



1-7-2009

TENNESSEE DEPARTMENT OF SAFETY, Petitioner, vs. MARILYN HOLMES, Grievant

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**BEFORE THE TENNESSEE
CIVIL SERVICE COMMISSION**

TENNESSEE DEPARTMENT OF SAFETY,)	
)	
Petitioner,)	
)	
v.)	Docket No. 26.19-098443J
)	
MARILYN HOLMES,)	
)	
Grievant.)	

INITIAL ORDER

This contested case came on to be heard on January 7, 2009 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. Ms. Deborah Martin, attorney for the Department of Safety represented the Department of Safety. The Grievant, Marilyn Holmes, was present and was represented by Mr. Worrick Robinson and Mr. Dylan Morse, attorneys of the Nashville, Tennessee Bar.

The parties submitted their respective “Proposed Findings of Fact and Conclusions of Law” on May 15, 2008 and May 18, 2009, making this matter ripe for consideration ¹

The subject of this hearing was Grievant’s appeal of her termination by the Department of Safety. Grievant was terminated

¹ It is noted that the Initial Order in this matter is due for issuance on or before ninety (90) days from the date the parties’ proposed findings of fact and conclusions of law were filed. The transcript was filed on March 6, 2009. Thereafter, the Department filed its “Proposed Findings of Fact and Conclusions of Law” on May 15, 2009. The Grievant filed her “Proposed Findings of Fact and Conclusions of Law” on May 18, 2009. The Initial Order in this matter is due on or before August 18, 2009. See T.C.A. § 4-5-314.

because she allegedly did not cooperate in an investigation conducted by the Department of Safety's Office of Professional Responsibility (OPR).² The Department of Safety asserts that Grievant violated the following rules by not agreeing to be interviewed by OPR: (1) *Department of Human Resources Rule 1120-10-.06(8)*: Conduct unbecoming an employee of the State service; *Department of Human Resources Rule 1120-10-06(24)*: For the good of the service as outlined in T.C.A. 8-30-326; *Department of Safety General Order 216-2, IV,B, 10, a)(1)*: conduct unbecoming a employee in the State service; *Department of Safety General Order 216-2, IV,B, 1, a, b, c*: Violation of any written rule, regulation, policy, or procedure including all rules of the Tennessee Department of Personnel. Willful disobedience of the rules and regulations or a negligent disregard thereof. No employee shall plead ignorance of the rules and regulations or offer same as a defense in a charge of omission or commission; *Department of Safety General Order 216-2, IV,B, 17*: Any employee dismissed when the department considers that the good of the service will be served thereby (T.C.A. §8-30-326).

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that the Department of Safety proved, by a preponderance of the evidence, that Grievant refused to give a statement to the OPR representative sent to interview Grievant on her second day back at work

² Grievant was not terminated for any other misconduct, but was terminated solely because she would not cooperate with the OPR investigation.

after a six-month leave for illness. Accordingly, the Department of Safety proved, by a preponderance of the evidence, that Grievant did not give a statement to the OPR investigator when asked to do so. While the Department of Safety showed that Grievant refused to give a statement to the OPR investigator, Grievant showed that there were extenuating circumstances which were not considered by the OPR investigator. Further, the Department of Safety failed to show that proceeding with the OPR investigation/statement on January 9, 2008 was reasonable or proper under the circumstances.

The Department of Safety failed to meet its burden of proof, by a preponderance of the evidence, that Grievant willfully or negligently violated the aforementioned rules as charged, including the section regarding “willful disobedience of the rules and regulations or a negligent disregard thereof the aforementioned rules.” Nor did the Department of Safety meet its burden of proof with regard to the other charges and violations it set forth: (1) *Department of Human Resources Rule 1120-10-.06(8)*: Conduct unbecoming an employee of the State service; *Department of Human Resources Rule 1120-10-06(24)*: For the good of the service as outlined in T.C.A. 8-30-326; *Department of Safety General Order 216-2, IV,B, 10, a)(1)*: conduct unbecoming a employee in the State service; and *Department of Safety General Order 216-2, IV,B, 17*: Any employee may be dismissed when the department considers that the good of the service will be served thereby (T.C.A. §8-30-326).

Because the charges have not been proved by a preponderance of the evidence, it is not necessary to consider what appropriate discipline might be. It is ordered that Grievant shall be **REINSTATED to her position, and awarded lost wages and benefits.**

FINDINGS OF FACT

1. Grievant, during the times relevant to this matter, was employed by the Tennessee Department of Safety as a Drivers' License Examiner. Grievant has been employed by the State of Tennessee for twenty-four years.³

2. In 1998, Grievant became a Drivers' License Examiner for the Tennessee Department of Safety. Grievant received a written warning from her supervisor in 1998, for allegedly being rude and speaking in a harsh manner to a drivers' license applicant. Her performance evaluation in 1998 was graded "marginal".

3. In December 2004, Grievant was robbed at gun point at a bank while attempting to deposit the fees collected by the Department of Safety's Centennial Driver's License Center. Depositing the fees received by the Department of Safety for driver's license applications, driver's license renewals, etc., was part of Grievant's job duties.

4. Grievant had problems with depression, high blood pressure, anxiety, and post-traumatic stress disorder following the robbery incident.

³ She had previously held the positions of secretary and word processor operator. She received "superior" and "exceptional" job ratings while in these positions with the State.

5. After Grievant's "marginal" 1998 evaluation (received during the year she transferred into the Driver's License Examiner position), until a May 4, 2007 incident, Grievant received "superior" and "exceptional" performance evaluations annually. Until the events of May 4, 2007, Grievant required no other disciplinary actions.

6. On June 5, 2007 Grievant was issued a notice of suspension for two (2) workdays without pay as discipline for refusing to follow a supervisor's order.⁴ The letter informing Grievant of the proposed two day suspension advised Grievant that she would remain on active duty until the minimum due process hearing which was to be held on July 12, 2007.

7. On July 13, 2007, Grievant was purportedly involved in an incident at the Centennial Boulevard Driver's License Testing Center. It was alleged that Grievant was "disrespectful" to a customer and "insubordinate" to her supervisor.⁵

8. Grievant testified, credibly, that during May through June, 2007, she began having "issues at work" due to ongoing mental problems stemming from the 2004 armed robbery, her father's illness and

⁴ On May 4, 2007 Grievant "called in" late, and arrived at work fifteen minutes late. When she arrived at work, she began to work on "C" tickets (knowledge tests). As the morning progressed, there was a backlog of "A tickets". Grievant's supervisor, Bob Wessels, ordered Grievant to pull the "A tickets". Grievant refused to pull the "A tickets". Grievant turned in her receipts for the day, and her supervisor sent her home. Grievant later stated that she did not feel it was her responsibility to help her co-workers if they were getting behind.

⁵ Whether or not Grievant was actually disrespectful to a customer or "insubordinate" to her supervisor was not addressed at this hearing, and is not considered for purposes of this order. As represented by the Department of Safety, the sole issue of this hearing is whether or not Grievant should be terminated due to not giving the OPR investigator a statement concerning the alleged incident.

subsequent death, and her handling her father's estate (dealing with his financial affairs, selling his property, etc.) During that time period, Grievant testified that she suffered from a lot of mental stress and strain.

9. After July 13, 2007, Grievant went on "sick leave", and did not return to work at the Driver's License Center until January 8, 2008.

10. Grievant was hospitalized for major depression and post-traumatic stress syndrome from July 21, 2007 through July 28, 2007 at a local psychiatric hospital. Her physician and therapists determined that her mental issues stemmed from the armed robbery suffered at work and her father's death.

11. Grievant returned to work at the Driver's License Center on September 4, 2007. Grievant had a medical release from her physician which allowed her to return to work, with the requested accommodation that Grievant not be made to perform bank deposits.

12. The Department of Safety did not "accept" the medical release when Grievant presented it. Rather, Grievant was asked by her supervisor to leave work.

13. Additionally, Grievant was told that she must apply for Family and Medical Leave because she had been off work greater than fifteen consecutive days.

14. Grievant was also instructed that she must go to "Life Signs" and have a "fitness for duty" physical and evaluation before she would be allowed to return to work. Grievant did not receive any kind of

psychiatric evaluation from “Life Signs” as a part of her “fitness for duty” evaluation.

15. Grievant received a letter sent from the Department of Safety on September 14, 2007 in which it requested a “full medical release” from Grievant’s physician. The “full medical release” referred to the release of Grievant’s medical and psychiatric records.

16. Grievant did not agree to release her medical and psychiatric records to the Department of Safety. However, she did agree on October 4, 2007 that the state’s physician could discuss her case with her physician, Dr. Solomon.

17. Sometime thereafter, Grievant filed a complaint with the Tennessee Human Rights Commission alleging employment discrimination.

18. The state’s physician, Dr. McNeal, talked with Grievant’s physician on November 14, 2007.

19. On December 3, 2007, the Department of Safety notified Grievant that ADA accommodations would be made for her and she could return to work.

20. Grievant returned to work on January 8, 2008.

21. When Grievant returned to work, she was on multiple psychiatric medications.

22. Upon Grievant’s return to work, she informed her supervisor that she did not think she should conduct drivers’ road tests due to her

being on the psychiatric medications. Accordingly, she was assigned to the information desk at the Driver's Testing Center.

23. On Grievant's second day back at work, on January 9, 2008, Sgt. Stacy Heatherly of the Department's Office of Professional Responsibility (OPR) was asked to investigate Grievant because a "complaint had come to them from her [Grievant's] chain of command through Linda Pipkins who was the district supervisor at the time."

24. Sgt. Heatherly arrived at the Centennial Blvd. Driver's License Station on the morning of January 9, 2008. A transcript of the recording of Sgt. Heatherly's conversation with Grievant was entered into evidence. The transcript began at 10:14 A.M.

25. The 10:14 A.M. transcript contains the following:

Sgt. Heatherly: ...Miss Holmes all I need you to do is read your Admonition of Rights...and just mark whether or not you'll give me a statement and answer any questions and sign it for me okay.

Holmes: Okay. Okay if I refuse to answer the questions and stuff, what then?

Sgt. Heatherly: Uh, then we'll, I'll take it back to my supervisors and we'll go from there. Basically Marilyn all this is saying is that any questions that I ask you, you'll be truthful and honest with me, okay.

Holmes: Okay, I hadn't had a problem with that before. Okay, 'if you do not answer these questions, neither your statement nor any information or evidence which is gained by reason by such statements can be used against you in any subsequent criminal proceeding; however, these statements may be used against you in relation to subsequent departmental charges. ...I have read this statement of my rights and I understand why my...what my rights are.' I don't so I won't.

Sgt. Heatherly: Okay that that's up to you Marilyn. I just want to make sure that you understand that okay.

Holmes: ...Okay

Holmes: No I don't think I'm gonna do this.

Sgt. Heatherly: Okay.

Holmes: Cuz I'm on medication and I'm not, I ain't doing this.

Sgt. Heatherly: Okay.

Holmes: Cuz I can barely sign my name.

Sgt. Heatherly: Okay I'm just gonna show that I witnessed it and if you would, just for the record, state what you signed here today, what you marked on the, on the paper for me okay.

Holmes: What do I do?

Sgt. Heatherly: Just read that for me if you would, just what you signed for me that's ...just for the audio.

26. Less than thirty minutes later, Sgt. Heatherly returned to the Centennial Driver's License station. Sgt. Heatherly noted on the second "interview" recording that the "Admonition of Rights" she had previously presented to Grievant had the incorrect date.

27. Despite Grievant's earlier statements that she "didn't understand", "was on medications", and "can barely sign my name", Sgt. Heatherly again attempted to get Grievant to sign an "Admonition of Rights" statement which stated that she understood the consequences of not giving an interview.

28. Grievant again stated: "I am not willing to make a statement and answer questions at this time."

29. Three hours later on the same day (January 9, 2008), Sgt. Heatherly returned for the stated purpose of putting Grievant on administrative leave.

30. As reflected by the transcript of the third meeting between Sgt. Heatherly and Grievant, the following exchange occurred between Sgt. Heatherly and Grievant:

Sgt. Heatherly: Since we talked this morning is uh of course I've talked to my supervisors and they have uh taken it on up to the Commissioner, the Commissioner has advised that he wants to put you on administrative leave, okay. And the reason we are doing that is because you failed to cooperate with the investigation okay by not...

Holmes: But I had a choice.

Sgt. Heatherly: answering...yes, yes ma'am you do have a choice but you still...I advised you that there would be consequences if you chose not to speak to me about the investigation.

31. Thereafter, Grievant was given notice that she was being terminated from employment with the Department of Safety because she refused to answer Sgt. Heatherly's questions on January 9, 2008.

32. Grievant timely appealed her termination.

33. At the hearing of this matter, Grievant testified that she told Sgt. Heatherly that she was taking medications and having difficulty understanding the Admonition of Rights sheet.

34. Grievant's testimony is deemed credible.

35. Grievant noted that one of the side effects of the medications she was on was that she had trouble remembering things. Upon her return to work on January 8, 2008, Grievant asked to be removed from the “road tests” because she didn’t feel that she needed to be responsible for bringing a person back to the station if they were unable to drive back. Grievant requested that she be removed from the “road tests” due to the medications she was taking.

36. On the second day that Grievant returned to work after being on sick leave/FMLA leave for six months for what is know in the vernacular as a “nervous breakdown”, an OPR investigator showed up at Grievant’s work, without notice, to question Grievant about alleged events which had occurred six months earlier.

37. The OPR investigator had already taken witness statements regarding the alleged incident which occurred in early July 2007.

38. No showing was made that the Department gave Grievant notice of the “interview”, or set up a meeting with Grievant in advance. To the contrary, the preponderance of the evidence supports that the OPR investigator appeared out of the blue and requested an immediate interview.

39. When told by Grievant that Grievant did not understand the process, was on medications, and did not think she should give a statement at that time, no attempt was made to reschedule the meeting at a later time. Rather, the OPR investigator continued to push Grievant

to sign the “Admonition of Rights” statement which indicated that she understood the statement, even when Grievant told the investigator she didn’t understand.

CONCLUSIONS OF LAW

1. The Department Safety bears the burden of proof in this matter to show, by a preponderance of the evidence, that Grievant violated the Department’s written rules, policies, or procedures, and that the discipline imposed, termination, was the appropriate discipline for Grievant’s violation of such rules.

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. Turning to the charges against Grievant, it is determined that the Department has failed to prove, by a preponderance of the

evidence, that Grievant has violated *Department of Human Resources Rule 1120-10-.06(8)*: Conduct unbecoming an employee of the State service; *Department of Human Resources Rule 1120-10-06(24)*: For the good of the service as outlined in T.C.A. 8-30-326; *Department of Safety General Order 216-2, IV,B, 10, a)(1)*: conduct unbecoming a employee in the State service; *Department of Safety General Order 216-2, IV,B, 1, a, b, c*: Violation of any written rule, regulation, policy, or procedure including all rules of the Tennessee Department of Personnel. Willful disobedience of the rules and regulations or a negligent disregard thereof. No employee shall plead ignorance of the rules and regulations or offer same as a defense in a charge of omission or commission; *Department of Safety General Order 216-2, IV,B, 17*: Any employee may be dismissed when the department considers that the good of the service will be served thereby (T.C.A. §8-30-326).

5. A review of Tennessee statutes, regulations, and case law does not reveal a definition of “conduct unbecoming an employee in the State service.” However, cases which have found violations of Rule 1120-10-.06(8) have typically dealt with employees who committed crimes, were guilty of assault, abuse, or sexual harassment, or who committed gross misconduct. There is no allegation that Grievant committed a crime, was guilty of assault, abuse, or sexual harassment, or that she committed gross misconduct.

6. Rule 1120-10-.05 of the *Rules of the Tennessee Department of Personnel* states:

Causes for Disciplinary Action. 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.

7. It is determined, by a preponderance of the evidence, that Grievant did not violate the rules and regulations as charged. Grievant's testimony was deemed credible.

8. Grievant does not deny that she did not sign the "Admonition of Rights" form she was urged to sign. Nor does she deny that she did not give a "statement" to Sgt. Heatherly on January 9, 2008. Rather, she reiterates that she did not understand the form, and did not believe she should give the statements because she was on psychiatric medications.

9. Questions which come to mind are: (1) Why did the OPR select the second day that Grievant was back at work from medical leave to decide to interview her? (2) Why did OPR not set up a meeting with Grievant and give her notice of the meeting? (3) Why would OPR not allow Grievant to meet with them at a later time when Grievant stated she didn't understand and was on medications?

10. The undersigned agrees with the Department of Safety that an employee must follow a supervisor's reasonable and proper orders. This would include answering questions posed by OPR investigators.

11. Rule 1120-10-.06 (18) of the *Rules of the Tennessee Department of Personnel* defines "insubordination" as the "refusal to accept a *reasonable* and *proper* assignment from an authorized supervisor".

12. However, key words which must not be overlooked when discussing "insubordination" are the words "reasonable" and "proper". In light of Grievant's expressed concerns about her understanding and medications, was the order to give an OPR statement a "reasonable" and "proper" order? Was it proper to ask Grievant to sign a statement which stated she "understood", when Grievant was clearly stating that she did not understand?

13. Because Grievant did not violate the rules and regulations, as charged, it is not necessary to discuss the discipline imposed in this matter.

Grievant's termination is **VACATED**. Grievant is **REINSTATED** to her position, and shall be paid lost wages and benefits.

This order makes no finding regarding whether or not Grievant suffers from a disability as defined by the ADA, whether or not Grievant has correctly requested accommodations, whether or not certain accommodations were afforded Grievant, nor any other finding with

regard to the FMLA, ADA, or any alleged claims of discrimination. Nor does this order make any finding with regard to Grievant's ability to perform the essential functions of her job as a Driver's License Examiner. Finally, the undersigned has made no determination regarding the complaint of "disrespect to a customer" and "insubordination to a supervisor" which allegedly occurred early in July 2007.

It is so ordered.

Entered and effective this 24th day of July, 2009.

A handwritten signature in black ink, reading "Thomas G. Stovall". The signature is written in a cursive style with a large, looped initial 'T' and 'S'.

Thomas G. Stovall, Director
Administrative Procedures Division