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TENNESSEE DEPARTMENT OF HUMAN SERVICES, Petitioner, v. VERNON HOOKS, Grievant.

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

In the matter of:	)	
	)	
TENNESSEE DEPARTMENT OF	)	
HUMAN SERVICES,	)	
Petitioner,	)	
	)	
v.	)	**Docket No. 26.11-112225J**
	)	
VERNON HOOKS,	)	
Grievant.	)	

ORDER DENYING DEPARTMENT OF HUMAN SERVICES MOTION FOR SUMMARY JUDGMENT IN PART AND GRANTING SUMMARY JUDGMENT IN PART

Pending before the undersigned is Petitioner Tennessee Department of Human Services' (DHS's) Motion for Summary Judgment.[1]

This matter came on to be heard at oral argument on November 16, 2011. Ms. Nathalie Essex, Assistant General Counsel for DHS, represented the Department or the State. Ms. Michelle Owens, Attorney, of the Nashville Bar, represented the Grievant.

Petitioner DHS seeks an order of Summary Judgment to dismiss Grievant's civil service appeal for two reasons. First, DHS asserts that Grievant's failure to be promoted to the position of Regional Supervisor is "non-grievable" pursuant to the TENNESSEE RULES OF THE DEPARTMENT OF HUMAN RESOURCES, RULE 1120-11-.07(5), and thus cannot be addressed by a civil service contested case hearing or appeal. As its second basis for a grant of summary judgment, Petitioner DHS also seeks to have this matter dismissed for failure to state a claim upon which relief can be granted.

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[1] Grievant Hooks, by and through counsel, filed a "Response in Opposition" to the Motion for Summary Judgment. Thereafter, Petitioner DHS filed a "Reply to the Response".

Preliminary Discussion of the Standard for Summary Judgment

Petitioner seeks a summary judgment order in this matter dismissing, as a matter of law, Grievant Hooks' civil service appeal on the basis that this civil service appeal is "non-grievable".

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." TENN. R. CIV. PROC. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn.1993). *See also* T.C.A. §20-16-101.[2]

The party seeking summary judgment has the burden of persuading the court that its motion satisfies these requirements. *See Byrd v. Hall,* 847 S.W.2d at 211; *Downen v. Allstate Ins. Co.,* 811 S.W.2d 523, 524 (Tenn.1991). Further, when considering a summary judgment motion, the court must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor. *Guy v. Mutual of Omaha Ins. Co.*, 79 S.W.3d at 534; *Byrd v. Hall,* 847 S.W.2d at 215.

Summary judgment should therefore be granted only when the facts and conclusions to be drawn from the facts permit a reasonable person to reach but one conclusion. *Guy v. Mutual of Omaha Ins. Co.,* 79 S.W.3d 528, 534 (Tenn.2002).

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[2] In July, 2011, the Tennessee legislature abrogated or superseded the standard for summary judgment set forth by the Tennessee Supreme Court in *Hannan v. Alltel Pub. Co.*, 270 S.W. 3d 1 (Tenn. 2008), by enacting T.C.A. §20-16-101. (In *Hannan,* the Court announced a new burden-shifting analysis for a trial court to employ when faced with a motion for summary judgment. The *Hannan* court announced that "[i]t is not enough for the moving party to challenge the nonmoving party to 'put up or shut up' or even to cast doubt on a party's ability to prove an element at trial." *Hannan,* 270 S.W.3d at 8.) The Tennessee legislature essentially changed the standard for summary judgment back to the old pre-*Hannan* standard.

No material facts are in dispute and the legal question can be disposed of as a matter of law only if the evidence and the inferences reasonably drawn from the evidence would permit a reasonable person to reach only one conclusion *General Motors Acceptance Corp.*, 118 S.W.3d 700 (Tenn. Ct. App. 2003.) *Godfrey v. Ruiz,* 90 S.W.3d 692, 695 (Tenn.2002); *Seavers v. Methodist Med. Ctr. of Oak Ridge,* 9 S.W.3d 86, 91 (Tenn.1999). At the summary judgment phase, "it is not the role of a trial court to weigh the evidence or substitute its judgment for that of the trier of fact." *Byrd v. Hall,* 847 S.W.2d at 211.

Statement of Material Facts Not in Dispute[3]

1. Grievant Hooks has been employed by the Department of Human Services since 1995.

2. Grievant has been employed as a Field Supervisor for the Division of Rehabilitation Services since October 1, 2001.

3. The position of Regional Supervisor for DHS's Division of Rehabilitation Services became vacant in 2009.

3. Both Grievant and Ms. Diedra Sawyer sought promotion to the position of DHS Regional Supervisor for Region 5.

4. The Tennessee Department of Human Resources certified a promotional list for the Region 5 Regional Supervisor position on September 15, 2010. The promotional list included four potential candidates qualifying for the Regional Supervisor position.

[3] Grievant points out that DHS did not comply with the format mandated by Tenn. R. Civ. Proc. 56.03 in DHS's "Statement of Undisputed Facts". It would be helpful if DHS's "Statement of Undisputed Facts" were in the correct form. However, Grievant did not object to the form of DHS's "Statement of Undisputed Facts" but merely recited such undisputed facts in his Response. Any objection to DHS's failure to follow 56.03 is deemed WAIVED.

5. Of the four candidates listed on the promotional list, only Grievant and Ms. Sawyer wished to interview for the Regional Supervisor position, which oversaw the Region containing Davidson and Robertson counties.

6. Ms. Sawyer was promoted to Regional Supervisor and officially assumed her duties on October 3, 2010.

7. On or about October 12, 2010, Grievant began contacting DHS's Division of Human Resources to complain that Ms. Sawyer was improperly promoted.

8. On November 15, 2010, Grievant Hooks requested a "third-level" civil service grievance regarding DHS's selection of Ms. Sawyer to fill the Regional Supervisor position. Grievant Hooks asserted that Ms. Sawyer lacked the requisite work and educational experience for the position, and further asserted that Ms. Sawyer had received the promotion to Regional Supervisor in violation of Civil Service guidelines.

9. DHS responded to the "level three" grievance by averring that Ms. Sawyer was promoted in accordance with Civil Service guidelines, such that Grievant Hooks' non-selection for promotion was not a "grievable" matter pursuant to RULE 1120-11-.08., TENNESSEE DEPARTMENT OF HUMAN RESOURCES.

10. RULE 1120-02-.12(4), TENNESSEE DEPARTMENT OF HUMAN RESOURCES, provides that "Interim Appointments" may not last more than one year, must be made from a certified register, and further states that all possible appointees must be advised that the "Interim Appointment" could become permanent.

11. Ms. Diedra Sawyer was working in the position as Quality Assurance Program Evaluator when she was appointed in Interim Regional Supervisor for Region 5, Department of Human Services in August 2009.

12. Ms. Sawyer was not formally interviewed prior to assuming the duties of the Regional Supervisor on August 1, 2009.

13. The Department of Human Services did not appoint Ms. Sawyer to the Interim Regional Supervisor position from a certified promotional list of eligibles.

14. Ms. Sawyer began her appointment as Interim Regional Supervisor on August 1, 2009.

15. DHS's Director of Field Operations, Connie Phillips, announced Ms. Sawyer's promotion on October 12, 2010 by e-mail. In the e-mail, Ms. Phillips stated, "...and for the past year, she [Ms. Sawyer] has served as Interim Regional Supervisor for Region 5."

16. Ms. Sawyer was not entitled to be assigned the duties of a higher level classification as Interim Regional Supervisor for more than one year pursuant to RULE 1120-04-.15. Ms. Sawyer's eligibility for the interim assignment expired on August 1, 2010.[4]

17. Ms. Sawyer did not return to her previous role as a Quality Assurance Program Evaluator on July 31, 2010, when her eligibility to act as Interim Regional Supervisor expired.

18. Ms. Sawyer received a pay increase effective October 31, 2009 on her 91st day as Interim Regional Supervisor. Ms. Sawyer's eligibility for that salary adjustment expired on August 1, 2010.

19. Ms Sawyer's pay was not decreased on August 1, 2010.

20. Ms. Sawyer did not receive any additional pay increase when she was promoted to the position of Regional Supervisor in October, 2010.

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[4] The Department concedes that Ms. Sawyer "served sixty days beyond her allotted time."

21. Ms. Sawyer did not continue to perform the duties of her previous position, Quality Assurance Program Evaluator after being appointed Interim Regional Supervisor. The Quality Assurance Program Evaluator position remained vacant.

22. Ms. Sawyer's duties did not change when she was appointed Regional Supervisor from her Interim role as Regional Supervisor.

23. The highest score Ms. Sawyer would have gotten on her performance evaluation (due to departmental production goals not being met), if an evaluation had been performed on Ms. Sawyer in 2010, would have been a score of "3". No evaluation was performed on Ms. Sawyer during the year 2010.

24. Ms. Sawyer received a performance evaluation score of "5" or "excellent" in 2007 while in the position of Quality Assurance Program Evaluator.

25. Grievant received a score of a "3" or "good" on his 2010 performance evaluation *which was completed by Interim Regional Supervisor Sawyer in February 2010.* Ms. Sawyer stated that "everyone" got a "3" because the Departmental Goals were not met.

26. Because Ms. Sawyer did not receive an evaluation in 2010, and did not receive the evaluation score of "3" uniformly given to DHS employees in during 2010, Ms. Sawyer's past performance evaluations had a higher average on the promotional list of eligibles generated on September 15, 2010 by the Tennessee Department of Human Resources, than did Grievant Hooks.

ANALYSIS AND CONCLUSIONS OF LAW
REGARDING THE "GRIEVABILTY ISSUE"

1. The threshold questions which must be asked in determining whether or not summary judgment is appropriate in this matter are: (1) Are material facts in dispute? and (2) If no facts are in dispute, is this appeal "grievable"?

2. The facts listed above are not in dispute.[5]

3. The Department disingenuously argues that Ms. Sawyer was not actually appointed "Interim Regional Supervisor". Instead, the Department takes the position that Ms. Sawyer was simply working "out of class", and the term "Interim Director" was "casual reference" or "a working title".

4. However, when *Ms. Sawyer* referred to herself as the "Interim Director"; and when *DHS's Director of Field Operations, Connie Phillips*, referred to Ms. Sawyer serving as the "Interim Regional Supervisor" for "the past year" in the official e-mail announcing Ms. Sawyer's appointment as Regional Supervisor, the inferences reasonably drawn from the evidence would permit a reasonable person to reach only one conclusion: Ms. Sawyer was appointed "Interim Regional Supervisor".

3. The next question which must be asked is whether DHS followed the Statutes and Rules which govern such "interim" or "temporary" appointments and promotions.

4. RULE 1220-01-.01 (30), TENN. COMP. R. & REGS. CH. 1120-01, RULES OF TENNESSEE DEPARTMENT OF RESOURCES, (2009)[6], defines "Interim Appointment" as:

> The appointment of a person to a position in the career service for a period of one (1) year.

5. RULE 1220-01-.01 (67), TENN. COMP. R. & REGS. CH. 1120-01, RULES OF TENNESSEE DEPARTMENT OF RESOURCES, (2009), defines "Temporary Provisional Appointment" [7]as:

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[5] If any material facts are in dispute, or the inferences from such facts are in dispute, summary judgment is not appropriate in this case, and the same result would still be reached that summary judgment on the "grievability issue" is DENIED.
[6] The Tennessee Department of Human Resources Rules which were in effect during 2009 apply to this matter.
[7] See also T.C.A.§ 8-30-315.

The appointment of a person to a position in the career service, for a period not to exceed four (4) months, when there is an insufficient referred list or not established eligible list.

6. DHS maintains that Ms. Sawyer was simply "working out of her work classification" during the time she assumed the "Regional Supervisor" duties. Policy 91-033 (in effect during 2009 and 2010) governs "working out of class". It states, in pertinent part:

Employees Assigned Duties of a Higher Level Classification---

Chapter 492, Public Acts of 1991 provides that (1) "no career service employee shall be assigned to perform the majority of duties and responsibilities of a position in a higher level classification without the approval of the appointing authority" and (2) if so assigned, the duration cannot exceed 90 days without approval of the Commissioner of Personnel. When the assignment is approved for greater than 90 days, additional compensation shall be awarded subject to budgetary limitations.

The following is established as policy to comply with and define the procedure to enact the intent of Chapter 492. [...]

Policy: In order to assign a career service employee the duties of a higher level classification, approval for the initial 90 day period <u>must</u> be given by the appointing authority of the agency. The employee's immediate supervisor or higher level manager does not have the authority to increase the employee's level of duties and responsibilities without this approval. Nor does the individual employee have the authority to assume these responsibilities on his or her own without this approval.

In order to continue to assign an employee higher level duties and responsibilities beyond the initial 90 day period, the appointing authority <u>must</u> obtain approval from the Commissioner of Personnel...[.]

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In situations where the temporary assignment of higher level duties in excess of 90 days is approved by the Commissioner of Personnel, *the assignment will be limited to a period of 12 months from the time the appointing authority initially approves the assignment and it is put into effect at the agency level.*

***

Included [with a request to exceed 90 days] should be written

> documentation supporting the agency's specific need for the employee to temporarily perform the duties of a position of higher level classification and how the agency plans to eliminate the need for the temporary assignment in the future.[...]
>
> ***

(Emphasis added.)

7. The above policy was enacted to establish a policy and procedure based upon T.C.A. §8-30-224.

8. Similarly, RULE 1220-01-.01 (67) reiterates the law regarding "temporary appointments" which is set forth in T.C.A. §8-30-315, which states:

> (a) When an appointing authority desires to fill a vacancy in the career service, *and the commissioner cannot certify the required number of eligibles for such vacancy, because there is not appropriate list or because there is not a sufficient number of persons on appropriate lists who are willing to accept appointment, the commissioner may authorize the appointing authority to fill the vacancy by temporary appointment*....A temporary appointee shall hold a position only until an appropriate list has been established and the required certification can be made. *No temporary appointment shall hold a position for more than four (4) months. No temporary appointment shall be renewed, and no person shall receive more than one (1) temporary appointment in any twelve-month period. [....].*[8]

(Emphasis added.)

9. Rule 1120-02-.11 TENN. COMP. R. & REGS. CH. 1120-02, RULES OF TENNESSEE DEPARTMENT OF RESOURCES (2009) outlines the process for filling "career service" [civil service] positions. It states, in relevant part:

> (1) Career Service Positions. All career service positions are regular full-time positions. These positions may be filled on a regular full-time basis by persons who have been successful in a competitive process by being among the top available eligibles on a referred list or who have achieved career status in a classification and have the right to be reemployed or reappointed to that classification or to a related classification to which they could be reclassified without further examination or certification as determined by the Commissioner.

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[8] DHS supplied no document reflecting that the commissioner could not certify the required number of eligibles for such vacancy, because there was not an appropriate list or because there was not a sufficient number of persons on appropriate lists who were willing to accept appointment

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> Career service positions may be filled on a full-time temporary basis outside the competitive process by qualified persons as determined by the Commissioner *by temporary provisional appointment, emergency appointment, or interim appointment. Career service positions may also be filled on a part-time temporary basis outside the competitive process by a regular part-time appointment or on a temporary basis with a seasonal appointment.*

(Emphasis added.)

10. RULE 1120-03-.04 TENN. COMP. R. & REGS. CH. 1120-02, RULES OF TENNESSEE DEPARTMENT OF RESOURCES (2009) addresses the "use of classification of titles." It states that:

> No person shall be appointed to, or employed in, a position in state service under a position in state service under a title which has not been approved by the Commissioner. *This requirement does not preclude the use of working titles by employees in those positions where the use of working titles is helpful in the employee's performance of duties, authority, and responsibilities as long as such working titles are authorized by the employee's appointing authority.*(Emphasis added.)

11. Rule 1120-02-.12 (4) TENN. COMP. R. & REGS. CH. 1120-02, RULES OF TENNESSEE DEPARTMENT OF RESOURCES (2009), sets forth the guidelines for "Interim Appointments". It clearly states that an individual appointed to an interim appointment must meet the minimum qualifications for the job classification; if the interim appointment is made using a referred list, the employee must be within the "top five (5) or top three (eligibles) on a referred list, and the rules for contacting eligibles on the referred list are notified that the interim appointment could change to a regular appointment at a later time.

12. Applying the applicable law to the undisputed facts in this matter, it is clear that the Department of Human Services did not follow the required Tennessee Human Resources Rules and Regulations in its appointment of Ms. Sawyer to the

position she held during 2009 and 2010 whether it was as "interim supervisor", a "temporary appointment", or "working out of class."

Notably, as a matter of law, "working out of class" is *not* one of the categories listed pursuant to Rule 1120-02-.11 for filling career service positions by "qualified persons" on a full-time temporary basis outside the competitive process.

DHS did not follow the applicable rules and regulations for appointing Ms. Sawyer into an "interim position" or a "temporary appointment". Even if DHS's position that Ms. Sawyer was "working out of class" is accepted, DHS did not follow Policy 91-033 (in effect during 2009 and 2010) which governs the "working out of class" assignment which DHS contends Ms. Sawyer was given.

13. DHS concedes that Policy 91-033 was not followed, as Ms. Sawyer exceeded the time limit for "working out of class."

14. Having determined that DHS did not follow the applicable State of Tennessee Rules and Regulations in Ms. Sawyer's August 2009 to October 2010 appointment, DHS's argument that this matter is not a "grievable matter" must fail.

15. Pursuant to Tennessee Rules of the Department of Human Resources, Rule 1120-11-.07, non-selection for promotion when the appointment is not in compliance with the Rules of the Department of Human Resources of the Civil Service statutes *is* grievable.

16. Grievant Hooks' appeal *is* grievable.

Department of Human Services' Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted

1. Lastly, the Department of Human Services argues that Grievant Hooks' civil service appeal must be dismissed for failure to state a claim upon which relief can be granted.

2. The undersigned agrees.

3. Rule 12.02 (6) of the TENNESSEE RULES OF CIVIL PROCEDURE provides that a party may bring a "Motion to Dismiss" for failure to state a claim upon which relief can be granted.[9]

4. In order for Grievant Hooks appeal to succeed, he must show, by a preponderance of the evidence: (1) If the proper procedures had been followed, he *would* have been appointed as Regional Supervisor, Region 5, and (2) a remedy exists for DHS's failure to follow Human Resources Rules and Regulations.

4. Grievant Hooks cannot show that he *would* have been promoted rather than Ms. Sawyer. He may argue that he *should* have been chosen, but such an argument is speculative at best.

5. Civil Service Rules do not require that the "eligible" chosen from the civil service promotional list have the "highest score" or highest tally of "points". *See* T.C.A. §8-30-308(a). T.C.A. §8-30-308(a) simply requires:

> The commissioner [of human resources] shall establish and maintain such promotion lists and employment lists for the various classes of positions in the career service as the commissioner deems necessary or desirable to meet the needs of the service. [....]

6. T.C.A. §8-30-309 sets forth the process of selection from the employment list:

> (a)(1) Whenever an appointing authority proposes to fill a vacancy in the career service, such authority shall submit to the commissioner a statement showing the position to be filled, the duties thereof, the official station, and the necessary and desirable qualifications of the person to be appointed thereto, and shall request the commissioner to certify the names of persons eligible for appointment to such position. [...]
> (2) The commissioner shall thereupon certify to the appointing authority a list of eligibles which shall come from the registered established as a

[9] In this matter, the parties submitted affidavits, deposition transcripts, and other exhibits and filings for consideration. As such, DHS's motion to dismiss is treated as a motion for summary judgment.

> result of competitive examinations for that class of positions. A promotion list shall consist of three (3) available eligibles scoring the highest grades…listed in rank order of examination scores[….]
> (3) The appointing authority shall appoint, within twenty (20) work days after such names are certified, one (1) of those whose names are certified to fill the vacancy.

7. There is no mandate, either by Statute or by the Rules of the Tennessee Department of Human Resources, that the highest ranking person on the "eligible list" be the person selected for the open civil service position.

8. Because there is no requirement that the highest ranking person on the "eligible list" be selected for the civil service position, Grievant Hooks cannot show, with any certainty, or by a preponderance of the evidence, that he *would* have been selected to fill the Regional Supervisor position.

9. Accordingly, Grievant Hooks cannot show that *even if DHS had followed the proper procedure with Ms. Sawyer's temporary or interim appointment,* more likely than not, Grievant Hooks would have been selected for the Regional Supervisor (Region 5) civil service position.

9. Secondly, for the sake of argument, even if Grievant Hooks could show that he "should" or "would" have been chosen to fill the Regional Supervisor position rather than the person selected (Ms. Sawyer), he has no lawful remedy.

10. Grievant Hooks cites *Tusant v. City of Memphis*, 56 S.W. 3d 10, 18 (Tenn. Ct. App. 2001) as support that his "remedy" would be "back pay" or "being placed in a comparable position". A review of the *Tusant* case reveals that it is not analogous to the case before the undersigned.

11. In *Tusant,* police officers for the City of Memphis filed a petition for mandamus to require the City to promote them to certain civil service positions after they completed the "promotional process" and were eligible and qualified for civil

service promotions. The *Tusant* court dismissed the police officers' mandamus petition on the basis that the court could not order the extraordinary remedy of mandamus (promotion) when the police director had the discretion to promote after making determinations, evaluations, and judgments. See *Tusant v. City of Memphis*, 56 S.W. 3d 10, 18 (Tenn. Ct. App. 2001). The court noted that the petitioner police officers were simply "eligible to participate in the proposed promotion process." *Id.* at 18.

10. The court in *Gillispie v. City of Memphis* 2008 WL 2331027 (Tenn. Ct. App. 2008) (Not reported in S.W. 3d) provides guidance in the analysis of a civil service "failure to promote" case.[10] The *Gillispie* court notes that "in cases involving discretionary promotions, damages are not the appropriate remedy." *Id.* at *9.

11. The "normal remedy for systematic violation of civil service promotion procedures is not damages or back pay." *Id.* at *9, citing with approval, *Matter of Greco v. Dep't of Personnel of City of New York*, 226 A.D. 2d 105 (N.Y. App. Div. 1996).

12. The "normal remedy" for violation of civil service promotion procedures is "reconsideration for appointment or promotion <u>*after the defect in the process has been corrected.*</u>" Id. at 9, quoting *Matter of Greco v. Dep't of Personnel of City of New York*, 226 A.D. 2d 105 (N.Y. App. Div. 1996). (Emphasis added.)

13. In this case, if there were any relief to be had, it would simply be for DHS to go back and follow the "correct procedure" regarding Ms. Sawyer's temporary or interim appointment, and her subsequent "promotion" into the permanent civil service position. There is no guarantee, or even a probability, that if DHS had followed the

[10] While the *Gillispie* case is not a published case, the undersigned agrees with the analysis used and relies upon the *Gillispie* case for guidance. No other cases addressing the issue of available remedies in "civil service failure to promote" cases were found.

"correct civil service procedure", the outcome would have been different and Grievant would have been promoted into the Regional Supervisor position.

14. The state civil service selection process affords eligible employees the right to be considered for civil service position promotions. Grievant does not have a "legal right to "be promoted" under the applicable civil service statutes and rules. Rather, applicable civil service statutes and rules offer Grievant the right to be "considered" for the promotion.

14. Construing Grievant's recitation of the facts/civil service appeal in the light most favorable to Grievant, and taking all of Grievant's allegations of fact as true, Grievant does not have a civil service action in this matter for "failure to promote", nor does he have any remedy for DHS's "failure to promote" him into the Regional Supervisor position.

15. Having determined that Grievant was afforded the opportunity to be "considered" for the promotion; and having further determined there is no remedy available to Grievant in this matter, this civil service appeal is treated as DHS's motion for summary judgment and dismissal for failure to state a claim upon which relief can be granted.

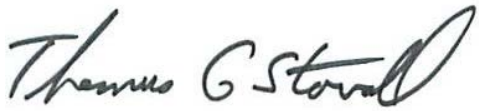
Summary judgment is granted to DHS regarding Grievant's failure to state a claim and lack of remedy. This appeal is DISMISSED.

For all the above reasons, the Department of Human Services' Motion for Summary Judgment regarding "grievability" is **DENIED.** However, as a matter of law, and there being no material facts in dispute, DHS's "Motion to Dismiss" is treated as a summary judgment motion which is **GRANTED** based upon Grievant's failure to state a claim and Grievant's lack of a remedy in this matter.

Grievant's civil service appeal is **DISMISSED.**

It is so ordered.

This order entered and effective this 1st day of December, 2011.



Thomas G. Stovall, Director
Administrative Procedures Division