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TENNESSEE DEPARTMENT OF TRANSPORTATION, Petitioner, V. EDWARD SMITH, Grievant

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

IN THE MATTER OF:	)	
	)	
TENNESSEE DEPARTMENT OF TRANSPORTATION,	)	
Petitioner	)	**Docket No. 26.22-100186J**
V.	)	
	)	
EDWARD SMITH	)	
Grievant	)	

ORDER

This matter came to be heard on December 30, 2008, before Margaret R. Robertson, Administrative Judge, sitting for the Tennessee Civil Service Commission in Knoxville, Tennessee. Ms. Tremecca Doss, Staff Attorney, represented the Department of Transportation (Department). The Grievant, Edward Smith, appeared *pro se*.

The subject of this hearing was the Grievant's appeal of his termination from employment by the Department for failure to maintain a satisfactory and harmonious working relationship with the public and fellow employees, conduct unbecoming an employee in State service, refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination) and violation of the Department of Transportation Workplace Violence Prevention Policy.

After consideration of the record in this matter, it is determined that the termination should be **SET ASIDE** and the Grievant should be **REINSTATED** to his former position or otherwise made whole for the losses he has incurred because of this action**.** This decision is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Grievant, Edward Smith, was employed by the Department of Transportation at its Region IV site in Jackson, Tennessee as a Highway Maintenance Worker I in the Highway Marking Unit for approximately three years until his termination, which was effective May 29, 2008. As a worker in the Highway Marking Unit, Grievant and his co-workers were responsible for maintaining highway marker signs, including installing and removing posts and signs. Another work group was responsible for handling very large interstate signs.

2. On the morning of Friday, March 28, 2008, Grievant had gathered with co-workers in his unit and with other highway maintenance workers at the Region IV Sign Shop. Workers report to the sign shop headquarters first thing in the morning to receive their assignments for the day. They go out for the rest of the day to complete those assignments, returning to the sign shop in the afternoon before being dismissed for the day. With the Grievant at a table at the shop headquarters were Ray Reaves, Darrell Emerson and Curtis Wise. James Rogers, Sherman Vires and William Gray Tosh were nearby, as was another supervisor, Skippy Diggs. The men were members of two separate crews, one that posted and maintained the smaller highway signage and the other that installed the larger highway signs. Grievant Smith was a member of the first group, along with Ray Reaves, Curtis Wise, Sherman Vires and Willie White. Skippy Diggs, James Johnson, Ricky Stewart and Gray Tosh were on the Interstate crew.

3. Willie White, James Rogers, Sherman Vires, Ray Reaves, William Tosh, Curtis Wise, Bobby Lonon, Vester Bullock, Rick Knoll, Chuck Rychen and Edward

Smith testified. The first seven men were witnesses to the events regarding the loading of the sign. Several of the men were at the back loading dock and saw Mr. Lonon cal the Grievant aside. They all gave statements in the Department's investigation. With the exception of Mr. Lonon, the men's statements describe Mr. Lonon making an unspecified request for them to help load a sign for which a second forklift had already been requested. Some of the men helped and others didn't. Of the men who did not rise to help, only Edward Smith offered an explanation. The statements also agree that Mr. Lonon later came to seek only Mr. Smith out, and that the conversation between Smith and Lonon increased in volume over time. None of the other men heard what was said, or heard profanity or any threats. They agreed that Mr. Smith worked with them performing their duties for the rest of the day.

4. Vester Bullock, a supervisor, was in the process of operating a forklift truck to load a very large highway sign, 12-16 feet by 8 feet in dimension, and described as weighing between 600 and 800 pounds. This sign would be installed by Mr. Diggs and his crew, not Mr. Smith's crew. The witnesses concur that Bobby Lonon, a supervisor whose responsibility it was to distribute the day's roadwork assignments to the various crews, came into the area and made an unspecified request for people to help raise the opposite end of the large sign. Vires, Tosh, Willie White and Skippy Diggs either went to assist or were already assisting. Emerson got up and went into the sign shop. Ray Reaves began to work on separating nuts and bolts, a task he often did in the mornings. Curtis Wise sat quietly.

5. James Rogers did not go to help. He had injured his toe on another day and wore a sandal. Why he was at work injured, whether he was capable of his normal duties with the injury or was given lighter duty was not put into evidence, but he did not attempt to assist. Tosh, White and Vires went to help Bullock, Diggs and James Johnson. Ricky Stewart had been sent to bring another forklift to manage the other end. Smith, Wise, Reaves, Emerson and Rogers did not go to assist. Grievant Smith said aloud that he couldn't lift the sign because he had strained his back. James Rogers said nothing but did not move. Reaves offered no explanation, but went to separate the nuts and bolts, an unassigned activity he often voluntarily assumed in the morning while the men were sitting waiting for their daily assignments. Emerson went into the sign shop.

6. Most of the men, including those who did not move to help, were aware that a second forklift has been sent for, and that signs of that size were at least as often as not lifted by the use of two fork lifts. No one was identified by name and specifically directed to help lift the sign. The men in the area were not all on the same crew. There was no statement of any urgency or particular reason why, a second forklift having been sent for, it was necessary for one end of the sign to be lifted by hand. All the witnesses agreed that several of the men on the highway crew did not help with the sign and were not called out for it. The men generally agreed that the sign to be moved was particularly large and heavy, the size that is often moved with two forklifts, although men on both sides and one end have move it that way also.

7. The sign was successfully loaded into the truck, and the men dispersed to their respective duties for the day. Grievant Smith and the others in his crew went to the

back loading dock to load posts and other materials into the truck they would be using, in preparation for going out and installing the posts. Just before they left the loading dock, Bobby Lonon came to their dock and called Grievant Smith aside to talk to him.

8. Only Lonon and Smith can know what exactly took place in their conversation, if any one does. They do not agree. None of the coworkers called as witnesses heard what was actually said on the loading dock. Lonon testified that he asked Grievant Smith to explain why he did not help with lifting the sign. He testified that Smith swore at him in response, saying "I didn't refuse to load the ------ (expletive deleted) sign." Lonon said that when he rebuked Smith for swearing, Smith raised his voice and issued a verbal threat to the effect that "you had better not go to … because you don't know who you are ----- (expletive deleted) with." Lonon said he felt threatened by Smith and thought Smith might hurt him somehow. He immediately left the scene and went to report the conversation to Vester Bullock. Bullock testified that Smith said the things reported above, but he had no first hand knowledge of the conversation. He was merely repeating what he said Lonon told him had happened. Mr. Bullock directed Lonon to go to Rick Knoll in the main office, who directly supervises Mr. Bullock in the chain of command, to report the incident, which Lonon did on the following Monday. Mr. Knoll later instructed Mr. Lonon to complete a written statement concerning the event. In a typed statement, Mr. Lonon said "he [Rick Knoll] told me to write it all down while it was still fresh on my mind and I did. I gave my written statement to him Tuesday, April 1, 2008." As it came out in his testimony, Mr. Lonon is not able to write his own statement, so one was prepared for him, which he later signed.

9. Mr. Smith testified that Mr. Lonon searched him out and called him over at the loading dock and repeatedly asked him why he refused an order. Mr. Smith said that, although he answered Mr. Lonon, Mr. Lonon kept repeating the same question over and over, and appeared not to hear or to accept the answer he was given. Mr. Smith said he eventually raised his voice to better convey his answer to Mr. Lonon. Smith denies he used any curse words to Mr. Lonon that day or any other day. Smith denied that he verbally threatened Lonon or told him not to report the conversation to superiors. Smith agrees that the conversation got out of hand and both men raised their voices because Mr. Lonon kept repeating the same question over and over.

10. None of the other men at the loading dock heard any of the words used by either party. They could only tell that the volume increased. During the rest of the day, Grievant Smith worked with his assigned crew to install sign posts. There is no suggestion that Smith failed to do the work that was assigned for him to do, or that he was other than properly cordial to his coworkers. He did not complain of back pain as a reason to be relieved of the work he normally was assigned to do. None of that work involved lifting anything as heavy as the interstate sign from that morning. No witness testified that he had ever heard Smith use profanity to another person.

11. Mr. Smith is a tall man, six feet four inches in height and 240 pounds in weight. He completed high school and attended some college courses. He worked as a bricklayer in New Jersey before moving to Tennessee. He said he wanted to work for the State to obtain the worker's benefits.

12. Mr. Lonon is a man of short stature. He has worked for TDOT for 40 years, rising over that time to a rank of supervisor. He has an eighth grade education. He is unable himself to write. His level of reading skills was not ascertained. He has a hearing deficit which required at the hearing that statements be repeated and that one speak in a louder than usual voice to facilitate the verbal exchange. The experience of testifying at the hearing clearly agitated and distressed Mr. Lonon. Mr. Lonon's reliability as a witness to exactly what occurred and was said on the date of these events is considered to be weak, based upon the content of his testimony, its lack of congruence with other witnesses, his demeanor at the hearing, and his difficulty hearing accurately what was said. It is undisputed that Mr. Lonon was upset after he sought Smith out and confronted him, but Mr. Lonon appears to be easily upset. There is only Mr. Lonon's testimony that Smith used profanity. Lonon also testified that Smith specifically used "ain't," a verbal construction conspicuously absent in Smith's lexicon but common in Lonon's. Lonon was unable to write his own statement about the event. One was prepared for his signature some time after the event, based upon his reputed verbal report. There were inconsistencies in Lonon's testimony that detract from his credibility.

13. Mr. Lonon testified to an earlier interaction in which he was displeased with Mr. Smith, believing Mr. Smith was disrespectful or intentional in the use of a chalk line near him. However, no evidence of official notice of this event was offered

14. Whatever workplace violence threat this incident purportedly represented did not seem so great to the Department that it took any precautions afterward. Mr. Smith continued to work daily for two more months without incident or interference. He

and Mr. Lonon were cordial with one another and had no conflicts. There was no evidence that Mr. Lonon was in any actual fear of retaliation, even though he had promptly gone and done what he said Mr. Smith warned him not to do, and even though he said that Smith's warning not to do so made him fearful of being hurt. There is no evidence that Mr. Smith has ever hurt or threatened to hurt any one. There was an investigation under the direction of Mr. Knoll, which elicited the statements of Messrs. White, Reaves, Wise, Vires, Rogers, Bullock and Tosh, as well as Mr. Lonon. The testimony at hearing and the statements of the men shortly after the events generally presented the appearance that this whole controversy was a non-event. Only the testimony of Mr. Lonon raises issues that might be considered disciplinary material. None of the witnesses other than Lonon testified that they ever heard Grievant Smith use curse words, on that day or on any other.

15. Nonetheless, based upon this investigation, a due process letter was sent on April 28, 2008. Mr. Rychen issued a recommendation for termination to Commissioner Nicely on May 14, 2008. Commissioner Nicely sent a letter on May 19, 2008, informing Grievant of his decision to terminate Grievant's employment. and a level IV hearing was conducted on June 25, 2008, which was the first occasion in which Grievant Smith had the opportunity to give his version of events. On June 30, 2009, a letter was issued from Commissioner Nicely informing Grievant Smith that his termination was upheld. Grievant subsequently filed his appeal, requesting this Level V hearing.

16. Grievant Smith had previously been disciplined with a five day suspension in May of 2006 for a mutual disagreement with another employee that was considered a

violation of the Department's zero tolerance workplace violence policy. The suspension letter gave no indication of what happened. Mr. Smith testified that he had reported the incident because of what the other man said. Both men were disciplined. Only Mr. Smith's discipline letter was entered in evidence. Mr. Smith was required to take training and to abstain from such behavior in the future. There was no other evidence presented of discipline in his record, although Mr. Lonon testified that he was upset with the Grievant once in the past over the use of a chalk string. But there was no evidence that this incident referred to by Mr. Lonon led to any disciplinary action. Nor is there any other evidence of any past friction between Mr. Smith and Mr. Lonon.

17. Grievant testified that he and Mr. Bullock had had a prior disagreement, and that he had the impression Mr. Bullock wanted to get rid of him. Mr. Bullock testified that when Mr. Smith was working there, the atmosphere was unpleasant. No one got along. After Mr. Smith was fired, the atmosphere was "real good."

CONCLUSIONS OF LAW

1. Rule 1120-10-.06 provides examples of employee conduct that can justify an appointing authority imposing disciplinary action, including those listed below which the Grievant is charged with violating:

> (4) Failure to maintain harmonious working relationships with co-workers;
>
> (8) Gross misconduct or conduct unbecoming an employee in the State service;
>
> (18) Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination).

2. Tennessee Department of Transportation's Workplace Violence Prevention Policy # 230.09 provides in pertinent part:

> Workplace violence is any physical assault, threatening behavior or intimidation occurring in the work setting. It includes but is not limited to: beatings, stabbing, shootings, rapes, near suicides, suicides, psychological traumas such as threats, obscene phone calls, stalking, etc.
>
> OSHA GENERAL DUTY CLAUSE is Section 5(a)(1) of the Occupational Safety and Health Act of 1970, which requires employers to provide their employees with a place of employment that is free from recognizable hazards that are causing or likely to cause death or serious harm to employees". The General Duty clause has been interpreted to mean that an employer has a legal obligation to provide a safe workplace.
>
> Zero tolerance means that violent behavior will not be tolerated in any form in the workplace. Incidents of violence must be reported and perpetrators, who are employed by TDOT, will be subject to immediate disciplinary action up to and including dismissal from State service.
>
> POLICY: It is the policy of the Department that TDOT will have zero tolerance for workplace violence. It is also the policy of the Department that all employees have an affirmative responsibility to report incidents of workplace violence and that all alleged incidents of workplace violence will be investigated fully. It is further the policy of the Department that all perpetrators of workplace violence employed by TDOT will be subject to disciplinary action up to and including dismissal from State service.

3. The Department failed to carry its burden of proof to establish that Grievant refused to accept a reasonable and proper assignment from an authorized supervisor (insubordination). It is undisputed that Grievant did not rise to help lift the highway sign after Mr. Lonon asked the group to help, and that Grievant stated that he had strained his back and did not want to hurt it as an explanation for not helping. However, several other employees did not help, either, and did not offer explanations; yet there was no evidence that their similar conduct was construed as insubordination or that any action was taken

because of their failure to help with the highway sign. Only one of these men was known to have an injury, a toe on which something had dropped. The evidence is not consistent with the request being an actual direct order to Grievant or to any one else. In fact, a sign of that size and weight is often moved by the use of two forklifts, which would seem to be the safer procedure for employees. Most of the men knew that the second forklift had already been sent for when Mr. Lonon issued the alternate instruction for the men to assist in manually lifting one end of the sign. The State argued that the fact that Grievant came to work and lifted posts and did his work that day is evidence that he did not have a back injury. The State argued that if Grievant truly had back problems, he would have called in sick and would have been unable to perform his normal duties. These arguments are not convincing. Helping to lift a nearly half- ton highway sign was not his normal duty and posed greater risk of aggravating an injury than his normal duties. Another employee was present who was injured and whose lack of assistance was not questioned. Nor were uninjured employees sought out to explain why they did not help.

4. The Department has failed to carry its burden of proof by a preponderance of the evidence that in this instance the Grievant failed to maintain harmonious relationships with others. This charge is apparently based solely upon the disputed discussion between Grievant and Mr. Lonon at the loading dock. The parties agree that Lonon came specifically to call Grievant out to delve into why Grievant did not help lift the sign. They agree that Grievant said he did not help because his back was hurt. Only Lonon says Grievant cursed and that he chided Grievant for this. Only Lonon says that Grievant then told him not to report the exchange because he didn't know who he was

dealing with, that being the threat that Grievant supposedly issued.. Bystanders did agree that the voices rose in volume, and that at the end, Grievant's voice may have been louder than Lonon's. Mr. Lonon has a hearing impairment. During his testimony, it was necessary to speak louder to be understood by him. One witness, who saw Lonon at the end of the day, noted that Lonon's face was red, consistent with being upset. But this was long after the interaction. At the hearing, Mr. Lonon appeared to be a nervous man, ill at ease. His unease does not in itself establish that Grievant was responsible for willfully acting in a manner that would constitute failure to maintain his responsibility to act to maintain harmonious relations with others. The credibility of Mr. Lonon's testimony was weakened by his undeniable discomfort at testifying, the variability of his recollections of what occurred and what was specifically said, and the problems inherent in the timing and manner in which his original statement was taken down, given his difficulties reading and writing it himself. Nonetheless, this is the charge against the Grievant in which the State has made its strongest case. It does seem convincing that Mr. Lonon was upset after his conversation with Grievant, whether or not Grievant actually said what Lonon reported he heard and which distressed him. Mr. Lonon's belief that Grievant acted disrespectfully or possibly uttered a threat is not doubted, but whether what Mr. Lonon perceived was happening did in fact happen the way he said it did is in question. There is simply no corroborating evidence.

5. Mr. Lonon did not address Grievant's decision not to help with the sign at the time the sign was being moved. Only later did he go to speak to Grievant. He did not choose to speak to anyone else about their failure to help. He called Grievant aside, and a

private conversation ensued that only the participants heard. Grievant and Lonon gave very different testimony about what was said. Lonon accuses Grievant of using profanity and making an amorphous threat. Grievant denies both allegations. None of the men at the loading dock heard Grievant use any profanity that day. They actually could not hear anything that was said. Nor had they heard him use profanity in any other context, according to their testimony. The threat Grievant is accused of making is very vague on its face. Aside from reporting immediately to Mr. Bullock and then to his higher superiors, Mr. Lonon displayed no indication that anyone observed that he was in any fear of Mr. Smith.

6. The Department failed to carry its burden of proof to establish that the Grievant's conduct rose to the level of gross misconduct or conduct unbecoming an employee in State service. This charge was presumably based upon the charges that Grievant swore and uttered a threat. As the evidence does not preponderate that this necessarily occurred, such a serious charge cannot be sustained on this record.

7. The Department failed to establish that Grievant's conduct in the incident alleged constituted an incident of violent behavior in violation of the workplace Violence Prevention Policy or that it merited termination.

8. Threats of violence in the work place should never be excused or taken lightly by management. However, the Department has a duty to investigate fully and objectively before coming to a decision that must be supported by the investigation. Presumably the Department has presented at hearing all of the information from the investigation that supports its decision that the Grievant committed an act of workplace

violence and that the offense was sufficiently grievous that termination was the proper disciplinary action. The Department successfully proved that Mr. Lonon made a general request for employees present to assist in lifting one end of a large highway sign, and that Grievant was one among several employees who did not rise to participate. That is the basis of the charge that Grievant refused to accept a reasonable and proper assignment from an authorized supervisor. The Department has also succeeded in proving that Mr. Lonon sought Grievant out some time later and that a conversation between the two men became increasingly loud. Evidence regarding whether Grievant used profanity or threatened Mr. Lonon is found only in Mr. Lonon's own testimony and is not corroborated. Management, in an excess of caution, may have acted precipitately or overreacted to Mr. Lonon's account.

9. Even had the Department succeeded in proving that Grievant had violated the workplace nonviolence policy by swearing at or vaguely threatening Mr. Lonon, the records of discipline meted out in other cases under the policy are not consistent with the severity of punishment proposed by the Department in this case. Of fourteen disciplinary records submitted by the Department, eleven employees were terminated. Two of those were probationary employees. Of the remaining nine who were terminated, their offenses were all physically violent actions, including the following: waving a knife and cursing; verbal harassment and profanity in conjunction with throwing coffee at a coworker; yelling at a cashier and throwing change in her face; deliberately damaging equipment and setting the hair of a coworker on fire as well as burning the neck of another with a heated screw; a verbal threat to kill a supervisor and two employees; a series of abusive

interactions culminating in throwing a sheaf of plans at a coworker; hitting a coworker and knocking him to the ground; holding a knife against a coworker's throat and threatening to slit his throat; and exhibiting repeatedly impulsive, socially aggressive unwelcome behavior that was not abated by warnings to stop. The inchoate threat Grievant Smith is alleged to have made is mild by comparison, did not seem to be taken seriously as a threat by Mr. Lonon or his superiors in spite of Mr. Lonon's testimony to the contrary, and, even if it had been convincingly proven by a preponderance of the evidence, clearly not deserving of the same level of discipline as applied to these more violent offenses, even when considered in conjunction with the five day suspension previously incurred by the Grievant in 2006.

10. Indeed, the evidence might be construed alternatively to support Mr. Smith's expressed fear that supervisors at TDOT intentionally wanted to get rid of him and used this incident as a way to accomplish that goal. The alacrity with which he was fired in the face of such weak evidence does not rebut Smith's fear that he was targeted. Whatever actually happened between Mr. Smith and Mr. Lonon on the loading dock, the preponderance of the evidence does not support such severe discipline in this case, and does not justify termination as an appropriate consequence under this set of facts. One must assume that if there was stronger evidence of misdoing by the Grievant in this incident, a proper investigation by the Department would have uncovered it and it would have been presented in this hearing. Conversely, the absence of more compelling evidence requires consideration of the possibility that it does not exist.

Based upon the foregoing, it is hereby **ORDERED** that the Grievant's termination is **SET ASIDE** and he shall be made whole, either by reinstatement with appropriate compensation for lost wages and reinstatement of benefits that would have been awarded, or by appropriate compensation for all back pay and benefits due as of the effective date of a Final Order in this matter, including the value of any sick and annual leave he may have either used or failed to accumulate because of this controversy, as calculated by the Department of Human Resources under applicable State law and regulation. The Department is also ordered to remove from Grievant's personnel file any reference to this disciplinary record and any marking of his personnel file as ineligible for rehire by the Department.

This Initial Order entered and effective this 14th day of September, 2009.

_____
Margaret R. Robertson
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 14th day of September, 2009.

_____
Thomas G. Stovall, Director
Administrative Procedures Division