

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

CHARLOTTE SMITH

FILED

MAR 11 2013

APPELLANT

VS.

EMPLOYEE APPEALS BOARD

NO. 09-089

**MISSISSIPPI DEPARTMENT
OF CORRECTIONS**

RESPONDENT

FULL BOARD ORDER

THIS CAUSE having come on to be heard on Appeal by both parties from the Order of EAB Hearing Officer dated May 10, 2010. After a complete review of the record in this case the EAB, en banc, does find as follows:

Charlotte Smith ("Smith") was initially hired on August 6, 1990, by the Mississippi Department of Corrections ("MDOC"). She began working as an assistant to the psychological evaluator in 1999. On December 20, 2002, Smith underwent an Administrative Review Hearing for her having received violations for acts on the job based upon four (4) Group II, #1; two (2) Group II #4; one (1) Group III, #9; and one (1) Group III #11 offenses. The Administrative Review Hearing Officer dismissed all but four (4) of the violations: two Group II, #1, acts of insubordination; and the Group III, #9 and Group III, #11 offenses; and recommended termination. Smith was terminated effective December 31, 2002, by memo from MDOC Commissioner Christopher Epps dated December 30, 2002. Smith appealed to the EAB.

In his Opinion and Order entered November 4, 2003, the EAB Hearing Officer Dismissed the two Group III Offenses and Affirmed the two Group II Offenses for insubordination. He remanded the case to the Agency for appropriate disciplinary action. Both parties appealed the case to the Full Board of the Employee Appeals Board. By Full Board Order filed April 22,

2004, the Opinion and Order of the EAB Hearing Officer was Affirmed. Both parties appealed to the Hinds County Circuit Court. By Memorandum Opinion and Order entered August 30, 2006, the Court Affirmed the Full Board Order and Remanded for action consistent with the ruling of the Court.

By memorandum dated October 19, 2006, to MDOC Commissioner Christopher B. Epps, David K. Scott, Special Assistant Attorney General, outlined the legal proceedings which had taken place and asked if Commissioner Epps concurred with his recommendation that Smith be terminated, effective December 31, 2002, based upon the two (2) Group II reprimands for insubordination. Commissioner Epps sent a second Letter of Termination of Employment State Service Employee to Smith dated November 6, 2006, which terminated her employment effective December 31, 2002. The record reflects that neither Smith nor her Attorney at that time received this November 6, 2006, termination letter.

On September 6, 2007, Smith's attorney faxed a letter to the Special Assistant Attorney General, Department of Corrections, asking that the Order entered by the Circuit Court on August 30, 2006, be enforced and that Smith be reinstated with back pay and seniority benefits. The next day, September 7, 2007, a copy of the termination letter of November 6, 2006, was faxed to Smith's attorney. On September 24, 2007, Smith's attorney asked for proof of mailing of the termination letter. MDOC responded on September 26, 2007, that it had mailed the letter to Smith. On October 1, 2007, Smith filed a Motion to Enforce the Judgment in Hinds County Circuit Court. On August 18, 2009, the Hinds County Circuit Court ruled that it did not have jurisdiction to hear the Motion. On September 1, 2009, Smith filed a Motion to Enforce Judgment or for an Out of Time Appeal with the EAB. On January 7, 2010, the EAB Hearing Officer entered an Order allowing the Appeal. On May 4, 2010, the Hearing Officer reversed the

decision and dismissed the Appeal to the EAB. The EAB affirmed and Smith appealed to the Hinds County Circuit Court. On March 15, 2012, the Circuit Court Ordered the case remanded to the EAB for an out of time appeal. A hearing was held on August 30, 2012. and an Order was entered on November 7, 2012. The Hearing Officer affirmed Smith's termination effective December 31, 2006, and awarded Smith back pay and benefits from January 1, 2003, to December 31, 2006, subject to any offset for wages earned during that period. Both parties filed an appeal to the EAB full board and the undersigned is tasked with writing this opinion.

The MDOC filed its Request for Clarification of Order or in the Alternative Review by the Employees Appeal Board on November 15, 2012. In its Request, the MDOC asserts that the actual effective date of termination was December 31, 2002, not December 31, 2006, and that back pay and benefits are not due Smith. Alternatively, Smith filed her Request for Review by the Full Employees Appeal Board on November 20, 2012, alleging that the decision is contrary to the law and Order of the Hinds County Circuit Court dated March 15, 2012; that procedural decisions were made in error; that the decision is contrary to the rules and guidelines provided in the Mississippi Employees Appeals Handbook; and that the decision violates Smith's Constitutional right under the 14th Amendment and her rights under Title Seven (7) of the Federal Civil Rights Act. In her brief, Smith supports her position by three basic arguments: First, Smith, an African American female, is disciplined more severely than three white employees of MDOC; Second, Smith's discipline was not progressive. She argues that the Group II offenses are not as severe as the dismissed Group III offenses and therefore, the punishment should be less severe than termination; and Third, Smith argues that the discipline she received was arbitrary, capricious and especially discriminatory.

The EAB Hearing Officer correctly ruled, based upon the record and preceding Orders in this matter, that Smith committed the two Group II violations for insubordination. Smith argues in her brief to the EAB that she was not afforded a due process hearing on the two violations for insubordination and that her rights under the 14th Amendment to the Constitution were violated. This argument is not valid. The initial Administrative Review hearing on December 20, 2002, addressed the validity of these charges as did the tribunals in the multiple appeals thereafter. Smith was provided ample opportunities at each level to provide a defense to the charges in deference to her due process rights. Therefore, the issue to be addressed in this Opinion is whether the punishment received by Smith was appropriate and whether the MDOC did in fact follow the Circuit Courts Order of March 15, 2012, and the Opinion and Order of the EAB Hearing Officer dated November 4, 2003, and reconsider discipline in the absence of the two Group III offenses.

The EAB Hearing Officer also correctly ruled that the Appellant, Smith, has the burden of proving that the punishment received for those Group II violations was arbitrary, capricious or against the overwhelming weight of the evidence and merits the relief requested.

The punishment given Smith, termination, for the two group two offenses of insubordination is allowed under the rules of the Mississippi State Personnel Board ("MSPB"). MSPB Handbook Ch. 8, I.B. Section I.B. of Chapter 8 clearly allows the MDOC to terminate Smith based upon her accumulating two written reprimands for insubordination within a one year period. Id. Because the action of the MDOC is allowed under the rules of the MSPB, the EAB is without authority to alter that action assuming the MDOC has acted in accordance with the published policies, rules and regulations of the MSPB. EAB Administrative Rules XXIV. B.

The MDOC was ordered to reconsider its termination of Smith by the EAB hearing officer in his November 4, 2003, Opinion and Order which was affirmed by the Full EAB and subsequent Hinds County Circuit Court Order entered August 30, 2006. There is no specific rule of the MSPB which defines a "reconsideration" of an action taken. The only evidence in the record of MDOC reconsidering termination as punishment in this case was the memorandum from David K. Scott, Special Assistant Attorney General, to MDOC Commissioner Christopher Epps outlining the legal proceedings which had taken place and recommending termination effective December 31, 2002. Following receipt of this memorandum, Commissioner Epps for the second time, issued a termination letter to Smith. Smith provided no evidence that that action was not a proper "reconsideration" by showing that it was an arbitrary or capricious act or that it was against the overwhelming weight of the evidence as is her burden in this matter.

Smith further argues that her termination was a violation of her rights under Title 7 of the Federal Civil Rights Act; that the action of termination was discriminatory. She bases this argument on the premises that the punishment was not progressive and that white employees were disciplined less severely than she. The State of Mississippi is an equal opportunity employer and the MSPB promotes non-discriminatory practices and procedures in all phases of State Service personnel administration and prohibits any form of unlawful discrimination. MSPB Handbook Ch. 1, II. The EAB is specifically tasked with holding hearings, reviewing evidence and rendering decisions on appeals of State agency action adversely affecting the employment status of employees who claim that they have been discriminated against because of race. Id. at III. D. To prove discrimination, Smith called a former MDOC personnel officer as a witness and questioned her about the punishment given three white employees of MDOC for receiving Group III reprimands. The three white employees were not terminated from

employment. Smith's argument is that the Group III offenses are the most serious in nature under the MSPB handbook and that these three employees were not terminated because they were white even though their acts were of a more serious nature than hers. Smith's argument in this matter is not persuasive. The same witness testified that she did not know the details surrounding reprimands of the three white employees and that the facts and circumstances of each case dictates the appropriate discipline. (Record P. 35). She also testified as follows:

Q. Do you know whether any of the decisions in these cases for disciplinary action whether or not the race of these individuals was factored into that decision?

A. Not to my knowledge.

Q. Ms. Hall, were you given any indication by anybody that directed you to issue a disciplinary notice to an employee that race was a factor in the discipline?

A. Absolutely not.

Q. In your experience as personnel officer, have you ever been or are you aware of any employees that were terminated based on committing two Group Two offenses?

A. Yes.

Q. Is that an uncommon event?

A. No.

(Record at PP. 37-39.) When this witness' testimony as a whole is weighed against Smith's burden of proving discrimination based upon the overwhelming weight of the evidence, this testimony falls short of proving racial discrimination under Title 7 to the Federal Civil Rights Act or the Rules and Regulations of the MSPB.

Based upon the foregoing, the Order of the Hearing Officer entered November 7, 2012, is hereby OVERRULED to the extent that it affirms Smith's termination effective December 31, 2006, and awards back pay and benefits from January 1, 2003, to December 31, 2006.

IT IS HEREBY ORDERED that the termination of Charlotte Smith by the Mississippi Department of Corrections effective December 31, 2002, is AFFIRMED.

SO ORDERED THIS THE 11th DAY OF MARCH, 2013.

MISSISSIPPI EMPLOYEE APPEALS BOARD



WESLA SULLIVAN LEECH