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Civil Service Commission vs. Tonja Turner

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BEFORE THE CIVIL SERVICE COMMISSION OF THE
STATE OF TENNESSEE

IN THE MATTER OF:

TENNESSEE DEPARTMENT OF MENTAL
HEALTH AND DEVELOPMENTAL
DISABILITIES

v.

TONJA TURNER,
Grievant.

DOCKET NO: 26.45-118675J

INITIAL ORDER

This matter came to be heard on December 21, 2013, in Memphis, Tennessee before Lynn M. England, Administrative Judge, sitting for the Tennessee Civil Service Commission.

The Department of Mental Health and Developmental Disabilities (the Department) was represented by attorney Jeffrey Coons. The Grievant was represented by attorney Jonathan Stevens.

The subject of the hearing was to determine if Grievant was properly suspended from work for one (1) day without pay for failure to work mandatory overtime and for three (3) days without pay for failure to work mandatory overtime.

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 without pay for two (2) separate offenses for failure to work mandatory overtime.

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

FINDINGS OF FACT

1. Grievant, Tonja Turner, is an employee of the Tennessee Department of Mental and Developmental Disabilities with a total of twelve (12) years of state service.
2. Grievant is currently employed as a Lead Psychiatric Technician at Memphis Mental Health Institute (MMHI) in Memphis, Tennessee.
3. MMHI issues an "Emergency support staff" roster every month. This roster or MOT list identifies which employees are to be available on certain days the following month to work mandatory overtime, if necessary.
4. On or about January 9, 2010, Grievant received a serious injury to her left knee requiring surgery. She was off work for one (1) year and four (4) days returning to work on or a January 16, 2011. Even following her return to work, Grievant still suffered with pain and swelling to her knee.
5. On February 10, 2012, Grievant worked the evening shift at MMHI from 3:00 p.m. to 11:00 p.m. She described the shift as extremely hectic and they were short staffed as well.
6. The Grievant was on her feet standing, walking and moving around for approximately 6 to 7 ½ hours during that shift.
7. One of Grievant's co-workers, Quinton Myers, testified that he observed Grievant's knee on February 10, 2012 when her shift began at 3:00 p.m. and it was swollen and she was limping.
8. However, Grievant continued to work her assigned shift that day.
9. Near the end of the shift, Grievant's supervisor informed her she was listed on the emergency support staff roster or mandatory overtime list "MOT". This meant she was required to work another shift following her regular shift that evening from 11:00 p.m. to 7:00 a.m.

10. Grievant informed her supervisor that she could not work her MOT because her knee was hurting and swollen. She attempted to show her supervisor her swollen knee but it was so swollen she could not raise her pant leg to over her knee.
11. Grievant requested the supervisor get someone else from the MOT list to work. Supervisor refused and told the Grievant, "Well, I got to do what I got to do and I got to write you up."
12. Ms. Sallie Powell, MMHI nursing executive officer, testified that Grievant would be required to perform the duties of her job, which included walking, during her shift.
13. Grievant could not perform the duties of her job because of her swollen knee and therefore she did not work the MOT that night. She followed up with her physician and was found to have "fluid" on her knee that caused the swelling in addition to the beginning of arthritis.
14. Grievant received a one (1) day suspension for her failure to work the MOT on February 21, 2012.
15. Ms. Sallie Powell further testified that the practice of the facility is for the MOT list to be released and available to staff on the 20th of each month. The MOT list identifies staff assignments for the following month. By releasing the list on the 20th of the month, it allows staff to make necessary arrangements and to make trades among themselves.
16. Ms. Powell stated that MMHI policy provides trades of MOT dates between staff members are allowed as long as the staff members inform the supervisor at least one week prior to the anticipated shift change, both employees sign the request and the supervisor approves the trade.
17. By testimony of the both Grievant and Mr. Myers, the March 2012, Emergency Support Staff roster (MOT list) was posted on February 28, 2012.

18. The February 28, 2013 MOT list required Grievant to be available to work an additional shift following her regularly assigned shift, if necessary, on March 2, 10, 19, 27 and 31, 2012.
19. On February 28, 2012, Grievant and Mr. Myers, prepared and signed a hand written memorandum for an MOT trade request which they submitted to Ms. Riley, MMHI's assistant director of nursing. They requested that Grievant and Mr. Myers be allowed to switch or trade MOT dates for March 2, 10, 19 and 27, 2012, because Grievant attended school on those days.
20. Even though the trade request was submitted to Ms. Riley three (3) days prior to the MOT trade of March 2, 2012, it was submitted on the same day the list was posted.
21. According to the testimony of Grievant and Mr. Myers, the standard practice for submitting MOT trade requests was to slip the request under the door of Ms. Riley's office. She does not ever to respond to the trade requests by either authorizing or denying the request.
22. The testimony of both Grievant and Mr. Myers is found to be credible. Ms. Riley did not testify and Ms. Powell was unaware of this practice.

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 threatening 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 Mental Health and Developmental Disabilities MEMPHIS Mental Health Institute Nursing Services Policy and Procedures Manual: Emergency Mandatory Scheduling:

POLICY:

To ensure the safety and protection of patients and staff, the Nurse Executive or officially designated supervisor(s) and manager(s) may authorize overtime work in addition to the employee's regular schedule. Employee is expected to work emergency mandatory overtime when the job requires it and the supervisor gives a reasonable job assignment. **All employees are expected to remain on duty until properly relieved.**

PROCEDURES:

- 1.0 The following steps should be taken to obtain adequate staffing before the use of overtime:
 - 1.1 readjust scheduled available staff
 - 1.2 carefully assess, plan, and schedule for staff coverage;
 - 1.3 obtain additional staff coverage on a voluntary bases;
 - 1.4 invoke the mandatory overtime procedure.
- 2.0 Overtime may be used when a shortage of personnel exists to continue services where the safety or health of patients is threatened due to one of the following:
 - 2.1 an emergency involving an unusual non-recurring workload for which plans were not made;
 - 2.2 seasonal peak work loads for which budget allowances were made;
 - 2.3 an extra workload created by a natural disaster, disturbance, or other situation;

- 2.4 an extra workload created by an agency or operation no in the State service but involving State employees.
- 3.0 Nurse Managers are expected to properly assess, plan, and schedule employees to ensure adequate coverage of their areas **without the use of overtime**. The Staffing Office shall maintain a list of volunteer staff who are interested in working extra shifts. This list will be updated daily in the Staffing Office.
- 4.0 When the supervisor **first** determines that a need for overtime **may** exist, personnel on the volunteer list should be called and units/staff members effected should be notified immediately.
- 5.0 The Staffing Office shall maintain an Emergency Support List where employee names will be scheduled. Employees will be assigned to specific dates on the calendar to work overtime, in the event volunteers cannot be obtained. The Overtime Calendar will be posted monthly, along with the regular schedule. Because of the difficulty to consider giving preference in scheduling, no consideration will be given to anyone in the overtime scheduling.
- 6.0 It is the responsibility of the employee to make himself/herself available to work overtime on the days assigned on the Overtime Calendar. Employees should make any necessary arrangements to cover personal obligations for the assigned time period. If a staff member realizes in advance that he can't be available to work overtime on an assigned date, the staff member is responsible for trading days with another staff member in the same classification and to inform the supervisor in writing, at least 1 week before the anticipated shift. The signature of both staff members is required. The supervisor must approve all trades.
- 7.0 Any employee who refuses to work mandatory overtime shall be disciplined according to the seriousness of the offense (insubordination) and their previous disciplinary record.

Progressive Disciplinary Action:

Employees who refuse to work mandatory overtime when assigned are subject to progressive disciplinary action as follows:

| | |
|-------------------------|--------------------------------------|
| 1 st Offense | One (1) day suspension without pay |
| 2 nd Offense | Three (3) day suspension without pay |
| 3 rd Offense | Ten (10) day suspension without pay |
| 4 th Offense | Termination |

ANALYSIS

It is determined that the Department of Mental Health and Developmental Disabilities has failed to carry the burden of proof a preponderance of the evidence that the Grievant was insubordinate on either occasion for which she was disciplined. Regarding the Grievant's one (1) day suspension without pay for failure to work mandatory overtime on February

10, 2012: Grievant was unable to perform the duties of her job due to an illness/injury. According to the Department's own policy, the overtime is to ensure the safety and protection of the patients and staff. Neither Grievant or the patients would be safe or protected if she had worked that shift with her physical limitation.

Regarding the Grievant's three (3) day suspension without pay for failure to work mandatory overtime: Grievant was not able to provide her trade request one (1) week prior to March 2, 2012 because the MMHI failed to publish the MOT list at least one week prior to March 12, 2012. She made the request the day the MOT list was published, she had her signature along with the signature of Mr. Myers, she put it under her supervisors door and she never heard back from the supervisor that it had been denied. To discipline Grievant because she failed to make the request one (1) week in advance when it was not possible to make it one (1) week in advance is inappropriate and is overturned.

IT IS THEREFORE ORDERED that the Department's decision to impose a one (1) day suspension without pay and a three (3) 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