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Civil Service Commission vs. SAMUEL OUTLAW, Grievant

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**STATE OF TENNESSEE
CIVIL SERVICE COMMISSION**

IN THE MATTER OF:

**DEPARTMENT OF SAFETY,
Petitioner,**

Vs.

**SAMUEL OUTLAW,
Grievant.**

DOCKET NO: 26.19-107247J

INITIAL ORDER

This matter was heard on April 26, 2011, in Nashville, Tennessee before Steve R. Darnell, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Tennessee Civil Service Commission. Attorney Deborah Martin represented the Tennessee Department of Safety (hereinafter "Department"), and Grievant was represented by attorney Andy Hoover. The record in this case closed on August 3, 2011, upon Grievant filing his proposed findings of fact and conclusions of law.

ISSUES FOR DETERMINATION

1. Did Grievant's conduct of releasing a possible drunk driver into the custody of her boyfriend with only a misdemeanor citation for underage drinking warrant disciplinary action?
2. Was termination the appropriate minimum level of disciplinary action for Grievant's conduct?

SUMMARY OF DETERMINATION

It is **DETERMINED** the Department has proven, by a preponderance of the evidence, that Grievant intentionally undercharged an offender as a result of sympathy and in an effort to assist the offender. Grievant attempted to conceal his conduct from his supervisors and from the

public. Grievant's relatively short career with the Department had resulted in two suspensions without pay. Termination for Grievant's instant conduct was the appropriate disciplinary action. This determination is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Historical Information:

1. Grievant was hired as a Commercial Vehicle Enforcement officer on November 16, 2002, and began working as a State Trooper on January 1, 2004. He graduated from the academy in April 2004, and formally began his career as a state trooper. Grievant was placed on leave for the circumstances described herein on November 16, 2009, and eventually terminated on February 6, 2010. Grievant's active career as a State Trooper spanned approximately 67 months.
2. From August 9, 2005–December 21, 2006 (approximately 17 months), and again on May 29, 2007–July 7, 2008 (approximately 13 months), Grievant was on pre-deployment and actual deployment to Iraq with the Tennessee National Guard. Grievant also had approximately 2 months of National Guard training during his tenure as a State Trooper in Bulgaria, Oklahoma City, and Milan Tennessee.
3. Grievant was disciplined in April of 2007, after an altercation in a night club that Grievant and his brother were patronizing, leading to the arrest of Grievant's brother. Grievant was unable to report to work the following day due to intoxication. Grievant was placed on administrative leave from April 4, 2007, which was continued until his pre-deployment leave began on May 29, 2007 (approximately 2 months). Grievant was ultimately disciplined with a 15-day suspension for his conduct.
4. Grievant was disciplined in January of 2009, after Grievant struck a tractor-trailer while attempting to stop another vehicle. The tractor-trailer did not stop, and Grievant reported the

incident to his supervisor as soon as he finished with the traffic stop, but did not fully comply with the Department's reporting provisions. For this conduct, Grievant was disciplined with a 5-day suspension.

5. Considering his military deployments, National Guard training, assignment to non-law enforcement duties, and the time he was on administrative leave for disciplinary reasons, Grievant has served in the traditional State Trooper capacity for less than 36 months.

Incident of October 24, 2009:

6. On October 24th, 2009, Grievant responded with Columbia city police officers to a possible DUI at a McDonald's restaurant.

7. Grievant arrived at the McDonald's before the Columbia police officers. The vehicle in question was in the drive-through lane and moving. Grievant ran towards the vehicle and instructed the driver to move the vehicle to a specific parking space.

8. When Grievant stopped the vehicle, it was being driven by a male and a female was in the passenger seat.

9. Employees and/or patrons of the McDonald's reported the female in the vehicle had been driving the vehicle prior to Grievant's arrival and the two had just switched places.

10. The female was 19 years old and very intoxicated. Due to her intoxication, her statements were rambling and confused. Ultimately though, she tells Grievant that she had not been driving the vehicle.

11. Grievant advised the young lady that people in the McDonald's saw her driving. Grievant then told her she was under arrest for DUI and placed her in the back of his patrol car. There were no charging documents executed by Grievant formally charging her with any crime.

12. Afterwards, Grievant spoke to the male who he had observed driving. The male was not

intoxicated. The male stated that he had been driving and not the female. The male and female were dating.

13. Grievant's conduct in responding to the McDonald's incident and his subsequent delayed interactions with the THP dispatch were consistent with typical practices of State Troopers. Even if not in technical compliance, his inactions and delays with THP dispatch would not support any type of disciplinary action.

14. Grievant decided not to charge the young lady with DUI. Arguably, he did not have good proof to convict her of DUI, but his ultimate decision was prompted by sympathy for the young lady.

15. Grievant consulted with the Columbia city police officers and determined the best course was to cite the female with underage consumption and release her into the custody of her boyfriend.

16. Grievant and the city officer agreed to relocate to an Exxon gas station a short distance from the McDonald's to release the young lady. This was to conceal the Grievant's actions from the people at the McDonald's.

17. Grievant and the Columbia city officer drove directly to the Exxon station. The young lady's boyfriend went to a Shell gas station by mistake. The Columbia city officer had to leave the Exxon station and locate the boyfriend. This is the only time Grievant was alone with the female.

18. Grievant selectively turned off his patrol car camera and audio recording equipment so that portions of this episode were not recorded. When the Columbia city officer left Grievant at the Exxon station to locate the young lady's boyfriend, Grievant did turn the camera back on her.

19. Grievant issued the female an underage drinking citation and released her into the

custody of her boyfriend at the Exxon station.

20. The incident came to light when the young lady was subsequently arrested for another DUI and a different Columbia city officer questioned what had occurred during this incident at her court hearing.

21. Grievant was charged with violating numerous General Orders of the Department as well as numerous policies of the Tennessee Department of Human Resources. Once the Department completed its investigation, Grievant was terminated.

Similar Disciplinary Actions:

22. The Department disciplined Trooper Inman on April 16, 2007, for turning off the audio to the camera system during two traffic stops. Trooper Inman received a two-day suspension without pay.

23. The Department disciplined Trooper McVey on December 22, 2008, for failing to activate the audio-video recorder upon arrival at a crash scene. Trooper McVey did activate the recorder after he became involved in a heated discussion with an individual. Trooper McVey received a written reprimand.

24. The Department disciplined Trooper Brobeck on August 28, 2006, for assisting a Greene County Sheriff's Deputy on a call but failing to notify THP dispatch or receiving permission from a supervisor to assist another agency; failing to inform a resident as to the reason for his presence at the resident's home, and drawing his weapon, leading to the filing by the resident of a formal complaint. Trooper Brobeck received a one-day suspension without pay.

25. The Department disciplined Trooper Simmons on April 1, 2008, for failing to notify dispatch of her completion of a motor assist stop, and failing to check out of service upon her arrival home, resulting in another trooper being dispatched to search for her. Trooper Simmons

received a two-day suspension without pay.

26. The Department disciplined Trooper Turley on October 16, 2006, for exceedingly aggressive and hostile behavior during a traffic stop in which he exited his vehicle with his weapon drawn, kicked the driver's side door, subdued the teenage driver by putting him prone on the ground and placing his foot on the teen's neck, handcuffed the driver with his weapon drawn and gave verbal commands to the passengers in a threatening manner. Trooper Turley stated that the stop was made after a short pursuit, but such pursuit was not included on the video, he did not notify dispatch of the pursuit, or call for backup. Trooper Turley had received a previous suspension, and for this incident received a twenty-day suspension without pay.

27. The Department disciplined Trooper Warren on June 26, 2009, as a result of his involvement in a vehicle pursuit. Trooper Warren failed to notify dispatch of his involvement, failed to answer another trooper on his radio, and failed to follow procedure for his role as the second unit in a pursuit. Trooper Warren's actions resulted in a wreck involving the patrol car and the pursued vehicle. Trooper Warren received a five-day suspension.

28. The Department disciplined Trooper Baxter on June 17, 2008, as a result of his pursuit of a speeding vehicle that refused to stop, when he failed to notify dispatch of the pursuit, and further failed to notify dispatch or the other trooper who was attempting to assist him of his abandonment of the pursuit without having stopped a vehicle that was driving recklessly. Trooper Baxter received a five-day suspension without pay.

29. The Department disciplined Trooper Knowles on January 26, 2009, resulting from a high speed pursuit of a group of motorcycles in which Trooper Knowles traveled at a high rate of speed for several minutes without activating his emergency equipment, failed to notify dispatch of the pursuit, later told dispatch he was discontinuing the pursuit when in fact he did continue,

turned his camera off for 2 ½ minutes during the pursuit, and failed to terminate the pursuit after losing sight of the motorcycles for a period of time. Further, Trooper Knowles then stopped a motorcycle that was not involved in the pursuit and commanded the driver to get off the motorcycle. Three (3) seconds after exiting his patrol car, Trooper Knowles put the driver in an arm-bar lock, and seven (7) seconds after that, pulled him from the motorcycle and took him to the ground, causing the motorcycle to fall over and be damaged. Trooper Knowles' communication with the driver was emotionally charged and he used profanity, and even after determining that the driver was not one of the original motorcyclists who refused to stop, he continued to yell and be argumentative. Trooper Knowles received a five-day suspension without pay.

30. The Department disciplined Sergeant Mckinnie on April 4, 2008, after investigation of a vehicle crash resulting in seizure of drugs, when Sergeant Mckinnie failed to record the crash scene with the video system, failed to record the seized drugs, and failed to log in the drugs on the day he seized them pursuant to policy, but instead put the evidence in his trunk and submitted to the TBI Crime Lab five days later. Sergeant Mckinnie received a one-day suspension without pay for failure to follow proper procedure in securing and submitting evidence prior to completion of the shift, and a one-day suspension without pay for neglecting to utilize the car video system in association with investigation of a crime.

31. The Department disciplined Trooper Jones on July 26, 2006, for failure to activate his remote microphone during a traffic stop after which a complaint was filed against him for rudeness and excessive force. Trooper Jones had been counseled by his supervisor on three occasions prior for not activating the microphone during traffic stops. Trooper Jones received a one-day suspension without pay.

32. The Department disciplined Trooper Bowman on February 6, 2007, after involving himself in a child custody dispute. Trooper Bowman went to the home of one of the parents and put his foot inside the door of the residence and used tobacco during the incident. Trooper Bowman failed to turn on the video camera to record the incident, and failed to notify dispatch or seek authority from a supervisor. Trooper Bowman received a one-day suspension without pay.

The Department again disciplined Trooper Bowman on August 18, 2008, after a complaint was filed against him in connection with a traffic stop, which revealed that he failed to record the stop on his video camera. Trooper Bowman received a three-day suspension without pay for this incident.

33. The Department disciplined Trooper Dykes on May 24, 2006, for failing to activate the video camera during an incident after which a person involved filed a rudeness complaint. During the investigation of the incident, Trooper Dykes was insubordinate in refusing to write a statement. Trooper Dykes received a two-day suspension without pay.

34. The Department disciplined Trooper Ray on May 11, 2006, for failing to videotape a traffic stop and using extreme profanity in speaking with the driver. Trooper Ray received a two-day suspension without pay.

35. The Department disciplined Trooper Sheldon on December 15, 2008, after a traffic stop in which he was rude to a driver when he refused to sign a citation, telling him to get his ass out of the vehicle, he was going to jail. Trooper Sheldon opened the driver's car door and intentionally turned off the microphone for two minutes while he spoke to the driver. Trooper Sheldon received a two-day suspension without pay.

36. The Department disciplined Trooper Harris on September 3, 2008, resulting from his investigation of a traffic crash, in which he failed to record the first portion of the investigation

on his video camera, failed to enforce Tennessee law by not issuing a citation to one driver who had a suspended driver's license, and made numerous errors on the crash report. Trooper Harris received a three-day suspension without pay.

37. The Department disciplined Trooper Maldonado on February 18, 2009, after a traffic stop in which his ex-wife was the driver. Trooper Maldonado and his ex-wife were discussing visitation by telephone shortly before the stop, and when he approached the vehicle he stated, "81 in a 70. You need to get a valid license, and work with me on visitation." Trooper Maldonado failed to record the stop by audio or video, and failed to take any enforcement action. Trooper Maldonado steadfastly denied having talked with his ex-wife shortly before the stop until being continually reminded about his duty to be truthful. Trooper Maldonado received a three-day suspension without pay.

38. The Department disciplined Trooper Allen on March 27, 2010, for failing to put his patrol car in gear when he exited at the investigation of a crash, resulting in the car rolling down an embankment and crashing into some trees. Trooper Allen also failed to have the memory card in place in his video camera, resulting in the matter not being video-recorded. Trooper Allen had received a previous written reprimand for careless, negligent or improper use of state property. Trooper Allen received a four-day suspension.

39. The Department disciplined Trooper Negrin on November 7, 2007, for the following conduct:

During a traffic stop he charged the driver for unlawful possession of a handgun when in fact the gun was being legally transported, and he charged the passenger with violation of the open container law, when such law only applied to drivers. Trooper Negrin further failed to follow his supervisor's instructions in taking the proper paperwork to headquarters, and failed to

properly operate the video equipment by failing to set the date and time correctly, and failed to have the audio repaired so that there was no audio from the stop. Trooper Negrin had two prior suspensions, and received a ten-day suspension without pay for this conduct.

He was also disciplined for disregarding a schedule change for the firing range, causing him to accrue overtime and interfered with time management for the rest of the troop. Again, the previous two suspensions were noted, and Trooper Negrin received a five-day suspension without pay for this conduct.

He was also disciplined for reporting for duty forty-five minutes late, and then claiming the full shift on the time sheet. Once again, the previous two suspensions were noted, and Trooper Negrin received a three-day suspension without pay for this conduct.

40. The Department disciplined Trooper Hefner on September 18, 2006, for failing to conduct himself in a courteous and professional manner during a traffic stop when he yelled and pointed his finger at the driver. Trooper Hefner also failed to record the traffic stop with the video camera system, and further failed to complete the mandatory stop data form. Trooper Hefner had received two previous suspensions. In this instance Trooper Hefner received a fifteen-day suspension without pay.

41. The Department disciplined Trooper Cutshall on November 20, 2006, after a traffic stop in which the driver's license was revoked for DUI but Trooper Cutshall failed to seize the vehicle as required by law, and allowed the minor passenger to finish an open can of beer and then drive the vehicle approximately 500 feet. Trooper Cutshall received a one-day suspension without pay.

42. The Department disciplined Trooper Marshall on April 25, 2008, after the manager of a BP station approached Trooper Marshall about an individual becoming a nuisance in his store.

The manager was unable to obtain a criminal summons for trespassing against the individual because the city police refused to complete a police report. Trooper Marshall went to the individual's home and instructed him not to return to the BP station. Trooper Marshall recorded the interaction with his video and audio equipment, and generated an offense report. Trooper Marshall then gave a copy of the report which had not been signed by his supervisor to the BP manager, thus releasing an unapproved official document.

When Trooper Marshall later returned to the BP station, the manager informed him that, while the individual had not come into the store, he had been in the turning lane in front of the store revving his engine and staring at the store, and also in the adjoining parking lot. Trooper Marshall went again to the individual's home and placed him under arrest for stalking, but failed to record any of the incidents by audio or video recording. Trooper Marshall placed handcuffs on the individual, put him in the patrol car, read him his Miranda warning, and interviewed him, after which Trooper Marshall allowed the individual to return to his house, stating that he did not feel the individual was competent.

In the investigation of the incident, Trooper Marshall stated that he spoke with a particular Assistant District Attorney regarding the matter, who cited a particular piece of case law to support his decision to allow the individual to leave. However, the ADA denied having said anything of that nature to Trooper Marshall. The Department categorized his actions against the individual as maltreatment and oppression and noted that he misled investigators by citing fabricated case law in an attempt to protect himself. Criminal charges of official misconduct, official oppression, and filing a false report were lodged against Trooper Marshall. Trooper Marshall was terminated from his position.

CONCLUSIONS OF LAW

1. In a fifth step hearing, an administrative law judge presides to take proof and render an initial order which is subject to review by the Civil Service Commission. T.C.A. §4-5-301.
2. It is a de novo proceeding, and no presumption of correctness attaches to the action of the agency. Big Fork Mining Co. v. Tennessee Water Quality Control Board, 620 S.W. 2d 515, at 521 (Tenn. App. 1981).
3. The burden of proof rests with the agency and the agency must prove by a preponderance of the evidence that: 1) the Grievant acted or failed to act as the agency alleges; 2) the Grievant's action constitutes a disciplinary offense; and 3) the recommended discipline is appropriate for the given offense. Id. at 520. Some instances of misconduct require an elevated level of discipline, even if the employee has no history of prior disciplinary action. Berning v. State, 996 S.W.2d 828, 830 (Tenn. App. 1999).
4. The Department of Safety bears the burden of proof in this case. The standard of proof is a preponderance of the evidence. TN. Department of State, Administrative Procedures Division, Rule 1360-4-1-.02(3)(7).
5. Preponderance of the evidence simply means "the greater weight of the evidence or that, according to the evidence, the conclusion sought by the party with the burden of proof is the more probable conclusion." Id.
6. **PURPOSE (Rule 1120-10-.01)**
To establish standards for the application of disciplinary procedures which will assure fairness and uniformity among agencies and institutions subject to the provisions of these rules.
7. **POLICY (Rule 1120-10-.02)**

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, but must be in compliance with the intent of the provisions of this rule and the Act. An executive service employee serves at the pleasure of the appointing authority.

8. MINIMUM DUE PROCESS (Rule 1120-10-.03)

(1) Career employees have a "property right" to a position in the classification in which they currently hold career status. Therefore, no suspension, demotion, dismissal or any other action which deprives a regular (career) employee of his "property right" will become effective until minimum due process is provided as outlined below.

(2) Minimum due process consists of the following:

(a) The employee shall be notified of the charges against him. Such notification shall detail times, places, and other pertinent facts concerning the charges and should be in writing.

(b) The notification will provide for the employee to have a predecision discussion with an appropriate manager and will state the mechanism through which such a discussion may be arranged. The employee should be given a reasonable period of time to prepare to answer charges and present information which might influence the manager's decision.

(c) The manager conducting such discussions must be an appointing authority or manager who has direct access to an appointing authority for this purpose.

(d) The meeting outlined above shall be for the purpose of allowing the employee to present information to the manager regarding the disciplinary action under consideration.

(e) The discussion shall be informal. The employees shall have the right to present written statements of witnesses or any other information with regard to the charges. Attendance and participation by persons other than the manager and the employee shall be at the discretion of the manager.

(f) If the employee declines the opportunity to have the discussion or present information, the provisions of this section are deemed to have been met.

(3) The commission shall determine as a preliminary matter to the merits of a grievance, a Grievant's allegation that he or she was denied minimum due process.

9. EXCEPTION TO MINIMUM DUE PROCESS (Rule 1120-10-.04)

When an employee is acting in a dangerous or otherwise threatful manner and must be removed from the workplace immediately, it is not necessary to provide "minimum due process" prior to removal. Minimum due process must be provided after removal as soon as practicable. The employee, in this case, may be placed on leave or on immediate suspension without pay.

10. CAUSES FOR DISCIPLINARY ACTION (Rule 1120-10-.05)

Causes for disciplinary action fall into two categories.

(1) Causes relating to performance of duties.

(2) Causes relating to conduct which may affect an employee's ability to successfully fulfill the requirements of the job.

11. EXAMPLES OF DISCIPLINARY OFFENSES (Rule 1120-10-.06)

The following causes are examples of those considered for disciplinary action and should not be considered the only causes of action.

(1) Inefficiency or incompetency in the performance of duties.

- (2) Negligence in the performance of duties.
- (3) Careless, negligent or improper use of State property or equipment.
- (4) Failure to maintain satisfactory and harmonious working relationships with the public and fellow employees.
- (5) Habitual improper use of sick leave privileges.
- (6) Habitual pattern of failure to report for duty at the assigned time and place.
- (7) Failure to obtain or maintain a current license or certificate or other qualification required by law or rule as a condition of continued employment.
- (8) Gross misconduct or conduct unbecoming an employee in the State service.
- (9) Conviction of a felony.
- (10) Willful abuse or misappropriation of State funds, property or equipment.
- (11) Falsification of an official document relating to or affecting employment.
- (12) 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.
- (13) Trespassing on the property of any State officer or employee for the purpose of harassment.
- (14) Damage or destruction of State property.
- (15) Acts that would endanger the lives and property of others.
- (16) Possession of unauthorized firearms, lethal weapons, alcohol or illegal drugs on the job.
- (17) Brutality in the performance of duties.
- (18) Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination).
- (19) Reporting to work under the influence of alcohol or illegal drugs, or partaking of such on the job.
- (20) Sleeping or failure to remain alert during duty hours.
- (21) Betrayal of confidential information.
- (22) Garnishment of wages for more than one indebtedness.
- (23) Political activity prohibited by T.C.A. Title 2, Chapter 19 (The Little Hatch Act)
- (24) For the good of the service as outlined in T.C.A. 8-30-326.

12. **PROGRESSIVE DISCIPLINARY ACTION (Rule 1120-10-.07)**

(1) The supervisor is responsible for maintaining the proper performance level, conduct and discipline of the employees under his supervision. When corrective action is necessary, the supervisor must administer disciplinary action beginning at the appropriate step as described.

(2) Oral Warning. The supervisor will meet privately with the employee to:

- (a) Review with the employee exactly what is expected on the job and why.
- (b) Explain to the employee how he has not met requirements and why present conduct or performance is unacceptable.
- (c) Allow the employee to give reasons for his actions or failure.
- (d) Make suggestions for correction.
- (e) Record the date of the discussion and other necessary information for future reference.
- (f) Written follow-up to the discussion may be forwarded to the employee but is not required. Written follow-up to an oral warning should not be construed as a written warning as described below and will not become part of the employee's official personnel file.

(3) Written Warning. The supervisor will meet with the employee and:

(a) Review the points covered in the oral warning, if an oral warning(s) was administered. The employee will be told that a significant change in his present conduct or performance must be made.

(b) Tell the employee he will receive a letter covering the significant points of the discussion to include:

1. What has been expected and how these expectations have not been met.
2. Suggestions for improvement.
3. Indication that failure to improve will lead to further disciplinary action.

(c) Review with the organizational unit head the contents of the letter prior to its delivery to the employee by the supervisor.

(d) A copy of the written warning may be placed in the employee's official personnel file in the agency personnel office at the discretion of the appointing authority. Any written warning which has been issued to an employee shall be automatically expunged from the employee's personnel file after a period of two (2) years from the date of the letter; provided, that the employee has had no further disciplinary actions with respect to the same area of performance, conduct, and discipline.

(4) Suspension Without Pay.

(a) After minimum due process is provided, a suspension without pay may be issued by the appointing authority for one (1) to thirty (30) days. No employee may be suspended without pay for disciplinary purposes for more than thirty (30) days in any consecutive twelve (12) month period. Suspensions with or without pay of more than thirty (30) days may be issued pending the outcome of an investigation or legal action with approval of the Commissioner.

(b) Before issuance, a written notice of the suspension without pay will be prepared. The notice will contain an account of the circumstances which led to the decision to issue the suspension, the beginning and ending dates of the suspension and information to the employee concerning his rights of appeal as outlined in Chapter 1120-11 of these rules. A copy of the notice will be placed in the employee's official personnel file and a copy will be sent to the Department.

(5) Dismissal.

(a) After minimum due process is provided, an employee may be dismissed by the appointing authority from his position for unacceptable conduct or performance of duties.

(b) Before an employee is dismissed, a written notification detailing the circumstances leading to the decision to dismiss will be prepared. The notice will indicate the effective date and inform the employee of his rights to appeal as outlined in Chapter 1120-11 of these rules. A copy of the notice will be placed in the employee's official personnel file and a copy will be sent to the Department.

(c) Before an employee can be dismissed, he must be given ten (10) calendar days paid notice. During the notice period an employee will not be required to report for duty. The employee's accumulated annual leave balance may be used during this notice period only if dismissal was for gross misconduct.

(6) Transfer or Demotion. If it is determined by the appointing authority that an employee's ability to satisfactorily perform his duties is beyond the capabilities of the employee or the employee has been compromised by notorious conduct to the extent that he is ineffective in his position, the employee may be demoted or transferred to a position that is more appropriate after minimum due process has been provided.

13. GRIEVANCE/PURPOSE (Rule 1120-11-.01)

To provide clear, orderly and expedient procedures through which all career or permanent employees of the State service may process bona fide complaints or grievances.

14. GRIEVANCE/POLICY (Rule 1120-11-.02)

(1) Career and permanent employees will be given every opportunity to resolve bona fide complaints or grievances through established procedures. Every reasonable effort will be made to resolve complaints at the lowest possible step in the procedure.

(2) Employees using this procedure will be entitled to process their complaints or grievances without fear, interference, discrimination, or reprisal.

15. GRIEVANCE/RESPONSIBILITY (Rule 1120-11-.03)

(1) The Commissioner will be responsible for providing and maintaining the basic standards and guidelines for implementing this rule chapter.

(2) Appointing authorities will be responsible for the proper effectuation of this rule chapter throughout their respective agencies. Modification of these procedures may be made in order to satisfy unusual circumstances within an agency if such modification is approved by the Commissioner.

(3) Appointing authorities will be responsible for ensuring that all employees and supervisory personnel are aware of the provisions of this rule chapter.

16. GRIEVANCE/BASIC STANDARDS (Rule 1120-11-.04)

(1) A complaint or grievance must be filed at the appropriate step in the grievance procedure within fifteen (15) workdays (Monday - Friday, 8:00 a.m. - 4:30 p.m.) of the action which is the basis for the grievance, otherwise it will be considered untimely and invalid.

(2) Although no standard grievance forms are provided, agencies may develop and make available such forms to employees. No grievance may be denied because a standard form adopted by an agency has not been used.

(3) A grievant may represent himself at any step in the procedure.

(4) At the informal hearing before the appointing authority, an attorney or a representative of an employee may speak on behalf of the employee.

(5) Legal counsel may represent a grievant before the Civil Service Commission, which is the final step of this procedure. The grievant and the agency may have counsel present at discussions prior to the final step. The presence of other observers at discussions prior to the final step of this procedure is at the discretion of the manager or supervisor in charge of that discussion.

(6) Grievants may present grievances during business hours or other mutually agreeable hours as work situations may require. Grievance discussions held during the scheduled off-duty hours for a grievant, witness, or representative will be considered the same as overtime work. Grievants or employees who are required to appear as witnesses or representatives will not be required to use leave for such periods and shall be reimbursed for travel and other expenses in accordance with the comprehensive travel regulations.

(7) Grievances concerning suspension without pay must be appealed to the lowest management level in the organization with authority to overturn the suspension.

(8) Grievances concerning dismissal should be appealed directly to the appointing authority, warden, or superintendent.

(9) Grievances concerning alleged discrimination prohibited by T.C.A. 8-50-103 or T.C.A. 4-21-401 may be appealed directly to the appointing authority, warden, or superintendent through this procedure. If the aggrieved is unsatisfied with the decision, the grievance and the appointing authority's response may be appealed to the Commission within thirty (30) days or the Tennessee Human Rights Commission as provided in T.C.A. 8-50-103(b).

(10) Grievance decisions should be communicated in writing directly to the grievant in a timely manner as outlined in Chapter 1120-11-.05. Certified or registered mail is mandatory if a decision must be mailed. Hand delivered grievance decisions should include a written heading indicating "Hand Delivered" with a place for a signature.

(11) Grievances must be expressed in reasonable terms. Each grievance submitted should contain:

- (a) the basis for the grievance;
- (b) the settlement or corrective action desired by grievant; and
- (c) sufficient facts or other information to begin an investigation.

17. **GRIEVANCE/PROCEDURES (Rule 1120-11-.05)**

The appropriate entrance step is determined by the grievant's relative level in the organization. Procedures shall not be more than five (5) steps to finality as follows:

(1) Step I - Grievant's immediate Supervisor (verbal)

- (a) Verbal discussion with supervisor within fifteen (15) workdays of cause.
- (b) Supervisory investigation and fact finding.
- (c) Decision clearly communicated to grievant within five (5) workdays of discussion.

(2) Step II - Next Appropriate Higher Level of Management (written)

- (a) Written grievance submitted to appropriate manager within ten (10) workdays of receipt of Step I decision.
- (b) Informal discussion or hearing of facts and allegations.
- (c) Investigation, fact finding, and written decision communicated to grievant within ten (10) workdays of discussion.

(3) Step III - Next Appropriate Higher Level of Management (written)

- (a) Written grievance and prior step decision submitted to next appropriate manager within ten (10) workdays of receipt of decision from Step II.
- (b) Informal discussion or hearing of facts and allegations with witnesses and documentation.
- (c) Investigation, fact finding, and written decision clearly communicated to grievant within ten (10) workdays of discussion.

(4) Step IV (written)

- (a) Written grievance and prior step decision submitted to the appointing authority or designee within ten (10) workdays of receipt of decision from Step III.
- (b) Informal discussion or hearing of facts, allegations, and testimony by appropriate witnesses as determined by the appointing authority or designated representative as soon as practical. Whenever possible, the fourth step hearing shall be conducted by a manager who had no input to or involvement in the original decision to discipline.
- (c) Investigation, fact finding, and written final agency decision communicated to grievant within ten (10) workdays of discussion.
- (d) The appointing authority shall have full authority to overturn, reduce, or alter any disciplinary action based on information gathered at the step IV hearing including

reinstatement of leave and awards of backpay, if appropriate, which may be offset by income earned from alternative employment or unemployment insurance payment received.

(5) Step V (Formal - Career Employee only)

(a) Written grievance and all relevant documentation shall be submitted within thirty (30) days of receipt of decision from Step IV to:

Secretary, Civil Service Commission
Tennessee Department of Personnel
Second Floor, James K. Polk Building
Nashville, TN 37243-0635

(b) Hearings will be held pursuant to T.C.A. §8-30-328 and the Uniform Administrative Procedures Act.

(6) The time limits set herein may be extended not in excess of six (6) months by written agreement between the manager involved and the employee. Failure of management to proceed within established time limits entitles the grievant to proceed to the next step in this procedure.

(7) Hearings conducted at Step V will conform to the model rules of the Secretary of State for contested cases and the Department hereby adopts Secretary of State Rule 1360-4-1 in statutory compliance.

18. GRIEVANCE/SCOPE OF PROCEDURE (Rule 1120-11-.06)

(1) The Commission will serve as the final step for all grievances by career employees.

(2) The agency appointing authority will serve as the final step for all grievances by permanent employees.

19. GRIEVANCE/GRIEVABLE MATTERS (Rule 1120-11-.07)

(1) Disciplinary suspension or demotion.

(2) Disciplinary dismissal.

(3) Involuntary geographical transfer of an employee or official duty station more than fifty (50) miles. Distance will be determined by drawing a circle, with a 50 mile radius, centered on the previous official duty station

(4) Non-compliance with an approved reduction in force plan by an appointing authority.

(5) Prohibited political activity as outlined in T.C.A. Title 2, Chapter 19 ("The Little Hatch Act").

(6) Coercion of an employee to "waive" his right to consideration on a certificate of eligibles.

(7) Performance evaluations under certain circumstances to the fourth step.

(8) Other matters within the discretion or control of the appointing authority or the Commission.

20. GRIEVANCE/EXCEPTIONS & NON-GRIEVABLE MATTERS (Rule 1120-11-.08)

(1) Actions that affect employees who are not career or permanent employees.

(2) Actions that affect an employee serving an initial probationary period.

(3) Normal supervisory counseling.

(4) Non-selection for promotion when the appointment was in compliance with these rules and the Act.

(5) Verbal and written reprimands.

(6) Performance award decisions.

(7) Actions resulting from suggestions adopted by the State Employee Suggestion Award Board.

- (8) Actions resulting from reductions in force when an approved reduction in force plan was followed.
- (9) Shift, post, and overtime assignments.
- (10) Reasonable work assignments outside those normally associated with the employee's assigned job classification.
- (11) Salary range assigned to classification.
- (12) Classification of position.
- (13) Denial of leave requests except as provided for in T.C.A. §§8-50-801 and T.C.A. 8-50-110.
- (14) Matters relating to internal agency or program management which are based on discretionary decision making.
- (15) Demotions during subsequent probation, if such demotion is to the job classification from which the employee was promoted and at a salary rate no lower than the salary rate had the promotion not occurred.
- (16) Agency rules or policies which do not conflict with statutes or rules of the Department of Personnel.
- (17) Any other matter over which an appointing authority or the Commission has no control or jurisdiction or is without the authority to grant requested relief.

21. **GRIEVANCE/TECHNICAL ADVICE AND ASSISTANCE (Rule 1120-11-.09)**

- (1) Technical questions regarding this rule may be resolved by referring questions to the agency personnel section.
- (2) Unresolved technical questions to an agency personnel section may be resolved by referring such to the Department of Personnel, Employee Relations Division.
- (3) Disputes over grievability may be resolved by an agency's appointing authority or by the Commissioner. The Civil Service Commission may review such determinations and, at its discretion, take whatever action it deems appropriate.
- (4) The intent of this policy is to legally, efficiently, and fairly resolve bona fide complaints, and grievances. The initiation of a grievance should not be considered as a negative reflection against an employee, supervisor, or agency management, but should be considered as an effort to communicate and seek resolution of work related problems.
- (5) Management should consider grievances objectively, fairly, and expeditiously while maintaining a helpful, cordial, and professional attitude throughout the process of redress.

ANALYSIS

The preliminary issue of whether Grievant's conduct warranted disciplinary action is simple. However, the issue involved is more than bad judgment by the Grievant in undercharging the young lady. All law enforcement officers must have discretion in determining who is charged with what crimes based on their observations and judgments in the field. But law enforcement officers do not have the absolute right to ignore criminal conduct because of sympathy. If Grievant had truly felt he did not have the proof to charge the young lady with

DUI, he could have arrested her for public intoxication instead. If this had occurred, disciplinary charges against Grievant most likely would have never been brought.

Here however, Grievant chose to aid this young lady out of sympathy. Clearly, Grievant sought to conceal his behavior by turning off his video and audio equipment at important times, and then, relocated to the Exxon station to release the young lady. These were his efforts to ensure his conduct was not detected by his supervisors or the public. There is more at issue here than a failure to properly charge an offender. The Department correctly determined that disciplinary action was appropriate.

Once disciplinary action is justified, it must be determined if Grievant's termination is the proper place in the progressive discipline hierarchy. This is more difficult since Grievant's conduct was not motivated by scienter, but in fact, was motivated by his moral desire to assist this young lady. One must also consider Grievant's committed military service to the country and his professionalism exhibited on the DVD of this incident. Grievant's professionalism was equally impressive at the hearing of this case. On the other hand, as noted above, Grievant had only been employed as a State Trooper for approximately 67 months. During that time, he served in the traditional role of a State Trooper for less than 36 months. During that time, he was suspended twice. Both of these prior disciplinary actions involved poor judgment and/or failing to follow the Department's rules.

Most likely termination would not have been appropriate if Grievant had no prior disciplinary history, or if his disciplinary history was spread over a longer career. Grievant's conduct in these prior disciplinary actions and the instant matter show a pattern that Grievant is not able or unwilling to comply with the Department's rules. After close scrutiny of the facts

and Grievant's disciplinary record, the Department's decision to terminate Grievant must be upheld.

Finally, the pattern of disciplinary action by the Department set forth in paragraphs 22 through 42 above gives good reason for Grievant to question what the Department's policies are in doling out disciplinary action and whether he has been treated consistently by the Department. However, this is a *de novo* hearing before the Civil Service Commission and this decision is made independent of the Department's policies, formal or informal, on discipline.

IT IS THEREFORE ORDERED that Grievant's termination from the Tennessee Department of Safety is upheld.

Entered this the _____ day of _____, 2011.

Steve R. Darnell
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 25 day of October, 2011



Thomas G. Stovall, Director
Administrative Procedures Division