



11-10-2010

TENNESSEE DEPARTMENT OF
CORRECTION, Petitioner, vs. MARY COLLIER,
Grievant.

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**BEFORE THE CIVIL SERVICE COMMISSION
OF THE STATE OF TENNESSEE**

| | | |
|--|---|---------------------------------|
| IN THE MATTER OF: |) | |
| |) | |
| TENNESSEE DEPARTMENT OF CORRECTION, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | DOCKET NO. 26.05-108792J |
| |) | |
| MARY COLLIER, |) | |
| |) | |
| Grievant. |) | |

INITIAL ORDER UPHOLDING TWO DAY SUSPENSION

NOTICE OF DEFAULT AGAINST GRIEVANT

This contested case came on to be heard on November 10, 2010, 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 of Tennessee. Mr. Bryce Coatney, Attorney, Tennessee Department of Correction, represented the Department of Correction or the State (“the Department.”) The Grievant, Mary Collier, was not present, nor was anyone present at the hearing on her behalf.

The subject of this hearing was Grievant’s appeal of a two day suspension, without pay, from the Department of Correction. Grievant was given the two day suspension for allegedly violating the following RULES OF THE TENNESSEE DEPARTMENT OF PERSONNEL (Revised May, 1999): Rule 1120-10-.06(6) – Habitual Pattern of Failure to Report for Duty at the Assigned Time and

Place; and Rule 1120-10-.06(18) – Refusal to Accept a Reasonable and Proper Assignment from an Authorized Supervisor (Insubordination).

**DEPARTMENT OF CORRECTION’S MOTION
FOR DEFAULT**

At the scheduled time for the hearing, the Department’s attorney, the Department’s party representative, the Department’s witnesses, the court reporter, and the undersigned were present at the Hearing Room at the Charles B. Bass Correctional Complex in Nashville, Tennessee. After waiting a significant amount of time for the Grievant to appear, the Department moved for an entry of Default against Grievant, and further moved to proceed with its proof in Grievant’s absence.

T.C.A. §4-5-309 governs motions for default in administrative cases such as civil service cases. It states:

Default.---(a) If a party fails to attend or participate in a pre-hearing conference, hearing or other stage of a contested case, the administrative judge...may hold the party in default and either adjourn the proceedings or conduct them without the participation of that party, having due regard for the interest of justice and the orderly and prompt conduct of the proceedings.

The Department, by and through its attorney, served notice of the scheduled civil service hearing upon Grievant by first class, United States mail. Additionally, The Grievant received additional notice of the hearing by the “Pre-Hearing Order” entered on September 13, 2010, which clearly stated the date, time, and location of the hearing. Neither the notice served by the Department nor the “Pre-Hearing Order” was returned as “undeliverable.”

Service by U.S. mail is complete upon mailing. See [TENN. R. CIV. P. 5.02](#). Proof of mailing may be by certificate of a member of the bar of the court. [TENN. R. CIV. P. 5.03](#). Proof of due mailing creates a presumption of receipt. *Kogan v. Tenn. Board of Dentistry*, 2003 WL 23093863 *1 (Tenn. Ct. App. 2003); *Card v. Tenn. Civil Serv. Comm'n*, 981 S.W.2d 665, 666 (Tenn.Ct.App.1998). Credible testimony or other evidence of non-receipt may overcome the presumption of receipt. *State ex rel. Flowers v. Universal Care of Tenn.*, 2007 WL 3072776 *7 n. 14 (Tenn. Ct. App. 2007).

No testimony or other evidence of non-receipt was offered to overcome the presumption of Grievant's receipt of notice of the hearing. To the contrary, Ms. Debby Dolan, Human Resources Analyst III, Charles Bass Correctional Complex, stated that she had communicated with Grievant regarding the scheduled hearing and expected Grievant to appear at the hearing.

It is determined that Grievant received proper notice of the scheduled civil service hearing, yet elected not to attend or participate in the hearing. Accordingly, the Department's "Motion for Default" against Grievant was considered well taken, and was **GRANTED**. Because the Department has the burden of proof in this matter, it requested that it be allowed to conduct the hearing without the participation of the Grievant and present its proof. The Department's request to present its proof was **GRANTED**.

FINDINGS OF FACT

1. Grievant Mary Collier is employed by the State of Tennessee as a Correctional Sergeant at the Charles B. Bass Correctional Complex in Nashville, Tennessee.

2. Grievant Collier has been employed by the State of Tennessee for thirty-four years, and on her last performance evaluation in 2007 received an “exceptional” rating.

3. From August 24, 2009 through September 30, 2009, Grievant was absent from her employment with the State¹.

4. On September 9, 2009, Ms. Debby Dolan, Human Resources Analyst III, sent Grievant a “Family Medical Leave Act” letter on behalf of the Department of Corrections. The letter, which was entered into evidence at the hearing as Exhibit 3, informed Grievant of “certain rights and responsibilities which exist under the provisions of the FMLA.” Specifically, Grievant was instructed to provide the Human Resources office with a completed application for Family Medical Leave and Certification of Health Care Provider Form no later than September 30, 2009; Grievant was further instructed to comply with the Department of Correction’s “call-in procedures” and “keep your immediate supervisor advised of your return to work status.” Finally, the September 9, 2009 letter informed Grievant that she must “present a fitness-for-duty certificate” prior to returning to work.

¹ Grievant attempted to return to work for 3.0 hours on September 23, 2009.

5. Grievant's immediate supervisor, Captain Michael Barbee, instructed Grievant that she must present medical documentation upon her return to duty.

6. On September 23, 2009, Grievant returned to work for three (3) hours. At that time, Grievant presented Captain Barbee with a medical statement dated September 18, 2009, that covered her absence from work for the dates September 18, 2009 through September 23, 2009. The "School/Work Excuse" was signed by Dr. Jeffrey B. Carter of the "Oral Surgical Institute". The "School/Work Excuse" stated that Grievant would be able to return to work on September 23, 2009.

7. Grievant failed to report for duty as scheduled, or to contact her supervisor (Captain Barbee) regarding her absence, on Sunday, September 27, 2009; Monday, September 28, 2009; Tuesday, September 29, 2009, and September 30, 2009.

8. On September 30, 2009, Grievant's supervisor, Captain Barbee, notified Acting Warden Charles Simmons of Grievant's unapproved absence, and recommended that Grievant be separated from her employment with the State for job abandonment.

9. Grievant was notified by HR Analyst Dolan that she must present medical documentation to support her entire absence from employment. Acting Warden Simmons also instructed Grievant to present medical documentation for her entire absence from her employment on or before Friday, October 16, 2009.

10. Following Grievant's absence from employment on Sunday, September 27, 2009; Monday, September 28, 2009; Tuesday, September 29, 2009, and September 30, 2009, Acting Warden Simmons terminated Grievant for "job abandonment".

11. On October 14, 2009, a "grievance hearing" was held at Grievant's request to address her separation from State employment for job abandonment.

12. Despite Ms. Dolan's and Acting Warden's Simmons' instructions to Grievant, Grievant failed to provide medical documentation of her absence from work until Tuesday, October 20, 2009. At that time, Grievant finally provided medical documentation for her extended absence from work.

13. On October 28, 2009, Warden Dwight Barbee reviewed the decision to terminate Grievant, reinstated Grievant to her employment as a Correctional Sergeant, and imposed a two (2) day suspension without pay.

14. Grievant appealed the two day suspension without pay (January 26 and January 27, 2010) through the Employee Grievance procedure.

15. The two day suspension without pay was upheld at a 4th step hearing. Thereafter, Grievant filed this appeal.

CONCLUSIONS OF LAW

1. The Department bears the burden of proof in this matter to show that Grievant violated the DEPARTMENT OF PERSONNEL RULES set forth in the letter of suspension without pay. The Department also has the burden of proof

to show that the discipline imposed was the appropriate discipline for any 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. The Department or Petitioner charges Grievant with the following violations:

Rule 1120-10-.06(6) – Habitual Pattern of Failure to Report for Duty at the Assigned Time and Place; and Rule 1120-10-.06(18) – Refusal to Accept a Reasonable and Proper Assignment from an Authorized Supervisor (Insubordination).

5. T.C.A. §8-30-331 provides that civil service employees (who have successfully completed their probationary period) have a property right to their positions.

6. Because State of Tennessee civil service employees have “property rights” in their jobs; such employees must be afforded constitutional due

process before the State may legally take an adverse action against an employee's job. *Hinson v. City of Columbia*, 2007 WL 4562886 (Tenn. Ct. App. 2007).

7. Grievant was afforded notice and due process in this matter.

8. The Department of Correction proved, by a preponderance of the evidence, that Grievant violated Rule 1120-10-.06(6) – Habitual Pattern of Failure to Report for Duty at the Assigned Time and Place; and Rule 1120-10-.06(18) – Refusal to Accept a Reasonable and Proper Assignment from an Authorized Supervisor (Insubordination).

Appropriate Discipline for Grievant

9. Rule 1120-10-10.22 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 service employee serves at the pleasure of the appointing authority.

10. Rule 1120-10-.01(45) of the *Rules of the Department of Personnel* provides that 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.

11. Grievant's actions/omissions fall within both categories.

12. Tennessee's Civil Service statutes and rules incorporate the doctrine of progressive discipline. Accordingly, state supervisors are expected to

administer discipline beginning at the lowest appropriate step. *Kelly v. Tennessee Civil Service Commission*, 1999 WL 1072566 (Tenn. Ct. App. 1999).

13. Further, at least one court, in expressing approval of the progressive discipline system, has stated that the legislative mandate for progressive discipline should be “scrupulously followed”. *Berning v. State of Tennessee, Department of Correction*, 996 S.W. 2d 828, 830 (Tenn. Ct. App. 1999).

14. T.C.A. §8-30-330 sets forth the state’s civil service progressive discipline system as follows:

(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.

(b) Any written warning or written follow-up to an oral warning which has been issued to an employee shall be automatically expunged from the employee’s personnel file after a period of two (2) years; provided, that the employee has had no further disciplinary actions with respect to the same area of performance, conduct, and discipline.

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

15. The Court in *Berning v. State Department of Correction* notes that the “key word in the statute [T.C.A. §8-30-330] is *appropriate*”. *Berning v. State Department of Correction*, 996 S.W.2d 828, 830 (Tenn. Ct. App. 1999), *Perm. to appeal denied* (Tenn. 1999). “The 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.” Id. At 830, *quoting the Chancellor’s order with approval.*

16. An employee’s prior conduct, both good and bad, along with his entire work history, can be considered when determining what the appropriate disciplinary action should be. *Kelly v. Tennessee Civil Service Commission*, 1999 WL 1072566 (Tenn. Ct. App. 1999).

17. The record reflects that the Grievant has previously received verbal warnings, a written warning, and a memorandum regarding prior absences from work, falling asleep on the job, and being “AWOL” without following established procedures.

18. The record also reflects that Grievant has been an employee of the State of Tennessee for thirty-four (34) years, and received an “excellent” performance evaluation on her last evaluation in 2007.

19. The Department has used “progressive discipline” with Grievant.

20. After considering the totality of the circumstances in this matter, it is determined that the appropriate discipline in this matter is a two (2) day suspension without pay.

21. Finally, while such is not determinative in this matter, it should be noted that Grievant is the party who asked that the appeal in this matter take place. Because Grievant asked for the 5th step hearing, the undersigned, the attorney for the Department of Correction, the Department’s party representative, and witnesses for the Department of Correction attended the

scheduled hearing. The Department of Correction incurred expenses for the Court Reporter and other hearing expenses associated with the hearing. Witnesses either had to attend the hearing rather than their usual work assignments, or had to attend the hearing after working the night shift prior to the hearing.

Had Grievant wished to notify the undersigned and the Department's counsel that she did not wish to pursue her appeal and wished to accept the discipline imposed, it would have saved the Department considerable preparation time and the expense of the hearing. Grievant's cavalier treatment of the Department of Correction's participants in the hearing was discourteous and unnecessary.

Grievant is **suspended for two (2) days without pay.**

It is so ordered.

Entered and effective this 30th day of November, 2010.

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'.

Thomas G. Stovall, Director
Administrative Procedures Division

