

FILED

DEC 05 2012

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

ANGELA MCCRAY

APPELLANT

VS.

NO: 12-026

MISSISSIPPI DEPARTMENT OF CORRECTIIONS

RESPONDENT

FULL BOARD ORDER

THIS CAUSE having come on appeal by the Mississippi Department of Corrections ("MDOC") from the Order of the Hearing Officer dated July 30, 2012, reversing the termination of Angela McCray (McCray), reinstating her employment and restoring all rights and benefits.

FACTS

McCray was employed as a Correctional Officer II at the Restitution Center in Flowood, Ms. On December 31, 2011, prior to reporting to work, McCray purchased food for a fish fry for employees at the Restitution Center. McCray did not participate in the preparation of the food but did eat it once prepared. On January 5, 2012, she received a written reprimand for unauthorized use of State property for participating in the fish fry. McCray was notified of her right to grieve the reprimand and did sign the notification. McCray had received an earlier written reprimand on May 10, 2011, for another Group III, #11 violation for improper conduct involving former inmates who were under MDOC supervision which resulted in a five (5) day suspension. McCray was terminated effective May 11, 2012 by notice dated May 9, 2012. The termination was based upon the accumulation of the two Group III offenses during the past 12 months.

The Hearing Officer found that the basis for the January 5, 2012, reprimand was a "minor" violation for misuse of state property and that the MDOC's decision to use that reprimand to terminate McCray, four months later, after her time for appeal of the written reprimand had passed, is a patent violation of McCray's right to due process. The Hearing Officer stated that "McCray had the right to know that the written reprimand would be used to

terminate her at the time that she received the reprimand so that she could make an informed decision regarding an appeal." Finding that the termination was improper, the Hearing Officer reinstated McCray in her position as of May 6, 2012, with all back pay and benefits.

CONCLUSIONS OF LAW

The rules and regulations of the Mississippi State Personnel Board ("MSPB") clearly allocate the burden of proof to McCray to show by a preponderance of the evidence, that the reasons stated in the May 9, 2012, termination notice are not true or not sufficient grounds for the action taken by the MDOC.

Further, the rules allow an agency to terminate an employee based upon the accumulation of one (1) Group Three offense. The rule provides that "one Group III offense 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."

Finally, these same rules also provide that a State employee facing disciplinary action for accumulating written reprimands is entitled to due process prior to being suspended, demoted, or dismissed. MSPB Handbook Ch. 7, I.B. The rules define "Due Process" as follows:

The process which is due to each State Service employee is written notice of a proposed disciplinary action which states with sufficient particularity what charges or allegations are being made concerning the employee, the proposed discipline which may be taken, and the opportunity for a conference with the appointing authority or designated representative allowing the employee to respond and present a defense to the allegations *prior to final action by the appointing authority*. The written notice shall be presented to the employee at least ten working days prior to the conference. The employee may also respond in writing to the allegations contained in the written notice. MSPB Handbook Ch. 7, III (emphasis added).

The reasons given in the May 9, 2012, termination notice were the two written reprimands for Group III offenses. McCray must show that these are insufficient grounds for the termination. The first written reprimand was received May 10, 2011, one day short of one year before the May 9, 2012, termination. This resulted in a five (5) day suspension. McCray did not grieve the suspension and accepted responsibility for her actions leading to this written reprimand and suspension. McCray received her disciplinary action at that time and it did not include dismissal as allowed by the rule. She had reasonable grounds to expect that she had

received her complete punishment as allowed in the rules especially given the fact that 364 days had passed since she received the reprimand. See MSPB Handbook Ch.7, I.C, *supra*. To subsequently terminate her employment based upon the same reprimand approximately one year later is in fact a violation of her due process rights as defined in the MSPB Handbook as she was not provided a conference prior to her termination.

The second written reprimand was given January 5, 2012. McCray did not grieve that reprimand and her appeal time ran. Because she did not appeal this written reprimand to the EAB this board has no authority to rule on whether the grounds upon which the reprimand was based are insufficient. However, the Hearing Officer, who has the benefit of observing the witnesses and initially evaluating the evidence in this case, did find that the grounds upon which the written reprimand were based were "minor". In addition, the Written Reprimand of January 5, 2012, contains the following language: "The consequences of *additional* infractions of *a similar nature* could result in a *more severe form of disciplinary action*." (emphasis added). This language could reasonably lead one to conclude that the written reprimand was the only disciplinary action to be taken for this offense and that the matter was concluded.

While the MDOC was technically within its right to terminate McCray based upon the receipt of the written reprimands, it cannot take such an action in violation of McCray's right to due process. McCray was not terminated until approximately one year following the first written reprimand and 4 months following the second written reprimand. Due to the delay of the MDOC to terminate her, she had no reason believe that she would be terminated. The language in the second written reprimand suggested that termination was NOT going to happen. McCray's termination was a surprise, out of the blue so to speak. She was not afforded a 10 day notice, she was not afforded a conference before being terminated and therefore, her due process rights were violated.

For these reasons, this board finds that the Hearing Officer's decision to reinstate McCray was proper and is affirmed in part. However, the Hearing Officer reinstated McCray as of May 6, 2012, but her termination was effective May 11, 2012, therefore, this board hereby modifies the decision of the Hearing Officer and reinstates McCray effective May 11, 2012, with all back pay and benefits.

SO ORDERED THIS THE  DAY OF DECEMBER, 2012.

MISSISSIPPI EMPLOYEE APPEALS BOARD


WESLA SULLIVAN LEECH