



University of Tennessee, Knoxville  
**Trace: Tennessee Research and Creative  
Exchange**

---

Tennessee Department of State, Opinions from the  
Administrative Procedures Division

Law

---

9-25-2007

# Department of Corrections, Petitioner, Vs. Dallas Pate, Grievant,

Follow this and additional works at: [http://trace.tennessee.edu/utk\\_lawopinions](http://trace.tennessee.edu/utk_lawopinions)

 Part of the [Administrative Law Commons](#)

---

This Initial Order by the Administrative Judges of the Administrative Procedures Division, Tennessee Department of State, is a public document made available by the College of Law Library, and the Tennessee Department of State, Administrative Procedures Division. For more information about this public document, please contact [administrative.procedures@tn.gov](mailto:administrative.procedures@tn.gov)

**BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION**

**IN THE MATTER OF:**

**Department of Corrections,  
Petitioner,**

**Vs.**

**Dallas Pate,  
Grievant,**

**DOCKET NO: 26.05-096388J**

**INITIAL ORDER**

This matter came to be heard on the 25<sup>th</sup> day of September 2007, before Steve R. Darnell, Administrative Law Judge, sitting for the Tennessee Civil Service Commission. The State of Tennessee, Department of Corrections (hereinafter TDOC) was represented by attorney William Hutchinson. The Grievant was present and not represented by counsel.

Grievant has raised several issues in his grievance many of which are outside the scope of the Commission's authority. However, he does raise issues concerning his designation as the "person in direct charge" of TDOC's water treatment plants at the Turney Center that are within the purview of the Commission, and this hearing constituted Grievant's 5<sup>th</sup> step hearing before the Civil Service Commission.

After due consideration of the evidence and the record as a whole it is **DETERMINED** that TDOC cannot require Grievant to be designated as the "person in direct charge" of its water treatment plants at the Turney Center because this is an unreasonable expansion of his job description. Further, TDOC inappropriately sought to discipline Grievant when he sought to withdraw his name from this designation.

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

## **FINDINGS OF FACT**

1. Grievant is employed by TDOC as a Treatment Plant Operator at the Turney Center, a correctional institution in west Tennessee. Grievant graduated from Perry County High School in 1967 and has been employed in the water treatment field since 1968. He did not attend college, but has received many hours of both classroom and on the job training in his field. He has worked for the cities of Linden, Parsons, and Perryville all in Tennessee. He has worked at the Turney Center for 17 years in its water treatment and waste water treatment plants.
2. Grievant received his first certifications from the State of Tennessee in the early '70s and has received advanced certifications throughout his career. He became certified at grade 4 in both clean water and waste water in 1992. This is the highest level of certification in the State of Tennessee.
3. The Turney Center pumps water from the Duck River, treats it and stores it in two 500,000 gallon storage tanks for use at the facility. Waste water is treated at a different onsite sewer treatment plant and eventually returned to the Duck River.
4. The Tennessee Department of Environment and Conservation has a requirement that each water treatment and sewage treatment plant designate a "person in direct charge" of the plant annually. The "person in direct charge" means the person "whose decisions and directions to system personnel control the manipulation of equipment and thereby determine the quality and quantity of the water supplied by a water treatment plant or a water distribution system, or the quality of the effluent from a wastewater treatment plant or the integrity of a wastewater collection system." This rule is applicable to the Turney Center, and it has in recent years designated Grievant as the "person in direct charge" of it plants.

5. Environment and Conservation requires that a certain grade of certification be held by the person in direct charge based on the particular aspect of the plant. Grievant holds the appropriate grade of certification for the Turney Center's plants. In fact, Grievant's level of certification exceeds the requirements.

6. The Department of Personnel's job classification for a treatment plant operator does not require any particular grade of certification to perform the job. The Turney Center has issued supplemental job descriptions that require the water plant operator and the waste water plant operator to have "licenses" required by the Tennessee Department of Environment and Conservation, Division of Water Supply.

7. The Commissioner of the Department of Environment and Conservation can revoke Grievant's certifications and/or levy civil penalties against him for failing to ensure the appropriate operation of the plant. By statute the civil penalty can be up to \$10,000 per day and a person can be convicted of a class C misdemeanor for violations of the act.

8. By designating Grievant as the person in direct charge, the TDOC is representing to the Department of Environment and Conservation that Grievant is making final decision concerning the operation of its plants.

9. Other persons also hold the position of treatment plant operator at the Turney Center. These individuals routinely disregard Grievant's directions and decisions on operation of the plants. They implement their own decisions on issues such as type, quantity and methods of introducing chemicals into the system. Grievant does not have any supervisory authority over them.

10. Grievant as the "person in direct charge" has made request for maintenance/repairs of equipment, use of different chemical, etc. which have been overruled by the facility manager for

the Turney Center. The facility manager has in the past authorized employees to disregard Grievant directions on operation of the plants.

10. Grievant is of the opinion that a new classification should be created by TDOC for the “person in direct charge.” TDOC has declined to pursue this path. Also, it is clear that Grievant does not believe he is compensated appropriately for being the “person in direct charge.” Additionally, Grievant has raised other issues that he believes are inappropriate. These issues are either not grievable or not within the jurisdiction of the Commission, and therefore, are not addressed in this order.

11. For various reasons, including others not following his directions, Grievant notified Environment and Conservation (through its contractor) that he was withdrawing his name as the “person in direct charge.” On April 20, 2007, Grievant was called to a meeting with two supervisors and told if he did withdraw his designation as “person in direct charge” for the plant then TDOC legal had instructed them to take disciplinary action against him.

12. As a result of this meeting Grievant withdrew his request with Environment and Conservation and remained the designated “person in direct charge” for TDOC’s plants.

13. There was already a grievance filed by Grievant in November 2005, which was still pending and slowly making its way through the underlying levels of appeal. This is Grievant’s 5<sup>th</sup> level hearing on this grievance.

#### **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 Grievant bears the burden of proof in this case. The standard of proof is a preponderance of the evidence. 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. **PURPOSE (Rule 1120-10-.01)**

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. **GRIEVANCE/POLICY (Rule 1120-11-.02)**

(1) Career and permanent employees will be given every opportunity to resolve bona fide complaints or grievances through established procedures. Every reasonable effort will be made to resolve complaints at the lowest possible step in the procedure.

(2) Employees using this procedure will be entitled to process their complaints or grievances without fear, interference, discrimination, or reprisal.

8. **GRIEVANCE/SCOPE OF PROCEDURE (Rule 1120-11-.06)**

(1) The Commission will serve as the final step for all grievances by career employees.

(2) The agency appointing authority will serve as the final step for all grievances by permanent employees.

9. **GRIEVANCE/GRIEVABLE MATTERS (Rule 1120-11-.07)**

**(1) Disciplinary suspension or demotion.**

**(2) Disciplinary dismissal.**

(3) Involuntary geographical transfer of an employee or official duty station more than fifty (50) miles. Distance will be determined by drawing a circle, with a 50 mile radius, centered on the previous official duty station

(4) Non-compliance with an approved reduction in force plan by an appointing authority.

(5) Prohibited political activity as outlined in T.C.A. Title 2, Chapter 19 ("The Little Hatch Act").

- (6) Coercion of an employee to "waive" his right to consideration on a certificate of eligibles.
- (7) Performance evaluations under certain circumstances to the fourth step.
- (8) Other matters within the discretion or control of the appointing authority or the Commission.** (emphasis added).

10. **GRIEVANCE/EXCEPTIONS & NON-GRIEVABLE MATTERS (Rule 1120-11-.08)**

- (1) Actions that affect employees who are not career or permanent employees.
- (2) Actions that affect an employee serving an initial probationary period.
- (3) Normal supervisory counseling.
- (4) Non-selection for promotion when the appointment was in compliance with these rules and the Act.
- (5) Verbal and written reprimands.
- (6) Performance award decisions.
- (7) Actions resulting from suggestions adopted by the State Employee Suggestion Award Board.
- (8) Actions resulting from reductions in force when an approved reduction in force plan was followed.
- (9) Shift, post, and overtime assignments.
- (10) Reasonable work assignments outside those normally associated with the employee's assigned job classification.** (emphasis added).
- (11) Salary range assigned to classification.
- (12) Classification of position.
- (13) Denial of leave requests except as provided for in T.C.A. §§8-50-801 and T.C.A. 8-50-110.
- (14) Matters relating to internal agency or program management which are based on discretionary decision making.
- (15) Demotions during subsequent probation, if such demotion is to the job classification from which the employee was promoted and at a salary rate no lower than the salary rate had the promotion not occurred.
- (16) Agency rules or policies which do not conflict with statutes or rules of the Department of Personnel.
- (17) Any other matter over which an appointing authority or the Commission has no control or jurisdiction or is without the authority to grant requested relief.** (emphasis added).

11. **GRIEVANCE/TECHNICAL ADVICE AND ASSISTANCE (Rule 1120-11-.09)**

- (1) Technical questions regarding this rule may be resolved by referring questions to the agency personnel section.
- (2) Unresolved technical questions to an agency personnel section may be resolved by referring such to the Department of Personnel, Employee Relations Division.
- (3) Disputes over grievability may be resolved by an agency's appointing authority or by the Commissioner. The Civil Service Commission may review such determinations and, at its discretion, take whatever action it deems appropriate.** (emphasis added).
- (4) The intent of this policy is to legally, efficiently, and fairly resolve bona fide complaints, and grievances. The initiation of a grievance should not be considered as a negative reflection against an employee, supervisor, or agency management, but should be considered as an effort to communicate and seek resolution of work related problems.

(5) Management should consider grievances objectively, fairly, and expeditiously while maintaining a helpful, cordial, and professional attitude throughout the process of redress. DCS Services Policies and Procedures 4.11:

12. The Legislature has adopted the “Water Environmental Health Act” found at T.C.A. §68-221-901, *et seq.* Relevant portions are found below.

**§68-221-902. Purpose**

Recognizing that correct operation of water and wastewater systems is necessary for the protection of the public health and the quality of the environment, it is declared to be the purpose of this part to prevent inadequate operation of all such systems through a system of certification of operators and penalties for noncompliance.

13. **§ 68-221-903. Definitions**

As used in this part, unless the context otherwise requires:

(1) "Board" means the board of certification created in § 68-221-905;

(2) "Certificate" means a certificate of competency issued by the commissioner stating that the operator has met the requirements for the specified operator classification of the certification program;

(3) "Commissioner" means the commissioner of environment and conservation or the commissioner's duly authorized representative;

(4) "Operator" means a person who is in direct charge, or that by education, training and experience is qualified to be in direct charge, of a water treatment plant, wastewater treatment plant, water distribution system or wastewater collection system;

(5) "Wastewater collection system" means the entire system of pipes, valves, pumping stations and appurtenances through which wastewater is collected and conveyed to the wastewater treatment plant;

(6) "Wastewater treatment plant" means the facility or group of units provided for the treatment of wastewater, either or both domestic and industrial wastes. Industrial wastes which do not enter a public wastewater system are excluded;

(7) "Water distribution system" means that portion of the water supply system in which water is conveyed from the water treatment plant or other supply point to the premises of the consumer;

(8) "Water supply system" means the system of pipes, structures and facilities through

which water is obtained, treated, and sold, distributed or otherwise offered to the public for household use or any use by humans, if such system has at least fifteen (15) service connections or regularly serves an average of at least twenty-five (25) individuals at least one hundred twenty (120) days or at least sixty (60) consecutive days out of the year. An industrial water system not delivering water for human consumption is excluded from this definition; and

(9) "Water treatment plant" means the portion of the water supply system which in some way alters the physical, chemical or bacteriological quality of the water.

14. **§ 68-221-904. Operators; certificates and certification; fines and penalties**

(a) It is unlawful for any person, firm or corporation, both municipal and private, operating a water supply system or wastewater system, to operate the water treatment plant, wastewater treatment plant, water distribution system, or wastewater collection system unless the competency of the operators in direct charge of such system are duly certified by the commissioner under the provisions of this part in effect on and after May 25, 1984, or under the provisions of former chapter 13, part 3 of this title in effect prior to May 25, 1984.

(b) Any municipality, utility district, corporation, or persons violating any provisions of this part or the rules and regulations adopted thereunder commits a Class C misdemeanor, and each day in violation constitutes a separate offense.

(c)(1) Additionally, any municipality, utility district, corporation or persons violating any provisions of this part, or the rules and regulations adopted thereunder, shall be subject to civil penalties up to ten thousand dollars (\$10,000) per day, for each day during which the violation occurs.

(2) The commissioner has the duty and authority to levy these civil penalties, and the duty and authority to issue orders requiring compliance with this part

15. **§ 68-221-907. Classification**

The board shall classify all water treatment plants, wastewater treatment plants, water distribution systems, and wastewater collection systems with due regard to the size, type, physical conditions affecting such treatment plants, collection systems and distributions systems, and according to the skill, knowledge and experience that the operator must have to supervise successfully the operation of the plant or system, so as to protect the public health.

16. **§ 68-221-909. Certificates and certification; operators**

(a) All operators of water and wastewater systems are encouraged to become certified, although this part requires only that a person in direct charge of a water treatment plant, wastewater treatment plant, water distribution system or wastewater collection system be certified.

(b) There is nothing in the part to prohibit a single person becoming a certified operator for more than one (1) of the functions listed in subsection (a).

(c) It is permissible for one (1) certified operator to have the responsibility for more than one (1) water and/or wastewater system where two (2) or more systems are involved in reasonable proximity to one another, and where the duties of operation are such that the work time of one (1) person may properly be divided among two (2) or more systems, or where a certified operator may adequately supervise the work of others in more than one (1) system.

17. **§ 68-221-911. Revocation of certificates**

(a) The commissioner, in accordance with the rules and regulations of the board, may revoke the certificate of an operator when it is found that the operator has practiced fraud or deception; that reasonable care, judgment or the application of such operator's knowledge was not used in performance of such operator's duties; or that the operator is incompetent to properly perform such operator's duties.

(b) An operator may appeal a revocation to the board.

(c) Appeal from the decision of the board may be made in accordance with the provisions of § 68-221-914.

18. The Department of Environment and Conservation has adopted various Rules that implement and further clarify the Act. Relevant portions are found below.

**1200-5-3-.04 GENERAL**

(1) Certification under Tennessee Code Annotated 68-221-901 et seq., being the "Water Environmental Health Act," is available to any operator of a water treatment plant, a wastewater treatment plant, a water distribution system, or a wastewater collection system who meets the minimum qualifications of a given classification.

(2) Each person in direct charge at a water treatment plant, a wastewater treatment plant, a water distribution system, or a wastewater collection system shall hold a certificate in a grade equal to or higher than the grade of the treatment plant, distribution system, or collection system he/she operates. The grade of a facility will be established by the criteria set forth in this chapter of rules.

(3) All operating personnel making process control/system integrity decisions about water quality or quantity that affect public health must be certified. A designated certified operator must be available for each operating shift.

(4) Each water supply system and wastewater system required to have a certified operator shall, no later than the first day of August annually, inform the Board, through its designated agents, the Division of Water Supply for water and distribution operators and the Division of Water Pollution Control for wastewater and collection operators, in writing of the name of each person who is a certified operator in direct charge of any water treatment plant, wastewater treatment plant, water distribution system or wastewater collection system it operates. A system shall notify the Division of Water Supply for water treatment plant and distribution system operators and the Division of Water Pollution Control for wastewater treatment plant and collection system operators in writing within thirty (30) days of its loss of the services of a certified operator in direct charge.

19. Rule **1200-5-3-.05** **DEFINITIONS** provides:

(1) "Available" means that a certified operator must be on site or able to be contacted as needed to initiate the appropriate action in a timely manner, based on system size, complexity and the quality of either the source water or the receiving stream

(2) "Board" means the board of certification as described in T.C.A. §68-221-905.

(3) "Commissioner" and "Department" mean the Commissioner of the Department of Environment and Conservation of the State of Tennessee or his/her duly authorized representative.

(4) "Operating Shift" is that period of time during which operator decisions that affect public health are necessary for proper operation of the system.

(5) "Process control/system integrity decisions" means decisions regarding the manipulation of equipment, chemicals or processes that determine the quality and quantity of the water supplied by a water treatment plant or a water distribution system, or the quality of the effluent from a wastewater treatment plant or the integrity of a wastewater collection system.

(6) "Person in direct charge" as used in these rules means the person or persons expressly designated to be in direct charge and so named in writing to the Board's authorized representative by each water supply system and wastewater system, whose decisions and directions to system personnel control the manipulation of equipment and thereby determine the quality and quantity of the water supplied by a water treatment plant or a water distribution system, or the quality of the effluent from a wastewater treatment plant or the integrity of a wastewater collection system.

### **ANALYSIS**

The Civil Service Commission does not have authority or jurisdiction to address many of Grievant's complaints. It clearly does not have power to require TDOC to create a new position. Grievant raises many issues in his grievance, and his grievance is in artfully drafted. However, it

is obvious that he grieves the requirement that he be designated the “person in direct charge” of the plant as being an unreasonable extension of his job duties, and he grieves the potential of disciplinary action if he withdraws from that designation.

The Commission does have authority to address unreasonable “work assignments outside those normally associated with the employee's assigned job classification.” Requiring Grievant to have the necessary certifications/licenses to operate the plant maybe reasonable, but requiring him to be designated the “person in direct charge” of the plant when he in fact has no such authority is unreasonable. By designating him as such, he is exposed to revocation of his certification, civil penalties, and criminal conviction for the inappropriate operation of the plants. It is not reasonable to require him to be exposed to these risks without giving him the corresponding ability and authority to perform the job appropriately. It is clear that TDOC has designated him as the “person in direct charge” of its plants with Environment and Conservation, but does not have the intention of allowing him to fulfill the role.

Secondly, the Commission has authority to address discipline of career employees. No authority if argued or found that prohibits the Commission from addressing anticipated or threatened discipline. Grievant took the steps to withdraw his name as the “person in direct charge” of the Turney Center’s plants. He was advised that if he did so disciplinary action would ensue. Based on this he cancelled his plans and remained the designated person. There is no requirement in Grievant’s job description that he be designated as the “person in direct charge” of the plant. There is no basis for disciplinary action, and he is free to withdraw his name as such without being disciplined.

**IT IS THEREFORE ORDERED** Grievant’s job description does not require him to be designated as the “person in direct charge” of TDOC water treatment and/or waste water plants

pursuant to Environment and Conservation's rules. Requiring him to be so designated is an unreasonable "work assignment outside those normally associated with [Grievant's] assigned job classification." Since being designated as such is not part of his job description, he is free to withdraw his name without fear of disciplinary action.

Entered this the \_\_\_\_\_ day of \_\_\_\_\_, 2008.

---

Steve R. Darnell  
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 26th day of February, 2008.



---

Thomas G. Stovall, Director  
Administrative Procedures Division