



12-6-2010

DEPARTMENT OF MENTAL HEALTH AND
DEVELOPMENTAL DISABILITIES, Petitioner,
vs. PERTRINA WILLIAMS, Grievant

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

IN THE MATTER OF:)	
)	
DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES,)	
)	
Petitioner,)	
)	
v.)	DOCKET NO. 26.15-108995J
)	
PERTRINA WILLIAMS,)	
)	
Grievant.)	

AMENDED INITIAL ORDER

This “Amended Initial Order” is issued, *sua sponte*, for the purpose of correcting typographical errors.

This contested case came on to be heard on December 6, 2010 in Memphis, Tennessee, before Administrative Judge Joyce Grimes Safley, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Civil Service Commission. Mr. Jeffrey Coons, Attorney for the Tennessee Department of Mental Health and Developmental Disabilities (hereinafter “the Department”), represented the State. The Grievant, Ms. Pertrina Williams, was present and was represented by her attorney, Ms. Cara N. Boyd, of the Tennessee and Arkansas Bars.

The subject of this hearing was Grievant’s appeal of her termination from her employment with the State of Tennessee. The Department asserts that Grievant was terminated for “falsifying an official document related to her

employment.”¹ The Commissioner’s June 25, 2010 letter upholding Grievant’s termination sets forth four reasons for Grievant’s termination: (1) and (2) “For the good of the service” for “Falsification of an official document relating to or affecting employment” (allegedly submitting false and misleading information to account for her absence from work on May 10, 2010), pursuant to RULES 1120-10-.06(24) and 1120-10-.06(11), TENNESSEE DEPARTMENT OF HUMAN RESOURCES (MAY 1999, REVISED);² (3) Interference with the ability of management to manage, RULE 1120-10-.06(12), TENNESSEE DEPARTMENT OF HUMAN RESOURCES (MAY 1999, REVISED); and (4) Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination), RULE 1120-10-.06(18), TENNESSEE DEPARTMENT OF HUMAN RESOURCES (MAY 1999, REVISED).

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that the State or the Department did NOT meet its burden of proof, by a preponderance of the evidence, that Grievant violated (1) RULE 1120-10-.06(12) – Interference with the ability of Management to Manage; or (2) RULE 1120-10-.06(18), Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination). Nor did the Department show, by a preponderance of the evidence, that Grievant’s alleged acts rendered her so ineffective in her administrative assistant/secretarial position that she must be terminated “for the good of the service” pursuant to RULE 1120-10-.06(24). Finally, the Department

¹ See Hearing Transcript, 10.

² The RULES OF TENNESSEE DEPARTMENT OF HUMAN RESOURCES were revised in May, 2011. The current RULES have different numbers than the rules which were in effect during Grievant’s employment with the Department. The RULES which govern this matter and are cited above are the RULES which were in effect prior to May, 2011.

did not show, by a preponderance of the evidence, that Grievant violated RULE 1120-10-.06(11), TENNESSEE DEPARTMENT OF HUMAN RESOURCES (MAY 1999, REVISED) - “Falsification of an *official document* relating to or affecting employment”.

Accordingly, because the Department did not show, by a preponderance of the evidence, that Grievant committed the four disciplinary offenses as charged, discipline is not appropriate, and Grievant’s termination is set aside. Grievant is reinstated to the State service status she enjoyed on May 10, 2010.³ Grievant cannot be reinstated to her job at the West Tennessee Licensure office due to the 2010 “Reduction in Force” (RIF) which was scheduled to occur for Grievant’s position and other State positions in 2010. However, Grievant shall receive the severance package to which she would have been entitled had she remained in her position until the State reduction in force (RIF) occurred and shall also receive the “re-hire status” she would have had at the time of the RIF if the May 10, 2010 incident and subsequent termination action had not occurred.

FINDINGS OF FACT

1. Grievant began working as a regular, full-time employee for the State of Tennessee on November 1, 2007. Prior to that time, beginning in January, 2007, Grievant worked as a “temporary employee” for the State.

2. Grievant’s first assignment with the State was working as a temporary administrative assistant in Clinical Services, Memphis Mental Health

³ Despite Grievant’s termination being reversed and set aside, it has limited practical effect for Grievant, who had already been notified by the State that she was subject to a Reduction in Force (RIF) which was taking place state-wide in many different departments during 2010, due to the State’s budget. The Department’s termination of Grievant meant, pragmatically, that Grievant did not receive the severance package that she would have received if the Department had not fired Grievant two weeks prior to the effective date for the scheduled RIF. Additionally, the Department’s termination of the Grievant meant that Grievant was not eligible for re-hire by the State if the State began hiring again or new positions open up with the State. Had Grievant simply been “laid off” in the scheduled RIF, she would be eligible for re-hire by the State.

Institute, Department of Mental Health and Developmental Disabilities. Grievant was hired into the temporary position by Dr. Kayla Fisher. Dr. Fisher was, and currently is, the Clinical Director at Memphis Mental Health Institute.

3. Dr. Fisher was Grievant's supervisor until Grievant transferred to the West Tennessee Office of Licensure, Department of Mental Health and Developmental Disabilities, in September, 2008.

4. Dr. Fisher testified, credibly, that Grievant was an excellent employee during the time that Grievant worked for her. Dr. Fisher also testified, convincingly, that Grievant did not receive any disciplinary actions while she worked with Dr. Fisher; Grievant was never disrespectful to Dr. Fisher; and Grievant was not late or tardy for work. Dr. Fisher described Grievant as "capable and bright...[and] very loyal to the office."⁴

5. Grievant testified in her own behalf.⁵

6. Grievant testified, credibly, that she had a "good working relationship" with Dr. Fisher while Grievant was working in the Clinical Services Department.

7. In September, 2008, Grievant was transferred to the West Tennessee Licensure Office under the supervision of Mr. Phil Brown.

⁴ It is noted that the Department objected to Dr. Fisher's is called as a witness and being allowed to testify. Because all the circumstances of Grievant's employment, including past discipline and past job performance, are relevant and must be considered with regard to determining appropriate discipline (if any), Dr. Fisher's testimony was deemed relevant and was allowed.

⁵ The Department also objected to Grievant's being allowed to testify. As the basis of the Department's objection, the Department asserted that Grievant should not be allowed to testify when she had not been listed on "Grievant's Proposed Witness List". Grievant's counsel responded that she believed Grievant was automatically able to testify due to the fact that she was a party to the proceeding. The Department could show no prejudice to its case due to Grievant's being allowed to testify. Accordingly, Grievant was allowed to testify at the hearing of this matter.

8. When Grievant was transferred to the West Tennessee Licensure Office, her working relationship with Mr. Brown was “initially ...okay”. Grievant noted that the work atmosphere was different than her previous work assignment at Clinical Services because the work load wasn’t as heavy, and the bulk of her job involved answering the telephone and doing the office mail.

9. Mr. Phil Brown, Mental Health Program Specialist III, was, at all relevant times, the West Tennessee Licensure Coordinator who supervised the West Tennessee Office of Licensure.

10. Mr. Brown has been employed by the State of Tennessee for thirty-seven (37) years. He has been employed by the Office of Licensure since 1981. He has held his current position (West Tennessee Licensure Coordinator) for thirty years.

11. Mr. Brown explained that Grievant filled an Office of Licensure administrative secretary position which was left vacant in August 2008, when the administrative secretary elected to take the “buy-out” offer that the State made at that time. For this reason, the Office of Licensure was left without an administrative secretary.

12. Grievant’s first day of work with the Office of Licensure was on September 2, 2008.

13. Mr. Brown held a “counseling session” for Grievant on October 20, 2008, approximately six (6) weeks after Grievant began working for him at the Licensure Office. Mr. Brown noted that Grievant was performing eight of her eleven job responsibilities “extremely well”: 1) answering the telephone, transferring calls/taking messages; 2) typing correspondence; 3) handling the

complaint hotline; 4) cooperating with co-workers; 5) courtesy; 6) promptly responding to requests; 7) the ability to learn new tasks; and 8) processing mail.⁶

14. At the “counseling session”, Mr. Brown “addressed the areas at which she [Grievant] was doing a good job which...at that time included most areas.” Mr. Brown summarized the “counseling session” in a memoranda.

15. Additionally, Mr. Brown also discussed three areas in which he believed Grievant needed improvement: “punctuality”, “excessive personal telephone calls”, and “excessive use of the internet for personal reasons.”

16. Grievant told Mr. Brown that she was having difficulty arriving on time in the mornings due to childcare issues and riding the State shuttle. Mr. Brown replied that Grievant was expected at work at eight o’clock, and that she must begin “taking annual leave...on any days that she reported late for work.”

17. Grievant worked from September, 2008 until September, 2009 without incurring any discipline.

18. During September, 2009 Grievant talked to Melissa Harper, a Human Resources Assistant Manager, about her supervisor, Mr. Brown. Grievant complained to Ms. Harper that Mr. Brown was not treating her fairly and was treating her differently than he was treating other employees in the West Tennessee Licensure office. Ms. Harper referred Grievant to a State Investigator with her complaints.

19. After Grievant complained to Ms. Harper, and to State Investigator⁷, Barbara Petty, that Mr. Brown “was not treating [her] fairly”; Mr. Brown began instituting disciplinary measures against Grievant.

⁶ Mr. Brown did not consider the “counseling session” to be a disciplinary session.

20. On October 6, 2009, Mr. Brown prepared a memorandum which he presented to Grievant. The memorandum placed restrictions on Grievant's use of sick and annual leave because of "her excessive use of leave or low balance of leave and her taking unexcused leave." Mr. Brown's memorandum directed Grievant to contact him personally any time she was going to use any kind of leave (sick or annual) prior to taking the leave. If Mr. Brown was not available in the office, he directed Grievant to call the Department's Director, Cynthia Tyler, in Nashville, and request leave from her.

21. The October 6, 2009 memorandum also instructed Grievant to provide a valid doctor's statement for any sick leave she needed to take. Additionally, Grievant was informed that all annual leave would have to be approved in advance. Finally, the memorandum directed Grievant to maintain an annual leave balance of at least 15 hours and advised that Mr. Brown would "not consider approving any annual leave that caused [Grievant's] balance to fall below 15 hours until further notice."⁸

22. Mr. Brown placed the 15 hour annual leave balance upon Grievant, but did not place such a restriction on the other employees under his supervision.

23. Six other employees were under Mr. Brown's supervision. When questioned about whether the other employees' annual or sick leave balances were being maintained above fifteen hours, Mr. Brown testified: "I honestly don't

⁷ The State Investigator was an employee of the Legal Counsel's Office. Ms. Petty's official title was "Investigator, Discrimination and Harassment Claims", DMHDD, Office of Legal Counsel.

⁸ No State regulation, rule, or statute requires a State employee to maintain an annual leave balance equal to or greater than 15 (fifteen) hours.

know.” Shortly thereafter, Mr. Brown testified that none of the other employees “consistently maintained” a leave balance below 15 hours. Because Mr. Brown made contradictory statements, his testimony on this issue is not credible.

24. Coordinator Brown believed the restrictions that he placed upon Grievant were not necessary for the other employees under his supervision.⁹

25. Coordinator Brown consulted the Department’s Personnel office and was told that he could place restrictions on Grievant’s sick and annual leave.

26. Mr. Brown required Grievant to “sign in” when she arrived at work.

27. Grievant and Mr. Brown agreed that Grievant told him “her child care issues were causing her to be late for work.” Mr. Brown offered to adjust Grievant’s schedule such that Grievant could come into work at 8:15 or 8:30 and work until 4:45 or 5:00pm. Grievant also explained to Mr. Brown that the day care center wouldn’t allow her to “drop off her child early enough in order to get [to work] and park and be at work by eight o’clock.”

28. Grievant asked Mr. Brown to “credit” her with the hour of lunchtime she was allowed to take each day, because she did not customarily use her lunch hour. Mr. Brown declined to allow the lunch hour “credit.” Grievant then asked Coordinator Brown if she could “work through” her lunch break and other breaks, come into work at 8:30 a.m., and leave work at 4:30 p.m. (Eight hours at work).

⁹ No other employees were required to contact Coordinator Brown personally in advance of any leave time the employee wished to use (sick or annual) prior to taking the leave; nor were they required to contact the Department’s Director, Cynthia Tyler in Nashville, to request leave if Mr. Brown was out of the office and not available.

29. Grievant explained that she parked in a parking lot located far enough away from her office building that she was required to take a State shuttle to her office building. She explained that if she missed the shuttle which ran before 8 a.m., she could not catch the next shuttle for her building until 8:15 a.m.

30. Mr. Brown refused to allow Grievant to “work through” her lunch break or other breaks in order to work a regular 7.5 hour “workday”.¹⁰

31. On November 30, 2009, Petitioner sent an e-mail complaint to Melissa Harper, a Human Resources manager, regarding Mr. Brown. In the e-mail to Ms. Harper, Petitioner complained that Mr. Brown “continuously harasses me and makes false accusations about me.” She also explained that “my aunt is in ICU, my mother was in the hospital last week, and my daughter is constantly sick. I have enough on my plate without my supervisor harassing and making false assumptions.”

32. On December 1, 2009, Mr. Brown placed a “time clock” in the office for all office employees to “clock in and clock out” of work.

33. On December 2, 2009, Grievant filed a formal complaint of “hostile work environment” with the Department’s Human Resources. Grievant complained that Mr. Brown was “too invasive and constantly over surveillances (sic) me.” Grievant explained that, despite her requests, “[Mr. Brown] continues to over-step the boundaries of a supervisor. He also fails to communicate work-

¹⁰ State employees on “regular schedules” are scheduled to work 7.5 hours per day, Monday through Friday. Employees are allowed a one hour lunch break, and two fifteen minute breaks, per day. Any agency may use irregular work schedules and vary its workdays at the discretion of the appointing authority. Any work schedule can be modified by the appointing authority as necessary to provide a reasonable accommodation for an employee with a disability. CH. 1120-10-.06, ATTENDANCE AND LEAVE, TENNESSEE DEPARTMENT OF HUMAN RESOURCES (MAY 1999, REVISED).

related material to me in an effort to make it impossible for me to perform the duties of my job accurately.” Additionally, Grievant complained that Mr. Brown tried to get her to sign memos which contained false information.

34. In her December 2, 2009 complaint, Grievant requested the following:

I want Phil Brown to receive training on how to be a better supervisor. Some classes on compassion/understanding would also be a positive result. Overall, I want him to learn that it is not ok to target, violate & harass someone because you supervise them. In addition, I do not want him entering my cubicle for any reason.

35. On December 4, 2009 Mr. Brown issued a “Written Warning” memorandum to Grievant for the stated reasons of “insubordination” and “your unexcused absenteeism during the months of October 2009 and November 2009.”

36. The “written warning” memorandum states, in pertinent part:

From October 7, 2009 until October 30, 2009 you were late for work every day, signing-in each day at **8:06**. On November 3rd you signed in at **8:02**. On November 9th you signed in at **8:03**. On November 17th you signed-in at **8:26**. On November 20th you signed in at **8:03**. On November 23rd you signed in at **8:01**. On November 24th you signed-in at **8:01**. (Emphasis added.)¹¹

37. Mr. Brown noted that he had an atomic clock in his office, a watch, and a cell phone which he used to ascertain Grievant’s arrival times. Grievant disagreed with Mr. Brown regarding the correct times, telling him that she was using Sprint PCS time on her cell phone.

38. Mr. Brown initially testified that he used his atomic clock, his watch, and his cell phone to determine whether or not Grievant was late. However, Mr. Brown testified later that he used the actual time which Grievant put on the time

¹¹ He noted that Grievant was late for work every day she was scheduled to work from October 7th through October 30, 2009 (eighteen days). On seventeen of those workdays, Grievant signed in at **8:06 a.m.** On one of the workdays, Grievant signed in at **8:17 a.m.** During the month of November, 2009, Grievant was late to work 11 times. The “late times” consisted of Grievant signing in at **8:01 a.m.** on two days; **8:02 a.m.** on one day; **8:03 a.m.** on four days; **8:06 a.m.** on three days; and **8:26 a.m.** on one day.

sheet to determine whether or not Grievant was late.¹² In light of the conflicting testimony, Mr. Brown's testimony on this issue not credible.

39. The December 4, 2009 "written warning" also states that Grievant did not answer the telephone as instructed and did not "screen" calls (by asking telephone callers who was calling and informing office employees before transferring the telephone call to her co-workers).

40. Further, the December 4, 2009 "written warning" warned Grievant that she had not submitted her time sheet correctly to Mr. Brown, and stated that Grievant refused to "clock-in" on the newly-acquired time clock.

41. Grievant asked Commissioner Betts to review the "written warning". By letter of January 7, 2010, Commissioner Betts responded that she had reviewed the matter, along with the documentation, and determined that there was sufficient cause for the warning.

42. On December 10, 2009 Mr. Brown issued a memorandum to Grievant stating that he was giving Grievant a one day suspension. Mr. Brown issued the suspension because Grievant "transferred at least two telephone calls to me without screening them." When Mr. Brown asked Grievant why she had not "screened" the telephone calls, Mr. Brown recalled that Grievant told him "she didn't have to." Grievant denies that she sent telephone calls to Mr. Brown without screening them. Grievant explained to Mr. Brown that she didn't have to ask who was calling if Grievant *knew* the caller.

¹²Grievant objected to the characterization by the Department that "[Grievant] signed in" and noted that Grievant had only signed in one time "that month". Curiously, after it was ruled that the "the [time sheet] document speaks for itself", *neither party* moved to enter the time sheet at issue into evidence at the hearing.

43. The one-day suspension was upheld by Commissioner Betts and by the Civil Service Commission.

44. Thereafter, Mr. Brown's and Grievant's work relationship deteriorated into a petty tit-for-tat, with disparaging and discourteous e-mails and comments being exchanged between the two.

45. On April 12, 2010, Mr. Brown recommended a two day suspension without pay for Grievant on the basis that Grievant's "defiant and disrespectful response undermines my authority (sic) constitutes insubordination."

46. This disciplinary recommendation resulted from Grievant sending Mr. Brown a March 31, 2010 email requesting an explanation of the time sheet revisions which Mr. Brown had made on Grievant's March 29, 2010 time sheet. After Mr. Brown replied to Grievant's email, Grievant responded by return e-mail: "You are delusional."

47. Grievant admitted that she replied to Coordinator Brown via e-mail that he was "delusional". According to Grievant, she made the statement to him because she had told Mr. Brown that there had been a storm during the night, the traffic lights weren't working properly, and she had been late to work the next morning as a result. Mr. Brown responded by saying a storm hadn't occurred; when, in fact, there had been a storm the night before.

48. The Commissioner's designee reviewed the requested two-day suspension and determined that "the recommended two-day suspension came about as a result of a difference of opinion with your supervisor... [.] *Discussions*

with both you and Mr. Brown indicated that there was a failure in communication.
(Emphasis added.)¹³

49. The Commissioner's designee reduced the suspension to a one-day suspension. She noted that Grievant's e-mail stating to her supervisor that he was " 'delusional' was an inappropriate response."

50. Grievant was the only employee in Mr. Brown's office that had a young child. She was also the youngest employee in the office.

51. Grievant testified, credibly, that Mr. Brown allowed other employees in the office to use their annual leave when they were sick, and to arrive at work after 8:00 a.m., without consequences from Coordinator Brown.

52. During April, 2010 Grievant contacted the federal Equal Employment Opportunity Commission (EEOC) regarding her complaint of discrimination and Mr. Brown's treatment of her. She also made further attempts to have the State Office of Legal Counsel (State Investigator Barbara Petty) investigate her charges of racial discrimination. However, at some point in April, 2010 Grievant sent an email to Barbara Petty, Investigator, and informed her that Grievant wished to have an outside agency handle the matter, and that she no longer wished to talk with anyone from the State about her problems with Mr. Brown.

53. On May 5, 2010 Mr. Brown recommended a ten-day suspension without pay resulting from an April 15, 2010 incident.

54. On April 15, 2010, Mr. Brown and Grievant had a verbal altercation at work, and re-hashed some of Grievant's past discipline, Mr. Brown's past

¹³ Cynthia Tyler, the Director who was Mr. Brown's supervisor, served as the Commissioner's Designee to review the recommended suspension.

actions, and his stated reasons for the imposed discipline. The exchange began at Grievant's cubicle and involved the delivery of a UPS package. It degenerated into a heated discussion thereafter.

55. During the argument between Mr. Brown and Grievant, both Grievant and Mr. Brown became angry. Grievant testified, credibly, that Mr. Brown was "hollering at me for being 10 feet from my cubical."

56. At one point during the disagreement, Grievant called Mr. Brown "honey." Mr. Brown was extremely offended that Grievant called him "honey".

57. Grievant told Mr. Brown that she was "a grown, 27 year old woman" and she did not like the way Mr. Brown was treating her.

58. Mr. Brown advised Grievant in a May 5, 2010 ten-day suspension memorandum:

Please understand that if you display any similar outbursts or are disrespectful of my authority as your supervisor, you may very well be dismissed from your position in this office. The fact that you have received a Reduction in Force notice does not in anyway (sic) protect you from the imposition of disciplinary actions up to and including dismissal. If your actions cause you to be dismissed before the date of your layoff, you will not be eligible for the severance package of \$3200.00 and two-year's college tuition at a State college or university, or to have your name placed on a list of individuals to be considered for any similar position that may become available.

59. Grievant asked Director Tyler to talk with Mr. Brown in order to rectify the ongoing conflict between her and Mr. Brown. Director Tyler noted that "the strife between [Mr. Brown and Grievant] had been going on since the Fall."

60. Director Tyler talked with Mr. Brown and advised him that she was going to reduce his recommended ten day suspension of Grievant. Director Tyler told Mr. Brown why she was going to reduce the suspension, and informed him

that “it was only three or four more weeks [until the RIF]. They need to work it out...[.]” (Emphasis added.)

61. Mr. Brown had previous, similar incidents with the Administrative Assistant who worked for him prior to Grievant.

62. The Commissioner’s designee (Director Tyler) reviewed the recommended ten-day suspension without pay and reduced the suspension to three (3) days.

63. The three day suspension was not served because Grievant was terminated prior to serving her three day suspension without pay.

64. A few days later, Mr. Brown issued a “Recommendation for Dismissal” (termination) for Grievant based upon his belief that Grievant provided an altered copy of a dentist’s statement as an excuse for a May 10, 2010 partial sick day taken by Grievant.

65. Mr. Brown recommended termination based upon the following: “Department of Human Resources: Chapter 12120-10, 1120-10.02, 1120-10.05, and 1120-10-.06(12) Falsification of an official document relating to or affecting employment.”

66. Grievant submitted a dental clinic statement (excuse) to Mr. Brown following her visit to the UT Dental School clinic on April 20, 2010.

67. On May 10, 2010, Grievant took 3.5 hours of “sick leave” in the afternoon. When Grievant turned in her May 10, 2010 dental clinic statement (excuse) to Mr. Brown on May 14, 2010, Mr. Brown believed that the May 10, 2010 statement was an exact copy of the earlier April 20, 2010 UT Dental Clinic’s

statement. Mr. Brown believed that the date on the earlier statement had been altered and submitted for the later dental clinic visit.

68. Mr. Brown did not ask Grievant whether or not she had submitted an altered “excuse” from the UT Dental School.

69. Rather, Mr. Brown visited the UT Dental School and talked with a patient coordinator, Ms. Becky House. Despite Federal regulations which prohibit releasing medical information to third parties, Ms. House reportedly told Mr. Brown that Ms. Williams was not seen at the dental school on May 10, 2010.¹⁴

70. Mr. Brown testified that the April 20, 2010 dentist’s excuse and the May 14, 2010 dentist’s excuse submitted to him by Grievant were:

Identical in every way except for where the four...has been changed to a five for the month and where the 20th has been changed to the 10th for the day.

71. Mr. Brown testified that he recommended termination or dismissal of Grievant on the basis that Grievant had submitted an altered dentist’s excuse to him.

72. Mr. Brown also testified that it was his desire that Grievant improve her performance and remain a part of his licensure staff. Mr. Brown’s demeanor was carefully scrutinized during this testimony. Mr. Brown’s statement was not credible or at all believable.

¹⁴ It is unknown why medical/dental personnel would allegedly give personal medical information to a third party such as Mr. Brown in direct contravention of Federal HIPPA violations. It is also unknown whether or not Mr. Brown presented his state ID or credentials in such a way that the UT Dental School’s patient coordinator believed Grievant’s information should be released. Grievant objected to consideration of UT Dental School’s patient coordinator’s statements as “hearsay”. The Department withdrew the question which elicited hearsay. Later, Mr. Brown attempted to testify about hearsay remarks at the dental school. For this reason, any hearsay information which UT Dental School’s patient coordinator may or may not have given to Mr. Brown is not considered for any purpose in this decision.

73. Petitioner never received an oral warning as part of her progressive discipline administered by Mr. Brown.

74. Mr. Brown acknowledged that he did not make any employees other than Grievant provide a doctor/dentist's excuse for sick leave.

75. Mr. Brown knew that Grievant had a small child. Grievant would typically tell Mr. Brown that her daughter was sick, she or her daughter had a doctor's appointment, or Grievant herself was sick. Mr. Brown did not like that Grievant waited "until the last minute" to request sick leave. Mr. Brown wrote Grievant "several e-mails about her not requesting leave in advance."¹⁵

76. Mr. Brown acknowledged that the majority of the time Grievant took off was for "illness". Mr. Brown knew that Grievant's child was two years old when she began working for him; he knew Grievant's child was in daycare; and he knew Grievant was a single parent.

77. Mr. Brown set up a system with Grievant where she would ALWAYS need to provide a doctor's excuse anytime she took off sick leave for herself or her daughter. Even if Grievant's daughter had just a "cold" or minor illness that did not require a doctor's visit, Mr. Brown still required that Grievant take her daughter to her pediatrician and provide him with a doctor's statement. Mr. Brown did not feel that he was being unfair or deviated from State policy by requiring this of Grievant, despite the fact that no other employees under his supervision had such restrictions placed upon their use of sick leave. Grievant was the only employee under Mr. Brown's supervision who had a young child in daycare.

¹⁵ It is judicially noted that a parent cannot always plan or schedule a small child's illness.

78. Mr. Brown admitted that Human Resources did not instruct him to use threats of loss of Grievant's severance package in the Reduction of Force, as part of his "discipline" of Grievant.

79. Mr. Brown was aware that Grievant had filed personal grievances against him. Human Resources' personnel had spoken to him about his working relationship with Grievant, and had investigated him.

80. Despite Mr. Brown's belief that Grievant had altered her May 10, 2010 dentist's statement, he never questioned Grievant about the two dentist's excuses, or asked her to explain. Mr. Brown explained his actions by stating: "I have never stated that Ms. Williams altered the doctor's statement. My statement was that the doctor's statement had been altered."

81. In light of Mr. Brown's earlier testimony, in which he stated, "[T]he *first thing I did was to contact Cynthia Tyler, our director in HR, appropriate people in human resources the day that she [Ms. Williams] submitted the altered statement to me and made them aware of the situation.*" (Emphasis added.) Mr. Brown did not want an explanation from Grievant.

82. Grievant explained that she had had extensive dental work at the University of Tennessee Dental School beginning in January 2010, including having all of her wisdom teeth removed. Thereafter, she had four other tooth extractions, several cavities fixed, and two dental implants.

83. On May 10, 2010 Grievant went to her dental appointment at UT Dental School. According to Grievant, she began to feel nauseated at the appointment and felt like she was going to vomit. Thereafter, she told the dentist

(dental student) that she felt nauseated and believed she might have a virus. The dentist (dental student) checked the dental site and let Grievant leave.

84. Grievant stated that her May 10, 2010 “excuse” came as a PDF file via email because she forgot to obtain her “excuse” while she was at the dental clinic.

85. According to Grievant, most of her doctor’s excuses were sent to her by email, and were not “originals”, but were emailed or faxed to her.

86. Cynthia Tyler, the director of the Office of Licensure and Review for the Department of Mental Health and Developmental Disability, testified on behalf of the State. Ms. Tyler oversees the individual offices of Licenses and Review in each State division. Ms. Tyler is Mr. Brown’s direct supervisor.

87. Ms. Tyler described Grievant’s job as Administrative Secretary as being “the front office person, the first one the public would see. They greet the public. They answer the phone. They assist the coordinator who is head of that office with various administrative tasks, and they also assist other surveyors if needed with administrative tasks.”

88. Ms. Tyler testified that it was important for the person receiving the calls to be in the office during assigned hours, however she acknowledged “...I know in some instances people are out for illness and other staff can have the ability to pick up the phone...[.]”

89. In 2010, the State decided it must have a reduction in force (RIF) of state employees for budgetary reasons. On March 25, 2010, Grievant was notified that she would be terminated due to a multi-agency/multi-department reduction

in force for State of Tennessee employees. Her last day of employment was stated as June 28, 2010.

90. After Grievant was notified that she would be “laid off” in the statewide Reduction in Force (RIF), Ms. Tyler talked to Grievant about the RIF.

91. Ms. Tyler noted that the State had developed a Reduction in Force package with the opportunity to get education (paid for by the State), a lump sum payment in addition to accumulated leave, plus the RIF’d employee would be given priority in rehiring, especially in the Shelby County area. If other State agencies had an open position, as a part of the RIF package, Grievant’s name would have been at the top of the list for rehire. Ms. Tyler also acknowledged that because Grievant’s position was an “administrative position, there more than likely would have been other openings coming up. And with that benefit she may not have been out of work very long if at all.”

92. Director Tyler finally explained that she believed there were proper grounds for termination in this case. She observed:

If this had simply been something just time and attendance, you know, we probably would not be here talking if this was simply time and attendance... [.]But these other actions, her attitude toward Mr. Brown, her reaction to his Statements or reaction to direction ... [.]And finally, just falsifying a document and submitting it to him as a legitimate excuse. I mean it just showed total disrespect for him and for his position of authority.

93. Director Tyler agreed that while Grievant used “excessive sick and annual leave”, *she did not use her leave improperly.*

94. Neither the State nor Grievant entered Grievant’s employee file or employee performance evaluations into evidence.

95. Grievant had a much lighter workload in the Licensure Office than she had previously had when she worked at the MMHI hospital. The bulk of Grievant's work with the Licensure Office was answering the telephone and doing the-mail.

96. Grievant testified, credibly, that when she first began working in the Licensure Office, her supervisor, Mr. Brown, didn't really give her assignments. The previous secretary had typed up a document which outlined her "administrative duties", and Grievant followed the duties listed on the documents because Mr. Brown did not give her direction.

97. Grievant believed that Mr. Brown treated her as "inferior" to the other employees in the office.

98. While Grievant worked for over a year for Mr. Brown without any disciplinary actions, after Grievant complained in September, 2009 to the Department's Human Resources Assistant Director, Melissa Harper, and State Investigator, Barbara Perry, about Coordinator Brown's treating her differently compared to other Licensure Office employees, Mr. Brown began disciplinary actions against Grievant.

99. Grievant also complained about Coordinator Brown to Vicki Graham, the Human Resources Director.

100. Grievant testified, credibly, that Mr. Brown did not treat her fairly.

101. Clearly, Mr. Brown treated Grievant differently than he treated other employees in the Licensure office. Grievant explained, credibly, that if she came into work at 8:01 a.m., Mr. Brown would mark her "late"; however, another

Licensure office employee could come in at 8:10 a.m. and Mr. Brown did not mark or call them "late".

102. Additionally, due to Mr. Brown's requiring Grievant to always submit a doctor's excuse, there were times when Grievant or her child just had a mild illness and which could have treated it with a day of rest and over-the-counter medication. However, due to Mr. Brown's requiring Grievant to provide a doctor's excuse for every sick leave day, Grievant incurred the expense of going to her (or her daughter's) physician's office and paying a co-pay for the office visit.

103. In October, 2009, Grievant noted that she received a memo from Mr. Brown stating that she was excessively using her sick time. At that time, Grievant talked with Mr. Brown's supervisor, Director Tyler, and explained that Grievant's daughter, Jayla, had been seen by her pediatrician fifteen times from September 2008 until October 2009. Grievant explained that her daughter had been sick a lot, and that Grievant had also used her annual leave to stay home and take care of her daughter when her daughter was sick.

104. At times Grievant would arrive at the office as early as 7:50 a.m., but Mr. Brown did not allow Grievant to record such times on her time sheet. One time when Grievant signed in at 7:50 a.m., Mr. Brown gave Grievant a memo (which Grievant refused to sign) that stated Grievant was trying to take overtime without permission.

105. After Grievant filed a formal "harassment" charge against Mr. Brown in December 2009, Mr. Brown began disciplining Grievant with a written warning, suspensions, etc.

106. Mr. Brown disciplined Grievant for failing to “screen” two telephone calls. Grievant testified, credibly, that she answered the office telephone correctly. On one occasion, Grievant answered the telephone in the Licensure Office, and did not ask the name of the caller because she recognized the caller’s voice and knew who was calling. Despite this, Mr. Brown, who was listening to Grievant’s telephone conversation, was quick to come to Grievant’s cubicle and chastise her for not asking the scripted words: “May I ask who is calling?”

107. On June 14, two weeks prior to Petitioner’s last day of employment with the State due to the scheduled Reduction in Force, Mr. Brown sent a memorandum to Grievant entitled “Recommendation for Dismissal.” Mr. Brown stated in the memorandum that:

This action is taken in conformity with the Rules of the Tennessee Department of Human Resources: Chapter 1120-10 Disciplinary Action; 1120-10-.02 Policy; 1120-10-.05 Causes for Disciplinary action (2) Causes relating to conduct which may affect an employee’s ability to successfully fulfill the requirements of the job; 1120-10-.06 Examples of Disciplinary Offenses (12) Falsification of an official document relating to or affecting employment.

108. Grievant’s supervisor, Mr. Brown, treated Grievant differently than he treated the other employees under his supervision. He required things from Grievant with regard to annual leave and sick leave that he did not require from other employees under his supervision.

109. Mr. Brown was unduly harsh, inflexible, and unreasonable in his treatment of Grievant. He nit-picked, hounded and harassed Grievant over matters which he either did not monitor or ignored in other employees under his

supervision. He raised his voice to Grievant, and spoke to her in a demeaning fashion. In short, he made Grievant's life miserable.¹⁶

110. At the time Coordinator Brown was criticizing Grievant for using earned sick and annual leave, he had the luxury of accruing 24 (twenty-four) annual leave days per year. It is unknown if Coordinator Brown remembered his early tenure with the State during which he accrued less annual leave per month; and it is unknown if Coordinator Brown was forced to use his annual or sick leave to stay home with sick children in the early days of his State service.¹⁷

111. Grievant was a single mother during the time she was employed by the Department. The evidence preponderates that she was the person responsible for parenting her child, including staying at home and caring for her child if the child was ill. In the vernacular, Grievant was the "Chief Cook and Bottle Washer" or "the Lone Ranger" in caring for her child.

¹⁶ Mr. Brown did not require other employees to maintain at least a 15 hour (two day) annual leave balance. He did not require other employees to present a doctor's excuse for any sick leave taken. He did not require other employees to stay confined to their offices, yet he chastised Grievant for going to a part of the Licensure Office in which the Employee Handbook was kept. Reading the State's employee handbook can certainly be considered part of a State employee's duties.

¹⁷ It is judicially noticed that Grievant had been employed by the State for over a year when she began working under Mr. Brown's supervision. With Grievant's tenure in State service at that time, she would have accrued 1 (one) annual day per month and 1 (one) sick day per month. State employees who have been with the State as long as Coordinator Brown, (37 years), accrue 2 (two) annual days per month after twenty (20) years of service, and 1 (one) sick day per month, and have the privilege of applying for the State employees' "sick bank". After a State employee has been employed for the required amount of time, the employee is eligible to "buy in" to the State "sick bank". All state employees who are entitled to accrue sick leave pursuant to T.C.A. § 8-50-802, who have been employed by state government for *12 full months immediately preceding application for participation, who are currently accruing leave, and who have a sick leave balance of at least 6 days as of October 31 of the current enrollment year are eligible to enroll in the Bank.* Employees electing to join the Bank must do so during the months of August, September, or October of any year. Employees may apply for membership in the Bank ... no earlier than August 1 and no later than October 31. ... *Any employee who elects to join the Bank will initially have the equivalent of 4 days of sick leave deducted from his or her personal accumulation and donated to the Bank.* Thereafter, 1 day of sick leave per year will be assessed each October 1. The Board may waive the assessment in any year by written notice. (Emphasis added.) Clearly, Grievant was never able to accumulate enough sick time to be eligible to "buy in" to the "Sick Bank".

It is also judicially noticed that children in "daycare" commonly suffer multiple illnesses such as colds, viruses, and the flu. Daycares will not allow a child to attend daycare if the child is running a fever or is ill, and the child must stay at home and have someone (usually the child's mother or father) to care for the child.

112. It is clear that Coordinator Brown either did not consider, or simply ignored, all of the facts and circumstances in his treatment of Grievant.

113. Even though he knew Grievant was a single mother with a small child, Mr. Brown acted in an oppressive manner and treated Grievant differently than he treated other employees under his supervision.

114. The evidence preponderates that Grievant was an excellent employee during her State employment at Memphis Mental Health Institute, and was a very good employee for the first year she worked in the West Tennessee Licensure Office.

115. While Coordinator Brown commended Grievant for her work, and while he stated that she did a good job in eight (8) areas of her job, he chose to write up a formal “memorandum” detailing what he perceived to be her shortcomings a mere six weeks after she began working for him.¹⁸ Coordinator Brown made no complaints regarding Petitioner’s performance of her job duties until over a year later, when Coordinator Brown began “disciplining” Grievant for getting to work at 8:01 a.m. or 8:03 a.m. rather than 8:00 a.m.

116. After Grievant formally complained about Coordinator Brown’s “harassment” to Human Resources on November 30, 2009, and a State Investigator, Coordinator Brown began meting out discipline to Grievant in earnest. Coordinator Brown made no complaints regarding Petitioner’s job performance until after November 30, 2009, when Coordinator Brown began

¹⁸ The memorandum was not a “written warning” or “discipline”. Despite this, and the State policy regarding what may be placed in a State employee’s personnel file, Mr. Brown placed the “memorandum” in Grievant’s personnel file.

“disciplining” Grievant for getting to work at 8:01 a.m. or 8:03 a.m. rather than 8:00 a.m.¹⁹

117. Grievant went from having no discipline for two years of employment to having “write ups” and “suspensions” every few weeks.

118. Grievant was not a perfect employee. Grievant *was* late to work on occasion. After Grievant learned that she was part of the group of State employees who were going to be “laid off” in the State-wide Reduction in Force, Grievant did not try as hard to maintain a cordial work relationship with Mr. Brown, engaged in “tit for tat” behavior with Mr. Brown, and made retorts to Coordinator Brown. At times Grievant was disrespectful to Mr. Brown.

119. As described, *supra*, after she and Coordinator Brown argued over what constituted “inclement weather”, she replied to Coordinator Brown by e-mail that he was “delusional”. During another altercation, both Coordinator Brown and Grievant raised their voices, Grievant “talked back” to Coordinator Brown, and called him “honey” in the middle of the verbal squabble. Coordinator Brown took great offense to Grievant addressing him as “honey”.²⁰

120. Grievant’s testimony is credible that she went to the UT Dental Clinic on May 10, 2010, felt nauseated and ill, and left the clinic without actually

¹⁹ It is noted that the State of Tennessee does not have a “grace period” for arriving to work at 8:01 a.m. rather than 8:00 a.m. Supervisor Brown is correct in stating that 8:01 a.m. is “late”. However, in the common course and practice of employment, it is unusual for a supervisor to obtain an “atomic clock” and “write up” an employee for signing into work within a minute of the start of the workday. It is also noted by the undersigned, after many years of hearing numerous civil service cases, that it is the rare and singular supervisor who would take the time and trouble to “write up” an employee for being one minute “late”.

²⁰ While calling people the generic “honey” is admittedly an unfortunate, cultural custom in this part of the country, Grievant was disrespectful and used poor judgment in using the term “honey” to her supervisor. It is clear from the record that both Mr. Brown and Grievant lost their tempers during this particular argument. Neither Mr. Brown nor Grievant were particularly respectful toward the other during the altercation. It is also apparent that Mr. Brown expected Grievant to treat him with respect, but Mr. Brown did not treat Grievant with respect.

having dental work done. It was not clear from Mr. Brown's testimony how he could have *reasonably* expected Grievant to telephone him and report to him that she was going home from the Dental Clinic because she felt sick at her stomach. This is especially true when Grievant had already asked off for "sick leave" and was using such previously scheduled "sick leave." It is clear that Mr. Brown would not have expected other office employees to have taken the unusual step of telephoning him from a dentist office to tell him they were nauseated and were going home.

121. Finally, the evidence preponderates that the Grievant did, indeed, turn in an "altered" dentist's excuse for her May 10, 2011 visit to UT Dental Clinic. The two completed forms are identical and match when one is placed on top of another. The areas of alteration are clearly seen. Frankly, Grievant's action in submitting an altered dental excuse was not smart, to say the least.

122. The Commissioner upheld Grievant's termination in a letter dated June 25, 2020, and Grievant pursued her civil service appeal in a timely manner.

CONCLUSIONS OF LAW

1. The Department bears the burden of proof in this matter to show, by a preponderance of the evidence, that Grievant violated the TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULES (MAY, 1999, REVISED) set forth in the letter of termination. The Department also has the burden of proof to show, by a preponderance of the evidence, that the discipline imposed was the appropriate discipline for any 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.

3. 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.

4. The Department charges Grievant with the following violations:

- (1) Termination “for the good of the service” as outlined in T.C.A. §8-30-326 – RULE 1120-10-.06(24);
- (2) Falsification of an official document relating to or affecting employment” -- RULE 1120-10-.06(11);
- (3) Interference with the ability of management to manage, RULE 1120-10-.06(12); and
- (4) Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination) RULE 1120-10-.06(18).

Due Process

5. T.C.A. §8-30-331 provides that civil service employees (who have successfully completed their probationary period) have a property right to their positions.

6. Because State of Tennessee civil service employees have “property rights” in their jobs; such employees must be afforded constitutional due process before the State may legally deprive the employee of his or her job. Hinson v. City of Columbia, 2007 WL 4562886 (Tenn. Ct. App. 2007).

**Falsification of an Official Document
Relating to or Affecting Employment**

7. All of the State’s four charges against Grievant arise from Grievant’s submission to her supervisor of an altered May 10, 2010 “dentist excuse”. Accordingly, the charge of “Falsification of an official document relating to or affecting employment” shall be addressed first.

8. The Department did prove, by a preponderance of the evidence, that Grievant presented an altered “dental clinic excuse” for 3.5 hours of previously scheduled sick leave. However, the question that must be asked is whether Grievant *actually* violated RULE 1120-10-.06(11), TENNESSEE DEPARTMENT OF HUMAN RESOURCES (MAY 1999, REVISED) - “Falsification of an *official document* relating to or affecting employment”.

9. The Department conceded that it could not prove that Grievant was the person who altered the “dentist’s excuse” submitted for May 10, 2010 sick leave.

10. Nor did the Department put on any proof, or define what an “*official document* which “relat[es] to or affec[ts] employment” actually is.

11. The “dental excuse” was not a standard or uniform requirement within Grievant’s office.

12. The Department did not enter Grievant's personnel file into evidence. There was no evidence or testimony which supported that the "dental excuse" at issue had been placed into Grievant's personnel file²¹ or that the "excuse" was being kept in a separate, confidential medical file in compliance with the ADA.

13. The "dental excuse" was not a document which was uniformly required for state employees by a state or federal statute, departmental rule, or departmental regulations

14. The Department offered no proof that the "dental excuse" was a document which was kept in the ordinary course of the State's business. Rather, the Department conceded that Grievant was the *only* employee who was required to supply such "excuses".

15. Grievant made an unwise choice by submitting the altered "excuse" to Mr. Brown.

16. However, the evidence does not support that Grievant's ill-considered submission of the altered "dentist excuse" rises to the level of violating RULE 1120-10-.06(11).

17. Accordingly, the Department did not offer any proof that the "dental excuse" at issue is actually an "official document related to or affecting employment." (Emphasis added.)

²¹ The Americans with Disabilities Act prohibits placing medical documents into an employee's personnel file in order to prevent employment decisions from being made based on disabilities as opposed to actual performance of the job.

18. For this reason, the altered “dentist’s excuse” cannot be considered an “official document” contemplated by RULE 1120-10-.06(11).²²

19. The Department did not prove, by a preponderance of the evidence, that Grievant violated RULE 1120-10-.06(11) – “Falsification of an *official document* related to or affecting employment.”²³

20. Accordingly, the Department did not show, by a preponderance of the evidence, that Grievant violated RULE 1120-10-.06(11). At best, the Department showed that Grievant, who admittedly had dental work scheduled, whose illness wasn’t contested, and who had already submitted to her supervisor the “sick leave” request form (for 3.5 hours of “sick leave”), supplied an altered “dentist

²² No definition of “*official document relating to or affecting employment*” is given under the definitions section of TENN. COMP. R. & REGS. Ch. 1120-01-.01, *et seq.* TENNESSEE DEPARTMENT OF HUMAN RESOURCES (MAY 1999, REVISED). Nor does a review of Tennessee case law, or other jurisdictions’ case law, provide a definition for such an “official document” contemplated by TENN. COMP. R. & REGS. Ch. 1120-01-.01, *et seq.* Information supplied to the State by its employees in compliance with a statute, rule, or regulation are clearly “official documents.” State employment applications, payroll forms, insurance forms, and withholding forms which all state employees are required to truthfully and accurately complete are clearly “official documents” related to or affecting employment. Leave request forms, time forms, travel reimbursement forms, and other information required for the accurate calculation of salaries, over-time pay, compensatory time, and reimbursement are applicable to all State employees and are clearly “official documents relating to or affecting employment.” State employees’ continuing education records which are placed in state employees’ personnel files are “official documents relating to or affecting employment.” Reports which employees are required to supply as part of their job duties for the state are clearly such “official documents.” Performance evaluations kept as a part of a State employee’s permanent personnel file fit into the category of such “official documents”. “Official documents relating to or affecting employment” seem to having the following in common: they apply to all employees within the same department or division, and/or all employees within a particular job description; they are required by state or federal statute(s), rule(s), or regulation(s); and they are routinely placed in state employees’ personnel files. No testimony was presented that the “dental excuse” presented by Grievant was an “official document” contemplated by Rule 1120-01-.01(11). The Department did not enter Grievant’s personnel file into evidence. There was no evidence or testimony which supported the “dental excuse” had been placed into Grievant’s personnel file. The “dental excuse” was not information which was uniformly required for state employees by a state or federal statute, departmental rule, or departmental regulation. The Department offered no proof that the “dental excuse” was a document which was kept in the ordinary course of the State’s business. Rather, the Department conceded that Grievant was the *only* employee who was required to supply such “excuses”. Accordingly, the Department did not offer any proof that the “dental excuse” at issue is actually an “official document related to or affecting employment.”

²³ Assuming, for argument’s sake, that Grievant’s altered “dental excuse” actually did violate RULE 1120-10-.06(11), when the Department conceded that Grievant had already legitimately submitted the sick leave request for a dentist visit, that she had available sick leave, and when the Department did not dispute that Grievant became ill on May 10, 2010, termination would be overly harsh and would not be appropriate, progressive discipline. Grievant was *already* being terminated in a RIF. Grievant’s supervisor went beyond what would be the harshest discipline which could occur (termination), and deprived Grievant of a severance package and re-hire status.

excuse". The "excuse" was not required by a statute, rule, or regulation, and was not a standard or uniform requirement within Grievant's office. However, despite the fact that submitting the altered excuse was not the smartest thing the Grievant had probably ever done, the evidence does not support that Grievant's ill-advised submission of the altered "dentist excuse" rises to the level of violating RULE 1120-10-.06(11). Because there is no violation, no discipline is required.

Termination "for the Good of the Service"

21. The Department also contends that Grievant must be terminated "for the good of the service" as outlined in T.C.A. §8-30-326. RULE 1120-10-.06(24), TENNESSEE DEPARTMENT OF HUMAN RESOURCES (MAY 1999, REVISED).

22. T.C.A. §8-30-326 (a) provides as follows:

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.

23. T.C.A. §8-30-326(b) requires:

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.* (Emphasis added.)

24. "For the good of the service" may, in proper cases, justify or require discharge of public employees when their efficiency or usefulness in their positions has been seriously impaired. *Reece v. Tennessee Civil Service Commission*, 699 S.W. 2d 808, 813 (Tenn. Ct. App. 1985). The Department did not show, during the hearing, that Grievant's efficiency, effectiveness, or

usefulness in her position as a secretary had been seriously impaired by giving Mr. Brown the May 10, 2020 “dental excuse.” There was no showing that the Department received adverse publicity due to the “dental excuse” incident, nor was there any showing that it prevented Grievant from performing her secretarial duties.

25. Neither Mr. Brown’s “Recommendation for Termination” nor the Commissioner’s termination letter state in detail how the service or the State will benefit from Grievant’s termination. For this reason, the Department does not comply with the requirements of T.C.A. §8-30-326(b) in giving notice of terminating Grievant “for the good of the service.”

26. Because the Department has not complied with the notice requirements of T.C.A. §8-30-326(b), the Department cannot fulfill the criteria to terminate Grievant “for the good of the service.”

27. Accordingly, the Department cannot meet its burden of proof that Grievant should be terminated “for the good of the service. This charge must be dismissed.

**Refusal to Accept a Reasonable and Proper Assignment
from an Authorized Supervisor (insubordination)**

28. The Commissioner’s termination letter to Grievant also charges Grievant with violation of RULE 1120-10-.06(18), TENNESSEE DEPARTMENT OF HUMAN RESOURCES (MAY 1999, REVISED) – “Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination).”

29. In order for Grievant to violate RULE 1120-10-.06(18) and commit “insubordination”, it was first necessary for Grievant to have received a reasonable and proper assignment from Mr. Brown which was the basis for the discipline (termination) which is at issue in this case. Throughout the hearing, Mr. Brown elaborated on past acts of “insubordination” by Grievant. However, Grievant had already received discipline for her previous acts.

30. A civil service employee cannot be punished twice for the same conduct.

Cope v. Tennessee Civil Service Commission, 2009 WL 1635140 *6 (Tenn. Ct. App. 2009), *Perm. to Appeal Denied* (Tenn. 2010).

31. The Commissioner’s June 25, 2010 termination letter to Grievant states, in relevant part:

You submitted false and misleading information to account for your absence from work the afternoon of May 10, 2010. Your deliberate action directly contravened your supervisor’s directions given in the October 6, 2009 memo.

32. The “directions” set forth in Mr. Brown’s October 6, 2009 memo instructed Grievant as follows:

[Y]ou are now required to provide a valid doctor’s statement upon your return to work from any absence for which sick leave will be requested.

33. The question which must then be asked is whether or not Mr. Brown’s requiring Grievant to present a “valid doctor’s excuse” for *any* sick leave taken constitutes “a reasonable and proper assignment” from a supervisor.

34. Mr. Brown imposed a “doctor’s excuse” requirement on Grievant that he did not require of any other employee under his supervision. Mr. Brown

admitted that Grievant used her sick leave *when she was sick or her child was sick*. Mr. Brown did not allege that Grievant used sick leave when she wasn't sick. Mr. Brown's stated issue was that he believed Grievant used "excessive sick leave" for herself and her small daughter. Mr. Brown required such "doctor's excuses" for *any* sick leave time that Grievant took. He *forced* Grievant to go to a doctor for an office visit and to incur the expenses of going to the doctor or taking her child to the doctor (travel expenses, co-pay, etc.) even if the illness was a virus or "cold" which could be treated at home with rest and over-the-counter medications. Mr. Brown placed this burden on Grievant, and did not require other employees to visit a physician and supply a physician's excuse for any illness. Mr. Brown did not impose the "doctor's excuse" requirement for a definite length of time—it was in effect indefinitely.

35. When considering all the circumstances and Mr. Brown's distinctly different treatment of Grievant from the other employees, Mr. Brown's "directives" to Grievant *always* to see a doctor for an office visit and *always* to submit a doctor's excuse for any sick leave taken, the evidence preponderates that such "directives" cannot be considered "a reasonable and proper assignment".

36. Grievant did not commit "insubordination" by submitting the "dentist excuse" when Mr. Brown's "directives" were neither reasonable nor proper.

37. Secondly, while Grievant's submission of the altered "dentist excuse" was not the brightest thing Grievant has probably ever done, there was no proof that submitting the altered "dentist excuse" was willful refusal to follow orders such that it rose to the level of "insubordination."

39. Rule 1120-60.12 (1) TENNESSEE DEPARTMENT OF HUMAN RESOURCES (MAY 1999, REVISED) states that an eligible employee may take sick leave for any of the following reasons: personal illness, disability due to an accident, exposure to contagious diseases, medical and dental appointments, illness or death in the immediate family (or for others with a similar relationship), maternity, and adoption.

40. While a supervisor can require “additional documentation” if there is “substantial evidence of sick leave abuse by the employee”, Mr. Brown did not allege that Grievant abused her sick leave by taking time off when she or her daughter weren’t sick. Rather, Mr. Brown stated that Grievant took too much sick leave (and annual leave for illness) for herself or her small child.

41. The Department failed to prove, by a preponderance of the evidence that Grievant refused to accept a reasonable and proper assignment from Mr. Brown.

42. Accordingly, the “insubordination” charge arising from submitting the “dental excuse” shall be dismissed.

Interference with the Ability of Management to Manage

43. Lastly, the Department charges Grievant with violation of RULE 1120-10-.06(12) - “Interference with the ability of management to manage.” RULE 1120-10-.06(12), TENNESSEE DEPARTMENT OF HUMAN RESOURCES (MAY 1999, REVISED).

44. Other than the conclusory statements contained in Mr. Brown’s recommendation for termination and the Commissioner’s termination letter, no proof was offered that Grievant’s submission of the May 10, 2010 “dental excuse”

interfered with Mr. Brown's ability to manage the West Tennessee Licensure Office. There was no allegation that "the excuse" hampered Mr. Brown from being able to perform his job duties. No proof was offered during the hearing to support the charge of "Interference with the ability of management to manage."

45. Offering conclusory statements without factual support will not fulfill the Department's burden of proof to actually show, by a preponderance of the evidence, that Grievant's "dental excuse" interfered with the ability of management to manage.

46. Accordingly, the charged violation of RULE 1120-10-.06(12) must fail, and must be dismissed.

Discipline

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

49. Tennessee's Civil Service statutes and rules incorporate the doctrine of progressive discipline. Accordingly, State supervisors are expected to administer discipline beginning at the lowest appropriate step. *Kelly v. Tennessee Civil Service Commission*, 1999WL 1072566 (Tenn. Ct. App. 1999). Further, at least one court, in expressing approval of the progressive discipline system, has

stated that the legislative mandate for progressive discipline should be “scrupulously followed.” *Berning v. State of Tennessee Department of Correction*, 996 S.W. 2d 828, 830 (Tenn. Ct. App. 1999), *Perm. to appeal denied* (Tenn. 1999).

50. T.C.A. §8-30-330 sets forth the State’s civil service progressive discipline system as follows:

(a) The supervisor is responsible for maintaining the proper performance level, conduct, and discipline of the employees under the supervisor’s supervision. When corrective action is necessary, the supervisor must administer disciplinary action beginning at the lowest appropriate step for each area of misconduct.

(b) Any written warning or written follow-up to an oral warning which has been issued to an employee shall be automatically expunged from the employee’s personnel file after a period of two (2) years; provided, that the employee has had no further disciplinary actions with respect to the same area of performance, conduct, and discipline.

(c) When corrective action is necessary, the supervisor must administer disciplinary action beginning at the step appropriate to the infraction or performance. Subsequent infractions may result in more severe discipline in accordance with subsection (a).

51. An employee’s prior conduct, both good and bad, along with his entire work history, can be considered when determining what the appropriate disciplinary action should be. *Kelly v. Tennessee Civil Service Commission*, 1999 WL 1072566 (Tenn. Ct. App. 1999).

52. An additional consideration for determining the appropriateness of the discipline to be imposed is whether the punishment imposed upon the Grievant is different than discipline used with other employees who have engaged in the same conduct. *Gross v. Gillless*, 26 S.W.3d 488, 495 (Tenn. Ct. App. 1999), *Perm. To Appeal Denied* (Tenn. 2000).

53. The Court in *Berning v. Tennessee State Department of Correction* notes that the “key word in the statute [T.C.A. §8-30-330] is *appropriate*.” *Berning v. Tennessee State Department of Correction*, 996 S.W.2d 828, 830 (Tenn. Ct. App. 1999), *Perm. to appeal denied* (Tenn. 1999). “The language of these provisions does not mandate application of discipline in a routine fashion without regard to the nature or severity of the behavior it is intended to address. The supervisor has discretion to determine what punishment fits the offense.” *Id.* at 830, *quoting the Chancellor’s order with approval*.

54. RULE 1120-10.06, of the RULES OF THE TENNESSEE DEPARTMENT OF PERSONNEL lists twenty-four (24) examples of disciplinary offenses. For due process reasons, the only offenses which could be considered for purposes of this matter were the four charged offenses which were set forth in Mr. Brown’s “Recommendation for Termination” and the Commissioner’s “Termination Letter.” Accordingly, no lesser offenses were considered with regard to the altered “dentist excuse.”

55. The Department did not meet its burden of proof, by a preponderance of the evidence, in showing that Grievant violated (1) RULE 1120-10-.06(12) – Interference with the ability of Management to Manage; or (2) RULE 1120-10-.06(18), Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination). Nor did the Department show, by a preponderance of the evidence, that Grievant’s alleged acts rendered her so ineffective in her administrative assistant/secretarial position that she must be terminated “for the good of the service” pursuant to RULE 1120-10-.06(24). Finally, the Department did not show, by a preponderance of the evidence, that

Grievant violated RULE 1120-10-.06(11), TENNESSEE DEPARTMENT OF HUMAN RESOURCES (MAY 1999, REVISED) - "Falsification of an *official document* relating to or affecting employment".

Accordingly, because the Department did not show, by a preponderance of the evidence, that Grievant committed the four disciplinary offenses as charged, discipline is not appropriate, and Grievant's termination is SET ASIDE. Grievant is reinstated to the State service status she enjoyed on May 10, 2010.²⁴ Grievant cannot be reinstated to her job at the West Tennessee Licensure office due to the 2010 reduction in force (RIF) which was scheduled to occur for Grievant's position and other State positions in 2010. However, Grievant shall receive the severance package to which she would have been entitled had she remained in her position until the State reduction in force (RIF) occurred and shall also receive the "re-hire status" she would have had at the time of the RIF if the "dental excuse" incident and subsequent termination action had not occurred.

It is so ordered.

Entered and effective this 28th day of July, 2011.



Thomas G. Stovall, Director
Administrative Procedures Division

²⁴ Despite Grievant's termination being reversed and set aside, it has limited practical effect for Grievant, who had already been notified by the State that she was subject to a Reduction in Force (RIF) which was taking place state-wide in many different departments during 2010, due to the State's budget. The Department's termination of Grievant meant, pragmatically, that Grievant did not receive the severance package that she would have received if the Department had not fired Grievant two weeks prior to the effective date for the scheduled RIF. Additionally, the Department's termination of the Grievant meant that Grievant was/is not eligible for re-hire by the State if the State began hiring again or new positions open up with the State. Had Grievant simply been "laid off" in the scheduled RIF, she would be eligible for re-hire by the State when positions became open.

