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CITY OF CHATTANOOGA, Petitioner vs.
DAVID HULLANDER, Grievant.

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**BEFORE THE CITY COUNCIL
OF THE CITY OF CHATTANOOGA**

**CITY OF CHATTANOOGA,
Petitioner,**

vs.

**DAVID HULLANDER,
Grievant.**

DOCKET NO: 56.00-116173J

INITIAL ORDER

This contested case came on to be heard on April 20, 2012, in Chattanooga, Tennessee, before Administrative Judge Kim Summers, assigned by the Tennessee Secretary of State, Administrative Procedures Division to preside in this matter on behalf of the City Council of the City of Chattanooga. Mr. Patrick Bobo and Mr. Keith Reisman, Assistant City Attorneys, represented the City of Chattanooga and the Chattanooga Fire Department (hereinafter referred to as "Chattanooga"). The Grievant, Mr. David Hullander, was present and was represented by Mr. Jimmy Rodgers, Esq. The subject of this hearing was Grievant's appeal of his termination from the Chattanooga Fire Department.

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that, while Chattanooga proved by a preponderance of the evidence both Grievant's misconduct and the need for appropriate disciplinary action, Chattanooga did not show by a preponderance of the evidence that termination was the appropriate discipline to be imposed.

This decision is based upon the following findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

The following witnesses testified on behalf of Chattanooga: Leslie Stevens, employed by Ace Hardware in Chattanooga; Parke Wilbourn, employed by Ace Hardware in Chattanooga; Harold Stockburger, employed by Ace Hardware in Chattanooga; Russ Bieger, employed by Ace Hardware in Chattanooga; Phillip Hetzler, employed by Ace Hardware in Chattanooga; James Whitmore, Assistant Fire Chief for Chattanooga; and Randy Parker, Fire Chief for Chattanooga.

Mr. Hullander testified on his own behalf.

The following eleven exhibits were entered into evidence: Exhibit 1, a video from the outside front porch of the Ace Hardware at 8164 East Brainerd Road in Chattanooga from October 2, 2011; Exhibit 2, a video from the inside front of the Ace Hardware at 8164 East Brainerd Road in Chattanooga from October 2, 2011; Exhibit 3, a video from the inside back of the Ace Hardware at 8164 East Brainerd Road in Chattanooga from October 2, 2011; Exhibit 4, a March 13, 2012 letter to Grievant from Fire Chief Parker; Exhibit 5, a twenty-one page print-out of fire fighter misconduct occurring since January 2002 and resulting discipline; Exhibit 6, the disposition of Grievant's criminal charges; and Exhibit 7, a January 5, 2012 letter to Grievant from Fire Chief Parker regarding use of personal leave; Exhibit 8, Section 2-174 of the Chattanooga City Code; Exhibit 9, Standard Operating Procedures for the Chattanooga Fire Department; Exhibit 10, a March 16, 2012 letter to Grievant from Fire Chief Parker regarding the decision to terminate his employment; and Exhibit 11, the Chattanooga City Charter.

In its closing statement, Chattanooga stated that the crucial issue in this appeal is the ability of the public and fellow firefighters to trust Mr. Hullander in his role as a firefighter.

In his closing statement, Mr. Hullander stated that the crucial issue in this appeal is whether there is just cause for his termination, specifically like treatment with other similarly situated individuals.

FINDINGS OF FACT

1. Mr. David Hullander has been with the Chattanooga Fire Department since 1993.
2. Since 1993, Mr. Hullander has been promoted three times: in 1997 to Senior Fire Fighter, in 2000 to Lieutenant, and in 2007 to Captain.
3. Pursuant to a separate disciplinary proceeding, Mr. Hullander has been demoted to Senior Fire Fighter.¹
4. Prior to his demotion, Mr. Hullander had not been subject to any other disciplinary actions.
5. On October 2, 2011, Mr. Hullander parked out front of the Ace Hardware. After exiting his vehicle, he walked directly to the straw mat rolls stacked outside the front of the store. He picked up a roll, threw it over a stack of other products into the parking lot, walked around the stacks into the parking lot, picked up the roll, and then placed it in the back of his vehicle. He then entered the store and walked around for a few minutes before the leaving the store, getting into his vehicle, and driving away without paying for the straw mat valued at \$50.
6. Mr. Hullander was charged with theft under \$500.
7. Mr. Hullander has admitted to leaving the store without paying for the straw mat but has not admitted an intent to steal.

¹ Mr. Hullander's appeal of this demotion has been placed on hold pending the outcome of the appeal of his termination.

8. A judgment has not been entered, and the charges against Mr. Hullander will be dismissed after eleven months and twenty-nine days if he completes ten days of public works, stays out of trouble, and stays away from Ace Hardware.

9. No publicity resulted from this incident.

10. On a previous occasion, Mr. Hullander was observed by an Ace employee placing two bales of wheat straw in his vehicle before going inside the store to pay for several other items. The wheat straw was not mentioned by Mr. Hullander but was brought to the attention of the cashier by the other Ace employee.

11. Mr. Hullander's actions at Ace Hardware on October 2, 2012, demonstrated an intent to remove the straw mat from the premises without payment.

12. Mr. Hullander's employment with the Chattanooga Fire Department was terminated on March 16, 2012, based solely on the October 2, 2012 incident, pursuant to City Code Section 2-174(b)(3), which permits disciplinary action for any just cause, including conduct unbecoming a public employee; and Chattanooga Fire Department Standard Operating Procedures Manual section 2.5.28 which prohibits a fire fighter from pilfering or being guilty of theft at a fire or elsewhere.

13. The Grievant timely appealed his termination.

14. Firefighters CH, DB, and MM engaged in conduct which result in negative publicity – domestic assault, inappropriate marital conduct, and pornography on work computer. All three individuals are still employed by the Chattanooga Fire Department.

15. In 2003, firefighter TD was charged with simple domestic assault. He was placed on personal leave pending disposition of the charges which were ultimately dismissed. TD received no discipline from Chattanooga.

16. In 2005, firefighter MD was charged with simple assault. He was placed on personal leave pending disposition of the charges which were ultimately dismissed. MD received no discipline from Chattanooga.

17. In 2008, firefighter IM was charged with driving under the influence. He was placed on administrative leave pending disposition of the charges. He was ultimately suspended without pay for two days for conduct unbecoming a public employee.

18. In 2009, firefighter GT was arrested for driving under the influence. He was placed on personal leave pending disposition of the charges. The charges were ultimately reduced to disorderly conduct, and he was suspended without pay for one day. In 2010, GT was charged with theft over \$1000 and fraudulent transfer of a motor vehicle which resulted in a written reprimand.

19. In 2011, firefighter DA was charged with domestic assault. He was suspended for two days without pay for violating the City Code.

20. Firefighter GA was terminated for stealing from a fire scene and was reinstated by the City Council with a demotion.

ANALYSIS AND CONCLUSIONS OF LAW

1. Chattanooga bears the burden of proof in this matter to show that Grievant has violated Chattanooga's written rules, policies or procedures, and that the discipline imposed was the appropriate discipline for any violation of such rules.

2. The Chattanooga Fire Department Standard Operating Procedures Manual specifies the following grounds for disciplinary action:

Section 2.5.28 – Members shall not loan, sell, give away, or appropriate for their own use any public property, nor shall they pilfer or be guilty of theft at fires or elsewhere.

3. CHATTANOOGA CITY CODE § 2-174 provides, in pertinent part:
- (a) No City employee shall be demoted, suspended or dismissed for...any...unjust or arbitrary cause.[...]
 - (b) Disciplinary action up to and including dismissal may be taken for any *just cause* including, but not limited to, the following:

- (5) Violation of department or city ordinance(s), rule(s), regulations(s) or law(s) or violation of any applicable state law, rule or regulation subject to the provisions of this Code.
- (6) Conduct unbecoming a public employee.

4. The legal standard which constitutes “just cause” to terminate a civil (classified) service employee is concisely stated in 67 C.J.S., *Officers and Public Employees*, § 137, cited by the Court in *Knoxville Utilities Board v. Knoxville Civil Service Merit Board*, 1993 WL 229505, at *10 (Tenn. Ct. App. 1993). “Just cause” is defined as follows:

“Just cause” is a ground for removal. In this respect, “just cause” implies a cause sufficient in law, and is any cause which is detrimental to public service. It may be established by a showing of conduct indicating that the employee lacks the competency and ability to perform the duties of his office.

Just cause requires grounds for the disciplinary action which are fair and reasonable.

5. The evidence has shown that Mr. Hullander violated section 2.5.28 of the Chattanooga Fire Department Standard Operating Procedures Manual.

6. Although Tennessee statutes, regulations, and case law do not provide a precise definition for “conduct unbecoming a public employee,” Mr. Hullander’s conduct and resulting violation of section 2.5.28 of the Standard Operating Procedures Manual rise to this level.

7. Because Mr. Hullander has engaged in conduct unbecoming a public employee by violating a state law, disciplinary action pursuant to City Code Section 2-174(b)(3) is warranted.

8. Whether termination is the appropriate discipline for Grievant’s misconduct must next be determined.

9. The “standard” for discipline in this case is set forth in RESOLUTION NO. 26612 OF THE CITY COUNCIL OF THE CITY OF CHATTANOOGA § 12 which provides that there must be “reasonable basis” for the employment decision.

10. In *City of Memphis v. Cattron*, 2011 WL 1902167 (Tenn. Ct. App. 2011), the Memphis Civil Service Commission found that a decision to terminate a city employee was not reasonable because, among other things, the discipline was more harsh than other discipline imposed for similar conduct. The Court of Appeals upheld the Commission’s decision finding that it was neither arbitrary nor capricious. *See also, Gross v. Gilless*, 26 S.W. 3d 488, 492 (Tenn. Ct. App. 1999) (indicating that appropriate discipline should consider the discipline imposed on other employees who have engaged in the same or similar conduct).

11. Based upon the guidance of *City of Memphis* and *Gross*, Chattanooga has not shown, by a preponderance of the evidence, that its decision to terminate Grievant was reasonable. *Gross*, at 495 (stating that an employment decision should not be overturned unless it was made in violation of constitutional or statutory provisions, in excess of statutory authority, was based on unlawful procedure, was arbitrary or capricious, or is lacking sufficient material evidence).

12. Mr. Hullander had been promoted several times with the Chattanooga Fire Department. Although he has recently been demoted for unspecified conduct, his disciplinary history with the Department is otherwise unremarkable, and his termination was based upon one act of misconduct.

13. There is no evidence in the record that Mr. Hullander has pilfered / stolen or engaged in any other inappropriate conduct in the line of duty.

14. Chattanooga did not show that Mr. Hullander's misconduct had any impact on his work performance or his ability to do his job, or imposed any other detrimental impact on Chattanooga.

15. Grievant introduced evidence indicating that, in many cases, criminal charges / conduct unbecoming a public employee did not result in termination of employment.

16. Grievant introduced evidence indicating that, in several cases, negative publicity caused by inappropriate conduct from firefighters has not resulted in termination of employment.

17. While it may be true that it is important for a firefighter to instill trust in the public as well as fellow firefighters, there is no evidence in the record to substantiate Chattanooga's contention that Mr. Hullander's conduct does more to undermine this trust than other misconduct by firefighters that has not resulted in termination.

18. Based upon the discipline imposed on other Chattanooga firefighters for conduct unbecoming, Chattanooga has failed to prove that the serious nature of Mr. Hullander's misconduct warranted termination, thus, the termination is not reasonable.

19. After considering the totality of the circumstances in this matter, including past discipline, Grievant's employment history and record, and all the facts and circumstances in this case, it is determined that Chattanooga has failed to prove by a preponderance of the evidence a reasonable basis for Grievant's termination.

20. In light of his years of service, generally unblemished work record, and his leadership position with the Chattanooga Fire Department, the gravity of Grievant's misconduct in violation of the Chattanooga Fire Department Standard Operating Procedures Manual and Chattanooga's Code of Conduct warrants both a lengthy suspension as well as a demotion.

21. It is hereby ordered that Grievant be **REINSTATED** to a position with the Chattanooga Fire Department, as specified below. Grievant's **SUSPENSION** without pay shall be for the length of time that Grievant has been out of work until the date of his reinstatement,² which must be within thirty (30) days from the entry of this order. Because of Grievant's misconduct, it is further determined that Grievant should be reinstated to the position of Senior Firefighter. This two-rank **DEMOTION** recognizes Grievant's years of service with the Department while also reducing his level of authority.

Pursuant to RESOLUTION NO. 26612 OF THE CITY COUNCIL OF THE CITY OF CHATTANOOGA, §12, the policy reasons for this decision are to uphold the public's and the government's interest in consistent classified service policies and procedures and to ensure that city actions are carried out in accordance the City's Charter and other applicable laws.

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the _____ day of _____ 2012.

DK Summers

**KIM SUMMERS
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE**

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the _____ day of _____ 2012.



**THOMAS G. STOVALL, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE**

² While Chattanooga may not suspend an employee without pay for greater than thirty days, Section 2-174 of the City Code permits an extension of this time limitation by the administrative judge for good cause.