

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

Cynthia Montgomery

FILED
MAR 11 2013

Appellant

v.

Case No. 12-069

Mississippi Department of
Finance and Administration

EMPLOYEE APPEALS BOARD

Respondent

ORDER OF HEARING OFFICER

THIS CAUSE having come on to be heard on February 12, 2013, and February 15, 2013, on Appeal filed by Cynthia Montgomery ("Appellant" or "Montgomery"). The Appellant was represented by the Honorable Jonathan B. Fairbank and the Mississippi Department of Finance and Administration ("DFA") was represented by the Honorable Romaine L. Richards. The DFA's designated representative at the hearing was Wallace O'Neil Rayborn, Chief, Mississippi State Capitol Police ("Chief Rayborn").

Prior to the Hearing, a Motion to Strike the Appellant's witnesses was heard. The Motion is overruled. There was no surprise witness as two of the witnesses in question were not called to testify and the third is the Appellant, Cynthia Montgomery.

FINDINGS OF FACT

The Appellant has been employed since 2009, by the DFA as an officer with the Mississippi State Capitol Police Department ("SCPD"). On September 12, 2012, she was working the night (Charlie) shift and received a radio call from SCPD dispatch at 12:13 am of an automatic phone recording for a fire alarm at the Central High School building. Montgomery acknowledged the call and stated she was en route to the building. The dispatcher called out to

other officers on the shift and two responded that they were en route, Corporal William Carpenter ("Roc" or "Carpenter") and Sergeant Daniel Smira ("Sergeant Smira").

Carpenter arrived at the Central High School building approximately eight to ten minutes after Montgomery and checked the perimeter then assisted Montgomery in unlocking the door to the alarm panel room. Approximately three to four minutes later, Sergeant Smira arrived. The three officers checked the building and Officer Smira turned off the alarm lights and reset the alarm after the Appellant was unable to do so. The other Sergeant on the Charlie shift, Sergeant Jesse Slater ("Sergeant Slater"), went to dispatch to check on the procedures for contacting the fire department but did not actually go to the Central High School location.

The Appellant called her Supervisor, Lieutenant Clifton Hamilton, by cell phone the next day, September 13, 2012, at approximately 3:00 p.m. when Hamilton was sleeping. The Appellant began to tell him about the fire alarm and that she "had no back up" when he cut her off and said "put it in writing". On September 14, 2012, she repeated to the SCPD Director, Chief of SCPD, Assistant Chief James Fowler and Lieutenant Hamilton over speaker phone that she received no back up from fellow officers in responding to the fire alarm. The Appellant maintains that she said she "received no back up from anyone but Roc" and does not consider Officer Smira to have backed her up.

In her written statement dated October 19, 2012, Montgomery states that she received back up from Corporal Carpenter and Sergeant Smira but not Sergeant Slater. In that statement, Montgomery maintained that the Sergeants' Smira and Slater are unprofessional, she does not feel safe and that she is being harassed for filing an EEOC complaint.

As a result of her allegation of not being backed up, Montgomery was charged with one Group III No. 16 Offense of giving a false statement on October 18, 2012. Montgomery was terminated effective October 18, 2012.

CONCLUSIONS OF LAW

Within the SCPD, the accusation of not receiving back up by an officer is significant as the failure to back up a fellow officer is grounds for termination. Officers Smira, Carpenter and Slater would therefore have been fired had they not backed up Montgomery. The testimony of all witnesses but Montgomery was consistent that Montgomery initially stated that she was "not backed up". Montgomery maintains that she said "no one backed her up but Roc".

The Group III No. 16 charge is as follows:

willful violation of MSPB policies, rules and regulations, including but not limited to refusing to cooperate and/or giving a *false statement* in an investigation of possible violation of MSPB policies, rules or regulations

(emphasis added). MSPB Handbook Ch. 7, I, C., 16 (effective 10/01/2010).

The issue is whether Montgomery made a false statement. Whether the statement is "no one backed me up" or "no one backed me up but Roc" is a distinction without a difference. That is because the testimony and written evidence in this case is clear that she was also backed up by Sergeant Smira and Corporal Carpenter and that Sergeant Slater went to dispatch to check on the procedure for contacting the fire department. This is in fact a "back-up" of Montgomery. Therefore, on its face her statement is false.

Is this technically false statement grounds for termination? To show that it is not, Montgomery has the burden of proving, by a preponderance of the evidence, that the allegations contained in the termination letter are either untrue or are insufficient for the action taken.

MSPB Policy and Procedures Manual Chapter 10, XX, (effective 10/01/2010). Here, the allegations of making a false statement are true.

The question now becomes whether or not the allegation of making a false statement is sufficient for the termination. The MSPB rules and regulations provide that the DFA may discipline an employee charged with a Group III offense by written reprimand and/or suspension, demotion or dismissal. MSPB Handbook Ch. 7 I.C. (effective 3/01/2010). While this Hearing Officer may not have imposed a punishment of termination, but written reprimand and 30 day suspension, the fact is that the DFA has authority to terminate for one Group III violation. Because the action of the DFA is in accordance with published MSPB rules and is allowed, this Hearing Officer does not have authority to overturn the DFA decision to terminate. MSPB Policies and Procedures Manual, Chapter 10.7, XXIV B. (effective 10/01/2010).

IT IS THEREFORE ORDERED that the termination of Cynthia Montgomery by the Department of Finance and Administration is hereby **AFFIRMED** and this Appeal is **DISMISSED WITH PREJUDICE**.

SO ORDERED THIS THE 14th DAY OF MARCH, 2013.

MISSISSIPPI EMPLOYEE APPEALS BOARD


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