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10-3-2007

DEPARTMENT OF SAFETY, Petitioner, vs.
CLIFF BABITS, Grievant

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

IN THE MATTER OF:)	
)	
DEPARTMENT OF)	
SAFETY,)	
)	
Petitioner,)	
)	
v.)	DOCKET NO. 26.19-094921J
)	
CLIFF BABITS,)	
)	
Grievant.)	

INITIAL ORDER

This contested case came on to be heard on October 3, 2007 in Nashville, Tennessee, before Administrative Judge Joyce Grimes Safley, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Civil Service Commission. Ms. Deborah Martin, Assistant Counsel for the Department of Children’s Services, represented the Department of Children’s Services. The Grievant, Cliff Babits, was present and was represented by Mr. P. Brocklin Parks of the Nashville Bar.

The subject of this hearing was Grievant’s appeal of a three day suspension without pay. Grievant was given this three day suspension for allegedly: (1) Failing to give a true and accurate statement in an Internal Affairs Investigation/Falsifying or intentionally and willfully withhold and material from a statement, or report, written or verbal, made to Headquarters or any superior, General Order 216-2, IV, B, 14,e; (2) violating Department of Personnel Rule 1120-10.06(04) – failure to maintain satisfactory and

harmonious relationships with the public and fellow employees; (3) violating Department of Personnel Rule 1120-1--.06(12) –Participation in any action which would in any way seriously disrupt or disturb the normal operation of the agency, or interfere with the ability of management to manage; (4) violating General Order 216-2, IV, B, 15, b – Any information coming to the attention of an employee which may be or may become official Department of Safety business or which may in any way reflect or bring discredit upon the Department of Safety or any of its employees shall be brought to the attention of his/her superior at the earliest possible time.

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that the Department of Safety failed to meet its burden of proof, by a preponderance of the evidence, that Grievant violated the aforementioned rules: (1) Failing to give a true and accurate statement in an Internal Affairs Investigation/Falsifying or intentionally and willfully withhold and material from a statement, or report, written or verbal, made to Headquarters or any superior, General Order 216-2, IV, B, 14,e; (2) violating Department of Personnel Rule 1120-10.06(04) – failure to maintain satisfactory and harmonious relationships with the public and fellow employees; (3) violating Department of Personnel Rule 1120-1--.06(12) –Participation in any action which would in any way seriously disrupt or disturb the normal operation of the agency, or interfere with the ability of management to manage; (4) violating General Orde3r 216-2, IV, B, 15, b – Any information coming to the attention of

an employee which may be or may become official Department of Safety business or which may in any way reflect or bring discredit upon the Department of Safety or any of its employees shall be brought to the attention of his/her superior at the earliest possible time.

Accordingly, it is therefore **ORDERED** that Grievant's three day suspension be **SET ASIDE OR VACATED**, and Grievant shall be paid for the three days which he was suspended without pay.

FINDINGS OF FACT

1. Grievant, Cliff Babits, is employed by the Tennessee Department of Safety. Grievant has been employed by the Tennessee Department of Safety, Division of Tennessee Highway Patrol, for twenty-five years. He currently holds the position of Sergeant and is stationed in Robertson County, Tennessee.¹

2. Grievant Babits has had no disciplinary actions taken against him by the Department for the last twenty years. During his employment he has received a promotion to the rank of Sergeant.

3. In October, 2006, the Tennessee Department of Safety, Division of Highway Patrol, was in the process of hiring a new trooper class.

¹ The Tennessee Highway Patrol (THP) is responsible for the enforcement of all federal and state laws relating to traffic. Serving the entire state of Tennessee with substations in each of its 95 counties, the THP has district headquarters in eight locations as well as scale houses in 5 additional locations. The Tennessee Highway Patrol is responsible for investigating accidents involving property damage, personal injury, and fatalities. When personal injury or fatal accidents involve drugs or alcohol, the THP is responsible for prosecution in the courts and working with the Attorney General's Office. The Highway Patrol is also active in criminal interdiction, which involves the suppression of narcotics on the roads, highways, and interstate systems in Tennessee. See <http://state.tn.us/safety/thp.htm>

4. As part of the evaluation and hiring process, panels of Department of Safety employees were trained to interview the trooper applicants. Panel members were given “protocols”, or testing booklets, in which the panel members wrote their respective scores of trooper applicants and wrote comments concerning each applicant.

5. Grievant Babits was requested to take part in the panel interviews of applicants and replace a panel member who was not present.

6. After the panel interviews and completion of the protocols by the panel, an unknown person contacted the new media and alleged that the process for rating trooper applicants was “tainted”. Specifically, there was an article about the THP testing protocols in the Nashville newspaper, *The Tennessean*. The allegations were that there was potential abuse of the interview process, and unfair manipulation of the test scoring.

7. Management employees in the Department of Safety learned of the allegations of unfair THP testing protocols when they read about it in *The Tennessean*. Understandably, the Department of Safety’s management was not happy that allegations of tainted testing and hiring were published in the newspaper.

8. As a result of the newspaper article and the allegations, the Criminal Investigation Division (hereinafter “CID”) and the Internal Affairs Division (hereinafter “IAD”) of the Department of Safety were assigned the task of investigating the allegations of misconduct reported in *The Tennessean*

9. Two Department of Safety employees, Lieutenant Colonel Danny Wilson and Captain Russ Beard were the first employees interviewed by the CID/IAD investigating team.

10. Thereafter, CID and IAD began interviewing individual members of the interview panels.

11. Frankie Floied, then Assistant Special Agent in Charge (hereinafter "ASAC") of CID, testified that he, along with other CID agents and IA investigators, interviewed members of the Department of Safety who were involved or suspected of being involved in spreading the "rumors" of possible manipulation of test scoring by the interview panels.

12. Because Grievant Babits was one of the interview panel members, he was questioned by ASAC Floyd and John Officer on October 12, 2006.

13. The transcript of the October 12, 2006 questioning session, "Interview of Sergeant Clifford Michael Babbitts [sic] by Sergeant Jon Officer and Special Agent Frankie Floied", was entered into evidence.

14. During the October 12, 2006 questioning of Grievant Babits, he was asked by ASAC Floyd if he had participated in the recruiting interviews as a panel member. Grievant Babits told ASAC that he was an "alternate" or "fill in" for a regular panel member, Sgt. McKenney, who was out one of work one day.

15. Grievant Babits was asked to describe the interview process during the questioning session. Grievant Babits responded as follows:

First off, one of us would go out and get the candidate and bring them in and introduce them to everybody. Then we would sit down

and, you know, explain to him what we were doing, how the questions were going to be asked and basically went through the questions on there [the booklet]. Once we were completed with that, then we told them that at this point we don't know what's going to happen, we're going to introduce you to a CID agent and from there you'll be notified. And after we got done with that, we put the 3 booklets in an envelope and Lt. Brown usually did it, I did it a couple of times, but immediately tape them up, marked on the back that they were taped up and then took it out to Penny to drop them off.

16. None of the test booklets were sent back to Grievant to "re-score".

When Grievant was questioned as to whether or not he learned that some test booklets were given back to panel members to review, he answered that he was aware of it.

17. When asked by the CID/IAD investigators how he knew that some booklets were returned to panel members., Grievant responded that he was present and saw and overheard Captain Beard giving the envelopes to Lt. Richard Cash, with Captain Beard saying that "they needed to be go[ne] over again, because there was a question or something in one of them or whatever that wasn't filled out. And that ... that's all I know." Grievant went on to state, " There was some discrepancies on ones they had done the prior day and he [Cash] needed to look at them, because there might have been some answers that weren't filled in."

18. Grievant was next questioned by ASAC Floied as follows:

Q by Floied: ...Now, have you heard anything since then about this revisiting of these particular...

A by Babits: No, not really, I mean...

Q by Floied: No rumors floating around?

A by Babits: I...if they...you know, I might've heard some back and forth talk or whatever, but I didn't pay any attention to it, because it ... you know, it didn't involve me and I just basically washed my hands of it.

Q by Floied: Okay. What did you think about it?

A by Babits: Pardon me?

Q by Floied: What's your opinion of it?

A by Babits: The fact that they were asked to look at them again?

Q by Floied: Uh-hmm.

A by Babits: I don't know the full details of what was going on, so I really don't know.

Q by Floied: Well, you've got an opinion.

A by Babits: I've got an opinion, yes. My opinion is once those things are sealed and they're out of our hands we're done with them.

19. Before the questioning session about the test booklets or protocols ended, ASAC Floied asked Grievant if he had talked to Israel Silva or Bob Brown about "it". Grievant replied that he had not.

20. Grievant testified, very credibly, that the context of the questioning session had been about the "protocols" or "test booklets". Grievant testified that he responded accordingly. It is noted that ASAC Floied started the questioning session of Grievant by stating: "The reason that we're here...well, it's...there was some things that went on at 3rd District during the last recruit... recruiting effort where we were doing interviews, are you familiar with the problem?" At that point, Grievant answered: "Not really, no. I mean I just was involved in interviews."

21. Grievant's testimony is deemed credible.

22. When Israel Silva and Bob Brown were interviewed by members of CID and IA, they indicated that they had talked to Grievant. Their interviews were not produced or entered into evidence, so it is unknown what Silva or Brown said they had discussed with Grievant.

23. ASAC Floied testified that, at that point, he "was instructed to go back along with John Officer and reinterview Cliff Babits".

24. On October 13, 2006, Grievant Babits was called into a second interview or questioning session by ASAC Floied. Grievant Babits was instructed to be at the session at 1:00 p.m. At 1:00 p.m., Grievant Babits met with ASAC Floied, Dan Hollis (an investigator), and Sergeant Jon Officer. Grievant Babits was "interrogated" from one o'clock until 1:58 p.m. off the record, with no recording or transcription of the meeting or session.

25. Grievant Babits testified that he was "threatened with [his] rank", and interrogated about personal telephone calls he had which had "nothing to do with the first interview."

26. At 1:58 p.m. on October 13, 2006, after being questioned for almost an hour, Grievant's questioning session or interview began to be recorded. A transcription of the portion of the session which was recorded was supplied and entered into evidence as an exhibit. The transcript reflects the following:

Q by ASAC Floied: Sergeant Babits, we interviewed you according to my notes, as limited as they are, on 10-12-05 at 1:04 p.m. [...]

A by Babits: Yes, sir.

Q by ASAC Floied: Okay, and when we conducted that interview everything that you told us in that interview was true?

A by Babits: Yes, sir.

Q by ASAC Floied: It was true. Was there any omissions?

A by Babits: Apparently so.

Q by ASAC Floied: And what was some of those omissions?

A by Babits: Personal phone calls that I had with other people.

Q by ASAC Floied: Did we ask you about any personal phone calls you may have made?

A by Babits: You never asked me about a personal phone call.

Q by ASAC Floied: Okay that's correct to my memory also.[...].

27. Grievant was Trooper Israel Silva's supervisor. Trooper Silva talked to Grievant prior to Grievant's October 12, 2006 questioning. Grievant did not discuss the protocol or testing with Trooper Silva. Trooper Silva told Grievant Babits that he (Silva) had been summoned to Internal Affairs and Silva was upset about it. In response, Grievant told Trooper Silva to "keep his chin up", that Grievant had "no idea what it was about" and "you [Silva] need to go."

28. Captain Russ Beard is Grievant's supervisor. Grievant had a brief conversation with Captain Beard in which Captain Beard notified Grievant that he needed to report to Internal Affairs for questioning.

29. Grievant talked to Lieutenant Bob Eckerman prior to his October 12, 2006 interview. The nature of the telephone conversation was that

Eckerman was on vacation, duck hunting in Michigan. Grievant and Eckerman were friends and talked to each other on a regular basis. When Eckerman asked “What’s new?”, Grievant responded that there was an investigation about the protocols. Eckerman told Grievant that “he knew all about it”, and there was no further discussion regarding protocols, testing, or the investigation.

30. Lieutenant Bob Brown served on the interview panel with Grievant. He and Grievant talked *after* Grievant’s interview on October 12, 2006. The gist of their conversation was that they were both glad their interview panel was not involved in the investigation. They did not mention Lt. Colonel Danny Wilson during their discussion.

31. Sgt. Angi Bain-Silva telephoned Grievant *after* his interview with Internal Affairs on October 12, 2006. Sgt. Bain-Silva is married to Trooper Israel Silva. They did not discuss the protocols or testing. Sgt. Bain-Silva made the telephone call because she was upset that her husband had been called to IA. Grievant testified that he did not really talk to her but basically listened to what she had to say, and ended the phone call.

32. Grievant’s testimony is deemed credible.

CONCLUSIONS OF LAW

1. The Department Safety bears the burden of proof in this matter to show that Grievant violated the Department’s written rules, policies, or procedures, and that the discipline imposed, a three day suspension without pay, was the appropriate discipline for his 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. (Emphasis added)

3. Rule 1120-10-.06 of the *Rules of the Tennessee Department of Personnel* lists, in pertinent part, examples of disciplinary offenses which should be considered for disciplinary action:

4) Failure to maintain satisfactory and harmonious working relationships with the public and fellow employees;

12) Participation in any action which would in any way seriously disrupt or disturb the normal operation of the agency, or interfere with the ability of management to manage.

4. 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.

5. Turning to the charges against Grievant, it is determined that the Department has failed to prove, by a preponderance of the evidence, that

Grievant has violated *General Order 216-2, IV, B, 14,e* - Failing to give a true and accurate statement in an Internal Affairs Investigation/Falsifying or intentionally and willfully withhold and material from a statement, or report, written or verbal, made to Headquarters or any superior, General Order 216-2, IV, B, 14,e. A review of the transcript of October 12, 2006 does not show that Grievant was asked specifically if he had discussed the “investigation”, “rumors”, or IA questioning sessions. Rather, Grievant was asked about protocols and testing. Grievant answered that he had not discussed the protocols or test booklets with anyone. This statement was true. It cannot be said that Grievant omitted facts or didn’t answer questions when he was not *asked* about whether he had discussed the investigation or the CID/IA investigation. Nor can Grievant have been said to omit information about calls which he received or made *after* the October 12, 2006 CID/IA questioning session.

6. It is further determined that the Department has failed to prove, by a preponderance of the evidence, that Grievant has violated *General Order 216-2, IV, B, 15, b* – Any information coming to the attention of an employee which may be or may become official Department of Safety business or which may in any way reflect or bring discredit upon the Department of Safety or any of its employees shall be brought to the attention of his/her superior at the earliest possible time.

7. It is not clear what Grievant could have told his supervisors which “might or might not have become official Department of Safety business” or

which might “in any way reflect or bring discredit upon the Department of Safety...”. The Department did not show that Grievant had any specific information which fulfills the requirements of *General Order 216-2, IV, B, 15, b.*

8. Grievant did inform ASAC Floied and Sgt. Officer that he had heard “rumors”. However, when Grievant said he didn’t really pay too much attention to the rumors, neither ASAC Floied or Sgt. Officer questioned him or followed up about what specific rumors Grievant had heard.

9. *General Order 216-2, IV, B, 15, b* is similar to Rule 1120-10-.06(8), *Rules of the Tennessee Department of Personnel*, which prohibits “conduct unbecoming an employee in the State service.”

10. A review of Tennessee statutes, regulations, and case law does not reveal a definition of “conduct unbecoming an employee in the State service.” However, cases which have found violations of Rule 1120-10-.06(8) have typically dealt with employees who committed crimes, were guilty of assault, abuse, or sexual harassment, or who committed gross misconduct. There is no allegation that Grievant committed a crime, was guilty of assault, abuse, or sexual harassment, or that he committed gross misconduct, or that he neglected to tell his supervisor of such acts or omissions committed by other employees.

11. The Department has also charged that Grievant violated Rule 1120-10-.06(4) of the *Rules of the Tennessee Department of Personnel*: Failure

to maintain satisfactory and harmonious working relationships with the public and fellow employees.

12. In considering whether or not Grievant has violated Rule 1120-10-.06(4), it is necessary to look at all the circumstances of this matter.

13. There was absolutely no evidence produced that supported the allegation that Grievant violated Rule 1120-10-.06(4), *Rules of the Tennessee Department of Personnel*. No evidence, testimony, or the “CID/IA interview” transcripts support that Grievant was rude or disrespectful during the course and scope of his employment. There was simply no evidence of rude behavior; disrespect for his supervisors, other employees, or the public; disharmony at work; or any other behavior on Grievant’s part which could have violated this Rule.

14. Grievant testified that he did not contact the media about the allegations of improper testing, nor did he discuss such with anyone.² His testimony was credible. There was *no* suggestion, much less evidence or testimony, which supported that Grievant had spread or passed along incorrect information or falsehoods.

15. Rule 1120-10-.05 of the *Rules of the Tennessee Department of Personnel* states:

Causes for Disciplinary Action. Causes for disciplinary action fall into two categories.

(1) Causes relating to performance of duties.

² At the hearing, IA investigator Jon Officer testified that the Department of Safety’s investigation determined that the “falsehoods” were “put out by [Trooper] Silva.”

- (2) Causes relating to conduct which may affect an employee's ability to successfully fulfill the requirements of the job.

16. It is determined, by a preponderance of the evidence, that Claimant did not violate the rules and regulations as charged. Claimant's testimony was deemed credible. It would take a stretch and major bootstrapping to find that Petitioner had even come close to violating the rules and regulations as charged.

17. Because Claimant did not violate the rules and regulations, as charged, it is not necessary to discuss the discipline imposed in this matter. Because there were no violations, no discipline is required.

Claimant's three day suspension is **VACATED**, Claimant shall be paid the lost wages due to the suspension, and this matter shall be **DISMISSED**.

It is so ordered.

Entered and effective this 11th day of January, 2008.



Thomas G. Stovall, Director
Administrative Procedures Division