

4. On July 7, 2011, the day before a resurfacing project was scheduled to take place on I-285, District Construction Engineer Lee Upkins notified Mr. Evans and Mr. Tarber that he and District Engineer Bryant Poole were going to be visiting the project and advised them to be at the site. At approximately 1:00 a.m. the following morning, Mr. Upkins and Mr. Poole arrived at the project site to find that Mr. Tarber was not there. Mr. Tarber's employees reported that Mr. Tarber was "riding traffic control"—a task that, in Mr. Upkins' experience, should take no more than twenty minutes at that time of night. Mr. Upkins directed the GDOT employees to call Mr. Tarber and tell him that they were at his project site. After waiting an hour and a half with no sign of Mr. Tarber, Mr. Upkins and Mr. Poole left the site. Mr. Tarber was subsequently issued a written reprimand for his failure to be at the site as directed and the incident was noted on his 2012 annual performance review. *Respondent's Exhibits 18, 20; Testimony of Lee Upkins.*

5. On his 2013 annual performance review, Mr. Tarber received a rating of 2.00 (Successful Performer-Minus) in "Construction Project Supervision Duties." Mr. Evans wrote in the comments section: "Need for you to be more proactive about going and staying out on the projects." *Respondent's Exhibit 19.*

GDOT Policy

6. Because the state's insurance policy covers its vehicles only insofar as they are used in an official capacity, employees are prohibited from making personal use of state vehicles. Although GDOT employees are allowed to utilize the state vehicle to get lunch when they are away at a project site, they must use their personal vehicles to go to lunch if they are at the district office. For example, if an employee uses his or her assigned state vehicle to visit a project site twenty miles away, it would be permissible under the GDOT's policies for that employee to use the state vehicle to visit a nearby restaurant during his or her designated lunch hour. However, if an employee were to drive the state vehicle from the district office to a restaurant for the purpose of getting lunch, this would constitute personal use of the state vehicle. All GDOT employees are instructed on the difference between personal and business use of state vehicles at mandatory safety meetings, which are conducted by the state on an annual basis. *Respondent's Exhibit 33; Testimony of Charlie Welmaker, Safety and Compliance Specialist, GDOT.*

7. Per the GDOT's Standards of Conduct, employees are expected to "[u]se work time effectively" and "[u]se appropriate reporting procedures for tardiness and/or absence and requesting leave." Further, "[e]mployees are expected to devote work time to work" and "to be on the job, on time, every day that they are scheduled to work." *Respondent's Exhibit 2; Testimony of Kelly Johnson, Lead Employee Relations Specialist, GDOT.*

January 27, 2015 Incident

8. On January 27, 2015, at approximately 1:45 p.m., Kelly Johnson of GDOT's Human Resources office received a call from an individual who identified himself as an employee of "Mr. Cue's Billiards" (hereinafter "Mr. Cue's"), an establishment located in the area of I-285 and Chamblee-Tucker. The caller reported to Ms. Johnson that a GDOT employee was at Mr. Cue's, and that the employee had arrived in a GDOT vehicle, which was parked in the establishment's parking lot. *Respondent's Exhibits 28, 29, 31; Testimony of Kenneth Whitworth.*

9. Ms. Johnson conveyed the caller's report to Angela Jones, the GDOT's Deputy General Counsel, who in turn contacted Mr. Kenneth Whitworth, Criminal Investigator with the GDOT, and requested that he investigate the complaint. Mr. Whitworth immediately called Jimmy Witherow, Assistant District Engineer for District 7, whom he knew to be in the I-285/Chamblee-Tucker area. Mr. Whitworth explained the nature of the complaint to Mr. Witherow, and requested that he drive by Mr. Cue's in order to ascertain whether a GDOT vehicle was in the parking lot. *Respondent's Exhibit 31; Testimony of Kenneth Whitworth.*

10. Mr. Witherow, who was accompanied by Bayne Smith, Director of Field Services, drove to Mr. Cue's and observed a GDOT vehicle bearing identification number 400-1950 parked in the establishment's front parking lot. The vehicle was backed into a parking space adjacent to a dumpster. Mr. Smith took a photograph of the GDOT vehicle and sent it to Mr. Whitworth via text message. *Respondent's Exhibit 31; Testimony of Bayne Smith.*

11. Mr. Whitworth received the text message with the photograph of the vehicle attached at approximately 2:23 p.m. He then called Mr. Smith, who verified that the GDOT vehicle was parked in front of Mr. Cue's. After reviewing GDOT records of fuel purchases, Mr. Whitworth was able to determine that Mr. Tarber had been the only employee to purchase fuel for the vehicle in the past ninety days, and concluded that the vehicle was assigned to Mr. Tarber. *Respondent's Exhibit 31; Testimony of Kenneth Whitworth.*

GDOT Investigation into Mr. Tarber

12. Mr. Whitworth contacted GDOT Lead investigator Marty Bozeman and obtained authorization to use a GPS tracking device on the GDOT vehicle. GDOT's Office of Investigations uses "Colbert" brand GPS tracking devices, which it selected for use in investigations after consultation with the Georgia Bureau of Investigations and the United States Marshals Service. GDOT investigators, all of whom are POST-certified, received training from the manufacturer on how to operate the tracking device and software. The tracking device is battery-powered, and may be attached to a vehicle by a magnet. Once in place, the device will transmit its coordinates to a laptop monitored by an investigator. The device sends an e-mail notification to the investigator each time the vehicle is started or stopped. Additionally, investigators may monitor the vehicle's movements in real time from a computer. *Testimony of Kenneth Whitworth.*

13. Mr. Whitworth placed a GPS tracking device on the GDOT vehicle assigned to Mr. Tarber on January 29, 2015 at approximately 5:00 p.m., and thereafter tracked the vehicle's movements and location from January 30 through February 6, 2015 ("the tracking period"). Based on GPS surveillance, Mr. Whitworth determined that Mr. Tarber used of the GDOT vehicle during the tracking period as follows:

- On January 30, 2015, Mr. Tarber departed from the GDOT District Office at 12:21 p.m., drove the GDOT vehicle to the DeKalb Farmer's Market and returned to the District Office at 1:49 p.m.

- On February 2, 2015, Mr. Tarber departed from the District Office at 2:27 p.m., drove the GDOT vehicle to the DeKalb Farmer's Market, and returned to the District Office at 3:41 p.m.
- On February 3, 2015, Mr. Tarber departed from the District Office at 12:44 p.m., drove the GDOT vehicle to the DeKalb Farmer's Market, and returned to the District Office at 2:07 p.m.
- On February 4, 2015, Mr. Tarber departed from the District Office at 10:44 a.m. and drove the GDOT vehicle to a church on Bouldercrest Road, where he remained until 12:04 p.m. Mr. Tarber subsequently drove the vehicle to the DeKalb Farmer's Market, where he remained until 12:54 p.m. Mr. Tarber eventually drove the vehicle back to the District Office, arriving at 1:36 p.m.
- On February 5, 2015, Mr. Tarber departed the District Office at 12:48 p.m. for a shopping center on Clairmont & Briarcliff, arriving at 1:16 p.m. Mr. Tarber remained at the shopping center for approximately three hours. At 4:13 p.m., Mr. Tarber departed the shopping center, and arrived back at the District Office at 4:32 p.m.

In reviewing the GPS data, Mr. Whitworth noted that Mr. Tarber had not visited any of the GDOT work sites to which he was assigned during the tracking period, and none of his travel destinations involved travel to or near a work site. *Respondent's Exhibit 31; Whitworth Test.*

14. Mr. Tarber did not account for any extended lunches on his timesheets during the tracking period. Further, he did not notify Mr. Evans that he required leave for an extended lunch or to address any emergencies. *Respondent's Exhibit 26; Testimony of Timothy Evans.*

15. Because the data provided by the GPS tracking device indicated that Mr. Tarber was misusing the GDOT vehicle, Mr. Whitworth decided to personally follow Mr. Tarber in order to visually confirm whether Mr. Tarber was using the vehicle for personal use. On February 6, 2015, Mr. Whitworth drove to the District Office after he received an e-mail notification from the GPS indicating that Mr. Tarber had started the vehicle. Mr. Whitworth arrived at the District Office at approximately 9:00a.m., and observed that the vehicle was unoccupied with its engine running. He parked his vehicle in the District Office and waited for Mr. Tarber to return to the vehicle so that he could begin following him. Mr. Tarber finally emerged from the District Office at 10:00 a.m., returned to the vehicle, and drove from the parking lot, whereupon Mr. Whitworth commenced following him. *Respondent's Exhibit 31; Whitworth Test.*

16. Mr. Whitworth followed Mr. Tarber as he drove the GDOT vehicle from I-285 to U.S. Highway 78—an area far afield from his assigned project sites—and eventually arrived at a residence located on Ridge Way in Lithonia, Georgia at 10:58 a.m. Mr. Whitworth drove by the location and observed the vehicle parked in the driveway with its driver's side door open. Using his cell phone, Mr. Whitworth took a photograph of the vehicle parked in the driveway of the residence. *Respondent's Exhibits 31, 38; Whitworth Test.*

17. At 11:05 a.m., Mr. Tarber drove the vehicle from the residence on Ridge Way to another residence located on Drake Avenue, approximately one mile away, and parked the vehicle in the driveway. Mr. Whitworth again followed Mr. Tarber, and photographed the vehicle as it was

parked in the driveway of the residence. Mr. Tarber remained at the Drake Avenue residence until 11:51 a.m. He returned to the district office 1:23 p.m. As discussed *infra*, Mr. Whitworth did not follow Mr. Tarber back to the district office. However, the GPS tracking data indicates that Mr. Tarber did not stop at project sites on the way back to the district office from the Drake Avenue residence. *Respondent's Exhibits 31, 37; Testimony of Kenneth Whitworth.*

18. Based on his personal observations of Mr. Tarber, Mr. Whitworth concluded that there was sufficient probable cause to believe that Mr. Tarber was inappropriately utilizing the GDOT vehicle for personal use in contravention of GDOT policies. While Mr. Tarber remained at the Drake Avenue residence, Mr. Whitworth returned to the District Office and arranged an immediate interview with Mr. Tarber. At 2:00 p.m. on February 6, Mr. Whitworth, along with fellow investigator George Gilson, met with Mr. Tarber at the District Office and conveyed the findings of the above-described investigation to him. Ira Witherspoon, Area Engineer, later joined this meeting. *Respondent's Exhibit 40; Testimony of Kenneth Whitworth; Testimony of Ira Witherspoon.*

19. Mr. Tarber acknowledged during the meeting that he had visited the locations as reported by the GPS tracking device. He estimated that he had been at Mr. Cue's for "[m]aybe two hours" on the day of the anonymous complaint. He also admitted that he had visited the shopping center on February 5 to meet with his daughter, though he did not account for why the meeting lasted three hours. With regard to his use of the GDOT vehicle on February 6, Mr. Tarber explained that he rode through his project on I-285 because one of the contractors had reported a closure between Chamblee-Tucker and Northlake. According to Mr. Tarber, after he rode through the project, he visited his residence on Ridge Way because he was responding to an emergency situation, and he thereafter visited the Drake Avenue location because he was dropping off a modem to an acquaintance since he "was in the area." Mr. Tarber conceded that he had become "lax" but asserted that he would remain on task in the future. At one point during the meeting, Mr. Tarber indicated that he was "quite certain that there [was] some validity" to what the investigators alleged, and asked them if they could reach some kind of "gentlemen's agreement," given that he was approximately one month short of having been employed by the GDOT for twenty-five years. *Respondent's Exhibit 40; Testimony of Kenneth Whitworth; Testimony of Ira Witherspoon.*

Present Disciplinary Action and Appeal

20. At the close of the meeting on February 6, Mr. Tarber was advised that he would be placed on suspension with pay pending the outcome of an investigation into his conduct. *Respondent's Exhibits 23, 40; Testimony of Kenneth Whitworth.*

21. On February 8, 2015, Mr. Tarber submitted a letter with the subject heading "Reply to Suspension with Pay Pending Investigation." In this letter, Mr. Tarber admitted to the allegations of personal use of the GDOT vehicle, taking an extended lunch in the absence of approved leave, and being off-site during work hours, though he proffered various excuses for his conduct. Mr. Tarber also downplayed the significance of his conduct, claiming that he had "never permitted any of the key phases" of his assigned projects to be neglected. *Respondent's Exhibit 35A.*

22. On March 2, 2015, Mr. Tarber was provided written notification that, based on the findings of the above-described investigation, and considering his disciplinary history, he would be dismissed from classified employment with the GDOT effective March 17, 2015 for misconduct and conduct reflecting discredit on the Department. Mr. Tarber was further advised of his right to seek internal review, which he exercised on or about March 5, 2015. *Respondent's Exhibits 24, 35.*

23. Jeffrey Baker, Director of Construction with GDOT, conducted an internal review of the GDOT's decision to dismiss Mr. Tarber. As part of this process, Mr. Baker reviewed a written statement and attached documentation submitted to him by Mr. Tarber. Among the documents Mr. Tarber submitted to Mr. Baker were two "concrete batch tickets" evidencing pours made by contractors at project sites assigned to Mr. Tarber on February 6, 2015. Both concrete batch tickets are signed by Mr. Tarber and include the handwritten notations "12:41p" and "1:20p", respectively, next to the blank that reads "Time at completion of discharge." *Petitioner's Exhibit J; Respondent's Exhibits 35A-H; Testimony of Jeffrey Baker.*

24. Mr. Baker also conducted an in-person interview with Mr. Tarber as part of the internal review. During this interview, Mr. Tarber reiterated the objections to his dismissal expressed in his written statement. Mr. Tarber again acknowledged that he had taken a three-hour lunch on February 5 without notifying his supervisor or obtaining leave. *Testimony of Jeffrey Baker.*

25. Mr. Tarber asserted throughout the review period that Mr. Cue's was a restaurant and, during the meeting with Mr. Baker, he averred that he "didn't recall" whether Mr. Cue's served liquor or if it had a bar area. However, after his interview with Mr. Tarber, Mr. Baker personally visited Mr. Cue's and concluded that "it was basically a pool hall with more than one bar that serve[d] alcohol." Specifically, Mr. Baker observed that a sign posted on the establishment's door indicated that no one under the age of eighteen was permitted to enter, that many of the patrons were smoking and consuming alcohol, and a large neon sign that read "BAR" was prominently displayed in the front room of the establishment. *Respondent's Exhibit 1; Testimony of Jeffrey Baker.*

26. Based upon his review, Mr. Baker upheld the GDOT's decision to dismiss Mr. Tarber from employment for misconduct and conduct reflecting discredit to the Department. Mr. Baker notified Mr. Tarber of his determination in a letter dated March 19, 2015. Mr. Baker cited Mr. Tarber's documented misuse of GDOT property, neglect of his duties as Construction Project Manager, his disciplinary history,¹ falsification of time sheets, inappropriate usage of leave, his "attempt to minimize and excuse" his misconduct, his lack of forthrightness during the internal review, and the fact that his misconduct had been brought to the attention of the GDOT by an anonymous caller as the reasons justifying his dismissal. *Respondent's Exhibit 1; Testimony of Jeffrey Baker.*

27. At the hearing on this matter, Mr. Tarber acknowledged that he had visited the locations indicated by the GPS tracking device. However, he insisted that in most instances—namely the

¹ At the hearing on this matter, Mr. Baker testified that he did not consider disciplinary action taken against Mr. Tarber in 2006 and 2007 in his review of Mr. Tarber's termination from employment. *Testimony of Jeffrey Baker, 277:19-20.*

visits to the DeKalb Farmers Market and the church—he had used the state vehicle for the legitimate purpose of getting lunch. Mr. Tarber admitted that the three-hour lunch meeting with his daughter was an infraction, but not one that justified his termination. *Testimony of Dwayne Tarber.*

28. Mr. Tarber insisted that he visited Mr. Cue’s for lunch, and asserted that the facts failed to support that he visited the establishment as frequently, or for as long a time, as was alleged by the anonymous caller. Mr. Tarber argued that the original allegation was further refuted by the fact that he was not found to have frequented Mr. Cue’s during the tracking period. *Testimony of Dwayne Tarber.*

29. Mr. Tarber asserted that his visit to his residence on February 6, 2015 was justified by an emergency. Specifically, Mr. Tarber testified that he received a call from a neighbor alerting him that an “unfamiliar and unoccupied vehicle” was parked in his driveway, which prompted him to drive home and eject an “uninvited old acquaintance” from his home. With regard to his subsequent visit to Drake Avenue, Mr. Tarber testified that he “reasonably decided” to deliver a package to a neighbor since “he had allotted break time remaining and . . . he was already in the area.” *Testimony of Dwayne Tarber.*

30. Mr. Tarber cited the above-described concrete batch tickets as evidence that he visited his assigned job sites on the way back to the district office on February 6, 2015. Mr. Evans testified that he recalled retrieving the batch tickets from Mr. Tarber’s assigned GDOT vehicle after Mr. Tarber was suspended on February 6, 2015. Mr. Tarber further asserted that the batch tickets called into question the GPS tracker’s indication that he had not stopped at any of his job sites during the tracking period. Mr. Evans and Mr. Baker, both of whom have experience regarding concrete pours, testified that concrete batch tickets do not necessarily provide supporting evidence that Mr. Tarber was present at the time of the pours. *Petitioner’s Exhibit J; Respondent’s Exhibit 35B; Testimony of Dwayne Tarber; Testimony of Jeffrey Baker; Testimony of Timothy Evans.*

III. Conclusions of Law

1. Under Georgia law, “[c]lassified employees . . . may be dismissed from employment or otherwise adversely affected as to compensation or employment status only if such action is taken in accordance with the rules and regulations of the State Personnel Board governing adverse actions and appeals for classified employees.” O.C.G.A. § 45-20-8(a) (2015). The procedure for adverse action against a classified employee’s employment must include, at a minimum, providing the classified employee with reasons for the adverse action and “an opportunity to file an appeal and request a hearing which may be held before either the [State Personnel Board] or an administrative law judge.” O.C.G.A. § 45-20-8(b) (2015).

2. SPB Rule 26 defines “adverse action” as “a disciplinary action taken by an [employer] which results in the suspension without pay, demotion, reduction in salary, or dismissal of a permanent employee.” Ga. Comp. R. & Regs. 478-1-.26(1). Pursuant to SPB Rule 26, employers may dismiss a classified employee for

- (a) negligence or inefficiency in performing assigned duties;

- (b) inability or unfitness to perform assigned duties;
- (c) insubordination;
- (d) misconduct;
- (e) conduct reflecting discredit on the department;
- (f) commission of a felony or other crime involving moral turpitude;
- (g) chronic tardiness or absenteeism; or
- (h) failure to report for or remain at work without justifiable cause.


Ga. Comp. R. & Regs. 478-1-.26(3)(a)-(h). In the present case, the GDOT dismissed Mr. Tarber for "misconduct" and "conduct reflecting discredit on the Department."

3. The GDOT met its burden in demonstrating that it properly dismissed Mr. Tarber for misconduct and conduct reflecting discredit on the department. The GDOT commenced an investigation based on a substantiated complaint that Mr. Tarber was taking extended lunch breaks and misusing his assigned vehicle. After an extensive investigation, the GDOT determined that Mr. Tarber frequently made inappropriate use of his state vehicle, shirked his responsibilities as Construction Project Manager, and misused GDOT time for personal purposes, all in a period of less than a week. Mr. Tarber does not deny that he used the GDOT vehicle for personal purposes or took a three-hour lunch in the absence of approved leave, but offers excuses for, or otherwise attempts to downplay the significance of, his misconduct. However, Mr. Tarber's proffered excuses for his misconduct lack both credibility and relevance. Moreover, even if the Court accepts concrete batch tickets as definitive evidence that Mr. Tarber visited his project sites on the way back to the district office on February 6, 2015, his dismissal was nonetheless proper given his documented, and admitted, misuse of state property and worktime. The instances of misconduct cited by the GDOT, taken in consideration with Mr. Tarber's disciplinary history, overwhelmingly support the determination to dismiss Mr. Tarber from employment with the GDOT. Further, even though GDOT only cited Mr. Tarber for misconduct and conduct reflecting discredit on the Department, the Court concludes that GDOT could also have asserted negligence or inefficiency in performing assigned duties as grounds for dismissal. The evidence strongly shows that Mr. Tarber failed to travel to his assigned work sites for several days, despite prior warnings that he needed to pay more attention to his job duties and personally visit each work area.

IV. Decision

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Department's dismissal of Mr. Tarber is hereby **AFFIRMED**.

SO ORDERED, this 3rd day of August, 2015.


M. PATRICK WOODARD
Administrative Law Judge