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1-15-2009

REGINALD THOMAS, Grievant, vs.  
TENNESSEE DEPARTMENT OF  
CORRECTION

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**BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION**

**IN THE MATTER OF:** )  
 )  
**REGINALD THOMAS,** )  
 *Grievant,* )  
 )  
**v.** ) **DOCKET NO. 26.05-098056J**  
 )  
**TENNESSEE DEPARTMENT OF** )  
**CORRECTION** )  
 )

**INITIAL ORDER**

This contested case was heard on January 15, 2009 in Tiptonville, Tennessee at Northwest Correctional Complex and on February 18, 2009 in Nashville, Tennessee by telephone, before Margaret R. Robertson, Administrative Judge, Administrative Procedures Division, assigned by the Secretary of State and sitting for the Commissioner of the Tennessee Civil Service Commission. John Drummond, counsel for the Tennessee Department of Correction, represented the Department of Correction (Department). Grievant Reginald Thomas proceeded on his own behalf. The parties were permitted to file proposed Findings of Fact and Conclusions of Law. The record was closed and became ready for consideration on May 5, 2009.

The issue in this matter is whether Grievant Thomas should be terminated from his position for violation of Tennessee Department of Personnel (TDOP) Rule 1120-10-.06(6), Habitual Pattern of Failure to Report for Duty at the Assigned Time and Place and Tennessee Department of Correction Policy (TDCP) 303.01, Attendance and Leave.

After consideration of the record, it is determined that **Grievant's** termination is **upheld**, based on the following findings of fact and conclusions of law.

## **FINDINGS OF FACT**

1. Grievant Reginald Thomas was employed as an electronics technician in the maintenance department at Northwest Correctional Complex (“NWCX”). He began work there in June of 1992.

2. On a daily basis, in addition to doing electronics work at the facility, Grievant was responsible for the tools and instruments he used in his job which would pose a threat to security if they were lost or fell into the hands of inmates. Grievant regularly worked around inmates at NWCX. Grievant was expected to arrive for work in a timely manner and to notify his superior in advance when legitimate circumstances prevented him from coming to work or from arriving on time. Timeliness and predictability in attendance and movement within the complex is more important for security reasons in a correction facility than in other contexts.

3. Generally, Grievant was regarded as good at his work and received favorable performance evaluations until he began to experience difficulties in 2004. From that time forward, Grievant had such difficulties meeting attendance and timeliness expectations that he received a number of disciplinary actions, none of which he appealed until he was terminated. In spite of progressively more severe discipline, Grievant’s overall performance on these issues did not improve, according to his personnel record.

4. Grievant’s difficulties in reporting for work on time or calling in to report when he would be late or was ill were exacerbated by his lack of a personal telephone or his own transportation. To call in, it was necessary for Grievant to walk to a neighbor’s house to borrow the use of their telephone. At the Level 5 hearing, Grievant sought to explain his failures to promptly notify his supervisors on the days he was absent, by saying, “You’ve got to get better before you can go get to a phone.” Grievant’s lack of telephone and automobile had long been a

matter of concern at work and even contributed to lower performance evaluations because his continual communication and transportation deficiencies prevented him from being accessible and “on call” in case of emergencies at the institution. Grievant’s salary was sufficient to cover the cost of a telephone in addition to his rent and other necessities, yet he did not obtain a telephone. Because of Grievant’s lack of transportation and his difficulty in complying with attendance requirements, over the years a number of different employees of NWCX attempted to assist Grievant by taking him to and from work.

5. Grievant’s disciplinary history for attendance and leave problems prior to the events which led to his termination hearing includes:

- (1) a written warning February 26, 2004, for “Failure to report at assigned time;”
- (2) two instances of tardiness, March 8, 2004 and March 11, 2004;
- (3) three instances of tardiness, April 2, 5, and 6, 2004;
- (4) a one-day suspension April 23, 2004 for failure to report at assigned time, (TENN. COMP. R. & REGS., *Rules of the Tennessee Department of Human Resources* Rule 1120-10-.06(6), (Habitual Pattern of Failure to Report for Duty at the Assigned Time and Place), and TDOC Policy 303.01.1 (Attendance and Leave));
- (5) a three-day suspension December 9, 2004, for failure to report at assigned time;
- (6) January 31, 2005, called in 8:30 a.m., reported to work at 9:30 a.m.;
- (7) February 2, 2005, 15 minutes late;
- (8) a four-day suspension February 9, 2005 for failure to report at assigned time;
- (9) May 3, 2005, called in sick and was told to bring a doctor’s statement when returned, but did not do so. Habitual pattern of noncompliance with TDOC policy #303.1 noted.
- (10) May 9, 2005 called late, advising he was sick and unable to report to work. Given letter of information that he must provide doctor’s statement after sick days hereafter.
- (11) August 2, 2005, called in sick and was told to bring in a doctor statement when he returned;
- (12) August 3, 2005 reported back to work but did not bring a doctor statement;
- (13) a seven-day suspension August 15, 2005 for failure to report at the assigned time and violation of attendance and leave policy.
- (14) February 28, 2006 suspended for five days for attendance and leave violations and failure to present doctor’s statements.

6. In addition, Grievant was disciplined on multiple occasions for violation of other policies and rules, specifically TDOC 506.03 regarding Tool Control and TDHR Rules 1120-10-.06(2) negligence in performance of duties and (3) careless, negligent or improper use of state property or equipment, which have bearing in this matter regarding what level of discipline is proper within the context of a progressive discipline policy if Grievant is found to have recently violated the attendance and leave provisions. Among the occasions when Grievant was disciplined for infractions of these rules and policies are:

- (1) December 16, 2005 written warning for negligence re tool control.
- (2) November 16, 2006 letter of information re requirements for tool control.
- (3) January 24, 2007 one day suspension for neglect of tool control.
- (4) May 2, 2007 two day suspension for negligence and inadequate tool control.
- (5) August 13, 2007 five day suspension (to be taken in September) for careless, negligent or improper use of state property, negligence and poor tool control.

7. Warden Tony Parker testified at the Level 5 hearing that the tools used at NWCX are specially designed to facilitate work of very sensitive and security-related importance, and would pose special risks if they were not accounted for properly or if they were accessible to inmates in the institution. Warden Parker opined that there was never an excuse for losing track of one's maintenance tools. According to Glen Stover's testimony, "When you sign out tools; when you take control of tools, it's your responsibility to maintain control of those tools. There [are] no excuses. There is no what if's, or this happened. You are responsible as a correctional employee to maintain control of your tools, because it is so important for security reasons." Mr. Stover did not think grievant ever accepted responsibility for his problems. Stover's testimony is credible. Grievant sought to explain and excuse his failure to maintain control of his tools by emphasizing the urgency of having to respond to an unspecified alarm.

8. On October 9, 2007, Grievant was called to a disciplinary hearing concerning his three most recent occurrences of tardiness, all within an eight-day period. Grievant was charged

with being twenty-five minutes late on September 25, 2007, ten minutes late on September 27, 2007, and 15 minutes late on October 3, 2007, after calling in to report that he would be late ten minutes after he was due for his shift.

9. Deputy Warden Brenda Jones, who has known Grievant and his performance record since he began employment at NWCX, conducted the hearing on October 9, 2007. Grievant attended the hearing and spoke on his own behalf. At the close of the hearing, Deputy Warden Jones prepared a recommendation to Warden Tony Parker that Grievant be terminated for violation of TDHR Rule 1120-10-.06(6), an habitual pattern of failure to report for duty at the assigned time and place, and for violation of the TDOC Policy 303.01.1, which addresses attendance and leave requirements. Deputy Warden Jones testified at Grievant's Level V hearing that she based her recommendation on Grievant's long history of tardiness and absence, and his prior record of discipline for this same reason.

10. Grievant did not report for duty on October 10, 2007. He called in on that date to give notice that he would not attend work that day. On October 11, 2007, when Grievant did not report for work again and did not communicate with his supervisor, Warden Jones directed Facilities Manager Glen Stover to visit Grievant's house to ascertain whether Grievant intended to come to work. Mr. Stover brought with him the letter from Warden Parker dated October 12, 2009 that informed Grievant of the Warden's intent to terminate him from State service as of October 26, 2007. Mr. Stover was directed to advise Grievant that he needed to either "check into rehab or come to work." Grievant told Mr. Stover that he had been trying to get in touch with Pathways Behavioral Services because he was "trying to get help."

11. Prior to this visit to Grievant's home, Stover had often come to Grievant's house during work hours after Grievant had failed to report for work, to learn whether Grievant

intended to come to work. Grievant's transportation problems were so endemic that for a period of five to six months, Stover regularly transported Grievant to and from work. Other employees had also periodically assisted Grievant in getting to and from work. These helpful employees included receptionist Doris Coleman, Rodney Johnson, Larry Howerton, Warden Tommy Mills and Assistant Warden Andy Haynes.

12. On October 11, 2007, Grievant admitted to Stover that he had problems. Grievant denies he told Stover that he had "drug problems", but had admitted to his supervisor and others on occasion that he had too much to drink some times.

13. At some time after the disciplinary hearing on October 9, 2007, Grievant was successful in making an appointment at Pathways Behavioral Services for October 18, 2007. The therapist at that appointment, Clifford Nathaniel, assisted Grievant in filing his appeal of the termination decision.

14. Grievant had availed himself of assistance at Pathways, and of counseling from Mr. Nathaniel, intermittently for some years, often renewing his participation after receiving disciplinary action for attendance and leave infractions. Grievant's supervisors supported and encouraged his efforts to seek assistance from the Employee Assistance Program through Pathways Behavioral Services. Mr. Thomas did appear to benefit temporarily from his participation in the EAP, resulting in some improvement in work performance and compliance with institutional requirements. However this progress tended to be sporadic and short-lived. Mr. Thomas exhibited a pattern of failure to follow through with his therapy, frequently not showing up for appointments, and failing to comply with the recommendations of his treatment providers. When he was discharged from regular treatment because of improvement, he had instructions to return to treatment if difficulties began again, but he only did so after the

difficulties in compliance resulted in further discipline. Stover recalled that Grievant's attendance improved for a month or two after he participated in the EAP, then it would go back down again.

15. Grievant's personnel record shows that the Department consistently applied progressive discipline on several occasions of violations of the leave and attendance requirements. Frequently, Grievant's supervisors chose to counsel and informally instruct, rather than resort to formal discipline, on numerous occasions when uncompensated suspensions would have been appropriate.

16. Contrary to Mr. Thomas' statements to Mr. Nathaniel at Pathways, Deputy Warden Jones denied that anybody at NWCX had tried to "set up" Mr. Thomas or put him in a position to fail. If anything, she believed that his supervisors could have taken more disciplinary action against Mr. Thomas, but sometimes refrained from doing so. Warden Parker noted in his testimony that Mr. Thomas' disciplinary record shows occasions when discipline was warranted but not administered, and other occasions when progressive discipline was not followed as might have been expected, but was "backed up," when Grievant's supervisors could have applied progressive discipline, but did not, apparently motivated by a desire to work with Mr. Thomas and correct his deficiencies.

17. Glenn Stover noted several occasions when Mr. Thomas would arrive in the maintenance shop at 7:35 or 7:40 a.m., when others in the shop would already have gotten their tools and were ready to go to work. According to Stover, such incidents of tardiness constitute infractions, but they never became the subject of disciplinary proceedings. Instead, Stover just talked to Grievant about it. These incidents also found their way into the supervisors' notes on

the Grievant's performance. If Grievant had been written up for these infractions, it would have increased his disciplinary record significantly.

18. According to Warden Parker, Thomas' "problem of attendance has been an habitual ongoing problem for years." With respect to his and other supervisors' role in helping Thomas get the assistance he needed, Parker stated:

. . . I don't doubt that Mr. Thomas has an issue - - I know he has an issue. But once we advise Mr. Thomas of the options he has, try to help him in any way possible, we can't make him go to treatment. We can't make him change his habits, or his - - whatever it is that's causing him trouble.

Warden Parker further explained his decision to uphold Deputy Warden Jones' decision to discharge Mr. Thomas.

As the Warden of the facility, I have a responsibility to look out for the welfare of the facility, as well as the inmates and the staff that work here. . . .And when you have an employee who has had the policy violations, habitual attendance issues, tardiness, violations in policies that Mr. Thomas has encountered, in my opinion, creates a significant hardship on the facility.

19. Grievant's personnel file contains documents related to the Grievant's job performance evaluations. These performance evaluations, especially those from 2004 on, support the department's contention, uncontradicted by the Grievant himself, that Grievant had chronic problems getting to work regularly and on time during that period, that he had a tendency to be disorganized and unfocused at work, and that he was often unwilling or unable to receive corrective instruction from his supervisors, especially over the last three years of his state

service. The Grievant's job performance evaluations also corroborate testimony and documents showing a history of deficiencies in the areas from which Grievant was repeatedly disciplined, and ultimately was dismissed from state service.

20. For example, on April 29, 2004, Grievant received a "marginal" rating in attendance and punctuality, due to a written warning and a one-day suspension for violations in this area during that period. It was noted that the Grievant was "always late leaving the shop in the morning." In the area of "safety and security procedures," it was noted that the Grievant had a tendency to take tools out of the toolbox and carry them in his pocket, and that he needed to keep all his tools in his toolbox, to stay with his tools until the end of the workday, until the tool control officer completes the necessary inventory. On April 17, 2006, Grievant received a "Not Acceptable" rating in attendance and punctuality. His evaluation for that period noted his suspension from March 20 to 24, 2006 and a seven-day suspension in August of 2005, for violation of TDOC Policy 303.01.1. In the area of being "on call," the Grievant received a "superior" rating, but it was noted that supervisors frequently could not get a hold of him, and that he could improve by getting a phone to make himself more accessible when needed. In March of 2007, Grievant was found lacking in his use of work time, and received a marginal rating in job performance responsibility, specifically for obstacles to being "on call," obstacles arising from communication and transportation problems. Improvement in punctuality was noted, but also that he had failed to call in sick until 2 p.m. on one day that he was sick. 21.

21. Grievant does not dispute the underlying infractions which were the subject of the disciplinary hearing on October 9, 2007. Nor does he deny that at the time of his discharge he had a long history of infractions of the same type for which he was discharged. The sole basis of this Level V grievance is Grievant's contention that "the decision to terminate [him] was wrong"

under the circumstances in which the decision was made, at a time when he was seeking assistance from the Employee Assistance Program. Grievant does not allege or prove that the termination was based on anything that happened after the hearing, but does state, somewhat contradictorily, that “the termination was for now [sic] allowing, you know, to seek the possibility of getting help. . . . That’s what I’m appealing on.” The gist of his grievance, then, is that the Department did not allow him to pursue professional counseling and medical treatment through the Employee Assistance Program in order to avoid termination and keep his job.

22. At the October 9, 2007 hearing and in his testimony at a level 5 hearing, Grievant contended that the disciplinary suspensions themselves were a factor in causing him to be unable to get up in time to be at work at the proper time. According to his testimony, Grievant’s tardiness and attendance problems were partly due to his electricity being cut off, because he had been unable to pay his bills after the suspensions and having his pay docked. When questioned further, Grievant admitted that having his power cut off temporarily did not keep him from getting to work on time, but that it did take time to get used to having to use an alarm clock in the morning.

23. Grievant presented no proof in support of his underlying contention that the Department did not allow him to seek assistance in the Employee Assistance Program. On the contrary, testimony and documents which were presented at the Level 5 hearing, uncontradicted by the Grievant, show otherwise, that Grievant’s supervisors and wardens in fact did support and encourage participation in EAP, for Grievant and all employees who so chose to take advantage of it. Grievant’s supervisors, including Glen Stover, Deputy Warden Brenda Jones, and Warden Tony Parker, were aware that he had sought help through Employee Assistance before. Larry Howerton, who briefly supervised the Grievant before he himself had to take time off for

medical reasons, talked with him about EAP services with the Grievant, and how he might go about accessing them to his benefit.

24. Participation in EAP, specifically the services provided by Pathways, apparently was of some benefit to Grievant, but that benefit was contingent on Grievant's actual participation and compliance, which was inconsistent and inadequate, according to Clifford

25. Mr. Nathaniel met with Mr. Thomas at the Dyersburg facility, on three occasions, first on September 11, 2006, for a professional evaluation. The next meeting was on October 16, 2006, for what Mr. Nathaniel described as a "30-minute pre-service visit." The last visit Mr. Nathaniel had with Mr. Thomas was on October 18, 2007. On that occasion, Mr. Thomas indicated to Mr. Nathaniel that he had been fired, and that he needed help filing a complaint. Mr. Nathaniel assisted the Grievant in preparing that document.

26. Thomas testified that he was fully engaged and participated in therapy at the Pathway facility in Dyersburg, but Clifford Nathaniel's testimony and the Pathways treatment records indicate otherwise. Mr. Thomas explained his failure to participate in any treatment after the October 2007 visit by asserting that Mr. Nathaniel had told him no more treatment would be available due to his dismissal from State service. Mr. Nathaniel testified that he remembered Thomas himself expressing concerns about insurance, but denies ever telling Mr. Thomas that there would be any problem with his coming back and getting more treatment, regardless of his employment situation. In any case, no proof shows that the Grievant ever inquired into alternate means of getting help from Pathways after his discharge from state service.

27. Mr. Nathaniel also testified to significant lapses in Thomas' visits to the facility. These included: November 10, 2005 to April 20, 2006; April 20, 2006 to September 11, 2006; September 11, 2006 to December 26, 2006. Following that, the only time Thomas returned to

the Dyersburg facility was October 18, 2007, after the disciplinary hearing that resulted in his dismissal.

28. Mr. Nathaniel never terminated his counseling services with Mr. Thomas. Nor was there ever a time, either before or after Mr. Thomas' discharge from state service, that Mr. Nathaniel and his facility would have been unable to continue counseling Mr. Thomas and providing him with assistance. If he had initiated it, Mr. Thomas could have continued to receive services, even without insurance.

29. Grievant met with a therapist at Pathways on or about March 3, 2005. Grievant's "chief complaint" was that he had been "written up" for being late to work several times. Grievant and his therapist agreed on a long term plan that included medication and behavioral therapy intended to improve his punctuality and attendance at work. Over the following 8 months, Grievant apparently took his medication as prescribed, but did not participate in therapy.

30. Doctor's statements indicate that the Grievant did receive services from Pathways in March 3 and 5, May 2 and 19, June, September 29 and November 10 of 2005. Following the May 2 and 19 appointments, Grievant was medically excused for one week for medication monitoring.

31. Grievant did not comply with his treatment recommendations at Pathways, even before his association with Clifford Nathaniel, nor did he comply with his treatment plan. The Pathways records include notations, dated May 11, 2006 and November 10, 2005, indicating failure of the treatment plan due to Grievant's noncompliance and failure to show up for appointment, ultimately recommending that Grievant "see another therapist if needed."

32. According to his treatment records, Grievant's chief complaint on September 29, 2005 was that he had been suspended for one week "due to not following all rules when sick"

and that he felt “they were slowly pushing him out the door.” The suspension to which this entry refers must be Grievant’s 7-day unpaid suspension from August 22 to 30, 2005, for failing to provide a doctor’s statement after using sick leave. Grievant had been specifically instructed to produce such documentation by his supervisor, Larry Daniel, and also pursuant to Fiscal Director Mike Holloway’s letter dated May 9, 2005.

33. According to his clinical record, Mr. Thomas received services at Pathways on the following dates prior to September of 2006: September 29, 2005, November 10, 2005, and April 20, 2006. These were at the Pathways facility in Tiptonville. He also returned on December 26, 2006. Mr. Nathaniel has had no contact with Mr. Thomas since October 18, 2007. On or about January 26, 2006, Mr. Thomas was discharged from medical care by a psychiatric nurse at Pathways. The decision was conditioned on Mr. Thomas’ continuing to feel better, as he had indicated to the nurse was the case. This decision by Grievant to stop medical treatment must correspond to a time when, as he testified at the Level 5 hearing, “the help stopped, the medication and all the counseling stopped, and everything came back on me again.” Some time after that, Mr. Thomas returned to Pathways, and saw a psychiatrist, Dr. Patel, for a couple of visits.

34. In Mr. Nathaniel’s opinion, Mr. Thomas could have continued in his therapy and gone to work as his job required, if he truly participated and was compliant with his treatment program. Mr. Nathaniel projected that such a program would consist of medication appointments either monthly or once every three weeks, also therapy appointments twice a month.

35. Since his discharge from State service, up through and including the date of the hearing, Grievant has shown no evidence that he sought or maintained regular employment, or

that he made any efforts to continue professional treatment for his depression, stress, or other personal problems.

36. Mr. Thomas testified that he was taken off the medication, before he started seeing Mr. Nathaniel at the Dyersburg facility, but the medical record shows that this decision was conditioned on Thomas' continuing to feel better. This encounter, according to Mr. Thomas' medical records, occurred January 26, 2006. Considering the Grievant's history with Pathways, Thomas knew or should have known that failure to participate in his recommended program, including medication and counseling, would not bode well for his employment or personal life. Thomas does not offer any satisfactory explanation for failing to do so, other than to say, "- - I stopped - - the help stopped, the medication and al the counseling stopped, and everything came back upon me again."

37. According to Mr. Nathaniel, the problems for which Mr. Thomas sought assistance from the Pathway facility would not necessarily have prevented him from going to work had been compliant with his medication, and his therapy. Nothing the grievant himself offered in proof contradicts this.

38. According to Mr. Nathaniel, Thomas' medication appointments would normally be once a month, or once every three weeks, and therapy at least once a month. When this is compared to Thomas' actual participation, it must be concluded that he did not avail himself of the professional assistance to which he had access from 2005 through 2007, and continued to have available up to and after the date of the hearing in this matter.

39. Grievant has presented no proof on which to base a finding that the deficiencies for which he was discharged would more probably than not be corrected if the Department had not dismissed him from state service.

## CONCLUSIONS OF LAW

1. The Grievant has been charged with violation of Tennessee Department of Human Resources (TDHR) Rule 1120-10-.06(6), Habitual Pattern of Failure to Report for Duty at the Assigned Time and Place and Tennessee Department of Correction Policy (TDCP) 303.01, Attendance and Leave.

2. The Department of Correction proposed termination of the Grievant for his recurrent pattern of violation of this Rule and Policy.

3. A Level V Civil Service hearing 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).

4. The Department bears the burden of proof in this matter to show by a preponderance of the evidence that Grievant violated the *Department of Human Resources Rules* set forth in the letter of termination. The Department also has the burden of proof to show that the discipline imposed was the appropriate discipline for any proven violation of such rules.

5. 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.

6. 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.

7. The Department (Petitioner) charges Grievant with the following violations: *Rules of the Tennessee Department of Personnel* (Revised May, 1999) TDOP Rule 1120-10-.06(6), Habitual Pattern of Failure to Report for Duty at the Assigned Time and Place, and Tennessee Department of Correction Policy (TDCP) 303.01, Attendance and Leave.

8. The Department has proved, by a preponderance of the evidence, that Grievant exhibited a continuing pattern of violation of TDOP Rule 1120-10-.06(6), Habitual Pattern of Failure to Report for Duty at the Assigned Time and Place, and Tennessee Department of Correction Policy (TDCP) 303.01, Attendance and Leave, despite repeated incidents of progressive discipline for violations, his performance reviews that cited his absenteeism and tardiness as deficiencies, the availability to Grievant of employee assistance in dealing with his problems, and his sporadic participation in that assistance program. Grievant's repeated tardiness and absenteeism without approval constitutes a violation of Rule 1120-10-.06(6), Habitual Pattern of Failure to Report for Duty at the Assigned Time and Place, and Tennessee Department of Correction Policy (TDCP) 303.01, Attendance and Leave.

9. The next question which must be asked is whether the Department has proved, by a preponderance of the evidence, that termination is the appropriate discipline for Grievant's violations. T.C.A. § 8-30-330, Progressive Discipline, states in relevant part:

- (a) The supervisor is responsible for maintaining the proper performance level, conduct, and discipline of the employees under the supervisor's supervision. When corrective action is necessary, the supervisor must administer disciplinary action beginning at the lowest appropriate step for each area of misconduct.
- (c) When corrective action is necessary, the supervisor must administer disciplinary action beginning at the step appropriate to the infraction or performance. Subsequent infractions or poor performance may result in more severe discipline in accordance with subsection (a).

10. Rule 1120-10-.02 provides that: “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. . .”Although the law prescribes implementation of progressive discipline for State employees, it also provides that disciplinary action must be administered at the step which is most appropriate for the misconduct. (*See*, TENN. CODE ANN., Sec. 8-30-330; and Rule 1120-10-.07, TENN. COMP. R. & REGS.)

11. As the courts have recognized in other cases dealing with these provisions,

“ . . . the key word in the statute is ‘appropriate.’ . . . (T)he language of these provisions does not mandate application of discipline in a routine fashion without regard to the nature or severity of the behavior it is intended to address. The supervisor has discretion to determine what punishment fits the offense.”  
*Berning v. State*, 996 S.W.2d 828, 830 (Tenn. App. 1999).

12. Clearly, there is no requirement that the consideration of the lowest appropriate discipline to be imposed in each situation against the Grievant must continue indefinitely to remain at the level of disciplinary suspension without pay. Warden Jones properly chose termination of the Grievant from state service as the appropriate level of disciplinary action in this matter considering the serious nature of the disciplinary infractions committed by the Grievant, the performance evaluations of the Grievant, and the past disciplinary history of the Grievant. Such prior disciplinary actions, consisting of multiple suspensions, increasing each time in severity, directly related to prior attempts to correct his behavior as to his compliance, or lack thereof, with attendance and leave and other requirements of TDOP rules and Department policy.

13. It is CONCLUDED that the disciplinary action imposed upon the Grievant by Deputy Warden Jones, termination from state employment, was the most appropriate disciplinary action in view of the Grievant’s chronic violations of Department attendance policy and

uncorrected job performance deficiencies, and also in view of the history of repeated discipline of Grievant for failure to comply with the tool safety requirements.

14. It is further concluded that the Petitioner, the Department of Correction, provided the Grievant with all minimum due process which he was required to receive per state law and Tennessee Department of Personnel policy. T.C.A. § 8-30-331 and TDOP Rule 1120-10-.03 set forth the minimum requirements necessary for due process prior to the deprivation of the property right of the Grievant.

IT IS THEREFORE ORDERED that the Commissioner's sanction of termination is UPHeld, and the Grievant's Fifth Step Civil Service Appeal of the Commissioner's decision is hereby DISMISSED.

Entered and effective this 30th day of September, 2009.

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Margaret R. Robertson,  
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 30th day of September, 2009.



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Thomas G. Stovall, Director  
Administrative Procedures Division