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5-9-2011

TENNESSEE DEPARTMENT OF SAFETY,  
Department/Petitioner, vs. CHERYL MCNEARY,  
Grievant/Respondent

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that the two (2) day suspension without pay is hereby REVERSED. This determination is based on the following Findings of Fact and Conclusions of Law:

### **FINDINGS OF FACT**

1. The Grievant was employed as a Trooper by the Department of Safety at all times in 2009, and was on active duty until July 21, 2009. A Trooper is expected to perform thirty-two (32) Level 3 inspections per year in order to maintain the required certification. A Level 3 inspection consists of a Trooper examining the documents, logbook, and medical card of the driver of a truck to insure compliance with Federal Motor Carrier Laws.
2. The Grievant was placed on medical leave status under a doctor's care due to an off duty injury which occurred in June of 2009.
3. The Grievant remained on medical leave from July 22, 2009 until January 28, 2010.
4. Due to her medical leave status Grievant was not able to complete the required 32 level 3 inspections.
5. As a result of not completing the required 32 inspections, the Grievant lost her certification to perform level 3 inspections.
6. After returning from medical leave, the Grievant attended and completed the 40-hour training course for Level 3 certification, and regained her certification in May of 2010. In September of 2010 Grievant received a two (2) day suspension for not completing the required 32 level 3 inspections for 2009.
7. In the past, Grievant had performed all of her level 3 inspections in December and was not disciplined or warned that this was not an acceptable practice.
8. Grievant testified that during her twenty-seven (27) years of employment with the State, there was no specific time frame required to complete your level 3 inspections other than within the course of one (1) year.

9. This is the first suspension of any kind for Grievant.

10. Although the Commercial Vehicle Safety Alliance Operational Policy recommends that each inspector complete eight (8) inspections per quarter, this recommendation has never been incorporated into a properly promulgated rule, operating procedure, or general order, as is evidenced by the fact that Grievant has previously completed all 32 required inspections in one quarter and has never been disciplined for doing so.

11. There have been instances in the past where Troopers were not suspended for failing to perform the required 32 inspections per year due to the fact that they were on sick leave. Specifically, Trooper John Ivy did not complete 32 inspections in 2009 because he was on sick leave. Trooper Ivy was not suspended.

### **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.

2. The Department has charged the Grievant with violating the following Orders.

- **DEPARTMENT OF SAFETY, GENERAL ORDER 900**

[24 October 2008]:

Commercial Motor Vehicle Inspections:

I. Purpose:

\* \* \*

. . . The purpose of safety inspections is to examine and ensure compliance of Federal Motor Carrier Safety Rules and Regulations and Tennessee State Laws.

II. Policy:

It shall be the policy of the Department of Safety (DOS) to establish inspection procedures for drivers and commercial vehicles and require members of the

Tennessee Highway Patrol (THP) to actively enforce all applicable laws relative to the safe operation of commercial motor vehicles. Members are required to conduct vehicle and driver inspections in order to detect and cite any violations that represent a hazard to the motoring public. . .

III. Procedures for Conducting Inspections:

\* \* \*

B. Inspection Levels:

\* \* \*

3. Level III – Driver only inspection, driver license, medical certificate, duty status and other required documents;

\* \* \*

F. Annual Certification:

\* \* \*

2. After annual certification, each member is required to complete thirty-two (32) inspections annually to maintain certification.

3. If a member fails to complete the annually required thirty-two (32) inspections, this will be cause for disciplinary action and the member shall be required to attend the necessary training to regain certification. Upon completion of the training, the member shall complete thirty-two (32) inspections to gain full certification.

And,

- DEPARTMENT OF SAFETY, GENERAL ORDER 216-1

[30 June 2008]:

Ethics, Compliments, Complaints and Disciplinary Regulations:

\* \* \*

II. Policy:

\* \* \*

It is the policy of the Department of Safety to warn, suspend, demote or dismiss any employee whenever just or legal cause exists.

\* \* \*

IX. Causes for Disciplinary Action:

A. Causes for disciplinary action fall into two (2) categories:

1. Causes relating to performance of duties;

\* \* \*

B. It is not feasible to itemize every cause in which disciplinary action may be taken. The following causes are examples of those considered for disciplinary action and should not be considered the only causes.

\* \* \*

\* \* \*

**21. NEGLECT OF DUTY:**

a. Employees shall not be inattentive to duty or neglect their duties.

\* \* \*

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. 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. Although General Order 900 requires all State Troopers to complete thirty-two (32) Level 3 vehicle inspections annually, it contains no provision requiring a certain number of inspections to be performed by certain dates throughout the calendar year. Grievant testified, credibly, that in other years she had completed all of her required inspections in December, and was never disciplined or otherwise penalized. During the year in question, however, and through no fault of her own, Grievant was placed on medical leave and was unable to complete the required inspections. The State attempts to justify the two (2) day suspension with several arguments, none of which have merit. First, the State contends that the CVSA Operational Manual "recommends" that each Trooper perform eight (8) inspections per quarter. Notwithstanding the fact that a recommendation is not a requirement, Grievant had in other years performed all of her required inspections in December and this was acceptable. So by past practices, even though the CVSA manual *recommends* that you do eight (8) inspections per quarter, it has been acceptable to do them all in the last quarter. Second, the State claims that they have incurred additional expense due to the fact that Grievant had to attend a 40-hour training course to be re-certified to perform inspections. However, Grievant went out on medical leave in July. Therefore, even if she had completed the *recommended* eight (8) inspections per quarter, she still would have only completed sixteen inspections and still would have had to be re-certified. The recertification training course costs the State the same amount of money regardless of how many inspections the Trooper performed the previous year. Third, the Department argues that the Grievant

neglected her duties by waiting until the end of the year to complete the required inspections. The Grievant had no way of knowing that she would injure her foot and have to be out on medical leave from July until January, and no one at the Department ever advised Grievant that it was unacceptable for her to perform all of her required inspections in one quarter. There exists no rule or requirement stating Grievant had the duty to complete eight (8) inspections per quarter. It is not possible to neglect a duty that doesn't exist. If the Department would like to create such a duty they could simply implement a General Order stating that during each calendar year eight (8) inspections must be completed by March 31, sixteen (16) inspections must be completed by June 30, twenty-four (24) inspections must be completed by September 30, and thirty two (32) inspections must be completed by December 31. There exists no such General Order, and the fact remains that Grievant had in the past completed all of her required inspections in one quarter, and that she had planned to do that in 2009, but circumstances beyond her control made it impossible for her to get her inspections completed.

5. 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. As to the first issue, it is CONCLUDED that there is no evidence that the Grievant was negligent in the performance of her duties pursuant to Department of Personnel Rule 1120-10-.06(2). It is CONCLUDED that there is no evidence that Grievant was inattentive or neglectful to her duties pursuant to General Order 216. And finally, it is CONCLUDED that the Department has failed to prove that General order 900 *requires* the completion of thirty two (32) inspections within a certain timeframe, or that a Trooper who fails to perform the required inspections should be subject to discipline, particularly under facts such as the present case where circumstances beyond the Trooper's control made it impossible to complete the required inspections. Any disciplinary action in this matter is inappropriate.

Accordingly, IT IS HEREBY ORDERED that the Tennessee Department of Safety has failed to establish by a preponderance of the evidence that the Grievant, Cheryl McNeary, acted in violation of *The Rules of the Tennessee Department of Personnel* and Department of Safety

General Orders, by failing to perform the required number of Level 3 Commercial Vehicle Inspections during 2009.

IT IS FURTHER ORDERED that Grievant is to be reimbursed for any and all lost wages, leave, and/or other compensation as a result of the two (2) day suspension. As a successfully appealing employee, Grievant's attorney's fees and costs are to be paid.

This Order entered and effective this 10 day of January, 2012

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Rob Wilson  
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 10 day of January, 2012



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Thomas G. Stovall, Director  
Administrative Procedures Division