

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

CHARLIE L. GROSS, JR.

FILED

APPELLANT

VS.

JUN 11 2014

DOCKET NO. 14-011

MISSISSIPPI DEPARTMENT OF WILDLIFE,
FISHERIES AND PARKS

EMPLOYEE APPEALS BOARD

RESPONDENT

ORDER

Before the Mississippi Employee Appeals Board is the appeal of Charlie L. Gross, Jr. ("Gross" or "Appellant") for being terminated by the Mississippi Department of Wildlife, Fisheries and Parks ("MDWFP"). A hearing was held on Gross' appeal on May 9, 2014. Gross was represented by William H. Hussey. The MDWFP was represented by Doug Mann.

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, Gross was an employee of the MDWFP and held the rank of Master Sergeant.
2. By letter dated February 26, 2014, Gross was terminated from his employment with the MDWFP after approximately fourteen (14) years of employment.
3. Gross' February 26, 2014, termination letter setting forth the factual grounds for termination stated the following:

At the conference on January 10, 2014, you admitted that, on November 19, you, your partner, and a Special Agent of the USFWS, were conducting an investigation of a complaint that a deer which had been unlawfully taken in Warren County around November 5, 2013, may have been taken across state lines to be entered in a Big Buck Contest. You admitted that after participating for approximately ten (10) hours, you asked the other officers to drop you at your patrol unit, because you had to work your part time job the next morning.

The other officers continued and completed the investigation. When this was reported to your supervisor, he checked and determined that you had not submitted a request for approval of outside employment as required by Chapter 02, Policy 04, of the MDWFP Policy Manual, as well as the rules of the State Personnel Board regarding outside employment at Chapter 7.5.13 of the MSPB Policy and Procedures Manual, and Chapter 5.14 of the State Employee Handbook (Rev. 07/01/2013). This was in spite of the fact that your supervisor had advised you to request approval of any outside employment on several occasions prior to November of 2013. An incomplete request form was forwarded to Human Resources on or about December 11, 2013, almost a month following these events.

In addition to leaving the investigation and engaging in unauthorized outside employment, a check of your TAL sheet for November 19, 2013, indicates that you claimed that you had worked five (5) hours and taken three (3) hours of leave, which we know to be incorrect. At the conference, you admitted that you often entered incorrect information on your TAL sheets to cover the fact that you would "patrol" more than eight (8) hours in a day, without the knowledge or approval of management, or otherwise used altered numbers to reflect "normal" or expected hours worked rather than actual hours worked.

I find that the act of leaving an investigation in progress constitutes a Group Two, Number 4 offense of, "leaving the work site without permission during working hours in the absence of a threat to life."

Engaging in outside employment without prior approval not only violates department policy (a Group Two Number 1 offense of Insubordination), but it also violates MSPB policy. Therefore, I find that your actions constitute a Group Three Number 19 offense of, "willful violation of MSPB policies and procedures"

Finally, I find that your admitted falsification of your TAL sheets constitutes a Group Three, Number 6 offense of, "falsification of records, such as, but not limited to, vouchers, reports, time records, leave records, employment applications, or other official State documents."

Taken as a whole, your actions also constitute a Group Three, Number 14 offense of, "an act or acts of conduct 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 Mississippi State Employee Handbook (Rev. 07/01/2013), states that Group Three offenses, "...may be disciplined by the agency with a written reprimand and/or may result in suspension without pay for up to thirty (30) working days, demotion, or dismissal."

4. Gross, prior to being terminated, was provided a pre-disciplinary conference on January 10, 2014.

5. On or about November 5, 2013, Gross received information that a buck deer had been illegally killed in Warren County, Mississippi. Because of the deer's size and its antlers, it was considered a "trophy" deer.

6. On November 19, 2013, Gross, another MDWFP employee Master Sergeant Tracy Tullos, and Federal Officer Raibalis worked together and investigated the illegal harvesting of the deer. Federal Officer Raibalis assisted in the investigation because the deer had been transported from the State of Mississippi to the State of Alabama to be entered in a Big Buck Contest. Transporting illegally taken game, interstate, is a federal crime.

7. Gross, Tullos and Raibalis began their investigation early in the morning of November 19, 2013. Throughout the day of November 19, 2013, Gross, Raibalis and Tullos interviewed a number of people including Leo Koestler.

8. During the late evening of November 19, 2013, Gross, Raibalis and Tullos determined that Koestler was the person that killed the deer.

9. Following Gross, Raibalis and Tullos determining that Koestler was responsible for killing the deer, it was decided that a statement needed to be obtained from Koestler.

10. On their way to Koestler's residence, Gross, Raibalis and Tullos passed where Gross' official state vehicle was parked.

11. On the way to Koestler's residence, Gross asked to be dropped off at his truck so he could go home to rest before reporting for his job the next morning at Tractor Supply Company in Vicksburg, Mississippi.

12. Gross was taken to his truck as requested and Gross went home. The investigation into the illegally harvesting of the deer had not ceased on November 19, 2013, when Gross went home early.

13. On November 19, 2013, Gross did not go with Master Sergeant Tullos and Federal Officer Raibalis to Koestler's home to obtain a statement from Koestler. Gross' failure to accompany Tullos and Raibalis to Koestler's home to obtain Koestler's statement constituted Gross leaving the work site without permission during work hours in the absence of a threat to life.

14. On the evening of November 19, 2013, Tullos and Raibalis obtained a statement from Koestler, and Koestler admitted to killing the deer. Tullos and Raibalis did not conclude their interview with Koestler before 2300 hours on November 19, 2013.

15. Subsequent to Koestler's admission to Tullos and Raibalis that he killed the deer, Koestler pled guilty to two state charges. Federal charges were still pending against Koestler on May 9, 2014, the date of Gross' appeal hearing.

16. Gross went to work on November 20, 2013, at Tractor Supply Company in Vicksburg, Mississippi.

17. Gross took at least one day of annual leave on November 21, 2013.

18. Gross began his employment with Tractor Supply Company in Vicksburg, Mississippi, on or about August 1, 2013.

19. At all material times, and for at least two years before 2013, MDWFP required its employees to complete a "Request for Prior Approval for Non-Agency Outside Employment."

20. At the time Gross began his employment with Tractor Supply Company in August, 2013, he had not completed a "Request for Prior Approval for Non-Agency Outside Employment" for fiscal year 2014 and had not completed a "Request for Prior Approval for Non-Agency Outside Employment" form for his August, 2013, employment with Tractor Supply Company.

21. Gross, prior to his acceptance of a job with Tractor Supply Company in August, 2013, knew that MDWFP required he complete a "Request for Prior Approval for Non-Agency Outside Employment." Gross had completed a Request for Prior Approval for Non-Agency Outside Employment on June 10, 2011 (fiscal year 2011), June 23, 2011 (fiscal year 2012), and July 12, 2012 (fiscal year 2013).

22. At all material times, Colonel Steve Adcock was a superior of Gross.

23. Adcock, during his investigation of Gross' failure to accompany Tullos and Raibalis to obtain Koestler's statement, learned that Gross was working at Tractor Supply Company and that Gross had not completed the required "Request for Prior Approval for Non-Agency Outside Employment" before Gross began employment with Tractor Supply Company. As a result, Adcock directed Lt. Bell, Gross' immediate supervisor, to direct Gross complete the "Request for Prior Approval for Non-Agency Outside Employment" form.

24. Gross submitted the fiscal year 2014 Request for Prior Approval for Non-Agency Outside Employment on December 11, 2013.

25. Gross admitted at his appeal hearing that he asked to be dropped off at his truck on the evening of November 19, 2013, so he could go home early before he went to work at Tractor Supply Company on November 20, 2013.

26. Gross admitted at his appeal hearing that he did not go with Tullos and Raibalis on the night of November 19, 2013, to obtain Koestler's statement.

27. At no time did Master Sergeant Tullos object to Gross' request that he be taken to his truck, nor did Tullos verbally object to Gross not accompanying Tullos and Raibalis to obtain Koestler's statement admitting to killing the deer.

28. A Time/Attendance/Leave sheet, also known as "TAL," was completed by Gross on November 19, 2013.

29. Gross, on his November 19, 2013, TAL sheet, represented that he worked five (5) hours and took three (3) hours of leave.

30. On November 19, 2013, Gross worked more than the five hours Gross stated on his November 19, 2013, TAL sheet.

31. On November 19, 2013, Gross worked at least ten hours.

32. Gross, before November 19, 2013, had intentionally misstated the number of hours he had worked on a given day.

33. Prior to November 19, 2013, Gross had reported untrue numbers on his TAL sheets and had incorrectly stated the hours he worked on given days.

CONCLUSIONS OF LAW

As the Appellant and employee, Gross has the burden of proof/persuasion that the allegations upon which his termination was based are either (1) untrue or, (2) if true, the actions taken by the

MDWFP in terminating 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. In *Richmond v. Mississippi Department of Human Services*, 745 So. 2d 254 (Miss. 1999) the court stated:

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 that testified at Gross' appeal hearing, and having reviewed and considered all exhibits introduced into evidence, this tribunal finds that Gross failed to meet his burden of proof that any of the allegations upon which his termination was based were untrue. Further, this tribunal finds that Gross likewise failed to meet his burden of proof that the action taken by the MDWFP in terminating him was not justified for the conduct Gross engaged in. Accordingly, Gross' termination from the MDWFP is AFFIRMED. The reasons for this tribunal's decision are set forth below.

Gross' February 26, 2014, termination letter set forth four grounds for his termination:

- (1) That Gross' leaving an investigation in progress constituted a Group Two, Number 4 offense of "leaving the work site without permission during working hours in the absence of a threat to life";

- (2) Engaging in outside employment without prior approval a violation of department policy (a Group Two, Number 1 offense) of insubordination and that such conduct was a willful violation of MSPB policies and procedures, a Group Three, Number 19 offense;
- (3) Falsification by Gross of his TAL Sheets which constituted a Group Three, Number 6 offense of “falsification of record such as, but not limited to, vouchers, reports, time records, leave records, employment applications or other official state documents”; and
- (4) That Gross’ actions, taken as a whole, constitute a Group Three, Number 14, offense of, “an act or acts of conduct occurring on or off the job which are plainly related to job performance and are of such a 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.”

Each of the four allegations are addressed separately below.

I. Gross Leaving Work Site Without Permission

There is no question that Gross did not assist officers Tullos and Raibalis in obtaining Koestler’s inculpatory statement. At Gross’ appeal hearing, Tullos testified that Gross did not accompany he and Raibalis to obtain Koestler’s statement. Gross also admitted that he did not accompany Tullos and Raibalis to obtain Koestler’s statement. Gross contends that while he did not accompany Tullos and Raibalis to Koestler’s home, his failure to do so did not prejudice the MDWFP’s investigation of the illegal harvesting of the deer or the obtaining of Koestler’s inculpatory statement and subsequent prosecution. This is so, argues Gross, because Koestler

confessed to Officers Tullos and Raibalis that he killed the deer and whether Gross was present or not when Koestler confessed had no bearing – positive or negative – on the investigation and its ultimate outcome.

At the appeal hearing, Tullos testified that it is always desirable to have more than one officer present when a person confessed to a crime for the obvious reason that two law enforcement officers testifying to what the offender stated is more convincing to a fact finder than one officer's testimony, and because there is always the possibility if only one officer obtained the statement that single officer might be unavailable for trial or need corroboration that a suspect, such as Koestler, was not coerced to provide the incriminating confession/statement. Gross' response to Tullos' testimony was that Officer Raibalis was with Tullos when Koestler's statement was obtained and Raibalis' presence rendered any of Tullos' concerns about the need for more than one officer to be present when Koestler was interviewed a nullity.

This tribunal does not find Gross' argument persuasive. Gross, in his termination letter, was charged with "leaving an investigation in progress," which constituted a Group Two, Number 4 offense of "leaving the work site without permission during working hours in the absence of a threat to life."

The Group Two, Number 4 offense of "leaving the work site without permission during working hours in the absence of a threat to life" does not require a state agency, such as MDWFP, to be prejudiced before disciplining an employee for its violation. For Gross to succeed on his appeal to the MEAB on that allegation, he must prove that either he did not leave the work site during working hours, or that he left the work site during working hours, but did so because of a threat to life.

The facts are undisputed that Gross did not complete the investigation on the night of November 19, 2013, and that he left work before the investigation was completed to go home early before going to work at Tractor Supply Company the next day. The fact that Gross believed that MDWFP was not prejudiced is irrelevant. Further, it is not clear that prejudice will not ultimately result because of Gross' failure to complete his shift and the investigation into the killing of the deer. At the time of Gross' appeal hearing, federal charges against Koestler were still pending. No one at this time can say whether Gross' failure to be present when Koestler provided the inculpatory statement will have a bearing on the ultimate disposition of the federal charges against Koestler. For these reasons, and the other reasons set forth, *supra*, this tribunal finds as a fact that Gross failed to meet his burden of proof/persuasion that his conduct in not accompanying Officer Tullos and Raibalis to Koestler's home on the night of November 19, 2013, was not a violation of the Group Two, Number 4 offense of "leaving the work site without permission during working hours in the absence of a threat to life." Accordingly, that allegation against Gross is affirmed.

II. Gross Engaging in Outside Employment Without Prior Approval

Gross' February 26, 2014, termination letter also alleged that Gross engaged in outside employment without prior approval, an alleged violation of Group Two, Number 1, constituting the offense of insubordination.

At all pertinent times, the MDWFP had in effect a requirement that employees in Gross' position complete the "Request for Prior Approval for Non-Agency Outside Employment" form. This form was required to be completed and submitted by Gross to his immediate superior before engaging in outside employment. At Gross' appeal hearing, documents were introduced into evidence establishing that Gross had completed a Request for Prior Approval for Non-Agency

Outside Employment in each of the following fiscal years – 2011, 2012, and 2013. Gross submitted his fiscal year 2011 “Request for Prior Approval for Non-Agency Outside Employment” form on June 10, 2011, his fiscal year 2012 “Request for Prior Approval for Non-Agency Outside Employment” form on June 23, 2011, and his fiscal year 2013 “Request for Prior Approval for Non-Agency Outside Employment” form on July 12, 2012.

Gross began his employment with the Tractor Supply Company in Vicksburg on or about August 1, 2013. Prior to Gross beginning his August, 2013, outside employment with Tractor Supply Company, he did not complete or submit the Request for Prior Approval for Non-Agency Outside Employment form for fiscal year 2014. The fiscal year 2014 approval form was not submitted by Gross until December 11, 2013, approximately four and one-half (4 ½) months after the time he was required to do so.

Gross’ completion of the fiscal year 2011, 2012, and 2013 employment approval forms establish that Gross was aware of the requirement that he should have completed and submitted a 2014 outside approval form for fiscal year 2014 before he began employment with the Vicksburg Tractor Supply Company on August 1, 2013.

At his appeal hearing, Gross admitted that he was aware that the outside approval form should have been completed before he began employment with Tractor Supply company. Gross also testified that once he was asked to submit the fiscal year 2014 form by his supervisor, Lt. Bell, he did so. Other evidence was introduced that suggested that Lt. Bell had to ask Gross on more than one occasion to complete the form and that Gross was dilatory in getting the outside approval form to Lt. Bell.

Gross' superior did not learn that Gross had failed to complete the outside approval form until some time after November 19, 2013. This is established by the testimony of Colonel Stephen Adcock who testified, without contradiction, that neither he or other of Gross' superiors knew of the failure to complete the outside approval form until they initially learned of Gross' failure to accompany Tullos and Raibalis to Koestler's home the night of November 19, 2013. Although it was not established at Gross' appeal hearing the exact date when Lt. Bell first requested Gross to complete the 2014 fiscal year outside employment form, the inference this tribunal draws from all the evidence is that it was at least after November 21, 2013, before Bell asked Gross about the approval form. This was after Gross returned from leave he had taken on November 21, 2013.

Gross submitted the 2014 fiscal year form on December 11, 2013, approximately three weeks after he was instructed to do so by Lt. Bell. The MDWFP alleges that Gross' failure to submit the form prior to December 11, 2013, and not immediately after Lt. Bell had instructed him to do so, establishes that Gross' conduct was a "willful violation of MSPB policies and procedures . . ." and constituted a Group Three, Number 19 offense. This tribunal rejects MDWFP's contention that Gross' failure to submit the 2014 approval form between approximately November 22 and December 11, 2013, was an intentional or willful violation of MSPB policies and procedures." This tribunal finds as a fact that Gross' failure to submit the required outside approval form between the period of approximately November 22 and December 11, 2013, was the result of a number of factors – some within Gross' control and some outside his control. For example, the Thanksgiving holidays occurred during this time and there is no evidence that establishes that Lt. Bell provided Gross a specific date to return the outside approval form. In summary, in not submitting the outside approval form to Lt. Bell, once Lt. Bell requested he do so was not a willful violation by Gross of the directive

that he complete the form earlier than he did once requested to do so by Lt. Bell. Gross' failure to complete the outside employment form before he began work at Tractor Supply Company on August 1, 2013, was insubordination.

For the reasons set forth above, this tribunal finds that Gross' failure to submit the 2014 fiscal year Request for Prior Approval for Non-Agency Outside Employment form was insubordination, a Group Two, Number 1 offense. Further, this tribunal finds as a fact that Gross did not commit the Group Three, Number 19 offense of a "willful violation of MSPB policies and procedures" as alleged in Gross' February 26, 2014, termination letter.

III. The Allegation that Gross Falsified Records

Gross' termination letter also alleged that Gross committed a Group Three, Number 6 offense of "falsification of records, such as but not limited to vouchers, reports, time records, leave records, employment applications, or other official State documents." Specifically, MDWFP alleged Gross falsified his TAL sheets by representing that on November 19, 2013, Gross worked five hours and used three hours of leave for a total of eight hours of official time on November 19, 2013. November 19, 2013, was the date Gross, Raibalis, and Tullos together investigated the illegal killing of the deer. It is undisputed that Gross, on November 19, 2013, worked more than five hours.

Gross, at his appeal hearing, did not dispute that his TAL sheet for the date of November 19, 2013, was incorrect. According to Gross, his misstatement that he worked only five hours and took three hours of leave time on November 19, 2013, occurred because of a mistake on his behalf. This fact, coupled with the fact that he did not overstate his work hours, but in actuality understated the hours he worked, inured to MDWFP's benefit and, therefore, he should not be considered to have falsified his TAL sheet. This argument is similar to Gross' contention that his absence from the

interview where Koestler's inculpatory statement was taken did not prejudice MDWFP. This tribunal rejects Gross' argument for the following reasons.

All State agencies are entitled to honest and truthful conduct from their employees. The State can only function through its employees and each person within each agency's department is obligated to accurately report and state correct information in any State document. In the instant case, Gross did not accurately report the hours he worked on November 19, 2013, and although he suggested his misstatement was a mistake, this tribunal finds otherwise. This tribunal finds as a fact that Gross failed to meet his burden of proof that the statement he worked five hours and took three hours leave on November 19, 2013, was not a false statement within the meaning of Group III, Number 6 offense of the *Mississippi Personnel Board Policy and Procedures Manual*.

This fact is corroborated by Gross' admissions at his pre-disciplinary conference held on January 10, 2014. At that conference, Gross admitted that he "often entered incorrect information on [his] TAL sheets to cover the fact that [he] would 'patrol' more than eight (8) hours a day, without the knowledge or approval of management, or otherwise used altered numbers to reflect 'normal' or expected hours worked rather than actual hours worked." Gross did not contradict these statements at his appeal hearing.

The above statements by Gross belie his argument that his misstatements on his November 19, 2013, TAL sheet occurred because of an oversight or honest error. Further, Gross' contention that it is appropriate for him to falsify State documents so long as MDWFP is not prejudiced, or adversely affected is without merit. A State employee's superior, such as Colonel Adcock or Lt. Bell, is entitled to receive truthful and accurate information on all matters a subordinate provides them. It was not appropriate for Gross to intentionally misstate his hours worked to a superior, even

if he thought there was no harm to MDWFP. For this reason, the Group III, Number 6 allegation against Gross is affirmed.

IV. MDWFP's Allegation of Act or Acts of Conduct Occurring On or Off Job.

Finally, Gross' termination letter alleged that Gross' actions, taken as a whole, constitute a Group III, Number 14 offense of "an act or acts of conduct occurring on or off the job which are plainly related to job performance and are of such a 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."

Because this tribunal has determined that Gross failed to meet his burden of proof that he did not leave an investigation in progress and left the work site without permission during working hours absent a threat to life, and that Gross did not meet his burden of proof that he did not falsify State documents, this tribunal finds as a fact that Gross failed to meet his burden of proof that his violation of those two provisions of the *Mississippi State Personnel Board Policy and Procedures Manual* do not constitute "an act or acts of conduct occurring on or off the job which are plainly related to job performance and are of such a 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, that ground for Gross' termination is affirmed.

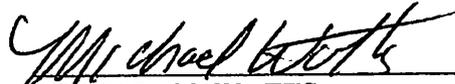
The only remaining issue is whether Gross has met his burden of proof that the action the MDWFP took in terminating him was too severe for the conduct Gross engaged in. Rule XXIV(B) of the *Mississippi State Personnel Board Policy and Procedures Manual* provides that the Mississippi Employee Appeals Board may not alter or modify the action taken by the agency "if the responding agency has acted in accordance with the published policies, rules and regulations of the

MSPB, and if the personnel action taken by the responding agency is allowed under said policies, rules and regulations” Here, the MDWFP acted in accordance with the published policies, rules and regulations of the Mississippi State Personnel Board. Accordingly, this tribunal may not alter or modify the MDWFP’s action in terminating Gross.

For all the reasons set forth herein, Gross’ February 28, 2014, termination from the MDWFP is AFFIRMED. Gross’ appeal is dismissed, with prejudice.

SO ORDERED, THIS THE 11 DAY OF June, 2014.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By: 
MICHAEL N. WATTS
Presiding Hearing Officer