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TENNESSEE DEPARTMENT OF SAFETY vs. Steven Bourque

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**STATE OF TENNESSEE
CIVIL SERVICE COMMISSION**

IN THE MATTER OF:

**TENNESSEE DEPARTMENT
OF SAFETY**

DOCKET NO: 26.19-110429J

v.

Steven Bourque

ORDER

This matter came to be heard on June 3, 2011, before Rob Wilson, Administrative Judge, assigned by the Secretary of State, and sitting for the Tennessee Civil Service Commission. Ms. Debra Martin, Esq., represented the Department of Safety. The Grievant, Steven Bourque, was represented by Steven T. Greer, Esq.

The subject of the hearing was whether the proposed termination of the Grievant's employment with the Tennessee Highway Patrol should be upheld. Grievant was charged with violation of the following Department General Orders: (1) Unbecoming Conduct, (2) Truthfulness, (3) Neglect of Duty, and Department of Human Resources Rules: (1) 1120-10-.06(1), Inefficiency in the performance of duties, (2) 1120-10-.06(8), Gross misconduct or conduct unbecoming an employee in the State Service, (3) Participation in any action that would in any way seriously disrupt or disturb the normal operation of the agency, institution, department, or any other segment of the state service

or that would interfere with the ability of management to manage, and (4) For the good of the service.

After consideration of the record in this matter, it is determined that the Grievant should be **REINSTATED** to his former position with a thirty-day suspension without pay. This decision is based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant had been employed as a State Trooper since January of 2002. During his employment Grievant underwent annual evaluations, all of which resulted in exceptional or superior ratings for his overall job performance.

2. As reflected by the Grievant's disciplinary history, prior to August of 2010 Grievant had only two minor disciplinary actions taken against him, one of which was a one day suspension as a result of damage that occurred to a State vehicle being operated by Grievant, and the other of which was a reprimand for allegedly violating a policy concerning the use of wrecker services.

3. In January of 2008 Grievant was seriously injured in a motor cycle accident while working in the course and scope of his employment as a State Trooper. During the course of his recovery he met Melissa Rector and the two developed a friendship. By August of 2010 Grievant's relationship with Ms. Rector had become intimate. On August 8, 2010, while on duty, Grievant met Melissa Rector at a cemetery located in Marion County, Tennessee, and engaged in sexual intercourse with Melissa Rector in her vehicle. Rhonda and Robert Keahey were at the cemetery at the same time and observed

Grievant's patrol car parked next to Melissa Rector's car, although they did not recognize Grievant.

4. Grievant was familiar with Rhonda Keahey because she worked at a local newspaper company with whom Grievant had interacted in the past in his official capacity with the Department of Safety.

5. Grievant went to Ms. Keahey's place of business the day after the incident to talk with her and explain his presence at the cemetery that day.

6. Grievant explained to Mrs. Keahey that he was there counseling a friend who was undergoing marital difficulties. The conversation occurred in the office where Mrs. Keahey worked, and was overheard and witnessed by her co-workers. Grievant was polite and courteous to Mrs. Keahey.

7. Mrs. Keahey's testimony came in through her affidavit [exhibit 1], and she did not state that she felt intimidated by Grievant.

8. The same day of Grievant's conversation with Mrs. Keahey, which was the day after the incident, Grievant called his supervisor, Captain Rex D. Prince, to arrange a time to come and talk with him about the incident.

9. Captain Prince agreed to meet with Grievant. Grievant met with Captain Prince the following day and told him about the incident at the cemetery with Melissa Rector. Although he did not specifically tell Captain Prince that he had engaged in intercourse with Ms. Rector, Grievant felt that Captain Prince knew what had occurred based on how Grievant described the events.

10. On the following Friday, August 13, 2010, Mr. Keahey lodged a complaint against Grievant. Mr. Keahey's reason for lodging the complaint against Grievant was because he felt that Grievant tried to intimidate his wife, even though Mrs. Keahey told her husband she was not intimidated by Grievant.

11. Mr. & Mrs. Keahey met with Captain Prince to report what had occurred.

12. After the Keahey's met with Captain Prince, the Department of Safety, through the Office of Professional Responsibility, began its investigation of the matter.

13. As part of that investigation, Grievant was interviewed by Sergeant Lowell Russell and Sergeant Roger T. Johnson. Grievant originally denied having sexual intercourse with Melissa Rector, but later during the course of the same interview admitted that he and Melissa Rector had engaged in sexual intercourse.

14. Following the conclusion of the investigation of this matter, three recommendations were made for disciplinary action against the Grievant. First, Grievant's immediate supervisor, Captain Prince, recommended a 10 day suspension without pay and reassignment within the district. Second, Col. Mike Walker recommended Grievant receive a 30 day suspension without pay and that he be transferred to Shelby County, Tennessee. And third, then Lt. Col Tracy Trott recommended termination of Grievant's employment. However, then Lt. Col. Trott, now Col. Trott, admitted that when he recommended termination he was not aware of several commendations and recognitions Grievant had received from his superiors, as well as members of the public he had assisted.

15. While then Lt. Col. Trott testified that it was his position that any trooper who engaged in sexual conduct on duty should be terminated, it came out during cross examination that Trooper Jerald Hefner received a ten day suspension without pay for engaging in sexual conduct while on duty. Furthermore, in Trooper Hefner's case, he had engaged in sexual conduct on several occasions, and he had a history of similar conduct before the events that led to his ten day suspension. No such prior history of similar conduct is present in Grievant's case, and Grievant's sexual conduct was a one-time, isolated incident.

16. During cross examination of Col. Trott it was also revealed that another trooper had been found guilty of giving false and deceptive answers during an internal investigation of the trooper. In that case, Lt. Jimmy Neal was given a three day suspension for giving false and deceptive information during an internal affairs investigation even though Lt. Neal did not recant during the interview where he gave the false and deceptive information. It was only at a subsequent interview where Lt. Neal was confronted with General Order 216-1 requiring truthfulness during an internal affairs investigation that Lt. Neal recanted and told the truth.

17. On September 20th, 2010, the Commissioner of Safety issued his decision to terminate Grievant's employment. Grievant timely filed his application for appeal and a level IV Grievance hearing was held on October 29, 2010, at which time Grievant's termination was upheld. Grievant timely appealed the matter for a hearing on the merits before the Civil Service Commission, which resulted in the instant hearing on June 3, 2011.

18. At the time of the incident that gives rise to this matter, there was in place and in full force and effect General Order 216-2 of the Tennessee Department of Safety. That General Order contained within it a requirement of progressive discipline for Department of Safety employees who were subject to disciplinary action. As part of the progressive discipline mandate, General Order 216-2 contains a disciplinary matrix that provides the minimum and maximum levels of discipline for each type of misconduct. It appears in this case that Grievant's actions and conduct amounted to "Severe Misconduct." Under the disciplinary matrix, a Department of Safety employee guilty of a first offense of Severe Misconduct can receive a minimum disciplinary action consisting of a two day suspension without pay, up to a maximum disciplinary action of termination.

19. Even though this was Grievant's first commission of severe misconduct, Grievant was given the most severe disciplinary action in the form of termination. It is also interesting to note that under the disciplinary matrix, an employee guilty of even a fourth offense of severe misconduct can receive as little as a ten day suspension.

CONCLUSIONS OF LAW AND ANALYSIS

For all State employees, progressive discipline is mandated by T.C.A. §8-30-330. Imposing discipline in a progressive fashion is not merely at the discretion of the disciplining authority, but is required. Under T.C.A. §8-30-330 the disciplining authority is required to impose the lowest appropriate level of discipline for each instance of misconduct. Progressive discipline is also required under Rule 1120-10-.06, Rules of the Tennessee Department of Human Resources.

It appears that given the circumstances of the misconduct, the impact of the misconduct on the Grievant and the Department, as well as taking into consideration Grievant's excellent record with the Department, Grievant was not given the lowest level of discipline required by T.C.A. §8-30-330.

T.C.A. §8-30-330. Progressive discipline.- (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.** [emphasis added]

The fact that the lowest appropriate level of discipline was not imposed here is further strengthened by the wide disparity of discipline recommended by Grievant's three superiors. Those recommendations ranged from a ten (10) day suspension without pay plus reassignment within the district, to a thirty (30) day suspension with reassignment to Shelby County, and finally to termination. The superior who knew the Grievant best was Captain Prince, who recommended a ten (10) day suspension without pay and reassignment within the district. Prince felt that Grievant could return to the Department and be an effective officer.

In this case, Grievant had an outstanding record with the Department of Safety prior to this incident, as is evidenced by the many accolades, commendations and recognitions he received, not only from his superiors with the Department of Safety, but with citizens with whom he encountered and who he had assisted. However, it was the opinion of Col. Trott that an officer engaging in sexual conduct while on duty should automatically result in termination, even though the Department has no policy to this

effect. Such a position is inconsistent with the principles of progressive discipline. Furthermore, to invoke such a policy unilaterally when no policy exists, where Grievant has not been given advance notice of the existence of such policy, even if one did exist, violates basic principles of procedural due process.

There were no facts or evidence entered into the record to warrant Grievant receiving the most severe disciplinary action by way of termination. As a result of Grievant's conduct, no one suffered personal injury, no lives were endangered, no documents were falsified, no one was acting under the influence of alcohol or drugs, no property damage of the State was incurred, and a crime was not committed.

In attempting to uphold Grievant's termination, the Department of Safety also relies on the fact that during the interview of Grievant by the OPR on August 20, 2010, Grievant was initially untruthful in his responses to questions from Sergeants Lowell and Johnson. In Grievant's initial handwritten statement given on August 20, 2010, he denied sexual conduct with Ms. Rector. However, although Grievant did not answer questions truthfully during the initial phase of the interview, before the interview concluded, Grievant told the truth and acknowledged his misconduct. During that same interview he wrote out another statement, wherein he admitted sexual conduct with Ms. Rector.

Even if Grievant has been charged with perjury, that is only a class A misdemeanor. T.C.A. §39-16-702. Furthermore, the law recognizes and rewards an individual who, after giving false statements during an official proceeding, later recants during the same proceeding. For example, if a person is charged with aggravated perjury, pursuant to T.C.A. §39-16-703, as a result of giving false statements during an official

proceeding, pursuant to T.C.A. §39-16-704, it is a defense to aggravated perjury if the person recants the false statement before completion of his testimony in the official proceeding. Grievant recanted his earlier denial of sexual conduct before the completion of his interview on August 20, 2010. As pointed out earlier, in the case involving Lt. Neal, the false and deceptive information he provided in an internal affairs investigation resulted in only a three (3) day suspension without pay, even though he did not recant during the same interview, as did Grievant.

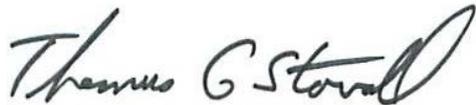
Therefore, considering the Grievant's single isolated offense, and also taking into consideration his impeccable record as a State Trooper prior to this incident, Grievant's discipline should not be the maximum discipline available for Severe Misconduct. Pursuant to the Progressive Discipline Matrix and the requirement that progressive discipline be used in this situation as required by T.C.A. §8-30-330 and Rule 1120-10-.06, Rules of the Department of Human Resources, it is hereby CONCLUDED that the appropriate level of discipline for Trooper Bourque's isolated offense is a thirty (30) day suspension without pay, and the decision to terminate Grievant's employment with the Department of Safety is REVERSED. Trooper Bourque was a good employee and can be a good employee. Details as to the location of his reinstatement are to be determined by the Department of Safety, provided that the position has equal pay and benefits as the position held by Grievant before his termination.

It is hereby ordered that Steven Bourque be reinstated with back pay, benefits and attorney's fees as per T.C.A. §8-30-328(e), less any mitigation earnings during the relevant time period.

This Order entered and effective this 21st day of December, 2011.

Rob Wilson
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 21st day of December, 2011.



Thomas G. Stovall, Director
Administrative Procedures Division