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Law

12-7-2009

TENNESSEE DEPARTMENT OF SAFETY,
Agency, vs. TROOPER LEON MARSHALL,
Grievant

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The hearing in this matter was completed on Tuesday, May 5, 2009, before Mattielyn B. Williams, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Tennessee Civil Service Commission. Ms. Deborah Martin, Attorney, Tennessee Department of Safety, represented the State. Sergeant Lowell Russell served as the State's Party Representative. Grievant Leon Marshall was represented by Attorney Arthur F. Knight, III, of the Knoxville bar.

The parties filed Proposed Findings of Fact and Conclusions of Law, as well as Responses to one another's Proposed Orders. The record closed on September 3, 2009.

The subject of this appeal is what discipline, if any, is appropriate for Grievant's conduct, after a series of incidents.

After consideration of the record and arguments of the parties, it is **DETERMINED** that the proper discipline for Grievant's conduct is **TERMINATION**.

This decision is based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. At the time of his dismissal, Grievant Leon Marshall was a Trooper with the Tennessee Highway Patrol (THP), assigned to its Fall Branch office. Grievant graduated from Trooper Academy on June 1, 2007, then, began his service as a Trooper. Grievant's Field Training Officer was Sergeant Osborne.

2. Grievant served as a Police Officer with the Kingsport Police Department (KPD), prior to training to become a THP Trooper. Grievant testified that KPD's

philosophy was that its Officers should view their role broadly, as being helpful to citizens, in whatever way possible, thus giving individual Officers wide discretion in the activities each elects to pursue. Grievant also served honorably in the U.S. Army, as a Sergeant.

3. Kingsport Police Officers Corporal Tim Horne and Sergeant David Moore both testified that the Grievant had served with distinction with KPD and that they would welcome the opportunity to serve with the Grievant again.

4. Although THP's scope of authority is broad, THP management made the decision, at some point prior to commencement of the Grievant's brief tenure, that THP would focus on matters related to highways, interstates, etc.

5. It is THP's practice to not infringe upon the jurisdiction of cities and counties, although THP has overlapping jurisdiction with them.

OUT-OF-COUNTY INCIDENT

6. In September 2007, Grievant accompanied a KPD Officer on a call. Without investigation, Grievant decided to act on that citizen's complaint by securing a warrant for theft over \$500. Grievant then drove two (2) counties away from his patrol route to serve the warrant personally, without obtaining his Supervisor's permission to leave his patrol route.

7. After the information provided by the complainant was proven false, Grievant then was required to have the warrant and case dismissed.

8. The complainant was a female.

CRUISER DAMAGED IN WOODS INCIDENT

9. Captain Richard D. Hurley has served as a captain in the Fall Branch District of the THP for three (3) years and has thirty-two and one half (32.5) years of experience as a Trooper.

10. In November 2007, just two (2) months after the Out-of-County Incident, Grievant received an Oral Warning from Captain Hurley because Grievant had damaged his cruiser, in the amount of Three Hundred Fifty-Two Dollars (\$352), by driving it into the woods, in the course of chasing an all-terrain vehicle because it had non-functioning or un-activated lights. Captain Hurley considered the absence of lights to be a minor violation, hardly worth pursuit into the woods and damage to the cruiser.

11. Grievant demanded that Captain Hurley meet with him about the Oral Warning, although Oral Warnings are not grievable.

12. Grievant did not think that the Oral Warning was fair because he was “enforcing the law” when he damaged the cruiser. Grievant did not understand the danger into which he placed himself and his cruiser, by driving it into the woods. Grievant’s last words at the end of the discussion with Captain Hurley were, “well you just gotta do what you have to do, don’t you Captain?”

OUT-OF-STATE HUNTING TRIP INCIDENT

13. Just one (1) month later, in December 2007, Grievant was on a hunting trip in Virginia and had a dispute with the owner of adjoining property. Grievant told the

property owner, “Listen, just because I’m wearing hunting gear, hunting clothing, don’t talk to me like I’m a dumb ass. I’m a Tennessee State Trooper, so don’t you talk to me that way. ... Well, I can guaran-damn-t’you that I will be back up here again.”

14. Grievant was not able to articulate a valid reason for him to identify himself as a Tennessee State Trooper, since he was out-of-state.

15. Grievant received a Written Reprimand for his statements to the property owner.

UNARREST INCIDENT

16. Just like the out-of-state-hunting incident, the scenario that led to Grievant’s dismissal was set in motion in December 2007. Grievant often filled his cruiser with gasoline from the BP Station in Rogersville. Ms. Rhonda Elkins, manager of that Station, expressed concern to Grievant that a customer, later revealed to be Mr. Anthony Fugate, had been present at the gas station far too often, was a nuisance, and was no longer welcome there. Grievant correctly referred Ms. Elkins to the Rogersville Police Department (RPD) as the law enforcement agency with primary jurisdiction.

17. RPD completed Complaint Cards, but declined to complete an official police report, concerning the allegations. The absence of a police report meant that Ms. Elkins was not able to obtain a Criminal Court summons.

18. Grievant considered Mr. Fugate’s behavior to constitute stalking, though he did not consult with the District Attorney in reaching that legal conclusion.

19. Ms. Elkins is a single mother and is reported to be a European-American female. Ms. Elkins was not called to testify at the hearing.

20. Mr. Fugate is an African-American male who is a person with bipolar disorder, diabetes, and who has had three (3) heart attacks. Mr. Fugate testified at the hearing.

21. Since the RPD was not as aggressive as Ms. Elkins and Grievant would have preferred, Grievant took the RPD Complaint Cards from Ms. Elkins and researched Mr. Fugate's address through his driver's license. When the driver's license address turned out to be the address of Mr. Fugate's mother, Grievant obtained Mr. Fugate's physical address from his mother and proceeded to that location, with both his police cruiser's video camera and audio tape turned on, documenting the encounter of December 31, 2007.

22. On that date, Grievant told Mr. Fugate not to go to the BP gas station again and completed a "police report"/Incident Report on Ms. Elkins' assertions. Grievant gave Ms. Elkins a copy of the Incident Report, without getting his Supervisor to review and sign the report, per procedure.

23. When asked why he gave Ms. Elkins a copy of the Incident Report, before it was reviewed and signed off on by his Supervisor, Grievant said that he did so because he wanted Ms. Elkins to have a copy of the report immediately.

24. When asked by THP why he made the journeys to Mr. Fugate's mother's home and to Mr. Fugate's home on December 31, 2007, Grievant explained that "there wasn't much going on in Highway Patrol duties that day."

25. Grievant says that he only learned of Mr. Fugate's mental illness from other Officers, after December 31, 2007.

26. Two (2) weeks later, on January 14, 2008, Ms. Elkins informed Grievant that although Mr. Fugate had not actually returned to the BP Station's premises, she had seen Mr. Fugate in his car, in the turning lane, in front of the BP Station, revving the engine of his car, at some point after December 31st, and that she had seen Mr. Fugate revving his engine in an adjacent parking lot on January 11, 2008.

27. Grievant "investigated" the alleged parking lot stalking incident by going to the adjoining businesses to check to see whether or not Grievant was doing business with them. The businesses informed Grievant that Mr. Fugate was not a customer. Grievant did not, however, inquire as to whether Mr. Fugate could have been dropping off someone who was a customer.

28. Grievant returned to Mr. Fugate's home, that same January 14th day, uniformed and armed, but this time, Grievant did not activate his police car's video camera or audio tape, when he exited the cruiser. Similarly, Grievant did not use his belt transmitter to activate the video camera or audio tape, when he knocked on Mr. Fugate's door or during any portion of his interaction with Mr. Fugate that day.

29. Mr. Fugate testified that when he answered the door, Grievant frisked and handcuffed him, took him into custody for aggravated stalking, placed him in the rear of the police car, read him his Miranda rights, and interviewed him. Grievant told Mr. Fugate that he could "do from one (1) to six (6) years in the pen."

30. Mr. Fugate testified that he was afraid and felt, as a person who has had three (3) heart attacks, that the Grievant was trying to make him have another heart attack or that the Grievant might take him somewhere and shoot him. Mr. Fugate said that he

was arrested for about ten (10) minutes.

31. Grievant explained that he made the determination that Mr. Fugate may have been under the influence of an intoxicant, just from looking at Mr. Fugate's face, although Grievant did not conduct field sobriety tests on Mr. Fugate.

32. Grievant continued that he considered charging Mr. Fugate with public intoxication, but did not. Grievant stated that the reason he wanted to handcuff Mr. Fugate and pat him down was because he might have been able to charge him with public intoxication. Grievant further testified that since Mr. Fugate had a jacket on, he (Grievant) felt that Mr. Fugate might be armed.

33. Both Mr. Fugate and Grievant testified that Mr. Fugate had been inside his residence and only exited it at the request of Grievant.

34. Grievant testified that the reason he "unarrested" Mr. Fugate is that he (Grievant) became convinced that Mr. Fugate was a person with a mental illness, addiction, or other medical condition, based on his interactions with Mr. Fugate that day, as well as based on the information he had received from other Officers, after December 31, 2007.

35. Grievant candidly admitted that he suspected Mr. Fugate would file charges against him, as a result of the January 14th incident, yet, Grievant conceded that he did not complete an Offense Report or notify his Supervisor of the January 14th incident.

36. Grievant did inform Ms. Elkins of his actions of January 14th, however.

37. Mr. Fugate had only been arrested once, prior to his arrest by Grievant.

The earlier arrest was for domestic assault. Mr. Fugate has lived in Rogersville all of his life.

38. At the hearing, Mr. Fugate agreed that an occasion did occur when he was in the middle turning lane, in front of the BP Station, and was planning to turn around, when a male from the BP Station came running towards him, while male BP oil changers yelled at him, taunting and daring him to step on BP Station property, so that they could “whip him.”

39. Mr. Fugate testified that he did not go on BP’s property, during that incident, or at any time of Grievant’s December 31st request, though he did stop in the store parking lot next door, that “turning lane” day, to drop off a friend at a clothing store.

40. Mr. Fugate agreed that RPD had asked him not to return to the BP Station, as well.

41. Mr. Fugate testified that the Grievant told him that he “was gonna see how stupid I was and that he was gonna let me hang myself.” Grievant agrees that the adjective “stupid” was used, but that the subject of that adjective was not Mr. Fugate.

42. Mr. Fugate believed that he had honored the request of RPD and Grievant, not to return to the BP Station’s premises. No proof of conduct, contrary to Mr. Fugate’s belief, was offered.

43. Subsequently, Mr. Fugate complained to the Highway Patrol and filed a lawsuit, regarding the January 14th incident.

44. Interestingly, Ms. Elkins did not pursue prosecution of Mr. Fugate.

45. Captain Hurley and others testified that when an arrest is made, the proper procedure is for the Trooper to take custody of the suspect, handcuff the suspect, place the suspect in the back seat of the patrol car, buckle the suspect in, and transport the suspect to a magistrate.

46. When Captain Hurley tried to tell Grievant that a police officer should not conduct themselves as he (Grievant) had done, Grievant adamantly insisted that what he had done was correct.

47. Captain Hurley described the basis for his recommendation of termination as being that the Grievant “should not have taken the actions that he did, as far as physically driving to Mr. Fugate’s house, talking with him at the door without a warrant, and making a physical arrest, charging him with felony stalking; placing him in the patrol car and then talking to him while he was in the patrol car, and then talking to him while he was in the patrol car with him and making the decision—he had handcuffed him and put him in the car cruiser, and then un-handcuffing him and letting him go”.

48. Based on his extensive experience, Captain Hurley testified that he believed that the Grievant violated Mr. Fugate’s constitutional rights. Captain Hurley continued that the Grievant saw nothing wrong with his conduct, when confronted. In contrast, non-lawyer Sergeant Lowell Russell, of the Office of Professional Responsibility, did not think that the Grievant’s conduct clearly violated the Constitution.

49. Lieutenant Charles Hughes, who has served with the THP for thirty-five (35) years, testified that there is no such thing in Tennessee as a Field Unarrest. Likewise, Captain Hurley testified that he did not know what constitutes a Field Unarrest,

but, is aware that a Field Unarrest is not an option for Tennessee Troopers.

50. Grievant insisted that nothing was wrong with his encounter with Mr. Fugate. Apparently, Grievant believed himself correct when engaging in the scenario on January 14th, as well as when Captain Hurley confronted him.

51. Grievant informed the Captain that Mr. Fugate's action of revving his engine in the turn lane and in the parking lot constituted felony stalking, based on his experience at KPD.

52. Rather than admit error concerning the Field Unarrest, Grievant provided his THP Supervisors with the case of State v. Green. Grievant either told or left his Supervisors with the impression that ADA Doug Godbee had provided him State v. Green.

53. Assistant District Attorney Godbee, who has twenty-four (24) years of experience, testified that he did not know what a Field Unarrest is, that he did not provide the Grievant the North Carolina case of State v. Green, which describes what constitutes a Field Unarrest, under North Carolina law, and that he never told Grievant that his (Grievant's) conduct toward Mr. Fugate was legally appropriate.

REAR-ENDING OF VEHICLE INCIDENT

54. In March 2008, Captain Hurley recommended a two (2) day suspension for Grievant, based on Grievant rear-ending a vehicle that he was attempting to stop.

Former enumerated paragraph 55 and the heading "Other Discipline" are hereby DELETED¹.

Subsequent paragraphs are re-numbered.

GRIEVANT'S EVALUATION

55. Grievant noted that his Performance Evaluation (PE), in January 2008, was positive. Captain Hurley explained that the PE was completed, prior to investigation of the then alleged January 14th incident. Captain Hurley's testimony is **CREDIBLE** and is **CREDITED**.

GRIEVANT'S PHILOSOPHY/ATTITUDE/PERSPECTIVE

56. Captain Hurley testified that Grievant is not teachable and is unwilling to admit when he is wrong. Captain Hurley considers the Grievant to be a liability to the Department.

57. Captain Hurley continued that, as a practical matter, when one (1) Trooper mistreats a citizen, the public gets a negative impression of THP, plus, mistreated citizens sue the State.

58. Lieutenant Hughes testified that he does not want to be responsible for the Grievant as a subordinate; that Grievant is a liability, who does not use sound judgment, and does not follow his training.

¹ Deleted text = **OTHER DISCIPLINE 55. Grievant was suspended for two (2) days for failing to follow an order to shave a beard that Grievant grew in violation of a general order. Grievant received a 9 (nine) day suspension for failing to call a pursuit and failing to video and audio tape the encounter.**

59. Based on Grievant’s demeanor at the hearing, and all of the incidents described, it is **DETERMINED** that Grievant genuinely expressed himself when he told Captain Hurley that “he was a Tennessee State Trooper and if all I have to do here is – if all I’m expected to do is write speeding tickets and work crashes, I may as well turn in my badge.” And, at the hearing when Grievant said, “Now, I don’t ultimately end up—I can’t sit here and say what’s in store for me down the road career-wise, even if by chance I am reinstated into the Highway Patrol, it’s clear to me that ultimately the Highway Patrol might not be the right choice for me in terms of law enforcement, you know, I would address that at that point in time.”

60. Grievant did not introduce any evidence to show why the Grievant did not explore the role of the THP, prior to taking THP training or to show why Grievant did not know, from his training, from his Supervised Field Training, or even from the name Tennessee *Highway Patrol* (emphasis added by Undersigned) itself, that the focus of THP is on patrolling the highways for certain times of crime and to file certain types of reports.

61. When Grievant was asked why a thirty (30) day suspension, not termination, should be the appropriate discipline, among other things, Grievant said that he “goes out there and tr(ies) to do what’s right.... tr(ies) to make the world a better place”

62. At the hearing, Grievant expressed a limited degree of remorse for his

conduct².

CONCLUSIONS OF LAW

1. As the petitioning party, the Tennessee Department of Safety bears the burden to show, by a preponderance of the evidence, that misconduct occurred, that such conduct violated the Department of Safety's Rules, Policies, Procedures, Orders, Canons of Ethics, and/or statutes, and/or Department of Human Resources' Rules, and to demonstrate what discipline of Grievant, if any, is proper.

2. The State contends that the Grievant violated:

A. Department of Human Resources Rule 1120-10-.06 (1): Inefficiency or incompetency in the performance of duties.

B. Department of Human Resources Rule 1120-10-.06 (2): Negligence in the performance of duties.

C. Department of Human Resources Rule 1120-10-.06 (8): Gross misconduct or conduct unbecoming an employee in the State service.

D. Department of Human Resources Rule 1120-10-06(24): For the good of the service as outlined in T.C.A. 8-30-326.

E. Department of Safety, General Order 102, III, B: Authority and Responsibility:

1. Employees shall be held accountable for the judicious use or delegated authority.

3. The use of delegated authority should be in accordance with the provisions of law and in compliance with the rules and regulations of the Department.

² While the written decision was pending, Grievant contacted the Undersigned about a matter (disclosed to both Counselors earlier), even though he was represented by able counsel. As a person in law enforcement, surely Grievant knows and knew that all discussion, on his behalf, should come through Grievant's counsel to the Undersigned. The Undersigned wonders whether or not Grievant, once again, was seeking to create his own rules; this time, for how litigation should proceed.

F. Department of Safety, General Order 216-2, IV, 4: Abuse of authority.

- i. Mistreatment of³ subordinates or the general public, or threatening to do so; extortion, bribery, blackmail.
- ii. No employee shall be guilty of oppression, favoritism, or willful wrong or injustice

d) Willful maltreatment of a prisoner or other person.

G. Department of Safety, General Order 216-2, IV, 14: Neglect of Duty.

- a) Failure to submit written or verbal reports when required or duty demands at the designated time.

H. Department of Safety, General Order 300, II: Policy:

- ... All actions and duties performed by members will be affected without regard to a person's race, ethnicity, gender or sexual orientation or any combination of these factors. All decisions or actions by members must be supported by case law, statutory law and knowledge of the particular law being applied.

I. Department of Safety, General Order 510, IV: General Information:

- b) Individuals with disabilities may also be suspects or arrestees and require detention, transport, and processing. Commissioned members will ensure that individuals with any disability are offered the same Constitutional rights provided to any other citizen.

J. Department of Safety, General Order 525, II: Policy:

It shall be the policy of the Department of Safety to require all employees to record and report all occurrences that directly involve themselves or departmental property that may lead to complaints, civil litigation, criminal prosecution, or embarrassment to themselves or the department. It shall also be departmental policy to require all commissioned members of the Department of Safety to properly record and report all other occurrences involving offenses committed against or occurring to citizens and/or their property caused by

³ The underlining in enumerated paragraph 2, Sections F - J, was shown in the Department of Safety's Proposed Order.

persons other than departmental members when required to do so in the performance of official duties.

K. Department of Safety, General Order 525, VI: Necessary Elements and Circumstances Required for Completion of an Offense Report:

- a) The event relates to occurrences involving offenses committed against or occurring to citizens and/or their property caused by persons other than departmental members.

L. Department of Safety, General Order 525, VII: Procedures for Submitting, Processing, and Supervisory Review of Reports:

- a) The Incident/Offense Report shall be completed and forwarded to the supervisor for review.

M. Department of Safety, General Order 712-1, II: Policy:

It shall be the policy of the Department of Safety to require members assigned audio/video recording equipment to utilize the equipment for the purpose of collecting accurate accounts of events as they occur. Such events include, but are not limited to traffic stops, arrests, motorists assists, checkpoints, and other contacts with citizens. It shall further be the policy of the department to provide this equipment to increase officer safety, retrieve an accurate record of a variety of incidents, aid in training, and enhance the quality of services delivered. Failure by members to utilize such equipment in accordance with the provisions of this policy could result in disciplinary actions.

N. Department of Safety, General Order 712-1, V, D: Members should operate the MVS with the remote function on. This enables the member to immediately activate audio/video while outside of the vehicle in the event a situation arises while the member is out of the vehicle.

O. Department of Safety, Oath of Office: . . . “and I do solemnly swear that I will support the Constitution of the United States...”

P. Canons of Law Enforcement Ethics, Article 2 concerning Limitation of Authority whereby it states: “The first duty of a law enforcement officer, as upholder of the law, is to know its bounds upon him in enforcing it.”

Q. Canons of Law Enforcement Ethics, Article 7 concerning Conduct toward the Public whereby it states: . . . (the law enforcement officer) “will be neither

overbearing nor subservient, as no individual citizen has an obligation to stand in awe of him nor a right to command him.”

R. Canons of Law Enforcement Ethics, Article 8 concerning Conduct in Arresting and Dealing with Law Violators whereby it states: “The law enforcement officer shall use his powers of arrest strictly in accordance with the law and with due regard to the rights of the citizens concerned.”

S. Tennessee Code Annotated 39-13-302: False Imprisonment-

- a) A person commits the offense of false imprisonment who knowingly removes or confines another unlawfully so as to interfere substantially with the other’s liberty.

T. Tennessee Code Annotated 39-16-402: Official Misconduct-

- a) A public servant commits an offense who, with intent to obtain a benefit or to harm another, intentionally or knowingly:
 - 1) Commits an act relating to the servant’s office or employment that constitutes an unauthorized exercise of official power.
 - 2) Commits an act under color of office or employment that exceeds the servant’s official power;
 - 3) Violates a law relating to the public servant’s office or employment;

U. Tennessee Code Annotated 39-16-403: Official Oppression-

- a) A public servant acting under color of office or employment commits an offense who:
 - 1) Intentionally subjects another to mistreatment or to arrest, detention, stop, frisk, halt search, seizure, dispossession, assessment or lien when the public servant knows the conduct is unlawful; or
 - 2) Intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity, when the public servant knows the conduct is unlawful.

The State further contends that on both December 31, 2007 and January 14, 2008, Grievant had no lawful reason to go to Mr. Fugate's residence; and that on January 14th, there was no lawful reason to arrest Mr. Fugate.

3. Based on review of the facts proven in this matter, it is **CONCLUDED**, by a preponderance of the evidence, that:

- A. When Grievant failed to investigate the complainant, that he learned about while accompanying a KPD officer, prior to obtaining and serving the warrant, Grievant demonstrated incompetence and negligence, in violation of DHR Rules 1120-10-.06 (1) and (2). Grievant also demonstrated inefficiency through that scenario, since Grievant's failure to conduct a proper investigation led to Grievant having to later have the warrant and case dismissed, constituting violation of DHR Rule 1120-10-.06 (1).
- B. When Grievant failed to inquire of adjacent store owners as to whether or not they observed Mr. Fugate drop off or transport someone else, who was one of their customers, Grievant demonstrated incompetence and negligence, in violation of DHR Rule 1120-10-.06 (1) and (2).
- C. Grievant also demonstrated, through such omission, in the adjacent store owners' portion of the Unarrest Incident, and in the Out-of County incident, that he uses poor investigatory techniques.
- D. When Grievant failed to complete an Incident Report and failed to utilize the video tape and audio taping capability's of his cruiser, on January 14th, Grievant demonstrated negligence, in violation of DHR Rule 1120-10-.06 (2).

- E. When Grievant inserted himself into matters for which RPD had primary jurisdiction, Grievant demonstrated a lack of knowledge of the proper role of THP Troopers, in violation of DHR Rule 1120-10-.06 (2), negligence.
- F. When Grievant engaged in the behavior of arresting and “un-arresting” Mr. Fugate, Grievant demonstrated incompetence and a lack of knowledge of OR lack of willingness to adhere to THP practices and to lawful conduct, in violation of DHR Rules 1120-10-.06 (1) and (2), and in violation of Department of Safety General Order 300, II.
- G. When Grievant refused to take seriously the reports of other Officers that Mr. Fugate was a person with a diagnosed mental illness and then failed to take that information into account when electing to handcuff him and place him in his cruiser, without a warrant, and in the absence of Grievant personally observing Mr. Fugate in crime, Grievant violated Department of Safety General Order 510, IV.
- H. When Grievant refused to follow directions from veteran Troopers and Supervisors Hurley and Hughes, Grievant demonstrated a lack of regard for the chain of command and authority of those Supervisors, an unwillingness to learn, arrogance, as well as basic impoliteness/rudeness⁴.
- I. Since the Grievant’s incidences have occurred so closely together and were accompanied by an unwillingness to follow established THP protocol, and since

⁴ It is **NOTED** that impoliteness and rudeness/failure to demonstrate harmony with co-workers/others, was not charged here, and is not the basis for the discipline recommended.

Grievant's conduct in arresting Mr. Fugate at his home, without a warrant, and in "un-arresting" him risked legal liability for the Department and may have violated Mr. Fugate's constitutional rights, Grievant's conduct falls within DHR Rule 1120-10-.06(8), gross misconduct or conduct unbecoming an employee in State service. When such conduct occurs, it is permissible to terminate that employee for the good of the service, as outlined in T.C.A. 8-30-326 and DHR Rule 1120-10-06 (24).

- J. Gross misconduct includes job-related conduct that may subject an employee to criminal prosecution. Grievant's conduct, i.e., in arresting Mr. Fugate, could well have resulted in criminal prosecution under T.C.A. 39-16-402 Official misconduct or T.C.A. 39-16-403: Official oppression. Thus, Grievant's January 14th behavior constitutes gross misconduct.
- K. When Grievant took it upon himself to travel two (2) counties over to serve a warrant, Grievant did not judiciously use his authority. When Grievant met with Mr. Fugate on December 31st, then arrested and "un-arrested" him on January 14th, Grievant did not judiciously use his authority. These two (2) incidences constitute violation of Department of Safety General Order 102, III, B.
- L. When Grievant met with Mr. Fugate on December 31st, then arrested and "un-arrested" him on January 14th, Grievant abused his authority, a violation of Department of Safety General Order 216-2, IV, 4, i.e. mistreatment of the general public, oppression, injustice, willful maltreatment of a person.

- M. Similarly, when Grievant identified himself as a Tennessee State Trooper, during the out-of-state hunting incident, Grievant abused his authority, a violation of Department of Safety General Order 216-2, IV, 4, i.e. mistreatment of the general public, oppression, injustice, willful maltreatment of a person, and violation of Department of Safety General Order 102, III, B, failure to use his authority judiciously.
- N. When Grievant drove into an area two (2) counties away from his assigned patrol route, without authorization from his Supervisor, and when Grievant failed to submit a written Incident Report regarding his January 14th interaction with Mr. Fugate, Grievant engaged in neglect of duty, in violation of Department of Safety General Order 216-2, IV, 14 and in negligence, in violation of Department of Safety General Order 102, III, B.
- O. Although not charged, and not considered in deciding the discipline, if any, appropriate in this matter, it is **NOTED** that the citizens that Grievant was assigned to protect were left unprotected, when Grievant elected to deviate from his assigned patrol, by a full two (2) counties of distance, without notifying his Supervisor and obtaining back-up coverage for his assigned patrol area.
- P. When Grievant failed to have Mr. Fugate take a Field Sobriety Test, yet formed the impression that Mr. Fugate was under the influence, Grievant was negligent, in violation of Department of Safety General Order 102, III, B.
- Q. When Grievant even considered charging Mr. Fugate with public intoxication, even though it was the Grievant who caused Mr. Fugate to open the door and step

outside, Grievant demonstrated incompetence, in violation of DHR Rule 1120-10-.06 (1).

- R. When Grievant failed to file a written report/Incident Report, and failed to inform his Supervisors of the January 14th incident with Mr. Fugate, even though Grievant himself admits that he knew a complaint was likely, Grievant violated Department of Safety General Order 525, II, regarding reporting all occurrences, and engaged in neglect of duty, in violation of Department of Safety General Order 216-2, IV, 14.
- S. It is clear that the Grievant was not forthcoming about his January 14th conduct. Perhaps Grievant hoped that Mr. Fugate would not report him. When Grievant failed to self-report his January 14th conduct, even when he (Grievant) himself knew a complaint was likely, Grievant demonstrated a callous disregard for the chain of command, his responsibility to his Supervisors, and the need for THP to prepare to protect its public image. THP is an organization in which chain of command and willingness to follow Orders is key.
- T. When Grievant failed to have a Supervisor review and sign off on the Incident Report that he provided Ms. Elkins, Grievant violated Department of Safety General Order 525, Sections II, VI, and VII.
- U. When Grievant failed to activate the video and audio equipment that he had been provided for encounters with citizens, when he contacted and had the incident with Mr. Fugate on January 14th, Grievant violated Department of Safety General Orders 712, Sections I, II, V, and D.

- V. When Grievant contacted Mr. Fugate on January 14th, at his home, without a warrant, and told Mr. Fugate that he was being arrested for aggravated stalking, Grievant violated Canon of Law Enforcement Ethics, Article 2, concerning Limitation of Authority, since he did not accurately know whether or not the aggravating stalking laws had been violated, did not know that “unarrest” was not an option in Tennessee, and did not know that he needed a warrant.
- W. When Grievant engaged in the January 14th incident, Grievant violated Canon of Law Enforcement Ethics, Article 7, by being overbearing and by causing Mr. Fugate to stand both in awe as well as in fear of him, without legal cause.
- X. When Grievant engaged in the January 14th incident, Grievant violated Canon of Law Enforcement Ethics, Article 8, by not using his powers of arrest strictly in accordance with the law and with due regard for Mr. Fugate’s rights as a citizen.
- Y. When Grievant engaged in the January 14th incident, Grievant violated T.C.A. 39-13-302, False Imprisonment, when he handcuffed and placed Mr. Fugate in his cruiser.
- Z. When Grievant engaged in the January 14th incident, and when Grievant engaged in the Out-of-County incident, Grievant violated T.C.A. 39-16-402, Official Misconduct and T.C.A. 39-16-403, Official Oppression. Violation of these statutes is made out, regardless of whether Grievant engaged in such behavior as some sort of inappropriate use of power, for his personal satisfaction, or, as the State contends, Grievant engaged in inappropriate use of power to appear more

attractive to females, such as Ms. Elkins or to the female in the Out-of-County Incident.

AA. Grievant's conduct in failing to file Incident Reports, in providing Incident Reports to citizens that have not been reviewed and signed off on by Supervisors, when Grievant admits that he knew and understood what was required by the THP but thought that he was serving a higher good, constitutes negligence and incompetence, in violation of DHR Rule 1120-10-.06 (1) and (2), as well as Department of Safety General Order 525, VII.

BB. Such conduct clearly assumes that Grievant, with less than one (1) year of service with THP, knows the law, protocol, and proper conduct, better than Supervisors with over thirty (30) years of experience, and better than the written policies and General Orders of the THP, based on the law and experience. Such conduct constitutes demonstration of a remarkable degree of arrogance⁵.

CC. Overall, Grievant has shown contempt and lack of respect for the Highway Patrol's practices and procedures, as set forth in its General Orders.

4. Based on review of the facts proven in this matter, it is **CONCLUDED**, by a preponderance of the evidence, that:

A. The proof was inadequate to show that Grievant violated his Department of Safety Oath of Office; rather, the Grievant, honestly, did not think he was failing to uphold the Constitution in the January 14th scenario with Mr. Fugate.

⁵ Arrogance was not charged and is not a chargeable offense.

B. The proof, regarding how the term “stupid” was used, was ambiguous and thus inadequate to constitute a separate violation.

C. Although there was some proof that Grievant may have a bias toward believing and aggressively assisting females (damsels in distress?), no proof of Grievant’s behavior, when the complainant is male, was submitted to show contrast.

Therefore, the proof to support violation of Department of Safety General Order 300, II was not adequate to establish violation of that particular General Order.

D. There was some discussion of whether or not the Grievant called Mr. Fugate a name that was racially offensive, during his contact with him. By a preponderance of the evidence, such did not occur.

5. The closeness in time of the incidents is unusual.

6. The fact that the Grievant had served with the THP for such a brief time, when the incidents started, is also **NOTED**.

7. Grievant seeks reinstatement, yet Grievant failed to present evidence that he can admit to and learn mistakes and failed to present evidence that he is willing to take directions and follow the instructions of his Supervisors. Evidence to the contrary is abundant. Based on the record presented, it is **CONCLUDED** that Captain Hurley’s opinion that the Grievant is not teachable is well-supported by the record.

8. In Watts v. Civil Service Bd. for Columbia, 606 S.W.2d 274 (Tenn. 1980), the Court indicates that, “The need for obedience in a police force is not just desirable, but oftentimes compelling. Each citizen cannot be policed by his own private constable. There must be

widespread voluntary compliance with the law. Except under the most unusual circumstances, citizens are required to submit to the authority of police officers. It is elementary that if there is to be order in an ever growing population, then citizens should show a great degree of respect to them. As previously stated in the discussion of First Amendment Rights, to maintain this respect requires a measure of conduct in an officer that is above that expected of government employees in general. Proper respect by subordinates for superior officers is necessary for the maintenance of public confidence.”

9. In *State of Tennessee v. Houston*, 900 S.W. 2d 712 (Ct. Cr. App. 1995), the Court opines that a Trooper functions under a public trust and is held to a higher standard than the ordinary citizen because his/her actions reflect on law enforcement and our system of justice.

10. Grievant contends that his warrantless arrest of Mr. Fugate for aggravated stalking was proper, even though the conduct did not occur in his (Grievant’s) presence. Had Mr. Fugate’s conduct clearly constituted aggravated stalking, this contention would have some merit, but, Mr. Fugate’s conduct did not.

11. Grievant contends that ADA Godbee advised him that his arrest/restraint of Mr. Fugate was more of a detention, than an arrest, and thus not a problem. However, ADA Godbee testified credibly to the contrary, under oath, at the hearing.

12. Grievant contends that he did not invoke his THP authority, during the out-of-state hunting incident. Grievant viewed his revelation of his THP connection as simply informing the property owner of his employment. It is unclear why identification of employment was necessary and why identification of employment as an employee of

the State of Tennessee was not sufficient, if some identification of employment were required. It is **CONCLUDED** that the Grievant lacks appreciation for the automatic authority conveyed when others learn or are informed that Grievant is a member of the THP, even when outside of his jurisdiction.

13. Grievant contends that he reasonably believed that he had probable cause to arrest Mr. Fugate. It is **CONCLUDED** that the Grievant's belief was not reasonable, under the circumstances, for a trained law enforcement officer.

14. Grievant argues that he is entitled to qualified immunity from civil damages, absent a clear violation of established statutory or constitutional rights. Grievant is correct, however, such argument should be reserved for the lawsuit that Mr. Fugate has brought, not the instant matter, which does not involve civil damages.

15. Grievant contends that his case is similar to that of Trooper Will Matsunaga and thus a suspension of thirty (30) days should be the appropriate penalty. In that case, Trooper Matsunaga swore out a warrant against a person whom he believed had committed burglary and assault against his wife, then, arrested that individual, took the individual to jail, but then that case was dismissed.

16. Grievant, unlike Matsunaga, did not obtain a warrant. Grievant, unlike Matsunaga, did not take Mr. Fugate to jail, after he arrested him. Therefore, the comparison of Grievant Trooper Leon Marshall's case with Trooper Matsunaga's disciplinary case is not well-placed. In addition, Grievant made no assertions concerning Trooper Matsunaga's prior disciplinary record, willingness to keep THP management informed, or Trooper Matsunaga's willingness to follow the directions of his Supervisors,

which are very important aspects of the instant matter.

17. Grievant contends that the investigation conducted by Special Agents Billy Grooms and Dave Brown should be disregarded because they have either resigned or been placed on administrative leave for alleged misuse of State funds. Although there is no necessary or apparent connection between the Agents alleged misuse of funds and their ability to investigate the charges against Grievant, which do not include alleged misuse of State funds, in light of the strength of the live testimony at the hearing from numerous witnesses, as a practical matter, out of an abundance of caution, the Undersigned is relying and basing her decision on the facts found overall from the testimony of Grievant himself, plus Witnesses Hurley, Hughes, Godbee, Horne, Moore, and Fugate.

18. When Grievant was asked why a thirty (30) day suspension, not termination, should be the appropriate discipline, among other things, Grievant said that he “goes out there and tr(ies) to do what’s right. ... tr(ies) to make the world a better place” It is **CONCLUDED** that Grievant, in his own way, does, in fact, try to do what he considers right. However, the extreme fashion in which Grievant adheres to this attitude/philosophy has become problematic, has affected Grievant’s conduct, has caused Grievant to choose his personal sense of right and wrong over his training, regarding what conduct is appropriate, and now plays a key role in the discipline deemed appropriate here. Grievant does not understand or appreciate that he was new, as a THP Trooper, and that his duty was to follow THP General Orders, protocol, and practices, applicable statutes, Rules, and Canons of Ethics, **not** to do whatever Grievant feels is

right or would make the world a better place (for some).

19. Rule 1120-10.02 of the Rules of the Tennessee Department of Human Resources (TDHR) provides as follows:

A career [civil service] employee may be warned, suspended, demoted or dismissed by his appointing authority whenever legal or just 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 employee serves at the pleasure of the appointing authority.

20. TDHR Rule 1120-10-.05 sets forth that disciplinary actions of state civil service employees involve two (2) categories:

- i. Causes related to performance of duties.
- ii. Causes related to conduct which may affect an employee's ability to successfully fulfill the requirements of the job.

21. "Just cause" to terminate civil service employees is concisely stated in 67 C.J.S., Officers and Public Employees, §137, cited by the Court in Knoxville Utilities Board v. Knoxville Civil Service Merit Board, 1993 WL 229505 (Tenn. Ct. App. 1993), p. 10. "Just cause" is defined as follows:

"Just cause" is a ground for removal. In this respect, "just cause" implies a cause sufficient in law, and is any cause which is detrimental to public service. It may be established by a showing of conduct indicating that the employee lacks the competency and ability to perform the duties of his office.

Where lawful grounds for dismissal of a civil service employee exist, the character and work record of the employee involved is of no importance, and the fact that he has previously received a general rating of satisfactory does not bar his removal.

22. Progressive discipline is certainly preferable to termination, if circumstances allow it. However, in certain cases, “the good of the service” requires an employee’s removal, rather than his rehabilitation, and places the good of the institution and its mission over the needs and interests of the individual employee. In Kelly v. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. Nov. 30, 1999), the Tennessee Court of Appeals clarified the requirements of progressive discipline under T.C.A. § 8-30-330, which provides that “supervisors are expected to administer discipline beginning at the lowest appropriate step.” Id. at *4. The Court explained that:

“[p]rogressive discipline does not require a supervisor to begin at the lowest level of discipline regardless of the nature of the employee’s conduct. It simply means that the supervisor should impose the lowest appropriate punishment taking into account the nature of severity of the employee’s behavior.” Id. In addition, “supervisors have the discretion to determine what punishment fits the offense.” Id.

23. The Grievant, in this matter, has received an Oral Warning and a Written Reprimand. *A suspension was recommended for Grievant by Captain Hurley, but never imposed.*^{6 7}

⁶ Deleted text = *, and two (2) Suspensions, for incidents ranging from growing a beard, damaging State vehicles, to inappropriate statements to a property owner, to failure to call a pursuit and video/audiotape that encounter. Thus, it is CONCLUDED that progressive discipline has been, in fact, employed with the Grievant.*

24. It is NOTED that failure to activate his cruiser’s audio-taping and videotaping capabilities on January 14th is a repeat of conduct, despite Grievant’s earlier discipline for the same conduct.

⁷ Did termination intervene? Unclear to Undersigned why suspension was not imposed.

24. *Given the numerous incidents and multiple violations in which the Grievant has been involved, yet the absence of an imposed suspension, one must consider whether a lengthy suspension v. termination is warranted.*

25. It seems that Grievant fails to think ahead and to consider the possible consequences of his actions. The Undersigned wonders whether or not such lack of foresight could result in injury or death for Grievant, in a THP matter in which a violent suspect is involved. Judgment is nearly impossible to teach, especially to an unwilling learner.⁸

26. Similarly, it is also **NOTED** that Grievant appears to still not appreciate fully the trouble, expense, embarrassment, and time that he has cost the Department of Safety by engaging in these various incidents.

27. In Reece v. Tennessee Civil Service Commission, 699 S.W. 2d 808 (Ct. App. 1985), Permission to Appeal Denied by Supreme Court Oct. 28, 1985), the Court concluded that:

the public payroll cannot be made a haven for those who with or without fault have become unable to perform the duties for which they were employed. It must likewise be conceded that the 'good of the service' may in proper cases justify or require the discharge of public employees when their efficiency or usefulness in their positions has been seriously impaired by their own fault, by the fault of others, or by blameless misfortune.

28. T.C.A. §8-30-330(c) sets forth that when corrective action is necessary:

The supervisor must administer disciplinary action beginning at the step appropriate to the infraction or performance.

⁸ *The paragraphs, now numbered as 25 and 26, were reversed in the original and presented later in the original Initial Order.*

29. Based on evaluation of Grievant's demeanor, testimony, and conduct, it is **CONCLUDED** that Grievant, at some point on January 14th, recognized that he should not have arrested Mr. Fugate, and so, "unarrested" him. *It is good that the Grievant showed compassion and did not take Mr. Fugate to jail or to a Magistrate or Judge, without cause.* But then, Grievant did not have the judgment, wisdom and maturity to know what to do or with whom to consult when he realized that Mr. Fugate may file a complaint, so the situation spun out of Grievant's control.

30. *On January 14th, when the Grievant most dearly needed to consult with his Supervisors, Grievant failed to do so, presumably in faint hope that his errors would not be discovered. Failure to consult, in the face of likely complaint or lawsuit, is inexcusable. Apparently Grievant's lack of trust and/or lack of confidence in the direction that could have been provided by his Supervisors was so extreme that the Grievant elected both not to consult them, directly, perhaps by radio, and, elected not to consult them indirectly, by following the standard procedure of writing an Incident Report. If an Incident Report had been written, the reviewing Supervisor would have intervened with Grievant, and perhaps may have been able to save the Department's face with Mr. Fugate as well.*

31. *If Grievant had chosen to swallow his fierce independence, his personal expectations of what a law enforcement Officer should do or be, and/or his pride, as applicable, and acted like a Team Member, consulted with his*

Supervisors and warned them of the potential lawsuit, in an effort to protect his Employer's reputation, the Undersigned would have found a thirty (30) day suspension to be the appropriate discipline in this matter. However, instant Grievant failed to consult, failed to notify, and failed to protect the THP.

32.⁹ ¹⁰Grievant clearly knew, as evidenced by his conduct on December 31st, that he should activate his audio and video equipment when engaged in official interactions with the public. Yet, Grievant failed to follow that protocol on January 14th. If lack of training were the problem, perhaps¹¹*a lengthy suspension plus further training would be warranted.* However, it is **CONCLUDED**, based on the record as a whole, that the Grievant's conduct is the result of simple *unwillingness* to conform to established THP protocol and procedures.

33. The State contends that the Grievant is a liability to the Department in several ways. First, when citizens are mistreated, they sue the State. Such lawsuits are expensive and time-consuming. Second, the public's perception of THP is damaged when others hear how the Grievant treated a citizen. Third, should the tax-paying public learn that THP has retained Troopers, whose conduct it cannot manage and who refuse to follow the Department's guidelines, the public fears for their safety and wonders whether or not the resources spent on funding THP are wise investments of State dollars. After

⁹ This paragraph was moved from a later section.

¹⁰ Deleted text = *For example,*

¹¹ Deleted text = *Grievant would be salvageable*

due consideration, it is **CONCLUDED** that the State's contentions about the Grievant being a liability to the Department are **CORRECT**.

34. Grievant's conduct casts doubt upon his competency and ability to discharge his duties, even more so, it is **CONCLUDED** that Grievant's conduct demonstrates a persistent unwillingness to conform to established THP protocol and procedures.

35. *Had Grievant's misconduct only occurred in one (1) area, for example, tardiness, perhaps the Grievant could focus and work towards improvement. However, Grievant's conduct in 2007-08 stretches across a broad array of areas from lack of neighborly courtesy and show of authority in Virginia, to damaging his cruiser, to arguing with Supervisors, to the arrest and unarrest of Mr. Fugate. Not only was Grievant's misconduct broad in scope, it was significant in depth. When the multiple incidents are viewed as a whole, gross misconduct and just cause for termination are both evidenced.*

36. *In the instant matter, somehow, in just a short amount of time, the* Grievant has destroyed the trust of his Supervisors, the very¹² persons charged with working with Grievant to reform his conduct, were he reinstated. Grievant is considered unteachable by the Supervisors with whom Grievant has argued and failed to follow. It seems that a suspension would only relieve the pain between Grievant's Supervisors and mismatched-for-THP Grievant, briefly, then, the animosity would resume.

¹² Deleted text = who would be the

37. *Although a suspension or lengthy suspension has not been tried, it is CONCLUDED that the instant matter is one of those rare cases in which it is simply not reasonable to expect the THP to accept the Grievant back as a THP Officer, even after a lengthy suspension, because the Grievant has so quickly demonstrated through behavior as well as words, so thoroughly that he neither trusts, respects, or nor seeks to protect his Employer, its reputation, and its management/Supervisory staff.*

38. *Thus,*¹³ it is CONCLUDED that neither a further oral reprimand nor written warning¹⁴ nor a suspension would¹⁵ be sufficient in getting the Grievant to conform his behavior to THP policies and protocol, because previous¹⁶ discipline has¹⁷ failed in reforming, controlling, or revising the Grievant's conduct, because the incidents occurred so closely together, because the incidences were so broad in range – from out-of-state to in-state, from failure to complete paperwork to driving two (2) counties away from his duty station, without notifying his Supervisor, from driving a cruiser into the woods to false arrest - because the proof presented showed¹⁸ that Grievant's THP business judgment is poor and is virtually impervious to progressive discipline and training, because Grievant did not show

¹³ Deleted text = in the instant matter

¹⁴ Deleted text = , or suspension

¹⁵ Deleted text = not

¹⁶ Deleted text = acts of progressive

¹⁷ Deleted letters = ve

¹⁸ Deleted letter = s

complete and genuine understanding of the errors of his ways, at the hearing, after reflection, and because the Grievant did not toss his inappropriate-for-THP-context philosophy to the wind and consult with his Supervisors or report the Fugate incident, thus acting to protect the THP, even when he knew a citizen complaint was likely.

39. Based on the record as a whole¹⁹, it is **CONCLUDED** that suspension is not feasible; too many bridges have been burnt by the Grievant's "attitude" and demonstrations thereof. *It is further CONCLUDED that* termination is the appropriate penalty, for Grievant's violation of the multiple Rules, statutes, General Orders, and Canons of Ethics, poor judgment, and the like, as delineated above in the Conclusions of Law in this Order, and, for the good of the service.

40. Based on the above, it is hereby **ORDERED** that Grievant receive the discipline of **TERMINATION**.

41. It is **SPECIFICALLY NOTED** that this decision does not constitute de-certification by the P.O.S.T. Commission.

42.²⁰ It ²¹also must be **NOTED** that the Grievant is a person of high energy, independent, and is a self-starter who wants to be helpful. Perhaps, as Grievant himself indicated, Grievant would be better suited to serve as a police officer, with a broad spectrum of duties, than as a THP Trooper, with what Grievant views as a limited scope

¹⁹Deleted text = *and in light of the failure of progressive discipline to have a positive effect on Grievant's conduct,*

²⁰ This enumerated paragraph was moved from an earlier section.

²¹ Deleted text = *is*

of duties. Perhaps Grievant could do well as a private investigator or in his own business where Grievant makes the rules and receives and is responsible for the result of his actions. Grievant seems to have an interest in researching the law and may wish to consider law school, but would soon learn that the Rules of Evidence, Civil and Criminal Procedure, and the like, require adherence.

This Amended Initial Order entered and effective this the 7th day of December, 2009.

Mattielyn B. Williams
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State
this 7th day of December, 2009.

Thomas G. Stovall, Director
Administrative Procedures Division