

BEFORE THE MISSISSIPPI EMPLOYEES APPEAL BOARD

ANTOINE DICKENS

FILED

APPELLANT

JUN 10 2016

VS.

CAUSE NO. 16-006

EMPLOYEE APPEALS BOARD

MISSISSIPPI DEPARTMENT OF MENTAL HEALTH

RESPONDENT

ORDER

This cause came before the Mississippi Employees Appeal Board for a hearing on May 18, 2016, at the office of the Mississippi State Personnel Board. The Appellant, Antoine Dickens (Dickens) represented himself as a pro se litigant at this hearing. The Mississippi Department of Mental Health (MDMH) was represented by the MDMH Attorney, Cynthia Eubank. The hearing was conducted during the morning hours, and a number of exhibits and witnesses were presented by MDMH. Dickens provided testimony to this tribunal as his only witness at the hearing.

FACTS

Dickens was employed by MDMH as a Direct Care Supervisor and was an employee of Mental Health beginning April 2, 2012, until his termination on February 23, 2016. Dickens' termination stems from an investigation by Mary J. Stubblefield, Risk Management Investigator with Hudspeth Regional Center concerning the alleged physical abuse of a resident who we will call SF at Dogwood Cottage. After interviewing a number of witnesses it was determined that Dickens was not on duty or involved in the alleged abuse of SF. Two other Mental Health employees were terminated after it was determined that they were

involved in the abuse of SF and were untruthful when given polygraph examinations by Mental Health. Dickens was also given a polygraph examination (Exhibit 8) during the investigation. Dickens was found by the polygraph examiner to be truthful, and it was verified that Dickens was not involved in the abuse of SF. However, the polygraph examiner asked Dickens a series of pre-test questions which led to a series of pre-test admissions that became the basis for the termination of Dickens from his employment with Mental Health. The investigative report (Exhibit 9) reads, "Though Mr. Dickens passed the exam, he did so only after admitting in the pre-test interview that he had seen accidents/injury reports before and was unsure of the truthfulness of the people who completed the reports and that prior to becoming a supervisor he has known of prior incidents that have never been reported. He also stated in the pre-test interview that he has seen employees horse playing with residents that might seem excessive from different people's perspectives. Based on the results of the exams of Mr. T and Mr. M and the pre-test admissions of Mr. Dickens, they are all being recommended for termination of employment." Dickens' termination notice from MDMH dated February 23, 2016, reads as follows, "You are hereby notified that your employment with Hudspeth Regional Center is terminated effective February 23, 2016. The termination of your employment is based on the following reason:

1. "On January 28, 2016, you stated that you have seen Accident and Injury reports and were unsure of the truthfulness of the people who reported it. You also stated that you have seen employees horse playing with residents that might seem excessive from different people's perspectives but never had you witnessed significant abuse on a resident and not reported it. You also admitted that prior to being a supervisor, you knew of prior incidents that were never reported.

2. Upon review of your personnel file, the following disciplinary actions were previously issued: a) On August 14, 2014, you were issued a three day suspension. Specifically, on July 28, 2014, a person in your care eloped from Dogwood cottage while you were the DCAS on duty. You had knowledge that the person eloped and you attempted to locate the shift supervisor to report the elopement; however, you were unable to locate the shift supervisor. Upon returning to your assigned cottage, you continued on with your regular duties as opposed to ensuring you made contact with the shift supervisor to report the elopement as required by HRC policy.

As stipulated in the Mississippi State Employee Handbook and the Mississippi Department of Mental Health Addendum thereto, such reasons would constitute a violation of the intent and the spirit of the standards of conduct required of an employee of Hudspeth Regional Center and are comparative in severity to one (1) Group III Offense and one (1) Group II Offense as outlined in the disciplinary guidelines. Number 1 is comparative to Section VII, C-9: Violation of safety rules causing a threat to life or human safety. Number 2a is comparative to Section VII, B-1: Insubordination, including, but not limited to, resisting management directives through actions and/or verbal exchange, and/or failure or refusal to follow supervisor's instruction, perform assigned work, or otherwise comply with applicable established written policy."

Dickens was then afforded a pre-termination conference which was held on February 12, 2016, at 10:50 a.m. Following that conference, he was informed in his termination letter, "After a careful consideration of all the facts, it is my determination that the reasons as

described above constitute grounds for termination as stipulated in the Mississippi State Employee Handbook and the Mississippi Department of Mental Health Addendum.” The aforementioned letter was signed by Michael E. Harris, M.Ed, Director of Hudspeth Regional Center. Dickens then perfected an appeal to the Mississippi Employee Appeals Board following his receipt of his termination notice from Hudspeth Regional Center.

RULING

Dickens was terminated for answers he provided to pre-test questions when he was given a polygraph examination concerning the investigation of the alleged abuse of a resident at Dogwood Cottage. The polygraph examiner indicated that Dickens was truthful in his responses to his questions and that Dickens was not involved in the abuse of the resident whose initials are SF. A critical piece of evidence in this cause is Exhibit 8, the results of the polygraph examination. Clayton Polygraph Services, LLC, administered the test on January 28, 2016. The examiner on the cover page begins by stating, “Dear Investigator, Per your request a Specific Issue Polygraph Test was administered on January 28, 2016. The results of the examination are as follows: **TRUTHFUL.**”

Next, the examiner has a paragraph entitled **PRETEST INTERVIEW**, which he states, “During this phase of the test, Mr. Dickens was interviewed to determine suitability for polygraph-testing. He was evaluated on several areas: abstract thinking, insight into her own and others’ motivation, understanding between right and wrong, identify basic differences between truth and lies, anticipate rewards and consequences for behavior,

maintain constant orientation to date, time and location. He was also asked questions about his medical health.”

The next section of the results of the polygraph is entitled **PRETEST ADMISSIONS**. There are four findings listed on the section titled Pretest Admissions and they are as follows:

1. He stated he had no knowledge of how the resident was injured and did not know for a fact whom caused the injuries.

2. He stated that he has been a supervisor for about a month. The only thing he stated is that he has seen AI reports before and was unsure of the truthfulness of the people who reported it.

3. He also stated he has seen employees horse playing with residents that might seem excessive from different people’s perspectives but never has he witnessed significant abuse on a resident and did not report it.

4. He stated that prior to being a supervisor he has known of prior incidents that have never been reported and some that were and watched employees get terminated for their behavior.”

It is important to note that MDMH did not provide a list of pre-test questions that the polygraph examiner asked Dickens. No other information was provided by the examiner or by any witness to bring clarity to the pre-test admission questions that were asked to Dickens and to the section entitled Pretest Admissions 1-4 which are outlined above. The polygraph examiner was not called as a witness at the hearing before this tribunal, and no other witness was able to provide any specificity as to what Dickens might have said in response to the pre-

test questions and to the Pretest Admissions 1-4 that the polygraph examiner listed in his report.

In the case of *Mississippi Department of Corrections v Paul R. Pennington, Jr.*, Cause No. 2009-CC-01595-COA, language is found giving direction to the EAB concerning the reduction of the severity of a reprimand. The Court writes, “The circuit judge in this cause correctly summed up the scope of the EAB’s authority. The EAB may only modify a decision if it concludes: (1) the agency did not act in accordance with published policies, rules, and/or regulations; (2) the employee was punished too severely; or (3) the employee met his burden of proof showing that the alleged acts that led to his termination did not occur.” The Court goes on to cite Miss. Code Ann. §§ 25-9-127(1);-131(1). *See McNeel*, 869 So, 2d at 1017.

I find that the MDMH was well within its purview to discipline Dickens concerning the aforementioned investigation and polygraph examination. However, several items are troubling in regard to Dickens’ rights as a state service protected employee. It is widely known and recognized that polygraph examinations can be unreliable and that test results can vary greatly from examiner to examiner and polygraph company to polygraph company. I find that terminating Dickens for being truthful during the polygraph examination in regards to the pre-test admission questions was too severe punishment in this cause. It is noteworthy again that the polygraph examiner was not called as a witness, nor did the Department provide a list of pre-test questions as an exhibit in this matter. Dickens was terminated based on the vague list of Pretest Admissions 1-4 listed above. It should be noted that no testimony or evidence was provided to substantiate the information provided in the Pretest Admissions 1-4. This tribunal is left to contemplate what this list of pre-test admissions actually means.

No witness called by MDMH was called to shed any light on any particular instance that Dickens might have been talking about or when these instances might have occurred. Obviously, these pre-test admissions are very remote in time and are unreliable as a basis for such a severe punishment as the termination of Dickens.

It appears that MDMH is terminating Dickens for a Group III, No. 9 Offense in the Mississippi State Employee Handbook, "Violation of safety rules causing a threat to life or human safety." It is the ruling of this tribunal that Dickens' offense in this matter is reduced to a Group II, No. 2 Offense, "Violation of safety rules in the absence of a threat to life." It is the ruling of this tribunal that the Group III Offense that Dickens received as a result of the polygraph test be reduced to a Group II, No. 2 Offense.

It is the decision of this tribunal that Dickens should receive a 30 suspension from his employment rather than be terminated. MDMH is ordered to suspend Dickens for 30 days and is directed to reinstate Dickens to his employment status and to restore all of his rights and benefits as allowed by law. It is also ordered that Dickens be restored of all of his retirement benefits he would have been entitled to had he 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 20th day of June, 2016.

MISSISSIPPI EMPLOYEE APPEALS BOARD
BY:



Grant M. Fox, Hearing Officer