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DEPARTMENT OF CHILDREN'SSERVICES, Petitioner, Vs. RICKY GREEN, Grievant

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

DEPARTMENT OF CHILDREN'S SERVICES, ***Petitioner*** **Vs.** **RICKY GREEN,** ***Grievant***	**DOCKET NO: 26.43-104467J**

INITIAL ORDER

This matter came to be heard on July 1, 2010 before Lynn M. England, Administrative Law Judge, sitting for the Tennessee Civil Service Commission. The State of Tennessee, Department of Children's Services (hereinafter "DCS") was represented by attorney Julie Randall Pablo . The Grievant was present for the hearing and proceeded *pro se*. This hearing constituted Grievant's 5th step hearing before the Civil Service Commission pursuant to T.C.A. § 8-30-328. The record was closed on September 1, 2010 with the filing of the State's proposed Findings of Fact and Conclusions of Law.[1]

ISSUE FOR CONSIDERATION

Whether it was proper for DCS to terminate Grievant for violation of Tennessee Department of Personnel Rule 1120-10-06 (1) Inefficiency or incompetency in the performance of duties; (2) Negligence in the performance of duties; (10) Willful abuse or misappropriate of State funds, property or equipment and DCS Policy 7.2 Acceptable Use, Network Access Rights and Obligations, Network Resources, Uses and Prohibitions as it pertains to State computer usage.

[1] Grievant did not file proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant, at all times relevant, was a Children's Services Officer at the Brighter Paths Group Home.

2. Brighter Paths is a step down home for young men from juvenile detention.

3. Grievant worked the 3:00 p.m to 11:00 p.m. shift with one (1) other officer.

4. There were eight (8) students living in the home. The home consisted of 8 bedrooms with each student having his own bedroom. There was a living area, dining area, bathrooms and a dayroom.

5. Grievant was found to have accessed the internet during work hours.

6. Grievant admitted to using the state computer during work hours to look up various sites such as Nascar, sports information, weather alerts and female movie stars on the internet. He also admitted that he asked a co-worker to throw away pictures of scantily clad female movie stars he had left on the printer.

7. Mr. James Oakes, DCS Desktop Services Engineer, identified Grievant's employee identification number for purposes of his computer use. Mr. Oakes found no evidence that any photos had been saved to the computer.

8. Mr. Jon K. Hall, DCS Internal Affairs Investigator, introduced evidence of Grievant's internet computer use which consisted of two hours during one eight hour work day (April 29, 2009) and four hours during another eight hour work day. (May 16, 2009). However, Mr. Hall did not provide any evidence that Grievant was constantly on line. No evidence was presented whether Grievant's internet computer use was intermittent use or if he had simply accessed a site and walked away.

7. No evidence was presented that any students were left unattended during any period of time Grievant was online. The office where the computer was located was within eyesight of the dayroom where the students gathered to watch television.[2]

8. No evidence was presented as to whether the students were awake or asleep during the time Grievant was online. No evidence was presented as to how much time Grievant spent on any given website, be it weather sites or sites containing photos of starlets.

CONCLUSIONS OF LAW

1. In a fifth step level hearing, an administrative law judge presides to take proof and render an initial order which is subject to review by the Civil Service Commission. T.C.A. §4-5-301.

2. It 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 burden of proof rests with the agency and the agency must prove by a preponderance of the evidence that 1) the Grievant acted or failed to act as the agency alleges; 2) the Grievant's action constitutes a disciplinary offense; and 3) the recommended discipline is appropriate for the given offense. Id. at 520. Some instances of misconduct require an elevated level of discipline, even if the employee has no history of prior disciplinary action. Berning v. State, 996 S.W.2d 828, 830 (Tenn. App. 1999).

[2] Eight students were monitored by two staff members. One staff member could not possibly observe all eight students at all times.

4. The Department of Children's Services bears the burden of proof in this case. The standard of proof is a preponderance of the evidence. TN. Department of State, Administrative Procedures Division, Rule 1360-4-1-.02(3)(7).

5. Preponderance of the evidence simply means "the greater weight of the evidence or that, according to the evidence, the conclusion sought by the party with the burden of proof is the more probable conclusion." Id.

6. **PURPOSE (Rule 1120-10-.01)**

To establish standards for the application of disciplinary procedures which will assure fairness and uniformity among agencies and institutions subject to the provisions of these rules.

7. **POLICY (Rule 1120-10-.02)**

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. An executive service employee serves at the pleasure of the appointing authority.

8. **CAUSES FOR DISCIPLINARY ACTION (Rule 1120-10-.05)**

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.

9. **EXAMPLES OF DISCIPLINARY OFFENSES (Rule 1120-10-.06)**

The following causes are examples of those considered for disciplinary action and should not be considered the only causes of action.

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

(2) Negligence in the performance of duties.

(3) Careless, negligent or improper use of State property or equipment.

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

(5) Habitual improper use of sick leave privileges.

(6) Habitual pattern of failure to report for duty at the assigned time and place.

(7) Failure to obtain or maintain a current license or certificate or other qualification required by law or rule as a condition of continued employment.

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

(9) Conviction of a felony.

(10) Willful abuse or misappropriation of State funds, property or equipment.

(11) Falsification of an official document relating to or affecting employment.

(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.

(13) Trespassing on the property of any State officer or employee for the purpose of harassment.

(14) Damage or destruction of State property.

(15) Acts that would endanger the lives and property of others.

(16) Possession of unauthorized firearms, lethal weapons, alcohol or illegal drugs on the job.

(17) Brutality in the performance of duties.

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

(19) Reporting to work under the influence of alcohol or illegal drugs, or partaking of such on the job.

(20) Sleeping or failure to remain alert during duty hours.

(21) Betrayal of confidential information.

(22) Garnishment of wages for more than one indebtedness.

(23) Political activity prohibited by T.C.A. Title 2, Chapter 19 (The Little Hatch Act)

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

10. **PROGRESSIVE DISCIPLINARY ACTION (Rule 1120-10-.07)**

(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. The supervisor will meet privately with the employee to:

(a) Review with the employee exactly what is expected on the job and why.

(b) Explain to the employee how he has not met requirements and why present conduct or performance is unacceptable.

(c) Allow the employee to give reasons for his actions or failure.

(d) Make suggestions for correction.

(e) Record the date of the discussion and other necessary information for future reference.

(f) Written follow-up to the discussion may be forwarded to the employee but is not required. Written follow-up to an oral warning should not be construed as a written

warning as described below and will not become part of the employee's official personnel file.

(3) Written Warning. The supervisor will meet with the employee and:

(a) Review the points covered in the oral warning, if an oral warning(s) was administered. The employee will be told that a significant change in his present conduct or performance must be made.

(b) Tell the employee he will receive a letter covering the significant points of the discussion to include:

1. What has been expected and how these expectations have not been met.
2. Suggestions for improvement.
3. Indication that failure to improve will lead to further disciplinary action.

(c) Review with the organizational unit head the contents of the letter prior to its delivery to the employee by the supervisor.

(d) A copy of the written warning may be placed in the employee's official personnel file in the agency personnel office at the discretion of the appointing authority. Any written 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 from the date of the letter; provided, that the employee has had no further disciplinary actions with respect to the same area of performance, conduct, and discipline.

(4) Suspension Without Pay.

(a) After minimum due process is provided, a suspension without pay may be issued by the appointing authority for one (1) to thirty (30) days. No employee may be suspended without pay for disciplinary purposes for more than thirty (30) days in any consecutive

twelve (12) month period. Suspensions with or without pay of more than thirty (30) days may be issued pending the outcome of an investigation or legal action with approval of the Commissioner.

(b) Before issuance, a written notice of the suspension without pay will be prepared. The notice will contain an account of the circumstances which led to the decision to issue the suspension, the beginning and ending dates of the suspension and information to the employee concerning his rights of appeal as outlined in Chapter 1120-11 of these rules. A copy of the notice will be placed in the employee's official personnel file and a copy will be sent to the Department.

(5) Dismissal.

(a) After minimum due process is provided, an employee may be dismissed by the appointing authority from his position for unacceptable conduct or performance of duties.

(b) Before an employee is dismissed, a written notification detailing the circumstances leading to the decision to dismiss will be prepared. The notice will indicate the effective date and inform the employee of his rights to appeal as outlined in Chapter 1120-11 of these rules. A copy of the notice will be placed in the employee's official personnel file and a copy will be sent to the Department.

(c) Before an employee can be dismissed, he must be given ten (10) calendar days paid notice. During the notice period an employee will not be required to report for duty. The employee's accumulated annual leave balance may be used during this notice period only if dismissal is for gross misconduct.

(6) Transfer or Demotion. If it is determined by the appointing authority that an employee's ability to satisfactorily perform his duties is beyond the capabilities of the employee or

the employee has been compromised by notorious conduct to the extent that he is ineffective in his position, the employee may be demoted or transferred to a position that is more appropriate after minimum due process has been provided.

11. The Tennessee Civil Service statute at T.C.A. 8-30-330 provides in relevant part 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.** *Emphasis added.*

12. "Tennessee's civil service statutes and rules incorporate the doctrine of progressive discipline. Accordingly, supervisors are expected to administer discipline beginning at the lowest appropriate step. *See* T.C.A. §8-30-330(a), (c) (1993); Tenn.Comp.R. & Regs. r. 1120-10-.07 (1996). Progressive discipline does not require a supervisor to begin at the lowest level of discipline regardless of the nature of the employee's conduct. It simply means that the supervisor should impose the lowest appropriate punishment taking into account the nature or severity of the employee's behavior. Accordingly, supervisors have the discretion to determine what punishment fits the offense. *See*, Berning v. State Dep't of Correction, 996 S.W.2d 828, 830 (Tenn. Ct. App.1999)." Kelly vs. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. 1999).

13. State of Tennessee Department of Children's Services Administrative Policies and Procedures 7.2(D)[3] in relevant portion sets forth the Internet Access policy:

1. Internet access is provided to network users to assist them in performing duties and responsibilities associated with their position.

2. Prohibited uses include, but are not limited to, using:

[3] DCS did not introduce any evidence of Grievant's knowledge of the Internet Use Policy.

(a) The Internet to access non-State provided web e-mail services.

(b) Instant Messaging or Internet Relay Chat (IRC).

(c) The Internet for broadcast audio for non-business use.

(d) The internet when it violates any federal, state or local law.

DISCUSSION

This incident stems from Grievant printing photos of starlets in bathing suits and asking a female co-worker to destroy them. As a result his computer use was investigated. This led to allegations of Grievant spending extended periods of time on the internet. However, no evidence was presented of Grievant's improper internet use other than the six hours previously identified that was not associated with his position or performance of his duties. Grievant did use poor judgment. He should not have been "surfing the net" during the time he was responsible for supervising the students. Further, he should not have printed the photos of the starlets.

DCS failed to identify any provision in the Internet Acceptable Use Policy that had been violated. DCS further alleged Grievant misappropriated funds by using the state printer to print off the pictures and by signing his time sheet rather than deducting the length of time he spent accessing or viewing the websites. To allege misappropriate of funds for this violation is excessive.

It is determined that DCS has NOT met its burden of proof as to Grievant's incompetency in the performance of duties, negligence in the performance of duties or willful abuse or misappropriation of state funds, property or equipment.

It is DETERMINED that DCS has met its burden of proof by a preponderance of the evidence as to Grievant's inefficiency in the performance of his duties.

The Grievant admitted to using the internet during the time he should have been supervising the students more closely. He also admitted to printing pictures of the starlets and asking a coworker to remove them from the printer. However, termination as the lowest level of discipline is excessive under the statute and rules governing progressive discipline. [4]

It is therefore ORDERED that a written warning is the lowest appropriate discipline for Grievant's actions. Grievant Rickey Green shall be REINSTATED to the position of Children's Services Officer, restored all leave balances, back pay, and other benefits of employment, consistent with this Order. However, such back pay will be reduced by any unemployment benefits, salary, or other money earned by the Grievant during his period of separation.

It is so ORDERED.

This Order entered and effective this 11th day of October, 2010.

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Lynn M. England
Administrative Judge

[4] DCS introduced evidence of a written warning issued to Grievant on May 27, 2009. The actions that are the subject of this hearing occurred April 29, 2009 and May 17, 2009. The written warning issued May 27, 2009 occurred after the fact and therefore is not relevant to this proceeding.