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DEPARTMENT OF SAFETY v. REGINA RICE, Grievant

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BEFORE THE CIVIL SERVICE COMMISSION
FOR THE STATE OF TENNESSEE

IN THE MATTER OF: **DEPARTMENT OF SAFETY** **v.** **REGINA RICE** **Grievant**	**DOCKET NO. 26.19-110674J**

INITIAL ORDER

This matter was heard on August 30, 2011 and October 10, 2011, before Leonard Pogue, Administrative Judge, sitting for the Tennessee Civil Service Commission. Deborah Martin represented the Department of Safety ("Department"). Grievant Regina Rice was present and represented by counsel, David King. This matter became ready for consideration upon the deadline for submission of proposed findings of fact and conclusions of law (Department submitted proposed findings on December 9, 2011; Grievant submit proposed findings on January 4, 2012). The subject of the hearing was Grievant's appeal of her termination by the Department. After consideration of the entire record in this matter, it is determined that the termination should be **SET ASIDE** and Grievant's discipline should be **REDUCED** to a **30 DAY SUSPENSION.** This decision is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Grievant was employed as a Driver's License Examiner at the Department's Dyersburg station for approximately four years.

2. On September 10, 2010, a due process discussion was held concerning allegations that Grievant took a cell phone photograph of a driver's license photograph and disseminated the photo.

3. On November 17, 2010, a Department representative conducted a Step IV Hearing. Commissioner Dave Mitchell, by letter dated November 18, 2010, determined that there was sufficient evidence to support termination.

4. The grounds for the termination were for violating Department of Human Resources Rule 1120-10-.06(2) negligence in the performance of duties; Rule 1120-10-06(8) gross misconduct or conduct unbecoming an employee in State service; Rule 1120-10-06(12) participation in any action that would in any way seriously disrupt 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; Rule 1120-10-06(24) for the good of the service as outlined in T.C.A. § 8-3-326; for violating Department General Order 216-1, II and IX; for violating the State of Tennessee Network User Agreement; for violating 18 U.S.C.A. 2721 and T.C.A. § 39-14-602 (b)(5).

5. No proof was presented as to whether or not Grievant had any prior disciplinary infractions, except an unofficial written warning (involving some of the underlying facts of this matter) from Grievant's supervisor that was never forwarded to the Department's personnel office. Grievant received positive employee work evaluations.

6. Ricky Smith, who had a tumultuous dating relationship with Grievant, filed a complaint (originally anonymously) with the Department alleging Grievant took a photograph of Brent Hill's, an officer with the Dyersburg Police Department, driver's license photo and forwarded the picture to Mr. Smith. The Department assigned Sergeant James Gunn of the Internal Investigation Unit to investigate the complaint. Grievant admitted to Sergeant Gunn that she had viewed and taken a cell phone photograph of officer's Hill driver's license picture but denied that she disseminated the photo. Sergeant Gunn then spoke with Mr. Smith and observed the photograph of Officer Hill on Mr. Smith's cell phone. No personal information/data was included with the photo. Sergeant Gunn also interviewed Trooper Henry Robinson, stationed at the Dyersburg office, who confirmed Grievant's account that she had spoken to Trooper Robinson about Officer Hill's contact information. Officer Hill was interviewed and he acknowledged to Sergeant Gunn that he given Grievant permission to view his license photo but not to copy it or disseminate it.

7. Officer Hill was telephoned by Trooper Robinson, a friend of his, and told that there was talk about an alleged relationship between Officer Hill and Grievant. Trooper Robertson passed the phone to Grievant who advised Officer Hill that Mr. Smith had accused her of seeing Officer Hill and had threatened both of their jobs. Officer Hill testified that he gave Grievant permission to view his photo. She did not request to photograph his picture and he did not give permission for her to do so. Officer Hill did not recall any plans to meet with Grievant to discuss the issue. They talked on the phone a few occasions after this-once when he advised her about the steps to file a stalking charge against Mr. Smith. Officer Hill believed Mr. Smith was a threat to Grievant and her job, Officer Hill and his job, and that Grievant wanted Officer Hill to be aware of the situation.

8. Michael Hogan, Director of Driver Services Division, testified that Grievant's termination was due to Grievant taking a photograph of a license picture and then sending it to someone else. Mr. Hogan noted that another employee was terminated, prior to Grievant's termination, for taking a photo on a cell phone and sending the cell phone photo to someone outside the Department; however, that employee was directly employed with an employment agency and temporarily working for the Department. Also, the photo in that instance was to be used for blackmail purposes. Mr. Hogan stated that in two other divisions of the Department employees were terminated for "similar acts" but did not describe the specific circumstances.

9. Grievant's supervisor, Mitzi Henson, testified when she first questioned Grievant about the complaint, Grievant denied that she had taken a photo. Prior to this conversation, Ms. Henson saw a printed e-mail of Grievant's referencing a received "dmv" photo and Grievant denied to Ms. Henson sending a license photo to anyone. After this meeting concerning e-mails and the photo, Ms. Henson issued an unofficial written warning (not sent to human resources to be included in her personnel file) to Grievant. Ms. Henson was familiar with threats made to Grievant by Mr. Smith. Ms. Henson acknowledged that she had taken a photo of a driver's license for training purposes.

10. Grievant talked to Trooper Henry Robinson about Mr. Smith making threats about Grievant's job. Trooper Robinson listened to a voicemail from Mr. Smith to Grievant wherein Mr. Smith threatened Grievant's job and Officer Hill's job. Trooper Robinson advised Grievant that she may need to take out a restraining order and told to her who Officer Hill was since Grievant did not know him. Trooper Robinson then called Officer Hill and Officer Hill and Grievant then talked on the phone.

11. Grievant received a voicemail from Mr. Smith wherein Mr. Smith stated that he had proof that Grievant had been dating Officer Hill, and that Grievant and Officer Hill would lose their respective jobs. Grievant did not know Officer Hill. The following day Grievant spoke to Trooper Robinson about the voicemail. Trooper Robinson told Grievant he knew Officer Hill and telephoned him. Grievant and Officer Hill spoke and he gave her permission to view his driver's license photo. She said she did this because of concerns about her job, the reputation of the Department and Office Hill's job. Grievant took the picture of him, approximately a month later, so she would recognize him because Officer Hill was to meet her some time later to listen to the voicemail.

12. Grievant denied sending Officer Hill's picture to Mr. Smith's phone. Mr. Smith was in and out of her house and had access to her phone which was not secured by a password or otherwise. Mr. Smith set up Grievant's home mail account and accessed it to send her e-mails at work that appeared as if she were sending e-mails to herself. Grievant admitted that she had responded, while at work, to Mr. Smith's e-mails.

13. Mr. Smith initiated the complaint with the Department because a truck tried to run him off the road and the license of the truck matched a truck he saw parked in front of Grievant's home. At the hearing, Mr. Smith initially denied threatening Grievant about her job but changed his testimony when presented with a taped message of himself making threats in general to and specifically about Grievant's and Officer Hill's jobs. According to Mr. Smith, someone else told him that Grievant was having an affair with Officer Hill. Mr. Smith stated that Grievant sent him the photo of Officer Hill to show him with whom she was accused of having a romantic relationship so that Mr. Smith then could present the picture to the person who made the original accusation. Mr. Smith acknowledged helping set up Grievant's home e-mail account.

14. Doneida Harris (Ms. Henson's supervisor) and another co-worker of Grievant's each testified that they considered Grievant truthful.

CONCLUSIONS OF LAW

1. The Department has the burden of proof, under Rule 1360-4-1-.02(7) of the Uniform Rules of Procedure for Hearing Cases before State Administrative Agencies, to show by a preponderance of the evidence that its decision to terminate Grievant was proper.

2. Tennessee Department of Human Resources Rule 1120-10-.07, PROGRESSIVE DISCIPLINARY ACTION, states in relevant part:

> (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
>
> (3) Written Warning
>
> (4) Suspension Without Pay
>
> (a) After minimal due process is provided, a suspension without pay may be issued by the appointing authority for one (1) to thirty (30) days.
>
> (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.
>
> (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.

3. T.C.A. § 8-30-330, Progressive Discipline, states in relevant part:

(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.

(c) When corrective action is necessary, the supervisor must administer disciplinary action beginning at the step appropriate to the infraction or performance. Subsequent infractions or poor performance may result in more severe discipline in accordance with subsection (a).

4. Tennessee Department of Human Resources Rule 1120-10-.06, EXAMPLES OF DISCIPLINARY OFFENSES, lists the following as examples of disciplinary offenses:

(2) Negligence in the performance of duties.

(8) Gross misconduct ("any job related misconduct which may subject an employee to criminal prosecution") or conduct unbecoming an employee in state service.

(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.

(24) For the good of the service as outline in T.C.A. 8-30-326.

5. T.C.A. § 39-14-602(b)(5) provides: "whoever intentionally and without authorization, directly or indirectly makes or cause to be made an unauthorized copy, in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network commits an offense punishable as provided in § 39-14-105."

6. 18 U.S.C.A. § 2721 provides, in part, as follows:

> (a) In General -- A State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity:
>
> (1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record….
>
> 18 U.S.C.A. § 2725 provides, in part, as follows:
>
> (3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.

7. Department of Safety, General Order 216-1, II, POLICY, provides as follows:

> It is the policy of the Department of Safety to warn, suspend, demote, or dismiss any employee whenever just or legal cause exists. Furthermore, employees shall not commit any act that would reflect discredit upon themselves and/or the Department while on or off duty. It is vital that employees concerned be fully aware of the penalties for misconduct and the procedures for enforcing them.

8. Department of Safety, General Order 216-1, IX, B. 2. VIOLATION OF RULES, provides as follows:

> a. Employees shall not commit any act or fail to perform any act, which would constitute a violation of any of the Directives, Orders, policies, and/or procedures of the Department and State Department of Human Resources Rules, whether or not they are stated in this Order.
>
> > (1) Ignorance of Departmental Directives, Orders, policies, or procedures shall not justify any such violation.
> >
> > (2) Employees shall be responsible for their own acts, and they shall not unjustly attempt to shift to others the responsibility for executing or for failing to execute a lawful order or duty.

9. Department of Safety, General Order 216-1, IX, B. 12. CONFIDENTIALITY OF INFORMATION-Official Business, provides as follows:

a. Employees shall treat the official business of the Department as confidential.

(1)Information regarding official business shall be disseminated only to those persons for whom it is intended and only in accordance with established policy and procedures.

10. The State of Tennessee, Acceptable Use Policy, Network Access Rights and Obligations, User Agreement Acknowledgement, provides as follows:

(1) I will protect State confidential data, facilities and systems against unauthorized disclosure and/or use.

(3) I will be accountable for all transactions performed using my computer access codes.

(4) I will not disclose any confidential information other than to persons authorized to access such information as identified by my section supervisor.

11. The following is not in dispute: Grievant viewed Officer Hill's driver's license photo with his permission, and Grievant did not ask Officer Hill if she could take a cell phone photo of his driver's license picture. There is a dispute as to who disseminated the photo. Grievant denies sending the photo to Mr. Smith. According to Mr. Smith, her motivation for sending the picture to him was to allow Smith to see the man he had accused her of having an affair and then show it to the original accuser. Mr. Smith denies sending the photo to his phone but he had the opportunity and mind-set to do so. Grievant's phone was available to Mr. Smith while he was in her home, and the phone had no lock or password. The proof clearly demonstrated that their relationship was tumultuous and that he was angry with Grievant throughout most of the time at issue. Moreover, he threatened to "wreck" her life/job and ultimately filed a complaint with her employer regarding the picture. Additionally, Grievant is

the more credible of the two witnesses. She has consistently maintained (her conversation with Ms. Henson, interview with Sergeant Gunn, her testimony at the hearing) that she did not send the photo to Mr. Smith. On the other hand, Mr. Smith denied threatening Grievant with her job, but changed his testimony after confronted with a tape of his threats. His version of the truck nearly running him off the road and ensuing chase (the event which he claims prompted him to file the complaint) was somewhat incredulous. Simply put, Mr. Smith was a less than credible witness.

12. Grievant argues that she should be excused or otherwise did not violate any order, rule, or statutes because she took the picture to protect the Department, her job and Officer Hill's job. This argument is without merit. Although her job may have been threatened, the Department was not at risk of harm and her reasons for viewing and taking the picture were personal.

13. Having concluded that Grievant took the photo for personal reasons but did not disseminate the photo, it is necessary to determine if there are any violations of rules, statutes, orders, etc. to warrant disciplinary action:

a) The Department alleges Grievant violated Department of Human Resources Rules 1120-10-.06 (2) (8) and (12). The proof does not demonstrate that Grievant's actions were negligent (2) or seriously disrupted the normal operation of the Department or interfered with management (12). Based on the definition of gross misconduct (8), Grievant could be disciplined for violating T.C.A. § 39-14-602(b)(5). Department of Safety, General Order 216-1, IX, B. 2. VIOLATION OF RULES, merely states that employees shall not violate a General Order or Department of Human Resources Rules.

b) By taking the photo, Grievant violated T.C.A. § 39-14-602(b)(5). However, Grievant's actions were more of a technical violation (the statute addresses computer data, software and programs) and there was no prosecution of Grievant as provided by the statute.

c) In regard to 18 U.S.C.A. § 2721, Grievant did not disclose any personal information and therefore did not violate the statute.

d) Grievant did not disclose any confidential information in violation of the State of Tennessee, Acceptable Use Policy, Network Access Rights and Obligations, but arguably did fail to protect confidential data, since the photo she took was ultimately disseminated, which is a violation of the policy.

e) Department of Safety, General Order 216-1, IX, B. 2. VIOLATION OF RULES, General Order 216-1, IX, B. 12. CONFIDENTIALITY OF INFORMATION-Official Business relates to dissemination of information and it has been determined that Grievant did not disseminate the photo.

14. Having concluded that Grievant's conduct (taking the photo) violated Department of Human Resources Rules 1120-10-.06 (8), T.C.A. § 39-14-602(b)(5), the Acceptable Use Policy, and portions of General Order 216-1, the remaining issue is a determination of the appropriate discipline. Grievant should not have used the driver's license data to view Officer Hill's picture, even though he gave her permission to do so, and should not have used her cell phone to photograph his picture. Although it has been determined that Grievant did not disseminate the photo, her phone was used to do so. However, the circumstances surrounding Grievant's conduct must be considered. Grievant's job and Officer Hill's were being threatened. After receiving the threat, she consulted Trooper Robinson who connected her with Officer Hill. Officer Hill gave her permission to view his picture. Grievant took the photo at a later date in

order to recognize Officer Hill (it is noted that Officer Hill did not recall a future meeting). The photo did not include any personal or confidential information. Grievant did take the picture for personal reasons-her job. Yet, the reason was not frivolous, not for wrongful purposes nor for some sinister or unlawful reason. The Department terminated an employee for taking a photo and sending it to someone to use for blackmail purposes, an act worthy of termination. Further, Grievant's supervisor, after viewing an e-mail to Grievant alleging that Grievant had sent a "dmv" photo to someone (Mr. Smith), determined that discipline concerning e-mails and the photo should be an unofficial written warning. Given the nature of Grievant's offense and the facts and circumstances surrounding this case, termination is extreme and the most appropriate discipline is a 30 day suspension.

15. The Department argues that termination is appropriate, in part, pursuant to Tennessee Department of Human Resources Rule 1120-10-.06 (24) for the good of the service as outlined in T.C.A. 8-30-326. More specifically, the Department relies upon Reece v. Tennessee Civil Service Commission, 699 S.W.2d. 808 (Tenn. Ct. App. 1985). In the Reece case publicity was so great that the Grievant's public image was marred because of a suspicion of guilt, and he was no longer a useful employee. In the case at bar, The Department did not present any proof that this matter was publicized and that notoriety attaches to Grievant or that Grievant's usefulness as an employee was impaired. The Reece case is simply inapplicable to this matter. The Department also argues that DOS v. Shirley, No. 09-21111-IV (Davidson County, Tn. Chancery Court, September 27, 2011) provides a basis for termination. The Shirley case also is distinguishable from this matter. In Shirley, Grievant accessed driver's license information for over 100 individuals for no legitimate purpose; there were reasonable misgivings about

Grievant's credibility; and there were Reece concerns about his ability to continue to serve as a law enforcement officer.

It is **ORDERED** that the decision by the Department of Safety to terminate Grievant be **SET ASIDE** and the Grievant's discipline should be **REDUCED** to a **30 DAY SUSPENSION**. Grievant shall be reinstated with loss of pay and benefits restored and receive an award of attorney's fees and costs in accordance with the provisions of Tenn. Code Ann. § 8-30-328(e) (f).

This Initial Order entered this 24 day of February, 2012

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Thomas G. Stovall, Director
Administrative Procedures Division