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Department of Children's Services vs. Douglas Masengill, Grievant

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

IN THE MATTER OF:

Department of Children's Services

DOCKET NO: 26.43-097688J

v.

Douglas Masengill,
Grievant

INITIAL ORDER

This contested case was heard in Clinton, Tennessee, on January 16, 2009, before Ann M. Johnson, Administrative Judge, assigned by the Secretary of State to sit for the Civil Service Commission of the State of Tennessee. Nancy V. Clark, Assistant General Counsel with the Tennessee Department Children's Services (Department or DCS) represented the Department. The Grievant appeared on his own behalf, waiving legal counsel.

The subject of this hearing was the Grievant's appeal of the termination of his employment by the Department of Children's Services. After consideration of the evidence and the arguments of the parties, it is determined that the termination should be upheld. This decision is based upon the following.

SUMMARY OF THE EVIDENCE

The Department called four witnesses to testify on its behalf: Laura Reneau, Bart W. Jenkins, Amanda Dunn, and Jewell Darlene McLain. The Grievant, who testified on his own behalf, also called Beth Boniface, Janie Eppers, and Jeffrey Armstrong.

Seven documents were admitted into evidence:

| | |
|----------------------|--|
| EXHIBIT 1 | Termination Letter dated September 13, 2007; |
| EXHIBIT 2 | System 2A Evaluation dated June 1, 2007; |
| EXHIBIT 3 | Investigative Report (Under Seal); |
| EXHIBIT 4 | Written Warning dated December 29, 2005; |
| EXHIBIT 5 | Wadley Affidavit; |
| COLLECTIVE EXHIBIT 6 | Affidavits; and |
| EXHIBIT 7 | DCS Policy 16.38-BA. |

FINDINGS OF FACT

1. The Grievant, Douglas Masengill, was employed by the Department of Children's Services for five years as a Case Manager 2.

2. As a Case Manager 2, the Grievant was assigned a caseload of several children in DCS custody. Among other tasks, his job duties required him to conduct face-to-face visits with the children according to policy, some twice monthly and some only once, to verify that the children were safe and that their needs were being met. After the visits, the Grievant was required to enter a description of the encounters and the condition of the children into the official state computer record, called TnKids. The TnKids recording are vitally important to insure the safety and welfare of children in DCS custody, since it is the method by which children are tracked and monitored. Ideally, entries should be made within five days of the visit, although entries made within thirty days complied with departmental policy.

3. The Grievant's employment was terminated by letter dated September 13, 2007, and became effective on September 23, 2007.

4. The Department's stated reasons for the termination included violation of the following: Tennessee Department of Human Resources¹ Rule 1120-10-.06(1), (2), (4), (8), (12), (15), and (18); DCS Policy 4.9; and DCS Policy 16.38.

¹ Previously the Tennessee Department of Personnel.

Unauthorized Contacts by Parents with Children

5. The Grievant violated departmental policy and placed children in jeopardy by allowing unauthorized contact between children and parents.

5.a. In the spring of 2007, for example, the Grievant allowed a child in custody to have overnight, unsupervised visits with a parent who had not completed required intensive alcohol and drug treatment. These visits were allowed in contravention of explicit instructions to the contrary that the Grievant received from his supervisor.

5.b. In May, 2007, the Grievant released a child into the custody of his parent because he felt it was best for the family. This action was in direct contravention of directions from the Grievant's supervisor, who had specified that the child could be released only with the authority of the court. The Grievant's supervisor had concerns, which she explained to the Grievant, regarding the parent's stability and ability to care for the child.

Reporting Issues

6. On multiple occasions, the Grievant failed to submit timely face-to-face contact reports, called TnKids recordings, for children in DCS custody who were on the Grievant's case list.

6.a. For example, the Grievant initially filed zero reports for contacts in April of 2007, even though the Department listed seventeen children on his case list. The recordings were due by May 14, 2007. When they were found to be missing, the Grievant was instructed to complete the reports by June 1, 2007, and was told that overtime hours would be approved if necessary. However, the reports were not completed until June 3, 2007.

Failure to Complete Required Visits

7. The Grievant failed to make required visits for some of the children assigned to him.

7.a. In April, 2007, the Grievant was required to see twelve of the children twice in the month. However, he made only one visit for these twelve children in the month of April.

7.b. In May of 2007, the Grievant was required to see nine children on his caseload at least two times, and the Grievant visited them only once during the month.

7.c. Other required visits were also not completed. In May of 2007, it was determined that there had been no visits to the child K.B. during that month. When the Grievant's supervisor inquired, the Grievant admitted he had failed to make that visit and also failed to see another child during that month. However, the Grievant stated that all other visits had been completed. In spite of this assurance, it was later determined that a third child was not seen in a face-to-face visit during the month of May. The Grievant's only explanation was that he had met the foster father.

Falsification of Records

8. The Grievant falsified official records to reflect face-to-face contacts that were never made.

8.a. Even though he admitted to his supervisor that he had not seen the child K.B. in May, he noted in a TnKids recording that he had seen the child at court on May 9, 2007. However, such a meeting never took place.

8.b. A second discrepancy was also found in a TnKids entry. The Grievant noted that he had made contact with the child B.G. at the child's day care center on June 15, 2007. However, there was no face-to-face meeting on that date.

Other Factors

9. Several times the Grievant's supervisors offered to provide help to the Grievant in completing required visits and reports, but the Grievant did not request assistance.

10. In June and July of 2007, an Internal Affairs investigation was conducted. The report concluded that the Grievant falsified TnKids entries and failed to complete required face-to-face visits.

11. The Grievant had been counseled repeatedly by his supervisors regarding failure to complete required work and regarding complaints from foster parents.

12. On December 29, 2005, the Grievant received a Written Warning for allowing direct, unsupervised contact between a child and parent, when the child was in DCS custody because of severe abuse by the parent. The Grievant allowed this contact without a final recommendation of a Commissioner Designee Review, contrary to DCS policy.

13. The Grievant received a job performance evaluation on June 1, 2007. His overall score was 3 (Good) out of a possible 5 points. All scores on specific responsibilities were 3 (Good) except for 2 (Marginal) in two areas: Case Management and Documentation. At the time the evaluation was completed, the Grievant's supervisor was not aware of several issues, particularly the falsification of records. Had she known, the Grievant's scores would have been lower on the evaluation.

14. The Grievant admitted he made mistakes and apologized for them, but explained that he was overworked and had been assigned more children than he should have been. Because of these pressures, as well as personal family issues, he simply made mistakes: "So I was over caps and overwhelmed. I made a mistake." He contended that he did not intentionally lie, but that he "stretched it" because his memory was faulty.

15. The Grievant also acknowledged that he may have violated DCS policies, but stated that he was acting appropriately in the best interest of the families; he felt he was doing his job in the best way he could.

16. The Grievant displayed a sincere concern for children, and presented testimonials from clients and other professional contacts. On many occasions, he served the children and foster parents well.

RELEVANT LAW

1. The Department, as the party “seeking to change the present state of affairs,” has the burden of proof under Rule 1360–4–1–.02(7) of the Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies, TENN. COMP. R. & REGS. ch. 1360–4–1 (June 2004 (Revised)), to prove by a preponderance of the evidence that the discipline imposed was appropriate under state law and regulations.

2. Tennessee Department of Personnel² Rule 1120-10-.06, in pertinent part, provides that the following are disciplinary offenses:

- (1) Inefficiency or incompetency in the performance of duties.
- (2) Negligence in the performance of duties.
- . . .
- (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.
- . . .
- (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.
- . . .

² Now Department of Human Resources.

(18) Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination).

3. DCS Administrative Policies and Procedures: 4.9, Employee Disciplinary

Actions, contain the following language in Section E(1):

In addition to the disciplinary offenses listed in the Tennessee Department of Human Resources Rules, the following offenses **may** be grounds for disciplinary action, up to and including termination:

. . .
b) Falsification of any official document.

Emphasis in original.

4. DCS Administrative Policies and Procedures: 16.38BA, Procedures, Section A5

contains the following requirement:

Following the initial sixteen (16) weeks of care, there shall be no fewer than two (2) face-to-face visits with the child each month.

5. T.C.A. Section 8-30-330 contains the following relevant provisions:

(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).

Emphasis added.

6. Progressive discipline steps are outlined and described in Department of

Personnel Rule 1120-10-.07, which states, in relevant part:

(1) The supervisor is responsible for maintaining the proper performance level, conduct and discipline of the employees under his supervision. When corrective action is necessary, the supervisor must administer disciplinary action beginning at the appropriate step as described.

- (2) Oral Warning.
- (3) Written Warning.
- (4) Suspension Without Pay.
- (5) Dismissal.

7. The Rules of the Tennessee Department of Personnel provide the overall policy for imposing disciplinary action in Rule 1120-10-.02:

POLICY. 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**, but must be in compliance with the intent of the provisions of this rule and the Act. . . .

Emphasis added.

ANALYSIS and CONCLUSIONS OF LAW

The Department has carried the burden of proof, to show by a preponderance of the evidence that the discipline imposed is warranted and appropriate in this case, by proving that the Grievant committed the majority of the violations with which he is charged.

The evidence shows that the Grievant was guilty of inefficiency, incompetence, and negligence in the performance of his duties. He failed to perform face-to-face visits as required by DCS policy, even though his superiors repeatedly offered help in this area. Furthermore, over the course of years he failed to complete required reports in a timely manner, and never submitted some at all. These reports are the method by which DCS monitors the children within its care and are vitally important to the safety and welfare of the children.

The Grievant was also charged with “failure to maintain satisfactory and harmonious working relationships with the public and fellow employees.” Although there was brief mention of previous complaints against the Grievant by foster parents, the Grievant presented

countervailing evidence of professional associates, coworkers, and several foster parents who held him in esteem and respected his work. It is determined that this charge is unsubstantiated.

A third allegation charges the Grievant with “conduct unbecoming an employee in the State service.” It is determined that the Grievant is guilty of this prohibited conduct, in that he falsified official state documentation. Although the Grievant asserted that he did so mistakenly, his arguments were unpersuasive in light of the evidence to the contrary. The facts of the case show that it is much more likely that the Grievant felt under pressure, both from his employment and his family issues, and so documented visits that he never made. For this same reason, the Grievant also violated DCS policy 4.9E(1)b) against “falsification of any official document.”

The Grievant also violated the proscription against “participation in any action that would in any way seriously disrupt or disturb 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.” The Grievant displayed blatant disregard for departmental policies and rules, choosing instead to substitute his own judgment in several situations. Although policies may work a hardship in some instances, they are in place for the protection of the children served by the Department, who is charged with formulating and implementing those policies. The Department would be in chaos, unable to function, if each employee felt free to disregard policy at will.

Similarly, it is found that the acts of the Grievant could have “endanger[ed] the lives and property of others.” By choosing to allow prohibited contact between children and parents, the Grievant put the safety of the children at risk.

The Grievant was also guilty of insubordination. The proof showed that several times he acted, or failed to act, in direct contravention of the instructions of his supervisors.

Finally, the evidence clearly showed, and the Grievant admitted, that he failed to conduct the required number of face-to-face visits with several children on his caselist, in contravention of DCS Policy 16.38BA.

The Grievant argued that termination was not the proper remedy because progressive discipline steps had not been attempted first. This contention is without merit. In the first place, there had been progressive discipline, in that the Grievant received a Written Warning in 2005 for allowing unsupervised and unauthorized visitation. In spite of this warning, the Grievant displayed the same type of behavior, a pattern that puts children at risk. Although there was no evidence to show that actual harm resulted, this egregious disregard of safety restrictions justifies the disciplinary action taken.

Additionally, the proof also showed another pattern, failure to adequately document visits in a timely manner, which had persisted throughout the recent years of the Grievant's employment. According to the record, the Grievant's supervisors had repeatedly counseled him regarding documentation requirements, without improvement. Moreover, the failure to adequately perform vital recordkeeping requirements is compounded by the falsification of reports.

Finally, the civil service rules do not require an employer to begin disciplinary action at the lowest step and then progress through each one in turn. Rather, "the supervisor must administer disciplinary action beginning at the step *appropriate* to the infraction or performance." In this case, the number, duration, and serious nature of the violations, as well as the previous counseling and discipline, indicate that termination is the appropriate discipline.

Accordingly, based upon the foregoing, it is hereby **ordered** that the Grievant's termination is **upheld**.

This Initial Order entered and effective this 30th day of October, 2009.

Ann M. Johnson
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this
30th day of October, 2009.



Thomas G. Stovall, Director
Administrative Procedures Division