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BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

TONY P. HARRIS

FILED

APPELLANT

VS.

JUN 24 2013

NO. 13-017

MISSISSIPPI DEPARTMENT OF CORRECTIONS ~~EMPLOYEE APPEALS BOARD~~ **RESPONDENT**

ORDER

Before the Mississippi Employee Appeals Board is the appeal by Tony P. Harris (hereafter "Harris" or "Appellant") of a three (3) day suspension from work without pay by the Mississippi Department of Corrections (hereafter "MDOC"). A hearing was held on Harris' appeal on May 17, 2013. Harris was represented by Thomas Morris. The Mississippi Department of Corrections (hereinafter "MDOC") was represented by David Scott.

Having considered the testimony of all witnesses who testified at the appeal hearing and having considered all exhibits introduced into evidence, this tribunal enters the following Order.

FINDINGS OF FACT

1. At all material times, Harris was an employee of the MDOC, and held the position of Field Officer Supervisor within the agency of Probation and Parole.
2. By Memorandum dated February 13, 2013, the MDOC suspended Harris from work for three (3) days without pay. The MDOC's Memorandum to Harris stated the following reasons for his suspension:

You are hereby notified you have been scheduled for suspension from duty without pay for three (3) days from the Mississippi Department of Corrections, effective February 20, 21, 22, 2013. Your suspension is based upon the following reason(s):

Group III, #11 "An act or acts of conduct, including, but not limited to, the arrest or conviction for a felony or misdemeanor occurring on or 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."

Specifically, on June 7, 2012, you received approval from your supervisor, Kenneth Fox, Community Corrections Associate Director, for Mack Cox, FO III to deliver a package to your personal place of business, a barber shop, in Shelby, MS. You failed to inform FO Cox or CCAD Fox that this package contained legal documents, an eviction notice for the shop's tenant, from the [REDACTED] Law Firm.

The aforementioned act of conduct constitutes violation of MDOC Policy 03.01, General Standards of Professional Conduct, which states, "It is the policy of the Mississippi Department of Corrections that all employees will conduct themselves and perform their duties in a professional manner."

3. At all material times, Kenneth Fox (hereafter "Fox") was an employee of the MDOC, held the position of Community Corrections Associate Director (CCAD) and was Harris' supervisor.

4. At all material times, Mack Cox (hereafter "Cox") held a position with the MDOC Probation and Parole and was a Field Officer III with the MDOC.

5. At all material times, Harris was Cox's supervisor.

6. At all material times, Harris and his wife, [REDACTED], owned a barbershop and a building located in Shelby, Mississippi, that they leased to [REDACTED].

7. On or about June 7, 2012, [REDACTED] was in arrears on his lease with the HARRISES in the amount of approximately [REDACTED].

8. On the night of June 6, 2012, a discussion occurred between Mr. and Mrs. Harris concerning [REDACTED] being behind on his lease payments and that [REDACTED] had recently threatened Mr. Harris and cursed him. On June 6, 2012, [REDACTED] left a vulgar message on Tony Harris' cell phone concerning Harris' attempt to have [REDACTED] pay the amount [REDACTED] owed the Harrises. During the week leading up to June 6, 2012, [REDACTED] failure to pay the Harrises had been a continuing problem and personal issue for Tony Harris.

9. During the June 6, 2012, conversation between Mr. and Mrs. Harris, Mrs. Harris told Mr. Harris to not "worry about it [REDACTED]. I will take care of it." Mrs. Harris did not tell Mr. Harris how she would take care of the problem with [REDACTED].

10. At all material times, [REDACTED] Harris was a licensed Mississippi attorney and was employed by the law firm of [REDACTED], in Cleveland, Mississippi,

11. On June 7, 2012, Harris was auditing files at Probation and Parole's office in Greenwood, Mississippi.

12. On June 7, 2012, Cox was at MDOC's Bolivar County Probation and Parole Office in Cleveland, Mississippi. While there, Cox called Tony Harris sometime between 4:30 p.m. and 5:00 p.m. to obtain Harris' permission for Cox to clock out from work on Harris' computer. Harris gave Cox the requested permission.

13. During the time Tony Harris and Cox were talking by phone, Tony Harris also spoke with his wife, [REDACTED]. During this conversation, Mrs. Harris told Mr. Harris some papers needed to be dropped off in Shelby, Mississippi.¹

¹When the words "package," "papers," or "letters" are mentioned in this Opinion, the reference is to the document Mr. and Mrs. Harris discuss in their June 7, 2012, phone call that was ultimately delivered to [REDACTED] by Mack Cox.

14. Harris did not ask [REDACTED] Harris what was stated in the letter.
15. Present with Harris when he was speaking to his wife was Harris' supervisor, CCAD Kenneth Fox.
16. Harris asked Fox if it would be a problem for Cox to drop a letter off for "my wife." Harris told Fox that Cox's delivery of the document was non-MDOC business. Fox gave Harris approval for Cox to deliver the letter.
17. Harris, during his and Cox's June 7, 2012, phone conversation, asked Cox which way Cox was going home. Cox told Harris he was going on Highway 61 (through Shelby). Harris asked Cox if he could deliver a package for him in Shelby, Mississippi. Cox agreed that he would deliver the package.
18. Harris told Cox the letter was to be dropped off at his (Harris') shop in Shelby, Mississippi.
19. On June 7, 2012, Cox knew Harris owned a barbershop in Shelby, Mississippi.
20. At all material times, Cox had a MDOC vehicle assigned to him.
21. Sometime between 4:30 p.m. and 5:00 p.m. on June 7, 2012, Mrs. Harris went to MDOC's Probation and Parole Office in Cleveland, Mississippi, and gave Cox a letter to be delivered to [REDACTED]
22. The document Mrs. Harris gave Cox to deliver to [REDACTED] was a letter dated June 7, 2012, which stated the following:

....

Dear Mr. [REDACTED]:

Be advised that you are four months behind in your obligation to pay rent to Tony P. Harris for rental of property located and situated at [REDACTED] also described

as a beauty and barbershop. As of today, you owe a total of [REDACTED] in unpaid rents and late penalties. This letter constitutes your three (3) day notice to vacate the premises. Be further advised that you will be assessed additional charges in the event you destroy the property or do not leave the property in the same or very similar condition as it was when you began your lease.

**FAILURE TO COMPLY WITH THE TERMS OF THIS NOTICE
COULD RESULT IN COURT IMPOSED FINES AND JAIL
TIME.**

....

23. The June 7, 2012, letter to [REDACTED] was prepared on plain paper and was not drafted on letterhead of the law firm [REDACTED] or any other law firm.

24. The June 7, 2012, letter to [REDACTED] was contained within an envelope from the law firm of [REDACTED] and was addressed as follows:

VIA PERSONAL HAND DELIVERY

[REDACTED]

25. The June 7, 2012, letter to [REDACTED] was an eviction notice and legal document.

26. When Cox arrived in Shelby, Mississippi, Cox did not know where Harris' barbershop was located or where [REDACTED] was located. For this reason, Cox requested assistance from Leroy Chillis. Chillis was also a MDOC Probation and Parole employee. Chillis knew where Harris' barbershop was located.

27. Cox and Chillis both went to the barbershop at [REDACTED] where Cox gave [REDACTED] the June 7, 2012, letter. Cox drove a MDOC vehicle to the barbershop. Cox was wearing his MDOC badge when he delivered the package to [REDACTED].

28. Cox did not know the contents of the letter he delivered to [REDACTED].

29. Cox was on his personal time from the time he left Cleveland, Mississippi, until the time he delivered the June 7, 2012, letter to [REDACTED].

30. It was a custom of MDOC employees to, periodically, deliver personal packages for other MDOC employees. This custom had been in effect for a significant period of time before June 7, 2012. This custom had been utilized by various MDOC employees who held various ranks and positions within the MDOC.

31. On July 9, 2012, Harris executed an Affidavit alleging that [REDACTED] on or about July 7, 2012, threatened Harris.

32. On July 9, 2012, Harris executed an Affidavit charging [REDACTED] with grand larceny.

33. Fox did not know the contents of the letter to be delivered to [REDACTED] at Harris' barbershop, nor did Fox know the letter was to be delivered to Harris' barbershop.

34. Had Fox known the content of the letter or that it was to be delivered to Harris' barbershop, he would not have authorized Harris to allow Cox to deliver the letter.

CONCLUSIONS OF LAW

As the Appellant and employee, Harris has the burden of proof/persuasion that the allegations upon which his suspension were based are either (1) untrue or, (2) if true, the actions taken by the MDOC in suspending him were not justified for the conduct that he engaged in. *See, Mississippi State Personnel Board Policy and Procedures Manual 10.7.21(C).*

The Mississippi Supreme Court has made clear 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.

Having considered the testimony of all witnesses who testified at the appeal hearing and having considered all of the exhibits introduced into evidence, this tribunal finds that Harris failed to meet his burden of proof/persuasion that the allegations upon which is three day suspension was based were untrue or that his three (3) day suspension was not justified for the conduct he engaged in. Therefore, Harris' three (3) day suspension from work without pay is **AFFIRMED**. The reasons for this decision follow.

Paraphrased, Harris' February 13, 2013, Notice of Suspension Memorandum alleged that Harris engaged in "an act or acts of conduct . . . occurring on . . . the job which are plainly related to job performance and are of such a nature to continue Harris in the assigned position could constitute negligence in regard to the agency's duty to the public as to other State employees." The facts upon which the MDOC's alleged violation is based are as follows:

Group III, #11 "An act or acts of conduct, including, but not limited to, the arrest or conviction for a felony or misdemeanor occurring on or 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."

Specifically, on June 7, 2012, you received approval from your supervisor, Kenneth Fox, Community Corrections Associate Director, for Mack Cox, FO III to deliver a package to your personal place of business, a barber shop, in Shelby, MS. You failed to inform FO Cox or CCAD Fox that this package contained legal documents, an eviction notice for the shop's tenant, from the [REDACTED]

The aforementioned act of conduct constitutes violation of MDOC Policy 03.01, General Standards of Professional Conduct, which states, "It is the policy of the Mississippi Department of Corrections that all employees will conduct themselves and perform their duties in a professional manner."

There is no question that on June 7, 2012, Harris obtained approval from his supervisor, Kenneth Fox, for Mack Cox, subordinate of Harris, to deliver a package to Shelby, Mississippi, and that Mack Cox delivered the package. Further, there is no dispute that the package Cox delivered to Shelby, Mississippi, consisted of a letter delivered to [REDACTED] at a barbershop located at [REDACTED]. There is no dispute that the barbershop was owned by Tony Harris and his wife, that it was leased to [REDACTED] and that on June 7, 2012, [REDACTED] was in arrears to the Harrises in the amount of approximately [REDACTED].

What is in dispute is whether the June 7, 2012, letter was an eviction notice and whether the letter was a "legal document." If the answer to those two questions is in the affirmative, the remaining question is whether Harris violated MDOC Policy 3.01 and failed to conduct himself and perform his duties in a professional manner resulting in the commission of a Group III, #11 offense.

The June 7, 2012, letter to [REDACTED] stated "Be advised that you are four months behind in your obligation to pay rent to Tony P. Harris This letter constitutes your three (3) day notice to vacate the premises" Based on the unambiguous language of "This letter constitutes your three (3) day notice to vacate the premises," this tribunal finds that the June 7, 2012, letter to [REDACTED] was an eviction notice.

There is no dispute that Harris failed to inform Cox or CCAD Fox that the letter to be delivered by Cox was an eviction notice. Harris contends he did not know what was said in the letter and, therefore, could not have told either his supervisor, Fox, or his subordinate Cox. Both Cox and Fox testified Harris did not tell them the substance of the letter.

Mack Cox testified at the appeal hearing that when he was asked by Tony Harris to deliver the package/letter that Harris told him he needed to drop the package off at Harris' shop in Shelby, Mississippi. Mrs. Harris testified at the appeal hearing that she did not give Cox any instruction as to what he should do with the letter because she was told Cox could drop it off. Mrs. Harris was asked the following question at the appeal hearing:

Q. There were no detailed instructions about what he [Cox] was supposed to do?

A. Not from me.

It is clear from Mrs. Harris' testimony that she did not give Mack Cox any substantive information about the delivery of the letter. Her interaction with Cox when she gave him the letter was limited to pleasantries.

Tony Harris, in his testimony in the MDOC's case-in-chief at the appeal hearing, was asked the following question by MDOC's attorney:

Q. You asked . . . Fox if it would be ok if officer Cox dropped off the letter at your building. . . . Is that correct? (Emphasis added)

A. Yes, sir.

Several minutes later, still in the MDOC's case-in-chief, in response to another question from MDOC's attorney, Tony Harris denied he told Fox or Cox that the letter was to be dropped off at his building, only that it needed to be delivered to Shelby, Mississippi.

Later, during Harris' case-in-chief, Harris was asked by MDOC's attorney about Cox's testimony that Harris asked him to deliver the letter to Harris' shop. Harris, in response to that question, stated he did not recall telling Cox "what to do with the letter."

While there is a conflict between the testimony of Tony Harris and Cox as to what Cox was told by Harris in regard to delivery of the letter, i.e., whether Harris told Cox, it was to be delivered to "[Harris'] shop" or only "to Shelby," this tribunal finds that Cox's version of what was stated between he and Harris during their June 7, 2012, phone conversation is more credible. Cox was unequivocal in his testimony that Harris told him to drop the package off "at my shop in Shelby." Further, [REDACTED] did not give Cox any instruction concerning the delivery of the letter. [REDACTED] testimony as to her lack of instruction to Cox about what he should do with the letter corroborates Cox's testimony that he understood the letter was to be delivered to Harris' shop before he talked to Mrs. Harris. Based on the record, Cox could have only received that instruction from Mr. Harris during their phone conversation as Cox related.

Tony Harris testified at the time he talked to both Fox and Cox that his wife had not read the letter to him, he had no idea what was in the letter and did not know where or to whom it was to be delivered in Shelby. While the facts support Mr. Harris' position that his

wife did not read the letter to him and corroborates that he may not have known exactly what was in the letter, the facts support that Mr. Harris had sufficient information to have understood that the letter pertained to his dispute and issues with [REDACTED]. Mr. Harris should have informed Fox. This is so because less than twenty-four hours before his conversation with Cox and Fox, Mr. Harris and his wife had discussed that [REDACTED] was in arrears, that Tony Harris was upset with [REDACTED] and that Mrs. Harris had told Mr. Harris she would "take care of it." These facts, when coupled with Cox's testimony that during his conversation with Tony Harris, Mr. Harris specifically told him he needed the letter dropped "off at my shop in Shelby," compel this tribunal to find that Tony Harris, while he did not know exactly what the letter stated, knew it was a letter to Dukes about the Harris' issues with [REDACTED]. Harris should have informed his supervisor, Fox, of this fact and he did not. Fox testified he would not have given Harris the requested permission if he had been told the letter was to be delivered to the Harris' shop. His failure to do so constituted a violation of MDOC Policy 03.01 and was a Group III, #11 offense with the *Mississippi State Personnel Board Policy and Procedures Manual*.

At the appeal hearing, Tony Harris' counsel raised as an issue that Harris' suspension letter alleged the letter delivered to [REDACTED] were "legal documents" and that there were no legal documents delivered to [REDACTED]. Counsel for Harris further argued that since the letter was not a legal document, Harris was not properly cited. This argument is without merit.

As noted in the Findings of Fact portion of this opinion, the letter to Dukes was an eviction notice. Considering that the letter also contained the words "fines" and "jail time" and was in an envelope from a law firm, this tribunal finds that Harris failed to meet his burden of proof that the letter delivered by Cox to Dukes was not a legal document. To the

extent Harris argues that the plural term "documents" as opposed to the singular "document" was used in his suspension letter does not provide Harris relief. Due process requires that Harris be informed of the charges against him, that he be given a meaningful opportunity to be heard, that he have the right to be represented by counsel, that he have the right to compel the presence of witnesses and the right to have those witnesses' testimony taken under oath. *See, Mississippi State Department of Health v. Hogue and The Employee Appeals Board*, 801 So. 2d 794 (Miss. 2001). Harris was provided sufficient notice of the grounds upon MDOC used to base its decision to suspend him for three (3) days without pay and was provided the other elements of due process.

A suspension of three (3) days without pay is a permissive punishment for a Group III offense. Therefore, Harris' three (3) day suspension is AFFIRMED. Harris' appeal is DISMISSED, with prejudice.

SO ORDERED THIS THE 21 DAY OF June, 2013.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By: Michael N Watts
MICHAEL N. WATTS
Presiding Hearing Officer