3-31-2009

ANITA WILLIAMS vs. TENNESSEE DEPARTMENT OFCORRECTION

BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

IN THE MATTER OF: **ANITA WILLIAMS** **v.** **TENNESSEE DEPARTMENT OF CORRECTION**	**DOCKET NO. 26.05-098896J**

INITIAL ORDER

This contested case was heard on March 31, 2009 in Nashville, Tennessee at Lois M. DeBerry Special Needs Facility before Margaret R. Robertson, Administrative Judge, Administrative Procedures Division, assigned by the Secretary of State and sitting for the Commissioner of the Tennessee Civil Service Commission. Teresa Thomas, counsel for the Tennessee Department of Correction (Department), represented the Department in this proceeding. Grievant Anita Williams proceeded on her own behalf. The parties were permitted to file proposed Findings of Fact and Conclusions of Law. The State filed its proposed order on June 8, 2009. After ten days, when the Grievant still had not filed a proposed order, the record was closed, and the mater became ready for consideration on June 18, 2009.

The issue in this matter is whether Grievant Williams should be terminated from her position as Correctional Officer for violation of Tennessee Department of Correction Drug-Free Workplace Policy (TDOC Policy 302.12), with particular but not exclusive

reference to Section VI(S), which states that a refusal to be tested may result in discipline.

After consideration of the record, it is determined that **Grievant's** termination should be **upheld,** based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant Anita Williams was employed as a Correctional Officer at Lois M. DeBerry Special Needs Facility ("Facility"). She began work there in November of 1992.

2. The Lois M. DeBerry Special Needs Facility is a unique maximum security facility. It contains 800 beds, 400-450 of which are reserved for the most severely mentally, medically or physically challenged inmates in the system, inmates who, because of their behavior or their vulnerability, cannot safely be harbored in other state facilities. Because of their medical, mental or physical disabilities, many of the inmates require a level of hands-on attention that could create serious security issues if they were under the oversight of an employee whose decision-making ability was impaired for any reason. Allowing an impaired employee to work in this environment could seriously compromise the security of the institution.

3. In December of 2006, the Department put in place a revised version of the existing Tennessee Department of Correction Policy 302.12, the Drug-Free Workplace Policy. The revised Policy is a zero tolerance policy, stating at Section V that "[T]he Department shall maintain a zero tolerance for the illegal use of drugs on or off the job and the use of alcohol on the job." Section IV.(V) defines zero tolerance as

"[A]ppropriate employee disciplinary or corrective action, up to and including termination, upon the confirmation of alcohol or drug usage by the employee while in the workplace." The policy includes within its scope prohibition of working under the influence of legal prescription drugs if it is determined that those particular drugs could impair the ability of the employee to maintain security and to make security-conscious decisions in the workplace.

4. One circumstance under which drug/alcohol testing is triggered by the policy *as a condition of continued employment* is when "reasonable suspicion" exists that the employee uses or is using illegal drugs or is using alcohol or is under the influence of alcohol on the job. Section VI.(E).

5. Reasonable Suspicion is defined in the policy at Section IV.(Q) as "[A] belief based on specific, objective, articulable facts and the reasonable inferences that may be drawn from those facts, or knowledge sufficient under the circumstances, to cause an ordinary prudent and cautious person to believe that an employee used or is using illegal drugs or alcohol. Section VI.(E)(2) includes, among reasons for testing, observable phenomena, such as the physical symptoms of being under the influence of a drug or alcohol, a pattern of abnormal conduct or erratic behavior, or information provided by reliable or credible sources or independently corroborated. The policy concludes, at VI.(S), that "[E]mployees who are confirmed to have a positive drug screen result or who refuse a required drug screen . . . are subject to disciplinary action."

6. Warden Colson testified that Grievant had been made aware of the revised policy but was not asked to elaborate. The exhibit entered containing Grievant's

signature as acknowledgment of the Drug-Free Workplace Policy was dated by Grievant as signed on November 12, 2001. Neither the State nor the Grievant made the absence of a separate signed acknowledgement page for the revision of the policy an issue at the hearing. The Grievant in her testimony acknowledged being aware of the zero tolerance policy. In fact, she argued correctly that the language of the policy, while mentioning discipline up to and including termination, did not directly mandate termination.

6. On December 5, 2007, Grievant was assigned to work first shift, which is from 6:00 AM to 2:00 PM. Grievant was in line about ten to fifteen minutes before 6:00 AM, just several people ahead of Correctional Clerical Officer Cheryl Bonner at the checkpoint. Officer Bonner observed that Grievant appeared off balance, leaning on Corporal Swindell, giggling and talking unusually loudly. Officer Bonner had worked with the Grievant before and was of the opinion that this behavior was not the Grievant's usual workplace behavior. Officer Bonner heard Corporal Swindell ask Grievant to say the alphabet backwards and heard the Grievant say she could not. Officer Bonner was not certain she could smell alcohol, but thought she detected something like alcohol or perfume. Officer Bonner was sufficiently concerned by what she was witnessing that she notified Lieutenant. Greenhill of her concern.

7. Captain Gary, the shift commander for first shift, who was notified by Lt. Greenhill of the situation, conferred with Officer Bonner about what she had observed, and then called the Grievant into his office. He asked Grievant if she had been drinking, which Grievant denied. When he pressed her again, she admitted she had had a glass of wine that morning before coming to work. Captain Gary told Grievant she would have to

go to Urgent Care, a medical facility used by the department for this purpose, to be tested for alcohol, and sent Grievant with Corporal Barbara Johnson for the test. Corp. Johnson noted that Grievant was upset when they left to get the test done.

8. When Corp. Johnson and Grievant arrived at Urgent Care, the medical office was not yet open. They arrived at about 6:45 AM. The medical office opened at 7:00 AM. While they waited, Grievant asked Corp. Johnson to take her to get something to eat or drink. Corp. Johnson refused, saying she could not do so until after the test. Eating or drinking might distort the results of the test. Grievant asked Corp. Johnson what Grievant should do in this situation. Corp. Johnson told her she could not advise her. Grievant asked to be taken to some other facility for the test, but Corp. Johnson refused, saying she had been told to take Grievant there, and that the facility would be open soon. Then Grievant, who had been smoking, began crying and asked Corp. Johnson to take her back to the correctional facility. Corp. Johnson asked if Grievant was refusing to take the test. Grievant affirmed that she was. Corp. Johnson called Capt. Gary and reported the developments. Capt. Gary told her to return with Grievant to the facility.

9. While they were in the car, Grievant told Corp. Johnson that she and a friend had been drinking wine the night before, and she had a hangover which she had tried to cure by taking "a bit of the hair of the dog that bit her." Corp. Johnson understood that to mean that Grievant had had a glass of wine before coming to work to relieve her hangover from the night before. Corp. Johnson told Grievant that if she tested below .04 for alcohol, Grievant would probably be sent to EAP, which would be all right,

but Corp. Johnson did not speculate beyond that. Still, Grievant asked to be taken back to the facility. Corp. Johnson was aware that it was a violation of the Drug-Free Workplace Policy to refuse to take a drug test when directed to do so.

10. Corp. Johnson brought Grievant back to the facility. Capt. Gary met them in the parking lot outside the facility. Grievant told Capt. Gary that she wanted to go home, and that she would call the Warden later. Capt. Gary asked if she could drive safely, and she assured him that she could. Capt. Gary believes he asked her to call him to let him know she arrived home safely, but does not recall whether she did call him later. He is certain that she confirmed to him that she was refusing to take the drug test, but is not certain whether he impressed on her how her job might be affected by that decision. After Grievant left the parking lot to return home, Capt. Gary contacted Warden Roland Colson to advise him of Grievant's behavior and decision. Capt. Gary shared with the Warden his observation of Grievant's slurred speech, admission of having drunk wine that morning, crying behavior and refusal to submit to a drug test.

11. Warden Colson scheduled a Due Process Hearing for Grievant and had a letter sent to her to notify her of the arrangements and her rights. Grievant declined to sign acknowledgement that she had received the letter. Grievant later explained that she did not agree with the charges in the letter and so declined to sign the document. The requested signature merely attests to receipt of the document and notice of the arrangements for the due process hearing. .After the Due Process Hearing was held, which Grievant attended, Warden Colson met again privately with the Grievant and heard her explanations for events again. After considering both the contents of the Due Process

Hearing and his discussion with Grievant afterwards, Warden Colson made the decision that the appropriate discipline in this case was termination and sent Grievant a letter to that effect on December 17, 2007. Grievant then requested and received a Level IV hearing. On April 10, 2009, Commissioner George Little wrote Grievant informing her of his decision, based upon the Level IV hearing and particularly on the fact that Grievant admitted refusing to submit to a drug test, that he had determined her to be in violation of TDOC's Drug-Free Workplace Policy (TDOC Policy 302.12) when she refused the drug screen. He concluded that it was necessary to terminate her employment with the Department. Grievant then appealed his Level IV decision, requesting a Level V. Hearing.

13. At the Level V hearing, the Grievant called Corp. Jeffrey Swindell and Officer Daniel Carmen to testify. Corp. Swindell has been casual friends with Grievant for some time. His impression of her behavior on the morning of December 5, 2007 was that it was normal. He knows her as a "cut-up" and accepted her giggles and behavior as normal. He did not smell alcohol, and did not think Grievant was impaired. If he had been concerned that she was impaired, he considers it would have been his responsibility to take some sort of action. He does not think she would intentionally jeopardize the safety of other officers by reporting to work impaired. He does not recall seeing Officer Bonner in line to go through the facility checkpoint on December 5, 2007.

14. Correctional Officer Daniel Carmen worked with Grievant on Unit 7-Charlie. The inmates they worked with at that time had severe mental impairments and could be very difficult to manage safely. Officer Carmen is reputed to have been

assaulted in the line of duty and placed on assault leave due to problems with some inmates in the unit. He agrees that it would not be safe or wise to come to work under the influence of a substance that could affect your judgment. He did not observe abnormal behavior by the Grievant on December 5, 2007. He did not smell alcohol on her. He did not observe her to appear impaired. If he had thought she was impaired, he would have called attention to this issue for safety reasons. Grievant did not actually work long on December 5, 2007. She was called to Capt. Gary's office not long after as she arrived at her unit.

15. Grievant acknowledges having read and signed the Department's Drug-Free Workplace Policy (TDOC Policy 302.12), and the Employee Code of Conduct (TDOC Policy 302.08) which includes a separate document (described by Warden Colson as the Ten Commandments) with twelve bulleted paragraphs containing statements of behavior from which employees must refrain and which requires a separate signature and date from the employee at the bottom of the page. The bulleted page includes as the fifth paragraph the statement "[T]he use of illegal drugs or narcotics or the abuse of any drug or narcotic is strictly prohibited at all times. Use of alcoholic beverages or being under the influence of alcohol while on duty or immediately prior to reporting for duty is strictly prohibited."

16. Grievant's position is that she should never have been taken to get a drug test in the first place because she was not acting abnormally and was not impaired. She stated that a half glass of wine would not register more than .015 given her body weight, and thus would not be in violation of the policy (.04), even if all the alcohol had not been

metabolized by the time the drug test was conducted. Grievant also noted in her closing argument that she had been under considerable stress around the time of this incident because of family matters and construed her emotional behavior that day after being called to Capt. Gary's office and her decision not to take the drug test as the results of a panic attack. She did not raise this point during her testimony. Grievant questioned whether Officer Bonner was actually present in the line to observe her behavior and disputed what Office Bonner might have been able to observe about her that morning. Grievant considers herself a good officer who did a good job and would not place her fellow employees in danger by being impaired while at work. Grievant would like to return to her position at the facility. Grievant said that she refused to sign documents and appealed the Department's decision to terminate her because she believed it to be unfair to be terminated when there was no proof that she had been impaired while on duty, and she disputes that she would have been found to be impaired by a drug test on that date, if she had taken one. She admitted that if she had thought of the policy (requirement that one must submit to a drug test when directed) at the time, she would have remained at Urgent Care until the test had been completed. She asserted she only wanted to get the experience over with, and that was why she asked to be taken to another location for testing and, in lieu of that, back to the facility so that she could go home without taking the test.

CONCLUSIONS OF LAW

1. A career service employee who has completed probation has a property right in his or her job. See, TENN. CODE ANN., Sec. 8-30-331(a). The Tennessee Civil

Service Commission has jurisdiction to make the ultimate determination upon any property-taking action against a career service employee. See T.C.A. 8-30-108(2).

2. A Level V Civil Service hearing is a de novo proceeding, and no presumption of correctness attaches to the action of the agency. Big Fork Mining Co. v. Tennessee Water Quality Control Board, 620 S.W. 2d 515, at 521 (Tenn. App. 1981).

3. The Department bears the burden of proof in this matter to show by a preponderance of the evidence that Grievant violated the *Department of Correction Policies* set forth in the letter of termination. The Department also has the burden of proof to show that the discipline imposed was the appropriate discipline for any proven violation of such rules.

4. 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.

5. 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.

6. The Department (Petitioner) charges Grievant with the following violation: *Department of Correction Policy 302.12, Drug-Free Workplace* (effective date November 15, 2001, revised version effective December 4, 2006). The purpose of the

Drug-Free Workplace Policy is to enhance professionalism and safety by promoting a drug free workplace within the department of Correction. The Drug-Free Workplace Policy provides, in pertinent parts, as follows:

Section VI (D)(2) & (3):

> D) As a condition of employment or continued employment, an employee shall not:
>
> * * *
>
> 2. Work or report to work visibly impaired or while possessing in his body, blood or urine, illegal drugs in any detectable amount.
>
> 3. Report to work under the influence of or impaired by alcohol.

Section VI(E) details the types of testing that may be implemented in carrying out this policy. Section (E)(2) sets out the requirements for reasonable suspicion drug and alcohol testing:

> 2. Employees shall be required to submit to drug and alcohol testing as a condition of continued employment to ascertain prohibited drug use in any case in which an individualized "reasonable suspicion" exists that the employee uses or is using illegal drugs or is using alcohol on the job. This may be based upon the following reasons:
>
> a. Observable phenomena, such as direct observation of drug or alcohol use or possession or the physical symptoms of being under the influence of a drug or alcohol.
>
> b. A pattern of abnormal conduct or erratic behavior.
>
> * * *
>
> d. Information provided by reliable and credible sources or independently corroborated.

Section VI(S)

> (S) Employees who are confirmed to have a positive drug screen result, or who refuse a required drug screen, or who have a positive drug screen result confirmed, or who have altered their specimen or drug screen results are subject to disciplinary action.

7. The Department of Correction proposed termination of the Grievant for her of violation of the above-referenced Policy. The Department has proved, by a

preponderance of the evidence, that, when directed to submit to a drug/alcohol test pursuant to the Drug-Free Workplace Policy, Grievant refused to submit to the drug/alcohol test. The Department has further proved, by a preponderance of the evidence, that the Department used observable phenomena, information provided by reliable and credible sources, and independent corroboration of observable phenomena to make the decision to require Grievant to submit to an individualized drug test. Officer Bonner reported observable phenomena, which led Grievant to Captain Gary's attention. Captain Gary's observations corroborated the gist of Officer Bonner's report, that Grievant's behavior was not normal and raised suspicion that Grievant was under the influence of drugs or alcohol. Further, Grievant admitted to Captain Gary that she had consumed alcohol not long before reporting for work. Regardless of whether it would ultimately be determined that Grievant was legally under the influence of alcohol, the Department met its burden to require Grievant to submit to the drug test.

8. The Department also met its burden to establish by a preponderance of the evidence that Grievant refused to take the drug test. The testimony of Corp. Johnson is found to be credible. She testified that Grievant admitted to having taken alcohol the night before, that Grievant asked what she should do about her predicament, that Grievant wanted access to food or beverage before having to be tested, that Grievant then sought to have the test in another location, which would have had the effect of further delaying the test and might allow the measurable alcohol in her system to diminish, and that then Grievant refused to wait for Urgent Care to open and told Corp. Johnson she wanted to refuse to take the test and to be returned to the facility so that she could go

home. The testimony of Capt. Gary on this and other issues is also determined to be credible. Capt. Gary testified that when Corp. Johnson and Grievant returned to the facility parking lot, Grievant told him clearly that she was refusing to take the test and that she wanted to go home. Capt. Gary is not certain whether he spelled out the specific disciplinary implications of this decision to Grievant, but he is in no doubt that she was clear in her choice and that she did not inquire about the implications of this decision.

9. The Department has proved by a preponderance of the evidence that Grievant knew or should have known that refusing to submit to a required drug test could have serious implications. Grievant had previously been made aware of the Department's Drug-Free Workplace Policy, as is evidenced by her signature on the acknowledgement page, made on November 12, 2002. Although there is no copy of a signature for the revised policy, neither party raised this issue, and it is difficult to imagine that employees of the Department were not made aware of the zero tolerance provisions when the updated policy went into effect. One feature of the updated policy was the requirement that all employees, including the Warden himself, whose responsibilities were considered to be security sensitive, were required to submit to random drug screens. Grievant's position with the inmates of Unit 7-Charlie was a security-sensitive position. It is inconceivable that Grievant was not aware of the likelihood of being selected for a random drug screen or the consequences of refusing such a screen. The implications are similar for refusing a drug screen required because of an individualized reasonable suspicion. Employees generally have a duty to be aware of the behavior requirements of their employer and to abide by those requirements.

Grievant also read and acknowledged understanding of the Department's Code of Conduct for Correction Department Employees and Oath to adhere to that code of conduct, which Grievant signed on November 11, 2001. The Oath includes affirmation that the signatory will diligently perform "all the duties required of me as an employee of the Department of Correction". One of the duties of an employee of the Department is to submit to a drug test when directed to do so.

10. The Department's Code of Conduct policy contains a discrete document entitled Tennessee Department of Correction Employee Code of Conduct, which contains twelve bulleted paragraphs of prohibited behavior and a line for the employee's signature and the date at the bottom of the page. The fifth bulleted paragraph strictly prohibits "[U]se of alcoholic beverages or being under the influence of alcohol while on duty or immediately prior to reporting for duty." Grievant's signature and the date November 12, 2002 are at the bottom of the page. Therefore, the Department has proven by a preponderance of the evidence that Grievant was officially on notice that coming to work under the influence of alcohol or using alcoholic beverages immediately prior to reporting for duty were prohibited behaviors, and that she was obligated to submit to a drug test when directed to do so. Grievant's agitation in Capt. Gary's office when told she must go for a drug test, her requests for food and drink and a different venue for the test, and her subsequent decision to refuse the test when these requests were denied preponderate in favor of a finding that she was aware that serious consequences would attend failure of the drug test and that she was more likely than not susceptible to being found to fail the drug test. These elements of Grievant's behavior also substantiate Capt.

Gary's decision to require the drug test and make it more likely than not that her refusal to submit to the test was because she feared the consequences of the results. Grievant's testimony that she would have stayed had she thought about the requirement to submit to a drug test, and that she only wanted the experience to end quickly is not credible or persuasive in light of her behavior. Nor is it reasonable or probable that she was unaware of the importance of submitting to the drug test.

11. The next question which must be asked is whether the Department has proved, by a preponderance of the evidence, that termination is the appropriate discipline for Grievant's violations. T.C.A. § 8-30-330, Progressive Discipline, states in relevant part:

> (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.
>
> (c) When corrective action is necessary, the supervisor must administer disciplinary action beginning at the step appropriate to the infraction or performance. Subsequent infractions or poor performance may result in more severe discipline in accordance with subsection (a).

12. Rule 1120-10-.02 provides that: "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. . ."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 <u>most appropriate</u> for the misconduct. (*See*, TENN. CODE ANN., Sec. 8-30-330; and Rule 1120-10-.07, TENN. COMP. R. & REGS.)

13. 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).

14. As Grievant pointed out, the Drug-Free Workplace Policy itself does not exclusively require termination for all perceived violations. In more than one location, even in the definition for zero tolerance, the policy calls for "corrective employee disciplinary or corrective action, *up to and including termination*, upon confirmation of alcohol or drug usage by the employee while in the workplace." However, the Policy also contains in more than one place the mandatory language "as a condition of employment or continued employment, an employee shall not . . . :" That phrase is associated with a list of employee prohibitions in Section VI(D) of the Policy, including #3. "Report to work under the influence of or impaired by alcohol." In addition, Section VI(S) of the Policy subjects employees who refuse a required drug screen to disciplinary action.

15. It is clear that Grievant must be subjected to discipline for her refusal to submit to a drug test. In addition, the preponderance of evidence is that a drug test, if performed, would have revealed the influence of alcohol. It is not clear what concentration of alcohol, if any, would have been detected once the test could be performed at Urgent Care, but because Grievant works in a safety-sensitive position, the issue of whether she was under the influence is itself a matter of significant concern. By

Grievant's own testimony, under normal circumstances officers may still be subjected to, and harmed by, assaults from mentally disturbed inmates. Such assaults constitute a serious security situation in the facility. Warden Colson properly chose termination of the Grievant from state service as the appropriate level of disciplinary action in this matter, considering the serious security nature of the alleged disciplinary infraction committed by the Grievant, and her refusal to comply with the order to take the required drug test. The Lois DeBerry Special Needs Facility is a unique facility because it serves the most mentally, medically and physically-challenged inmates in the entire state correction system. More so than in most other correctional facilities, the behavior of many of the inmates, including those in the Unit to which Grievant was assigned, is unpredictable, potentially violent or disruptive and a security risk to the entire facility. In addition, at DeBerry, there is a higher than normal proportion of inmates who are unusually vulnerable due to their medical, mental or physical disabilities. Lack of attention or poor judgment by an employee could have extremely serious consequences for the security of inmates and employees. TDOC's Drug-Free Workplace Policy was specifically intended to prevent drugs and alcohol from being factors that might contribute to violation of security of the entire institution. If an employee by his or her behavior raises concerns about whether he or she may be impaired by drugs or alcohol on the job, and that employee will not obey orders to comply with required procedures to determine whether there is a breach of security, it is too great a risk for the facility to continue the employment of that individual. Thus, in this case, legal and just cause exists

for concluding that termination was the proper discipline for failure to submit to the drug test when ordered to do so.

IT IS THEREFORE ORDERED that the Commissioner's sanction of termination is UPHELD, and the Grievant's Fifth Step Civil Service Appeal of the Commissioner's decision is hereby DISMISSED.

Entered and effective this 7th day of October, 2009

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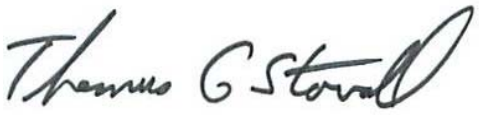
Margaret R. Robertson,
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 7th day of October, 2009



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