

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

TAWANDA MITCHELL

FILED

APPELLANT

APR 10 2014

VS.

DOCKET NO. 13-071

EMPLOYEE APPEALS BOARD

MISSISSIPPI DEPARTMENT OF CORRECTIONS

RESPONDENT

ORDER

Before the Mississippi Employee Appeals Board is the appeal of Tawanda Mitchell ("Mitchell" or "Appellant") for being terminated by the Mississippi Department of Corrections ("MDOC"). A hearing was held on Mitchell's appeal on March 14, 2014. Mitchell represented herself. The 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. Mitchell, at all material times, was an employee of the MDOC whose duty station was the Mississippi State Penitentiary at Parchman, Mississippi.
2. Mitchell began her employment with the MDOC on or about March 1, 2012.
3. On November 25, 2013, Mitchell was provided written notice from Earnest Lee, Superintendent of the MDOC, that her employment with the MDOC was terminated effective December 3, 2013. The November 25, 2013, letter to Mitchell advising her of her termination of employment was received by Mitchell on December 2, 2013. Mitchell timely appealed her termination to the Mississippi Employees Appeal Board ("MEAB").
4. The November 25, 2013, termination letter stated, in pertinent parts, that Mitchell's termination was based on the following reasons:

1. You failed to report to work without giving required notice to supervisor on the following days:

October 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 2013
September 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22,
23, 24, 27, 28, 29, 30, 2013

Chronic absenteeism which is defined as three (3) or more incidents of unauthorized absence without required notification and satisfactory explanation to the supervisor or the appointing authority in a timely manner within any ninety (90) day period is a violation of Subparagraph Number 2 of Appendix III (Third Group Offense) as outlined in the State Personnel Board Manual of Policies, Rules and Regulations updated January 2013.

Mississippi State Employee's Handbook, January 2013 edition, states the commission of one Group Three Offense may be disciplined by the agency with a written reprimand and/or may result in suspension without pay for up to thirty working days, demotion, or dismissal.

5. Prior to Mitchell's termination, she was provided due process at the agency level.

6. At all material times, and on the dates identified in Mitchell's November 25, 2013, termination letter, the MDOC had in effect Standard Operating Procedure 16-03-02. Standard Operating Procedure 16-03-02 at lines 87-90 provides the following:

- (A) Every employee is responsible for reporting to work at the appropriate work site or duty post ready to begin work at the scheduled time.

- (B) If an employee is not able to report at the scheduled time, the employee is responsible for calling in prior to the beginning of the scheduled work period.

- (C) Security personnel will call in not less than two (2) hours prior to their beginning duty time.

(D) All security personnel must notify their shift supervisor/commander in the event of an absence or tardy.

(E) Employees are expected to personally make the required notification by speaking to the shift supervisor not by a voice mail.

7. Mitchell failed to report to work and failed to call in on the following days:

(A) October 1, 4, 5, 6, 7, 8, 11, 12, 13, and 14, 2013; and

(B) September 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 28, 29, and 30, 2013.

8. Mitchell called the MDOC/MSP at phone number 662-745-6611 on August 31, 2013, at 23:39:56 hours (11:39 p.m.)

9. Mitchell called the MDOC/MSP at phone number 662-745-6611 on September 27, 2013, at 09:52:17 hours (9:52 a.m.).

10. Other than August 31, 2013, and September 27, 2013, Mitchell did not call the MDOC/MSP on any of the other days for which she is alleged to have been absent without calling in to her supervisor or the appointing authority.

11. At all material times, Mitchell's supervisor was Lieutenant Nick Colbert.

12. On neither August 31, 2013, nor September 27, 2013, did Mitchell speak to her supervisor and inform him that she would be absent from work. Instead, she left a message with Captain Sellers or other MDOC employees that she would not be at work on those days.

13. Mitchell was absent the days identified in Finding of Fact No. 7 because she was caring for her mother who was sick with cancer.

14. Mitchell's normal work shift was from midnight to 8:00 a.m. at Unit 30.

15. Mitchell was not paid for her absences for the days identified in Finding of Fact No. 7.

16. Mitchell did not call in every day that she was out during the days identified in Finding of Fact No. 7. She only called in the two times identified in Finding of Fact Nos. 8 and 9, to-wit August 31, 2013, and September 27, 2013.

17. Captain Sellers was one of the shift commanders at Unit 30 where Mitchell worked. Captain Sellers was deceased at the time of Mitchell's appeal hearing.

18. Mitchell missed nineteen days of work in September, 2013, and only called in to report that she would be absent on one of the nineteen days of work, September 27, 2013.

19. Mitchell missed ten days of work in October, 2013, without calling in to advise her supervisor or other appropriate authority that she would not be able to report to work.

20. Mitchell's failure to call to her supervisor or other appropriate authority during her absences in September, 2013, and October, 2013, constituted chronic absenteeism of three (3) or more incidents of unauthorized absences without required notifications and satisfactory explanation to the supervisor or appointing authority in a timely manner within a ninety (90) day period and was a violation of Subparagraph Number 2 of Appendix III (Third Group Offense) as outlined in the *State Personnel Board Manual of Policies, Rules and Regulations Updated January, 2013*.

CONCLUSIONS OF LAW

As the Appellant and employee, Mitchell has the burden of proof/persuasion that the allegations upon which her termination was 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. 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 Tawanda Mitchell and Ellen Miller, the only two witnesses to testify at Mitchell's appeal hearing, and having reviewed and considered all exhibits introduced into evidence, this tribunal finds that Mitchell failed to meet her burden of proof that the allegations upon which her termination were based are untrue or that the actions taken by the MDOC in terminating her was too severe for the conduct she engaged in. Accordingly, Mitchell's termination from the MDOC is AFFIRMED. The reasons for this tribunal's decision follow.

Mitchell does not dispute she was absent from work all of the days identified in her November 25, 2013, termination letter. Mitchell contends that she called an unknown number of times to various persons at the MDOC at MSP during the time period in September and October she was absent and informed Captain Sellers, or others, that she would not be in to work.

Mitchell stated, at her appeal hearing, that she did not know how many times she called in during September, 2013, or October, 2013, or the dates and times she called in to report she would be absent. At her hearing, Mitchell requested that she be allowed to submit phone records from her

niece's cell phone to establish the dates and times Mitchell called the MDOC/MSP during the September and October, 2013, time period, after the conclusion of the hearing. The MDOC had no objection to Mitchell's request and Mitchell was allowed to submit the phone records. Mitchell filed those records with the MEAB on March 18, 2014. A review of those records confirms that Mitchell called MDOC/MSP twice during the September/October time period in question. Specifically, Mitchell called the MDOC/MSP on August 31, 2013, at approximately 11:39 p.m. and on September 27, 2013, at approximately 9:52 a.m. Thus, even though Mitchell missed twenty-nine (29) days of work, she only called in twice.¹

As noted previously, to prevail on her appeal, Mitchell has the burden of proof/persuasion to prove at least one of the following, either (1) that the allegation that she missed work and did not call in to her supervisor or appointing authority on the day she missed work was untrue, or (2) that even though she may have missed work and failed to call in twenty-seven (27) days was not chronic absenteeism, a violation of Subparagraph Number 2 of Appendix III (Third Group Offense) as outlined in the *State Personnel Board Manual of Policies, Rules and Regulations Updated January, 2013*, or 93), or (3) that Mitchell's conduct in missing twenty-seven (27) days of work during approximately six (6) weeks without calling in to report she would be absent was not sufficient grounds for the MDOC to terminate Mitchell.

Mitchell admitted, at the appeal hearing, that she missed work on the days her termination letter stated she missed. Mitchell admitted that her only contact with a supervisor or the appointing

¹One of the days Mitchell called in was August 31, 2013, which was five (5) days before her first absence of September 6, 2013. However, this tribunal accepts that the August 31, 2013, phone call was Mitchell informing her supervisor or the appointing authority she would be absent on September 6, 2013.

authority informing them she would be absent was limited to the phone calls made to phone number 662-745-6611, a primary number of MSP at Parchman, Mississippi. Mitchell's submission of phone records reflects that she only called in twice, August 31, 2013, and September 27, 2013. There is no evidence in the record to suggest that Mitchell called in at all in October, 2013. Because the record establishes that Mitchell only called in twice during a time of approximately six (6) weeks and missed twenty-seven (27) days of work and did not call in as required by MDOC SOP 16-03-02, this tribunal finds as a fact that as Mitchell committed a violation of Subparagraph Number 2 of Appendix III (Third Offense) as outlined in the *State Personnel Board Manual of Policies, Rules and Regulations Updated January, 2013*.

Having found that Mitchell failed to meet her burden of proof that the allegations upon which her termination were based were untrue, the sole remaining question is whether Mitchell met her burden of proof that her actions in not calling in the large number of times she failed to was insufficient grounds for the MDOC to terminate her. This tribunal finds that the answer is "no."

It is axiomatic that the MDOC must have sufficient employees available on each shift to properly staff each shift. Mitchell's failure to appropriately advise her supervisor or the appointing authority that she would be absent to such a large extent placed the MDOC in an untenable position. It did not know whether or not Mitchell was going to work on a given day, and it did not know when, if ever, Mitchell would return to work. The facts justify the MDOC's termination of Mitchell for the reasons stated in Mitchell's November 25, 2013, termination letter. Accordingly, Mitchell's termination is AFFIRMED and her appeal is DISMISSED, with prejudice.

SO ORDERED, THIS THE 9 DAY OF April, 2014.

MISSISSIPPI EMPLOYEE APPEALS BOARD

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