

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

EMPLOYEE APPEALS BOARD

LASHUNDA WASHINGTON

APPELLANT

VS.

NO. 12-070

MISSISSIPPI DEPARTMENT OF CORRECTIONS

RESPONDENT

ORDER

Presently before the Mississippi Employee Appeals Board is the appeal by Lashunda Washington (hereafter "Washington" or "Appellant") of her termination by the Mississippi Department of Corrections (hereafter "MDOC"). A hearing was held on Washington's appeal on May 24, 2013. Washington was represented by John Cox. 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. Washington, at all material times, was an employee of the MDOC stationed at the Mississippi State Penitentiary, Parchman, Mississippi.
2. Washington was terminated from the MDOC by letter dated October 24, 2012, with an effective date of termination of October 25, 2012.
3. Washington's October 25, 2012, termination letter provided, in pertinent part, the following grounds for termination:

You violated MDOC Policies and Procedures: 16-6-01, entitled, "Offender Count", "Certified Count", "Formal Counts", "Body Counts", on February 6, 2012 at Unit 26-A by not conducting proper counts, not making sure inmates are living and breathing when counts are conducted, and by falsifying documentation the Unit Register and Unit Count sheets. You

falsely reported in the Unit Registers and Unit Count Sheets that Offender Steven Lefford, #130705, was alive between 0800 hours and 1246 hours on February 6, 2012; the autopsy report indicated Offender Lefford died at approximately 0500 hours on February 6, 2012, which indicates counts were not properly conducted because Offender Lefford was not alive during the counts.

Falsification of records, such as, but not limited to, vouchers, reports, time records, leave records, employment applications, or other official state document is a violation of Subparagraph Number 4 of Appendix III (Third Group Offense) as outlined in the State Personnel Board Manual of Policies, Rules and Regulations updated March 2010.

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 is a violation of Subparagraph Number 11 of Appendix III (Third Group Offense) as outlined in the State Personnel Board Manual of Policies, Rules and Regulations updated March 2010.

A breach of agency security or confidentiality is a violation of Subparagraph Number 15 of Appendix III (Third Group Offense) as outlined in the State Personnel Board Manual of Policies, Rules and Regulations updated March 2010.

Mississippi State Employee's Handbook, March 2010 edition, states that the commission of one Group III Offense may be disciplined with a written reprimand and/or may result in suspension without pay for up to thirty working days, demotion, or dismissal.

4. At all material times, Washington held the rank of Sergeant as a Correctional Officer for the MDOC.
5. On February 6, 2012, Washington was working the 8:00 a.m. to 4:00 p.m. shift (second shift) at Unit 26-A at the Mississippi State Penitentiary at Parchman,

Mississippi. Working with Washington on February 6, 2012, on the 8:00 a.m. to 4:00 p.m. shift was Officer Michelle Frederick.

6. Inmate Steve Lefford was an inmate housed at Unit 26-A on February 6, 2012.

7. Before Frederick and Washington began their 8:00 a.m. to 4:00 p.m. shift at Unit 26-A, a shift change certified count was made at Unit 26-A. This count was made at approximately 5:40 a.m. on February 6, 2012. The count was made by Officer Frederick and Officer Williams from the 12:00 a.m. to 8:00 a.m. shift (first shift).

8. At approximately 9:36 a.m. on February 6, 2012, Washington made a count of all inmates under her supervision at Unit 26-A. At the 9:36 a.m. body count, Washington viewed Lefford on his bed and saw him breathing.

9. Frederick, at approximately 9:36 a.m. on February 6, 2012, also counted inmates at Unit 26-A. At Frederick's February 6, 2012, 9:36 a.m. count Lefford was alive.

10. At approximately 12:05 p.m. on February 6, 2012, another count was made of the inmates at Unit 26-A. Washington saw offender Lefford on his bed and saw that Lefford was breathing.

11. Frederick also performed a count at approximately 12:05 p.m. on February 6, 2012. Frederick's count reflected Lefford was alive at the February 6, 2012, 12:05 p.m. count.

12. A Unit Register was completed by both the first shift and second shift of Unit 26-A on February 6, 2012.

13. The Unit Register does not reflect any inmate deceased at the 5:40 a.m. count, the 8:16 a.m. count, the 9:36 a.m. count, or the 12:05 p.m. count on February 6, 2012.

14. At approximately 12:50 p.m. on February 6, 2012, an inmate told Officers Washington and Frederick that Lefford was not breathing.

15. After being advised that Lefford was not breathing, Washington immediately checked on Lefford. Washington performed CPR on Lefford. Subsequently Lefford was pronounced dead.

16. On February 7, 2012, an autopsy was performed by a pathologist at The University Hospital and Clinics in Jackson, Mississippi.

17. The Report of Autopsy prepared by the pathologist does not provide a reliable basis for the time of death of offender Lefford.

18. The pathologist who performed the autopsy on offender Lefford did not make an independent medical finding as to the time of death of offender Lefford.

19. The statement in the autopsy report that offender Lefford's "expiration" was at 5:00 a.m. on February 6, 2012, is not the opinion of the pathologist who performed Lefford's autopsy, but is a statement by the pathologist based on a statement, or statements, of some unidentified person or persons.

20. Offender Lefford was alive at approximately 5:40 a.m. on February 6, 2012, when the first shift completed the 5:40 a.m. count.

21. At the time of the shift count, at the 8:16 a.m. shift change on February 6, 2012, offender Lefford was alive.

22. When Washington conducted the February 6, 2012, 9:36 a.m. count, offender Lefford was alive.

23. When Frederick conducted the 9:36 a.m. count on February 6, 2012, Lefford was alive.

24. At the 12:05 p.m. count by Washington on February 6, 2012, offender Lefford was alive.

25. At the 12:05 p.m. count by Frederick on February 6, 2012, Lefford was alive.

26. Washington met her burden of proof that the allegations which formed the basis of her termination were untrue.

27. At all material times, the MDOC had in effect policy no. 16-6-01. Policy no. 16-6-01, at lines 107-108, required that all correctional officers “. . . ensure that a living, breathing, human body is being counted; not hair, clothing, shoes or a dummy substitute.”

CONCLUSIONS OF LAW

As the Appellant and employee, Washington has the burden of proof/persuasion that the allegations upon which her termination were based are either (1) untrue or, (2) if true, the actions taken by the MDOC in terminating her were not justified for the conduct that she 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 persons who testified at the appeal hearing, and having considered all exhibits introduced into evidence, this tribunal finds as a fact that Washington met her burden of proof that the allegations set forth in her October 24, 2012, termination letter alleging that Washington “falsely reported in the Unit Registers and Unit Count Sheets that Offender Steven Lefford, #130705, was alive between 0800 hours and 1246 hours on February 6, 2012 . . . which indicates counts were not properly conducted because Offender Lefford was not alive during the counts” is untrue. Accordingly, Washington’s termination is REVERSED and she is REINSTATED to her position as a Correctional Officer, with the rank of Sergeant. The reasons for this tribunal’s decision follow.

The primary basis for the MDOC’s termination of Washington was the MDOC’s interpretation of the autopsy report that Lefford died at approximately 0500 hours on February 6, 2012. A review of the autopsy report reflects that the pathologist who conducted the autopsy did not state that it was the pathologist’s opinion that Lefford died at approximately 0500 hours on February 6, 2012. Specifically, on page 2 of the autopsy report under “Clinical Summary” it is stated “[Lefford] was brought into the ER at Parchman hospital and was dead on arrival. Rigor had set in, and livor mortis was fixed. He was pronounced dead at 5:00 a.m. on February 6, 2012.” (Emphasis added). This statement is not correct because Lefford was not pronounced dead until after 12:50 p.m. on February 6, 2012. He could not have been pronounced dead at 5:00 a.m. on February 6, 2012, when he was not discovered deceased until after 12:50 p.m. on February 6, 2012.

Further, the pathologist's report states that Lefford "was pronounced dead at 5:00 a.m. on February 6, 2012," is a past tense statement. The pathologist's report does not state that the pathologist's opinion is that Lefford died at 5:00 a.m. The inference that this tribunal draws from the autopsy report is that the pathologist did not make an independent medical finding that in the pathologist's opinion Lefford died at 5:00 a.m.

Washington stated that she personally viewed offender Lefford at approximately 9:36 a.m. and approximately 12:05 p.m. on February 6, 2012. She testified that she saw Lefford breathing at each count. Washington stated she saw "his [Lefford's] chest moving." I find Washington's testimony credible. Her testimony is corroborated by the fact that at least two counts were performed by three other officers of the MDOC prior to the 9:36 a.m. count on February 6, 2012. Specifically, a count was performed at 5:40 a.m. on February 6, 2012, by both officers of the first shift. The Unit Register reflects that a formal body count and security check was conducted at approximately 5:40 a.m. on February 6, 2012. There is no notation in the Unit Register for Unit 26-A at 5:40 a.m. that Lefford, or any offender, was deceased. In fact, the Unit Register reflects the 5:40 a.m. count was uneventful and all inmates were accounted for. Further, an additional count was performed at 8:16 a.m. by Officer Frederick and an officer of the first shift. Again, the Unit Register reflects that every inmate was properly accounted for and there was no indication any were deceased. In addition, Officer Frederick stated in her statement to investigator Cole that when she performed the count following Officer Washington at both the 9:36 a.m. and 12:05 p.m. count on February 6, 2012, that offender Lefford was alive. Accordingly, there was a minimum of eight body counts prior to offender Lefford being determined to be deceased at approximately 12:50 p.m. on February 6, 2012. The Unit Register certified all

counts were proper. For these reasons, this tribunal finds as a fact that offender Lefford was alive at the 12:05 p.m. count on February 6, 2012, and that he died some time after 12:05 p.m. on February 6, 2012. Accordingly, Washington met her burden of proof that the allegation that Lefford died at approximately 0500 hours on February 6, 2012, and that she, by indicating that he was alive when she performed the February 6, 2012, 9:36 a.m. count and 12:05 p.m. count falsified records, is untrue.

In reaching this decision, this tribunal considered all of the exhibits introduced into evidence. The exhibits included the Report of Investigation by investigator Cole. That report summarized his interview of various inmates. No weight was given by this tribunal to the hearsay statements of these inmates. The inmates purported testimony as set forth in investigator Cole's report was not subject to cross-examination, and was entirely hearsay. While inmate's testimony should not be disregarded solely because of their felon status, in this case when their purported statements are compared to that of Washington and the documentary evidence as set forth in the Unit Register and other exhibits, the testimony of Washington and the other officers is more credible.

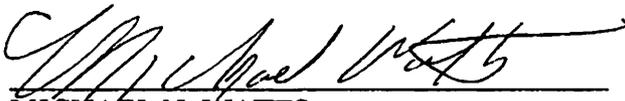
For all the foregoing reasons, the termination of Lashunda Washington is REVERSED and she is reinstated to her position as a Correctional Officer with the rank of Sergeant. She is entitled to back pay from the date of her termination (October 25, 2012) up until January 8, 2013.¹ In addition, it is ordered that Washington be restored to all of

¹Washington's back pay is limited to the period of time from her date of termination (October 25, 2012) until January 8, 2013, the day the appeal hearing was first scheduled. The initial hearing date was continued at Washington's request. At the second hearing, Washington agreed to settle the case with the MDOC. Later she withdrew, without objection from the MDOC, her agreement to settle. This required a third hearing date be scheduled for May 24, 2013. For these reasons, Washington is not entitled to back pay after January 8, 2013.

her retirement benefits, medical leave and personal leave she would have been entitled to had she not been erroneously terminated, provided the integrity of such benefits remain uncompromised in accordance with all applicable laws, policies, rules and regulations.

SO ORDERED THIS THE 3 DAY OF June, 2013.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By: 
MICHAEL N. WATTS
Presiding Hearing Officer