



7-15-2011

TENNESSEE DEPARTMENT OF  
TRANSPORTATION Department/Petitioner, vs.  
JAMES VERNON PRENTICE, Grievant/  
Respondent.

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**BEFORE THE CIVIL SERVICE COMMISSION OF THE STATE OF TENNESSEE**

**IN THE MATTER OF:** )  
 )  
**TENNESSEE DEPARTMENT** )  
**OF TRANSPORTATION,** )  
    *Department/Petitioner,* )      **DOCKET NO. 26.22-110192J**  
v. )  
**JAMES VERNON PRENTICE,** )  
    *Grievant/Respondent.* )

**INITIAL ORDER**

This contested administrative proceeding was heard in Nashville, Tennessee on July 15, 2011, before J. Randall LaFevor, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Tennessee Civil Service Commission. Ms. Tremecca D. Doss, Assistant General Counsel for the Tennessee Department of Transportation (“Department” or “TDOT”) represented the Department. The Respondent, James Vernon Prentice, was present and was represented by his legal counsel, Mr. J. Daniel Freemon. At the conclusion of the hearing, the parties were instructed to file Proposed Findings of Fact and Conclusions of Law according to a schedule provided in a Post-Hearing Scheduling Order. The last of those documents was filed on August 30, 2011, and the matter was then declared ready for determination.

This was a fifth-step disciplinary hearing, convened at the Grievant’s request to consider the termination of his state employment with the Tennessee Department of Transportation. That sanction resulted from the Commissioner’s determination that the Grievant had engaged in conduct that was unacceptable for the Department’s employees. Upon consideration of the pleadings, evidence, arguments of counsel, and the entire record, it is concluded that the Grievant engaged in the prohibited conduct, as charged, and that the appropriate disciplinary response is termination of his state employment. This determination is based on the following Findings of Fact and Conclusions of Law:

## **FINDINGS OF FACT<sup>1</sup>**

1. The Grievant, James Vernon Prentice, was employed as an Operation Specialist 2 with the Tennessee Department of Transportation (“TDOT” or the “Department”).
2. At the time of his dismissal from employment with TDOT, the Grievant worked in the Lawrence County Construction Office in Lawrenceburg, Tennessee.
3. The Grievant was employed with TDOT from May 14, 2001 to August 2, 2010.
4. Prior to 2008, the Grievant had no disciplinary actions in his work record with TDOT.
5. In May 2008, the Grievant was the subject of an internal TDOT investigation regarding allegations of workplace sexual harassment made by a co-worker, Tammy Jo Gordon. This investigation was convened under TDOT’s Workplace Discrimination and Harassment Policy.
6. Among other allegations against Mr. Prentice, including assault and/or forcible rape, Tammy Jo Gordon complained that the Grievant made unwelcome sexually explicit and sex-related comments toward her. An ensuing investigation by law enforcement regarding the assault and/or rape allegations resulted in no charges being filed against the Grievant.
7. During TDOT’s internal investigation of the workplace sexual harassment allegations in May 2008 and upon questioning by TDOT investigators, the Grievant specifically denied engaging in sexually explicit and/or sex-related conversations with Ms. Gordon.

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<sup>1</sup> At the outset of the hearing, the parties agreed that the facts of this case were not in dispute. Their agreed-upon statement of the facts of the case was submitted as a Stipulation of Facts, which is incorporated herein as *Findings of Fact* 1-30. All references to sources of those facts are in the parties’ original Stipulation of Facts.

8. After a review and assessment of the available evidence, TDOT's internal investigation concluded that the Grievant did not commit the acts as alleged by Ms. Gordon, and therefore, did not violate TDOT's Workplace Discrimination and Harassment Policy.
9. In July 2008, Grievant was suspended for ten (10) days without pay for misconduct involving the misuse of a State-issued laptop computer assigned to the Grievant for work-related use. Specifically, someone used the Grievant's computer username and password to log onto the State-issued laptop and access inappropriate and pornographic websites. (See Exh. 1.)
10. The specific misconduct for which Grievant was suspended included the following:
  - a. Department of Human Resources ("DOHR") Rule 1120-10-.06(3): Careless, negligent, or improper use of State property or equipment;
  - b. DOHR Rule 1120-10-.06(8): Conduct unbecoming an employee in the State service;
  - c. DOHR Rule 1120-10-.06(10): Willful abuse or misappropriation of State funds, property, or equipment;
  - d. TDOT Policy 280-02: Information Technology Resources Acceptable Usage Policy; and
  - e. TDOT Policy 101-02: Ethics Policy.
11. The Grievant did not contest or appeal the ten (10) day suspension without pay.
12. In October 2008, Tammy Jo Gordon filed a civil complaint, initiating a lawsuit against the Grievant and TDOT based upon the same or similar allegations as the ones she had made in May 2008.
13. In March 2010, during the discovery phase of the aforementioned civil litigation, the Grievant testified under oath during a deposition that he engaged in mutual sexually explicit and/or sex-related talk with Ms. Gordon at work.
14. The Grievant testified at the deposition that he and Tammy Jo Gordon mutually engaged in sexually explicit and/or sex-related conversations at work, and that such conversations were not unwanted by Ms. Gordon or the Grievant. The Grievant testified during his deposition that he and Tammy Jo Gordon discussed sex on many occasions. (Exh. 6, Prentice Depo., p. 140).

15. Mr. Prentice testified that such conversations were contrary to workplace training regarding acceptable workplace conduct and related policies in place at TDOT. (Id., p. 135). The Grievant acknowledged that to engage in sexually explicit and/or sex-related conversations at work, even with a willing mutual participant, was less than appropriate workplace conduct (Exh. 6, p. 135, ll. 17-18, agreeing that such conduct, even if mutually welcome, is “playing with fire”).
16. The Grievant testified that conversations with Tammy Jo Gordon included the Grievant telling Ms. Gordon that he and his wife could go three months without having sex (Exh. 6, p. 125); Ms. Gordon telling the Grievant that she wanted to “be on top in a sexual encounter” with him (Exh. 6, pp. 125-26); and the Grievant describing to Ms. Gordon how he groomed his genitalia (Exh. 6, pp. 133-34).
17. During the same deposition, the Grievant admitted that his deposition testimony directly contradicted his statements to TDOT investigators during the May 2008 investigation.
18. TDOT’s investigative findings regarding Ms. Gordon’s sexual harassment allegations remain unchanged.
19. The Grievant maintains that his testimony during the March 2010 deposition is the complete truth regarding his involvement in the events which were the subject of the May 2008 TDOT workplace harassment investigation and subsequent civil litigation.
20. Because of the Grievant’s admitted dishonesty and its impact, Region III Director Winston Gaffron served him with notice of pending disciplinary action, also called a due process letter. (See Exh. 2.)
21. Mr. Gaffron has direct access to TDOT’s appointing authority in employee disciplinary matters.
22. The specific misconduct for which the Grievant was charged included the following:
  - a. DOHR Rule 1120-10-.06(12): Participation in any action that would interfere with the ability of management to manage;

- b. DOHR Rule 1120-10-.06(18): Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination); and
  - c. TDOT Policy 140-01: Fraud Policy – “Employee Responsibilities” paragraph.
23. The due process letter provided the Grievant with notice of the disciplinary charges against him as well as with an opportunity to discuss those charges.
  24. Throughout the disciplinary process leading to his dismissal from State service, the Grievant did not dispute that he committed the misconduct for which he was charged.
  25. Region III Director Winston Gaffron, who convened the Grievant’s due process meeting, submitted a letter to TDOT Commissioner Gerald Nicely recommending that the Grievant receive a thirty (30) day suspension without pay for his misconduct. Region III Assistant Director David Layhew signed the recommendation letter on Mr. Gaffron’s behalf. (See Exh. 3.)
  26. Commissioner Nicely is the Department’s appointing authority as defined by Tenn. Code Ann. § 8-30-101(1).
  27. After considering the Grievant’s entire disciplinary history and in light of the seriousness of the Grievant’s misconduct, Commissioner Nicely terminated the Grievant’s employment effective August 2, 2010. (See Exh. 4.)
  28. During his employment with TDOT, the Grievant received notice of departmental policies and standards of conduct. He was aware that workplace misconduct, including acts involving misuse of State property, fraud or dishonesty, and insubordination, could result in disciplinary action up to and including dismissal from State service. (See Coll. Exh. 5.)
  29. The parties stipulate that with respect to the issue of TDOT’s prior institutional precedent, the only disciplinary case involving dismissal from employment involving the employee’s deception and/or dishonesty during an investigative inquiry is that of Rodney Jenkins v. TDOT, Civil Service Docket No. 26.22-094770J. Upon timely appeal by Grievant Rodney Jenkins and after a Level V grievance hearing, the dismissal was

reduced by order to a one-year suspension and one-year probationary period with no back pay or benefits.

30. The parties stipulated that the material facts and circumstances of the Grievant's dismissal are not in dispute. The only issue of the instant civil service appeal is whether Grievant's dismissal from State service is the appropriate level of discipline.

### **CONCLUSIONS OF LAW & ANALYSIS**

1. The Tennessee Department of Transportation 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. Rule 1360-4-1-.02(7), TENN. COMP. R. & REGS. In the instant case, that means that the Department of Transportation must prove, by a preponderance of the evidence, that the Grievant engaged in conduct prohibited for State employees, as described in specified State and Departmental Policies and Procedures, and that separation from state employment is the appropriate disciplinary sanction for his conduct.

2. In the Department's view, lying to investigators during a sexual harassment investigation cannot be taken lightly. The Department argues that TDOT, a State of Tennessee employer, has a legal duty to enforce and comply with equal employment opportunity ("EEO") laws, including the prohibition against sexual harassment. TDOT fulfills this obligation by enforcing the TDOT Workplace Discrimination and Harassment Policy. The Department has a dual purpose for investigating sexual harassment and other alleged EEO violations. First, TDOT has a responsibility to prevent and eliminate EEO discrimination, harassment, and retaliation in the workplace. Second, TDOT and other State of Tennessee agencies convene internal EEO investigations to help shield the State from, and to defend against, civil liability. *See generally, Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (regarding employer's affirmative defense in EEO context). *See also, e.g., The*

*Tennessean, et al. v. Tenn. Dept. of Personnel*, No. M2005-02578-COA-R3-CV, 2007 WL 1241337 at \*12 (Tenn. Ct. App. Apr. 27, 2007) (a State agency’s EEO investigations serve a dual function, to “investigate potential wrongdoing more fully, and pursue remedial options, so as to protect the State from extensive civil liability.”) When employees are not truthful during internal sexual harassment investigations, the Department’s efforts to discover and prevent EEO-related wrongdoing in the workplace are hindered. The State may be exposed to possible civil liability and potential defenses can be weakened. The Department’s argument is found to be persuasive.

3. The parties’ Stipulated Facts, as incorporated in the *Findings of Fact*, above, established that the Grievant lied to Departmental investigators in the course of a Department-authorized investigation of a co-worker’s allegations of sexual harassment in 2008. He persisted in those lies for the next two years, before finally telling the truth in 2010, when he and the Department were preparing to defend themselves in a lawsuit brought by the alleged sexual-harassment victim. The Department asserted that the Grievant’s dishonesty during that investigation [and the following two years] violated various State and Departmental Policies and Procedures. Those Policies and Procedures were generated to define acceptable employee conduct, and were distributed to the Grievant and all other Departmental employees to ensure that those practices would be uniformly followed. It is concluded, as alleged by the Department, that the Grievant’s conduct violated the specified State and Departmental Rules and Regulations.

4. a. First, the Department asserted that, when the Grievant lied to State investigators during an official investigation, he violated two provisions of the Rules and Regulations that apply to all State employees. Those Regulations [currently codified as Rules 1120-10-.05(15) and (21), TENN. COMP. R. & REGS, May 2011 (Revised)] prohibit all State employees from engaging in: (1) conduct that interferes with the ability of management to manage; and (2) insubordination.

b. And second, the Department alleged that the Grievant violated its Policy requiring that Departmental employees cooperate with authorized internal investigations. [*TDOT Policy #140-01 – Fraud Policy*] That Policy defines “Fraud” broadly, as “an intentional deception for personal benefit.” It then provides that:



It is an employee's official job duty to cooperate fully with any investigation conducted by the Office of Internal Audit. *Failure to do so may result in discipline up to and including termination.* [Emphasis in original.]

That TDOT Policy informs the Grievant of the consequences of lying to investigators, and authorizes the Commissioner to impose disciplinary sanctions, *including termination*, when a TDOT employee lies to, or otherwise fails to cooperate fully with any investigation. [Disciplinary action based on violation of an agency's internal policy is appropriate. *See, Lynn v. Camp*, No. M2002-02708-COA-R3-CV, 2003 WL 22401280 at \*4 (Tenn. Ct. App. Oct. 22, 2003) (affirming dismissal of an employee who violated his employer agency's internal policy against sleeping on duty).]

5. By lying to investigators about his conduct in the workplace, the Grievant violated State and Departmental Regulations set out above, as cited by the Department. By withholding pertinent information from his supervisors, the Grievant was insubordinate to their lawful demands to provide truthful responses to their inquiries; and, without his truthful cooperation, the Grievant interfered with their ability to effectively manage their employees by preventing any form of early intervention in the situation between the Grievant and his co-worker. Furthermore, the Grievant hampered the Department's efforts to gather truthful information about the Grievant's alleged sexual harassment of a co-worker, and for two years impeded the Department's ability to prepare its defense and properly respond to the lawsuit filed by the Grievant's co-worker. The Grievant's conduct evidences a clear violation of the cited State and Departmental Rules and Policies, and warrants "appropriate corrective action."

6. 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. 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. Although the law prescribes implementation of progressive discipline for State employees, it also provides that disciplinary action must be

administered at the step which is most appropriate for the misconduct.<sup>2</sup> (*See, Tennessee Code Annotated* § 8-30-330; and Rule 1120-10-.07, TENN. COMP. R. & REGS.) As the courts have recognized in other cases dealing with these provisions,

. . . the key word in the statute is ‘appropriate.’ . . . (T)he language of these provisions does not mandate application of discipline in a routine fashion without regard to the nature or severity of the behavior it is intended to address. The supervisor has discretion to determine what punishment fits the offense.

*Berning v. State*, 996 S.W.2d 828, 830 (Tenn. App. 1999).

7. The Grievant had been employed by the State for about seven years at the time of these infractions, and had received only one previous disciplinary sanction, a 10-day suspension resulting from the Department’s discovery that his state-issued computer had accessed numerous inappropriate and pornographic web sites.<sup>3</sup> Despite his generally acceptable previous service, however, his lying to investigators and supervisors and persisting in those lies for nearly two years had a negative impact on the Grievant’s relationship with his superiors, which cannot be discounted. It is axiomatic that employee honesty and truthfulness are core values of any organization, and that an employee who exhibits dishonesty and lacks truthfulness harms the mission of the organization and diminishes his value to his superiors. The TDOT Region III Director found that the Grievant’s conduct – lying to Departmental investigators – was unacceptable for a TDOT employee, and recommended a lengthy suspension as the appropriate disciplinary sanction.

8. When the Commissioner reviewed that recommendation and 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.) Dismissal from employment is one of those options. Rule 1120-10-.07(5), TENN. COMP. R. & REGS. Pursuant to that regulation, “After minimum due process is

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<sup>2</sup> In support of their legal arguments, both parties cited prior disciplinary rulings by the Civil Service Commission. A review of those cases reveals that none are sufficiently similar to the instant case to be deemed controlling authority. Just as a tub must “rest on its own bottom,” all cases must be decided on their own peculiar facts.

<sup>3</sup> An appointing authority may consider an employee’s entire disciplinary history and/or previous conduct when determining the severity of discipline. *See, Kelly v. Tenn. Civ. Serv. Comm’n*, No. M1999-00168-COA-R3-CV, 1999 WL 1072566 at \*4 (Tenn. Ct. App. Nov. 30, 1999) (“While prior disciplinary actions have no bearing on whether an employee has engaged in work-related conduct that warrants discipline, an employee’s prior conduct, both good and bad, can be considered when determining what the appropriate disciplinary action should be.”)

provided, an employee may be dismissed by the appointing authority from his position for unacceptable conduct or performance of duties.” Rule 1120-10-.07(5)(a), TENN. COMP. R. & REGS. Without a doubt, the Grievant’s conduct was unacceptable, and warranted a severe sanction. TDOT employees are required to be truthful during internal investigations, especially EEO/sexual harassment investigations, because it is anticipated that they could subsequently be called as witnesses to testify under oath on the same facts during judicial proceedings. If an employee is dishonest during the internal investigation, and then later lies under oath, or as in the instant case, changes his story and/or testimony, significant potential harm can come to TDOT and the State of Tennessee. “A[n] [employee] who is known to be untruthful reflects badly on the integrity of the department, . . . and could cause a loss of credibility with the public and perhaps in court cases.” *Story v. Tenn. Civ. Serv. Comm’n*, 2011 WL 2623904 at \*4. By lying to investigators, the Grievant potentially subjected the Department and the State to that liability. Such an action by a TDOT employee, charged with the responsibility to serve the State and its citizens, is inexcusable. The Commissioner determined that his “misconduct cannot and will not be tolerated” by the Department. In this case, the egregious nature of the Grievant’s conduct, the resulting interference with the Department’s ability to investigate and respond to sexual harassment allegations, the administration’s inherent loss of confidence in and respect for the Grievant’s judgment, and the negative impact of his conduct on the Department’s mission, all weigh heavily in favor of dismissal from employment as the appropriate sanction. The courts have held that, when an employee’s conduct results in loss of effectiveness in his/her job, or adversely affects the Department’s ability to perform its mission, such a negative impact:

. . . may in proper cases justify or require the discharge of public employees when their efficiency or usefulness in their positions has been seriously impaired by their own fault, by the fault of others, or by blameless misfortune.

*Reece vs. Tennessee Civil Service Commission*, 699 S.W.2d 808, 813 (Tenn. App. 1985)

9. The issues presented for consideration in this case are (1) whether the Department has proven, by a preponderance of the evidence, that the Grievant engaged in conduct prohibited by State and Departmental Policies and Procedures; 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. The evidence in the record amply supports the Department’s allegations

of wrongdoing, and establishes a compelling argument in favor of termination of the Grievant's employment with the State.

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Accordingly, IT IS HEREBY DETERMINED AND ORDERED that the Tennessee Department of Transportation has met its burden of proof, and has established by a preponderance of the evidence that the Grievant, James Vernon Prentice, engaged in conduct prohibited by State and Departmental Policies and Procedures.

IT IS FURTHER DETERMINED AND ORDERED that the Grievant's dismissal from State employment, imposed as a disciplinary sanction, was appropriate, and warranted by his conduct, and is therefore Upheld.

AND, IT IS FINALLY ORDERED that the Grievant's appeal of the Commissioner's decision to terminate his State employment is hereby DISMISSED.

Entered and effective this 29 day of September, 2011

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J. Randall LaFevor, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 29 day of September, 2011



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Thomas G. Stovall, Director  
Administrative Procedures Division