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3-9-2011

DEPARTMENT OF CORRECTION, Petitioner,  
vs. SCOTTY SMITH, Grievant.

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**BEFORE THE TENNESSEE  
CIVIL SERVICE COMMISSION**

**IN THE MATTER OF :** )  
 )  
**DEPARTMENT OF CORRECTION,** )  
 **Petitioner,** )  
 )  
**vs.** )  
 )  
 )  
**SCOTTY SMITH,** )  
 **Grievant.** )

**DOCKET NO. 26.05-109896J**

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**NOTICE OF DEFAULT AND INITIAL ORDER**

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This matter came to be heard on March 9, 2011, before Steve Darnell, Administrative Law Judge, sitting for the Tennessee Civil Service Commission. The Petitioner, the Tennessee, Department of Correction (hereinafter "TDOC"), was represented by attorney Bryce Coatney. The Grievant did not appear for the hearing, and no one appeared on his behalf.

At the beginning of the hearing, counsel for the Petitioner made a motion, pursuant to T.C.A. § 4-5-309, for an Order finding the Grievant to be in default. A review of the record shows that the Grievant was provided notice of the hearing. The Petitioner's motion was **GRANTED**, and the Grievant was held in **DEFAULT**.

### **NOTICE OF DEFAULT**

**NOTICE IS HEREBY GIVEN TO THE GRIEVANT THAT THE GRIEVANT HAS BEEN HELD IN DEFAULT FOR FAILURE TO APPEAR AT A HEARING ON THE MERITS AFTER RECEIVING ADEQUATE NOTICE, AS PROVIDED BY T.C.A. § 4-5-309. THE GRIEVANT HAS 15 DAYS FROM THE EFFECTIVE DATE OF THIS ORDER TO REQUEST THAT THIS FINDING OF DEFAULT BE SET ASIDE. THIS REQUEST MUST BE RECEIVED IN THE OFFICE OF THE SECRETARY OF SATE, ADMINISTRATIVE PROCEDURES DIVISION, 312 ROSA L. PARKS AVENUE, 8<sup>TH</sup> FLOOR, WILLIAM R. SNODGRASS TOWER, NASHVILLE, TENNESSEE 37243. THE REQUEST TO HAVE THE FINDING OF DEFAULT SET ASIDE SHOULD INCLUDE THE REASONS TO JUSTIFY THE GRIEVANT'S FAILURE TO APPEAR. IF THE GRIEVANT DOES NOT REQUEST THAT THE DEFAULT BE SET ASIDE OR OTHERWISE APPEAL THE ACCOMPANYING INITIAL ORDER, THEN THE INITIAL ORDER WILL BECOME A FINAL ORDER SUBJECT TO COURT REVIEW.**

### **INITIAL ORDER**

After the Grievant was held in default, the Petitioner elected to proceed uncontested in this matter and present its proof. The Grievant, a former employee of the TDOC, has appealed his termination from the agency's Turney Center Industrial Complex. The Grievant was originally disciplined for misconduct. While an appeal of that action was pending he went on leave for medical reasons not specified here and exhausted all leave benefits available to him. He was ultimately dismissed as having failed to make arrangement either to return to work or to provide specifics as to the need for continued unpaid leave. The suspension and the dismissal

were both addressed in 4<sup>th</sup> Step hearing decision by TDOC Commissioner Gayle Raye, on September 17, 2010. The present hearing on this 9<sup>th</sup> day of March, 2011, constituted the Grievant's 5<sup>th</sup> step hearing before the Tennessee Civil Service Commission on both the suspension and his termination.

After due consideration of the evidence and the record as a whole it is **DETERMINED** that the Grievant was properly disciplined with a five-day suspension for his misconduct on the job, and was properly terminated from his employment, afterward, and the Petitioner's actions of disciplinary suspension and subsequent termination of the Grievant's employment are **UPHELD**. This determination is based upon the findings of fact and conclusions of law following below.

#### **FINDINGS OF FACT**

1. TDOC has shown by a preponderance of evidence that Grievant was found at his assigned post on October 23, 2009, unable to carry out his duties. The cause of this circumstance is not known, but the evidence presented reasonably suggests that the Grievant was under the influence of an intoxicant of some kind.
2. After the incident of October 2009, and while an appeal of the discipline for that incident was pending, the Grievant took leave from work for medical reasons. In doing so he exhausted all accrued annual and sick leave benefits, and subsequently exhausted all right of leave permitted under the Family and Medical Leave Act.
3. After having exhausted all benefit and right of leave, the Grievant failed to notify the TDOC of his status and failed to cooperate in the TDOC's generous attempts to provide him leave without pay.

## CONCLUSIONS OF LAW

1. A career service employee who has completed probation has a property right in his job. T.C.A. 8-30-331(a). The Tennessee Civil Service Commission has jurisdiction to make the ultimate determination upon any property taking action against a career service employee. T.C.A. 8-30-108(2)
2. A career service employee may be suspended, demoted, or dismissed from employment whenever just or legal cause exists. Tenn. Comp. R. & Regs. 1120-10-.02. Grounds for such action include conduct unbecoming an employee in the State service. Tenn. Comp. R. & Regs. 1120-10-.05
3. The degree and kind of disciplinary action to be taken with a career employee is at the discretion of the appointing authority, per Tenn. Comp. R. & Regs. 1120-10-.02. When corrective action is necessary, however, the disciplinary action must be of the lowest degree appropriate for each area of misconduct. T.C.A. 8-30-330 (c).
4. Additionally, Tenn. Comp. R. & Regs. 1120-10-.14 (5) provides that:

An employee who is absent from duty for more than three (3) consecutive business days without giving notice to the appointing authority or appropriate manager concerning the reason for such absence and without securing permission to be on leave, or who fails to report for duty or to the immediate supervisor or the appointing authority within two (2) business days after the expiration of any authorized leave of absence, absent unusual circumstances causing the employee's absence or preventing the employee's return, is considered as having resigned not in good standing.
5. In an action before the Tennessee Civil Service Commission, it is the appointing authority's burden, as the Petitioner, to prove that just or legal cause exists, as provided above.
6. The preponderance of the evidence presented in this matter indicates that the Grievant is guilty of conduct unbecoming an employee in State service, by reason of presenting himself in a

state of apparent intoxication while he remained on duty. TDOC has appropriately disciplined the Grievant with a five-day suspension for this incident.

7. The preponderance of the evidence received in this matter indicates, also, that Grievant ultimately abandoned his job by failing to give notice of his status and failing to cooperate with the Petitioner regarding approval of leave without pay. The Grievant is thus deemed, by operation of law, to have resigned from his appointment, not in good standing, as provided by Tenn. Comp. R. & Regs. 1120-10-.14 (5).

**IT IS THEREFORE ORDERED** that the Department of Correction's decisions to suspend Grievant for five days and its decision to terminate Grievant are **UPHELD**.

Entered this the \_\_\_\_\_ day of \_\_\_\_\_, 2011.

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Steve R. Darnell  
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 22nd day of March, 2011.



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Thomas G. Stovall, Director  
Administrative Procedures Division