May 2015

Stephen Holt vs. Civil Service Commission

State of Tennessee
Department of State
Administrative Procedures Division
312 Rosa L. Parks Avenue
8th Floor, William R. Snodgrass Tower
Nashville, Tennessee 37243-1102
Phone: (615) 741-7008/Fax: (615) 741-4472

May 18, 2015

Commissioner Rebecca Hunter
TN Civil Service Commission
2nd Floor, James K. Polk Bldg.
505 Deaderick St.
Nashville, Tennessee 37243-0635

Robert R. Davies, Esq.
Tennessee Department of Labor
and Workforce Development
220 French Landing Drive
Legal Division, 3B
Nashville, Tennessee 37243-0655

Stephen Holt
c/o Bryan R. Huffman, Esq.
P.O. Box 944
Covington, Tennessee 38019

RE: In the Matter of: Stephen Holt Docket No. 26.13-119405J

Enclosed is an Initial Order rendered in connection with the above-styled case.

Administrative Procedures Division
Tennessee Department of State

/llp
Enclosure

c: Vicki Milam, Civil Service Commission

BEFORE THE TENNESSEE
CIVIL SERVICE COMMISSION

IN THE MATTER OF:

Stephen Holt **DOCKET NO.: 26.13-119405J**

NOTICE

ATTACHED IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS:

1. THE PARTY FILES A WRITTEN APPEAL, OR EITHER PARTY FILES A PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN **June 2, 2015.**

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
WILLIAM R. SNODGRASS TOWER
312 ROSA PARKS AVENUE, 8th FLOOR
NASHVILLE, TENNESSEE 37243-1102

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, **615/741-7008 OR FAX 615/741-4472.** PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

BEFORE THE CIVIL SERVICE COMMISSION OF THE STATE OF TENNESSEE

IN THE MATTER OF: **TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT,** ***Petitioner,*** **v.** **STEPHEN HOLT,** ***Grievant.***	**DOCKET NO: 26.13-119405J**

INITIAL ORDER

This contested case was heard *de novo* in Nashville, Tennessee, on April 26, 2013, before Ann M. Johnson, Administrative Judge. The State was represented by Charles S. Herrell, Attorney with the Tennessee Department of Labor and Workforce Development (State or Department). Subsequently Robert R. Davies, Assistant General Counsel, filed a Notice of Appearance as substitute counsel for the Department. The Grievant was present and was represented by attorney Bryan R. Huffman.

The issue in this matter concerned the Grievant's appeal of his termination by the Department. After consideration of the entire record, including the evidence and arguments of

the parties, it is determined that the Grievant's termination should be upheld. This decision is based upon the following.

ALLEGED VIOLATIONS

The Grievant was charged with the following violations of State policies and regulations:

1. Policy EEO/AA5, TDLWD Policy on Workplace Discrimination and Sexual Harassment;

2. Department of Human Resources Rule 1120-10-.05(2), Incompetency in the performance of duties;

3. Department of Human Resources Rule 1120-10-.05(6), Failure to maintain satisfactory and harmonious working relationships with the public and fellow employees;

4. Department of Human Resources Rule 1120-10-.05(11), Conduct unbecoming an employee in state service;

5. Department of Human Resources Rule 1120-10-.05(27), T.C.A. Section 8-30-326, for the good of the service; and

6. State of Tennessee Acceptable Use Policy.

SUMMARY OF THE EVIDENCE

One witness was called to testify for the Department. Evelyn Gaines-Guzman, Equal Employment Opportunity Affirmative Action Officer for the Department, explained the training required for all employees regarding a respectful workplace, State and Departmental policies, and the investigation process for discrimination/harassment complaints.

The Grievant Stephen Holt testified on his own behalf, acknowledging that he sent an e-mail containing inappropriate language; however, he stated that he mistakenly sent the message

to multiple recipients instead of to only one coworker as a joke. The Grievant argued that the discipline imposed was too severe.

Documents admitted into evidence include the following:

EXHIBIT 1 Letter of Dismissal;

EXHIBIT 2 E-mail messages;

EXHIBIT 3 TDLWD Policy EEO/AA5, Workplace Discrimination and Sexual Harassment;

EXHIBIT 4 Acknowledgement; and

EXHIBIT 5 State of Tennessee Acceptable Use Policy.

FINDINGS OF FACT

1. The Grievant was employed by the Tennessee Department of Labor and Workforce Development (TDLWD) for over seven years.

2. During his tenure with the Department, the Grievant received no formal disciplinary actions. His performance evaluations were very good. He was assigned to supervise several staff members, with the position of Unemployment Insurance Interviewer Supervisor.

3. On January 4, 2012, the Grievant sent an electronic mail message through the State e-mail system to eight of his coworkers, seven of whom he supervised. The Subject line of the message read "just so you know," and the body of the communication stated, "HNIC, I do what I want. Your lack of books means nothing to me! HA!"

4. One minute later, the Grievant sent a second e-mail message with a Subject of "ignore that last e-mail it was not for everyone." There was nothing in the body of message.

5. The Grievant admitted that the term "HNIC" was an acronym for "head nigger in charge," and that he knew use of such language was inappropriate.

6. The Equal Employment Opportunity Affirmative Action Office received complaints regarding the e-mail message. Several callers were extremely upset about the derogatory term used.

7. After an investigation, it was determined that termination was the appropriate discipline for this offense.

8. All State employees receive training to prevent any discrimination or sexual harassment. Supervisors receive additional training in maintaining a respectful workplace.

9. All State employees also receive training in the acceptable usage of State e-mail and equipment.

10. Supervisors are held to a higher standard of conduct because of their responsibilities in managing staff and workplace environment.

RELEVANT LAW

1. The Department, as the party "seeking to change the present state of affairs," has the burden of proof under Rule 1360–4–1–.02(7) of the Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies, TENN. COMP. R. & REGS. ch. 1360–4–1 (June 2004 (Revised)), to prove by a preponderance of the evidence that the discipline imposed was appropriate under state law and regulations.

2. The Department charged that the Grievant violated the following rules of the Tennessee Department of Human Resources:

> 1120-10-.05 **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.
>
> (2) Incompetency in the performance of duties.
>
> . . .

(6) Failure to maintain satisfactory and harmonious working relationships with the public and fellow employees.

. . .

(11) . . . conduct unbecoming an employee in the State service.

. . .

(27) For the good of the service.

3. TDLWD Policy EEO/AA5, Workplace Discrimination and Sexual Harassment, prohibits conduct that degrades or shows hostility or aversion towards a person because of race, color, national origin, and other protected categories. Specific prohibitions include the following:

- Slurs and jokes about a class of persons, such as disabled persons or a racial group;

- Distributing via electronic means epithets, slurs, jokes or remarks that are derogatory, demeaning, threatening or suggestive to a class of persons or a particular person or that promote stereotypes of a class of persons;

. . .

The State of Tennessee strictly forbids and will not tolerate discrimination or harassment of any employee, applicant for employment, or third party on the basis of an individual's race, color, national origin, age [40 and over], sex, pregnancy, religion, creed, disability, veteran's status or any other category protected by state and/or federal civil rights laws. **The fact that an alleged offender meant no harm or was teasing will not excuse conduct that violates this policy**.

Emphasis added.

4. It is a violation under the State of Tennessee Acceptable Use Policy for an employee to send communications that violate conduct policies of the State or the employee's Department.

5. T.C.A. Section 8-30-330 contains the following relevant provisions:

(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.

. . .

(c) When corrective action is necessary, the supervisor must administer disciplinary action beginning at the step appropriate to the infraction or performance. Subsequent infractions or poor performance may result in more severe discipline in accordance with subsection (a).

6. The Rules of the Tennessee Department of Human Resources provide the overall policy for imposing disciplinary action:

> 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. . . .

ANALYSIS and CONCLUSIONS OF LAW

The Department has carried its burden of proof, to show by a preponderance of the evidence that termination is warranted in this case. It is concluded that the Grievant violated the majority of the regulations and policies with which he was charged.

The evidence clearly shows that the Grievant sent an e-mail containing epithets, slurs, jokes or remarks that are derogatory and demeaning, in violation of policy. Although the Grievant admitted to the conduct, he argued that termination is not the appropriate discipline for this offense, which he characterized as an unfortunate lapse that was intended to be a joke. However, according to Departmental policy, "the fact that an alleged offender meant no harm or was teasing will not excuse conduct that violates this policy." This electronic message also violated the State's Acceptable Use Policy.

The Grievant was a supervisor of a team of employees and is therefore held to a higher standard because of this status. Like all State employees, he received training to prevent

discrimination in the workplace. Additionally, he also received additional training in maintaining a respectful workplace because of his managerial position. Even without these circumstances, the language used in the communication is so egregious that any professional would know to scrupulously avoid its use, particularly in the workplace.

Although the Grievant contended that the wide dissemination of the message was a mistake, nevertheless it caused distress in the office and embarrassment for the Department. Because of his conduct, he can no longer work effectively and productively. Tennessee courts have recognized that in some cases termination of employment is necessary: "It must be conceded that the public payroll cannot be made a haven for those who with or without fault have become unable to perform the duties for which they were employed. It must likewise be conceded that 'the good of the service' may in proper cases justify or require the discharge of public employees when their efficiency or usefulness in their positions has been seriously impaired by their own fault, by the fault of others, or by blameless misfortune." *Reece v. Tennessee Civil Serv. Comm'n*, 699 S.W.2d 808, 813 (Tenn. Ct. App. 1985) *cert. denied* 475 U.S. 1019.

Based upon these facts, it is **concluded** that the preponderance of the evidence shows that the Grievant's conduct violated Department of Human Resources Rule 1120-10-.05(6) Failure to maintain satisfactory and harmonious working relations with the public and fellow employees; (11) ...conduct unbecoming an employee in State service; and (27) T.C.A. §8-30-326, for the good of the service. There was no proof to show that the Grievant was incompetent in the performance of his duties, as specified in Rule 1120-10-.05(2).

The severity of the discipline imposed must be commensurate with nature of the offense: "when corrective action is necessary, the supervisor must administer disciplinary action

beginning at the step appropriate to the infraction or performance." In light of the serious nature of the Grievant's violations and his subsequent inability to perform his employment responsibilities, it is determined that the disciplinary action imposed by the Department is the lowest step that is appropriate, even though the Grievant has received no prior discipline.

Based upon the foregoing, it is **ordered** that the Grievant's termination is hereby **upheld**.

This Initial Order entered and effective this 18th day of May 2015.

Ann M. Johnson
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 18th day of May 2015.

J. Richard Collier

J. Richard Collier, Director
Administrative Procedures Division

APPENDIX A TO INITIAL ORDER
NOTICE OF APPEAL PROCEDURES

Review of Initial Order

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8th Floor, William R. Snodgrass Tower, 312 Rosa L. Parks Avenue, Nashville, Tennessee, 37243. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

Review of Final Order

Within fifteen (15) days after the Initial Order becomes a Final Order, a party may file a petition for reconsideration of the Final Order, in which petitioner shall state the specific reasons why the Initial Order was in error. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.