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DEPARTMENT OF SAFETY, Petitioner, v. KYLE CANTWELL, Grievant

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BEFORE THE TENNESSEE
CIVIL SERVICE COMMISSION

IN THE MATTER OF:

DEPARTMENT OF SAFETY,
Petitioner
v.

KYLE CANTWELL,
Grievant

DOCKET NO: 26.19-098442J
DOS File IA-173-08-20-07

INITIAL ORDER

This matter was heard in Nashville, Tennessee on November 10, 2008 before Lynn M. England, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Civil Service Commission. The Department of Safety was represented by Deborah Martin, Staff Attorney and the Grievant was represented by Arthur Knight, of the Knoxville Bar.

This matter became ready for consideration February 10, 2009 upon completion of the record.

The issue presented in this matter is whether Grievant's conducted warranted a nine (9) day suspension without pay for violation of the Department of Safety's General Orders 216-2 ; 411; 712-1 and Rules of the Department of Human Resources 1120-10-.06 (1), (2) and (11).

FINDINGS OF FACT

1. On August 19, 2007, at approximately 3:00 a.m., Grievant, Kyle Cantwell, a trooper with the Tennessee Department of Safety, was traveling in his cruiser southbound on Interstate 81 near exit 63.

2. Grievant was in the left hand lane of the interstate when he was passed by an individual on a motorcycle in the right hand lane traveling at an exceptionally high rate of speed.

3. Grievant estimated his own speed to be between 65 and 70 miles per hour and the motorcyclist's speed was in excess of 140 mph.

4. Grievant activated his camera, blue lights and siren and began to pursue the motorcyclist.[1] The motorcyclist turned around, looked at the Grievant and sped off.

5. Grievant notified the dispatcher but did not identify his actions as a "1099 pursuit".

6. As he approached the ramp at exit 59, the motorcyclist slowed down. Once he exited the interstate, he accelerated again onto State Route 36 toward Kingsport.

7. Grievant exited the interstate in the same direction as the motorcyclist, deactivated his lights and siren and continued traveling at approximately 65 miles per hour. Grievant told the dispatcher to notify the Kingsport police department of the situation.

8. Grievant next spotted the motorcyclist near the Wal-Mart Super Center in Kingsport at the intersection of State Route 36 and State Route 93. Upon spotting the motorcyclist the Grievant reactivated his emergency equipment. The motorcyclist accelerated again on State Route 93 toward Virginia.

9. Grievant spotted the motorcyclist again on State Route 93 near US 11W but decided at this point that he could not keep up with or overtake the motorcyclist.

10. At 3:18 a.m., Grievant told the dispatcher to notify the Virginia authorities that the motorcyclist was headed toward Virginia and deactivated his equipment.

11. Grievant then topped a hill and witnessed the motorcyclist crash into a guard rail. The motorcyclist died at the scene.

12. As a result of this incident Grievant was suspended for nine (9) days without pay. He received a five (5) day suspension for violation of the pursuit policy, two (2) days for failure to engage his camera and audio equipment and two (2) days for giving false information on official records.

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[1] No audio was available. Grievant testified that his vehicle was not equipped with an internal microphone nor did it have a dash-hound system.

13. At no time did Grievant request the dispatcher to identify his actions as a "1099 pursuit" pursuant to the Department of Safety Pursuit Policy.

14. Grievant testified that he was not of the belief that he was actively involved in a "pursuit". He did activate his emergency equipment and contact the dispatcher when he attempted to catch up to the motorcyclist on several occasions. But when the motorcyclist accelerated and Grievant lost sight of him, he deactivated his emergency equipment and discontinued his pursuit.

15. By Grievant's own testimony, "the only difference in calling or not calling a pursuit were the words '1099'. Because I immediately notified the dispatcher of what the charges were, what I was attempting to stop him for; what my speed was; what his speed was; and the direction of travel. Other agencies in the surrounding area were notified. The only difference would have been, is if I would have called 1099 on the radio, the paperwork that would have ensued with it. The only difference would have been I would have had to done (sic) an incident report."

16. One of the officers testifying was Captain Richard Hurley. Captain Hurley was one of Grievant's commanding officers. He was also a Lieutenant in Safety Education for three years prior to being promoted to Captain.

17. Captain Hurley testified that it was his opinion that Grievant was engaged in a pursuit. His opinion was based on the fact the motorcyclist was traveling at 140 miles per hour, avoiding apprehension, the Grievant was in radio contact with the dispatcher, and he was traveling at 130 miles per hour with his emergency equipment activated and attempting to catch up to the motorcyclist.

CONCLUSIONS OF LAW

1. In a fifth step level 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.

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. *The Rules of the Tennessee Department of Personnel*, Disciplinary Action, Chapter 1120-10, TENN. COMP. R. & REGS,

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.

9. Rule 1120-10-.06 sets forth a list of offenses for which an employee may be disciplined. At issue in this case are:

(1) Inefficiency or incompetence in the performance of duties.
(2) Negligence in the performance of duties.
(11) Falsification of an official document relating to or affecting employment.

8. A State employee may be disciplined for (1) causes relating to performance of duty, or (2) causes relating to conduct which may affect an employee's ability to successfully fulfill the requirements of the job. Rule 1120-10-.05, TENN. COMP. R. &

REGS. "A career employee may be warned, suspended, demoted or dismissed by his appointing authority whenever just or legal cause exists. The degree and kind of action is at the discretion of the appointing authority. . ." Rule 1120-10-.02, TENN. COMP. R. & REGS. Although the law prescribes implementation of progressive discipline for State employees, it also provides that disciplinary action must be administered at the step which is most appropriate for the misconduct. (*See*, *Tennessee Code Annotated* § 8-30-330; and Rule 1120-10-.07, TENN. COMP. R. & REGS.) As the courts have recognized in other cases dealing with these provisions,

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

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

9. **Department of Safety General Order 411**[2] sets forth the Departments of Safety's Regulations as they relate to Pursuits:

Section III. DEFINITIONS.

A. Pursuit: A motor vehicle pursuit is an active attempt by a law enforcement officer operating an emergency vehicle and utilizing, simultaneously, all emergency equipment (headlamps, blue lights and siren) to apprehend one (1) or more occupants of another moving vehicle, when the driver of a fleeing vehicle is aware of that attempt and is resisting apprehension by maintaining or increasing his/her speed, disobeying traffic laws, ignoring the officer or attempting to elude the officer.

Section V. STATE LAW 55-8-108 (summary)

A. The driver of an authorized emergency vehicle, when responding to an emergency call, or when in pursuit of an actual or suspected violator of the law, may exercise the privileges set forth in T.C.A. §55-8-108, but subject to certain conditions.

1. Privileges provided police officers by statute include the following:

(a) Parking the vehicle irrespective of other traffic laws;

[2] General Order 411, adopted September 30, 1999, was in effect at the time of the incident.

(b) Proceeding past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
(c) Exceeding speed limit so long as it does not endanger life or property;
(d) Disregarding regulations governing direction or movement or turning in specified directions.

2. In order to exercise the preceding privileges the following must be met.

(a) Vehicles must use both audible and visual signs.

(1) Motorists and pedestrians may have difficulty in seeing and/or hearing an approaching emergency vehicle. Never assume a vehicle's emergency equipment is a substitute for skilled emergency driving.

(2) When the patrol vehicle is operated at a rate of speed greater than the posted limit, or in violation of a traffic sign, or signal, or other sections of the Motor Vehicle Code, all emergency equipment (head lamps, blue lights and siren) will be activated.

(a) When a member is attempting to overtake an actual or suspected violator, all emergency equipment will be activated.

(d) Members should be aware of personal and department liability involving those actions taken in pursuit driving. This includes the decision to initiate, continue or terminate the pursuit.

Section VII. THE FOLLOWING REGULATIONS WILL GOVERN PURSUITS.

B. The first patrol unit to become involved in a vehicular pursuit will be classified as the primary vehicle and will have the following responsibilities:

1. The officer will activate the patrol vehicle's headlamps, blue lights and siren and notify the radio dispatcher of the following:

(a) Patrol vehicle call number;
(b) That the patrol unit is in pursuit (10-99), with the location, and direction of travel;
(c) The charges involved;
(d) If possible, license number, vehicle description and number of occupants;

(e) The speed of the pursued vehicle; and
(f) In order for all other patrol units and the dispatcher to monitor the pursuit, members hall switch to the appropriate repeater channel for that area.

10. **Department of Safety General Order 712-1** sets forth the Department of Safety's Regulations regarding Mobile Video Systems (MVS):

Section III. DEFINITIONS.

Mobile Video System (MVS): A camera and recording system with video and audio capability that is mounted in a departmental vehicle.

Section V. OPERATIONAL PROCEDURES AND MEMBER REPSONSIBILITIES.

A. To ensure system integrity, member's responsibilities will include the following:

1. Inspecting the MVS equipment prior to each shift.

a. Inspection shall include:

(1) Turning on the unit and activating the remote microphone transmitter to ensure the batter is charged. The unit should then perform an automatic sequence check to verify proper operation.
(5) All members will be issued a remote microphone audio transmitter to be worn during their shift. To test the transmitter, activate the in-car microphone and ensure the volume is on and turned up. When you speak into the microphone transmitter, your voice should be heard. To test the rear microphone, turn off the belt microphone and switch on the rear microphone.
(6) Prior to the beginning of each shift, members are to turn the video and audio on and give a test count from 1 to 5, state rank, name, badge number, unit number, date and shift. Members should then play it back to verify proper operation. This procedure can be performed by standing in front of the vehicle or, in the event of inclement weather, from inside the patrol unit.

C. Any malfunction, damage or deviation in operating conditions of the recording equipment will be reported by the member to his/her supervisor or available district/division on-duty supervisor and dispatcher immediately. If the

member's supervisor is not available, notification to the immediate supervisor shall be made a soon as possible thereafter.

D. The MVS will be turned on at the beginning of each shift and will remain in a state of operational readiness for the duration of the assigned shift.

F. When a member's emergency lights are activated, the MVS will automatically begin recording. Once the MVS is activated, it will remain activated and not be deactivated until the occurrence has been concluded. Turning the emergency lights off will not stop the MVS from recording. To discontinue recording, members would have to manually push the stop button on the control center.

G. Members shall leave the wireless microphone on during contacts with subjects while the MVS is recording. The wireless microphone may be turned off during conversations between officers, officers and supervisor, or officers and confidential informants. However, members shall include verbal narrations with the video recording to enhance its value in documenting an incident and to explain reason prior to deactivation. If the incident being records has been concluded, there is no need to make any statements.

11. **Department of Safety General Order 216-2**[3] sets forth Disciplinary Regulations for the Department of Safety.

Section IV. CAUSES FOR DISCIPLINARY ACTION.

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

1. Causes relating to performance of duties;
2. Causes relating to conduct which may affect an employees ability to successfully fulfill the requirements of the job.

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

14. Neglect of duty.

e) No member shall falsify or intentionally and willfully withhold any material from a statement, or report, written or verbal, made to Headquarters or any superior.

[3] General Order 216-2, adopted August 15, 1999, was in effect at the time of the incident.

ANALYSIS

The State has carried its burden of proof by a preponderance of the evidence that the Grievant's nine (9) suspension without pay should be UPHELD.

The proof clearly establishes that the Grievant was well aware of the applicable General Orders as they relate to a pursuit and to the operation of the MVS and it is clear that Grievant failed to follow the General Orders.

Grievant was required to perform an inspection of his MVS. The General Order clearly states the procedure he was to follow prior to each shift. The lack of audio is evidence of his failure to follow this procedure and warrants his two (2) day suspension for violation of the procedure and for inefficiency, incompetence and negligence in the performance of his duties.

Grievant is found have been actively involved in a pursuit. By his own testimony, with the exception of identifying the event as a "1099", he followed the procedure according to the General Order as it relates to a pursuit. For whatever reason, Grievant chose to not follow the General Order and call it what it was - a pursuit. It is recognized the decision to initiate a pursuit lies with the individual trooper. However, it is evident from the video and testimony that the Grievant was involved in a pursuit and should have identified it as such with the dispatcher and continued withal of the appropriate protocols. His conduct warrants his five (5) day suspension.

Further Grievant's conduct warrants his two (2) day suspension for falsification of an official document relating to or affecting employment.

It is therefore ORDERED that the Department of Safety's suspension of the Grievant for nine (9) days without pay is hereby upheld.

IT IS SO ORDERED.

This Order entered and effective this 14th day of April, 2009.

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Lynn M. England
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 14th day of April, 2009.

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Thomas G. Stovall, Director
Administrative Procedures Division