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

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BEFORE THE TENNESSEE
CIVIL SERVICE COMMISSION

TENNESSEE DEPARTMENT OF SAFETY,	)	
Petitioner,	)	
	)	
v.	)	**Docket No. 26.19-099201J**
	)	
KYLE CANTWELL,	)	
Grievant.	)	

INITIAL ORDER

This contested case came on to be heard on December 16, 2008, in Nashville, Tennessee before Administrative Judge Joyce Grimes Safley, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Civil Service Commission of Tennessee. Ms. Deborah Martin, Attorney for the Department of Safety, represented the Department of Safety or the State. The Grievant, Mr. Kyle Cantwell, was present and was represented by Mr. Arthur Knight, attorney, of the Knoxville, Tennessee Bar.

The Department of Safety submitted its "Proposed Findings of Fact and Conclusions of Law" on March 10, 2009, making this matter ripe for consideration. Extra time for consideration of the case was allotted in the event that Grievant wished to file responsive "Proposed Findings of Fact and Conclusions of Law." Grievant did not file "Proposed Findings of Fact and Conclusions of Law."

The subject of this hearing was Grievant's appeal of his termination from the Department of Safety. Grievant was terminated for allegedly violating certain Department of Safety General Orders, and several Department of

Human Resources Rules. Grievant allegedly violated the following *General Orders of the Department of Safety*:

> (1) *Department of Safety, General Order* 216-2, IV, B, 14(e): No employee shall falsify or intentionally and willfully withold any material from a statement, or report, written or verbal, made to Headquarters or any supervisor.
>
> (2) *Department of Safety, General Orders* 546, III, C, D, and E (2):
>
> Procedures for determining and recording items of evidence.
> C. All evidence/property obtained and placed in the Department of Safety's control should be placed under the evidence control function in which district/division the evidence or property was obtained prior to the completion of the member's shift.
>
> D. All evidence/property shall be logged into each district/division's records as soon as possible by the evidence custodian or the alternate. This includes evidence that has been mailed or personally transported to the crime lab.
>
> E. Chain of custody or chain of possession is the total accounting for evidence since its acquisition by the investigating member.

The Department of Safety also charged Grievant with violating *Tennessee Department of Human Resources Rule*s: Rule 1120-10-.06(1) – Inefficiency or incompetency in the performance of duties; Rule 1120-10-.06(2): Negligence in the performance of duties; Rule 1120-10-.06(8) - Conduct unbecoming an employee in State service; Rule 1120-10-.06(16) - Possession of unauthorized firearms, lethal weapons, alcohol or illegal drugs on the job; and Rule 1120-10-.06 (24): For the good of the service, as outlined in T.C.A. §8-30-326.

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that the Department of Safety met its burden of proof, by a preponderance of the evidence, that Grievant violated *Department of Safety, General Orders* 546, III, C, D, and E (2): All evidence/property obtained and placed in the Department of Safety's control should be placed under the evidence control function in which district/division the evidence or property was obtained prior to the completion of the member's shift; All evidence/property shall be logged into each district/division's records as soon as possible by the evidence custodian or the alternate. This includes evidence that has been mailed or personally transported to the crime lab; and Chain of custody or chain of possession is the total accounting for evidence since its acquisition by the investigating member.

Additionally, the Department of Safety showed, by the preponderance of the evidence, that Grievant violated *Tennessee Department of Human Resources Rules* 1120-10-.06(1) – Inefficiency or incompetency in the performance of duties; 1120-10-.06(2): Negligence in the performance of duties; and 1120-10-.06(8) - Conduct unbecoming an employee in State service. Further, the Department proved, by a preponderance of the evidence, that Grievant should be terminated pursuant to Rule 1120-10-.06 (24): For the good of the service, as outlined in T.C.A. §8-30-326.

Accordingly, it is therefore **ORDERED** that the appropriate discipline in this matter is **TERMINATION.**

FINDINGS OF FACT

1. Grievant did not testify in this matter. Nor did Grievant call any witnesses who contradicted or rebutted the Department's factual assertions. Consequently, the testimony and evidence presented by Petitioner, Department of Safety, remains uncontradicted and unrebutted.

2. Grievant has been employed as a State Trooper by the Tennessee Department of Safety, Division of Tennessee Highway Patrol, since 2004.

3. At the time of his termination, Grievant held the position of State Trooper and was stationed at the Fall Branch District Headquarters, Fall Branch, Tennessee.[1]

4. Sergeant Lowell Russell, an investigator with the Department of Safety Office of Professional Responsibility, testified that he was assigned to investigate allegations against Grievant in October 2007. Sergeant Russell testified that he went to the Fall Branch District Office on October 10, 2007 after learning of allegations that Grievant was not following established procedures in filing (or "turning in") traffic tickets with courts, that Grievant had discrepancies or inconsistencies in his handling of tickets/arrests, and that Grievant was not recording and storing evidence properly. Sgt. Russell also testified that Grievant did not always complete a THP-33 form, which is

[1] The Tennessee Highway Patrol (THP) is responsible for the enforcement of all federal and state laws relating to traffic. Serving the entire state of Tennessee with substations in each of its 95 counties, the THP has district headquarters in eight locations as well as scale houses in 5 additional locations. The Tennessee Highway Patrol is responsible for investigating accidents involving property damage, personal injury, and fatalities. When personal injury or fatal accidents involve drugs or alcohol, the THP is responsible for prosecution in the courts and working with the Attorney General's Office. The Highway Patrol is also active in criminal interdiction, which involves the suppression of narcotics on the roads, highways, and interstate systems in Tennessee. *See* http://state.tn.us/safety/thp.htm

the property receipt required to be completed when a traffic stop is made and property is taken from the individual stopped.

5. Grievant failed to turn in a blood sample taken on P. Michaels from a DUI traffic stop. Grievant did not send the blood sample to the Tennessee Bureau of Investigation (TBI) lab as mandated by Department rules and regulations. Even after the District Attorney informed Grievant that the blood sample was needed for prosecution of the DUI case, Grievant failed to take the blood sample to the TBI lab. P. Michaels' blood sample was taken in conjunction with a third offense DUI traffic stop in July. Grievant improperly left P. Michaels' blood sample in his patrol car until October of the same year.

6. Sgt. Russell interviewed Grievant on October 23, 2007 regarding the allegations of misconduct made against Grievant.

7. Grievant admitted to Sgt. Russell that he did not always complete THP-33 forms (property receipts).

8. When Sgt. Russell searched Grievant's desk at the Fall Branch Station, he discovered evidence from several cases in the desk: a hand rolled marijuana cigarette, a small baggy of marijuana, two hemostats, one green pipe, one pack of rolling papers, razor blades, and other items.

9. Sgt. Russell testified that the proper procedure following the seizure of property at a traffic stop is for the trooper to complete a property receipt (THP-33) form, giving the violator one copy of the form and retaining the other copy. The seized evidence should then be taken into the evidence room and logged in through a property receipt showing a chain of custody.

10. Sgt. Russell's investigation revealed that there was no record of at least 29 citations which Grievant had supposedly issued to violators.

11. Grievant was involved in another disciplinary incident earlier in the year, and was placed on paid administrative leave.

12. When Sgt. Jarrett Ramsey, Grievant's direct supervisor at the Fall Branch station, went to Grievant's home to serve the "notice of administrative leave" papers on Grievant, he noticed an evidence bag lying in Grievant's driveway. The evidence bag contained pills (Lortabs), a controlled substance.

13. Sgt. Ramsey asked Grievant if there was any other "evidence" which was at Grievant's residence. In response, Grievant pulled another evidence bag out of a box on his front porch and handed the bag to Sgt. Ramsey.

14. Grievant worked on several "drug cases" in which no evidence was ever turned in.

15. A search of Grievant's locker at the Fall Branch station revealed that the locker contained several items of drug paraphernalia.

16. Grievant admitted to investigator Sergeant Russell that he was "one to two years behind" on his "destruction orders."

17. "Destruction orders" are court orders issued after completion of a case which order evidence custodians to dispose of or destroy evidence.

18. An investigation of Grievant conducted by the Department of Safety revealed that Grievant Cantwell made numerous "traffic stops". However, Grievant Cantwell would arrest some drivers who possessed illegal

drugs, while he would release other drivers in possession of illegal drugs without charging them.

19. Ms. Helen Day Adams, the Operations Manager with the General Sessions Court in Kingsport, Tennessee, testified that her department oversees and processes all "paperwork" coming in from Tennessee State troopers, the police department, and the sheriff's department. Ms. Adams' department prepares the affidavits used in criminal cases and prepares criminal dockets for the general sessions judges.

20. Ms. Adams performed a search of the General Sessions records concerning Trooper Cantwell's warrants.

21. The results of Ms. Adams' search revealed that Trooper Cantwell had issued numerous citations and affidavits in cases in which the citations were not filed with the court, and affidavits were dismissed because Trooper Cantwell failed to appear in court on the citations court date. Additionally, there were affidavits which Trooper Cantwell should have completed which the General Sessions Court did not receive.

22. As a result of Trooper Cantwell's failure to appear in court on cases, failure to file citations with the court, and failure to complete and/or file affidavits, numerous criminal cases were automatically dismissed by General Sessions' judges.

23. Ms. Adams became aware of the problem with Trooper Cantwell's failure to file citations because "numerous people came in to pay citations and all of that, and we would have no record of it." Ms. Adams went on to testify:

"We also had people to come in and say that they were supposed to be there for court and we [the court] had no record."

24. Trooper Cantwell had been previously disciplined for violations of departmental rules and regulations, involving an improper pursuit. Grievant received a nine day suspension for violating Department of Safety policies and rules in the pursuit incident.

25. Captain Richard Hurley is the THP Captain in charge of the 5th District, Fall Branch Office. When Captain Hurley received the results of the investigation into Grievant's violations of Department of Safety Rules and Regulations, he recommended that the Grievant be terminated.

26. The evidence preponderates that Grievant did not properly secure evidence, that he incorrectly stored evidence in his desk (including a hand-rolled marijuana cigarette and drug paraphernalia), that he carelessly left bags of evidence in his patrol car, on his front porch, and in his drive-way, that he did not always complete THP-33 forms (property receipt forms) for property he had confiscated, that he failed to turn in or file a blood sample in a third offense DUI citation, that he violated established "chain of custody" rules and regulations, that he failed to file citations and warrants in court cases, that he failed to complete affidavits in court cases, that Grievant failed to appear in court cases, that Grievant's failure to properly participate in his cases caused cases to be automatically dismissed by judges, that Grievant was inconsistent in his treatment of people in traffic stops (some in possession of illegal drugs

were cited, while others with illegal drugs were released)and that Grievant was, by his own admission, "one to two years behind" on destruction orders.

CONCLUSIONS OF LAW

1. The Department of Safety bears the burden of proof in this matter to show that Grievant Cantwell violated the Department's written rules, policies or procedures, and that the discipline imposed was the appropriate discipline for his violation of such rules.

2. Rule 1120-10.02 of the *Rules of the Tennessee Department of Personnel* 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. (Emphasis added)

3. As defined by the *Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies,* Rule 1360-4-1-.02(7), "preponderance of the evidence" means the greater weight of evidence, or that, according to the evidence, the conclusion sought by the party with the burden of proof is the more probable conclusion.

4. Turning to the charges against Grievant, it is determined that the Department of Safety proved, by a preponderance of the evidence, that Grievant violated the following *General Orders of the Department of Safety*:

Department of Safety, General Orders 546, III, C, D, and E (2):

Procedures for determining and recording items of evidence.

C. All evidence/property obtained and placed in the Department of Safety's control should be placed under the evidence control function in which district/division the evidence or property was obtained prior to the completion of the member's shift.

D. All evidence/property shall be logged into each district/division's records as soon as possible by the evidence custodian or the alternate. This includes evidence that has been mailed or personally transported to the crime lab.

E. Chain of custody or chain of possession is the total accounting for evidence since its acquisition by the investigating member.

5. It is determined that the Department of Safety also proved, by a preponderance of the evidence, that Grievant violated *Tennessee Department of Human Resources Rule*s: Rule 1120-10-.06(1) – Inefficiency or incompetency in the performance of duties; Rule 1120-10-.06(2): Negligence in the performance of duties; Rule 1120-10-.06(8) - Conduct unbecoming an employee in State service; and Rule 1120-10-.06 (24): For the good of the service, as outlined in T.C.A. §8-30-326.

6. The Department of Safety did not prove, by a preponderance of evidence, that Grievant violated Rule 1120-10-.06(16) - Possession of unauthorized firearms, lethal weapons, alcohol or illegal drugs on the job. It was not shown that the seized evidence (controlled substances and a knife) was possessed by Grievant for his personal use. Rather, the Department proved that Grievant failed to properly record, store, and preserve evidence. Further, the Department did not prove, by a preponderance of the evidence, that Grievant violated *Department of Safety, General Order* 216-2, IV, B, 14(e): No

employee shall falsify or intentionally and willfully withhold any material from a statement, or report, written or verbal, made to Headquarters or any supervisor. No proof was offered that Grievant "possessed" firearms, lethal weapons, alcohol or illegal drugs on the job for his personal use. Rather, the Department proved that Grievant was negligent and sloppy in recording and storing evidence. Nor did the Department prove that Grievant willfully and intentionally withheld material from statements or reports. Rather, again, the Department showed that Grievant was negligent and sloppy. Accordingly, it is determined that Grievant did not violate the two rules discussed in this paragraph.

7. The testimony of the witnesses testifying on behalf of the Department is deemed credible.

8. The facts presented by the Department of Safety through witness testimony and exhibits entered into evidence are undisputed and unrebutted. Grievant did not testify at the hearing, and none of the testimony and evidence presented by the Department of Safety at the hearing of this matter was contradicted.

9. Grievant's counsel argued that Grievant had not been properly trained on the disposition of evidence. However, no competent evidence or testimony was presented to support such an assertion. Further, the evidence preponderated that Grievant had received sufficient training regarding the handling of evidence.

Appropriate Discipline for Grievant

10. Rule 1120-10-10.22 of the *Rules of the Tennessee Department of Personnel* 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 service employee serves at the pleasure of the appointing authority.

11. The legal standard which constitutes "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 case" 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.

12. Rule 1120-10-.01(45) of the *Rules of the Department of Personnel* provides that causes for disciplinary action fall into two categories:

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

13. Grievant's acts and omissions set forth above fall within both categories of causes for disciplinary action.

14. Tennessee's Civil Service statutes and rules incorporate the doctrine of progressive discipline. Accordingly, state supervisors are expected to administer discipline beginning at the lowest appropriate step. Kelly v. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. 1999). Further, at least one court, in expressing approval of the progressive discipline system, has stated that the legislative mandate for progressive discipline should be "scrupulously followed". Berning v. State of Tennessee, Department of Correction, 996 S.W. 2d 828, 830 (Tenn. Ct. App. 1999).

15. T.C.A. §8-30-330 sets forth the state's civil service progressive discipline system as follows:

> (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.
>
> (b) Any written warning or written follow-up to an oral warning which has been issued to an employee shall be automatically expunged from the employee's personnel file after a period of two (2) years; provided, that the employee has had no further disciplinary actions with respect to the same area of performance, conduct, and discipline.
>
> (c) When corrective action is necessary, the supervisor must administer disciplinary action beginning at the step appropriate to the infraction or performance. ***Subsequent infractions may result in more severe discipline in accordance with subsection (a).*** (Emphasis added.)

16. The Court in Berning v. State Department of Correction notes that the "key word in the statute [T.C.A. §8-30-330] is *appropriate".* Berning v. State Department of Correction, 996 S.W.2d 828, 830 (Tenn. Ct. App. 1999), *Perm. to appeal denied* (Tenn. 1999). "The 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." Id. At 830, *quoting the chancellor's order with approval.*

17. An employee's prior conduct, both good and bad, along with his entire work history, can be considered when determining what the appropriate disciplinary action should be. Kelly v. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. 1999).

18. An additional consideration for determining the appropriateness of the discipline to be imposed is whether the punishment imposed upon the Grievant is different than discipline used with other employees who have engaged in the same conduct. Gross v. Gilless, 26 S.W. 3d 488, 495 (Tenn.Ct. App. 1999), *Perm. to Appeal Denied* (Tenn. 2000).

19. Neither party presented evidence of "discipline" for other Tennessee State Troopers who had committed the kind and amount of violations committed by the Grievant.

20. In determining whether or not termination is the appropriate discipline for Grievant, it is necessary to consider whether there is "just cause" to terminate Grievant due to the acts and omissions set forth above.

21. Considering all the circumstances of this matter, including Grievant's employment record, and Grievant's disciplinary record, it is determined that the Department has "just cause" for terminating the Grievant.

22. It is clear that Grievant was guilty of not properly securing evidence, incorrectly storing evidence in his desk (including a hand-rolled

marijuana cigarette and drug paraphernalia), carelessly leaving bags of evidence in his patrol car, on his front porch, and in his drive-way, not always completing THP-33 forms (property receipt forms) for property he had confiscated, failing to turn in or file a blood sample in a third offense DUI citation, violating established "chain of custody" rules and regulations, failing to file citations and warrants in court cases, failing to complete affidavits in court cases, failing to appear in court cases, failing to properly participate in his cases resulting incases being automatically dismissed by judges, being inconsistent in his treatment of drivers in traffic stops , and ,by Grievant's own admission, being "one to two years behind" on destruction orders.

23. Clearly Grievant violated *Department of Safety, General Orders* 546, III, C, D, and E (2), and violated *Tennessee Department of Human Resources Rules* 1120-10-.06(1) – Inefficiency or incompetency in the performance of duties; 1120-10-.06(2): Negligence in the performance of duties; and 1120-10-.06(8) - Conduct unbecoming an employee in State service.

24. Further, it is clear that if Grievant remained employed with the Department of Safety as a State Trooper, it would subvert the "good of the service".

25. T.C.A. §8-30-326 (a) addresses the dismissal of civil service employees. It states: "An appointing authority may dismiss any employee in the authority's division when the authority considers that the good of the service shall be served thereby."

26. "The good of the service" may, in proper cases, justify or require 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. Reece v. Tennessee Civil Service Commission, 699 S.W. 2d 808, 813 (Tenn. Ct. App. 1985).

27. It is noted that law enforcement officers, including police officers and state troopers, are expected to have a higher standard of personal conduct than that of the average public or governmental employee. Lee v. Personnel Merit Bd. of City of Dyersburg, 1986 WL 3368, p. 5 (Tenn.Ct. App.); Watts V. Civil Service Board for Columbia, 606 S.W. 2d 274, 282 (Tenn. 1980.) Such officers are expected to maintain law and order in our society. Id. at 282. The Lee court stated: "[The officer] represents law and order to the people and must present an image of personal morality and honesty to have the respect of the citizenry." at 5.

28. Considering all the facts and circumstances of this case, and due to the extremely serious nature of Grievant's position, which involves the protection and safety of the citizens of Tennessee and other drivers using Tennessee's roadways; and in light of the fact that Grievant received a nine day suspension previously for misconduct, all the facts and circumstances of this case preponderate in favor of termination being the appropriate discipline.

29. Grievant's acts and omissions have established a pattern of negligent acts and omissions in his work performance, and a failure to follow established procedures and standards. The ability of Grievant's supervisors

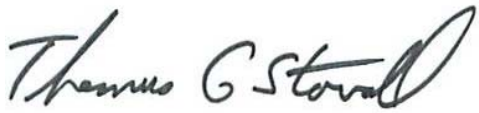
and co-workers to rely and depend on Grievant to properly and safely perform his job has been damaged beyond repair. Nor can the applicable courts or district attorneys rely upon Grievant to perform his job in conjunction with the prosecution of criminal cases.

30. For the good of the service, and because of Grievant's violations of the rules and regulations set forth above, Grievant must be **TERMINATED.**

It is ordered that **TERMINATION** is the appropriate discipline in this matter. The Department's decision shall be **UPHELD,** and this matter is **DISMISSED.**

It is so ordered.

Entered and effective this 2nd day of July, 2009.



Thomas G. Stovall, Director
Administrative Procedures Division