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DEPARTMENT OF SAFETY, Petitioner, V. RONNIE SHIRLEY, Grievant

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

IN THE MATTER OF:	)	
	)	
DEPARTMENT OF SAFETY	)	
	)	
Petitioner	)	**Docket No. 26.19-101317J**
V.	)	
	)	
RONNIE SHIRLEY	)	
	)	
Grievant	)	

INITIAL ORDER

This matter came to be heard on June 1 and 2, 2009, before Thomas G. Stovall, Administrative Judge, sitting for the Tennessee Civil Service Commission in Nashville, Tennessee. The Department of Safety (Department) was represented by Mr. Joe Bartlett, Ms. Deborah Martin and Ms. Lizabeth Hale, Staff Attorneys. The Grievant, Ronnie Shirley, was represented by Mr. Robert W. Briley. This matter became ready for consideration on August 24, 2009, upon the submission of proposed findings of fact and conclusions of law.

The subject of this hearing was the appeal filed by the Grievant of his termination of employment by the Department. After consideration of the entire record in this matter it is determined that the termination should be **UPHELD.** This decision is based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Grievant has been employed by the Department as a trooper with the Tennessee Highway Patrol (THP) since 1989. At the time of his termination in October 2008, the Grievant was a Lieutenant with the THP assigned to the Tennessee Emergency Management Agency (TEMA) as the Department's Emergency Services Coordinator. The Grievant's duty station was located in Nashville.

2. The Administrative Office of the Courts (AOC) administers the Integrated Criminal Justice Program Web Portal (Portal). The Portal provides a secure access point to the databases of multiple criminal justice agencies through a single point of entry. The Department was one of the governmental agencies which entered into user agreements with the AOC granting access to the Portal. Pursuant to the user agreement the agencies were to provide training to employees permitted to utilize the Portal. In October 2006, the Grievant was granted access to the Portal. The Portal was to be used for legitimate law enforcement purposes only. According to the user agreement not only an individual employee but an entire agency is subject to termination of access for misuse.

3. In June 2008, the Department determined that the Grievant had misused the Portal to access the driver's license information of another departmental employee, Lt. Robert Eckerman, without a legitimate purpose. Subsequently, the Department's Office of Professional Responsibility began an investigation into the matter. The investigation was ultimately turned over to the

Department's Criminal Investigations Division (CID). The investigators determined that the Grievant had accessed perhaps as many as 182 individual records through the Portal. Only a small number of these inquiries were for a legitimate law enforcement purpose. The Department's investigators were able to interview most of the individuals whose records had been accessed by the Grievant. Most did not know the Grievant and few if any could identify any reason why the Grievant would be looking at their records.

4. The Grievant cooperated with the investigators from CID but was less than forthcoming with his responses to their inquiries. After first denying that he accessed Lt. Eckerman's records, he later admitted doing so after discussing the matter with his wife. It was also established that upon the request of a fellow departmental employee, Kelly Harrington, the Grievant accessed the personal information of Ms. Harrington's ex-husband and shared the information with her.

5. The record is not conclusive as to exactly how many individual records were accessed by the Grievant. It was established that he improperly accessed between 132 and 182 individual records.[1] During the course of the CID investigation the Grievant stated that he accessed the Portal: "Less than once per month on average…probably used once a quarter…I wouldn't know how to put a

[1] The CID investigation concluded that 182 records were accessed by the Grievant while some of the Department's witnesses at the hearing testified that the number may have only been 132.

number on it…"[2] Finally, while the Grievant could not recall specifically why he accessed any of the records he did not deny doing so.

6. The Department's investigators failed to find evidence that the Grievant did anything improper with, or received any tangible benefit from, the information he discovered during his inappropriate usage of the Portal. Despite this fact the Department referred the matter to the offices of the Davidson County District Attorney and United States Attorney for investigation. Criminal prosecution was not sought by either office. The Office of the Davidson County District Attorney issued a press release on February 5, 2009, announcing that no criminal charges would be filed against the Grievant. The statement did indicate that the Grievant may have violated the law by disseminating driver's license information to a third party which could constitute a Class C misdemeanor. Prosecution however would likely be barred by the one-year statue of limitations.

7. The allegations against the Grievant generated an unprecedented amount of media attention throughout Tennessee and around the country as well. The Department conducted two press conferences in response to the media interest and to address some of the inaccurate information that was being circulated. Both Commissioner Dave Mitchell and Colonel Mike Walker, the head of the THP, believe that the Grievant's actions and the resulting publicity negatively impacted the public perception of the Department.

[2] The Grievant's rate of usage of the Portal was highest in the period of time immediately after gaining access to the Portal in October 2006.

8. According to Colonel Walker the publicity surrounding the Grievant's activity also had a negative impact on the Department internally. During the course of his periodic meetings with district captains from around the state the allegations against the Grievant were a constant topic of discussion. Troopers all over the state were reporting that when they would stop a motorist on the highway they would sometimes be asked if they were going to access the driver's personal information.

9. Law enforcement officers are held to a higher standard of conduct than ordinary citizens and both Commissioner Mitchell and Colonel Walker considered the Grievant's credibility and effectiveness as a member of the THP to be irreparably compromised. Special concern was expressed about the Grievant's future ability to testify in court proceedings he may become involved in as a law enforcement officer where his credibility could be challenged resulting in his lack of effectiveness as a witness. Transferring the Grievant to another location outside of Nashville was not considered a viable option due to the notoriety the Grievant's activity had gained throughout the state and the THP.

10. On September 3, 2008, Colonel Walker recommended that the Grievant be terminated for 11 separate violations of state rules, statutes, the Department's General Orders and the Portal's Access Agreement. Commissioner Mitchell upheld the termination in a Step IV Grievance Hearing-Decision dated November 18, 2008, revised November 20, 2008. Commissioner Mitchell's decision affirmed the previous recommendation of Colonel Walker.

11. During the course of the CID investigation of the Grievant, the investigators looked into the use of the Portal by other departmental employees. At least 2 other employees, Lt. Eckerman and Lt. Clifford Babitts, were found to have improperly utilized the Portal by accessing personal information without having a legitimate law enforcement purpose. Both Lt. Eckerman and Lt. Babitts received written warnings. Commissioner Mitchell stated that unlike the Grievant, Lts. Eckerman and Babbitts were reprimanded rather than terminated because of the limited number of Portal inquiries they made and the fact that they were truthful with the investigators.

RELEVANT LEGAL AUTHORITY

1. **Tenn. Code Ann. § 39-14-602**: (Unlawful use of a computer or computer system)

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

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

4. **Department of Human Resources Rule 1120-10-.06(12):** Participation in any action that would in any way seriously disrupt 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.

5. **Department of Personnel Rule 1120-10-.06(24)**: For the good of the service as outlined in **Tenn. Code Ann. § 8-30-326.**

6. **Department of Safety General Order 216-2 II**. Policy: It is the policy of the Department of Safety to warn, suspend, demote or dismiss any employee whenever just or legal cause exists. Employees shall not commit any act that would reflect discredit

upon themselves and the department while on duty. It is vital that all persons concerned be fully aware of the penalties for misconduct and the procedures for enforcing them. When off duty, no employee shall commit any act that would reflect discredit upon themselves or the Department, or which would hamper their ability to perform their duties.

7. **Department of Safety, General Order 216-2: IV, B, 1, a, b, c**: Violation of any written rule, regulation, policy or procedure including all rules of the Tennessee Department of Personnel; Willful disobedience of the rules and regulations or a negligent disregard thereof; No employee shall plead ignorance of the rule and regulations or offer same as a defense in the charge of omission or commission.

8. **Department of Safety, General Order 216-2: IV, B, 3, b**: Employees are expected to be an example to the public in abiding by and complying with all traffic laws, rules and regulations and other laws.

9. **Department of Safety, General Order 216-2, IV, 4, b, c**: No employee shall be guilty of oppression, favoritism, or willful wrong or injustice; No employee shall allow personal feelings to influence him/her in dealing fairly in any matter which he/she is called to handle.

10. **Department of Safety, General Order 216-2, IV, 17**: Any employee may be dismissed when the department considers that the good of the service will be served thereby, (T.C.A. § 8-30-326).

11. **Tenn. Code Ann. § 8-30-326(a)**: An appointing authority may dismiss any employee in the authority' division when the authority considers that the good of the service will be served thereby…

12. **Integrated Criminal Justice Program Web Portal Access Agreement**

CONCLUSIONS OF LAW

1. The Department has carried its burden of proof by a preponderance of the evidence that the Grievant's conduct violated the provisions of the applicable law, General Orders and the Portal Agreement as set forth above and that the termination of his employment was appropriate and should be **UPHELD.**

2. **Tenn. Code Ann. § 39-14-602(b)**: (Unauthorized use of a computer or computer system)

18 U.S.C. §§ 2721-2725 prohibits the disclosure to a third person the personal driver's license information of another individual except for legitimate law enforcement purposes. The Grievant was in violation of this law by sharing information with Kelly Harrington about her ex-husband that he had accessed through his use of the Portal.

3. **Rule 1120-10-.06(2):** Negligence in the performance of duties.

The Grievant was granted access to the Portal in his position in the THP to perform legitimate law enforcement functions. His abuse of his access to the Portal not only violated the privacy rights of the citizens whose records he queried but had the potential of causing the Department to lose access rights to the Portal. The Grievant's excessive unauthorized use of the Portal clearly constituted negligence in the performance of his duties in violation of this Rule.

4. **Rule 1120-10-.06(8):** Gross misconduct or conduct unbecoming an employee in the State Service.

The Grievant's conduct constituted both gross misconduct and conduct unbecoming an employee in State Service in violation of this Rule. Gross misconduct is defined as "any job related conduct that may subject an employee to criminal prosecution." **Rule 1120-01-.01(42).** The rule does not require that an employee actually be prosecuted for a crime, merely that the employee may be subject to prosecution. In this case the Davidson County District Attorney declined to prosecute the Grievant even though in the opinion of that office he may have violated the law. This constitutes gross misconduct. The Grievant's use of the Portal as well as the less than forthright manner in which he cooperated with the CID investigators also constituted conduct unbecoming a state employee.

5. **Rule 1120-10-.06(12):** Participation in any action that would in any way seriously disrupt the normal operation of the agency…

The conduct of the Grievant clearly violated the provisions of this Rule. The Department had to expend significant resources both to investigate the Grievant's activity and to deal with the media storm that engulfed the Department. It is impossible to calculate the damage to the Department's image in the eyes of the public that resulted from this situation. The THP was seriously disrupted as the story circulated throughout the ranks of the troopers. Colonel Walker indicated that this was a common topic of discussion when he had meetings with his captains from around the state. Individual troopers had to deal with the issue in their interactions with members of the public. As stated earlier, the Grievant's

actions could also have caused the Department to lose access to the Portal for violation of the Portal Agreement. For all these reasons it is determined that the Grievant's conduct was in violation of this Rule.

6. **Department General Order 216-2** (text above).

The Grievant's misuse of the Portal and failure to truthfully cooperate with the investigation constituted violation of the General Orders of the Department. His misuse of the Portal reflected discredit upon both himself and the Department. The Grievant's conduct was a willful disregard of the law, the policies of the Department and the Portal Agreement.

7. **Integrated Criminal Justice Web Portal Access Agreement.**

The Portal User Agreement states that access must be limited to authorized users for legitimate law enforcement purposes. There is no question that the Grievant violated the Portal User Agreement and his misuse of the Portal could have resulted in the termination of the Department's access to the Portal.

8. **Tenn. Code Ann. § 8-30-326; Rule 1120-10-.06(24); General Order 216-2, IV, 17:** Dismissal of an employee for the good of the service

It is settled law in Tennessee that a governmental agency may terminate an employee when that employee can no longer effectively perform necessary job duties as a result of notoriety caused by the actions of the employee or others. The Tennessee Court of Appeals stated in *Reece v. Tennessee Civil Service Commission*, 699 S.W. 2d 808, 811 (Ct. App. 1985), Permission to Appeal Denied by Supreme Court Oct. 28, 1985):

> The premise of the State, which is supported by the evidence and by common sense, is that whenever a public official is accused of wrongdoing, especially that which closely affects his public duties, his public image is marred because of a suspicion of guilt which is not allayed or removed without a conclusive determination of the fact of guilt or innocence. . . For the superiors of such public employee, the issue is not guilt or innocence, but usefulness or uselessness.

The court also looked at the employee's position and whether the charges cast doubt on the employee's competency and ability to execute required duties:

. . .the public payroll cannot be made a haven for those who with or without fault have become unable to perform the duties for which they were employed. It must likewise be conceded that the "good of the service" may in proper cases justify or require the discharge of public employees when their efficiency or usefulness in their positions has been seriously impaired by their own fault, by the fault of others, or by blameless misfortune. Id. at 813.

9. In this case the Department has clearly demonstrated sufficient reasons why the good of the service requires the termination of the Grievant's employment. The Grievant brought discredit to himself and the Department and tarnished the image of the THP and his fellow officers. As a member of the THP the Grievant was held to a higher standard of conduct and he failed to maintain that standard. The Grievant's actions seriously impaired his usefulness and efficiency. The Grievant has lost his credibility with both the Department and the public. It is difficult to see how the Grievant could serve in any law enforcement capacity within the THP and not have his credibility and image constantly called into question. The media attention surrounding this case was intense and would

not dissipate upon the Grievant's return to work. Both Colonel Walker and Commissioner Mitchell testified that the Grievant could no longer be an effective employee. There is no assignment within the Department where Grievant would not be a liability or where his conduct would be unknown.

10. The Department has proven that the Grievant's conduct violated the laws, departmental policies and the Portal Agreement as set forth above. Based upon the foregoing it is hereby **ORDERED** that the termination of the Grievant's employment be **UPHELD.**

This Initial Order entered and effective this 21st day of September, 2009.

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Thomas G. Stovall
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 21st day of September, 2009.

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Thomas G. Stovall, Director
Administrative Procedures Division