University of Tennessee, Knoxville
Trace: Tennessee Research and Creative Exchange

Tennessee Department of State, Opinions from the Administrative Procedures Division

Law

12-17-2013

Samuel Outlaw vs. Dept. of Safety

Follow this and additional works at: http://trace.tennessee.edu/utk_lawopinions

This Initial Order by the Administrative Judges of the Administrative Procedures Division, Tennessee Department of State, is a public document made available by the College of Law Library, and the Tennessee Department of State, Administrative Procedures Division. For more information about this public document, please contact administrative.procedures@tn.gov

Mailed On:12-17-2013

STATE OF TENNESSEE BOARD OF APPEALS

IN THE MATTER OF:

DEPARTMENT OF SAFETY,
Petitioner,

Vs.

SAMUEL OUTLAW,
Grievant.

DOCKET NO: 26.19-107247J

SUPPLEMENTAL INITIAL ORDER

This matter came for consideration upon the Memorandum and Order of June 3, 2013, issued by Chancellor Carol L. McCoy reversing in part the decision of the Civil Service Commission (now the Board of Appeals), and remanding the case to the undersigned for further consideration. The Department of Safety and Homeland Security (Department) is represented by attorney Deborah Martin, and Samuel Outlaw (Grievant) is represented by attorney Andrew Hoover.

PROCEDURAL HISTORY

This is Grievant's appeal of his termination by the Department. Grievant's level 5 hearing on the merits took place on April 26, 2011. An Initial Order was entered October 25, 2011, upholding Grievant's termination. The Civil Service Commission issued its Final Order on February 14, 2012, adopting the Initial Order in its entirety. Grievant sought review in the Chancery Court of Davidson County. Chancellor Carol McCoy issued a Memorandum and Order on June 3, 2013, affirming the final order to the extent it supported disciplinary action against Grievant, but reversing it to the extent it found termination to be the appropriate level of disciplinary action. Chancellor McCoy remanded the case to the undersigned "for a *de novo* determination of the appropriate discipline" of Grievant. The parties declined the opportunity to

reopen the record and submit additional proof. The parties requested oral argument which was held on September 17, 2013.

ISSUES FOR CONSIDERATION

1. What discretion, if any, did Grievant have to revise the DUI charge?[1]

2. Did Grievant have good proof to convict the offender of DUI?[2]

3. Did the Department properly follow progressive discipline in Grievant's case?[3]

4. Does the Progressive Discipline policy require scienter?[4]

5. Did Grievant prove, by a preponderance of the evidence, that the Department disciplined him differently than its other employees?[5]

6. Was the 5th level decision by the Civil Service Commission made independent of the progressive discipline policy and was it *de novo*?[6]

1. What discretion, if any, did Grievant have to revise the DUI charge?

Grievant has no discretion to dismiss, reduce, or cancel a charge once he has arrested an offender. Department General Order 501 provides that troopers "…should take the enforcement action that they deem necessary to ensure the safety of the motoring public, reduce the number and severity of traffic crashes, and reduce the number of criminal acts committed on the highways of this state." This policy provides Grievant some discretion **prior** to charging and arresting an offender. However, once an offender is charged and arrested, **Grievant had no**

---

[1] McCoy Order, p. 8, "The ALJ did not discuss what discretion [Grievant] had to revise a criminal charge against an individual 'in the field'…"
[2] McCoy Order, p. 4, "[The ALJ] acknowledged that [Grievant] did not have good proof to convict the subject of DUI."
[3] McCoy Order, p. 9, "[T]he ALJ offered no analysis of the Department's implementation of its own progressive discipline policy."
[4] McCoy Order, p. 8, "Rather than discuss how the Department's progressive discipline policy require scienter, strict liability or mere negligence, the ALJ proceeded to weigh [Grievant's] military services and his professionalism …"
[5] McCoy Order, p. 9, "The ALJ examined the Department's prior implementation of its progressive discipline policy and determined that its pattern of disciplinary action gave [Grievant] good reason to question how that policy is administered …"
[6] McCoy Order, p. 8, "[ALJ's] decisions … were made independent of the Department's policies, formal or informal, on discipline." McCoy Order, p. 9, "The ALJ stated that his decision to uphold the termination was made independent of the Department's progressive discipline policy and was *de novo*."

discretion to deviate from the mandates of General Order 501. (see, Trotz's testimony, hearing transcript, p. 203). General Order 501 establishes the protocols for DUI arrest. It provides in relevant part as follows:

> B. ENFORCEMENT GUIDELINES BY OFFENSE:
>
> 1. Driving Under the Influence of Alcohol or Drugs:
>
> a. Whenever practicable, a person determined to be driving under the influence of alcohol or drugs will be taken into custody and be delivered to the county jail for booking…
> (General Order 501,VII,B,1)

Once Grievant arrested and charged the offender he was required to transport her to jail. General Order 501 provides in relevant part as follows:

> 3. Custodial Arrest:
> a. Custodial arrest are normally conducted for all on-scene DUI charges, ….
> b. Persons arrested and taken into custody **will** be incarcerate in an authorized holding facility. … (General Order 501, §VII, A, 3, emphasis added).

Once an offender is charged and arrested, as in this case, those charges can only be dismissed, reduced, or cancelled in compliance with General Order 501 which provides in relevant part as follows:

> A. Any member of the Tennessee Department of Safety who request the dismissal, reduction, or cancellation of any traffic citation and/or criminal charges may do so only:
>
> 1. When appearing personally in open court, during a regularly scheduled court session; and
> 2. After having <u>first</u> secured the approval of the appropriate District Attorney General, or his/her designated and sworn Assistant District Attorney General. The District Attorney General or designated Assistant District Attorney General must appear in open court with the member, and shall make the motion for dismissal or reduction of the charges; or
> 3. ….

B. Any member who illegally requests the dismissal, reduction, or cancellation of a traffic citation and/or criminal charges, is a party to such, or has knowledge of such an action of this nature without immediately notify his/her superior shall be subject to disciplinary action, up to and including termination. (General Order 501, VI).

2. Did Grievant have good proof to convict?

Whether Grievant had good proof to convict the offender of DUI was not material to this decision. In the Initial Order the undersigned did not "acknowledged that [Grievant] did not have good proof to convict the subject of DUI" in the Initial Order. The Initial Order, finding of fact no. 14, states, "**Arguably**, [Grievant] did not have good proof to convict her of DUI, but his ultimate decision was prompted by sympathy for the young lady." (emphasis added). The Initial Order also provided in the Analysis section, "If Grievant had truly felt he did not have the proof to charge the young lady with DUI, he could have **arrested** her for public intoxication instead. If this had occurred, disciplinary charges against Grievant most likely wound have never been brought. (Initial Order, pp. 19-20, emphasis added).

As previously noted, Grievant had discretion in selecting the charges to lay against the offender. Grievant exercised his discretion and decided there was legal cause to arrest and charge the offender with DUI. Once Grievant charged the offender and arrested her, he has no discretion to dismiss, reduce, or cancel those charges without following the mandates of General Order 501. Hence the statement in the Initial Order that if Grievant had charged her with public intoxication there would likely had been no disciplinary action.

3. Did the Department properly follow progressive discipline in Grievant's case?

The Department and the undersigned applied the State's progressive discipline policy in this case. The Initial Order establishes the law applicable to this case under the Conclusions of Law heading. Tennessee's Progressive Discipline policy is set forth there at number paragraph

12. (Rule 1120-10-.07). Grievant's disciplinary history with the Department was established in findings of fact 3, 4, and 5. They provide as follows:

> 3. Grievant was disciplined in April of 2007, after an altercation in a night club that Grievant and his brother were patronizing, leading to the arrest of Grievant's brother. Grievant was unable to report to work the following day due to intoxication. Grievant was placed on administrative leave from April 4, 2007, which was continued until his pre-deployment leave began on May 29, 2007 (approximately 2 months). Grievant was ultimately disciplined with a 15-day suspension for his conduct.
>
> 4. Grievant was disciplined in January of 2009, after Grievant struck a tractor-trailer while attempting to stop another vehicle. The tractor-trailer did not stop, and Grievant reported the incident to his supervisor as soon as he finished with the traffic stop, but did not fully comply with the Department's reporting provisions. For this conduct, Grievant was disciplined with a 5-day suspension.
>
> 5. Considering his military deployments, National Guard training, assignment to non-law enforcement duties, and the time he was on administrative leave for disciplinary reasons, Grievant has served in the traditional State Trooper capacity for less than 36 months. (Initial Order, pp. 2-3).

The Initial Order's Analysis section provides, "[o]nce disciplinary action is justified, it must be determine if Grievant's termination is the proper place **in the progressive discipline hierarchy**…." In addition to Grievant's prior disciplinary history, the undersigned also considered Grievant's professionalism, at both the incident in question and at the hearing, military services, and that his actions were prompted by a moral desire to assist the offender, to determine the proper place in the discipline hierarchy. This analysis is necessary for the undersigned to determine if the level of discipline is appropriate for the offense. Big Fork Mining Co. v. Tennessee Water Quality Control Board, 620 S.W.2d 515, at 520 (Tenn. App. 1981).

The Initial Order goes on to state, "Grievant had only been employed as a State Trooper for approximately 67 months. During that time, he served in the traditional role of a State Trooper for less than 36 months [due to his military commitment]. During that time, he was suspended twice. **Both of these prior disciplinary action involved poor judgment and/or**

failing to follow the Department's rules. … Most likely termination would not have been appropriate if Grievant had no prior disciplinary history, or if his disciplinary history was spread over a longer career." (Initial Order, p. 20, emphasis added). Clearly, progressive discipline was applied to Grievant's conduct at the 5th level decision.

4. Does the Progressive Discipline policy require scienter?

The progressive discipline policy does not require scienter. The term scienter is use on one occasion in the Initial Order. The Initial Order states, "Once disciplinary action is justified, it must be determined if Grievant's termination is the proper place in the progressive discipline hierarchy. This is more difficult since Grievant's conduct was not motivated by **scienter**, but in fact, was motivated by his moral desire to assist this young lady." (Initial Order, p. 20, emphasis added.) As noted above, Grievant's motivation was considered for the sole purpose of determining the proper place in the progressive discipline hierarchy to impose discipline. The Initial Order does not assert, explicitly or implicitly, that a standard of scienter is a necessary element in Tennessee's progressive disciple policy.

5. Did Grievant prove, by a preponderance of the evidence, that the Department disciplined him differently than its other employees?

Grievant failed to show, by a preponderance of the evidence, that the Department treated him differently than other employees. Additionally, as noted in the Initial Order, this determination is a *de novo* hearing before the Civil Service Commission and this decision is made independent of the Department's policies, formal or informal, or discipline." (Initial Order, p. 21). Grievant asserted that he was treated differently by the Department. He bears the burden of proving this position by a preponderance of the evidence. Grievant introduced documentation of how the Department disciplined 21 other troopers over a five year period from 2006 through 2010. (Initial Order, pp. 5-11). The Initial Order acknowledged the oddities of some of this prior

discipline when it stated that this "pattern of disciplinary action by the Department … gives good reason for Grievant to question what the Department's policies are in doling out disciplinary action and whether he has been treated consistently by the Department." (Initial Order, p. 21). However, this anecdotal proof presented by Grievant did not establish, by a preponderance of the evidence, that the Department treated Grievant differently than its other employees.

6. Was the 5th level decision by the Civil Service Commission made independent of the progressive discipline policy and was it *de novo*?

As previously discussed, progressive discipline was applied to Grievant in this case. There is no statement in the Initial Order indicating that the progressive discipline policy was ignored by the undersigned.[7] To the contrary, the Initial Order in replete with application of the progressive discipline policy by the undersigned to Grievant's conduct.

Additionally, Grievant was afforded a *de novo* hearing at his 5th level hearing as required by statute. The Initial Order was issued based solely on the evidence presented and the record developed at the 5th level hearing before the undersigned. To the contrary, the Initial Order specifically rejected Grievant's claim that he was treated differently than other employees because "this is a ***de novo*** hearing before the Civil Service Commission and **this decision** is made independent of the Department's policies, formal or informal, on discipline." (Initial Order, p. 21).

Based on the foregoing, and the Initial Order entered on October 25, 2011, it is determined that termination is the appropriate level of disciplinary action applying Tennessee's progressive disciple policy. Termination is appropriate given Grievant's prior disciplinary history, the nature of his prior offenses, and his short tenure with the Department.

[7] McCoy Order, p. 9, "The ALJ stated that his decision to uphold the termination was made independent of the Department's progressive discipline policy and was *de novo*."

IT IS THEREFORE ORDERED that Grievant's termination from the Department of Safety is **UPHELD**.

This Supplemental Initial Order entered and effective this _____ day of _____ 2013.

_____
Steve R. Darnell
Administrative Law Judge

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

_____
J. Richard Collier, Director
Administrative Procedures Division