

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 21, 2014 Session

MARVIN NORFOLK v. TENNESSEE CIVIL SERVICE COMMISSION

**Appeal from the Chancery Court for Davidson County
No. 120564III Ellen H. Lyle, Chancellor**

No. M2013-01012-COA-R3-CV - Filed February 26, 2014

State trooper challenges his termination for the good of the service. We find substantial and material evidence to support the decision of the Civil Service Commission and affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J. and BEN H. CANTRELL, SR. J., joined.

Andy L. Allman, Hendersonville, Tennessee, for the appellant, Marvin Norfolk.

Robert E. Cooper, Jr., Attorney General and Reporter; William E. Young, Solicitor General; and Eugenie B. Whitesell, Senior Counsel; for the appellee, Tennessee Department of Safety.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Martin Norfolk, a state trooper, filed this petition for review of the decision of the Civil Service Commission to terminate his employment.

Mr. Norfolk was hired as a state trooper in March 1998. On March 1, 2010, Mr. Norfolk was indicted on charges of child abuse and filing a false police report. On April 1, 2010, the Department of Safety issued a minimum due process memorandum to Mr. Norfolk recommending that he be terminated. The memorandum listed violations of Department rules and orders, including a rule allowing termination “for the good of the service” pursuant

to Tenn. Code Ann. § 8-30-326. Mr. Norfolk was terminated on May 7, 2010. He filed an administrative appeal of his termination, and a hearing was held before an Administrative Law Judge (“ALJ”) on April 19, 2011.

The ALJ issued an initial order in November 2011 setting forth findings of fact and conclusions of law. The chancellor found that the factual findings made by the ALJ are, with the exception of one sentence, not in dispute. We will, therefore, set forth those factual findings without the disputed sentence:

1. Grievant Marvin Norfolk was hired as a Tennessee Highway Patrol State Trooper on March 1, 1998 by the Tennessee Department of Safety.
2. Grievant was assigned to various Highway Patrol Stations in West Tennessee during his tenure with the Department of Safety, including the Tipton and Crockett County Stations. Grievant’s last assignment as a State Trooper was in Fayette County, Tennessee.
3. Grievant received “exceptional” over-all scores on his performance evaluations for the last five years of his employment with the Tennessee Highway Patrol. Prior to that, all of Grievant’s performance evaluations over-all scores were either “superior” or “exceptional,” with the exception of the 2003 performance evaluation which [had] the over-all score of “marginal.”
4. The incidents which form the basis for Grievant’s termination occurred on December 26, 2009.
5. Grievant had an extremely acrimonious relationship with his ex-wife.
6. On December 26, 2009, Grievant had re-married, and was living in his new house with his new wife and step-daughter. Grievant’s nine year old son was visiting with Grievant for the holidays, for a two week “visitation.” December 26, 2009 was the first day of the son’s “visitation.”
7. Grievant’s son did not deal well with the changes in his father’s family. Prior to the holidays and the “visitation,” Grievant’s son was placed in ISS (In School Suspension) at school for misbehavior. Grievant’s son broke some dishes at Grievant’s new in-laws’ house, and had other instances of bad behavior. Grievant chastised his son and talked with him about the incidents as a means of “discipline.”

8. On December 26, 2009 Grievant's son engaged in some annoying behavior during the "visitation" at Grievant's home. Grievant's son turned pictures around, moved medications, changed a home telephone's language from English to Spanish, and generally went out of his way to be irritating to his father, the father's new wife, and his father's new step-daughter.
9. Later in the day, Grievant discovered his step-daughter in tears and calling for her mother. Grievant learned that his son had written some "bad things" about his wife and step-daughter on a dry erase board that was in his step-daughter's room. Grievant's son hid from Grievant in a closet, but when he was found, admitted that he had written the "bad things."
10. Grievant decided to "discipline" his son because he "had talked to him as much as he could." Grievant spanked his son with a belt (his son was dressed in a shirt and jeans), and around an hour later, Grievant decided that the visitation wasn't working out and decided to take his son home.
11. Grievant took his son to his oldest daughter's house for return to his mother.
12. Later on December 26, 2009, Denise Norfolk, Grievant's ex-wife and the mother of Grievant's son, picked up her son from his sister's house, and took him to Baptist Hospital-Tipton County.
13. The Tipton County Sheriff's Department and the Department of Children's Services received a complaint of possible child abuse, and interviewed Grievant's ex-wife (Denise Norfolk) and his son at the hospital.
14. Grievant's son gave a statement that Grievant was "whipping him with a belt." Pictures were taken which showed red welts on the son's back, shoulders, arms, legs, and buttocks. Additionally, there were some pictures which showed bruises on the son's arm. One picture showed a red mark on the son's face.
15. On December 29, 2009, Deputy Chief Donna Turner of the Tipton County Sheriff's Department contacted Grievant to question him about the spanking he had given his son.
16. Grievant Norfolk voluntarily reported to the Tipton County Sheriff's Department and provided a written statement regarding the incident. In the

December 29, 2009 statement, Grievant Norfolk described the incident as follows:

I walked up to Marvin, Jr. and grabbed him by his arm and spanked him on his butt. I spanked his butt twice with my hand and he was wearing blue jeans.

17. On January 15, 2010, Grievant Norfolk voluntarily went to the Tipton County Sheriff's Department and amended his earlier statement regarding the incident with his son. Grievant Norfolk informed Chief Turner that his earlier statement was not correct because he had whipped his son with a belt. He also related that his son was jumping around and kicking him as Grievant was trying to spank him.

18. The Tipton County Sheriff's Department notified the Department of Safety in January, 2010 that Grievant was being investigated on charges of child abuse and making a false police report.

19. Thereafter, Grievant was placed on "Administrative Leave with Pay" by the Department of Safety pending an investigation by the Department of Safety's Office of Professional Responsibility.

20. On January 25, 2010, Denise Norfolk (Grievant's ex-wife) petitioned the Tipton County General Sessions Court for an "*Ex Parte* Order of Protection: on behalf of Grievant's [ex-wife] and her son. The *Ex Parte* Order of Protection was issued and served on Grievant on January 25, 2010.

21. On February 9, 2010, the Department of Safety assigned Grievant to perform administrative duties at the Millington Driver Services Station until further notice. Grievant was instructed that he was prohibited from performing any Trooper duties at Millington.

22. A hearing giving Grievant an opportunity to respond to the petition for Protective Order was set for February 11, 2010. By order of February 24, 2010, Judge Janice Craig dismissed the Order of Protection on the basis "That Petitioner has failed to prove by a preponderance of the evidence the allegations contained in the Petition for Order of Protection."

23. On March 1, 2010, Grievant was indicted by a Tipton County Grand Jury for the charge of Child Abuse (T.C.A. § 39-15-401) and the charge of Filing

a False Report to Law Enforcement (T.C.A. § 39-16-502). Both charges were dismissed by Order of the Criminal/Circuit Court of Tipton County, Tennessee on August 27, 2010.

24. When Grievant was indicted on March 1, 2010, the Tipton County Sheriff's Office issued a press release regarding the incident and the indictment. The press release stated that Grievant was facing charges of "Child Abuse" and "Filing a False Police Report" in "a December 2009 criminal investigation." It also identified Grievant as a "Tennessee Highway Patrol Trooper." The press release reported that Grievant and his wife "lied in their statements to Detectives and Agents about their role in the incident." The press release also related that Grievant had been arrested and was free on bond. The Tipton County Sheriff's Department released photographs of Grievant being led into the Sheriff's Department in handcuffs.

25. Following the press release, West Tennessee television stations reported the story of Grievant's arrest; and the story also ran in area newspapers, including newspapers' online websites.

26. After Sgt. Johnson finished his investigation, he turned in his "summation of the investigation" to Colonel Trott and Colonel Mike Walker with the Department of Safety.

27. Sgt. Johnson did not make any recommendations regarding discipline for Grievant Norfolk.

28. Colonel Tracy Trott testified on behalf of the Department of Safety. He has been employed by the Tennessee Highway Patrol, Department of Safety, for thirty-three years.

29. Colonel Trott testified he was the person in the command staff that made the recommendation to terminate Grievant Norfolk.

30. Colonel Trott testified that he took the facts of criminal charges and Grievant's previous disciplinary record into consideration when recommending termination. However, Colonel Trott did not review or consider Grievant's "exceptional" scores from his performance evaluations.

31. Colonel Trott received copies of news reports and newspaper headlines reporting Grievant's criminal charges.

32. Colonel Trott also asserted that a major consideration in the decision to terminate Grievant was the fact that Grievant lied to an investigator during the child abuse investigation by the Tipton County Sheriff's Department.

33. Colonel Mike Walker issued a minimum due process letter on April 1, 2010 in which he recommended Grievant's termination.

34. The "minimum due process" letter from Colonel Walker stated that [t]he recommendation to terminate Grievant is based upon the indictments for child abuse and a false police report. The letter also outlined reasons why Grievant should be terminated "for the good of the service."

35. The Commissioner of Safety issued a termination memorandum on April 27, 2010 upholding the recommendation for Grievant's termination based upon the facts and reasons set forth in the "minimum due process letter."

36. Grievant's termination was effective May 7, 2010.

37. Grievant timely filed his civil service appeal.

38. After Grievant's charges for child abuse and filing a false police report were dismissed in August, 2010, Grievant's ex-wife, Denise Norfolk, then swore out a warrant against Grievant alleging "Domestic Abuse" for the same December 26, 2009 incident.

39. Grievant filed a "supplemental exhibit" showing that Grievant was found "not guilty" of the charge of domestic abuse in a trial by jury which occurred on May 5-6, 2011. Grievant's records were expunged of a charged offense following the jury's finding of innocence.

40. Colonel Trott testified, at the April 19, 2011 hearing of this matter that the fact that the child abuse and "false report" charges had been dismissed against Grievant "did not have a bearing on our decision" to terminate Grievant.

41. However, Colonel Trott also testified at the hearing that he was "aware" of a new assault charge being filed stemming from the same December 26, [2009] incident.

42. Because Colonel Trott's testimony reflects that he knew about the August, 2010 dismissal of the original [charges] against Grievant prior to the hearing

on the merits, and knew about the pending assault charge during the hearing, in the interests of fairness, Grievant is allowed to file the “late filed” exhibit regarding the domestic assault trial being found in Grievant’s favor, and his record expunged.

43. Colonel Trott also agreed that a misdemeanor conviction for child abuse would not prevent Grievant Norfolk from possessing a firearm, but a domestic assault conviction would. Because all such charges against Grievant were eventually dismissed, and because such dismissal affected Grievant’s ability to carry a firearm as part of his Trooper duties, such dismissals impacted the State’s “dismissal for the good of the service” argument. In the interests of fairness and completeness, it is necessary important [sic] to consider the jury verdict and finding of “not guilty” on the domestic assault charge in this civil service case.

(footnotes omitted).

The ALJ found that the Department had failed to prove four of the five asserted grounds for termination, but that the Department had just cause for terminating Mr. Norfolk for the good of the service. The Tennessee Civil Service Commission adopted the ALJ’s findings of fact, conclusions of law, and holding.

Mr. Norfolk filed a petition for judicial review, and the chancery court affirmed the agency’s termination in an order entered on March 22, 2013. Mr. Norfolk then appealed to this court.

On appeal, Mr. Norfolk argues (1) that the minimum due process memorandum did not comply with Tenn. Code Ann. § 8-30-326(b), and (2) that the Department’s termination of Mr. Norfolk for the good of the service was not supported by substantial and material evidence.

STANDARD OF REVIEW

Judicial review of the final decision of an administrative agency is governed by the Tennessee Uniform Administrative Procedures Act (“UAPA”), Tenn. Code Ann. § 4-5-101 *et seq.* See *Story v. Civil Serv. Comm’n*, No. M2010-01214-COA-R3-CV, 2011 WL 2623904, at *2-3 (Tenn. Ct. App. July 5, 2011). The UAPA limits our scope of review as follows:

The court may affirm the decision of the agency or remand the case for further

proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.
- (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h).

Under the UAPA, this court, like the trial court, must apply the substantial and material evidence standard to the agency's factual findings. *City of Memphis v. Civil Serv. Comm'n*, 239 S.W.3d 202, 207 (Tenn. Ct. App. 2007). Substantial and material evidence is “such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.” *Macon v. Shelby Cnty. Gov't Civil Serv. Merit Bd.*, 309 S.W.3d 504, 508 (Tenn. Ct. App. 2009) (quoting *Pruitt v. City of Memphis*, No. W2004-01771-COA-R3-CV, 2005 WL 2043542, at *7 (Tenn. Ct. App. Aug. 24, 2005)). It is “something less than a preponderance of the evidence, but more than a scintilla or glimmer.” *Id.* at 508 (quoting *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988)).

The UAPA's narrow standard of review for an administrative body's factual determinations “suggests that, unlike other civil appeals, the courts should be less confident that their judgment is preferable to that of the agency.” *Wayne Cnty.*, 756 S.W.2d at 279. This Court cannot displace the agency's judgment as to the weight of the evidence even where there is evidence that could support a different result. *Id.*

ANALYSIS

(1)

Mr. Norfolk asserts that the minimum due process memorandum sent to him concerning his termination did not satisfy the requirements of Tenn. Code Ann. § 8-30-326(b), which provided that, “Whenever an employee is dismissed ‘for the good of the service,’ the notice of termination must outline in detail how the service will be benefited by such termination.”¹

The memorandum sent to Mr. Norfolk on April 1, 2010 stated that his termination was based upon “the following information and evidence obtained during this investigation [by the Department’s Office of Professional Responsibility].” The memorandum went on to describe the December 26, 2009 incident when Mr. Norfolk disciplined his son and Mr. Norfolk’s statements during his interview with the investigators from the Office of Professional Responsibility:

[Y]ou stated that you recanted your original statement [to the sheriff’s department] concerning what you used for discipline because you knew that you were untruthful in the first statement. You acknowledged that your untruthfulness in your first statement was a violation of State Law.

After noting Mr. Norfolk’s indictment for child abuse and filing a false police report, the memorandum went on to outline his previous disciplinary history; Mr. Norfolk was disciplined for gross misconduct or conduct unbecoming (suspended two days without pay), dispute of citation (written reprimand); Department patrol crash (written warning); and unprofessional conduct (suspended three days without pay).

The memorandum listed Department rules and general orders that Mr. Norfolk’s actions were alleged to have violated. The memorandum includes the following language with respect to the good of the service:

The good of the service is served for the following reasons:

¹Tennessee Code Annotated section 8-30-326 was repealed effective October 1, 2012. 2012 Tenn. Pub. Acts. ch. 800, § 41.

Reece v. Tennessee Civil Service Commission, 699 S.W.2d 808 ([Tenn.] Ct. App. 1985) . . .—a complainant “is accused of wrongdoing, especially that which closely affects his public duties, his public image is marred because of a suspicion of guilt which is not allayed or removed without a conclusive determination of the fact of guilt or innocence. . . . For the superiors of such public employee, the issue is not guilt or innocence, but usefulness or uselessness.”

Further, the court looked at the employee’s position and whether the charges cast doubt on the employee’s competency and ability to execute his duties and whether the charges gave the appearance of impropriety. The court concluded that “the public payroll cannot be made a haven for those who with or without fault have become unable to perform the duties for which they were employed. It must likewise be conceded that the ‘good of the service’ may in proper cases justify or require the discharge of public employees when their efficiency or usefulness in their positions has been seriously impaired by their own fault, by the fault of others, or by blameless misfortune.”^[2]

Your actions have seriously impaired your usefulness and efficiency. Your actions, which may be a violation of criminal law and are a violation of departmental rules and regulations, including but not limited to T.C.A. 39-15-401 and 39-16-502.

Your indictments created negative publicity for you and the Department. The local newspaper, *The Leader*, published your photograph on the front page as you were escorted inside the Tipton County Sheriff’s Office to post bond. Furthermore, the regional newspaper, *The Commercial Appeal*, published an article that identified you as a Tennessee Highway Patrol Trooper who was indicted by a Tipton County Grand Jury for Child Abuse and Filing a false Police Report.

You are held to a higher standard of conduct, which you have failed to maintain as your actions have reflected negatively upon the department and destroyed the public’s trust in law enforcement. *Watts v. Civil Service Bd. for Columbia*, 606 S.W.2d 274 (Tenn. 1980). “The need for obedience in a police force is not just desirable, but oftentimes compelling. Each citizen cannot be

²The quoted passages in this and the previous paragraph are from *Reece v. Tennessee Civil Service Commission*, 699 S.W.2d 808, 811, 813 (Tenn. Ct. App. 1985). The quotations were italicized in the original memorandum.

policed by his own private constable. . . . It is elementary that if there is to be order in an ever growing population, then citizens should show a great degree of respect to [police officers]. As previously stated in the discussion of First Amendment Rights, to maintain this respect requires a measure of conduct in an officer that is above that expected of government employees in general. Proper respect by subordinates for superior officers is necessary for the maintenance of public confidence.” *State of Tennessee v. Houston*, 900 S.W.2d 712 ([Tenn.] Ct. Cr. App. 1995)—a trooper functions under a public trust and is held to a higher standard than the ordinary citizen and his actions reflect on law enforcement and our system of justice.

Mr. Norfolk argues that this notice does not state how his termination would restore public trust or change the impact of the negative publicity. In light of the nature of Mr. Norfolk’s infractions, especially lying in an official matter, the Department determined that his ability to effectively perform his job—which requires the trust of his fellow officers and of the public—had been seriously impaired. In order to prevent further harm from Mr. Norfolk’s actions, the Department decided that termination was necessary. We conclude that this notice provides sufficient reasons as to how the good of the service necessitated Mr. Norfolk’s termination.

(2)

Mr. Norfolk’s second argument is that the decision to terminate him for the good of the service was not supported by substantial and material evidence “when all the remaining allegations were unfounded, when the charges against him were dismissed, when the Appellant was found not guilty by a jury, and when his record was expunged.”

Tennessee Code Annotated section 8-30-326(a) provided: “An appointing authority may dismiss any employee in the authority’s division when the authority considers that the good of the service shall be served thereby.”³ An employer must have “sufficient reason” for a dismissal for the good of the service. *Reece v. Tenn. Civil Serv. Comm’n*, 699 S.W.2d 808, 811 (Tenn. Ct. App. 1985). In *Reece*, the plaintiff was a correctional sergeant at a prison; he was placed on indefinite suspension and then terminated after he was arrested and charged with manufacturing marijuana. *Id.* at 809. The plaintiff participated in a pre-trial diversion program, and the charges against him were dismissed. *Id.* at 810. On appeal, the plaintiff emphasized that his record had been expunged and argued that his termination was not supported by substantial and material evidence. *Id.* at 811-812.

³Tennessee Code Annotated section 8-30-326 was repealed effective October 1, 2012. 2012 Tenn. Pub. Acts. ch. 800, § 41.

The court in *Reece* reversed the decision of the chancellor and affirmed the decision of the Civil Service Commission. *Id.* at 813. The court emphasized that “the gravamen of the grounds of dismissal was the publicity accorded to the accusation and its effect upon the usefulness of plaintiff in the particular public position held by him.” *Id.* at 812. Acknowledging the difficulty of the case, the court stated:

The determinative factor is which of two considerations predominate: (1) the right of the State to maintain an efficient, effective correction institution for the protection of the public, or (2) the right of the individual employee to retain his position until he has been proven guilty of misconduct. It is the view of this Court that the first consideration must prevail over the second.

Id. at 813.

In another case, *Cope v. Tennessee Civil Service Commission*, No. M2008-01229-COA-R3-CV, 2009 WL 1635140, at *1 (Tenn. Ct. App. June 10, 2009), the court upheld the termination of a trooper for the good of the service where a video of a traffic stop showed the trooper engaging in rude and unprofessional behavior and the video was broadcast by the media. In rejecting the trooper’s due process claim, the court recognized the State’s interest in maintaining public respect for state troopers:

Because law enforcement officers interact with the public on a daily basis and are entrusted with the safety of citizens of Tennessee, they must have the public’s respect to function effectively. Similarly, the reliability and fairness of our justice system begins with the public’s confidence that law enforcement officers will uphold proper standards of performance. . . . When there are improprieties in the [Tennessee Highway Patrol], the State also has a legitimate interest in regaining the public’s confidence and in creating an internal culture of responsibility, professionalism and accountability by disciplining officers whose conduct falls below proper standards.

Cope, 2009 WL 1635140, at *4 (footnotes omitted); *see also Watts v. Civil Serv. Bd. for Columbia*, 606 S.W.2d 274, 282 (Tenn. 1980); *Lee v. Personnel Merit Bd. of City of Dyersburg*, 1986 WL 3368, at *5 (Tenn. Ct. App. Mar. 17, 1986).

We do not consider the present case as close as the *Reece* case because, in addition to the criminal charges filed against Mr. Norfolk and the publicity related to them, Mr. Norfolk’s termination was based upon his dishonesty in his statements to the sheriff’s department and his prior disciplinary history. The ALJ made the following relevant conclusions of law regarding the grounds for Mr. Norfolk’s termination for the good of the

service:

The Department of Safety has shown, by a preponderance of the evidence, that Grievant's credibility, effectiveness, and usefulness in his position as a Highway Patrol State Trooper has been seriously impaired by the publicity surrounding his failure to tell the truth during the course of the Tipton County Sheriff's Department's initial investigation, and by the publicity surrounding the criminal charges lodged against Grievant.

Grievant admitted he did not tell the truth to the Tipton County Sheriff's Department's investigator.

Regardless of whether or not the criminal charges were dismissed against Grievant, the extremely negative publicity surrounding Grievant's criminal charges of child abuse and filing a false police report, and Grievant's admission that he did not give accurate information to the Tipton County Sheriff's Department, has essentially ruined Grievant's credibility, effectiveness, and usefulness as a State Trooper.

Any accident report, arrest report, interdiction report, or any testimony by Grievant in either criminal or civil court, which Grievant would be called upon to provide as a State Trooper in court cases, would be subject to impeachment and could be discredited.

...

Most damaging is Grievant's admission that he did not give accurate or truthful information to the investigating officers from the Tipton County Sheriff's Department at his initial interview. Once a law enforcement officer's reputation for truthfulness has been tarnished, it is very difficult to re-establish that reputation.

In response to Mr. Norfolk's argument that termination was not the appropriate form of discipline, the ALJ discussed his previous disciplinary history and "the fact that Grievant has received other disciplinary measures in the past for serious misconduct." The ALJ specifically noted the following disciplinary incidents:

[L]ess than a year prior to the December 26, 2009 incident, [Grievant] received a three day suspension in April 2009 for a February 6, 2009 incident in which Grievant abused his position as a State Trooper by reacting improperly to a motorist's seeking emergency medical attention for her husband. Further, in 2002, Grievant received a two day suspension for a "domestic assault" arrest

following a physical altercation with his then-wife *at the highway patrol station.*

The ALJ's findings, which are supported by the testimony of Colonel Trott, establish that Mr. Norfolk's termination was based upon substantial and material evidence. We agree with the chancellor's conclusions:

When the record of previous serious misconduct is considered with the lack of trust stemming from the Petitioner making a false statement and that the negative publicity has damaged his reputation as a Trooper, the Court concludes that the decision below to terminate the Petitioner constitutes more than a scintilla or glimmer of evidence and furnishes a reasonably sound basis for the Department's decision.

CONCLUSION

For the foregoing reasons, we affirm the decision of the chancery court. Costs of appeal are assessed against the petitioner, and execution may issue if necessary.

ANDY D. BENNETT, JUDGE