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TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES, Department/ Petitioner, v. GWENDOLYN FISHER, Grievant/ Respondent

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

IN THE MATTER OF:	)	
	)	
TENNESSEE DEPARTMENT OF	)	
CHILDREN'S SERVICES,	)	
Department/Petitioner,	)	
v.	)	**Docket No.: 26.43-103872J**
	)	
GWENDOLYN FISHER,	)	
Grievant/Respondent.	)	

INITIAL ORDER

This contested administrative case was heard in Nashville, Tennessee, on December 4, 2009, before J. Randall LaFevor, Administrative Judge assigned by the Secretary of State, and sitting for the Tennessee Civil Service Commission. Ms. Julie Randall Pablo, Assistant General Counsel, represented the Department of Children's Services ("the Department" or "DCS"). The Grievant, Gwendolyn Fisher, appeared *pro se*. At the conclusion of the hearing, the matter was taken under advisement, pending submission of the parties' Proposed Findings of Fact and Conclusions of Law. On February 8, 2010, the final post-hearing pleading was filed, and the matter was declared ready for consideration.

This fifth-step disciplinary hearing was convened, at the Grievant's request, to consider her appeal from the disciplinary sanction imposed by the Commissioner of Children's Services. The Commissioner determined that the Grievant was guilty of inefficiency, incompetence, negligence and insubordination in the performance of her assigned duties, and terminated her employment with the State. The Grievant appealed that decision, leading to the instant hearing. Upon consideration of all the evidence, arguments of counsel, and the entire record in this matter, it is determined that the disciplinary action taken in this case was appropriate, and should be upheld. This determination is based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACTS

1. The Department of Children's Services is the State's public child welfare agency. It maintains offices throughout the state. The Grievant worked in the Department's Davidson County office, as a Human Resources Technician, from November 2002 until May 2009. The Human Resources Division provides personnel support to the Department's employees, handling all of the paperwork that is necessary to initiate their enrollment in, and maintain their eligibility for, the various benefit programs available to State employees.

2. As a Human Resources Technician, her duties included: New employee orientation[1] and initial benefit programs enrollment, as well as receiving, processing, filing and forwarding documents related to workers' compensation, the Family & Medical Leave Act, the Sick Leave Bank, deferred compensation and the employee's insurance benefits programs (including both initial enrollment and subsequent changes.)

3. Beginning early in her tenure with the Department, the Grievant was identified as a very disorganized employee. Her supervisor testified that the Grievant was constantly losing paperwork, her desk and cubicle were in continuous disarray, and papers that should have been filed were piled in stacks on the floor. From 2005 through the rest of her time with the Department, her supervisors frequently directed her to organize and clean up her work area, but she consistently failed to do so. The Grievant's persistent failure to organize her files and work station, failure to properly process paperwork, and numerous other workplace deficiencies, resulted in an oral warning in 2005, written warnings in 2006 and 2007, and a seven (7) day suspension in 2008.

4. In January 2009, in advance of an accreditation file review, the Grievant's supervisor specifically directed her to organize her files and office. In February, when the review began, the Grievant had not complied with her supervisor's direct order. On February 6, 2009, she was given a deadline of February 17 to complete the task. Again,

[1] New employee orientation classes lasted for about 1 ½ days, and were conducted 2-3 times annually.

she failed to comply. And, finally, she failed to meet a deadline imposed by the Central Office for completing the same task by March 18.

5. On April 3, 2009, due to ongoing performance issues and the condition of her work station, her supervisor was directed to check the Grievant's desk for paperwork that might have been neglected by the Grievant. That work station inspection, and an audit performed by the Department's Central Office, discovered the following deficiencies: [2]

5a. Forms related to Workers' Compensation claims for two individuals who were injured in January 2009 were found in a file folder. Neither had been processed. A third employee's unprocessed Workers' Compensation forms were also found in the folder, attached to numerous e-mails urging the Grievant to forward the forms to the appropriate individuals. She had failed to comply.

5b. A name-change form, submitted to the Grievant on November 21, 2008, with attached new Social Security card, was found in her desk drawer, unprocessed.

5c. An application for Optional Term Life Insurance for a new employee, dated August 18, 2008 (and signed by the Grievant on August 19, 2008) was found in her desk, still not processed. An application for increased Universal Life Coverage, dated October 27, 2008, had not been processed. Because both of these applications had missed the annual enrollment deadline, they could not re-apply until the 2009 annual enrollment, and would not be effective until January 2010.

5d. Original retirement plan enrollment forms for employees hired in April 2008 and December 2008 were still in the Grievant's work station, unprocessed, during the audit of her files in April of 2009.

5e. Two forms submitted in August and September 2008, by employees who were seeking to enroll in or change their contributions to the State's 401(k) plan, were still in her desk, and had not been forwarded to the plan

[2] This list of deficiencies is taken from the Commissioner's Termination letter dated May 5, 2009. At the outset of the hearing, the Grievant stipulated that the list of deficiencies contained in that letter was accurate, and that her purpose in appealing the Commissioner's action was not to challenge the factual basis for the decision, but simply to advance her argument that the sanction imposed was too harsh.

administrator. That failure denied the employees the State's 401(k) matching funds.

5f. A folder was discovered that contained new State employee identification cards for employees hired as far back as 2003, which were never distributed to those employees.

5g. Family & Medical Leave documents dating back to December 2008 and January 2009, that had not been processed, were found in her work station.

5h. Additional documents found in her desk included a "Verification of Employment" form that she had failed to respond to, or otherwise process, and a "Court Order" that was still in its original envelope, unopened.

6. The Grievant admitted that she was not well-organized, that she had trouble keeping up with the workload, and that she mistakenly believed that she had already processed many of the documents that were found in her work station. Other employees performing similar duties did not display the same level of disorganization or neglect of duty that was evident in the Grievant's work station. Like the others in her Division, the Grievant was provided with adequate training in the areas of her responsibility.

7. Following a review by the Commissioner, the Commissioner found that the Grievant was inefficient, ineffective and negligent in the performance of her duties, and insubordinate by refusing to follow direct orders by her supervisor, and terminated the Grievant's employment with the State. The Grievant filed an appeal of that decision, resulting in the scheduling of this hearing.

CONCLUSIONS OF LAW and ANALYSIS

1. The Department of Children's Services is the Petitioner in this matter, the party that initiated the proceedings, and as such, it is assigned the "burden of proof." The burden of proof is the duty imposed upon a party to establish, by a preponderance of the evidence, that an allegation is true, or that an issue should be resolved in favor of that party. A "preponderance of the evidence" means the "greater weight of the evidence," or "the more probable conclusion, based on the evidence presented." The burden of proof is

generally assigned to the party seeking to change the present state of affairs with regard to any issue. Rule 1360-4-1-.02(7), TENN. COMP. R. & REGS. In the instant case, that means that the Department of Children's Services must prove, by a preponderance of the evidence, that the Grievant was insubordinate, inefficient, incompetent, or negligent in the performance of her duties, as set out in State statutes, and Departmental Rules, Regulations and Policies.

2. Thus, the issues presented for consideration in this case are (1) whether the Petitioner has proven, by a preponderance of the evidence, that the Grievant was insubordinate, inefficient, incompetent or negligent in the performance of her duties, as alleged; and (2) if so, whether the sanction imposed by the Commissioner was appropriate. With respect to both issues, the Department has met its burden of proof.

3. Rule 1120-10-.06, TENN. COMP. R. & REGS, provides as follows:

> **EXAMPLES OF DISCIPLINARY OFFENSES**. The following causes are examples of those considered for disciplinary action and should not be considered the only causes of action.
> (1) Inefficiency and incompetence in the performance of duties
> (2) Negligence in the performance of duties
> * * *
> (18) Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination)

The terms "inefficiency," "incompetence," "negligence," and "insubordination" are used in this Rule as they are in common daily usage. Webster's New World Dictionary of the American Language equates "inefficiency" and "incompetence" with "ineffectiveness" and "failing to meet requirements." It defines "negligence" as the "habitual failure to do the required thing; carelessness [or] indifference." And, "insubordinate" means "not submitting to authority; disobedient."

4. First, it is concluded that the Grievant was insubordinate due to her persistent "refusal to accept a reasonable and proper assignment" from her supervisor. Nearly from the day she was hired, her supervisors continuously admonished her to handle her work in a timely manner, and to keep her work area organized. She refused to organize her files, her desk or her work station, resulting in her loss of paperwork, and her failure to

process various documents that were important to the employees she was supposed to be supporting. Even after she received oral and written warnings and a seven (7) day suspension, she still persisted in her failure to organize her work station. In the months immediately preceding her termination, she rejected several deadlines for compliance that were imposed by her supervisor. Her total rejection of the reasonable and proper orders from her supervisor and superiors in the Department clearly constitutes insubordination, and subjects the Grievant to disciplinary action, as provided in Rule 1120-10-.06(18), TENN. COMP. R. & REGS.

5. Simply put, the Grievant's job as a Human Resources Technician was to handle the paperwork necessary to insure that the Department's employees were enrolled in and participated in various State employee benefit programs to which they were entitled. Her negligence resulted in the loss of paperwork related to those duties, and her failure to do her job efficiently and competently resulted in the loss or delay of program benefits by numerous Departmental employees. Every area of her responsibility was adversely affected by her lack of organization, and her incompetence, inefficiency and negligence. When her work station was audited, reviewers found unprocessed documents related to new employees ID cards, retirement benefits, enrollment and change forms for insurance and 401(k) plans, name changes, Workers' Compensation claims and Family & Medical Leave authorizations. It would be difficult to find a more compelling case of employee negligence, incompetence and inefficiency. It is therefore concluded that the Department has proved is allegations with respect to Rules 1120-10-.06(1)&(2), TENN. COMP. R. & REGS. Disciplinary action was clearly warranted.

6. Having concluded that the Department established its factual allegations against the Grievant, the question becomes, "What is the proper disciplinary sanction for such misconduct?" The law provides that: "A career employee may be warned, suspended, demoted or dismissed by his appointing authority whenever just or legal cause exists. The degree and kind of action is at the discretion of the appointing authority. . ." Rule 1120-10-.02, TENN. COMP. R. & REGS. Although the law prescribes implementation of progressive discipline for State employees, it also provides that disciplinary action must be administered at the step which is <u>most appropriate</u> for the misconduct. (*See*, TENN.

CODE ANN., Sec. 8-30-330; and Rule 1120-10-.07, TENN. COMP. R. & REGS.) As the courts have recognized in other cases dealing with these provisions,

> " . . . the key word in the statute is 'appropriate.' . . . (T)he 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."
> *Berning v. State*, 996 S.W.2d 828, 830 (Tenn. App. 1999).

Clearly, some cases are so egregious, given the harmful impact of the employee's actions or omissions, that they support a decision to skip over lesser sanctions, like additional oral and written warnings, and suspensions, in favor of more severe sanctions, up to and including separation from state employment.

7. When the Commissioner considered the issue of punishment in this case, she had a wide range of options at her disposal. *See*, Rule 1120-10-.07, TENN. COMP. R. & REGS. The seriousness of the Grievant's failure to do her job; the impact that such failure had on the Department, the mission of her Division and the employees it sought to serve; the Department's attempts to correct the Grievant's conduct through prior disciplinary measures; and her steadfast refusal to accept the supervision and direction of her superiors; all weigh heavily in favor of a severe disciplinary sanction. Upon due consideration of all of these factors, it is concluded that the Commissioner's decision to terminate the Grievant's State employment was appropriate.

Accordingly, based on these findings, conclusions and analysis, and upon full consideration of the pleadings, hearing testimony and other evidence, and the entire record in this contested administrative case, it is concluded that the Tennessee Department of Children's Services has met its burden of proof, and has established by a preponderance of the evidence that the Grievant, Gwendolyn Fisher, acted with inefficiency, incompetence and negligence in the performance of her duties, and that she

refused to accept reasonable and proper assignments from her supervisors, as alleged, and that termination of her State employment, is the appropriate disciplinary sanction for that conduct.

IT IS THEREFORE ORDERED that the Commissioner's sanction of termination of the Grievant's State employment is UPHELD, and the Grievant's Fifth Step Civil Service Appeal of the Commissioner's decision is hereby DISMISSED.

Entered and effective this 11th day of February, 2010.

J. Randall LaFevor, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 11th day of February, 2010.

Thomas G. Stovall, Director
Administrative Procedures Division