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DEPARTMENT OF CORRECTION, Petitioner vs. SHARON FUENTES, Grievant

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BEFORE THE TENNESSEE
CIVIL SERVICE COMMISSION

IN THE MATTER OF:	)	
	)	
DEPARTMENT OF CORRECTION	)	
Petitioner,	)	
	)	
vs.	)	**Docket No. 26.05-106512J**
	)	
SHARON FUENTES,	)	
Grievant	)	

INITIAL ORDER

This matter came forward on March 22, 2012 before Mattielyn B. Williams, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, sitting for the Tennessee Civil Service Commission. The State was represented by Ms. Teresa Scott Thomas, Assistant General Counsel, Tennessee Department of Correction. Grievant Sharon Fuentes represented herself.

The record closed on June 14, 2012, with the filing of the parties' Proposed Orders.

The subject of this appeal is whether or not the Grievant engaged in misconduct; and if so, what is the proper discipline.

After due consideration of the record and arguments of the parties, it is **DETERMINED** that Grievant Fuentes engaged in misconduct and that termination is the proper discipline for the Grievant's misconduct.

This decision is based on the following:

FINDINGS OF FACT

1. At the time of her termination, Grievant Sharon Fuentes worked as a Correctional Officer at Morgan County Correctional Complex (MCCC). MCCC is operated by the Tennessee Department of Correction. Warden David Mills was serving as Warden at the time of the Grievant's termination. Subsequently, Warden Mills was promoted to Deputy Commissioner of TDOC.

2. Grievant Fuentes worked in the Maximum Security Unit of the complex, which is the highest level of custody.

3. Ms. Ginger Davidson, former Correctional Sergeant, and now Inmate Relations Coordinator, supervised Corporal Robert Hamby, who supervised Grievant/Correctional Officer Fuentes.

4. According to Collective Exhibit 1, his statements of January 7 and January 12, 2010, Corporal Hamby complained about Grievant Fuentes calling over the radio to make arrangements to tell an inmate goodbye. When Corporal Hamby asked Grievant Fuentes about this incident, Grievant Fuentes explained to the Corporal that Inmate Edward Dahm was one of her best friends. Grievant reportedly continued that Inmate Dahm would always be one of her best friends.

5. Corporal Hamby was concerned that Grievant Fuentes had established a personal friendship with an inmate because doing so is a violation of TDOC Policy. Corporal Hamby had admonished the Grievant to stay away from Inmate Dahm earlier, based on talk that she was friendly with inmate Dahm.

Corporal Hamby was concerned regarding whether Grievant Fuentes would be loyal to her fellow Officers v. more loyal to Inmate Dahm in a security emergency. In January 2010, Corporal Hamby asked that Grievant Fuentes be removed, for the safety of the other officers.

6. At the hearing, Grievant Fuentes did admit to confiding in Inmate Dahm about her brother's suicide. Grievant testified that she had been crying over the situation when Inmate Dahm reached out to her emotionally. Inmate Dahm offered to call the crow's nest for relief for Grievant, but Grievant did not want other Officers and inmates to become aware that she had been crying.

7. Sometime after talking with Corporal Hamby, Grievant Fuentes went to talk with then Correctional Sergeant Ginger Davidson, who supervised Corporal Hamby. Now Inmate Relations Coordinator Davidson testified that Grievant Fuentes told her (Davidson) that Inmate Dahm was her best friend and that he had helped her through a difficult time. IRC Davidson continued that Grievant Fuentes had confided in Inmate Dahm.

8. IRC Davidson cautioned Grievant Fuentes, reminding Grievant that it was inappropriate to share personal matters with an inmate. Grievant Fuentes agreed but explained that she was really having a hard time and that Inmate Dahm had been supportive.

9. IRC Davidson further testified that if an Officer is friends with an inmate and a riot or fight breaks out, the remainder of Officers would be left wondering about such an Officer's reaction.

10. Part of Grievant Fuentes' duties involved patting down inmates. Grievant Fuentes questioned whether or not she should be responsible for patting down Inmate Dahm, since they were friends.

11. Former Correctional Officer Misty Wright testified that Grievant Fuentes told her that she and Inmate Dahm were friends and that she trusted him more that she did the "gray shirts," i.e. other Correctional Officers. Ms. Wright continued that Grievant Fuentes thought Inmate Dahm would stand up for her and that he was the only person with whom she could converse. Ms. Wright further testified that Inmate Dahm and Grievant Fuentes were best friends and that he had been through a similar situation of loss.

12. Ms. Wright cautioned Grievant Fuentes that relationships with inmates always in sadly and that she (Fuentes) could lose her job because of such a relationship. Grievant, reportedly, did not care about losing her job potentially because Inmate Dahm was her friend. Grievant, according to Ms. Wright, gave Inmate Damn her cousin's phone number so that he could get in touch with her whenever he wanted to do so.

13. It is **DETERMINED** that cross-examination did not draw the testimony of either Ms. Davidson or Ms. Wright into question. Both women's testimony was consistent within itself and consistent with that of the other.

14. Ken Hutchison has been a Correctional Officer, Corporal, Sergeant, and Lieutenant, as well as being an Internal Affairs Investigator. At the time of the hearing, Mr. Hutchison was a Compliance Manager.

15. Warden Mills asked Mr. Hutchison, who was an Internal Affairs Investigator in January 2010, to investigate the situation with Grievant Fuentes. Warden Mills was concerned that Grievant Fuentes' work as a Correctional Officer may have been compromised.

16. Mr. Hutchison concluded that there was an inappropriate relationship between Grievant Fuentes and Inmate Dahm, though there was not a sexual relationship. Grievant Fuentes admitted to Mr. Hutchison having told Corporal Hamby that "I guess the inmates are my best friends because the officers sure aren't."

17. During the internal due process hearing, Warden Mills emphasized that Grievant Fuentes had simply gotten too close with Inmate Dahm and was sharing too much personal information with him. Grievant Fuentes was clear with the Warden that she trusted Inmate Dahm more than anyone else at the facility. Grievant Fuentes admitted that she did not trust the staff at the facility.

18. Warden Mills testified that he recommended termination because Grievant Fuentes had confided too much personal information and because she had become too close of friends with Inmate Dahm. Warden Mills was concerned that Inmate Dahm would share Grievant Fuentes' information with others and that they could use the information against her.

19. Warden Mills was also under the belief, whether accurate or mistaken, that Grievant Fuentes had been terminated at the end of her probationary period at Northwest Correctional Facility for having become too friendly with inmates there. At Grievant's request, the circumstances of her earlier termination were not delved into in the hearing of the instant matter. Part of Exhibit 14, a letter of June 27, 2005, shows Grievant Fuentes' separation to have been for "performance and policy violations …unfavorable performance…"

20. It is **DETERMINED** that Warden Mills' demeanor at the hearing was business-like, sincere about his view that Grievant Fuentes was no longer fit to serve as a Correctional Officer, and matter-of-fact.

21. In her January 19, 2010 letter Grievant to Warden Mills, Grievant admits having stated, "I guess these Inmates are my best friends because you can tell them something and they won't tell it like my co-workers and so-called Corporals." Also in her January 19th letter, Grievant admits thinking "she told the Officer to tell the inmates to step to their doors so she could tell them goodnight," on another occasion.

22. Current Warden John Anthony Howerton agrees with former Warden Mills that Grievant is unfit to serve as a Correctional Officer because of the friendship she developed with Inmate Dahm. Warden Howerton testified that Morgan County is a maximum custody facility. The inmates housed there are not ones that have no experience in attempting to mold events to fit their needs. This

situation is exactly the situation that the Code of Conduct policy addresses. Fraternization between inmates and staff is strictly prohibited, per Howerton.

23. Exhibit 4 is a Bid Sheet showing that Grievant Fuentes had put in a bid to be moved to Building 25A, where Inmate Dahm was housed at the time of the bid. Grievant Fuentes denies Inmate Dahm's presence in Building 25A having been a factor in her bid. Grievant contends that her bid was based on other factors such as shift, days off, and supervisor.

24. Grievant denies many of the statements, reported by others, regarding her relationship with Inmate Dahm.

25. Grievant admits that she was angry and on medication in January 2010 and therefore was not exercising her best judgment.

26. Grievant Fuentes did not call any character witnesses or fact witnesses to support her contention that she did not make the bold statements to Warden Mills, Corporal Hamby, Mr. Hutchison, Ms. Davidson, and Ms. Wright that they reported. Each live witness was sequestered until time for his or her testimony.

27. All of the steps required by due process were completed. A Letter of Intent was issued. Grievant Fuentes was given a due process hearing on January 19, 2010, and was able to provide Warden Mills with any information that may have changed his intent to take disciplinary action. The Commissioner then reviewed the evidence in this case and made the determination that the Department

was best served by Grievant Fuentes not being able to continue her employment as a Correctional Officer.

CONCLUSIONS OF LAW

1. As the Petitioner, the Tennessee Department of Correction bears the burden to show, by a preponderance of the evidence, that the Grievant violated Departmental and/or Civil Service policies and that termination is the proper discipline for such violation(s).

2. There is testimony by multiple witnesses that Grievant Fuentes told them of her friendship with Inmate Dahm. Witnesses testified that Grievant Fuentes stated that she trusted Inmate Dahm more than the Officers.

3. First, Grievant contends that the statements were not in her best interest; therefore, surely she did not make them as reported. Second, Grievant contends that the witnesses against her are simply lying; however, Grievant did not offer a motive or explanation for the individual witnesses lying.

4. After due consideration, based on the witnesses' demeanor and the consistency of their statements with one another, it is **CONCLUDED** that the witnesses against Grievant Fuentes are **CREDIBLE** and their testimony is **CREDITED**.

5. Grievant is uncertain about which statements she made and which

she did not. Grievant contends that she was being sarcastic when she stated that she could trust Inmate Dahm and/or the inmates more than she could trust her fellow Officers. It is **CONCLUDED** that Grievant is genuinely uncertain about whether or not she made certain statements. It is **CONCLUDED** that if Grievant intended some of her statements to be taken as sarcastic remarks, such expectation is further exercise of poor judgment, whether influenced by medication or not.

6. Grievant's Proposed Order discusses witnesses that she could have called, but did not, and discusses documents that she could have presented as evidence, but did not. It is **CONCLUDED** that the decision in this matter is based on testimony and exhibits presented, not those which were not presented.

7. Grievant's discharge letter, dated July 28, 2010, delineates the reasons for termination as violation of Policy 305.3, Employee/Offender Relationships and the Code of Conduct, Policy 302.8.

8. Exhibit 6, TDOC Policy 305.3, Employee/Offender Interaction, edition May 1, 2008, prohibits fraternization with inmates and family members of inmates.

Section VI A indicates that:

> Employees shall conduct themselves in a professional manner when interacting with offenders.

Section VI B indicates that:

> Social relationships are prohibited, including but not limited to emotional, sexual or romantic attachments with offenders in an institution…

Section VI C indicates that:

> Conversation with inmates shall be limited to that necessary as part

of the employee's duties. …

9. Although it is sometimes difficult to ferret out which statements the Grievant admits making versus which she denies, Grievant does admit that she had a conversation with Inmate Dahm regarding her brother's suicide; Grievant was crying at the time. It is clear that she considered the inmate to be a friend. This crossed a line that could have resulted in a very dangerous situation for all employees of Morgan County Correctional Complex.

10. It is **CONCLUDED** that a Correctional Officer engaging in a conversation about one's brother's suicide violates Policy 305.03, Employee/Offender Relationships, because interactions and conversations between employees and inmates are supposed to be strictly professional and because such conversations are to be limited to matters necessary to the employee's duties.

11. Grievant Fuentes signed the TDOC Code of Conduct and Oath in April 2006. By signing such, Grievant Fuentes professed that she understood and would comply with the directive that "fraternization with inmates … is prohibited. Employees shall not make more than incidental contact or become unduly familiar with inmates … nor permit inmates to become unduly familiar with them …"

12. It is **CONCLUDED** that Grievant Fuentes violated TDOC Policy 302.8, Code of Conduct and Oath of Correction Department Employees when she confided in Inmate Dahm about the loss of her brother, permitting him to become unduly familiar with her.

13. Grievant candidly admits having conversed with Inmate Dahm about a family tragedy. It is **CONCLUDED** that this admission, standing alone, is sufficient to find a violation of both Policy 305.3 and 302.8.

14. There is an admission in Grievant's letter of Jan. 19, 2010 to Warden Mills about her actions in another matter. Grievant admits, in the second paragraph, that she thinks she told the officer to tell the inmates to step to their doors so she could tell them goodnight. This contact is certainly more than incidental contact as contemplated by the policy. It is **CONCLUDED** that there is more than enough evidence to support the conclusion that multiple employees of the Department came to regarding Ms. Fuentes' violation of Policies 305.3 and 302.8 and suitability for continued employment with the Department of Correction.

15. Correctional institutions are unique places "fraught with serious security concerns." Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 1989 (1979). The position of correctional officer is recognized as a sensitive one. Reese v. Tennessee Civil Service Commission, 699 SW 2nd 808, 812 (Tenn. App. 1985). Policies and rules in a prison are present to ensure security and should not be taken lightly. Security is risked when employees choose to ignore the prohibition of entering into a social or nonprofessional relationship with an inmate. Enforcement of anti-fraternization policies is key in a correctional environment.

16. The courts accord wide-ranging deference to correction officials in adopting and administering policies that, in the officials judgment, are needed to preserve internal order and discipline and to maintain institutional security. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 US 119,126,97 S.Ct. 253, 2538 (1977) Because the realities of running a penal institution are complex and difficult, courts have also recognized the wide ranging deference to be accorded the decision of prison administrators. Procunier v. Martinez, 416 U.S. 396,405, 94 S.Ct. 1800, 1807, 40 L.Ed. 2d 224 (1974)

17. The case of Akers v. McGinnis, et al, 2003 WL 22847249 (6th Cir.(Mich.)), involves correction employee non-work-related contact with inmates. In that case, current and former employees of the Michigan Department of Correction sued the Director and other administrators on grounds that baring all employees from any non-work-related contact with prisoners, parolees, probationers, their relatives and visitors was unconstitutional. The Court stated that under the rational basis test, the rule did not violate the constitutional freedom of association.

> The department had a legitimate interest in preventing fraternization between its employees and offenders and their families. Given the proven willingness of offenders to break the law, often violently, to reach their ends, on the one hand, and the near plenary power over offenders entrusted to the MDOC employees on the other the potential for exploitation of vulnerable offenders by MDOC employees, or vulnerable MDOC employees by offenders needs no elaboration. Even clerical workers without any penal authority can by the mere manipulation of paperwork greatly affect an offender's status for better or worse or at least be pressured into attempting to do so. The inclusion of offenders' visitors and families into the class with whom contact is forbidden may be necessary to prevent

> the use of third parties to circumvent the ban on direct contact and influence. Akers v. McGinnis, 2003 WL 22847249(6th Cir.(Mich.))

18. The instances in which termination should be the first discipline administered are rare when the employee's overall work performance has been excellent. In the Matter of Department of Correction v Rick Moore, Docket No. 26.05-12-0018J, p.16, para. 11. Also, In the Matter of Department of Human Services v. Phyllis McDonald and Alice Lucas-Mason, Docket Nos. 26.11-12-0031J and 26.11-12-0033J, p.6, para. 2.

19. The quality of Grievant's work performance was not discussed at the hearing. Never-the-less, Exhibit 15, an annual performance review of Grievant, dated April 30, 2008, shows Grievant's performance to have been "exceptional."

20. In Kelly v. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. Nov. 30, 1999), the Tennessee Court of Appeals clarified the requirements of progressive discipline under T.C.A. § 8-30-330, which provides that "supervisors are expected to administer discipline beginning at the lowest appropriate step." Id. at *4. The Court explained that:

> "[p]rogressive 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 of severity of the employee's behavior." Id. In addition, "supervisors have the discretion to determine what punishment fits the offense." Id.

21. Ms. Fuentes stated many times that she trusted Inmate Dahm more than the Officers. This attitude and actions in conjunction with such an attitude need not be tolerated in a secure institution.

22. With violations of Policies 305.3 and 302.8 established, one must then consider what discipline, if any, is appropriate for Grievant's violations of Policy. Given Grievant's rank as a Correctional Officer, demotion was not an option. An oral warning or written reprimand would clearly be insufficient for Grievant's infractions.

23. Next, one must consider whether a suspension would be likely to cause Grievant Fuentes to stop confiding in inmates and trust authorities and rank and file Officers more.

24. Grievant cites In the Matter of Corey Conley, Docket Number 26.05-101167J, for the proposition that a fifteen (15) day suspension is appropriate for violations of anti-fraternization policies. Conley can be distinguished from the instant matter in several ways:

A. Grievant Conley self-reported the violation to authorities in less than twenty (20) minutes, whereas Grievant Fuentes waited for Corporal Hamby to inquire.

B. An inmate was seeking cigarettes from Conley; Conley was not seeking cigarettes or solace from an inmate, unlike in the instant matter wherein Grievant Fuentes was the initiating party.

C. An exchange of goods (i.e. cigarettes) was involved, not an exchange of deeply personal information and feelings, unlike in the instant matter.

D. The Commissioner of Correction reduced the Warden's proposed discipline of termination to suspension, whereas in this matter, the Commissioner supported the Warden's recommendation of termination.

E. Conley had been terminated on other grounds, prior to the hearing on his suspension, unlike in the instant matter.

Therefore, it is **CONCLUDED** that Conley is neither controlling nor instructive.

25. In considering a lengthy suspension as the proper discipline, on the one hand, if Grievant were bitter about being disciplined for her friendship, it is possible that a lengthy suspension would simply deepen Grievant's feeling that inmates are suitable friends and that Officers are not to be trusted. On the other hand, even if Grievant Fuentes had a change of behavior and attitude as a result of a suspension, the sensitive information about Grievant's brother's suicide was likely already spread among the population of inmates at MCCC.

26. Based on the above, given Grievant's significant, personal, and profound violations of Policy 305.03 and 302.8, it is hereby **ORDERED** that Grievant Fuentes be **TERMINATED,** as the appropriate discipline for Grievant Fuentes' misconduct**.**

This Initial Order entered and effective this the ___ day of __July _, 2012.

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Mattielyn B. Williams
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State this 24 day of July, 2012

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Thomas G. Stovall, Director
Administrative Procedures Division