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5-2-2013

## Department of Transportation vs. James Hawks

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

<b>IN THE MATTER OF:</b>	)	
	)	
	)	
<b>TENNESSEE DEPARTMENT OF TRANSPORTATION,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>DOCKET NO. 26.15-108995J</b>
	)	
<b>JAMES W. HAWKS,</b>	)	
	)	
<b>Grievant.</b>	)	

**INITIAL ORDER**

This contested case came on to be heard on October 8, 2012 in Jackson, Tennessee, before Administrative Judge Joyce Grimes Safley, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Civil Service Commission. Ms. Tremecca Doss, Attorney for the Tennessee Department of Transportation (hereinafter "TDOT"), represented the State. The Grievant, Mr. James W. Hawks, was present and was represented by his attorney, Mr. Michael Weinman, of the Jackson, Tennessee Bar.

The subject of this hearing was Grievant's appeal of a five (5) day suspension for the alleged violation of TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-10-.05 (5) which sets out the following as a cause for disciplinary action: "the careless, negligent or improper use of State property or equipment."

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that the State or the Department failed to meet its burden of proof, by a preponderance of the evidence, that Grievant "carelessly, negligently or improperly used State property or

equipment” as charged. The evidence preponderated that ANOTHER Departmental employee was careless or negligent with the State equipment or property at issue in this case.

Accordingly, because the Department failed to carry its burden of proof that Grievant violated TENN. COMP. R. & REG. 1120-10-.05(5) as charged, no discipline is warranted. Grievant’s five (5) day suspension is **SET ASIDE**. The Department is **ORDERED** to compensate Grievant for lost pay or back wages for the five-day suspension without pay.

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

#### **FINDINGS OF FACT**

1. Grievant is a “Roadway Specialist 2” who has worked with the Tennessee Department of Transportation of for the past nine (9) years. A “Roadway Specialist 2” is not technically considered a “supervisory position”.

2. On May 31, 2011 Grievant and a TDOT crew member, Mike Blankenship, were on a work assignment surveying Highway 18 in Madison County, Tennessee.<sup>1</sup> On the day of the survey, Grievant was the assigned “Party Chief” of the two-man survey crew. Mike Blankenship’s position was a “Transportation Assistant 1”.

3. Grievant and Mike Blankenship were using TDOT survey equipment to measure distances between established Points along Highway 18.

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<sup>1</sup> Mr. Blankenship died on October 8, 2012.

5. At each Point of measurement, Grievant and the other TDOT employee would get remove the survey equipment from the TDOT truck, and would set the equipment up and take the measurement for the survey.

6. After Grievant and Mr. Blankenship measured each distance with the equipment, one member of the survey crew would load each piece of the TDOT survey equipment into the bed of the TDOT pickup truck. Grievant and Mr. Blankenship would then drive to the next two Points to be measured.

7. Grievant's task utilized the "total station" in calculating distances between GPS locations. Mr. Blankenship's task was to set up the "reflector" on the forward GPS location.

8. On May 31, 2011, Grievant loaded the "total station" into the truck at "Point 9" of the survey. Grievant testified, credibly, that he secured the tail gate and rear camper shell window of the TDOT truck.

9. Grievant and Mr. Blankenship drove to "Point 10" of the survey. At "Point 10", Mr. Blankenship got out of the TDOT truck and loaded the "reflector" in the truck. Grievant sat in the truck and made "field notes" necessary for the survey. Grievant and Mr. Blankenship then drove the TDOT truck to Point 12. Mr. Blankenship unloaded the "reflector" and set it up at "Point 12". Again, Grievant stayed in the TDOT truck and worked on "survey field notes."

10. Grievant (the driver) turned the TDOT truck around and traveled back down Hwy 18 to "Point 11".

11. Clearly, during the last two stops for the May 31, 2011 survey, Grievant remained inside the TDOT truck and made "field notes", while Mike Blankenship loaded and unloaded the "reflector" survey equipment.

12. Testimony at the hearing supported that the equipment is light enough in weight that the equipment only required one person to load and unload the equipment. Testimony at the hearing also supported that Grievant was completing a necessary task for the survey (field notes) while Mike Blankenship was completing another necessary task (loading and unloading equipment).

13. Both Grievant, and the other Roadway Specialist 2 who testified, Dean Brown, testified credibly that their working on “field notes” at the same time that another member of the team unloaded and loaded equipment was an efficient use of time.

14. When Grievant and Mr. Blankenship arrived at “Point 11”, Grievant got out of the truck in order to set up the “total station” at “Point 11”. When Grievant went to the rear of the truck to unload the “total station”, he discovered that the rear camper shell door was up, and the “total station” was no longer in the truck bed.<sup>2</sup>

15. Mike Blankenship was the last person to load or unload the TDOT truck’s hatch. Accordingly, Mike Blankenship was last person who secured (or didn’t secure) the latch on the back of the truck.

16. No witness for the Department alleged that Grievant was the person who failed to secure the equipment or properly close the back of the TDOT truck.

17. Grievant and Mr. Blankenship drove up and down Hwy 18 and searched for the missing “total station” unsuccessfully.

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<sup>2</sup> There is no dispute that the last person to load and unload equipment from the TDOT truck was Mr. Blankenship.

18. Grievant notified Mike Corder, Roadway Specialist 1 at TDOT, that the “total station was missing”. Mr. Corder is Grievant’s immediate supervisor. Mr. Corder’s immediate supervisor is Glen Blankenship, Survey Supervisor 2, West Tennessee Region.<sup>3</sup>

19. Grievant also telephoned the Madison County Sheriff’s Department to report the missing “total station”.

20. The “total station” was recovered and returned to TDOT.

21. Mr. Chuck Rychen, Director, TDOT Regional Office, sent Grievant a letter on June 6, 2011, informing Grievant that the Grievant had violated Rule 1120-10-.05(5).

22. Thereafter, Director Rychen sent a June 23, 2011 Memorandum to TDOT’s Commissioner, John Schroer, recommending a five (5) day suspension. Director Rychen stated in the memorandum: “I am not holding a Transportation Assistant 1 (Grade 11) [Mike Blankenship] responsible.”

23. Commissioner Schroer notified Grievant via letter of July 5, 2011 that Grievant had received a five (5) day suspension without pay as a result of violating DOHR Rule 1120-10-.05(5) – “careless, negligent or improper use of State property or equipment.”<sup>4</sup>

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<sup>3</sup> Glen Blankenship is Mike Blankenship’s first cousin.

<sup>4</sup> Grievant had previously received a “written warning” on March 31, 2011 as a result of a March 23, 2011 incident in which Grievant was responsible for the temporary loss of surveying equipment (Topcon GR3 Receiver and FC200 Controller). In the March 23, 2011 incident, Grievant admitted that he was responsible for the temporary loss of equipment.

24. Mike Blankenship, the member of the survey crew who admittedly did not secure the back of the truck, was given an “oral warning” as discipline for failing to secure the back of the truck resulting in the loss of the “total station.”<sup>5</sup>

24. Certain witnesses of the State opined that Grievant should have been “watching” Mike Blankenship load and unload the truck each time, and should also have been “watching” Mike Blankenship secure the truck latch each time. However, no evidence was presented of any *prior* instructions to Grievant from his supervisors to get out of the truck and watch another team member load and unload rather than performing his task of “field notes.” No evidence was presented in the form of a written policy or procedure that the “Crew Chief” had to personally watch and monitor each loading and unloading of equipment, and each latching of the truck, rather than performing his job tasks of making “field notes”.

### **CONCLUSIONS OF LAW**

1. The Department bears the burden of proof in this matter to show, by a preponderance of the evidence, that Grievant violated the TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULES (MAY, 1999, REVISED) set forth in the letter of termination. The Department also has the burden of proof to show, by a preponderance of the

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<sup>5</sup> It is noted that Mike Blankenship had received prior discipline for a vehicular collision with a TDOT truck he was driving. Mr. Blankenship was driving a TDOT truck, veered to the left, overcorrected and caused the truck to go off the road into a wooded area, causing a collision and damage to the TDOT truck.

Frankly, in this the instant case involving Grievant, it does not make sense that the person who actually violated the Rule on “negligent or improper use of State equipment or property” was given an “oral warning”, especially in light of previous discipline for a serious violation; while Grievant was admittedly NOT the person who “negligently or improperly used State equipment”, but was given a five (5) day suspension.

evidence, that the discipline imposed was the appropriate discipline for any violation of such RULES.

2. 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. An executive employee serves at the pleasure of the appointing authority.

3. 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.

4. TENN. COMP. R. & REG. 1120-10-.05 sets forth examples of disciplinary offenses. It states, as follows:

The following are examples of acts that may warrant disciplinary action. This list is not all-inclusive and shall not limit an appointing authority’s discretion in disciplinary matters:

- (1) Inefficiency in the performance of duties;
- (2) Incompetency in the performance of duties;
- (3) Negligence in the performance of duties;
- (4) Misconduct involving public officials and employees pursuant to T.C.A., Title 39, Chapter 16, Part 4;
- (5) *Careless, negligent, or improper use of state property or equipment;*
- (6) Failure to maintain satisfactory and harmonious working relationships with the public and fellow employees;
- (7) Habitual improper use of sick leave;
- (8) Habitual pattern of failure to report for duty at the assigned time and place;



- (9) Failure to obtain or maintain a current license or certificate or other qualification required by law or rule as a condition of continued employment;
- (10) Gross misconduct;
- (11) Conduct unbecoming an employee in state service;
- (12) Conviction of a felony;
- (13) Willful abuse or misappropriation of state funds, property or equipment;
- (14) Falsification of an official document relating to or affecting employment;
- (15) Participation in any action that would in any way seriously disrupt or disturb 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;
- (16) Trespassing on the property of any state officer or employee for the purpose of harassment;
- (17) Damage or destruction of state property;
- (18) Acts that would endanger the lives and property of others;
- (19) Possession of unauthorized firearms, lethal weapons, alcohol or illegal drugs on the job;
- (20) Brutality in the performance of duties;
- (21) Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination);
- (22) Reporting to work under the influence of alcohol or illegal drugs, or partaking of such on the job;
- (23) Sleeping or failure to remain alert during duty hours;
- (24) Unauthorized disclosure of confidential information;
- (25) Garnishment of wages for more than one indebtedness;
- (26) Political activity prohibited by T.C.A., Title 2, Chapter 19 (the "Little Hatch Act") or by U.S.C., Title 5, Chapter 15 (the "Federal Hatch Act"); and
- (27) For the good of the service as outlined in T.C.A. § 8-30-326.

5. The Department charged Grievant with violating RULE 1120-10-.05(5) "the careless, negligent or improper use of State property or equipment."

6. The Department did not charge Grievant with RULE 1120-10-.05 (3) – "negligence in the performance of duties", or any other violations.

7. The Department's position is that Grievant failed to properly supervise the individual who admittedly was negligent in securing the state property at issue in this case.

8. While Grievant's position is not technically a "supervisory position", the Department argues that Grievant was responsible as a "Crew Chief" for the other TDOT employee's negligence in failing to secure the State's equipment.

9. The State wishes to hold Grievant strictly liable for another employee's negligence.

10. However, the State did not charge Grievant with "negligence in the performance of *his* [Grievant's] duties", nor did it charge him with a failure to properly supervise. The Department charged Grievant with a violation of RULE 1120-10-.05 (5).

### **Due Process**

11. T.C.A. §8-30-331 provides that civil service employees (who have successfully completed their probationary period) have a property right to their positions.

12. Because State of Tennessee civil service employees have "property rights" in their jobs; such employees must be afforded constitutional due process before the State may legally deprive the employee of his or her job. *Hinson v. City of Columbia*, 2007 WL 4562886 (Tenn. Ct. App. 2007).

13. TENN. COMP. R. & REG.1120-10-.05 lists twenty-seven (27) examples of disciplinary offenses. For due process reasons, the *only* offense which can be considered for purposes of this contested case is the charged offense or violation of RULE 1120-10-.05 (5) which was set forth in Director Chuck Rychen's June 6, 2011 "Recommended Suspension" letter to Grievant, and the Commissioner's July 5, 2011 "decision letter".

14. The Department emphasizes that Grievant “temporarily lost” survey equipment on March 23, 2011. Grievant readily admits that the March 23, 2011 incident was his responsibility. He received a “written warning” for that offense.

15. However, a civil service employee cannot be punished twice for the same conduct. *Cope v. Tennessee Civil Service Commission*, 2009 WL 1635140 \*6 (Tenn. Ct. App. 2009), *Perm. to Appeal Denied* (Tenn. 2010).

16. Accordingly, the previous discipline for the March 23, 2013 incident is only deemed relevant to this case if Grievant is found to have committed the charged May 31, 2011 violation. If such a conclusion is reached, previous discipline would then be considered only for the limited purpose of applying “progressive discipline” and deciding the appropriate discipline for the May 31, 2011 incident.

### **DECISION**

17. The Department did not meet its burden of proof, by a preponderance of the evidence, in showing that Grievant violated TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULE 1120-10-.05 (5): “The careless, negligent or improper use of State property or equipment.”

18. It would be a violation of Grievant’s due process rights to find that Grievant may have violated some other rule or regulation other than the one charged in Mr. Rychen’s letter and the Commissioner’s decision.

Accordingly, because the Department did not show, by a preponderance of the evidence, that Grievant committed the charged disciplinary offense, discipline is not appropriate in this matter, and Grievant’s suspension is **SET ASIDE**.

Grievant shall be compensated for any lost wages resulting from the five (5) day suspension.

It is so ordered.

Entered and effective this \_\_\_\_ day of May, 2013.

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Joyce Grimes Safley  
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of  
State, this \_\_\_\_\_ day of \_\_\_\_\_ 2013.



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Thomas G. Stovall, Director  
Administrative Procedures Division