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1-27-2009

# Department of Children's Services, Petitioner, Vs. Tremayne Franks, Grievant.

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**BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION**

**IN THE MATTER OF:**

**Department of Children's Services,  
Petitioner,**

**Vs.**

**Tremayne Franks,  
Grievant.**

**DOCKET NO: 26.43-100237J**

**INITIAL ORDER**

This matter came to be heard on the January 27, 2009 before Steve R. Darnell, Administrative Law Judge, sitting for the Tennessee Civil Service Commission. The State of Tennessee, Department of Children's Services (hereinafter "DCS") was represented by attorney Julie Randall Pablo. The Grievant was present for the hearing and proceeded *pro se*. This hearing constituted Grievant's 5<sup>th</sup> step hearing before the Civil Service Commission pursuant to T.C.A. § 8-30-328. The record was closed on June 1, 2009 with the filing of Grievant's post-hearing memorandum.

**ISSUE FOR CONSIDERATION**

Whether it was proper for DCS to discipline Grievant with a ten day suspension for failing to ensure a child in state custody was placed in a proper foster home, failing to report another child's runaway status, and giving a cellular telephone to a foster parent?

**SUMMARY OF DETERMINATION**

After due consideration of the evidence and the record as a whole it is **DETERMINED** that:

1. Grievant failed to ensure that an infant in DCS custody was placed in an appropriate foster home. Grievant's malfeasance resulted in life threatening injuries to the infant.

2. Grievant failed to properly and timely report (or ensure his subordinate properly reported) the runaway status of two DCS service recipients. Because their run-away status was not reported, authorities were not notified to look for the children, therefore placing them in danger.

3. Grievant provided a foster parent a cellular telephone as a gift. This was in violation of DCS's conflict of interest policy.

DCS's decision to suspend Grievant for ten days without pay is **UPHELD**. This determination is based upon the following findings of fact and conclusions of law.

#### **FINDINGS OF FACT**

1. Grievant is a 35-year-old employee of DCS. He has worked for DCS for approximately the last 10 years. He holds a bachelor's degree in physical education and a master's degree in education administration. He is working towards a second master's degree in social work. At all times relevant to this case, Grievant held the position of Team Leader with DCS.

2. As a Team Leader, Grievant is responsible for the direct supervision of up to five Case Managers. Each Case Manager was assigned up to 20 cases or service recipients which they directly provide DCS services to. It is the Team Leader's responsibility to ensure that all Case Managers under his control follow DCS policy.

3. DCS policies are implemented pursuant to state and federal laws. DCS policy is adopted primarily to ensure the safety and wellbeing of children placed in DCS's custody. Grievant has been adequately trained and is knowledgeable of DCS policy.

4. According to DCS policy 16.4, children under DCS control can only be placed in approved foster homes. There are exceptions for emergent situations under this policy, but strict guidelines must be followed which are found in policy 16.4 I. In general, this provision requires that the Regional Administrator approve any waiver or modification of policy 16.4.

5. One of Grievant's service recipients was a 16-year-old female, C.H. and her not quite 2-year-old son, D.H. Both were placed in a DCS approved foster home under the direct supervision of a Case Manager. While in DCS custody, C.H. gave birth to a second child, a female named T.H. At all times relevant to this case C.H. was 16-years-old, D.H. was approximately 2-years-old, and T.H. was approximately 2½ months old. T.H. was not in DCS's custody.

6. On the weekend of June 2<sup>nd</sup> and 3<sup>rd</sup>, 2007, C.H. had an altercation with her foster parent and then attempted suicide. Consequently, C.H. was hospitalized and her children, T.H. and D.H. remained with the foster parent. C.H.'s foster parent was no longer able to cohabitate with C.H.

7. As a result of the aforementioned incident, T.H. (2½-months-old infant) was taken into custody by Children's Protective Services (CPS). T.H. was removed from the foster home and placed in the home of Chaquila Wright, who apparently has some familial relationship to these children. D.H. (almost 2-years-old son), who was in DCS custody, was also removed from the foster home and placed in Chaquila Wright's home. Ms. Wright was not an approved foster parent.

8. Grievant failed to ensure that DCS policy 16.4 was complied with prior to allowing D.H. to be placed in Ms. Wright's home. Grievant essentially assumed that if CPS found Ms. Wright's home safe for T.H., then it would be safe for D.H.

9. If DCS policy 16.4 was followed as mandated, Ms. Wright's home would not have been an acceptable placement for D.H. An appropriate criminal background check, home study, internet records search, etc. would have produced enough negative information about Ms. Wright's home that the Regional Administrator would not have approved the placement as required by DCS policy 16.4 I.

10. On June 13, 2007 a DCS emergency referral was initiated for D.H. D.H. was taken to the hospital for injuries that included "fractured pelvis, lacerated spleen, subdural hematoma, bruising all over his body, including his ear, penis, back stomach, hip and side of his head." It was unclear if D.H. would survive his injuries. After extensive medical treatment and rehabilitation, D.H. did survive.

11. It is not clear exactly what happened to D.H., but it appears that a teenager living in Ms. Wright's home admitted to battering D.H. and causing his injuries. Further, it appears that someone within the home had a criminal record that was not detected during the criminal background search because Grievant and the Case Manager did not have correctly spelled names.

12. D.H.'s injuries exposed the failure of the Case Manager, Team Leader (Grievant), and the Team Coordinator (Grievant's direct supervisor) to ensure a proper placement for D.H. The Case Manager was terminated, the Team Coordinator was demoted, and Grievant was given a 10 day suspension as a result of this incident. This suspension is the subject of this appeal.

13. Grievant's 10 day suspension was also given as discipline for two other incidences. The first involved the runaway status of K.Z. and her infant daughter E.Z. K.Z. ran away from her foster home and took her daughter E.Z. with her. The runaway status was reported to E.Z.'s and K.Z.'s Case Manager and to Grievant. However, neither properly reported their runaway status as required by DCS policy.

14. DCS requires that runaways be reported to the Endangered Runaway List. Once a child is reported as a runaway, an investigator with DCS's Absconder Recovery Division (ARD) is assigned to search for the child, and law enforcement agencies across the county, including the FBI are notified to be aware of the child's status if they are encountered.

15. E.Z. and K.Z. were placed on the runaway list approximately two month after K.Z. actually left her foster home. They were placed on the list by an investigator with the ARD. During this two month period, law enforcement would have had no knowledge of K.Z.'s. and E.Z.'s status, thus placing them in additional harm.

16. DCS asserts that Grievant sought to forge an inappropriate relationship Michelle B. a DCS foster parent. Grievant admitted that he gave a cellular telephone to Michelle B., and as a result of his admission this fact is proven. However, DCS has failed to present any other competent proof to support any additional findings<sup>1</sup>.

### **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

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<sup>1</sup> DCS offered hearsay testimony of complaints and allegations by Michelle B. and the child under her care of Grievant's alleged conduct. It did not subpoena either to the hearing, attempt to depose them, or offer an affidavit pursuant to T.C.A. §4-5-313. DCS also offered its investigative report as a business record which contains much of the same hearsay, as evidence of these other incidences. However, these hearsay statements made to the investigating officer by others, not under a legal duty to report them, are generally not admissible. See generally, United States vs. Snyder, 787 F.2d 1429 (10<sup>th</sup> Cir. 1986). This hearsay evidence is not admissible and will not support any additional findings.

action constitutes a disciplinary offense; and 3) the recommended discipline is appropriate for the given offense. Id. at 520. Some instances of misconduct require an elevated level of discipline, even if the employee has no history of prior disciplinary action. Berning v. State, 996 S.W.2d 828, 830 (Tenn. App. 1999).

4. The Department of Children's Services 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. **PURPOSE (Rule 1120-10-.01)**

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.

7. **POLICY (Rule 1120-10-.02)**

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, 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.

8. **MINIMUM DUE PROCESS (Rule 1120-10-.03)**

(1) Career employees have a "property right" to a position in the classification in which they currently hold career status. Therefore, no suspension, demotion, dismissal or any other action which deprives a regular (career) employee of his "property right" will become effective until minimum due process is provided as outlined below.

(2) Minimum due process consists of the following:

(a) The employee shall be notified of the charges against him. Such notification shall detail times, places, and other pertinent facts concerning the charges and should be in writing.

(b) The notification will provide for the employee to have a predecision discussion with an appropriate manager and will state the mechanism through which such a discussion may be arranged. The employee should be given a reasonable period of time to prepare to answer charges and present information which might influence the manager's decision.

(c) The manager conducting such discussions must be an appointing authority or manager who has direct access to an appointing authority for this purpose.

(d) The meeting outlined above shall be for the purpose of allowing the employee to present information to the manager regarding the disciplinary action under consideration.

(e) The discussion shall be informal. The employees shall have the right to present written statements of witnesses or any other information with regard to the charges. Attendance and participation by persons other than the manager and the employee shall be at the discretion of the manager.

(f) If the employee declines the opportunity to have the discussion or present information, the provisions of this section are deemed to have been met.

(3) The commission shall determine as a preliminary matter to the merits of a grievance, a Grievant's allegation that he or she was denied minimum due process.

**9. EXCEPTION TO MINIMUM DUE PROCESS (Rule 1120-10-.04)**

When an employee is acting in a dangerous or otherwise threatening manner and must be removed from the workplace immediately, it is not necessary to provide "minimum due process" prior to removal. Minimum due process must be provided after removal as soon as practicable. The employee, in this case, may be placed on leave or on immediate suspension without pay.

**10. CAUSES FOR DISCIPLINARY ACTION (Rule 1120-10-.05)**

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.

**11. EXAMPLES OF DISCIPLINARY OFFENSES (Rule 1120-10-.06)**

The following causes are examples of those considered for disciplinary action and should not be considered the only causes of action.

**(1) Inefficiency or incompetency in the performance of duties.**

**(2) Negligence in the performance of duties.**

(3) Careless, negligent or improper use of State property or equipment.

(4) Failure to maintain satisfactory and harmonious working relationships with the public and fellow employees.

(5) Habitual improper use of sick leave privileges.

(6) Habitual pattern of failure to report for duty at the assigned time and place.

(7) Failure to obtain or maintain a current license or certificate or other qualification required by law or rule as a condition of continued employment.

(8) Gross misconduct or conduct unbecoming an employee in the State service.

(9) Conviction of a felony.

(10) Willful abuse or misappropriation of State funds, property or equipment.

(11) Falsification of an official document relating to or affecting employment.

(12) Participation in any action that would in any way seriously disrupt or disturb the normal operation of the agency, institution, department or any other segment of the State service or that would interfere with the ability of management to manage.

(13) Trespassing on the property of any State officer or employee for the purpose of harassment.

(14) Damage or destruction of State property.

**(15) Acts that would endanger the lives and property of others.**

(16) Possession of unauthorized firearms, lethal weapons, alcohol or illegal drugs on the job.

(17) Brutality in the performance of duties.

- (18) Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination).
- (19) Reporting to work under the influence of alcohol or illegal drugs, or partaking of such on the job.
- (20) Sleeping or failure to remain alert during duty hours.
- (21) Betrayal of confidential information.
- (22) Garnishment of wages for more than one indebtedness.
- (23) Political activity prohibited by T.C.A. Title 2, Chapter 19 (The Little Hatch Act)
- (24) For the good of the service as outlined in T.C.A. 8-30-326.** (Emphasis added).

**12. PROGRESSIVE DISCIPLINARY ACTION (Rule 1120-10-.07)**

- (1) The supervisor is responsible for maintaining the proper performance level, conduct and discipline of the employees under his supervision. When corrective action is necessary, the supervisor must administer disciplinary action beginning at the appropriate step as described.
- (2) Oral Warning. The supervisor will meet privately with the employee to:
  - (a) Review with the employee exactly what is expected on the job and why.
  - (b) Explain to the employee how he has not met requirements and why present conduct or performance is unacceptable.
  - (c) Allow the employee to give reasons for his actions or failure.
  - (d) Make suggestions for correction.
  - (e) Record the date of the discussion and other necessary information for future reference.
  - (f) Written follow-up to the discussion may be forwarded to the employee but is not required. Written follow-up to an oral warning should not be construed as a written warning as described below and will not become part of the employee's official personnel file.
- (3) Written Warning. The supervisor will meet with the employee and:
  - (a) Review the points covered in the oral warning, if an oral warning(s) was administered. The employee will be told that a significant change in his present conduct or performance must be made.
  - (b) Tell the employee he will receive a letter covering the significant points of the discussion to include:
    - 1. What has been expected and how these expectations have not been met.
    - 2. Suggestions for improvement.
    - 3. Indication that failure to improve will lead to further disciplinary action.
  - (c) Review with the organizational unit head the contents of the letter prior to its delivery to the employee by the supervisor.
  - (d) A copy of the written warning may be placed in the employee's official personnel file in the agency personnel office at the discretion of the appointing authority. Any written 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 from the date of the letter; provided, that the employee has had no further disciplinary actions with respect to the same area of performance, conduct, and discipline.
- (4) Suspension Without Pay.
  - (a) After minimum due process is provided, a suspension without pay may be issued by the appointing authority for one (1) to thirty (30) days. No employee may be suspended without pay for disciplinary purposes for more than thirty (30) days in any consecutive

twelve (12) month period. Suspensions with or without pay of more than thirty (30) days may be issued pending the outcome of an investigation or legal action with approval of the Commissioner.

(b) Before issuance, a written notice of the suspension without pay will be prepared. The notice will contain an account of the circumstances which led to the decision to issue the suspension, the beginning and ending dates of the suspension and information to the employee concerning his rights of appeal as outlined in Chapter 1120-11 of these rules. A copy of the notice will be placed in the employee's official personnel file and a copy will be sent to the Department.

(5) Dismissal.

(a) After minimum due process is provided, an employee may be dismissed by the appointing authority from his position for unacceptable conduct or performance of duties.

(b) Before an employee is dismissed, a written notification detailing the circumstances leading to the decision to dismiss will be prepared. The notice will indicate the effective date and inform the employee of his rights to appeal as outlined in Chapter 1120-11 of these rules. A copy of the notice will be placed in the employee's official personnel file and a copy will be sent to the Department.

(c) Before an employee can be dismissed, he must be given ten (10) calendar days paid notice. During the notice period an employee will not be required to report for duty. The employee's accumulated annual leave balance may be used during this notice period only if dismissal was for gross misconduct.

(6) Transfer or Demotion. If it is determined by the appointing authority that an employee's ability to satisfactorily perform his duties is beyond the capabilities of the employee or the employee has been compromised by notorious conduct to the extent that he is ineffective in his position, the employee may be demoted or transferred to a position that is more appropriate after minimum due process has been provided.

13. **GRIEVANCE/PURPOSE (Rule 1120-11-.01)**

To provide clear, orderly and expedient procedures through which all career or permanent employees of the State service may process bona fide complaints or grievances.

14. **GRIEVANCE/POLICY (Rule 1120-11-.02)**

(1) Career and permanent employees will be given every opportunity to resolve bona fide complaints or grievances through established procedures. Every reasonable effort will be made to resolve complaints at the lowest possible step in the procedure.

(2) Employees using this procedure will be entitled to process their complaints or grievances without fear, interference, discrimination, or reprisal.

15. **GRIEVANCE/RESPONSIBILITY (Rule 1120-11-.03)**

(1) The Commissioner will be responsible for providing and maintaining the basic standards and guidelines for implementing this rule chapter.

(2) Appointing authorities will be responsible for the proper effectuation of this rule chapter throughout their respective agencies. Modification of these procedures may be made in order to satisfy unusual circumstances within an agency if such modification is approved by the Commissioner.

(3) Appointing authorities will be responsible for ensuring that all employees and supervisory personnel are aware of the provisions of this rule chapter.

**16. GRIEVANCE/BASIC STANDARDS (Rule 1120-11-.04)**

(1) A complaint or grievance must be filed at the appropriate step in the grievance procedure within fifteen (15) workdays (Monday - Friday, 8:00 a.m. - 4:30 p.m.) of the action which is the basis for the grievance, otherwise it will be considered untimely and invalid.

(2) Although no standard grievance forms are provided, agencies may develop and make available such forms to employees. No grievance may be denied because a standard form adopted by an agency has not been used.

(3) A grievant may represent himself at any step in the procedure.

(4) At the informal hearing before the appointing authority, an attorney or a representative of an employee may speak on behalf of the employee.

(5) Legal counsel may represent a grievant before the Civil Service Commission, which is the final step of this procedure. The grievant and the agency may have counsel present at discussions prior to the final step. The presence of other observers at discussions prior to the final step of this procedure is at the discretion of the manager or supervisor in charge of that discussion.

(6) Grievants may present grievances during business hours or other mutually agreeable hours as work situations may require. Grievance discussions held during the scheduled off-duty hours for a grievant, witness, or representative will be considered the same as overtime work. Grievants or employees who are required to appear as witnesses or representatives will not be required to use leave for such periods and shall be reimbursed for travel and other expenses in accordance with the comprehensive travel regulations.

(7) Grievances concerning suspension without pay must be appealed to the lowest management level in the organization with authority to overturn the suspension.

(8) Grievances concerning dismissal should be appealed directly to the appointing authority, warden, or superintendent.

(9) Grievances concerning alleged discrimination prohibited by T.C.A. 8-50-103 or T.C.A. 4-21-401 may be appealed directly to the appointing authority, warden, or superintendent through this procedure. If the aggrieved is unsatisfied with the decision, the grievance and the appointing authority's response may be appealed to the Commission within thirty (30) days or the Tennessee Human Rights Commission as provided in T.C.A. 8-50-103(b).

(10) Grievance decisions should be communicated in writing directly to the grievant in a timely manner as outlined in Chapter 1120-11-.05. Certified or registered mail is mandatory if a decision must be mailed. Hand delivered grievance decisions should include a written heading indicating "Hand Delivered" with a place for a signature.

(11) Grievances must be expressed in reasonable terms. Each grievance submitted should contain:

- (a) the basis for the grievance;
- (b) the settlement or corrective action desired by grievant; and
- (c) sufficient facts or other information to begin an investigation.

**17. GRIEVANCE/PROCEDURES (Rule 1120-11-.05)**

The appropriate entrance step is determined by the grievant's relative level in the organization. Procedures shall not be more than five (5) steps to finality as follows:

(1) Step I - Grievant's immediate Supervisor (verbal)

- (a) Verbal discussion with supervisor within fifteen (15) workdays of cause.
  - (b) Supervisory investigation and fact finding.
  - (c) Decision clearly communicated to grievant within five (5) workdays of discussion.
- (2) Step II - Next Appropriate Higher Level of Management (written)
- (a) Written grievance submitted to appropriate manager within ten (10) workdays of receipt of Step I decision.
  - (b) Informal discussion or hearing of facts and allegations.
  - (c) Investigation, fact finding, and written decision communicated to grievant within ten (10) workdays of discussion.
- (3) Step III - Next Appropriate Higher Level of Management (written)
- (a) Written grievance and prior step decision submitted to next appropriate manager within ten (10) workdays of receipt of decision from Step II.
  - (b) Informal discussion or hearing of facts and allegations with witnesses and documentation.
  - (c) Investigation, fact finding, and written decision clearly communicated to grievant within ten (10) workdays of discussion.
- (4) Step IV (written)
- (a) Written grievance and prior step decision submitted to the appointing authority or designee within ten (10) workdays of receipt of decision from Step III.
  - (b) Informal discussion or hearing of facts, allegations, and testimony by appropriate witnesses as determined by the appointing authority or designated representative as soon as practical. Whenever possible, the fourth step hearing shall be conducted by a manager who had no input to or involvement in the original decision to discipline.
  - (c) Investigation, fact finding, and written final agency decision communicated to grievant within ten (10) workdays of discussion.
  - (d) The appointing authority shall have full authority to overturn, reduce, or alter any disciplinary action based on information gathered at the step IV hearing including reinstatement of leave and awards of backpay, if appropriate, which may be offset by income earned from alternative employment or unemployment insurance payment received.
- (5) Step V (Formal - Career Employee only)
- (a) Written grievance and all relevant documentation shall be submitted within thirty (30) days of receipt of decision from Step IV to:
    - Secretary, Civil Service Commission
    - Tennessee Department of Personnel
    - Second Floor, James K. Polk Building
    - Nashville, TN 37243-0635
  - (b) Hearings will be held pursuant to T.C.A. §8-30-328 and the Uniform Administrative Procedures Act.
- (6) The time limits set herein may be extended not in excess of six (6) months by written agreement between the manager involved and the employee. Failure of management to proceed within established time limits entitles the grievant to proceed to the next step in this procedure.
- (7) Hearings conducted at Step V will conform to the model rules of the Secretary of State for contested cases and the Department hereby adopts Secretary of State Rule 1360-4-1 in statutory compliance.

18. **GRIEVANCE/SCOPE OF PROCEDURE (Rule 1120-11-.06)**

- (1) The Commission will serve as the final step for all grievances by career employees.
- (2) The agency appointing authority will serve as the final step for all grievances by permanent employees.

19. **GRIEVANCE/GRIEVABLE MATTERS (Rule 1120-11-.07)**

- (1) Disciplinary suspension or demotion.
- (2) Disciplinary dismissal.
- (3) Involuntary geographical transfer of an employee or official duty station more than fifty (50) miles. Distance will be determined by drawing a circle, with a 50 mile radius, centered on the previous official duty station
- (4) Non-compliance with an approved reduction in force plan by an appointing authority.
- (5) Prohibited political activity as outlined in T.C.A. Title 2, Chapter 19 ("The Little Hatch Act").
- (6) Coercion of an employee to "waive" his right to consideration on a certificate of eligibles.
- (7) Performance evaluations under certain circumstances to the fourth step.
- (8) Other matters within the discretion or control of the appointing authority or the Commission.

20. **GRIEVANCE/EXCEPTIONS & NON-GRIEVABLE MATTERS (Rule 1120-11-.08)**

- (1) Actions that affect employees who are not career or permanent employees.
- (2) Actions that affect an employee serving an initial probationary period.
- (3) Normal supervisory counseling.
- (4) Non-selection for promotion when the appointment was in compliance with these rules and the Act.
- (5) Verbal and written reprimands.
- (6) Performance award decisions.
- (7) Actions resulting from suggestions adopted by the State Employee Suggestion Award Board.
- (8) Actions resulting from reductions in force when an approved reduction in force plan was followed.
- (9) Shift, post, and overtime assignments.
- (10) Reasonable work assignments outside those normally associated with the employee's assigned job classification.
- (11) Salary range assigned to classification.
- (12) Classification of position.
- (13) Denial of leave requests except as provided for in T.C.A. §§8-50-801 and T.C.A. 8-50-110.
- (14) Matters relating to internal agency or program management which are based on discretionary decision making.
- (15) Demotions during subsequent probation, if such demotion is to the job classification from which the employee was promoted and at a salary rate no lower than the salary rate had the promotion not occurred.
- (16) Agency rules or policies which do not conflict with statutes or rules of the Department of Personnel.
- (17) Any other matter over which an appointing authority or the Commission has no control or jurisdiction or is without the authority to grant requested relief.

21. **GRIEVANCE/TECHNICAL ADVICE AND ASSISTANCE (Rule 1120-11-.09)**

(1) Technical questions regarding this rule may be resolved by referring questions to the agency personnel section.

(2) Unresolved technical questions to an agency personnel section may be resolved by referring such to the Department of Personnel, Employee Relations Division.

(3) Disputes over grievability may be resolved by an agency's appointing authority or by the Commissioner. The Civil Service Commission may review such determinations and, at its discretion, take whatever action it deems appropriate.

(4) The intent of this policy is to legally, efficiently, and fairly resolve bona fide complaints, and grievances. The initiation of a grievance should not be considered as a negative reflection against an employee, supervisor, or agency management, but should be considered as an effort to communicate and seek resolution of work related problems.

(5) Management should consider grievances objectively, fairly, and expeditiously while maintaining a helpful, cordial, and professional attitude throughout the process of redress.

22. The Tennessee Civil Service statute at T.C.A. 8-30-330 provides in relevant part 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.** Emphasis added.

23. “Tennessee's civil service statutes and rules incorporate the doctrine of progressive discipline. Accordingly, supervisors are expected to administer discipline beginning at the lowest appropriate step. *See* T.C.A. §8-30-330(a), (c) (1993); Tenn.Comp.R. & Regs. r. 1120-10-.07 (1996). Progressive 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 or severity of the employee's behavior. Accordingly, supervisors have the discretion to determine what punishment fits the offense. *See, Berning v. State Dep't of Correction*, 996 S.W.2d 828, 830 (Tenn. Ct. App.1999).” *Kelly vs. Tennessee Civil Service Commission*, 1999 WL 1072566 (Tenn. Ct. App. 1999).

## DISCUSSION

As noted above, progressive discipline does not require DCS to provide the lowest possible level of discipline to Grievant. In this case, DCS correctly found that Grievant's conduct was so egregious and the actual harm so great, that a 10 day suspension was the lowest possible disciplinary action. The proof clearly supports DCS's decision. The 10 day suspension would have been appropriate if the only infraction was the placement of D.H. in Ms. Wright's home. Grievant's actions or inactions nearly caused the death of a child he was directly charged to protect.

However, in addition, DCS has shown that Grievant also failed to report the runaway status of two other juveniles under his authority, and also violated DCS's conflict of interest policy by giving a cellular telephone to foster parent Michelle B. When all of this is weighed together, DCS has clearly shown by a preponderance of the evidence that a 10 day suspension was appropriate and should be upheld.

**IT IS THEREFORE ORDERED** that the Department of Children's Services' decision to suspend Grievant for 10 days is fully **UPHELD**.

Entered this the \_\_\_\_\_ day of \_\_\_\_\_, 2009.

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Steve R. Darnell  
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this  
10th day of June, 2009.

A handwritten signature in cursive script that reads "Thomas G. Stovall". The signature is written in black ink and is positioned above a horizontal line.

Thomas G. Stovall, Director  
Administrative Procedures Division