BOPP Code of Ethics Policy, and that separation from state employment is the appropriate disciplinary response.

2. *The Rules of the Tennessee Department of Personnel*, Disciplinary Action, Chapter 1120-10, TENN. COMP. R. & REGS, describe certain prohibited conduct for State employees that may result in disciplinary action being taken against them.

**1120-10-.06 EXAMPLES OF DISCIPLINARY OFFENSES.** 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.
- (8) Gross misconduct or conduct unbecoming an employee in the State service.
- (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.
- (15) acts that would endanger the lives and property of others.
- (24) For the good of the service as outlined in T.C.A. 8-30-326.

3. In a termination letter dated September 9, 2008, Mr. Welch is told “it is necessary to terminate your service based on statements you made on the website “myspace.com” and in open court in Davidson County, Tennessee.” The letter continues to state that all of the statements made on MySpace are freely available to the public. However, the single reason the MySpace statements are available to the public is due to the fact they were surreptitiously obtained by the daughter of the parolee, and then presented in court

for the sole purpose of attacking the credibility of Mr. Welch. Furthermore, the MySpace statements were not posted on the public access section – they were posted as private emails between “Lindsay” and Mr. Welch. It is obvious that the statements were meant to be private, and to elicit a response from a woman who seemingly expressed an interest in Mr. Welch’s line of work. There was absolutely no evidence introduced to prove that Mr. Welch ever acted in a hostile or aggressive manner towards any parolee. There was no testimony from any person stating that Mr. Welch “tossed their home or car,” or that he was “ready to crack someone’s skull open,” or that he told anyone, or believed, that his parolees should be “shot at sunrise.” If these allegations were actually true, as the BOPP claims they are, then it would seem that at least one parolee could have testified of the horrible treatment suffered under Mr. Welch’s supervision. Quite the opposite, Mr. Welch’s employee file shows that he was an exemplary employee. His efficiency reports reveal that he is “an excellent probation/parole officer...That his supervising of his clients is well above the standards set forth by the Board of Probation and Parole, as well as the sex offender board.” And most importantly, the Director of Field Services for the BOPP testified that there has never been a complaint filed against Mr. Welch and that he has never shown any anger towards a client. This statement was not rebutted.

4. The termination letter also states that Mr. Welch violated BOPP Policy #301.02 Acceptable Use of Personal Computers. The BOPP introduced several exhibits which covered internet protocol. The first was a document entitled “Whois,” which traces user accounts as they log into the Comcast website. This document was introduced through

the BOPP's Information Resource Support Specialist. The report showed that Mr. Welch had logged into Comcast on several different dates, but did not show who the actual user was, or if the login was generated from a desktop, a laptop, or a personal device such as a Smart Phone. There was no substantial or material evidence presented by the BOPP to prove that Mr. Welch had used a State Computer in violation of the Department Rules and Regulations. There is no way to determine who was using the computer at the time the Department claims it was being inappropriately used. The BOPP did introduce a print of a risqué photo of Mr. Welch's wife, but Mr. Welch claimed that the photo was transferred to his computer by accident from his personal thumb drive.

5. A State employee may be disciplined for (1) causes relating to performance of duty, or (2) causes relating to conduct which may affect an employee's ability to successfully fulfill the requirements of the job. Rule 1120-10-.05, TENN. COMP. R. & REGS.

In this matter, the evidence submitted by the BOPP to support the charges alleged against Mr. Welch is not substantial or material. The issues presented for consideration in this case are (1) whether the Agency has proven, by a preponderance of the evidence, that the Grievant engaged in conduct prohibited by the BOPP Ethics Policy and *The Rules of the Tennessee Department of Personnel*; and (2) if so, whether the disciplinary sanction imposed by the Board's Chairman was appropriate. With respect to both issues, the Agency has failed to meet its burden of proof. There is not one single piece of evidence in the record to prove that Mr. Welch has ever mistreated or physically or



verbally abused a parolee. Mr. Welch has been consistently praised for his work, and there is nothing in the record to suggest that he cannot continue working as a Probation/Parole Officer.

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Accordingly, IT IS HEREBY DETERMINED AND ORDERED that the Tennessee Board of Probation and Parole has failed to meet its burden of proof, and has not established by a preponderance of the evidence that the Grievant, James Welch, engaged in any conduct prohibited by *The Rules of the Tennessee Department of Personnel*, or committed any violation of the Board of Probation and Parole Ethics Policy.

IT IS FURTHER DETERMINED AND ORDERED that Mr. Welch's termination was unwarranted and is OVERTURNED.

Accordingly, the Grievant shall be REINSTATED and restored all leave balances, back pay, and other benefits of employment consistent with this Order, and awarded reasonable attorney's fees and costs. T.C.A. Section 8-30-328 (f).

This Initial Order entered and effective this 23rd day of December, 2009.

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Rob Wilson  
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,  
this 23rd day of December, 2009.

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".

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Thomas G. Stovall, Director  
Administrative Procedures Division