

MARCIE ANNA BETTS,
CORRECTIONAL OFFICER I

v.

DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES

- * BEFORE D. HARRISON PRATT,
- * AN ADMINISTRATIVE LAW JUDGE
- * OF THE MARYLAND OFFICE
- * OF ADMINISTRATIVE HEARINGS
- * OAH NO.: SPMS-RCI-11-03-07088

* * * * *

DECISION

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STATEMENT OF THE CASE

On January 29, 2003, the Department of Public Safety and Correctional Services ("DPSCS" or "Management") notified Marcie Anna Betts, a Correctional Officer I ("Employee"), that she was being terminated on initial probation effective February 12, 2003. The Employee appealed this action to the Office of Administrative Hearings on March 17, 2003. Md. Code Ann., State Pers. & Pens. § 11-110 (Supp. 2003).

A hearing was held on August 19, 2003 and September 22 and 23, 2003 at the Roxbury Correctional Institution ("RCT"). The hearing was held before D. Harrison Pratt, an Administrative Law Judge ("ALJ"), pursuant to Md. Code Ann., State Pers. & Pens. § 4-401 (1997 & Supp. 2003) and the Code of Maryland Regulations ("COMAR") 17.04.07.14. The Employee was present and was represented by Jonathan L. Katz, Esq. 1400 Spring Street, Suite 410, Silver Spring, Maryland and Lawrence G. Walters, Esq., 781 Douglas Avenue, Altamonte

Springs, Florida. Mr. Walters participated in the hearing by telephone. The DPSCS was represented by Scott Oakley, Esq., Assistant Attorney General, 6779 Reisterstown Road, Suite 313, Baltimore, Maryland.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999 & Supp. 2003); COMAR 28.02.01.

Preliminarily, the Employee was advised that her appeal is limited to the legal and constitutional bases for the termination. Md. Code Ann., State Pers. & Pens. § 11-303(d) (1997 & Supp. 2003). Attorney Walters indicated that the Employee's termination was being challenged on the basis of the first amendment protections of the United States Constitution.

ISSUE

The issue is whether the Employee was terminated on initial probation for illegal or unconstitutional reasons.

SUMMARY OF THE EVIDENCE

Exhibits

The Employee submitted the following documents that were admitted into evidence:

- Appellant Ex. 1 Investigation Report of Captain Keith Lyons, January 23, 2003.
- Appellant Ex. 2 General Release Form, May 29, 2002.
- Appellant Ex. 3 Memo from Captain Marvin Lewis to Warden Joseph Sacchet, January 29, 2003.
- Appellant Ex. 4 Page from "Burning Angel" website and page from "Tabu Tattoo" magazine.
- Appellant Ex. 5 State Personnel Management System Appeal and Grievance Form,

- February 4, 2003.
- Appellant Ex. 6 DPSCS Disciplinary Appeal Decision, March 6, 2003.
- Appellant Ex. 7 DPSCS Standards of Conduct & Internal Administrative
Disciplinary Process.
- Appellant Ex. 8 Correctional Officer I job description.
- Appellant Ex. 9 RCI Institutional Directive #35-7-1, CJIS/OBSCIS/Micro-
Computer Privacy & Security Requirements, September 13, 2002.
- Appellant Ex. 10 RCI Institutional Directive #220-004-1, Allowable Property, May
12, 2003.
- Appellant Ex. 11 RCI Institutional Directive #250-1-2, Incoming/Outgoing Mail,
January 14, 2003.
- Appellant Ex. 12 Division of Correction ("DOC") Directive #35-7, Data Processing
Privacy and Security Requirements, February 15, 2002.
- Appellant Ex. 13 DOC Regulation #50-57, Contraband, July 1, 1987.
- Appellant Ex. 14 DOC Directive #220-004, Allowable Inmate Property, December
1, 1998.
- Appellant Ex. 15 DOC Directive #250-1, Incoming and Outgoing Mail, July 15,
1989.
- Appellant Ex. 16 Institutional Directive #250-1-2 (continued).
- Appellant Ex. 17 Unsatisfactory Report of Service filed by Warden Joseph Sacchet,
January 29, 2003.
- Appellant Ex. 18 Letter from Attorney Scott Oakley to Attorneys Lawrence Walters
and Jonathan Katz, September 15, 2003.

Management submitted the following document that was admitted into evidence:

Mgt. Ex. 1 Personal and Professional Resume of Ron Angelone.¹

Admitted as Joint Exhibit #1 was a notebook containing the photographs of the Employee that were displayed on the "Burning Angel" website.

Testimony

The Employee testified on her own behalf.

The following individuals testified on behalf of Management:

1. Mark Martin, Correctional Officer Lieutenant, Investigating Officer for RCI.
2. Ron Angelone, admitted as an expert in correctional management and custody operations.
3. Marvin Lewis, Correctional Officer Captain.
4. Joseph Sacchet, Warden, RCI.
5. Keith Lyons, Correctional Officer Captain, Investigation Captain for RCI.

FINDINGS OF FACT

Having considered the evidence presented, I find the following facts by a preponderance of the evidence:

1. In May 2002, the Employee filed an application for employment with the DPSCS.
2. On May 29, 2002, after filing her application for employment, but before being hired, the Employee sold 2 CDs containing 81 pictures of herself to an Internet website called "Burning Angel". One of the CDs was sent to the website before the Employee was interviewed for her job and the other CD was sent after the interview.

¹ Management offered but then withdrew a document pertaining to characteristics of inmate populations.

3. The Employee's pictures appeared on the "Burning Angel" website in late May or June 2002.
4. On October 29, 2002, the Employee was hired as a Correctional Officer with the DPSCS. She began working on November 18, 2002. She completed her training on January 7, 2003.
5. The photographs of the Employee were taken by the Employee and her husband and were sold to the website for \$300.00. The photographs show the Employee in various poses, including poses where the Employee is wearing little or no clothing. The photographs also depict the Employee licking a dildo, with a dildo in her mouth and with her finger in her vagina and anus.
6. The photographs have not been determined or adjudicated to be obscene.
7. On January 20, 2003, while the Employee was on duty in the dining hall, she was approached by another Correctional Officer who asked the Employee if she had appeared in photographs on the internet. The Employee replied that she had not. On the same day, the Employee was asked the same question by an inmate and she again replied that she had not.
8. On January 21, 2003, a packet containing some of the photographs from the website was anonymously placed under the Warden's door. The Warden had Cpt. Lyons and Lt. Martin conduct an investigation.
9. On January 22, 2003, in an interview with Cpt. Lyons and Lt. Martin, the Employee acknowledged that the photographs were of her and that she had sold them to the "Burning Angel" website.

10. As part of their investigation, Cpt Lyons and Lt. Martin accessed the "Burning Angel" website by paying a membership fee. They printed the 81 photographs of the Employee that were on the website.
11. On January 29, 2003, after meeting with the Warden, the Employee was terminated. The termination was effective on February 12, 2003. At the time of her termination, the Employee was on initial probation. She was terminated as a result of her photographs appearing on the website.
12. Inmates are not permitted to use any computers that can access the Internet. Inmate's mail, incoming and outgoing, is monitored. Inmates are permitted to have sexually explicit material.
13. While employed with the DPSCS, the Employee was an excellent employee.

DISCUSSION

In an appeal of a termination on initial probation, the employee must establish by a preponderance of the evidence that there was an illegal or unconstitutional reason for her termination. Md. Code Ann., State Pers. & Pens. Section 11-109(b) (Supp. 2003) and Section 11-303(d) (1997); COMAR 17.04.05.01E(2). Section 11-109(b)(1) and (2) provide that "an employee in a skilled service or professional service may appeal a disciplinary action taken while the employee is on probation only on the basis that the action was illegal or unconstitutional" and the "employee has the burden of proof." Pursuant to COMAR 17.04.05.01(E)(2) and (F), the only issue relevant in a hearing as to termination of a probationary employee is "whether the employer's action was illegal or unconstitutional." In the instant case, the Employee has the threshold burden of showing that her speech is entitled to constitutional protection and that her protected speech was the basis for her termination. Should the Employee meet her threshold

burden, then Management has the burden of showing that its termination was not illegal or unconstitutional, i.e. that it would have terminated the Employee even if she had not engaged in the protected speech. Smack v. Department of Health & Mental Hygiene, 134 Md. App. 412, 759 A.2d 1209 (2000), Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. (1977), Hawkins v. Department of Public Safety and Correctional Services, 325 Md. 621, 602 A2d 712 (1992).

For the following reasons, I find that the Employee has met her burden of showing that her speech was protected speech and that she was terminated as a result of that protected speech. I find further that Management has failed to meet its burden of showing that its termination was constitutional, i.e. that it would have terminated the Employee even absent the protected speech.

PROTECTED PUBLIC SPEECH

All agree that the Employee was terminated solely because pictures of her were published on the website "Burning Angel" and in the magazine "Tabu Tanoo". Furthermore, the photographs have not been determined by any court to be obscene. That the publishing of the photographs, even though non-verbal speech, is sufficient to raise the issue of first amendment protection is also clear from the evidence and as supported by case law. Therefore, the Employee has met her initial burden. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977), Flanagan v. Munger, 890 F.2d 1557 (10th Cir., 1989).

For the following reasons, I find that Management has failed to show that its termination was constitutional and that it would have terminated the Employee even absent the publication of the photographs. The discussion and holding in Flanagan is controlling. The Plaintiffs in Flanagan were police officers who were reprimanded for having a part interest in a video store that rented sexually explicit videos. The Flanagan court relied on the Supreme Court decisions in

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968) and Connick v. Myers, 461 U.S. 138, 103 St. Ct. 1684 (1983). Under the Pickering/Connick test, in order to assess "whether a public employer has violated an employee's right to freedom of speech, a court is to 'arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting efficiency of the public services it performs through its employees.'" Pickering, 391 U.S. at 568, 88 S.Ct. at 1734.

Normally, according to the Flanagan court, there is a two step analysis: first a determination as to whether the employee's speech is "upon a matter of public concern and if so, we balance the employee's interest in free speech against the 'government's interest in the effective and efficient fulfillment of its responsibilities to the public. Connick, 461 U.S. at 150, 103 S.Ct. at 1692.

Referring further to the Connick holding, the Flanagan court stated:

If an employee's speech "cannot be fairly characterized as constituting "speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for the [employer's adverse employment decision]. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Connick, 461 U.S. at 146, 103 S.Ct. at 1690.

The Flanagan case concerned public employer discipline for public employee speech, however, it was factually and conceptually different than a typical case analyzed under the Pickering/Connick test. Cases typically analyzed under the Pickering/Connick test involve an employee disciplined for disruptive comments made "about work." Flanagan, as in the instant case, involved speech that was off the job and that was unrelated to any "internal functioning of the employer." In Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891 (1987), the

Pickering/Connick test was extended to cover cases of discipline for employee speech that was unrelated to employment but that was made while at work. Flanagan, at 1562.

Flanagan held that the "public concern" prong of the Pickering/Connick test was inappropriate and did not apply in cases where the employee's "nonverbal protected expression does not occur at work and is not about work." The Flanagan court further held that:

The alternative test should be whether the speech involved is "protected expression." If the speech involved is protected, then the second half of the existing Pickering test- the balancing between the employee's right to free speech and the employer's right to curtail activity that interferes with the efficient operation of the office - should be applied. This approach is consistent with the underlying principles behind the Pickering and Connick decisions and their application of the public concern test. Even the Fourth Circuit in the Berger case, which applied the public concern test, agreed that the principles behind the cases would support an approach of this type. Flanagan, at 1564-1565.²

As the instant case concerns "speech" that did not occur at the Employee's place of work and that was not about her work, the public concern test does not apply. The second prong of the Pickering/Connick test, the balancing between the employee's right to free speech and the employer's right to curtail activity that interferes with the efficient operation of the office, does apply.

THE BALANCING TEST

The Flanagan court, in providing guidelines for applying the balancing test, refers to several other cases. Flanagan at 1565. Under Pickering, we must balance the Employee's interest in engaging in protected expression, i.e. having her explicit photographs published on the

² The Flanagan court referred to the following passage from the Berger case: "The principle that emerges is that all public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which is of purely 'personal concern' to the employee-most typically, a private personal grievance." Berger, 779 F.2d at 998 (emphasis in the original). The instant case does not involve a private personal grievance.

internet and in the magazine, against the State's interest in "promoting the efficiency of public services it performs through its employees." Pickering, 391 U.S. at 568, 8 S.Ct. at 1735. In balancing, "we consider the content, context, manner, time and place of the employee's expression." Connick, 461 U.S. at 152-153, 103 S.Ct. at 1693. Pertinent considerations include "whether the [expression] impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the speaker's duties or interferes with the regular operation of the enterprise." Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 2898 (1987) (citing Pickering, 391 U.S. at 570-573, 88 S.Ct. at 1735-1737). Essentially, the balance must tip in favor of protection of speech "unless the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." Childers v. Independent School District No. 1, of Bryan County, 676 F.2d 1338, 1341 (10th Cir. 1982).³

On one hand, as in Flanagan, the Employee has established a substantial interest in engaging in the taking of photographs of herself and having them published, in that she was exercising her free speech right, a basic and integral protection provided by the Constitution. On the other hand, the DPSCS has an interest in protecting its Correctional Officers, including the Employee and other staff and inmates within the prison system. The DPSCS also has an interest in providing for the efficient and regular operation of the prison.

The allegations against the Employee are contained in Cpt. Lyons' investigative report of January 23, 2003. (Appellant's Ex. #1). According to this report, there were 2 allegations:

³ As pointed out in Flanagan, the Pickering balancing test is concerned with the employee's "interest" in engaging in free speech and not in the "value" of the speech itself. Flanagan at 1565.

1. That the website exists ("Burning Angel") that contains explicit nude and pornographic photographs of Correctional Officer Marcie Betts.
2. That the pictures contained in the Website ("Burning Angel") on the Internet, will diminish her capability to perform her duties, compromise her as a professional correctional officer and may jeopardize her personal safety.

Security Issues

Certainly no one would reasonably contest that many of the inmates in the prison system are dangerous and at times violent. Inmates housed at the RCI have been incarcerated for various crimes including murder, rape, assault, armed robbery, drug offenses and sexual assault. Correctional Officers are admittedly greatly outnumbered by the inmates and normally order and control must be maintained by something other than force.

Those testifying on behalf of the DPSCS were all of the opinion that the Employee was put at greater risk "should" the inmates come into possession of her photographs. The consensus of the DPSCS witnesses was that inmates who saw the Employee's photographs would view her differently, that they would view her as a sexual object. This view, according to DPSCS witnesses, would create a greater likelihood that the inmates would either sexually assault the Employee or try to compromise her with the knowledge they had of the photographs. The DPSCS witnesses also testified that the safety of other Correctional Officers would be jeopardized because they "might" have to come to the Employee's assistance if she were attacked.

Although all of the DPSCS witnesses were of the opinion that the Employee and other Correctional Officers would be placed in greater danger if the inmates came into possession of the photographs, they have provided no credible evidence to support their opinions. I note that the photographs were published on the website in late May or June 2002. There is scant evidence

to show that in the intervening 15 months between June 2002 and the date of the hearing that inmates have even been aware of the photographs let alone had possession of them. Although the DPSCS claims that an inmate was in possession of the photograph included in the "Tabu Tattoo" magazine, it was in fact intercepted by prison staff before getting to the inmate. The only other evidence that others were aware of the photographs is the inquiry made by another Correctional Officer and one inmate. They both asked the Employee if she had photographs on the Internet to which she replied that she did not. There is no evidence that the other employee or the inmate ever had possession of photographs or had accessed the website. Furthermore, there is no evidence that anything untoward happened as a result of what the other employee and the inmate knew, or might have known. In short, nothing happened that would indicate any actual increase in danger to the Employee, other staff or inmates.

I also note that the institutional regulations permit inmates to have sexually explicit material, including photographs and magazines. (Appellant's Ex. #11). Also, access to computers is restricted. Inmates are not permitted to use any computers that can access the Internet and they are not permitted to have any computer storage devices such as CDs. (Appellant's Ex. #12). Inmate mail, both incoming and outgoing, is monitored. (Appellant's Ex. #15). These measures provide the institution with some means by which to keep photographs of the Employee from getting into the institution.

The DPSCS argues, however, that these measures are inadequate and that eventually the Employee's photographs will become available to inmates. To support this position, the DPSCS claims that inmates are able to receive illegal drugs in spite of numerous regulations prohibiting drugs. According to the DPSCS witnesses, illegal drugs get into the institution through inmate family members and even through employees.

The regulations pertaining to drugs, however, are intended to keep all illegal drugs out of the institution. Sexually explicit photographs and material, however, are permitted into the institution and are readily accessible to the inmates. While this might make it easier for inmates to obtain the Employee's specific photographs, it also means that inmates already have ready access to other sexually explicit photographs. The DPSCS argues further that the security risk "would be" increased "if" an inmate had the Employee's photographs and the Employee was standing right in front of the inmate as opposed to the inmate having the photograph of some other person not in the inmate's presence. The evidence to support this hypothesis is lacking and speculative. Why an inmate would be more prone to attack because he has the Employee's photographs rather than any other photographs has not been demonstrated. Although the DPSCS witnesses all agree that the danger is enhanced, their opinions are not based on any specific examples and they did not point to any. Although these witnesses have considerable experience in the field of corrections, none are Psychologists and none testified of any prior experiences similar to this case. Furthermore, as mentioned previously, the only photograph ever to get into the institution was in fact intercepted by the staff. There simply is no evidence that anyone, other than Cpt. Lyons and Lt. Martin during their investigation in this case, ever received copies of the photographs or accessed the website.

Finally, as to the issue of security, it is relevant and significant that the Employee's actions, i.e. taking photographs of herself and publishing them on the Internet, were conducted while she was not an employee of the DPSCS. Her actions were taken more than 5 months before she was hired and she was hired without any questions concerning nude modeling or the like. Her actions were legal and she did not attempt to deceive her prospective employer.

Any increase in danger or security risks was at best minimal and the evidence on this issue is clearly speculative. Although much deference is normally afforded institution administrators as to security issues, such deference is inappropriate when, as in the instant case, there is little evidence of increased danger while, on the other hand, significant free speech interests are at stake.

Conduct Unbecoming a Correctional Officer

The DPSCS Standards of Conduct II, B, 1, provides:

Each employee shall conduct him/herself at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any employee of the Department, either within or outside of his/her place of employment, which tends to undermine the good order, efficiency, or discipline of the Department, or which reflects discredit upon the Department or any employee thereof, or which is prejudicial to the efficiency and discipline of the Department even though these offenses may not be enumerated or stated, shall be considered conduct unbecoming an employee of the Agency, and subject the employee to disciplinary action by the Agency.

The Employee was hired in October 2002 and began working in November of that year. When she took the photographs of herself and had them published on the website, she was not an employee of the DPSCS. The actions for which she was terminated all took place before she was employed. The conduct which is said to be unbecoming a Correctional Officer was conduct committed by someone who was not a Correctional Officer. Furthermore, the DPSCS provided the Employee with no basis for even knowing that her pre-employment actions, which were legal actions, were or even could be conduct unbecoming a correctional officer and could lead to her termination. In fact, at the time the DPSCS offered her a position, it indicated that there were conditions. In the letter of October 29, 2002 (Appellant's Ex. #17), the Employee was informed that the offer of a position was made "pending a negative result of your drug test, pre-placement

physical and completion of your background investigation." She was also informed that she had to meet selection standards and that if she did not the offer of employment could be withdrawn and that she could be terminated from her position. All of which goes to show that the DPSCS could easily have inquired as to the Employee's past and informed her that the publishing of her photographs would preclude her being hired or result in her termination.

The Standards of Conduct themselves make no mention of a prohibition against nude modeling and the examples of unacceptable behavior contained in the Standards would not lead one to conclude that publishing sexually explicit photographs would be a reason for not being hired or for termination. The photographs of the Employee in no way identify her as a Correctional Officer, prospective Correctional Officer, State employee or prospective State employee. She was not in uniform in the photographs and no references to the DPSCS, employees of the DPSCS, the State or Correctional Officers were made. The DPSCS has presented only opinion evidence that the Employee's pre-employment, legal actions "would" interfere with her duties. The DPSCS has not demonstrated that the pre-employment legal actions of the Employee fit into any of the unacceptable actions listed in the Standards of Conduct or that her actions were in any other way conduct unbecoming a Correctional Officer.

Summary

The DPSCS has shown, at best, that there "might" be an increased security risk "should" the Employee's photographs come into the possession of inmates. Even if the security risk is increased, the DPSCS has demonstrated, at best, that the increased risk is minimal. The DPSCS's position is based on the speculation of its witnesses, with little evidence that the photographs would get into the hands of the inmates or that if they did the danger would be anything but minimal. I reject the expert testimony of the DPSCS witnesses because it is based on speculation.

In the balancing process, the Employee's Constitutional right to take photographs of herself and publish them, far outweighs the minimal impact that such activities "might" have on the DPSCS's ability to protect staff and inmates and to efficiently operate its facilities.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Employee's termination on initial probation was unconstitutional in that it violated her right to freedom of speech.

ORDER

I **ORDER** that Employee's termination on initial probation be, and it is hereby **RESCINDED**, and I further;

ORDER that the Employee be reinstated in her previous position with restitution of full pay and benefits; and I further;

ORDER that this matter be set in for an additional hearing on the Employee's Motion for Attorney fees.

November 12, 2003
Date

D Harrison Pratt
D. Harrison Pratt
Administrative Law Judge 9

DHP/cf
#57007

REVIEW RIGHTS

A party aggrieved by this final administrative decision may file a petition for judicial review with the circuit court for the county where any party resides or has a principal place of business within thirty (30) days of the mailing of the decision. Md. Code Ann., State Gov't § 10-222 (1999); Md. Rules 7-201 through 7-210. The Office of Administrative Hearings is not a party to the judicial review process.