

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIE B. SMITH, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 03-0197  
 )  
 DEPARTMENT OF CHILDREN )  
 AND FAMILY SERVICES, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

A hearing was held pursuant to notice in the above-styled cause on March 9, 2004, by Stephen F. Dean, assigned Administrative Law Judge of the Division of Administrative Hearings, in Chattahoochee, Florida.

APPEARANCES

For Petitioner: Anita L. Davis  
Qualified Representative  
708 Brag Drive  
Tallahassee, Florida 32305

For Respondent: Jacqueline H. Smith, Esquire  
Department of Children  
and Family Services  
Post Office Box 1000  
Chattahoochee, Florida 32324-1000

STATEMENT OF THE ISSUE

Whether the Petitioner was discriminated against based upon his race when he was disciplined for absenting his post contrary to Chapter 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On December 10, 2001, the Petitioner filed a charge of discrimination based upon his race for a written reprimand he received from his employer, the Respondent. On or about January 3, 2002, the Petitioner filed an amended charge of discrimination. The Florida Commission on Human Relations issued a "Notice of Determination: No Cause" in this case, and the Petitioner filed a timely request for a formal administrative hearing on January 15, 2003. The Petitioner's request for hearing was forwarded to the Division of Administrative Hearings on January 22, 2003.

The parties were sent an initial order on January 23, 2003, and, there being no response, the matter was set for hearing on April 11, 2003, by a Notice of Hearing dated February 26, 2003. On April 4, 2003, the Petitioner requested a continuance and the matter was reset for July 16, 2003, by an Order Granting Continuance and Re-scheduling Hearing dated April 25, 2003. On July 9, 2003, the Petitioner again requested a continuance, and stated that he was to be represented by Mrs. Anita L. Davis,

who, at that time, had not requested recognition as a Qualified Representative. The formal hearing was again continued and reset for formal hearing by Order dated July 11, 2003, during the week of September 8 through 12, 2003, for two days to be determined after Mrs. Davis' qualification had been determined. Thereafter, the Petitioner filed in his own behalf on July 29, 2003, a motion to have an independent investigation of discrimination that was denied by an Order dated August 22, 2003. A status conference was requested by the Respondent to address various problems, but, pending the conference, the hearing set for the week of September 8-12, 2003, was continued.

On December 1, 2003, an Order Setting Status Conference was issued setting a status conference for January 5, 2004. On December 4, 2003, the Respondent filed a Motion for Summary Final Order. The status conference was held, and it was determined that Mrs. Davis was qualified, and directed to file a Notice of Appearance. On January 28, 2004, the case was noticed for hearing on March 2, 2004, and on January 30, 2004, the Respondent's Motion for Summary Order was denied.

Mrs. Davis moved by letter on January 2, 2004, to continue the hearing because her mother was sick, and the case was continued one week, until March 9, 2004. Thereafter, the Respondent advised this office that the Petitioner was

personally attempting to serve subpoenas upon witnesses at the State Hospital where they and the Petitioner are employed. This is contrary to the rules governing the service of subpoenas.

A conference call ensued in which it was directed that the Petitioner could mail subpoenas to the attorney for the Respondent, who would forward them to the Human Relations Officer at the hospital. These instructions are memorialized in the Order Granting Continuance and Re-scheduling Hearing on March 2, 2004.

The hearing was held on March 9, 2004, as noticed. The Petitioner testified in his own behalf, and presented two exhibits. The Respondent presented the testimony of Jimmie L. Williams, Roger Howell, Amy Bryant, William T. Parker, and Steve Mears, and presented a composite exhibit consisting of 35 documents plus one additional document.

Both parties submitted post-hearing filings which were read and considered.

#### FINDINGS OF FACT

1. The Petitioner, Willie B. Smith, is an African-American male. He is now and was at the time of the incidents involved in his complaint employed by the Respondent, Department of Children and Family Services, at Florida State Hospital as a guard in the forensic (prison) unit.

2. The Petitioner is part of a bargaining unit that is represented by the Florida Police Benevolent Association.

3. On November 15, 2001, at approximately 1:05 a.m., the Petitioner contacted his Shift Supervisor, Jimmie Williams, an African-American male, and requested to leave his assigned post in Tower B and go to Unit 3 at the hospital and pick up food from a fish fry. Williams approved the Petitioner's leaving his post to get the food and to return to his post after getting the food.

4. At 2:35 a.m., Williams was contacted on the radio by the Control Room Officer, Johnny Smith, who indicated that the Petitioner wanted to talk to him on the telephone. Williams provided Johnny Smith a telephone number at which the Petitioner could reach him, and the Petitioner called Williams a short time later.

5. The Petitioner informed Williams that he had spilled diesel fuel on his uniform and asked permission to take the remainder of the shift off. Williams asked the Petitioner where he was, surprised that the Petitioner was some place other than at his post. The Petitioner refused to identify where he was, and Williams denied his request for leave.

6. Realizing that the Petitioner was not at his post, Williams proceeded to Tower B and manned that post until the

Petitioner arrived there at 3:04 a.m. When he arrived at Tower B, Williams asked the Petitioner where he had been, and the Petitioner stated he had been at the Florida State Hospital gas station. Williams had checked the Florida State Hospital gas station looking for the Petitioner and was aware that the Petitioner had not been there. At this point, angry words were exchanged and the Petitioner admitted that he had not been at the gas station.

7. Williams wrote up an incident report that initiated a formal investigation into the Petitioner's having absented himself from his post while on duty without proper authorization. The Petitioner was advised of the investigation, and he requested that the PBA represent him in the investigation pursuant to the provisions of the collective bargaining agreement.

8. At the Petitioner's specific request, Steve Mears, from the Tallahassee Office of the PBA, represented the Petitioner in this matter.

9. During the course of a break in a meeting held with regard to the investigation, the Petitioner mentioned to Mears voluntarily changing duty stations, and Mears raised this request with representatives of the Respondent, including William T. Parker, now Chief of Security. As a result, the

Petitioner was re-assigned from the forensic unit to the central forensic unit because this was the only place where there was a vacancy. His shift and days off remained the same, which did not constitute a transfer under the terms of the contract. Such a re-assignment was not subject to being grieved under the terms of the bargaining agreement. See testimony of Parker and Mears.

10. The Petitioner's days off changed from the first and third weeks of the month to the second and fourth weeks of the month, but the days of the week remained the same. Although the evidence supports a finding that this move was voluntary, it is not material because, under terms of the bargaining agreement, such a re-assignment was not subject to a grievance.

11. The investigation established sufficient cause for the Respondent to issue an official letter of reprimand to the Petitioner for absenting his post without permission. Pursuant to internal policy, the Petitioner's new supervisor, Roger Howell, who had had nothing to do with the incident upon which the reprimand was based, issued the letter. See testimony of Howell and Bryant.

12. The Respondent introduced the Employee's Handbook, dated May 29, 2001, which the Petitioner had received. The book contains the Standards for Disciplinary Action, which include absences without authorized leave. This provision

provides that for the first occurrence of Absence Without Authorized Leave, the section under which the Petitioner was disciplined, the violator can be given a range of punishments from a written reprimand to dismissal. See testimony of Bryant.

13. Evidence was received that these penalties have been imposed upon employees of the Respondent without regard to race or gender. See testimony of Williams.

14. At the hearing, the Petitioner expressed his concern that his reprimand had been signed by someone who had no knowledge of the incident, and stated that he felt he had permission to leave his post. He also introduced a doctor's excuse (Petitioner's Exhibit 2); however, the date of the doctor's visit did not relate to the date of the incident.

15. The supervisor who signed the letter of reprimand and the personnel specialist who prepared the letter testified that it was policy for an employee's supervisor to sign the reprimand, even if he or she personally did not have knowledge of the events.

16. Mr. Williams testified regarding his authorization to the Petitioner to leave his post to get food. He was very credible. He expected the Petitioner, in accordance with regular procedure, to leave his post, get his food, and return to the post immediately, being absent from the Tower for



approximately 30 minutes. This was the normal process for getting food during a shift. The Petitioner was gone for two hours, and gone for over an hour without Williams being aware that Tower B was not covered.

17. There was significant evidence introduced that none of the actions complained of by the Petitioner were motivated by racial animus. The disciplinary action taken by the Petitioner was at the lower end of penalties that could have been imposed. The complainant, Williams, was also an African-American.

18. The PBA representative, whom the Petitioner specifically requested over the regular one at the hospital, testified regarding the events leading up to the Petitioner's re-assignment. The Petitioner sought a change of assignment and voluntarily accepted the change. See the testimony of Mears and Parker.

19. There was no evidence adduced to show pretext.

#### CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 120 and 760, Florida Statutes.

21. The Petitioner initiated a Petition for Relief alleging that he had been disciplined and transferred because of his race, contrary to Section 760.10.

22. The evidence produced at hearing showed that the Petitioner's "transfer" was a re-assignment under terms of the collective bargaining agreement to which the Petitioner was subject. The Respondent could re-assign personnel at will, and re-assignment was not subject to grievance. In sum, re-assignment was not an adverse personnel action.

23. Regarding the letter of written reprimand, the Respondent presented evidence to show that the Petitioner absented himself without authority from his guard post, an action for which he could have been dismissed for the first offense. The Respondent had sufficient cause to issue the Petitioner a written reprimand, which it did in accordance with its internal procedures. The Respondent had a legitimate, non-discriminatory reason for issuing the letter of reprimand.

24. None of the evidence presented indicates that the discipline imposed was a pretext for racial or other illegal discriminatory animus.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations dismiss the Petition for Relief filed by the Petitioner.

DONE AND ENTERED this 31st day of March 2004, in  
Tallahassee, Leon County, Florida.

*Stephen F. Dean*

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STEPHEN F. DEAN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of March, 2004.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.