

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

FRED MOORE

FILED

MAR 13 2013

APPELLANT

VS.

EMPLOYEE APPEALS BOARD

NO. 12-074

MISSISSIPPI DEPARTMENT OF CORRECTIONS

RESPONDENT

ORDER

A hearing was held on Fred Moore's appeal on February 8, 2013. Fred Moore (hereinafter "Moore") was represented by Mitchell J. Creel. The Mississippi Department of Corrections (hereinafter "MDOC") was represented by David Scott.

FINDINGS OF FACT

1. At all pertinent times, Moore was employed by the MDOC.
2. Moore began his employment with MDOC on or about May 1, 1993.
3. By letter dated October 24, 2012, Moore was terminated from MDOC with an effective termination date of October 24, 2012.
4. Moore's October 24, 2012, termination letter stated the following grounds for his termination:

Your termination is based upon the following reason(s):

Group III, Number 11 - An act or acts of conduct, including, but not limited to, the arrest or conviction for a felony or misdemeanor occurring on or off the job which are plainly related to job performance and are of such nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to other State employees.

You were arrested by the Mississippi Highway Patrol on September 19, 2012 for DUI, possession of controlled substance (Marijuana), and fleeing. During a search of your vehicle, several items belonging to MSP, were recovered: (four (4) cans of training spray, one (1) can of MK-IV Pepper Mace, one (1)

box of five (5) 12 Gauge bean bag Super shock rounds, and four (4) 12 Gauge 2552 Rubber ball rounds were found).

5. At all material times, Moore was a Correctional Supervisor holding the rank of Lieutenant.

6. On September 19, 2012, Moore's duties, *inter alia*, were to supervise officers to be sure that they performed their duties as required by the MDOC.

7. On September 19, 2012, Moore was a Certified Training Officer for MDOC.

8. On or about March 7, 2012, Moore was provided Written Counseling by Faye Noel, Deputy Warden - Area I for the MDOC.

9. Moore's March 7, 2012, Written Counseling provided in pertinent part:

Be advised that this letter will serve as official documentation that you:

Reported for duty on March 7, 2011 with a pair of handcuff and a can of chemical agent in your possession at Gate I. You advised the equipment was signed out to you from Unit 29 Armory. After checking the paperwork, the equipment was signed out to you. You were previously advised not to take any security equipment off the institutional grounds without authorization. (Emphasis in original)¹

Be advised that this behavior must not continue. If this type of behavior continues more serious disciplinary action will be taken. (Emphasis added).

10. Moore did not appeal his March 7, 2012, Written Counseling.

11. At Moore's appeal hearing on February 8, 2013, Moore admitted that his March 7, 2012, Written Counseling letter instructs him that he should not take "any security

¹The body of the March 7 letter states March 7, 2011, but it was signed on March 7, 2012, by Noel and Moore admitted at the appeal hearing the correct year was 2012 and not 2011.

equipment off institutional grounds without authorization.”²

12. Moore, on September 19, 2012, was arrested by an officer of the Mississippi Highway Patrol for DUI, possession of a controlled substance (marijuana) and fleeing.

13. Moore’s arrest on September 19, 2012, occurred off the institutional grounds of the MDOC.

14. During the search of Moore’s vehicle on September 19, 2012, the Mississippi Highway Patrol Officer recovered the following items:

1. four (4) cans of training spray;
2. one (1) can of MK-IV Pepper Mace;
3. one (1) box of five (5) 12 Gauge bean bag Super shock rounds; and
4. four (4) 12 Gauge 2552 rubber ball rounds.

15. MK-IV Pepper Mace was not given to Moore and was not his personal property.

16. The MK-IV Pepper Mace that was discovered in Moore’s vehicle at the time of his stop on September 19, 2012, by the Mississippi Highway Patrol was security equipment of the MDOC and was property of the MDOC.

17. Moore, at his February 8, 2013, appeal hearing, did not meet his burden of proof/persuasion that the MK-IV Pepper Mace was not taken off the institutional grounds of the MDOC.

²Moore did not sign the March 7, 2012, Written Counseling letter, but it was clear from his testimony at his appeal hearing that he received the March 7, 2012, letter and understood it.

18. The four (4) cans of training spray, one box of five (5) 12 Gauge bean bag Super shock rounds and four (4) 12 Gauge 2552 rubber ball rounds were not State property. Those items were Moore's property.

19. Moore did not, at his February 8, 2013, appeal hearing, meet his burden of proof/persuasion that he did not possess marijuana in his vehicle on September 19, 2012, when he was stopped by the Mississippi Highway Patrol Officer.

20. Moore, at his February 8, 2013, appeal hearing, met his burden of proof/persuasion that his arrest for fleeing from the Mississippi Highway Patrol Officer on September 19, 2012, was not plainly related to his job performance.

21. Moore, at his February 8, 2013, appeal hearing, met his burden of proof/persuasion that his arrest for DUI on September 19, 2012, was not plainly related to his job performance.

CONCLUSIONS OF LAW

Moore, as the Appellant, has the burden of proof on his appeal. *See, Mississippi State Personnel Board Policy and Procedures Manual 10.7.21(C)*. The Mississippi Supreme Court has explained that the administrative rule which places the burden of proof/persuasion on the employee is not merely semantics. Specifically, the Mississippi Supreme Court stated in *Richmond v. Mississippi Department of Human Services*, 745 So. 2d 254 (Miss. 1999) the following:

The statute and administrative regulations clearly place the burden of persuasion on the aggrieved employee to demonstrate that the reasons given are not true. Rule 17, Administrative Rules of the Mississippi Employee Appeals Board; Miss. Code Ann. § 25-9-127 (1972). ... This is not mere semantics. Under our scheme, in a nutshell, ties go to the appointing authority. That is, unless the employee carries the

burden of persuasion that the alleged conduct did not occur, the employee has no right to have the employment decision overturned. *Mississippi Employment Security Commission v. Collins*, 629 So. 2d 576, 580 (Miss. 1993); Miss. Code Ann. § 25-9-127.

Thus, to prevail on his appeal, Moore must prove that either (1) the allegations upon which his termination were based are not true or (2) if true, those facts were not sufficient grounds for the action taken against Moore by the MDOC. Having considered the testimony and credibility of Moore and CID Investigator Joe Sullivan, the only witnesses that testified at Moore's appeal hearing and having considered all exhibits introduced into evidence, this tribunal finds that Moore failed to meet his burden of persuasion/burden of proof on the following allegations set forth in Moore's October 24, 2012, termination letter:

- (1) that one (1) can of MK-IV Pepper Mace belonging to the Mississippi Department of Corrections (MSP) was found in his vehicle on September 19, 2012; and
- (2) that Moore was arrested for possession of a controlled substance (marijuana) on September 19, 2012, by an officer of the Mississippi State Highway Patrol.

This tribunal further finds that Moore's possession of a controlled substance (marijuana) and possession of one (1) can of MK-IV Pepper Mace belonging to the Mississippi Department of Corrections (MSP) were both Group III, Number 11 violations of the Mississippi State Employees Handbook, and that such conduct by Moore constituted "an act or acts of conduct, including, but not limited to, the arrest or conviction for a felony or misdemeanor occurring on or off the job which are plainly related to job performance and are of such nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to other State

employees.” Accordingly, Moore’s termination is AFFIRMED. The reasons for those findings follow.

Moore did not, at his appeal hearing, contend that the MK-IV Pepper Mace belonged to him, nor did he deny that the MK-IV Pepper Mace belonged to the Mississippi Department of Corrections/Mississippi State Penitentiary. Moore’s defense to his possession of the MK-IV Pepper Mace was that it may have “been in [his vehicle] two or three years and he forgot to throw it away.”

Moore initially contended he was not aware he was not supposed to bring security equipment off the institutional grounds without authorization. Moore was impeached on this position by Exhibit 2, which was admitted into evidence.

Exhibit 2 was a Written Counseling letter that Faye Noel, Deputy Warden - Area I, provided to Moore on or about March 7, 2012. The Written Counseling to Moore occurred because Moore “reported for duty on March 7, 2011, with a pair of handcuffs and a can of chemical agent in your possession at Gate I. You advised the equipment was signed out to you from Unit 29 Armory. . . . You were previously advised not to take any security equipment off the institutional grounds without authorization.” (Emphasis in original)

Noel’s March 7, 2012, Written Counseling letter to Moore also stated: “Be advised that this behavior must not continue. If this type of behavior continues more serious disciplinary action will be taken.” (Emphasis added)

It is noteworthy that Noel’s March 7, 2012, Written Counseling letter to Moore was only a short period of time before September 19, 2012, the date the MK-IV Pepper Mace was discovered in Moore’s vehicle. Notwithstanding Moore having been admonished and counseled approximately six months before September 19, 2012, to not take security

equipment, specifically a can of chemical agent, off the institutional grounds of the MDOC without authorization, he did so. Although Moore's excuse for doing so was he "forgot to throw it away," this tribunal does not find his testimony credible.

This tribunal also finds that Moore's possession of MK-IV Pepper Mace off the institutional grounds of the Department of Corrections (MSP) constituted "an act or acts of conduct, including, but not limited to, the arrest or conviction for a felony or misdemeanor occurring on or off the job which are plainly related to job performance and are of such nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to other State employees."

The MDOC could be considered to be negligent if it continued to allow an employee such as Moore to work for it after the employee failed to heed the Department of Corrections' directives to not take security equipment off institutional grounds without authorization. Accordingly, Moore's termination by the MDOC on this ground was appropriate.

Although Moore's action in taking the MK-IV Pepper Mace off the MDOC property is sufficient by itself to support Moore's termination, this tribunal also finds Moore did not meet his burden of proof/persuasion that he did not have possession of a controlled substance, marijuana, on September 19, 2012, when he was stopped by the Mississippi Highway Patrol.

Moore, at his appeal hearing, when asked if he disagreed with the allegation that he possessed the marijuana did not deny he possessed the marijuana. Moore stated instead the Mississippi Highway Patrol Officer "didn't show it to him." Moore had ample opportunity to deny he possessed the marijuana and otherwise had an opportunity to deny

he knew it was in his vehicle. However, Moore did not do so. Instead, he tried to deflect the allegation against him by stating “[the marijuana] wasn’t shown to him.” Such statement by Moore is insufficient to meet his burden of proof/persuasion that he did not, as alleged in his October 24, 2012, termination letter, possess the controlled substance of marijuana. Possession of a controlled substance by a State employee, especially a supervisor at the MDOC, is conduct which is related to the employee’s job performance even if such possession was off the MDOC’s institutional grounds. The MDOC could be negligent to other State employees and/or the public if it continued to employ a person who engaged in such conduct. Moore’s arrest for possession of marijuana clearly could have an adverse impact on his job performance. Such conduct by Moore makes it more difficult for his subordinates and other co-workers to respect Moore, trust his judgment, and follow his directives.

As to the other allegations against Moore – that he was arrested for DUI and fleeing – this tribunal does not find that the arrest for those offenses was “plainly related to Moore’s job performance.” So far as the record is concerned, such actions by Moore were isolated incidents, did not occur while Moore was on duty and did not occur on the MDOC institutional grounds. Further, Moore testified he had only a few beers to drink on September 19, 2012, was not intoxicated and was not provided the opportunity after his arrest to take the intoxilyzer test at the police station. Moore also testified he did not flee from the Highway Patrol Officer, but could not immediately stop for the Highway Patrol Officer because of the road’s terrain. Although the Mississippi Highway Patrol Officer who arrested Moore was present to testify at Moore’s appeal hearing, he did not do so. Moore’s testimony as to not being intoxicated and not fleeing was not rebutted. Therefore, I find he

met his burden of proof on the DUI and fleeing allegations set forth in Moore's October 24, 2012, termination letter.

As to the allegation in Moore's October 24, 2012, termination letter that he possessed "four (4) cans of training spray, . . . one (1) box of five (5) 12 Gauge bean bag Super shock rounds, and four (4) 12 Gauge 2552 Rubber ball rounds," Moore testified he and other officers were given these during training by an out-of-state training officer. CID Investigator Sullivan testified, but his testimony as to these items was limited to him stating that another MDOC officer had told him those items were State property. Such hearsay testimony was insufficient to rebut Moore's testimony that the items belonged to him.

In summary, Moore did not meet his burden of proof/persuasion that he did not take security equipment off the MDOC institutional grounds, nor did he meet his burden of proof/persuasion that he did not possess marijuana on September 19, 2012. Further, he did not prove that such conduct was not plainly related to his job performance. Both offenses are Group III offenses and either standing alone are sufficient grounds for Moore's termination. Because he failed to meet his burden of proof/persuasion on both of them, Moore's termination is AFFIRMED. Moore's appeal is DISMISSED with prejudice.

SO ORDERED THIS THE 13 DAY OF March, 2013.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By:



MICHAEL N. WATTS
Presiding Hearing Officer