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BEFORE THE CIVIL SERVICE COMMISSION OF THE STATE OF TENNESSEE

IN THE MATTER OF: **DEPARTMENT OF CORRECTION,** ***v.*** **TERRY DWYER,** ***Grievant.***	**DOCKET NO: 26.05-118830J**

INITIAL ORDER

This matter was heard on May 7, 2013, at the Northwest Correctional Complex (NCC) in Tiptonville, Tennessee, before Administrative Judge Kim Summers assigned by the Secretary of State, Administrative Procedures Division, to sit for the Civil Service Commission of the State of Tennessee. The Tennessee Department of Correction (TDOC) was represented at the hearing by John Drummond, Esq. The Grievant represented himself, having waived the right to legal counsel.

The issue presented in this matter is whether the Department properly terminated the Grievant for the alleged improper conduct. After consideration of the evidence and argument of the Parties, it is determined that the termination was proven to be appropriate by a preponderance of the evidence and should therefore be **UPHELD**. This decision is based upon the following Findings of Fact and Conclusions of Law.

SUMMARY OF EVIDENCE

The following seventeen exhibits were entered into evidence – EXHIBIT 1, April 25, 2012 Employee Grievance Form; Collective EXHIBIT 2, pleadings filed in the Obion County Courts; EXHIBIT 3, Policy regarding Conflicts of Interest and the Acceptance of Gifts and Gratuities; EXHIBIT 4, Policy regarding Code of Conduct and Oath of Correction Department Employees; EXHIBIT 5, October 8, 2012 letter from Commissioner Schofield regarding termination for conduct

unbecoming a state employee and violation of policies pertaining to Code of Conduct and Conflicts of Interest (Termination No. 1); EXHIBIT 6, March 30, 2012 Preliminary Summary from Scott Miller; EXHIBIT 7, CD recording of March 28, 2012 interview with the Grievant; EXHIBIT 8, January 3, 2013 letter from Ashad Ali; EXHIBIT 9, letters from Warden Steward dated April 18, 2012, and April 26, 2012; Collective EXHIBIT 10, documents regarding the criminal charges against the Grievant in Obion County; Collective EXHIBIT 11, Orders of Protection; Collective EXHIBIT 12, documents from Obion County General Sessions Court regarding the criminal charges against the Grievant; EXHIBIT 13, August 9, 2012 letter of termination from Warden Steward; EXHIBIT 14, August 9, 2012 Employee Grievance Form; EXHIBIT 15, October 8, 2012 letter from Commissioner Schofield regarding termination for alleged criminal action (Termination No. 2); EXHIBIT 16, November 9, 2012 letter regarding the Level V hearing; and EXHIBIT 17, Print-out from the Tennessee Sexual Offender Registry.

The following individuals presented live testimony at the hearing – the Grievant; Warden Henry Steward; Scott Miller, Special Agent with the Department's Investigation and Compliance Division; Mr. Roger Parsons, private citizen; and Inmate Louis Webb (aka Ashad Ali).

The Grievant provided the following testimony on Termination No. 1 – while doing research in the NCC law library about his personal civil action, he was approached by Louis Webb, the inmate assigned to the library, and asked if assistance were needed; Mr. Webb directed the Grievant to the law on verbal contract and provided him a printout of Rule 60 of the Tennessee Rules of Civil Procedure as well as a basic shell for the pleadings that would need to be filed; and that "printing" rather than "typing" more accurately reflects the assistance provided by Mr. Webb. The Grievant denied providing any specific information to Mr. Webb regarding his civil action or allowing Mr. Webb to draft the pleadings on his behalf. The Grievant did concede that any such assistance from Mr. Webb would warrant his termination.

Mr. Webb provided the following testimony on Termination No. 1 – the Grievant provided a general overview of his case, and Mr. Webb provided advice and guidance on how to proceed; Mr. Webb worked for several hours preparing documents for the Grievant and, ultimately, provided a draft to the Grievant of three or four different motions.

Warden Steward provided the following testimony on Termination No. 1 – it is not permissible for staff to use inmate legal services, and he is not aware of staff engaging in this practice; sharing personal information with the inmates is not a good practice and can compromise objectivity; the Grievant's conduct would generally result in termination, but he recommended suspension for the Grievant because of his years of service; failing to follow rules and protocols can compromise the security of the facility.

The Grievant provided the following testimony on Termination No. 2 – he was concerned about his ex-wife's boyfriend being around his children; he engaged in a motor vehicle pursuit in order to take pictures of his children in the moving vehicle with his ex-wife and her boyfriend; he was not aware at the time that it was a felony to stop his car in front of another oncoming vehicle; the motor vehicle pursuit was not wise conduct.

Warden Steward provided the following testimony on Termination No. 2 – public trust is very important for the facility and its staff; the Grievant's conduct and resulting arrest undermined his ability to be effective in his position with the Department; the inmates are generally very critical of issues involving children; the damage to the Grievant's credibility was done by the arrest and indictment, regardless of the ultimate outcome; reinstatement of the Grievant to his former position would create turmoil in the facility and the community.

RELEVANT LAW

1. Level V Civil Service appeals are heard *de novo* before an Administrative Judge. No presumption of correctness is attached to the agency's action.[1]

2. The Department, as the party seeking to "change the present state of affairs," has the burden of proof, pursuant to TENN. COMP. R. & REGS. 1360–4–1–.02(7), to prove by a preponderance of the evidence that the discipline imposed on the Grievant complies with state law.

3. TENN. COMP. R. & REGS. 1120-10-.01(45) specifies 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.

4. TENN. COMP. R. & REGS. 1120-10-.05 provides the following reasons for disciplinary action –

(11) Conduct unbecoming an employee in state service;

(27) For the good of the service as outlined in T.C.A. § 8-30-326.

5. TENN. COMP. R. & REGS. 1120-10-.01 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.

6. T.C.A. §8-30-330(a) and (c) 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.

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[1] *Big Fork Mining Co. v. Tennessee Water Quality Control Bd.*, 620 S.W. 2d 515, 521 (Tenn. Ct. App. 1981).

(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).

7. Pursuant to Tennessee's Civil Service statutes and rules, supervisors are expected to administer discipline beginning at the lowest appropriate step. 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.[2]

8. The Court of Appeals in *Berning v. State Department of Correction*[3] notes that the "key word in the statute [T.C.A. §8-30-330] is *appropriate,"* that "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," and that the legislative mandate for progressive discipline should be "scrupulously followed."[4]

9. When dismissing an employee for the good of the service, the supervisor must articulate a "sufficient reason" that the good of the service will be served by dismissal.[5]

10. The Court of Appeals in *Reece v. Tennessee Civil Service Commission* upheld the termination of a correctional sergeant at the Bledsoe Regional Prison for the good of the service after the sergeant had been arrested on charges involving marijuana, even though he was never convicted, because, in the opinion of his employer, the intensive publicity resulting from his arrest had compromised the sergeant's ability to effectively carry out his law enforcement duties.[6]

11. The Department's Policy pertaining to Conflicts of Interest and the Acceptance of Gifts and Gratuities prohibits an employee from "directly or indirectly accept[ing] gifts or favors from any inmate or an inmate's / probationer's / parolee's family or agent."

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[2] *Kelly v. Tennessee Civil Service Commission*, 1999 WL 1072566 (Tenn. Ct. App. 1999).
[3] 996 S.W.2d 828, 830 (Tenn. Ct. App. 1999).
[4] Id. at 830 (quoting the chancellor's order with approval).
[5] *Reece v. Tennessee Civil Service Commission*, 699 S.W.2d 808, 811 (Tenn. Ct. App. 1985).
[6] Id. at 809.

12. The Department's Code of Conduct specifies the following –

– Employees will avoid situations that involve conflicts of interest with their employment with this department.

– Fraternization with inmates, ex-inmates, or inmates' relatives or friends is prohibited. Employees shall not make more than incidental contact or become unduly familiar with inmates, former inmates, or their friends, nor permit inmates to become unduly familiar with them.

– Illegal activities on the part of any employee, in addition to being unlawful, reflect on the integrity of the department and betray the trust and the confidence placed in state employees by the public. It is expected that that employees shall obey all laws while engaged in official or personal activities.

EMPLOYMENT / PROCEDURAL HISTORY

1. The Grievant has been employed by TDOC since 1981 and was working as a Pre-Release Coordinator at the time of his termination.

2. The Grievant timely requested a Step V hearing to consider the propriety of both Termination No. 1 and Termination No. 2.

FINDINGS OF FACT PERTAINING TO TERMINATION No. 1

1. A judgment was entered against the Grievant in a personal civil action in Obion County General Sessions Court on October 28, 2011.

2. For several months thereafter, the Grievant attempted to obtain relief from the judgment as follows – appealing the judgment to Circuit Court; requesting relief from the Circuit Court order pursuant to Tenn. Rule Civ. Proc. 60.02; appealing the Circuit Court order to the Tennessee Court of Appeals.

3. Sometime during this process, the Grievant entered the inmate law library and inquired about caselaw relevant to his civil action. The Grievant requested and received assistance from the inmate assigned to the law library, Louis Webb, on relevant caselaw, statutes, and rules.

4. Eventually, the Grievant provided Mr. Webb a narrative and outline about the civil action and asked Mr. Webb to help with the drafting of the pleadings necessary to commence the appeal process.

5. Mr. Webb spent several hours drafting documents for the Grievant which were ultimately filed with the court. The Grievant made no monetary payment to Mr. Webb for this service.

6. Mr. Webb had provided similar assistance to other prison employees and had never been informed that such assistance was prohibited.

7. During his interview with Special Agent Scott Miller on March 28, 2012, the Grievant admitted to the above-specified interactions with inmate Louis Webb. The Grievant made the following specific admissions –

– He approached Mr. Webb and asked him about some case law

– He was in a bad situation so he solicited the inmate to help

– He "tried to get some advice to see what avenues to take"

– He provided Mr. Webb a couple of pages of written testimony and "how he wanted him to go with it"

– He asked Mr. Webb to "just draft it up enough so that I can get this thing rolling"

– Mr. Webb drew up documents with some blanks, which the Grievant signed and filed

– Mr. Webb wound up doing all of it but of his own accord

– The assistance of an attorney would have been nearly as costly as the amount of the judgment

8. For the above-specified conduct, the Grievant received from Warden Steward a five-day suspension.

9. Following a Level IV hearing, the TDOC Commissioner, Derrick Schofield, changed the five-day suspension to a termination for violation of the policies pertaining to Conflicts of

Interest and the Code of Conduct and Human Resources Rule 1120-10-.05(11), conduct unbecoming an employee in state service.

ANALYSIS AND CONCLUSIONS OF LAW PERTAINING TO TERMINATION No. 1

1. During his interview with Investigator Miller, the Grievant provided a sworn statement in which he admitted to the following: approaching Mr. Webb to request assistance; providing Mr. Webb an overview of the litigation and seeking his advice on how to proceed; and specifically asking Mr. Webb to help with the drafting of his documents. The Grievant also admitted that Mr. Webb did, ultimately, do most, if not all, of the drafting.

2. Mr. Webb's sworn testimony at the hearing was consistent with the Grievant's initial account of his interactions with Mr. Webb.

3. In his sworn testimony at the hearing, the Grievant was parsing his words and denying the extent of Mr. Webb's involvement in his litigation to which he had previously admitted.

4. Based upon the sworn testimony from Grievant during his initial interview and from Mr. Webb during the hearing, the Grievant's sworn testimony during the hearing appeared less than credible.

5. Contrary to the Grievant's contention at the hearing, it is evident that Mr. Webb provided more than just minor assistance.

6. If, as Grievant contends, he did not intend for Mr. Webb to do so much work on his personal litigation but the situation just got out of hand, it is still true that the Grievant initiated Mr. Webb's involvement and made no apparent effort, thereafter, to curtail it.

7. The Grievant's conduct violated the Department's policy against receiving favors from inmates.

8. The favor, in lieu of services from a paid attorney, had significant monetary value.

9. The Grievant's conduct violated the Department's policy against allowing an inappropriate familiarity with inmates.

10. The Department determined that the Grievant's failure to follow these departmental rules and policies amounted to conduct unbecoming an employee in state service and warranted his termination.

11. Although the Grievant was initially given a five-day suspension in deference to his thirty-one years of state service, it is on account of these years of service that the Grievant should have been cognizant of the impropriety of his actions. Admittedly, he chose to ignore the Department's rules and policies due to the gravity of his personal circumstances. Having made this chose, he must now live with the consequences; and, in fact, the Grievant, himself, conceded that the conduct alleged by the Department would warrant termination.

12. The preponderance of the evidence presented in this matter supports the termination of the Grievant's employment for conduct unbecoming an employee in state service and in violation of departmental rules and policies which undermines the Grievant's objectivity and compromises the security of the facility.

FINDINGS OF FACT PERTAINING TO TERMINATION No. 2

1. On May 28, 2012, the Grievant commenced a motor vehicle pursuit of his two minor children who were in a moving motor vehicle with their mother and their mother's boyfriend.

2. As a result of this incident, the Grievant was arrested and, ultimately, indicted in Obion County for four counts of aggravated assault, a Class C Felony, and two counts of Reckless Endangerment, a Class E Felony.

3. On January 25, 2013, the Grievant pled guilty to two counts of Reckless Endangerment and was placed on three years of deferred probation. The four counts of Aggravated Assault were dismissed. Since the Grievant was granted judicial diversion, the two counts of

Reckless Endangerment will also be dismissed after successful completion of his three-year probation.

4. The Grievant's conduct and/or resulting criminal proceedings were covered in the local newspaper and were the subject of conversation in Dyersburg, Union City, and also in Tiptonville at the prison.

5. The Grievant's conduct resulted in his termination from state service, effective August 20, 2012, for the good of the service.

6. The termination was upheld by Commissioner Schofield following a Level IV hearing.

ANALYSIS AND CONCLUSIONS OF LAW PERTAINING TO TERMINATION No. 2

1. Whether or not the Grievant did knowingly engage in illegal conduct, the car chase initiated by the Grievant on May 28, 2012 did, nonetheless, result in his arrest and indictment on six felony charges.

2. This conduct was in violation of the Department's policy that all employees shall refrain from all illegal activity whether in their personal or professional capacity.

3. Although the two remaining felony charges may, ultimately, be dismissed, in the judgment of the Department, the Grievant's credibility at the facility and in the community and his ability to effectively perform the duties of his position have already been compromised since individuals at the facility and in the community at large are aware of the Grievant's arrest and indictment.

4. Based on the notoriety resulting from the arrest and indictment, the Grievant's employment with the Department was appropriately terminated for the good of the service.

It is determined that the violations of departmental rules and policies, as specified above, provided more than adequate justification for the terminations, whether considered alone or together, for conduct unbecoming an employee in state service, and for the good of the service. Accordingly, it is **ORDERED** that the Grievant's appeal is **DENIED,** and the Grievant's termination on all counts is hereby **UPHELD**.

The Policy reason for this decision is to protect the citizens and employees of the State of Tennessee and to protect the integrity of the civil service laws and applicable rules.

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the _____ day of _____ 2013.

DKSummers

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KIM SUMMERS
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

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

J. Richard Collier

J. RICHARD COLLIER, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE