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DEPARTMENT OF SAFETY, Petitioner, vs. MARVIN FORD, Grievant

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

DEPARTMENT OF SAFETY, ***Petitioner*** **vs.** **MARVIN FORD,** ***Grievant***	**DOCKET NO: 26.19-104964J**

INITIAL ORDER

This contested administrative case was heard in Nashville, Tennessee, on January 25, 2010, before Lynn M. England, Administrative Judge, assigned by the Secretary of State, and sitting for the Civil Service Commission for the State of Tennessee. Ms. Deborah Martin, Staff Attorney for the Department of Safety, represented the Department/Petitioner. The Grievant/Respondent, was present and appeared *pro se.*.

PROCEDURAL HISTORY

The Commissioner of the Tennessee Department of Safety convened a Level IV Disciplinary Hearing on September 24, 2009 to consider possible disciplinary action against the Grievant for Based on his analysis of the facts, and upon applying the law, the Commissioner demoted the Grievant from rank of Sergeant to Trooper. The Grievant appealed that decision.

This contested administrative proceeding is a Level V Disciplinary Hearing convened at the Grievant's request, to consider his challenge to the sanction imposed by the Commissioner of the Department of Safety for violations of State Department of Personnel Rules & Regulations, and Departmental General Orders. Upon consideration of the evidence and arguments, and the entire record, it is determined thatit is determined that the Grievant violated the Department of Safety General Orders and Department of

Personnel Rules, as charged, and that the proper disciplinary action for those violations is demotion. This determination is based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Grievant was employed by the Department of Safety at all relevant times in 2009.

2. The Grievant had 23 years of service with the Department of Safety prior to being placed as a Sergeant on the midnight shift. Prior to his position as a Midnight Sergeant he was a Litter Sergeant.

3. The Office of Professional Responsibility received numerous complaints regarding the Grievant remaining at his residence while on duty. As a result an investigation was conducted and a tracking device was placed on the Grievant's vehicle.

4. On March 18, 2009 the Grievant reported to work at 11:00 p.m., however, he remained at his residence while on duty until 4:07 a.m. March 19, 2009.

5. On March 20, 2009 the Grievant reported to work at 1:00 a.m. but remained at his residence while on duty until 3:14 a.m.

6. On March 22, 2009 the Grievant reported to work at 10:00 p.m. but remained at his residence while on duty until 2:22 a.m. on March 23, 2009.

7. On March 25, 2009 the Grievant reported to work at 9:00 p.m. and patrolled until 3:26 a.m. on March 26, 2009. Grievant then returned to his residence and remained there while on duty until his shift ended (approximately two and a half hours.)

8. On April 30, 2009, the Grievant reported to work at 9:00 p.m. and patrolled until 3:45 a.m. at which time he returned to his residence and remained there while on duty until his shift ended (approximately two hours).

9. The Grievant acknowledged he had difficulty adjusting to the midnight shift. He was raising two children as a single parent and could not sleep well during the daylight hours.

10. The Grievant also acknowledged that on several occasions he would remain at his residence to eat, catnap or rest in order to make it through his shift. He would also

combine his meal breaks with his two (2) fifteen (15) minute breaks which he knew was a violation of policy.

11. The Grievant has had prior disciplinary actions against him resulting in suspension without pay. One of those violations was a three (3) day suspension without pay for failure to meet an on-duty supervisor at a predetermined time and location because he was at home asleep.

CONCLUSIONS OF LAW and ANALYSIS

1. The Tennessee Department of Safety is the Petitioner in this matter, the party that initiated the proceedings, and as such, is assigned the "burden of proof." The burden of proof is the duty imposed upon a party to establish, by a preponderance of the evidence, that an allegation is true, or that an issue should be resolved in favor of that party. A "preponderance of the evidence" means the "greater weight of the evidence," or "the more probable conclusion, based on the evidence presented." The burden of proof is generally assigned to the party seeking to change the present state of affairs with regard to any issue. *See*, Rule 1360-4-1-.02(7), TENN. COMP. R. & REGS. In the instant case, that means that the Department of Safety must prove, by a preponderance of the evidence, that the Grievant violated *Tennessee Department of Personnel Regulations*, and/or Department of Safety General Orders regarding Unsatisfactory performance, Reporting for duty, Patrol time usage procedures; and that the appropriate disciplinary response to those actions is a demotion from Sergeant to Trooper.

2. The Department of Safety has promulgated certain General Orders that are binding on, and govern the conduct of its law enforcement officers. Those orders reflect the Department's determination that, due to the sensitive and highly visible nature of their positions, Highway Patrol officers may, in certain instances, be held to a different, and sometimes higher, standard of conduct than other State employees. Among those Orders are General Order #216-1, *Ethics, Compliments, Complaints and Disciplinary Regulations*; and General Order , *Commercial Vehicle Inspections*. The Department has charged the Grievant with violating the following Orders.

- **DEPARTMENT OF SAFETY, GENERAL ORDER 216**
  [30 June 2008]:
  Ethics, Compliments, Complaints and
  Disciplinary Regulations:

I. Purpose:
* * *
To establish policy and procedures for the employees of the Tennessee Department of Safety concerning the above subject.

II. Policy:

An accumulation of disciplinary actions taken against an employee may be deemed sufficient cause for dismissal demotion or other disciplinary or administrative action as provided in this Order.

IX. CAUSES FOR DISCIPLINARY ACTION:
* * *
B. 2. VIOLATION OF RULES:
* * *

a. Employees shall not commit any act or fail to perform any act, which would constitute a violation of any of the Directives, Orders, policies, and/or procedures of the Department and State Department of Human Resources Rules, whether or not they are stated in this Order.

(1) Ignorance of Departmental Directives, Orders, policies, or procedures shall not justify any such violation.
(2) Employees shall be responsible for their own acts, and they shall not unjustly attempt to shift to others the responsibility for executing or for failing to execute a lawful order or duty.

4. UNSATISFACTORY JOB PERFORMANCE

a. Employees shall maintain sufficient competency to properly perform their duties and to assume the responsibilities of their positions.

b. Employees shall perform their duties in a manner, which would tend to establish and maintain the highest standards of efficiency while carrying out the functions and objectives of the Department.

c. Examples of unsatisfactory performance, include, but are not limited to the following:

(4) Failure to conform to work standards established for the employee's rank, grade or position;
(6) Failure to report for regular duty or special assignment at the assigned place and time;

(7) Leaving any assigned post, absent themselves from any duty or leave their assigned area without permission from the immediate supervisor;
(8) Unnecessary absence from assigned duty…

d. The following will be considered prima facie evidence of unsatisfactory job performance:

(2) Repeated infractions of Departmental Directives, Orders, policies or procedures.

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13. REPORTING FOR DUTY:

a. Employees shall report for duty at the time and place required by assignment or orders and shall be capable of performing their duties.

DEPARTMENT OF SAFETY, GENERAL ORDER 470

[15 October 2008]:
Visibility & Use of Patrol Time
*** * ***

II. POLICY:
It shall be the policy of the Department of Safety to require uniformed members to work periods of visibility during each shift of traffic patrol duties, and to effectively utilize scheduled patrol time.

III. PROCEDURES:
***

H. **Members shall stay alert at all times. Any activity that would give the appearance of the member not being alert is prohibited (e.g. Sleeping,** reading, using a cell phone, etc.).

IV. PATROL TIME USAGE PROCEDURES:

A. Each member may take a one (1) hour meal period.

B. Two (2) rest breaks are permitted for a period of time not to exceed fifteen (15) minutes each; however discretion should be used in the member's selection of time in regard to these breaks. Generally, one (1) should be allowed in the first half of the shift, and the other in the last half of the shift. They should not be taken during the time of greatest need for patrol services.

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D. If a member chooses, or is unable to take advantage of the rest or meal breaks, **such time may not be accumulated and added to another rest period, lunch period, any type of leave or used in order to take off early.**

E. All members shall check in and out with the dispatcher when taking meal and/or rest breaks.

* * *
[Bold emphasis added throughout text.]

3. Additionally, *The Rules of the Tennessee Department of Personnel*, Disciplinary Action, Chapter 1120-10, TENN. COMP. R. & REGS, describe certain prohibited conduct for all State employees that may result in disciplinary action being taken against them. As a State employee, the Grievant knew, or should have known, of the application of those *Rules* to his conduct. Those *Rules* contain the following provision:

> **1120-10-.06 EXAMPLES OF DISCIPLINARY OFFENSES**. The following causes are examples of those considered for disciplinary action and should not be considered the only causes of action.
> * * *
> (2) Negligence in the performance of duties.

The Department alleged that, in addition to violating the Department's General Order prohibiting "Neglect of Duty," the Grievant is guilty of violating the above Rule of the State Department of Personnel.

4. The Grievant admits that he experienced a lot of difficulty transitioning to the night shift. He admitted that he neglected his duties by failing to report to work on time and instead remained at home "cat napping", eating or watching television. Grievant explained that he was having difficulty coping as a single father, getting his children ready for school and getting adequate sleep. While being a single parent is difficult, it is not impossible and it does not excuse the Grievant's failure to act responsibly in his position as Sergeant.

5. A State employee may be disciplined for (1) causes relating to performance of duty, or (2) causes relating to conduct which may affect an employee's ability to

successfully fulfill the requirements of the job. [*See*, Department of Safety General Order 216-2,IV,A, and Rule 1120-10-.05, TENN. COMP. R. & REGS.] "A career employee may be warned, suspended, demoted or dismissed by his appointing authority whenever just or legal cause exists. The degree and kind of action is at the discretion of the appointing authority. . ." Rule 1120-10-.02, TENN. COMP. R. & REGS. When the Commissioner considered the issue of punishment in this case, he had a wide range of options at his disposal. (*See*, Rule 1120-10-.07, TENN. COMP. R. & REGS.) Demotion is one of those options. Rule 1120-10-.07(6), TENN. COMP. R. & REGS. Pursuant to that regulation, "After minimum due process is provided, a demotion may be issued by the appointing authority[1] for one (1) to thirty (30) days." Rule 1120-10-.07(6), TENN. COMP. R. & REGS. The record establishes, by a preponderance of the evidence, that the Grievant's conduct violated provisions of the Departmental General Orders, and *Rules of the Department of Personnel*. His failure, while not egregious, still warranted a measured disciplinary response. The record also reflects that, prior to the instant case, the Grievant had been employed by the Department for many years, and that he has been suspended twice previously: twenty (20) days in 2006 for "purchasing a vehicle after winning a bid on GOVdeals.com;" and three (3) days in 2008 for "Failure to obey orders, failed to meet on-duty supervisor at a predetermined time and location because he was at home asleep." Given the nature of the Grievant's continued failure to comply after having already receiving a three (3) day suspension for essentially the same offense. The Grievant was a Supervisor and was expected to act accordingly. The disciplinary sanction imposed by the Commissioner is appropriate.

7. The issues presented for consideration in this case are (1) whether the Department proved, by a preponderance of the evidence, that the Grievant engaged in acts or omissions prohibited by *The Rules of the Tennessee Department of Personnel* and/or the Department of Safety General Orders; and (2) if so, whether the disciplinary sanction imposed by the Commissioner was appropriate. With respect to both issues, the Department has met its burden of proof.

[1] In this case, the appointing authority was the Commissioner of the Department of Safety.

Accordingly, IT IS HEREBY ORDERED that the Tennessee Department of Safety has established by a preponderance of the evidence that the Grievant, Marvin Ford, acted in violation of *The Rules of the Tennessee Department of Personnel* and Department of Safety General Orders regarding Unsatisfactory performance, Reporting for duty, Patrol time usage procedures; and that the appropriate disciplinary response to those actions is a demotion from Sergeant to Trooper.

IT IS FURTHER ORDERED that the appropriate disciplinary sanction for the Grievant's conduct is a demotion to the rank of Trooper.

IT IS FINALLY ORDERED that the Grievant's appeal of the Commissioner's decision is hereby DISMISSED.

Entered and effective this 30th day of April, 2010. England
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 30th day of April, 2010.

Thomas G. Stovall, Director
Administrative Procedures Division