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Kimberly Allen

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

IN THE MATTER OF:

Kimberly Allen

DOCKET NO: 26.19-097652J

INITIAL ORDER

This contested administrative case was heard on March 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. Ms. Deborah Martin, Staff Attorney for the Department of Safety, represented the Department. The Grievant, Kimberly Allen, proceeded on her own behalf.

PROCEDURAL HISTORY

The Commissioner of the Tennessee Department of Safety convened a Due Process Hearing on September 27, 2007. After considering the Grievant's conduct during a July 20, 2007 incident, and the impact of that conduct, he terminated the Grievant's employment with the State of Tennessee. The Commissioner reaffirmed that decision following a Step IV Grievance Hearing conducted on November 20, 2007.

This contested administrative proceeding was a Fifth-Step Disciplinary Hearing convened at the Grievant's request, to consider the termination of her state employment by the Commissioner of the Department of Safety for engaging in certain prohibited conduct, including *(1) Failure to maintain satisfactory and harmonious working relationships with the public and fellow employees; (2) Gross misconduct or conduct unbecoming an employee in the State service; and (3) For the good of the service as outlined in T.C.A. 8-30-326;* and for violation of specific Department of Safety General Orders. Upon consideration of the evidence and arguments, and the entire record, it is determined that the Grievant engaged in the prohibited conduct, as charged, and that the proper disciplinary action for those offenses is termination from state employment. This determination is based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Grievant was employed as a Driver's License Examiner and worked at the Bradley County Driver License Station.
2. On July 20, 2007, Grievant brought a handgun into the Bradley County Driver License Station and showed it to a co-worker, Melissa Owens.
3. Melissa Owens notified acting supervisor Cherie Davis-Wyatt of the incident because she was concerned about her safety and the safety of her co-workers.
4. Multiple employees of the Bradley County Driver License Station stated that they felt threatened and/or intimidated by Grievant's actions.

5. Sgt. Stacy Heatherly works in the Department of Safety's Office of Professional Responsibility. On July 27, 2007, Sgt. Heatherly obtained an Order of Protection against the Grievant to protect the staff at the Bradley County Driver License Station.

6. Wanda Adams, Assistant Director of the Driver License Station, stated that bringing a firearm into the Driver License Station is a violation of General Orders.

CONCLUSIONS OF LAW and ANALYSIS

1. The Tennessee Department of Safety 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. *See*, Rule 1360-4-1-.02(7), TENN. COMP. R. & REGS. In the instant case, that means that the Department of Safety 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 in Department of Safety General Orders; 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. As a State employee, the Grievant knew,

or should have known, of the application of those *Rules* to her conduct. Those *Rules* contain the following provisions:

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.

* * *

(4) Failure to maintain satisfactory and harmonious working relationships with the public and fellow employees.

* * *

(8) Gross misconduct or conduct unbecoming an employee in the State service.

* * *

(24) For the good of the service as outlined in T.C.A. 8-30-326.

3. The Department alleges that the Grievant's conduct was unprofessional and unbecoming a state employee, and that she failed to maintain satisfactory and harmonious working relationships with the public and fellow employees. The conduct engaged in by the Grievant on July 20, 2007 was intimidating to fellow employees, and fits squarely within the category of "conduct unbecoming an employee in the State service." That incident, along with the other incidences of unusual and vindictive behavior toward Grievant's coworkers, establishes a pattern of "failure to maintain satisfactory and harmonious working relationships with fellow employees." Disciplinary action for this specific incident, and for the ongoing pattern of conduct, is warranted.

4. 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. "A career employee may be warned, suspended, demoted or dismissed by his appointing authority whenever just or legal

cause exists. The degree and kind of action is at the discretion of the appointing authority. . .” Rule 1120-10-.02, TENN. COMP. R. & REGS. Although the law prescribes implementation of progressive discipline for State employees, it also provides that disciplinary action must be administered at the step which is most appropriate for the misconduct. (*See, Tennessee Code Annotated* § 8-30-330; and Rule 1120-10-.07, TENN. COMP. R. & REGS.) As the courts have recognized in other cases dealing with these provisions,

. . . the key word in the statute is ‘appropriate.’ . . . (T)he 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. The supervisor has discretion to determine what punishment fits the offense.

Berning v. State, 996 S.W.2d 828, 830 (Tenn. App. 1999).

5. When the Commissioner considered the issue of punishment in this case, he had a wide range of options at his disposal. (*See*, Rule 1120-10-.07, TENN. COMP. R. & REGS.) Dismissal from employment is one of those options. Rule 1120-10-.07(5), TENN. COMP. R. & REGS. Pursuant to that regulation, “After minimum due process is provided, an employee may be dismissed by the appointing authority from her position for unacceptable conduct or performance of duties.” Rule 1120-10-.07(5)(a), TENN. COMP. R. & REGS. Without a doubt, the Grievant’s conduct was unacceptable, and warranted a significant sanction. “An appointing authority¹ may dismiss any employee in the authority’s division when the authority considers that the good of the service will be served thereby.” *Tennessee Code Annotated* § 8-30-326.² The collective testimony establishing a pattern of intimidation among Grievant’s coworkers weighs heavily in favor of dismissal from employment as the appropriate sanction in this case, “for the good of the service.”

¹ In this case, the appointing authority was the Commissioner of the Department of Safety.

² *See also*, Rule 1120-10-.06(24), TENN. COMP. R. & REGS., *Rules of the Tennessee Department of Personnel*.

It must be conceded that the public payroll cannot be made a haven for those who with or without fault have become unable to perform the duties for which they were employed. It must likewise be conceded that "the good of the service" may in proper cases justify or require the discharge of public employees when their efficiency or usefulness in their positions has been seriously impaired by their own fault, by the fault of others, or by blameless misfortune.

Reece vs. Tennessee Civil Service Commission, 699 S.W.2d 808, 813 (Tenn. App. 1985).

6. The issues presented for consideration in this case are (1) whether the Department has proven, by a preponderance of the evidence, that the Grievant engaged in conduct prohibited by *The Rules of the Tennessee Department of Personnel* and/or the Department of Safety General Orders; and (2) if so, whether the disciplinary sanction imposed by the Commissioner was appropriate. With respect to both issues, the Department has met its burden of proof.

IT IS THEREFORE ORDERED that the Tennessee Department of Safety has met its burden of proof, and has established by a preponderance of the evidence that the Grievant, Kimberly Allen, engaged in conduct prohibited by *The Rules of the Tennessee Department of Personnel* and Department of Safety General Orders.

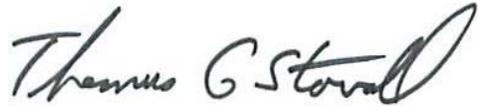
IT IS FURTHER ORDERED that the Grievant's dismissal from State employment is appropriate, and warranted by her conduct on July 20, 2007, and is therefore UPHeld.

Accordingly, IT IS HEREBY ORDERED that the Grievant's appeal of the Commissioner's decision to terminate her State employment is DISMISSED.

This Initial Order entered and effective this 1st day of June, 2009.

Rob Wilson
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 1st day of June, 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' and 'S'.

Thomas G. Stovall, Director
Administrative Procedures Division