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TENNESSEE DEPARTMENT OF SAFETY vs. ERIC MCCORMICK, Grievant

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BEFORE THE CIVIL SERVICE COMMISSION OF THE STATE OF TENNESSEE

IN THE MATTER OF:

TENNESSEE DEPARTMENT OF SAFETY,

v.

ERIC MCCORMICK,

Grievant.

DOCKET NO: 26.19-115968J

INITIAL ORDER

By Order issued on June 5, 2012, the parties were given through and including June 11, 2012, to file any motions to dismiss, responses thereto be filed by July 9, 2012, and reply briefs by July 17, 2012. On June 11, 2012, the Tennessee Department of Safety and Homeland Security (DOS) filed a Motion to Dismiss with an accompanying Memorandum and Affidavits in support thereof. The Grievant, Trooper Eric McCormick, filed a Response to the Motion with attachments on July 9, 2012. DOS filed a Response Brief on July 11, 2012. Oral arguments on the motion were heard on July 24, 2012, with Deborah Martin representing DOS and Richard M. Brooks representing the Grievant. Accordingly, pursuant to RULE 1360–4–1–.09(3) (2004) of the Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies, TENN. COMP. R. & REGS. RULE 1360–4–1 (2004), the motion is deemed ready for consideration.

After consideration of the RECORD and the arguments presented, it is determined that the Department of Safety’s motion to dismiss should be and is hereby GRANTED. This decision is based upon the following.
FINDINGS OF FACT

1. The Grievant is employed by DOS as a Road Trooper.

2. In October of 2011, an opening was announced for a Critical Incident Response Team (CIRT) Trooper located in the Cookeville District. The opening was announced in accordance with DOS General Orders 215 (Transfers) and 436 (Critical Incident Response Team (CIRT)).

3. The Grievant applied for transfer to the CIRT in response to the vacancy notice.

4. The Grievant, after meeting the minimum qualifications for transfer, was interviewed on November 7, 2011, before an interview panel pursuant to DOS General Orders 215 and 436.

5. The Grievant completed a written examination as part of the interviewing process as detailed in DOS General Order 436, section V.D.

6. The Grievant was interviewed by a panel of three interviewers, all heads of CIRTs from Nashville, Knoxville and Cookeville. The panelists, following the procedure set out in DOS General Order 436, section V, notified Colonel Tracey Trott, head of the Tennessee Highway Patrol, that the best-qualified candidate was Trooper Jonathan Reed. Colonel Trott assigned Trooper Jonathan Reed to the CIRT Trooper vacancy.

7. The factors that weighed against the interview panel’s choosing the Grievant as the best-qualified candidate included the lack of a degree, no training at a crash-reconstruction school, not appearing to be self-motivated during the interview, not coming across as a team

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1 AFFIDAVIT OF COLONEL TRACY TROTT (head of the Tennessee Highway Patrol) ¶¶ 2-3 (TECHNICAL RECORD (T.R.) 8).
2 Id. at ¶ 2 & 4.
3 Id. at ¶ 4; AFFIDAVIT OF LIEUTENANT MICHAEL MCALISTER (head of CIRT in Nashville and interview panelist) ¶2 (T.R. 7).
4 TROTT AFFIDAVIT ¶ 5.
5 Id. at ¶ 5 & 6; MCALISTER AFFIDAVIT ¶ 3-4 & Jan. 18, 2011, Attached Memorandum.
player, and lack of professionalism in his presentation.  

8. DOS General Order 436, section V, does not list any other requirements the panelists must consider in order to choose the best-qualified candidate.

9. The Grievant filed a grievance over his not being selected for the CIRT Trooper vacancy.

10. At Steps I and II of the grievance process, the Grievant’s grievance was rejected as non-grievable by Lieutenant Lawson and Sergeant Agee, the Grievant’s supervisors.

11. At Step III of the grievance process, Captain David Allred determined on January 3, 2012, that he concurred with the lower level decisions of Lieutenant Lawson and Sergeant Agee, that non-selection as a result of the process in question was a non-grievable transfer decision.

12. The Grievant requested a Step IV grievance on January 17, 2012. The Step IV informal discussion between the Grievant and Colonel Trott occurred on January 23, 2012. A Step IV Grievance Decision was rendered on January 30, 2012, stating that Commissioner Bill Gibbons concurred with the conclusion of Colonel Trott and the previous supervisors that the non-selection for a transfer to CIRT was a non-grievable issue.

13. The Grievant, dissatisfied with the result of the Step IV Grievance, requested a Level V hearing from the Civil Service Commission.

14. During the grievance process, Colonel Trott referred to the process used to fill the CIRT Trooper vacancy as both a transfer and a promotion. In an email to the Grievant dated

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6 McALISTER AFFIDAVIT (T.R. 7, Jan. 18, 2011, Attached Memorandum); TROTT AFFIDAVIT ¶¶ 6 & 7.
8 Id. at p. 12.
10 Id. at p. 10.
November 9, 2011, Colonel Trott referred to the position in question as a promotion.\textsuperscript{11} In contrast, in the Step IV Grievance Decision dated January 23, 2012, Colonel Trott stated to the Grievant that the position was a transfer.\textsuperscript{12} Likewise, in the affidavit of Colonel Trott dated June 7, 2012, Colonel Trott stated multiple times that the position was a transfer.\textsuperscript{13}

**ANALYSIS and CONCLUSIONS OF LAW**

DOS has moved to dismiss this case because the Grievant has appealed a non-grievable issue and accordingly, he lacks standing to pursue the instant appeal. Presumably, DOS’s motion to dismiss is made pursuant to RULE 12.02(6) of the Tennessee Rules of Civil Procedure for failure to state a claim upon which relief can be granted.\textsuperscript{14} Pursuant to RULE 12.02, a motion to dismiss for failure to state a claim upon which relief can be granted that is supported by matters outside the pleadings, not excluded by the court, is treated as a RULE 56 motion for summary judgment. Because affidavits were submitted by DOS with the memorandum filed in support of the motion, and attachments were submitted by the Grievant in response thereto,\textsuperscript{15} DOS’s motion to dismiss is deemed to be a motion for summary judgment.

As the movant, DOS has the burden under RULE 56 to show that “there are no disputed, material facts creating a genuine issue . . . and that [DOS] is entitled to a judgment as a matter of law.” TENN. RULE CIV. PRO. 56.04; Shipley v. Williams, 350 S.W.3d 527, 535 (Tenn. 2011); Hannan v. Alltel Publishing Co., 270 S.W.3d 1, 5 (Tenn. 2008); Byrd v. Hall, 847 S.W.2d 208, 207 (Tenn. 1992).

\textsuperscript{11} November 9, 2011, Email attached to Grievant’s Response to Motion to Dismiss (T.R. 10).
\textsuperscript{12} Jan. 30, 2012, Memorandum to Trooper McCormick from Commissioner Bill Gibbons (T.R. 1, p. 10).
\textsuperscript{13} TROTT AFFIDAVIT ¶¶ 4, 6 & 8.
\textsuperscript{14} The Tennessee Rules of Civil Procedure are referenced pursuant to RULE 1360–4–1–.01(3), which provides: In any situation that arises that is not specifically addressed by these rules, reference may be made to the Tennessee Rules of Civil Procedure for guidance as to the proper procedure to follow, where appropriate and to whatever extent will best serve the interests of justice and the speedy and inexpensive determination of the matter at hand. RULE 1360–4–1–.01(3) of the Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies, TENN. COMP. R. & REGS. RULE 1360–4–1–.01(3) (2004) (emphasis added).
\textsuperscript{15} When relying upon facts which are not of record, a supporting affidavit should be included. See RULE 1360–4–1–.09(5). Because DOS did not object to the admission of the attachment filed by the Grievant, it has been admitted for the purposes of the instant motion.
215 (Tenn. 1993). As the nonmoving party, the Grievant’s “evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the [Grievant as the] nonmoving party.” Martin v. Norfolk S. Ry., 271 S.W.3d 76, 84 (Tenn. 2008). The Grievant has opposed the motion on the grounds that a dispute still exists – whether the position denied to the Grievant was a transfer or a promotion. However, the Grievant erroneously argues that the issue would be grievable had the position been qualified as a promotion rather than a transfer. The applicable Rules make clear that neither a transfer nor a promotion in this case is a grievable issue. Therefore, taking the facts in the light most favorable to the Grievant, there are no facts that support the Grievant’s position that he has stated a grievable claim.

The Grievant must present a statutory, regulatory, or constitutional provision entitling him to a grievance hearing in order for the Civil Service Commission to have jurisdiction to hear this appeal. The TENNESSEE CIVIL SERVICE ACT governs the conditions of employment with the State of Tennessee, delegating to the Department of Human Resources the authority to establish grievance procedures for regular employees. TENN. CODE. ANN. §§ 8-30-101 (2011), et seq.; Moser v. Dep’t of Transp., 982 S.W.2d 864 (Tenn. Ct. App. 1998). The Civil Service Commission, formed by the TENNESSEE CIVIL SERVICE ACT, shall be the final step in the grievance procedure provided to regular employees. TENN. CODE. ANN. § 8-30-108. Any employee will be given every opportunity to resolve a bona fide grievance through these established procedures. TENN. CODE. ANN. § 8-30-328(a)(4); TENN. COMP. R. & REGS. RULE (hereinafter RULE) 1120–11–.01 (2011).

The Tennessee Department of Human Resources, under the authority granted to it by TENN. CODE. ANN. § 8-30-328(a)(1), has promulgated rules and regulations to govern the grievance process. RULES 1120–11–.01 through .09; See Moser, 982 S.W.2d at 866. The

16 The newly enacted TENNESSEE EXCELLENCE, ACCOUNTABILITY, AND MANAGEMENT ACT OF 2012 (T.E.A.M ACT), amending TENN. CODE. ANN. Title 8, is not effective until October 1, 2012.
Tennessee Department of Human Resources has determined that the following are grievable matters:

1. Disciplinary suspension or demotion;
2. Disciplinary dismissal;
3. Any disciplinary action or layoff that the employee believes is the result of discrimination prohibited by TENN. CODE. ANN. § 8-50-103 or TENN. CODE. ANN. § 4-21-401. The employee may file such grievance directly with the appointing authority, warden, or superintendent;
4. Involuntary geographical transfer of an employee or official duty station more than fifty (50) miles. Distance will be determined by drawing a circle, with a fifty (50) mile radius, centered on the previous official duty station;
5. Non-compliance with an approved reduction in force plan by an appointing authority;
6. Prohibited political activity as outlined in TENN. CODE. ANN. Title 2, Chapter 19 (the "Little Hatch Act");
7. Coercion of an employee to waive his right to consideration on an eligibles’ list;
8. Final performance evaluations based on procedural grounds to the fourth step; and
9. Other matters determined at the sole discretion of the appointing authority to be grievable, but not included in section 1120–11–.07 below.

Rule 1120-11-.06 (emphasis added). See also DOS General Order 216-3, section IX. As discussed in Moser, Rule 1120–11–.06(9) includes a catch-all provision that:

allow[s] the appointing authority or the commission, depending upon who is called upon to act, to determine in their discretion that some matters not specifically set out in the rules should be grievable.

Moser, 982 S.W.2d at 867. This catch-all provision specifically provides that the appointing authority’s discretion to hear other matters does not include those matters specifically identified as non-grievable in Rule 1120–11–.07. The Tennessee Department of Human Resources has determined that the following are non-grievable matters:

1. Actions that affect employees who are not career employees;
2. Actions that affect employees who are not covered under TENN. CODE. ANN. § 41-22-407 (d)(3);
3. Actions that affect an employee serving an initial probationary period;
4. Normal supervisory counseling and management;
5. Non-selection for promotion when the appointment was in compliance with these Rules and the Act;
6. Oral and written reprimands;
7. Performance evaluation ratings;
8. Actions resulting from suggestions adopted by the State Employee Suggestion Award Board;
(9) Actions resulting from reductions in force when the actions by the appointing authority were in compliance with statutes and rules;
(10) Shift, post, and overtime assignments;
(11) Reasonable work assignments outside those normally associated with the employee's assigned job classification;
(12) Salary range assigned to classifications;
(13) Administration of salary increases established and funded by the legislature;
(14) Classification of position;
(15) Denial of leave requests except as provided for in TENN. CODE. ANN. § 8-50-110 and TENN. CODE. ANN. § 8-50-802;
(16) Matters relating to internal agency or program management based on discretionary decision making;
(17) Demotions during subsequent probation when the demotion is to the job classification the employee held prior to the promotion and at a salary rate no lower than the salary rate had the promotion not occurred;
(18) Agency rules or policies which do not conflict with statutes, rules, or policies of the Department of Human Resources; and
(19) Any other matter over which an appointing authority or the Commission has no control or jurisdiction or is without the authority to grant requested relief.

RULE 1120-11-.07; see also DOS General Order 216-3, section X.

DOS argues that the Grievant’s claim is non-grievable because it was a transfer and transfers are non-grievable matters. Rule 1120-11-.07(16). It is argued that the process in question was correctly characterized as a transfer and the process was referenced as a transfer by every supervising individual at every level of grievance prior to the current appeal. Conversely, the Grievant claims that the process should have been characterized as a promotion, due to the different benefits received by a CIRT Trooper in comparison to a Road Trooper, and the fact that Colonel Trott referred to the move as a “promotion” in an email to the Grievant. Non-selection for promotion is a non-grievable issue “when the appointment was in compliance with these Rules and the Act.” Rule 1120–11–.07(5); DOS General Order 216-3, section X.E.

However, the process utilized to fill the CIRT Trooper vacancy cannot be defined as a “promotion” under the rules promulgated by the Tennessee Department of Human Resources. It is an undisputed fact that the move would have been from a Road Trooper to a CIRT Trooper position, which does not denote a change in “classification” as it is defined in the rules. Rule 1120–11–01–.01(10). The Tennessee Department of Human Resources has defined promotion under Rule 1120–11–01–.01(48), as a “change of an employee to a position in a classification at
a higher salary grade,” which requires a change in classification. Alternatively, “a change from one position to another position in the same classification” is defined as a transfer. RULE 1120–11–01–.01(71). Even taking the facts in the light most favorable to the Grievant, the change in position from a Road Trooper to a CIRT Trooper is clearly “a change from one position to another position in the same classification,” which is defined as a transfer and cannot be heard as a grievable matter regarding a “promotion.” RULE 1120–11–01–.01(71).

DOS is correct that non-selection for a transfer is also a non-grievable issue because it is a discretionary management decision. DOS General Order 215, section IV. A. (3) states that “the filling of a vacancy from a transfer request . . . is a management decision.” Further, “[m]atters relating to internal agency or program management which are based on discretionary decision making,” is non-grievable. RULE 1120–11–.07(16); DOS General Order 216-3, section X.P. Because this process is non-grievable under Rule 1120-11-.07, the appointing agency cannot use its discretion to hear the matter. Moser, 982 S.W.2d at 867 (quoting RULE 1120-11-.06). Therefore, the decision to choose the best-qualified candidate from a pool of applicants all meeting the minimum qualifications, and following the procedures set out in DOS General Orders 215 and 436, is a non-grievable matter under RULE 1120–11–.07(16). Further, neither General Order requires that the highest scoring candidate be chosen. Lt. McAlister, one of the panelists that participated in the interviewing process, listed the Grievant’s lack of degree, not having gone through reconstruction school, and inferior professionalism as contributing factors to the decision to choose another trooper for the position. Further, statements by Lt. McAlister and Colonel Trott support the holding that the transfer process occurring in October and November of 2011 for the CIRT opening in Cookeville was done in accordance with DOS General Orders 215 and 436. The decision to transfer another trooper to the CIRT Trooper vacancy was valid as discretionary decision making by management. Accordingly, even taking the facts in the light most favorable to the non-moving party, the Grievant is not entitled to grieve the DOS’s decision under the Rules promulgated by the Tennessee Department of Human Resources through the statutory authority granted to them.
It is determined that Rule 1120–11–07(16) and DOS General Order 216, section X.P. preclude the Grievant from proceeding to a Level V hearing under these facts.

Without a showing of a statutory, regulatory, or constitutional provision entitling the Grievant to a Level V grievance hearing, the Civil Service Commission lacks jurisdiction to hear the matter. Accordingly, it is determined that the Grievant has failed to state a claim upon which relief can be granted and that the DOS is entitled to judgment as a matter of law.

Accordingly, pursuant to Rules 12.02(6) and 56 of the Tennessee Rules of Civil Procedure, the DOS’s motion for summary judgment is GRANTED.

It is ORDERED that the Grievant’s appeal is DISMISSED for failure to state a claim upon which relief can be granted.

It is so ORDERED.

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

_________________________________
MARY M. COLLIER
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 ____________________ 2013.

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