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BEFORE THE CIVIL SERVICE COMMISSION OF THE STATE OF TENNESSEE

IN THE MATTER OF:	
Danny Demoss	**DOCKET NO: 26.05-119589J**

INITIAL ORDER

This matter was heard on June 19, 2013 in Henning, Tennessee, before Joyce Carter-Ball, Administrative Law Judge, assigned by the Secretary of State to sit for the Civil Service Commission of the State of Tennessee. John Drummond, Attorney for the Department of Correction (hereinafter referred to as "the Department") represented the Petitioner. The Grievant, Danny DeMoss, chose to proceed without legal counsel.

The issue presented for consideration is whether the State carried its burden of proof of preponderance of evidence that Grievant's conduct warranted his termination of employment with the Department. Upon conclusion of the hearing, the matter was taken under advisement pending submission of the parties' Proposed Findings of Fact and Conclusions of Law.

After consideration of all of the evidence, arguments of counsel and the entire record in this matter, it is **determined** that Grievant's termination of employment with the Department is UPHELD**.**

This decision is based upon the following:

PROCEDURAL HISTORY

Grievant was a correctional officer at West Tennessee State Penitentiary from April 12, 2010 to September 23, 2012. During that time, Grievant had no disciplinary problems. Grievant served honorably in the United States Army and was honorably discharged.

The Department has a Drug Free Work Place Policy that has been in effect since 2006. The policy allows for any person in a safety-sensitive position within the Department, which Grievant was in as a correctional officer working behind the compound with convicted felons, to be randomly tested for a number of drugs, including marijuana. It has been the policy that if any drug screens test positive for people in safety-sensitive positions, the person will be dismissed from employment. The disciplinary policy has language that says subject to discipline up to and including termination.

Grievant was randomly tested on August 27, 2012. The Medical Review Officer later informed Grievant that he tested positive for marijuana. The Department contends that Grievant violated the Drug Free Work Place Policy. Grievant's employment with the Department was terminated on September 23, 2012.

FINDINGS OF FACT

1. At all relevant times, the Tennessee Department of Correction, ("TDOC" or "[the] Department"), had implemented TDOC Policy # 302.12, ("Drug-Free Workplace Policy" or "the Policy), whose purpose was "to enhance professionalism and safety by promoting a drug-free workplace within the Tennessee Department of Correction." According to the Policy, an employee's confirmed drug usage in the workplace warrants "appropriate employee disciplinary or corrective action, up to or including termination."

2. To accomplish the goals of the Policy, the Department has implemented random drug testing for all employees in "safety sensitive positions," defined as "position(s) in which a drug impairment constitutes an immediate and direct threat to public health or safety." According to the Policy, every "safety-sensitive employee" in the Department must be notified of this designation and is required to certify his/her acknowledgment of the safety-sensitive designation.

3. Grievant, Danny DeMoss, was employed by the Department as a correctional officer, from April 12, 2010 until September 23, 2012.

4. Kelly Dobbins is owner and President of Mid-South Drug Testing, Inc., ("Mid-South"), which is the third-party administrator of the Department's drug testing services. These services included random drug testing, employment drug testing, post-accident drug testing, and reasonable suspicion drug testing.

5. Ms. Dobbins is a college professor, a professional collector-trainer certified by the Drug and Alcohol Testing Industry Association ("DAITA"), and an author of professional literature in her field. Ms. Dobbins is familiar with all the processes involved in lab-based urine testing, and with the processes applicable to other entities involved in the drug testing process, including laboratories where specimens are tested.

6. Ms. Dobbins has testified as an expert witness in over a hundred legal proceedings concerning drug testing issues and procedures, in all of the courts of record in the state of Tennessee, including General Sessions, Juvenile Court, Circuit Court, and Federal Court, as well as administrative proceedings. Because of her education, training, experience, professional qualifications, and special knowledge about drug testing procedures and standards, Ms. Dobbins was deemed qualified to testify as an expert witness in this matter.

7. A verified copy of Midsouth's business records pertaining to Grievant's drug test was entered into evidence.

8. As the third-party administrator of the Department's drug testing program, Midsouth contracted with MEDTOX Drug Testing Laboratories, ("MEDTOX"), in St. Paul, Minnesota to do the initial and confirmatory screenings for the Department.

9. MEDTOX is a SAMHSA ("Substance Abuse Mental Health Services Administration") certified lab. MEDTOX testing processes have been peer-reviewed under SAMHSA guidelines. The National Laboratory Certification Program inspects MEDTOX semiannually to ensure its compliance with standard operating procedures. MEDTOX also undergoes annual inspections by the College of American Pathologists' Forensic Urine and Drug Testing Program, to ensure that all testing is performed in accordance with "forensically acceptable criteria."

10. On the basis of his relevant experience, education, professional qualifications, and special knowledge pertaining to toxicology and laboratory drug testing processes, Mr. LeBard was deemed qualified to testify as an expert witness in this case. A copy of MEDTOX's business records pertaining to the Grievant's drug screen was entered. .

11. At all relevant times, Todd Shoulberg was Director of Drug Screening Services for ClearStar, located at 1122 South Wickham Rd., Suite D, West Melbourne, Florida. Like Mid-South, ClearStar is a third-party administrator. ClearStar has a drug testing division and a background check division. ClearStar has Medical Review Officers operating out of its office. In Grievant's case, the MRO who reviewed his drugs test results operated under the auspices of ClearStar. A copy of ClearStar's business records pertaining to the Grievant's drug screen was entered.

12. Mr. Shoulberg has extensive experience in drug screen management, working with medical review officers, policy writing, drug-free workplace consultations, and managing employees who perform various drug screen functions. Mr. Shoulberg has trained other professionals in the drug testing field, at industry associations and trade show conferences, over the past 14 years.

13. For all relevant times, Mr. Shoulberg, and his company, ClearStar, have had a contractual relationship with MidSouth Drug Testing and MEDTOX laboratories. Pursuant to that relationship, ClearStar provides drug testing and MRO services to Midsouth, and buys laboratory drug testing from MEDTOX. ClearStar also maintains the Medical Review Officer review of the drug test on Grievant's account in the present case.

14. The Department requires a split urine lab-based test for all drug testing. In this procedure, the sample collected is split and stored in two separate vials which are sent to the testing laboratory, where one is tested and the other is frozen. If the tested sample comes back positive for one of the drugs tested, the other sample remains frozen for up to a year. This allows the employee to have the frozen vial retested if he or she wants to challenge the test results. If the tested sample comes back negative, the second sample is stored for 3 to 4 days, depending on the laboratory.

15. As the Department's third-party administrator for drug testing, Mid-South processed the results of Grievant's drug test, and communicated this information to the Department's designated representatives. It was Mid-South's practice to "house" under its own letterhead all reports generated by all entities involved in the process.

16. On the day he was hired, April 12, 2010, **Grievant acknowledged in writing his receipt and understanding of the Department's Drug-Free Workplace Policy, and that because of**

his designation as a "safety sensitive employee" he would be subject to random drug and alcohol testing.

17. On August 27, 2012, shortly before Grievant began his shift at West Tennessee State Penitentiary (WTSP), he was asked to submit to a random drug screen. Grievant complied with the request, and voluntarily submitted a urine sample to Gilbert Parnell, a contract employee for Mid-South Drug Testing, Inc ("Mid-South"). At all relevant times, Gilbert Parnell was a certified urine collector and certified breath alcohol technician.

18. After Grievant's urine specimen was collected on August 27, 2012, it was placed into two vials which were then sealed and labeled with Grievant's identification information. Grievant signed the custody and control form, documenting that he had witnessed the process, and then gave Mr. Parnell his phone numbers.

19. On August 27, 2013 the two sealed vials containing Grievant's urine specimen collected were transmitted by FedEx to MEDTOX. Two days later, on August 29, 2012, the package containing the vials which contained Grievant's urine specimen was delivered to a highly restricted area of MEDTOX. In this area, called the "accessioning area," the barcode on the package was scanned to ensure that chain of custody procedures had been and would continue to be followed.

20. **All relevant documentation showed that Grievant's urine sample was received normally by MEDTOX on August 29, 2012, and that the specimen seals were intact. Since no "fatal flaws" were detected, Grievant's urine specimen was then subjected to the initial screening process.** A small amount of Grievant's urine, called an *aliquot,* was taken out of the container containing Grievant's urine sample and was placed into a bar-coded tube which was

identified against the accession number which had already been assigned. The *aliquot* was then transferred to the laboratory for initial testing under continuing chain of custody monitoring.

21. Grievant's urine sample was initially tested on August 29, 2012 by an automated process using equipment especially calibrated for this purpose. The MEDTOX technician in charge of the initial screening of Grievant's urine sample made sure that the screening instrument was appropriately calibrated and that there was sufficient quality control for testing. In keeping with MEDTOX testing criteria, 10% of the batch to be tested was used for quality control. This portion consisted of a "blind," a negative sample containing no targeted drugs.

22. **According to MEDTOX procedures, any test result that is "not negative" is presumed positive,** and is flagged in the computer system to indicate that a second *aliquot* should be extracted and made available in case a confirmatory test is needed. As a result of this process, **Grievant's sample was screened presumptively positive for the presence of marijuana.**

23. On September 6, 2013, at approximately 7:30 am. (CST), Grievant received a phone call from Dr. Emilia Vives, the Medical Review Officer (MRO) assigned by ClearStar to communicate the drug test results to the Grievant. After verifying that the person she was talking to was the donor associated with the identifying information she had, **Dr. Vives informed the Grievant that his urinalysis test on the Grievant's urine specimen collected on August 27, 2012 had come back positive for marijuana.**

24. When Dr. Vives informed Grievant on September 6, 2012, that his drug test had come back positive for marijuana, Grievant told her "that was not possible," because, as he said, he did not "do marijuana." Dr. Vives told the Grievant he could have a portion of his original specimen tested again, at his own expense. **Grievant said that he wanted the "split specimen test."** In

response, Dr. Vives told Grievant that ClearStar[10] would communicate with him further about conducting the retest.

25. On Monday, September 10, 2012, Grievant mailed a letter to ClearStar requesting the "split specimen" test, along with a **postal money order for $250, as payment for the "split specimen test" he requested.**

26. On September 11, 2012, Grievant called ClearStar and left a voice mail message, indicating that he had mailed the money order, but saying to **"hold off on starting the "reconfirmation test"** until he spoke with the Warden.

27. On September 13, 2012, at 11:38 AM (EST), **Grievant called ClearStar and told them to send the money back.** On that same day, September 13, in **response** to Grievant's instruction, **ClearStar mailed back the money order** which Grievant had sent them as payment for the retest.

28. According to Mr. Shoulberg, Grievant could have **requested a retest** of his original urine specimen at **any time** since September 13, 2012. As of the date of the hearing, and at least until August 27, 2013, **Grievant could still have had a portion of the urine specimen tested** which he provided on August 27, 2012.

29. Grievant acknowledged that at no time was he ever told by the MRO or her representative that they weren't going to do his retest.

30. **Grievant admitted that the most important evidence he could have brought to the Level 4 hearing, which probably would have gotten his job back, would be the results of a split specimen test showing there was no marijuana in his system on August 27, 2012. Grievant initially testified that he did not bring that evidence to the Level 4 hearing because "somebody denied [his] test." However, Grievant finally admitted that no one**

from the Department, MidSouth, MEDTOX, ClearStar, or the Medical Review Officer, ever told him that he could not have the reconfirmation test he first requested on September 6, 2013.

31. At the hearing on September 13, **Grievant presented no new evidence which would raise doubt about the accuracy of the test results in his case**. Because of the seriousness of the charge, because it was drug related, Mr. Barbee decided to discharge the Grievant and forego progressive discipline, even though Grievant had no significant disciplinary history prior to this case.

APPLICABLE 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.

2. The Department, as the party that initiated these proceedings, is the Petitioner and has the burden of proving this matter to a "preponderance of the evidence." A "preponderance of the evidence" means the "greater weight of the evidence, or the more probable conclusion, based on the evidence presented. Rule 1360-4-1-.02(7), Tenn. Comp. R. & Regs. (1999).

3. The burden of proof is usually assigned to the party seeking a change of the status quo.

4. Department of Personnel Rule 1120-10-.06 contains the following relevant provisions:

> The following causes are examples of those considered for disciplinary action and should not be considered the only causes of action.
>
> . . .
>
> (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.
>
> . . .
>
> (15) Acts that would endanger the lives and property of others.. . .

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

5. Tennessee Department of Correction Policy Index # 302.12, (Drug-Free Workplace),[13] includes the following relevant language:

> VI.D. As a condition of employment or continued employment an employee shall not:
>
> 1. Use, possess, sell, trade, offer for sale, or offer to buy illegal drugs or otherwise engage in the illegal use of drugs on or off the job.
>
> 2. Work or report to work visibly impaired or while possessing in his or her body, blood or urine, illegal drugs in any detectable amount.

ANALYSIS

Kelly Dobbins, President of Mid-South Drug Testing, Inc., testified that it is a State mandate that if you follow Tennessee Drug Free Workplace, you should do a split urine, lab-based test. She explained that "in a split urine, both vials go to the laboratory. One is tested, one is frozen. If the test is positive, they keep the frozen urine for a year. If it's negative, it's probably about four days, three or four days depending on the laboratory." Ms. Dobbins explained that the reason for this is because if there is an issue with the test, **the employee has the right to have the frozen vial retested.**

The evidence shows that **Grievant could have gotten a retest of his urine specimen**, and the Warden had no authority to **decline or interfere** with such a request, nor did the Grievant need the warden's approval to get such a retest. Grievant failed to prove that he was denied an opportunity to have his split specimen retest, or that any act or omission by Mr. Barbee or any other representative of the Department deprived Grievant of due process. **Grievant did not**

deny that he has had a continuing opportunity to have a "reconfirmation test" of his urine sample, up to the day of the Level 5 hearing.

To tolerate illegal drug use by staff who supervise inmates would compromise prison safety and security, for inmates and staff alike. Mr. Barbee testified that there was no requirement to wait until his assigned shift began before asking Grievant to submit a urine sample. Grievant had been selected for testing, and was among a list of employees generated **randomly** by computer and sent to the facility every month.

Grievant failed to prove that he was denied an opportunity to have his split specimen retest, or that any act or omission by Mr. Barbee or any other representative of the Department deprived Grievant of due process.

At the Level 5 hearing, Grievant ultimately admitted that in his communications with the MRO's office, he "**told them to hold off"** on his request for a retest. As a result, Grievant waived his right to have his split specimen retested, and to present the test results as evidence at the Level 5 hearing.

CONCLUSIONS OF LAW

1. It is **determined** that Grievant's termination of his employment with the Department for violation of the "Drug-Free Workplace Policy" was warranted.

2. The Department of Correction has shown by a preponderance of the evidence that Commissioner Schofield's decision to terminate the employment of the Grievant was warranted, based on the provisions of the Policy and its underlying imperative, which is to maintain safe and secure prisons staffed by employees who are not impaired by illegal drugs, including marijuana.

3. The Department of Correction has shown by a preponderance of the evidence that at all relevant times Grievant was **aware** that using marijuana on or off the job was a violation of the

Policy and state law, and that as a **safety-sensitive employee** he was subject to **random** drug testing implemented to enforce this Policy.

4. The Department of Correction has shown by a preponderance of the evidence that in spite of his knowledge of the Policy and his safety-sensitive status, the Grievant apparently used marijuana in violation of the Policy and The Tennessee Drug-Free Workplace Act.

5. The Department of Correction has shown by a preponderance of the evidence that the **Grievant canceled his re-test and requested a refund of the testing fee, which ClearStar sent back at Grievant's request.** Thus**,** Grievant **knowingly waived** his right to a second test of the urine specimen collected from him on August 27, 2012.

6. Based on the foregoing proof, it is determined that Grievant's termination of employment with the Department was proper. Therefore, it is **ORDERED** that Grievant's termination be **UPHELD.**

IT IS SO ORDERED, this the _____ day of _____, 2013.

This Initial Order entered and effective this _____ day of _____, 2013.

_____
Joyce Carter-Ball
Administrative Judge

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

J. Richard Collier

_____
J. Richard Collier, Director
Administrative Procedures Division