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Department of Children's Services vs. Yvonne Beard

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BEFORE THE CIVIL SERVICE COMMISSION OF THE
STATE OF TENNESSEE

IN THE MATTER OF:

TENNESSEE DEPARTMENT OF
CHILDREN'S SERVICES

v.

YVONNE BEARD,
Grievant.

DOCKET NO: 26.43-117158J

INITIAL ORDER

This matter came to be heard on December 5, 2012, in Nashville Tennessee before Lynn M. England, Administrative Judge, sitting for the Tennessee Civil Service Commission.

The Department of Children's Services (DCS) was represented by attorney Marjorie Bristol. The Grievant was represented by attorney Jonathan Stevens.

The subject of the hearing was to determine if Grievant was properly suspended from work for two (2) days without pay for violations of DoHR Rules , DCS administrative Policies and Procedures and New Vision post orders regarding failure to properly supervise residents.

This matter became ready for consideration upon submission of Findings of Fact and Conclusions of Law by the parties.

After due consideration of the evidence and the record as a whole it is **DETERMINED** Grievant was not properly suspended from work for two (2) days without pay.

This determination is based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant, Yvonne Beard, is an employee of the Tennessee Department of Children's Services with a total of thirteen (13) years of state service.
2. Grievant is currently employed as a Children's Services Officer (CSO) at the Woodland Hills Youth Development Center.
3. On May 14, 2011, Grievant was employed as CSO at New Visions Youth Development Center, Hope Dormitory, in Nashville, Tennessee.
4. New Visions Youth Development Center is a secure facility providing treatment and rehabilitation to delinquent females in state custody for committing an offense that would be considered a felony if in the adult system.
5. On May 14, 2011, Grievant was serving as relief security staff for second shift showers in the Hope Dormitory.
6. There were approximately twelve (12) students (girls) housed in the Hope Dorm.
7. At approximately 7:00-7:30 p.m., the students were all moved to their rooms prior to their showers.
8. Once the showers were completed, the students were then allowed in the day room to watch television or to make telephone calls. Telephone calls had to be completed prior to 8:00 p.m.
9. Upon completion of their showers, the students were to have on their pajama tops and bottoms, housecoats, house shoes and bras before they could go to the day room to watch TV.
10. Grievant had a desk located in an area outside the door where the telephones were located but inside the day room area.

11. Grievant's duties included monitoring the student's while they shower, dialing the telephone numbers for their telephone calls along with monitoring the student's while they watched TV in the day room.
12. While the students were in the day room watching TV, the chairs were to be separated by at least two feet. On the night in question, they were separated enough for the Grievant to walk between them.
13. On the night in question, there were two (2) girls talking to the Grievant at her desk, but they were not obstructing her view of the day room.
14. The incident that led to the Grievant's suspension involved two (2) students S.M. and C.K.
15. Student, S.M.'s room was next to the TV in the day room.
16. Student S.M. asked the Grievant to open her dorm room door for her. At the same time, another student requested Grievant open her door as well. As she was opening the second student's door, C.K. appeared to be "sliding out" of S.M.'s room.
17. At the same time, Mr. Holt, the Chief Security Officer entered the dorm. He also observed student C.K. exiting S.M.'s room. He announced to the Grievant that he would "handle it" and issued "write-ups" to both C.K. and S.M.
18. Part of the Department's allegation against the Grievant is that students S.M. and C.K. were engaged in inappropriate sexual activity. However, there was no testimony by anyone that any inappropriate sexual activity had been observed.
19. The allegations were made by the students, of which no testimony was presented at the hearing.

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).

4. The Department 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. Tenn. Comp. R. & Regs. (Rule 1120-10-.01) PURPOSE

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. Tenn. Comp. R. & Regs. (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. An executive service employee serves at the pleasure of the appointing authority.

8. Tenn. Comp. R. & Regs. (Rule 1120-10-.03) MINIMUM DUE PROCESS

(1) Career employees have a "property right" to a position in the classification in which they currently hold career status. Therefore, no suspension, demotion, dismissal or any other action which deprives a regular (career) employee of his "property right" will become effective until minimum due process is provided as outlined below.

(2) Minimum due process consists of the following:

- (a) The employee shall be notified of the charges against him. Such notification shall detail times, places, and other pertinent facts concerning the charges and should be in writing.
 - (b) The notification will provide for the employee to have a predecision discussion with an appropriate manager and will state the mechanism through which such a discussion may be arranged. The employee should be given a reasonable period of time to prepare to answer charges and present information which might influence the manager's decision.
 - (c) The manager conducting such discussions must be an appointing authority or manager who has direct access to an appointing authority for this purpose.
 - (d) The meeting outlined above shall be for the purpose of allowing the employee to present information to the manager regarding the disciplinary action under consideration.
 - e) The discussion shall be informal. The employees shall have the right to present written statements of witnesses or any other information with regard to the charges. Attendance and participation by persons other than the manager and the employee shall be at the discretion of the manager.
 - (f) If the employee declines the opportunity to have the discussion or present information, the provisions of this section are deemed to have been met.
- (3) The commission shall determine as a preliminary matter to the merits of a grievance, a Grievant's allegation that he or she was denied minimum due process.

9. Tenn. Comp. R. & Regs. Rule 1120-10-.04 EXCEPTION TO MINIMUM DUE PROCESS
 When an employee is acting in a dangerous or otherwise threatful manner and must be removed from the workplace immediately, it is not necessary to provide "minimum due process" prior to removal. Minimum due process must be provided after removal as soon as practicable. The employee, in this case, may be placed on leave or on immediate suspension without pay.

10. Tenn. Comp. R. & Regs. Rule 1120-10-.05 CAUSES FOR DISCIPLINARY ACTION

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. Tenn. Comp. R. & Regs. Rule 1120-10-.06 EXAMPLES OF DISCIPLINARY OFFENSES
 The following causes are examples of those considered for disciplinary action and should not be considered the only causes of action.

- (1) Inefficiency in the performance of duties;**
- (2) Incompetency in the performance of duties;**
- (3) Negligence in the performance of duties;**
- (4) Misconduct involving public officials and employees pursuant to T.C.A. Title 39, Chapter 16, Part 4;
- (5) Careless, negligent, or improper use of state property or equipment;
- (6) Failure to maintain satisfactory and harmonious working relationships with the public and fellow employees;
- (7) Habitual improper use of sick leave;
- (8) Habitual pattern of failure to report for duty at the assigned time and place;
- (9) Failure to obtain or maintain a current license or certificate or other qualification required by law or rule as a condition of continued employment;
- (10) Gross misconduct;
- (11) Conduct unbecoming of an employee in state service;

- (12) Conviction of a felony;
- (13) Willful abuse or misappropriation of state funds, property or equipment;
- (14) Falsification of an official document relating to or affecting employment;
- (15) 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;
- (16) Trespassing on the property of any state officer or employee for the purpose of harassment;
- (17) Damage or destruction of state property;
- (18) Acts that would endanger the lives and property of others;
- (19) Possession of unauthorized firearms, lethal weapons, alcohol or illegal drugs on the job;
- (20) Brutality in the performance of duties;
- (21) Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination);
- (22) Reporting to work under the influence of alcohol or illegal drugs, or partaking of such on the job;
- (23) Sleeping or failure to remain alert during duty hours;**
- (24) Unauthorized disclosure of confidential information;
- (25) Political activity prohibited by T.C.A., Title 2, Chapter 19 (the "Little Hatch Act") or by U.S.C., Title 5, Chapter 15 (the "Federal Hatch Act"); and
- (26) For the good of the service as outlined in T.C.A. § 8-30-316.

12. Tenn. Comp. R. & Regs. Rule 1120-10-.07 PROGRESSIVE DISCIPLINARY ACTION

- (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 was 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.

13. Tennessee Department of Children's Services Administrative Policy 4.9-D. (12) It is the duty of each employee to correct all children/youth observed in violation of rules and regulations in a fair, consistent, and impartial manner.
14. Tennessee Department of Children's Services Administrative Policy 27.38-DOE Youth Supervision
 - B. All employees shall be concerned with the safety, cleanliness, security and order, which shall be accomplished in the following manner:
 1. Continually move around your assigned area/program observing youth behavior;
 2. Take immediate corrective action against youths which is necessary and reasonable to maintain security;
 3. Know where youths in your charge are at all times and take frequent counts to ensure that all youths are present.
15. The Tennessee Department of Children's Services Employee Code of Conduct states, "Employees will conduct themselves in a manner that creates and maintains respect

for their worksites, fellow employees and visitors, the Tennessee Department of Children's Services and the State of Tennessee.

ANALYSIS

The Department of Children's Services has failed to prove by a preponderance of the evidence that the Grievant was inefficient or negligent in the performance of her duties. The allegation that two students were engaged in inappropriate sexual behavior was not substantiated.

The Department of Children's Services also failed to prove by a preponderance of the evidence that the grievant was sleeping on the job as alleged in the Notice of Suspension.

IT IS THEREFORE ORDERED that the Department's decision to impose a two day suspension without pay upon the Grievant is OVERTURNED and she shall be restored all leave balances, back pay, and other benefits of employment, consistent with this Order if applicable.

It is so Ordered.

Entered this the _____ day of _____, 2013.

Lynn M. England
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this _____ day of _____ 2013.

Thomas G. Stovall, Director
Administrative Procedures Division

