VOID FOR VAGUENESS ISSUES UNDER THE 14th AMENDMENT IN ADMINISTRATIVE DISCIPLINE CASES IN STATE LAW

IN THE CHANCERY COURT FOR DAVIDSON COUNTY TENNESSEE

E. JACKSON SMITH

v. No. 06-1095-IV

Nat E. Johnson, Acting Commissioner of Personnel and
Executive Secretary, the CIVIL
SERVICE COMMISSION and the
TENNESSEE DEPARTMENT OF HEALTH

Plaintiff's Brief and Memorandum of Law

STATEMENT OF FACTS

This entire case is based on a complaint about one telephone call that plaintiff Eddie Jackson Smith made to obtain information for his Supervisor Mary Jo Harlan. Harlan's supervisor, Ms. Carney, had sought information from Harlan about a pending emergency investigation of a Dr. Long relating to his possession or use of drugs and weapons, and his instability. Supervisor Harlan then talked to Mr. Smith about it and he called Dr. Long's office as a direct result. Supervisor Carney and her boss got embarassed about the call because they had privately promised Dr. Long's office manager that they would not let the patients or medical staff know about this emergency problem. Mr. Smith knew nothing about this private promise.

The Tennessee Department of Health (hereinafter referred to as the
Department) brought disciplinary charges against Plaintiff Eddie Jackson Smith (hereinafter referred as Mr. Smith) who was protected by state civil service laws. The charges were allegedly set forth by the Department in its letters of August 16, 2004 and October 27, 2004. The Department issued a three day suspension for Mr. Smith which was timely appealed.

On April 20, 2004 Mr. Rick Hightower, administrator of the Pain Management Group Medical Practice and Ambulatory Surgical Treatment Center in Nashville called Denise Moran who is Director of the Office of Investigations for Health Related Boards of the Department. Tr. 31-32. Hightower was "agitated" and needed assistance because Dr. Long, the owner of the practice, was very volatile, threatening, was suspected of drug abuse and psychological problems and had a standoff with a SWAT team and was present at the medical practice and refusing to leave. Dr. Long, according to Hightower was intimidating and had been asked to leave but refused. Tr. 34-36. It was clear to Ms. Moran that Mr. Hightower was describing a person that was "dangerous" and "volatile." Tr. 80. Ms. Moran advised Mr. Hightower to call 911, the police emergency number. Tr. 81. To Ms. Moran's knowledge, however, Mr. Hightower did not call 911 and neither did she. Tr. 81, 87. Ms. Moran was not worried about the patients or other people at the medical practice that day because she assumed they were secure and because Mr. Hightower was talking to his corporate lawyers about it. Tr. 82. Ms. Moran decided that she would follow Mr. Hightower's lead on these matters (Tr. 83, 85), although Ms. Moran knew that there had been previous investigations by the Department of this medical practice of Dr. Long (Tr. 88-89,90-91) and previous investigations of Dr. Long. Tr. 90. Mr. Hightower did not want the two hundred patients per day medical practice disrupted and he wanted the staff and patients of the practice not to know about the investigation. Tr. 38-39. Ms. Moran agreed to this. Tr.40.

Denise Moran initiated an immediate investigation on a level that she described as a Priority 5 which could take up to two weeks but this investigation resulted in a summary suspension of Dr. Long within two days. Tr. 35, 41, 43.

Ms. Moran sent investigators to the medical practice that day (April 20) and told her assistant Ms. Carney how volatile and dangerous the situation at the medical practice was and instructed Ms. Carney to contact and tell this to Mary Jo Harlan. Ms. Harlan is a Regulatory Boards Investigator Supervisor and is the direct boss of Mr. Smith. Tr. 54, 65-66, 273. As a result Ms. Harlan, without disclosing the volatile nature of circumstances at the medical practice, went to Mr. Smith and asked him if he had seen or heard anything about the situation at the medical practice with Dr. Long and the SWAT standoff (Ms. Harlan at Tr. 274; see also Tr. 110). Ms. Moran says Ms. Harlan told Mr. Smith that there was a SWAT standoff with Dr. Long and asked Mr. Smith what he knew based on Smith's having investigated physical therapist Boucher at that office last year Tr. 113. Ms. Harlan was then interrupted by someone else and quickly left. Tr. 113-114. As a result of Ms. Harlan telling all this to Mr. Smith and asking what he knows, without telling him the circumstances,Mr. Smith routinely calls the physical therapist, John Boucher, at the medical practice that he had investigated before and makes a routine inquiry. In fact Ms. Moran admits that Ms. Harlan askingMr. Smith about what he "might know about" the situation "gave rise … to Mr. Smith having made the phone call."

Tr. 66, lines 9-13. According to Ms. Moran, Mr. Smith believed, based on his boss's statements that the SWAT standoff was happening at Dr. Long's office right then. Tr. 115, lines 15-17. Mr. Smith then reported this conversation with Boucher to his boss, Ms. Harlan, just as he would in any other case. Tr. 275,279,308-309. During the conversation with Boucher, Mr. Smith specifically said there was no investigation going on. Tr. 320, lines 16-17, Tr. 321-322, lines 19-20 and 1-2. Denise Moran confirmed that Mr. Smith told her that he told Boucher this was not an investigation. Tr. 116, 117-118.

Ms. Moran then scheduled and organized a meeting of the usual departmental people and attorneys to provide for the summary suspension hearing for Dr. Long and reviewed the reports involved. Tr. 42-43, 106. During this meeting at the Department's office, a departmental employee knocked on the door and said that Mr. Hightower was on the phone with a complaint and Ms. Moran sent Ms. Carney out of the room to talk to Mr. Hightower. Tr. 45-49. This very brief interruption (20 seconds to half a minute or a minute – Tr. 130-131) at the door and Ms. Carney's brief absence did not delay the decisionmaking by the Department and did not delay the scheduling of the summary suspension hearing for Dr. Long which was held the next morning. Tr. 52-53.

Ms. Moran and the Department admit that Mr. Smith's action in making the telephone call changed nothing and did not alter anything in the legal investigation and legal proceeding against Dr. Smith. Tr. 92-93. The Summary Suspension hearing against Dr. Long was held as scheduled on April 22, 2004 and everything was accomplished by that day from the Department's point of view. Tr. 108-109.

The Department, through Ms. Moran, initially stated that Mr. Smith's alleged breach of confidentiality was stating Dr. Long's name in the telephone call (Tr. 153), stating that there was an investigation in the telephone call (Tr. 153), and that Dr. Long's medical practice had to handle their "internal situation" differently after the call. Tr. 158, 159. However in response to questioning by the Judge, Ms. Moran said the alleged breach of confidentiality was that he called when it was not his case, that he used information from a previous case to make the call and that he used Dr. Long's name. Tr. 176. Under either of these scenarios, the bottom line isMr. Smith made the call in direct response to his boss, Ms. Harlan, asking him what he knew about Dr. Long and stating that Smith had information or sources from a previous case Smith had investigated there. (Tr. 169-170. "from Jack Smith's point of view, he's the subordinate, Mary Jo Harlan's the boss, and Mary Jo Harlan, as you say in your report, comes in and says, that we've got an investigation about Doctor Long, a SWAT Team problem. We've investigated him before. In fact, you investigated somebody else at Doctor Long's office – what do you know about this Jack?...That's what happened? Ms. Moran: that's, to my recollection, yes.").

In fact, it is undisputed that there is a direct line of information and conversation from each of Mr. Smith's bosses down to him about this investigation. Ms. Moran tells Ms. Carney about Dr. Long and the investigation and the SWAT Team. Ms. Carney tells Ms. Harlan about Dr. Long and the investigation and the SWAT Team. Ms. Harlan tellsMr. Smith, and also reminds him that she made a previous investigation about Dr. Long and the investigation and the SWAT Team.

Ms. Moran could not specify any state statute that Mr. Smith allegedly violated except TCA 63-1-117. Tr. 116-117, 151. Ms. Moran and Ms. Harlan testified that Departmental investigators should not make calls or help on unassigned investigations but could not cite any departmental policy, rule, or guideline to this effect. Tr. 296, 322.

In fact, only after the events of April 2004 concerning Dr. Long did the Department of Health issue such a written policy (Tr. 323).

No Department of Health official offered any testimony as to why Mr. Smith with 29 years experience would have made the telephone call to Mr. Boucher other than and except for his direct superior, Ms. Harlan, coming to him and asking him what he knew about Dr. Long. Mr. Smith acted throughout in an aboveboard and straight forward manner. Immediately after calling Mr. Boucher,Mr. Smith reported about his telephone conversation to his boss, Ms. Harlan. Tr. 275, 279, 308-309. There was no concealment byMr. Smith. Tr. 279.

Mr. Smith did not make any use of the previous departmental file where he had made an investigation at Dr. Long's practice. That file was in archives at central office several miles away fromMr. Smith's office. Tr. 280-281, 306.Mr. Smith never looked at that file in April 2004. Tr. 318. The only informationMr. Smith had was what Ms. Harlan had told him, Tr. 315, lines 6-8, and during that conversationMr. Smith told Ms. Harlan that he could call Mr. Boucher. Tr. 317 lines 4-6.

Mr. Smith did not know there was a Summary Suspension proceeding under way and no one told him. Tr. 328. Harlan did not tellMr. Smith that the situation at Dr. Long's practice was dangerous or volatile. Tr. 279. Mr. Smith had no intent to breach any confidence and only intended to do what his boss wanted. Tr. 325, 327 ("My Supervisor had come to me asking me if I knew of information regarding this matter. The telephone call to Mr. Boucher was to obtain information that she had asked me about."). The Department of Health does not even try to claim thatMr. Smith had any personal agenda or personal stake in this whatsoever.

The testimony of Mr. Boucher about the telephone call is not credible (whereasn Mr. Smith has an excellent reputation for truthfulness as set forth in the affidavits quoted in paragraph 16 herein). First, Boucher was apprehensive, nervous, upset, and intimidated during this very brief call. Tr. 118, 245. Second, the department told Boucher's boss, Mr. Hightower, that they were going to interview Mr. Boucher and the nature of the issue before they ever contacted Mr. Boucher, allowing an opportunity for influence or misdirection by Mr. Hightower. Tr. 124. Mr. Hightower is the medical practice administrator who testified at length that telling his staff and employees that the DOH investigators were there only to make a survey was neither untruthful but misleading. Tr. 233, 234-236. Third, Boucher's testimony was not reliable in that Boucher may have resentedMr. Smith because of the previous year's investigation.

When Boucher was asked if he resented Mr. Smith, Boucher did not deny it and did not say no in his initial answer. Instead Boucher said, well the case was cleared. Tr. 248. Fourth, many times in his testimony Boucher kept claiming that he remembered "exactly" what was said by Mr. Smith in this brief telephone conversation. See, for example, Tr. 245, 249. Finally, while Mr. Hightower says Boucher was laid off from his employment because his job was eliminated (Tr. 218), Boucher says it "was not." Tr. 241-242.

THE DEPARTMENT PRESENTED NO SUBSTANTIAL AND NO MATERIAL EVIDENCE TO SUPPORT A FINDING THAT ANY STATE LAW AUTHORITY WAS VIOLATED

The Department did not correctly apply or use statutory law in this case. TCA Section 63-1-117 is the law relied upon by the Department on the confidentiality issue, but said statute does not require

confidentiality for anyone except a complainant or witness (part b(2)), neither of which is involved in this case. Thus the only rule involved in this case is the departmental rule against betrayal of confidential information. A reasonably competent adult would not consider a doctor's name to be confidential information. While the Department is entitled to minimize disruptions, the only problem here was Ms. Carney having to step out of the meeting to make the telephone call to Mr. Hightower which did not disrupt the Summary Suspension from going forward in a timely manner.

At the time of the events in question in this case, the Department of Health had no other written rules or written policies that address these actions.

There is not material and substantial evidence in this record to support the department's suspension of Mr. Smith. Under these circumstances, the suspension of Mr. Smith should be reversed and the suspended days reinstated with back pay and full benefits.

THE DEPARTMENT FAILED TO ENFORCE PROGRESSIVE DISCIPLINE WHEN IT IMPOSED A LESSER PENALTY ON ONE SUPERVISOR INVOLVED AND NO DISCIPLINE ON THE OTHER SUPERVISOR

Progressive discipline is an alternative issue in this case. The Department disciplined both Ms. Harlan (Mr. Smith's immediate supervisor) and Mr. Smith. However, the discipline for Ms. Harlan was only an oral warning for incompetence and unprofessional conduct (Tr. 276) although Ms. Harlan was the supervisor and she had actual knowledge (that she did not share with Mr. Smith) that the situation was dangerous and volatile. Tr. 68. The Department did not discipline or punish Harlan's supervisor (Ms. Carney) at all even though Ms. Carney started this chain reaction by discussing the investigation with Ms. Harlan. No reason was given by the Department of Health as to why Ms. Carney ever told Ms. Harlan anything about Dr. Long and the SWAT team instead of Ms. Carney just saying Mr. Sailor will not be available today because I am assigning him another task. There was no investigation by the department and no recommendation of discipline for Ms. Carney. Tr. 141. Ms. Moran is the person who told Ms. Carney about the SWAT team and danger. Tr. 142.

Mr. Smith has been an investigator for almost 30 years. Tr. 70. Mr. Smith has received prior discipline on unrelated matters of an oral warning in May, 2003 (Exhibit 2-use of Internet) and a written warning in August, 2003 (Exhibit 3- records in office not in accord with HIPAA). Tr.73-75. The affidavits entered into evidence as Collective Exhibit 4 are the uncontested testimony of nine different supervisors and co-workers in the Department attesting that Mr. Smith does "not break confidentiality"(Gorski affidavit); has "never been known to… discuss any departmental confidential information"(M.Woods affidavit); is "diligent in his duties"(Hill affidavit); "takes his responsibilities very seriously"(Collins affidavit); acts "professionally"(Baker affidavit); is a "knowledgeable and truthful" person(Fosbinder affidavit); and performs at a "high level" with "great concern that his investigations be thorough and complete."(Sellers affidavit). Since the events of April 2004,Mr. Smith has voluntarily transferred to a different Department in state government. Tr. 272, 303.Mr. Smith has been a state employee for almost 30 years. Tr. 304.

Ms. Moran is the department official who recommended the three day suspension (Tr. 76) even though she was the official who felt pressured to apologize to Mr. Hightower (and described it as not pleasant). Tr.

96-97. Ms. Moran considered terminating Mr. Smith but reduced it to suspension because of his years of service. She did not consider an oral warning or written warning for Mr. Smith. Tr. 77-78.

T.C.A. Section 8-30-330 states:

(a) The supervisor is responsible for maintaining the proper performance level, conduct, and discipline of the employees under the supervisor's supervision. When corrective action is necessary, the supervisor must administer disciplinary action beginning at the lowest appropriate step for each area of misconduct.

(b) Any written warning or written follow-up to an oral warning which has been issued to an employee shall be automatically expunged from the employee's personnel file after a period of two (2) years; provided, that the employee has had no further disciplinary actions with respect to the same area of performance, conduct, and discipline.

(c) When corrective action is necessary, the supervisor must administer disciplinary action beginning at the step appropriate to the infraction or performance. Subsequent infractions or poor performance may result in more severe discipline in accordance with subsection (a).

In Berning v. State, 996 S.W.2d 828, 830 (Tenn. App. 1999) the court ruled that "the key word in the statute is 'appropriate'…. Tennessee's Civil Service statutes and rules incorporate the doctrine of progressive discipline. Accordingly, state supervisors are expected to administer discipline beginning at the lowest appropriate step. Kelly v. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. 1999). Further, the Court of Appeals in expressing approval of the progressive discipline system, has stated that the legislative mandate for progressive discipline should be "scrupulously followed". Berning v. State of Tennessee, Department of Correction, 996 S.W.2d 828, 830 (Tenn. Ct. App. 1999). The department acted in an arbitrary and capricious manner, abusing their authority when they failed to follow the progressive discipline law and exceeded their statutory authority.

In this case there is no evidence to support a conclusion that a three day suspension was the lowest appropriate level of discipline, especially where other Department of Health supervisory employees communicated the same information and were not disciplined or received only a verbal warning

A major factor in determining the appropriate level of discipline is to see how other Department of Health employees who have committed the same or similar infractions have been disciplined and whether the punishment imposed upon Mr. Smith is different. See Gross v. Gilless, 26 S.W. 3rd 488, 495 (Tenn. Ct. App.1999), Perm. to Appeal Denied (Tenn. 2000). It was arbitrary and capricious for Mr. Smith to be suspended when other employees were treated differently. THE DEPARTMENT VIOLATED MR.SMITH'S DUE PROCESS RIGHTS BY FAILING TO GIVE PROPER NOTICE OF THE CHARGES AND BY DEFINING CONFIDENTIALITY IN A VAGUE AND OVERBROAD MANNER

Mr. Smith is an employee of the state who is classified as a regular employee and therefore is entitled to both due process protections and the civil service law protections. The state violated due process by intentionally and deliberately using a statutory law that did not apply to these circumstances and by relying upon third party witnesses (whose testimony contradicted one another) who had

entered into an agreement with the state government to silence and conceal knowledge and information about the absence of safety and quality of healthcare being provided. The state also violated due process by failing to give proper notice of the charges in this case.

The Department has violated due process guarantees by failing to provide adequate, proper and timely notice of the allegations against Mr. Smith. The Department changed the sections under which Mr. Smith is charged and thus denied proper notice to Mr. Smith. The Department also failed to follow proper statutory requirements under TCA 8-30-331 that mandate proper notice. See also Cleveland Bd. of Education v. Loudermill, 470 U. S. 532, 84 L. Ed. 2d 494,105 S. Ct. 1487 (1985).

The Deparment ex parte affidavits do not provide proper or adequate notice to Mr. Smith. The affidavits do not cure the Deparment's failure to provide fair notice and minimum due process at the beginning of these
legal proceedings. Post hoc rationalizations for administrative action "have traditionally been found to be an inadequate basis for review." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419 (1971). "[A]n advocate's hypothesis that an administrative decision-maker did in fact conclude thus-and-such because the record shows that he could reasonably have concluded thus-and-such, is not likely to be highly impressive. The courts prefer to appraise the validity of an order by examining the grounds shown by the record to have been the basis of decision." W. Gellhorn, C. Byse, & P. Strauss, Administrative Law 361 (7th ed., 1979). Accordingly, the Deparment affidavits are inadequate and insufficient to remedy the original denial of Mr. Smith's due process rights.

In answering the interrogatories and discovery in this case and in their evidence at trial, the Deparment has been unable to state with specificity the facts and details which allegedly support the charges brought against Mr. Smith. Since the Tennessee Department of Personnel rules fail to state with clarity the conduct that is forbidden and fail to state with specificity what confidential information Mr. Smith supposedly betrayed or how Mr. Smith seriously disrupted the department or what conduct of Mr. Smith is gross misconduct, then it is unclear for people of ordinary common sense to know how to conform their conduct to meet the Tennessee Department of Personnel (DOP) rules and there is no reasonable definiteness to be used by managers to decide who has allegedly violated those rules. Accordingly, the rules used by the Department are void for vagueness.

Neither the definitions section of the state law nor the DOP rules state or define the nature, scope or extent of "confidential information" or "betrayal". Therefore,
these rules fail to establish standards for the state and public that are sufficient to guard against arbitrary and capricious deprivation of liberty. Accordingly, the rules used by the Department are void for vagueness.

In this case the rules are vague and the orderly process of litigation has not clarified the rules. When asked to state in Interrogatory No. 2 specifically what Mr. Smith did wrong, the Department failed to state any specifics. Instead the Department produced a memorandum of August 5, 2004 to Commissioner Robinson from Ricky T. Frazier, special Assistant for Administration (copy of said memorandum attached to original motion to dismiss). Under the Conclusions section on page 2, Mr. Frazier writes:

"In regards to his (meaning Mr. Smith) assertion he did not betray any confidential information; there is "room" for such debate." (emphasis added).

Accordingly, the rules used by the Department are void for vagueness.

According to the Department's own investigation of this matter, it is arguable that Mr. Smith is correct that no "confidential information" was "betrayed" and neither this interrogatory answer nor any evidence at trial even attempts to clarify or provide guidance as to the meaning of the rules under which Mr. Smith is charged. Thus, either the rules used by the Department are void for vagueness or the Department failed to provide proper and adequate notice of the charges.

The state also violated due process by failing to meet its burden of proof where its primary witnesses contradicted each other; where the state relied upon the wrong law. Under such circumstances, suspension of the petitioner was certainly unwarranted, arbitrary and capricious. Further, the state failed to use or follow statutory requirements concerning progressive discipline. Based upon the above, the actions of the respondents violate the due process rights of Mr. Smith, violate statutory provisions, are in excess of their statutory authority, were made upon unlawful procedures, were made in an improper manner, and were done in an arbitrary, capricious, abusive manner using a clearly unwarranted exercise of discretion. Further, the decision below is unsupported by evidence that is both substantial and material.

Any claim by the Department about misconduct, disruption, or confidentiality concerning Mr. Smith's telephone call faces severe constitutional constraints. In Doe v. Doe, 127 S.W.3d 728(2004); 2004 Tenn. LEXIS 128 the Tennessee Supreme Court reviewed the impact of the First and Fourteenth Amendments on agency rules that try to make files and investigations "confidential" and held such rules unconstitutional.

The free speech clause of the First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." Similarly, Article I, section 19 of theTennessee Constitution states in relevant part that "the free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Article 1, section 19 provides protection of free speech rights at least as broad as the First Amendment. Leech v. Am. Booksellers Ass'n, Inc., 582 S.W.2d 738, 745 (Tenn. 1979).

Content-based restrictions are presumptively invalid, R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 382, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992), and must be subjected to the most exacting scrutiny. Boos v. Barry, 485 U.S. 312, 321, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988). Under the strict scrutiny standard adopted in Doe v. Doe, the State has the burden of proving (1) that the restriction is necessary to serve a compelling state interest and (2) that it is narrowly drawn to achieve that end. Burson v. Freeman, 504 U.S. 191, 198, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992).

In Doe v. Doe, the court held that the rule making attorney grievance complaints and investigations confidential violated the constitution: "We conclude that the three interests advanced by the Attorney General
- protection of reputation of an attorney and the Bar from meritless complaints, protection of anonymity of complainants and other persons supplying information to the Board, and maintenance of the integrity of pending investigations - while legitimate, are not sufficiently

compelling to justify the restriction on free speech …, particularly considering the broad scope of its confidentiality requirement." This Court should follow the reasoning and ruling in the Doe case and apply it to this proceeding. CONCLUSION

For all these reasons, the suspension of Mr. Smith should be reversed. The respondents should be ordered to reinstate Mr. Smith's suspended days and to pay back pay, benefits, and reasonable attorney's fees pursuant to 42 U.S.C. §1983, 1988, et seq. and costs.Petitioner should be awarded reasonable attorney fees since petitioner was deprived of his constitutionally protected rights as a result of the unlawful action of the state operating under color of law. See, Wimley v.Rudolph, 931 S.W. 2d 513 (Tenn. 1996). The Wimley case specifically holds that petitioner in a UAPA appeal may seek and receive attorney's fees pursuant to 42 U.S.C. Section 1988.

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