



3-23-2010

## DEPARTMENT OF SAFETY vs. JOHN C. CURRY, Grievant

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**BEFORE THE CIVIL SERVICE COMMISSION  
FOR THE STATE OF TENNESSEE**

**IN THE MATTER OF:**

**DEPARTMENT OF SAFETY**

**v.**

**JOHN C. CURRY**  
**Grievant**

**DOCKET NO. 26.19-105534J**

**INITIAL ORDER**

This matter was heard on March 23, 2010, before Leonard Pogue, Administrative Judge, sitting for the Tennessee Civil Service Commission in Nashville, Tennessee. Deborah Martin, counsel for the Department of Safety (“Department”), represented the State. Grievant John C. Curry was present and represented by counsel, P. Brocklin Parks. This matter became ready for consideration upon the parties submission of proposed findings of fact and conclusions of law (Department on June 4, 2010, Grievant on June 7, 2010). The subject of the hearing was Grievant’s appeal of his termination of employment by the Department for being charged with Driving Under the Influence (DUI). After consideration of the record in this matter, it is determined that the termination should be **REVERSED** and **SET ASIDE** and Grievant’s discipline should be **REDUCED** to a **Thirty (30) day SUSPENSION**. This decision is based upon the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. Grievant was employed by the Department as a trooper (supervisor) with the Tennessee Highway Patrol. He has been employed by the Department for twenty-three (23) years, the last thirteen (13) as a trooper.

2. On September 1, 2009, Grievant was recommended for termination from the Department by Colonel Mike Walker “based upon the results of the investigation [into Grievant’s conduct unbecoming of an employee in State service and other violations] and the recommendation from Lieutenant Colonel Tracy Trott.” The Department’s investigator did not interview Grievant or the arresting officer.

3. The grounds for termination were for violating Department of Human Resources Rules 1120-10-.06(4) failure to maintain satisfactory and harmonious relationships with the public and fellow employees; Rule 1120-10-.06(8) gross misconduct or conduct unbecoming an employee in the state service; Rule 1120-10-.06(24) for the good of the service as outlined in T.C.A. § 8-30-326; and, Department of Safety General Order 216-1, ethics, compliments, complaints and disciplinary regulations.

4. On November 2, 2009, Commissioner Dave Mitchell subsequently upheld the recommendation for termination following a due process discussion and a Step IV Hearing (in which termination was recommended).

5. On the night of August 31, 2009, Officer Steven Sams of the White House, Tennessee Police Department received a citizen’s complaint of a possible drunk driver. Officer Sams drove to the reported address and observed Grievant standing outside of his vehicle in his driveway. Grievant was asked by Officer Sams to perform a series of field sobriety tests and Grievant cooperated. Officer Sams had Grievant perform the Horizontal Gaze Nystagmus, the walk and turn, and the one-leg stand. Grievant advised Officer Sams that he had been injured on the job and was taking medication for his injury. Grievant did not do well on the tests and Officer Sams requested Grievant give a blood sample. Grievant agreed to accompany Officer Sams to Sumner Regional Hospital to provide a blood sample for toxicology. Officer Sams and Grievant returned to Grievant’s home at approximately 11:35 p.m. Because Officer Sams thought Grievant was impaired, Officer Sams requested that Grievant not drive for the rest of the evening.

6. At approximately 11:55 p.m. that same night, Officer Sams observed Grievant drive his vehicle into a local fast food restaurant and then to a nearby Wal-Mart. Officer Sams followed Grievant. Grievant's driving was not out of the ordinary. At the Wal-Mart parking lot Grievant told Officer Sams that he was driving because needed to eat. Even though no signs of impairment were noted in Grievant's driving, Officer Sams requested another officer administer a series of field sobriety tests to Grievant. Officer Sams observed that Grievant did not perform the tests properly. During the testing, Grievant advised Officer Sams that he had back problems. Officer Sams arrested Grievant for driving under the influence. Grievant again agreed to a blood test for toxicology.

7. The alcohol report (issued 9/9/09) was negative and the toxicology reports (both issued 10/1/09) showed eight different drugs in Grievant's system. All of the drugs were within therapeutic or normal levels. (Exhibit 6, "Winek's Drug & Chemical Blood-Level Data 2001")

8. Grievant has had neck fusion surgery on three occasions, 2001, 2005, and 2009. On August 7, 2009, Grievant suffered a fall while on duty. He went to the emergency room and followed-up with visits to a general practitioner. Grievant was initially treated for the injury with steroid tablets, muscle relaxers and pain medication. His doctor noted at an October 26, 2009 visit that Grievant had weakness and unsteadiness of gait. Grievant was ultimately referred to a neurosurgeon who performed a neck fusion on November 19, 2009.

9. At the time of his encounter with Officer Sams on August 31, 2009, Grievant had been off work since his injury on August 7, 2009. He agreed to the tests because he did not think he was impaired and out of respect for another agency. Because of Grievant's physical condition, performance of the field sobriety tasks was difficult and painful. Grievant told the officers of his injury and pain in performing the tests. He requested to take other recognized field sobriety tasks, not affected by his injury, but his request was refused by the officers.

10. Grievant took several prescribed drugs (for pain, anxiety, blood pressure) on August, 31, 2009 with the last one at approximately 4:00 p.m. Some of the drugs listed on the toxicology report were taken several days before August 31. All of the medications he took were prescribed and Grievant followed the instructions. Grievant ignored Officer Sams request that he not drive again that night because he had not eaten in approximately 30 hours and knew a local fast food restaurant was open. (He also needed items from Wal-Mart.) Grievant did not believe he was impaired by the medications while driving on August 31, 2009.

11. The case against Grievant for Driving Under the Influence was brought in the General Sessions Court for Robertson County on December 7, 2009. During the hearing of the criminal case against Grievant, Officer Sams testified as to the events surrounding Grievant's arrest. Following a hearing on the matter, the case against Grievant was dismissed by the court for lack of probable cause for the charge of Driving Under the Influence. At the time of the hearing of this matter, Grievant was in the process of having the criminal matter expunged.

12. Lieutenant Colonel Tracey Trott, head of field operations for the Tennessee Highway Patrol, testified that he believes troopers have higher expectations than the public and troopers are not expected to be arrested for DUI. As a result of his arrest, Colonel Trott thinks Grievant's working relationship with other law enforcement agencies may be adversely affected.

### **CONCLUSIONS OF LAW**

1. T.C.A. § 55-10-401 states:

(a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises that is generally frequented by the public at large, while:

(1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system; or

(2) The alcohol concentration in the person's blood or breath is eight-hundredths of one percent (.08%) or more.

(b) For the purpose of this section, "drug producing stimulating effects on the central nervous system" includes the salts of barbituric acid, also known as malonyl urea, or any compound, derivatives, or mixtures thereof that may be used for producing hypnotic or somnifacient effects, and includes amphetamine, desoxyephedrine or compounds or mixtures thereof, including all derivatives of phenylethylamine or any of the salts thereof, except preparations intended for use in the nose and unfit for internal use.

2. Tennessee Department of Human Resources Rule 1120-10-.06, EXAMPLES OF DISCIPLINARY OFFENSES, lists the following as examples of disciplinary offenses:

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

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

(24) For the good of the service as outlined in T.C.A. 8-30-326.

3. Tennessee Department of Human Resources Rule 1120-10-.07, PROGRESSIVE DISCIPLINARY ACTION, states in relevant part:

(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

(3) Written Warning

(4) Suspension Without Pay

(a) After minimal due process is provided, a suspension without pay may be issued by the appointing authority for one (1) to thirty (30) days.

(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.

(6) Transfer or Demotion

4. 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).

5. T.C.A. § 8-30-326, Dismissal, states in relevant part:

- (a) An appointing authority may dismiss any employee in the authority's division when the authority considers that the good of the service will be served thereby.
- (b) Whenever an employee is dismissed "for the good of the service," the notice of termination must outline in detail how the service will be benefited by such termination.

6. Department of Safety General Order 216-1, Ethics, Compliments, Complaints and Disciplinary

Regulations, states in relevant part:

II. POLICY:

All employees shall conduct themselves, both on and off duty, in a manner, which will in no way reflect negatively upon the professional image of the Department or any of its employees....Furthermore, employees shall not commit any act that would reflect discredit upon themselves and/or the Department while on or off duty....

IX. CAUSES FOR DISCIPLINARY ACTIONS:

B. It is not feasible to itemize every cause in which disciplinary action may be taken. The following causes are examples of those considered for disciplinary action and should not be considered the only causes.

1. CONFORMANCE TO LAWS:

- a. Each employee shall obey the laws of the United States, the State of Tennessee, and local jurisdictions.

(1) If facts revealed by a thorough investigation indicate there is evidence an employee has committed acts, which constitute a violation of civil or criminal law, ordinance, or infraction other than a parking ordinance, then the member may be deemed to have violated this subsection, even if the member is not prosecuted or is found not guilty in court.

(4) Employees are expected to be a good example to the public in abiding by and complying with all traffic laws, rules and regulations, and other laws.

3. UNBECOMING CONDUCT:

a. Employees shall conduct themselves at all times, on and off duty, in a manner as to reflect most favorably upon themselves and/or the Department.

(1) Unbecoming conduct shall include any conduct which tends to bring the Department into disrepute; or which reflects discredit upon the Department or any employee(s) of the Department; or which tends to impair the operations and efficiency of the Department or an employee; or which violates Departmental policy.

7. Grievant was recommended for termination the day following the subject incident and the Department's investigation. The results of the blood alcohol test and toxicology reports were issued subsequently and the dismissal of the DUI charge occurred several months later. Despite Grievant's exoneration in court, the Department argues that Grievant violated the law by driving after taking prescription medication and therefore he is in violation of General Order 216-1 IX B1a(1)(4), B3a(1) and should be terminated. The proof showed that Grievant had no alcohol in his system. The drugs were all prescription medication, some taken several days earlier, and all within therapeutic or normal levels. Officer Sams observed Grievant driving properly. Grievant did struggle with the field sobriety tests; however, this does not seem unusual based on his physical condition. Grievant was injured a few weeks prior to this incident, was being treated with medication and ultimately needed surgery. On the night at issue, Grievant told the officers that the tests were painful and difficult due to his injury. Subsequent to this incident and prior to surgery, Grievant's doctor noted that Grievant had an unsteady gait and weakness. At no time on the day in question did Grievant think he was impaired while driving. The Department has not proved that Grievant's conduct

violated General Order 216 or any other order, rule or statute that would warrant termination from the Department.

8. The Department also argues that if Grievant remains with the Highway Patrol he possible will be a liability in the prosecution of DUI cases, despite the court ordered dismissal of his DUI case, and should therefore be dismissed for the good of the service. The Department representatives offered no proof of prior problems of this nature involving similarly situated troopers or specific evidence in this particular case. There was not sufficient evidence presented such that one could conclude that Grievant's usefulness has been seriously impaired.

9. Although Grievant may have demonstrated poor judgment by driving his car after Officer Sams requested that he not do so, this act was not a violation of the law nor does it rise to the level of unbecoming conduct or failure to maintain satisfactory and harmonious working relationships such that it should result in termination. However, just as Grievant cooperated with the officers in regard to the field tests out of respect for another agency, he should have respected Officer Sams' professional request that he not drive again that evening. Although Officer Sams didn't arrest Grievant initially and the testing ultimately demonstrated that Grievant was not impaired, Officer Sams had sufficient reservations to make the suggestion not to drive and Grievant should have heeded the request. Grievant's actions were a violation of Tennessee Department of Human Resources Rule 1120-10-.06 (4) failure to maintain satisfactory and harmonious relationships with the public and fellow employees and warrant a 30 day suspension.

It is **ORDERED** that the decision by the Department to terminate Grievant's employment with the Department be **REVERSED** and **SET ASIDE** and Grievant's discipline should be **REDUCED** to a **Thirty (30) day SUSPENSION**. Grievant shall receive an award of attorney's fees and costs in accordance with the provisions of Tenn. Code Ann. § 8-30-328(f).

This Initial Order entered this 7th day of September, 2010.

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Thomas G. Stovall, Director  
Administrative Procedures Division