



5-3-2011

# DEPARTMENT OF CHILDREN'S SERVICES vs. LASHAUN HODGES, Grievant

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

**IN THE MATTER OF:**

**DEPARTMENT OF CHILDREN'S  
SERVICES,**

**v.**

**LASHAUN HODGES,  
*Grievant.***

**DOCKET NO: 26.43-108943J**

**INITIAL ORDER**

This matter was heard on May 3 and 4, 2011, in Nashville and Memphis, Tennessee, via video conference<sup>1</sup> before Administrative Judge Mary M. Collier, assigned by the Secretary of State, Administrative Procedures Division, to sit for the Civil Service Commission of the State of Tennessee. During the hearing, the Department of Children's Services (DCS) was represented by Jennifer N. Mayberry Wade and Kristie M. Faulkner<sup>2</sup> and the Grievant, Lashaun Hodges, was represented by William R. Bruce.

The issue is whether DCS properly terminated Ms. Hodges' employment with DCS. After consideration of all of the evidence and arguments of the parties, it is determined that the termination of Ms. Hodges' employment by DCS was not proven to be appropriate by a preponderance of the evidence and should therefore be **OVERTURNED**. Accordingly, Ms.

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<sup>1</sup> Pursuant to TENN. CODE ANN. § 4-5-312(c), by agreement of the parties and the undersigned Administrative Judge, the hearing was conducted via video conference.

<sup>2</sup> On April 20, 2011, Ms. Wade made an appearance on behalf of DCS with a limited and conditioned license to practice law pursuant to Article X, Section 10.4 of Tennessee Supreme Court Rule 7 under the supervision of Ms. Faulkner. Since the hearing, both Ms. Wade and Ms. Faulkner have left the employment of DCS. To date, no attorney has filed a NOTICE OF APPEARANCE to substitute as counsel for DCS. Accordingly, a copy of this ORDER will be served upon the DCS General Counsel, Douglas E. Dimond.

Hodges' appeal is **GRANTED** and her employment with DCS is hereby **REINSTATED with back pay and full benefits**. This decision is based upon the following.

### **PROCEDURAL HISTORY**

The Grievant filed her Level V Grievance hearing request with the Civil Service Commission on August 10, 2010. Thereafter, on September 1, 2010, the matter was referred to the Administrative Procedures Division in the Secretary of State's Office for a contested case hearing. By ORDER entered on December 21, 2010, the hearing was continued past the 120<sup>th</sup> day after filing<sup>3</sup> at the request of the parties because they were still conducting discovery. The hearing was set for February 2-3, 2011. On January 2, 2011, DCS moved for a continuance. By ORDER entered on January 25, 2011, the hearing was continued to May 3-4, 2011.

The due dates for post-hearing briefs, which were set at the end of the hearing on May 4, 2011, were adjusted because the transcript was not filed until August 3, 2011. On September 6, 2011, DCS filed proposed findings of fact and conclusions of law. On October 10, 2011, the Grievant filed proposed findings of fact and conclusions of law and a memorandum in support thereof. On October 12, 2011, DCS filed a reply brief. In addition, after the hearing, the parties filed multiple late filed exhibits pursuant to the instructions pertaining to redaction made during the hearing.

The issue in this hearing was whether the termination of Ms. Hodges' employment with DCS as a Case Manager 2 in Shelby County constituted appropriate disciplinary action. At the conclusion of the hearing, the Grievant's request to dismiss<sup>4</sup> two of the violations that DCS had originally alleged against her was GRANTED. Specifically, it was determined that DCS had

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<sup>3</sup> See TENN. CODE ANN. § 8-30-328(c).

<sup>4</sup> The Grievant labeled this motion a motion for a directed verdict. Because this case was not heard before a jury, the motion should have been labeled a motion to dismiss at the close of DCS's proof. Regardless of the nomenclature, the motion was granted with regard to two of the alleged violations.

failed to prove by a preponderance of the evidence that the Grievant had violated Tennessee Department of Human Resources Rules 1120–10–.06(11) and 1120–10–.06(18). Accordingly, as determined during the hearing, it is hereby held that DCS failed to prove by a preponderance of the evidence that the Grievant violated Tennessee Department of Human Resources Rules 1120–10–.06(11) (Falsification of an official document relating to or affecting employment) and 1120–10–.06(18) (Refusal to accept a reasonable and proper assignment from an authorized supervisor).

The only issues left for determination are whether DCS proved by a preponderance of the evidence that Ms. Hodges violated Tennessee Department of Human Resources Rules 1120–10–.06(2), 1120–10–.06(4), and 1120–10–.06(12), and whether DCS proved by a preponderance of the evidence that such violations constitute grounds for termination. DCS alleges that the Grievant violated the following three rules:

(2) Negligence in the performance of duties.

...

(4) Failure to maintain satisfactory and harmonious working relationships with the public and fellow employees.

...

(12) Participation in any action that would in any way seriously disrupt or disturb the normal operation of the agency, institution, department or any other segment of the State service or that would interfere with the ability of management to manage.

TENNESSEE DEPARTMENT OF HUMAN RESOURCES RULES 1120–10–.06(2), (4) & (12), COMP. R. & REGS. ch. 1120–10–.06 (May 1999 (Revised)).<sup>5</sup>

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<sup>5</sup> The current rules are entitled “Rules of the Tennessee Department of Human Resources” but they were previously entitled “Rules of the Tennessee Department of Personnel.” The Rules relied upon by DCS were those of the Tennessee Department of Personnel, which became effective in May 1999. TENN. COMP. R. & REGS. ch. 1120-10 (Disciplinary Action) (May 1999 (Revised)). RULES 1120–10–.06(2), (4) & (12), COMP. R. & REGS. ch. 1120–10–.06 (May 1999 (Revised)), are found in the new Rules at 1120–10–.05(2), (6) & (15), COMP. R. & REGS. ch. 1120–10–.05 (May 2011 (Revised)). The earlier set of Rules will be referred to herein as “DHR RULES.”

## FINDINGS OF FACT

1. The Grievant Lashaun Hodges was employed by DCS as a Case Manager 2 in Shelby County.
2. Ms. Hodges received a Superior Overall Rating in her 2006 Annual Performance Evaluation.
3. Ms. Hodges received a Superior Overall Rating in her 2007 Annual Performance Evaluation.
4. In March 2008, Ms. Hodges transferred from the social services area to work for the Child Protective Services (CPS) Team.
5. From March 2008 until December 2009, Ms. Hodges worked under CPS Team Leader Helen Giannone.
6. After the initial rating by Ms. Giannone was overturned, Ms. Hodges received a Superior Overall Rating in her 2008 Annual Performance Evaluation.
7. Prior to her termination from employment by DCS, Ms. Hodges was subject to other disciplinary action. Ms. Hodges received a written warning dated December 29, 2008,<sup>6</sup> which was partially overturned on February 4, 2009.<sup>7</sup> Ms. Hodges also received a 10-day suspension issued on October 27, 2009,<sup>8</sup> which was based on a July 6, 2009, recommendation for the same suspension.<sup>9</sup> These two (2) prior disciplinary actions were not the basis for Ms. Hodges' current appeal.

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<sup>6</sup> Ex. 12.

<sup>7</sup> LATE FILED EX. 15. Ms. Giannone wrote up Ms. Hodges for coming into the office late despite the fact that Team Coordinator Tamara Love, Ms. Giannone's supervisor, had approved Ms. Hodges coming into the office late. This disciplinary action, as well as an accusation that Ms. Hodges failed to return phone calls, was found to be unfounded upon review by then DCS Commissioner Viola P. Miller. *Id.*

<sup>8</sup> Ex. 24.

<sup>9</sup> Ex. 18.

8. The 10-day suspension, which was recommended on July 6, 2009, issued on October 27, 2009, and served in November 2009, represented punishment of Ms. Hodges by DCS for all offenses and infractions by Ms. Hodges prior to and including July 6, 2009.

9. In late 2008 and early 2009, Ms. Hodges did not enter information into the TNKids computer system pertaining to KN in a timely manner. For example, Ms. Hodges entered information for November and December 2008 into TNKids in January and February 2009. Similarly, Ms. Hodges' supervisor, Team Leader Giannone, did not enter information into the TNKids computer system pertaining to KN in a timely manner. For example, Ms. Giannone entered information for November and December 2008 into TNKids in March 2009. The written warning issued to Ms. Hodges on December 29, 2008, and the 10-day suspension recommended on July 6, 2009, and issued on October 27, 2009, included discipline for Ms. Hodges' conduct pertaining to KN.

10. On March 26, 2009, Ms. Hodges missed a court appearance. The 10-day suspension recommended on July 6, 2009, and issued on October 27, 2009, included discipline for Ms. Hodges' conduct pertaining to the March 26, 2009, missed court appearance.

11. On June 5, 2009, and June 10, 2009, Tonja Brown met with Ms. Hodges to assist her with formulating a plan to complete her overdue cases. The 10-day suspension recommended on July 6, 2009, and issued on October 27, 2009, included discipline for Ms. Hodges' conduct pertaining to these overdue cases.

12. Ms. Hodges was out on sick leave from June 22, 2009, through June 26, 2009.

13. Ms. Hodges was out on approved FMLA leave from July 17, 2009, through September 30, 2009.

14. After Ms. Hodges perceived that she was being subjected to a hostile work environment by Ms. Giannone, including an incident where Ms. Giannone touched Ms. Hodges in what she perceived to be an offensive and unwanted manner in the close quarters of an elevator, Ms. Hodges complained to DCS that Ms. Giannone was subjecting her to a hostile work environment. Ms. Hodges made this complaint via fax, which was received by the DCS Division of Diversity Initiatives on July 17, 2009. On July 22, 2009, the DCS Division of Diversity Initiatives declined to investigate Ms. Hodges' workplace harassment complaint. Yolando Jackson, the DCS Affirmative Action Officer, explained that DCS did not investigate Ms. Hodges' workplace harassment complaint because Ms. Hodges and Ms. Giannone are of the same sex and race.

15. After the DCS Division of Diversity Initiatives declined to investigate Ms. Hodges' hostile work environment complaint, Ms. Hodges made a similar complaint to the DCS Internal Affairs Division (DCS IA). Because Ms. Hodges was out on FMLA leave at the time, the DCS IA Investigator, West Regional IA Supervisor Monica Hardaway, waited until Ms. Hodges returned from FLMA leave to investigate her allegations. Even though Ms. Hardaway explained that part of her investigation included interviewing any witnesses, Ms. Hardaway failed to contact or interview, Cherlonda Hunt, the person identified by Ms. Hodges as a witness to the touching incident in the elevator. Ms. Hardaway also failed to interview the witnesses identified by Ms. Hodges regarding the unprofessional manner in which Ms. Giannone interacted with Ms. Hodges. Because of these failures by Ms. Hardaway, the investigation conducted by DCS IA was incomplete and the conclusions reached are unreliable.

16. Ms. Hodges returned to work from her approved FLMA leave on October 1, 2009.

17. Ms. Hodges received a Marginal Overall Rating in her 2009 Annual Performance Evaluation, which was given to Ms. Hodges in November 2009.

18. On December 16, 2009, Ms. Hodges did not attend an interview with Internal Affairs, which pertained to the complaint that Ms. Hodges made in July regarding Ms. Giannone. Ms. Hodges attended the rescheduled interview with Internal Affairs on December 17, 2009.

19. DCS IA completed its investigation of Ms. Hodges' workplace harassment complaint on December 21, 2009.

20. Ms. Merlene Hyman is the Regional Administrator for DCS in Shelby County. Ms. Hyman observed that there was an "interpersonal conflict and not a professional conflict" between Ms. Giannone and Ms. Hodges. Other than the interaction between Ms. Hodges and Ms. Giannone, Ms. Hodges maintained a harmonious working relationship with others in the workplace.

21. Team Leader Giannone, Ms. Hodges' supervisor, was transferred in December 2009.

22. In the time between returning to work from approved FMLA leave on October 1, 2009, and December 2009, when Team Leader Giannone was transferred, Ms. Hodges was not on any overdue case lists.

23. Ms. Hodges was not on any overdue case lists between December 2009, and February 24, 2010.

24. Ms. Hodges received a recommendation for termination on February 24, 2010,<sup>10</sup> and received a termination from state service dated March 23, 2010.<sup>11</sup>

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<sup>10</sup> Ex. 13.

<sup>11</sup> Ex. 14.

25. Both the memorandum recommending Ms. Hodges for termination on February 24, 2010, and the memorandum terminating Ms. Hodges from state service dated March 23, 2010, rely upon the finding by DCS IA that Ms. Hodges' hostile work environment claims were not sustained by the DCS IA investigation.

26. DCS did not produce substantial and material evidence of any specific deficiencies by Ms. Hodges in her job performance during the time period of July 6, 2009, through February 24, 2010.

27. DCS did not produce substantial and material evidence of any specific negligence by Ms. Hodges in the performance of her duties during the time period of July 6, 2009, through February 24, 2010.

28. DCS did not produce substantial and material evidence of a failure by Ms. Hodges to maintain satisfactory and harmonious relationships with the public and fellow workers during the time period of July 6, 2009, through February 24, 2010.

29. DCS did not produce substantial and material evidence of any action by Ms. Hodges that would in any way seriously disrupt or disturb the normal operation of DCS, or that would interfere with the ability of DCS management to manage during the time period of July 6, 2009, through February 24, 2010.

30. DCS did not produce any admissible evidence that Ms. Hodges falsified an official document relating to or affecting employment during the time period of July 6, 2009, through February 24, 2010.

31. DCS did not produce any evidence that Ms. Hodges refused to accept a reasonable and proper assignment from an authorized supervisor (insubordination) during the time period of July 6, 2009, through February 24, 2010.

## ANALYSIS and CONCLUSIONS OF LAW

Level V Civil service appeals are heard *de novo* before an Administrative Judge. No presumption of correctness is attached to the agency's action. *Big Fork Mining Co. v. Tennessee Water Quality Control Bd.*, 620 S.W. 2d 515, 521 (Tenn. App. 1981). DCS, as the party seeking to "change the present state of affairs," has the burden of proof, under RULE 1360-4-1-.02(7) of the Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies, TENN. COMP. R. & REGS. ch. 1360-4-1 (June 2004 (Revised)), to prove by a preponderance of the evidence that the discipline imposed on the Grievant Lashaun Hodges complies with State law and the Rules of the Tennessee Department of Human Resources, TENN. COMP. R. & REGS. ch. 1120-10 (Disciplinary Action) and ch. 1120-11 (Grievance) (May 1999 (Revised)) (hereinafter "DHR RULES"). DCS must prove, by a preponderance of the evidence, that: (1) the Grievant acted or failed to act as it alleges; (2) the Grievant's actions constitute a disciplinary offense; and (3) termination of the Grievant's employment with DCS is appropriate for the given offense.

DCS terminated Ms. Hodges for allegedly violating the following DHR RULES:

(2) Negligence in the performance of duties.

...

(4) Failure to maintain satisfactory and harmonious working relationships with the public and fellow employees.

...

(11) Falsification of an official document relating to or affecting employment.

(12) Participation in any action that would in any way seriously disrupt or disturb the normal operation of the agency, institution, department or any other segment of the State service or that would interfere with the ability of management to manage.

...

(18) Refusal to accept a reasonable and proper assignment from an authorized supervisor (insubordination).

DHR RULES 1120-10-.06(2), (4), (11), (12) & (18) (May 1999 (Revised)).

As found above, Ms. Hodges' motion to dismiss at the close of DCS's proof was GRANTED with regard to the claims that the Grievant violated DHR RULES 1120-10-.06(11) and 1120-10-.06(18) because DCS failed to present even a scintilla of admissible evidence to support those two claims. It is again hereby determined that because DCS failed to produce even an scintilla of admissible evidence to support these claims, it is found that DCS failed to prove by a preponderance of the evidence that the Grievant violated DHR RULES 1120-10-.06(11) (Falsification of an official document relating to or affecting employment) and 1120-10-.06(18) (Refusal to accept a reasonable and proper assignment from an authorized supervisor).

With regard to the remaining three claims, it is also determined that DCS failed to prove by a preponderance of the evidence that the Grievant violated DHR RULES 1120-10-.06(2), (4) & (12). Discipline may be imposed on state employees as follows:

Progressive Discipline. — (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 or poor performance may result in more severe discipline in accordance with subsection (a).**

TENN. CODE ANN. § 8-30-330 (2011) (emphasis added). A prior disciplinary record may only be considered once the specific instance of conduct warranting the discipline has been determined on the merits. It is only then that the prior record may be considered in its totality in order to

determine the penalty to be imposed. *See Memphis & Shelby County Health Dep't v. Bailey*, 1984 Tenn. App. LEXIS 3350 at \*3-4 (Tenn. Ct. App. Dec. 6, 1984) (“Although we have found no Tennessee cases dealing with the question, several other jurisdictions have held that while the past record of an employee is not admissible to establish the charges upon which his dismissal is predicated, the past record may be considered in determining the penalty imposed.”). *See also Maasikas v. Metropolitan Gov't of Nashville*, 2003 WL 22994296 at \*6 (Tenn. Ct. App. Dec. 23, 2003) (citing a Pennsylvania case which held that “a previous disciplinary record cannot be resurrected and used in the absence of a present new offense in order to discipline an employee anew”).

Because Ms. Hodges' prior discipline covered all offenses and infractions through July 6, 2009, the only time period that is at issue to determine whether discipline is warranted is the time period between July 6, 2009, and February 24, 2010. Only if DCS first proves by a preponderance of the evidence that Ms. Hodges engaged in conduct warranting discipline between July 6, 2009, and February 24, 2010, may DCS then rely on the earlier instances of discipline to justify the severity of her punishment.

DCS has failed to carry its burden of establishing any infractions by Ms. Hodges between July 6, 2009, and February 24, 2010. First, DCS did not produce evidence of any specific deficiencies in Ms. Hodges's performance for the time period of July 6, 2009, through February 24, 2010. In contrast, the evidence shows that although Ms. Hodges was on overdue case lists in June 2009, she was not on any overdue case lists after her return from FMLA leave in October 2009 through February 24, 2010. Second, DCS did not produce evidence of any specific negligence in the performance of duties by Ms. Hodges for the time period of July 6, 2009, through February 24, 2010. Instead, DCS relies upon earlier allegations of negligence that were

included in her previous two disciplinary actions to support this claim. DCS cannot rely on these earlier allegations of negligence until it first proves a new allegation of negligence during the time period between July 6, 2009, and February 24, 2010.

Third, other than the mutual and longstanding inability of Ms. Hodges and her Team Leader Helen Giannone to get along, the Department did not produce evidence of any failure to maintain satisfactory and harmonious relationships with the public and fellow workers by Ms. Hodges for the time period of July 6, 2009, through February 24, 2010. Instead, the evidence demonstrates that Ms. Hodges got along harmoniously with everyone in the workplace other than Ms. Giannone. Because Ms. Hodges submitted two workplace harassment complaints against Ms. Giannone, neither of which were properly investigated by DCS, DCS's reliance upon the poor relationship between Ms. Hodges and Ms. Giannone is found to be insufficient to warrant any disciplinary action against Ms. Hodges.

Finally, DCS did not produce evidence of any action by Ms. Hodges that would in any way seriously disrupt or disturb the normal operation of the agency, or that would interfere with the ability of management to manage for the time period of July 6, 2009, through February 24, 2010. Instead, DCS relies upon the conduct cited in the earlier suspension letter for this allegation. This is insufficient proof.

DCS also argues that Ms. Hodges violated DCS Policy 1.16 when she did not attend an interview with DCS IA, which pertained to the workplace harassment complaint that Ms. Hodges made in July regarding Ms. Giannone. However, the following day, December 17, 2009, Ms. Hodges attended the rescheduled DCS IA interview. As discussed *infra*, the DCS IA investigation was not properly conducted. It is determined that Ms. Hodges' failure to attend the meeting on December 16, 2009, does not warrant termination by DCS.

Finally, DCS argues that Ms. Hodges violated DCS Policy 31.14. This policy was not cited by DCS in either the memorandum recommending Ms. Hodges for termination on February 24, 2010, or the memorandum terminating Ms. Hodges from state service dated March 23, 2010. Accordingly, DCS's argument that Ms. Hodges should be terminated for violating this policy fails for lack of notice and due process.<sup>12</sup>

Based upon the above, it is determined that DCS failed to prove by a preponderance of the evidence that it had any basis for imposing the current discipline on Ms. Hodges. Instead, DCS attempts to bolster the termination decision by the fact that Ms. Hodges received earlier discipline. It is well established that Ms. Hodges received the earlier discipline; however, DCS

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<sup>12</sup> TENN. CODE ANN. § 8-30-331 provides that civil service employees (who have successfully completed their probationary period) have a property right to their positions. 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. Dec. 27, 2007). The requirements for "minimum due process" include proper notice. *Sanford v. Tennessee Dep't of Env't*, 992 S.W.2d 410, 414-15 (Tenn. Ct. App. 1998), *App. for Perm. to Appeal Denied* (Tenn. 1999). If a Grievant is not provided with adequate notice of the charges made against him or her, such a Grievant has been denied due process. TENN. CODE ANN. § 8-30-331 states:

**Minimum due process.**---(a) Employees who have successfully completed their probationary period have a "property right" to their positions. Therefore, no suspension, demotion, dismissal or any other action which deprives a regular employee of such employee's "property right" will become effective until minimum due process is provided as outlined below.

TENN. CODE ANN. § 8-30-331(b) specifically provides:

Minimum due process consists of the following:

(1) The employee shall be notified of the charges. Such notification should be in writing and shall detail times, places, and other pertinent facts concerning the charges.

Proper notice, for minimum due process purposes, has been defined as "notice reasonably calculated under all the circumstances, to apprise interested parties' of the claims of the opposing parties." *Gluck v. Civil Serv. Comm'n*, 15 S.W.3d 486, 491 (Tenn. Ct. App. 1999) (citation omitted), *App. for Perm. to Appeal Denied* (Tenn. 2000). Procedural due process does not require "perfect, error free governmental decision-making." *Qualls v. Camp*, 2007 WL 2198334 \*4 (Tenn.Ct. App. July 23, 2007) (citation omitted). However, it does require affording a Grievant a "relatively level playing field in a contested case hearing." *Id.* Accordingly, violation of DCS Policy 31.14 cannot be raised for the first time at the contested case hearing level. To allow such would be to violate Ms. Hodges' due process rights.

Even if DCS had properly notified Ms. Hodges that her termination was based, in part, upon her violation of DCS Policy 31.14, the evidence relied upon by DCS for this violation is the same conduct that DCS relied upon for the previous two disciplinary actions. Because DCS failed to present evidence of new misconduct in this regard, DCS's argument on this issue must fail.

failed to prove by a preponderance of the evidence that Ms. Hodges engaged in conduct that warranted additional discipline after it had imposed the 10-day suspension for her conduct occurring prior to July 6, 2009. The earlier disciplined conduct cannot be the basis for Ms. Hodges' termination without proof by DCS of conduct after July 6, 2009, that warrants discipline. Principles of fundamental fairness dictate that a civil service employee should not be punished twice for the same conduct. *Cope v. Tennessee Civil Serv. Comm'n*, 2009 WL 1635140 at \*6 (Tenn. Ct. App. June 10, 2009) ("While we have found no Tennessee law, rule or regulation that prohibits a civil service employee from being disciplined twice for the same event, principles of fundamental fairness and the fact that a civil service employee like Mr. Cope can only be terminated for cause, *see* Tenn. Comp. R. & Regs. 1120-10-.02, demonstrates to us that such an employee should not be punished for the same conduct. Such a conclusion is supported by several other jurisdictions. *See Ladnier v. City of Biloxi*, 749 So.2d 139 (Miss. Ct. App. 1999) (ruling that if a civil servant is disciplined once for certain misconduct, it follows that good cause would not then exist to sustain the employee's later discharge for the same event)" (other citations omitted)), *App. for Perm. to Appeal Denied* (Tenn. 2010).

It is determined that the termination of Ms. Hodges' employment with DCS was unwarranted and unfounded by the reasons argued by DCS. None of these reasons were supported by proof of any misconduct by Ms. Hodges during the relevant time period. In contrast, Ms. Hodges' argument that she was terminated in retaliation for having accused her supervisor of workplace harassment is supported by the evidence. Two separate Divisions within DCS failed to properly investigate Ms. Hodges' workplace harassment complaints. First on July 22, 2009, five days after she made her complaint, the DCS Division of Diversity Initiatives declined to investigate Ms. Hodges' workplace harassment complaint. Yolando

Jackson, the DCS Affirmative Action Officer, who wrote the letter declining to conduct this investigation, testified that DCS did not investigate Ms. Hodges' workplace harassment complaint because Ms. Hodges and Ms. Giannone are of the same sex and race. This is an invalid reason for DCS to ignore a workplace harassment complaint. *See Oncale v. Sundowner Offshore Serv., Inc.*, 118 S. Ct. 998 (1998) (same-sex sexual harassment is actionable).

Second, DCS IA found Ms. Hodges' workplace harassment claims not to be sustained. DCS IA reached this conclusion based upon an unreliable investigation conducted by the DCS IA West Regional Supervisor Monica Hardaway. Even though Ms. Hardaway testified that part of her investigation included interviewing any witnesses, Ms. Hardaway failed to contact or interview, Cherlonda Hunt, the person identified by Ms. Hodges as a witness to the touching incident in the elevator. Ms. Hardaway also failed to interview the witnesses identified by Ms. Hodges regarding the unprofessional manner in which Ms. Giannone interacted with Ms. Hodges. Because of these failures by Ms. Hardaway, the investigation conducted by DCS IA was incomplete and the conclusions reached are found to be unreliable. Both the memorandum recommending Ms. Hodges for termination on February 24, 2010, and the memorandum terminating Ms. Hodges from state service dated March 23, 2010, rely at length upon the finding by DCS IA that Ms. Hodges' hostile work environment claims were not sustained by the DCS IA investigation. This reliance by DCS upon the fact that Ms. Hodges made a purportedly invalid workplace harassment complaint as grounds for her termination is evidence of retaliation by DCS. It is determined that DCS's termination of Ms. Hodges was in retaliation for Ms. Hodges' workplace harassment accusations against her supervisor. It is further determined that retaliation for making a workplace harassment complaint is not a valid reason for DCS to have terminated Ms. Hodges' employment.

It is determined that DCS failed to meet its burden of proof by a preponderance of the evidence as to the violations alleged in this case, and that DCS failed to prove by a preponderance of the evidence that Ms. Hodges engaged in conduct during the time period between July 6, 2009, and February 24, 2010, that warranted disciplinary action.

Accordingly, it is **ORDERED** that the termination of Ms. Hodges' employment by DCS is **OVERTURNED**, Ms. Hodges' appeal is **GRANTED**, and her employment with DCS is hereby **REINSTATED AND SHE IS TO BE MADE WHOLE WITH FULL BACK PAY, SENORITY AND BENEFITS**.

Pursuant to TENN. CODE ANN. § 8-30-328(f), Ms. Hodges is **AWARDED** attorney's fees and costs in this action. Mr. Bruce submitted an Affidavit signed on October 12, 2011. DCS has not submitted any opposition to Mr. Bruce's calculation of attorney's fees. Accordingly, it is **ORDERED** that Ms. Hodges is **AWARDED** \$4,788.94 in attorney's fees and costs.

This INITIAL ORDER is issued to protect the integrity of the Tennessee civil service laws and DHR RULES.

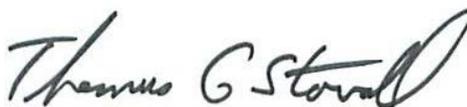
It is so **ORDERED**.

This INITIAL ORDER entered and effective this the \_\_\_\_\_ day of \_\_\_\_\_ 2012.

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MARY M. COLLIER  
ADMINISTRATIVE JUDGE  
ADMINISTRATIVE PROCEDURES DIVISION  
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the \_\_\_\_\_ day of \_\_\_\_\_ 2012.

A handwritten signature in black ink that reads "Thomas G. Stovall". The signature is written in a cursive style with a large, looped initial "T".

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THOMAS G. STOVALL, DIRECTOR  
ADMINISTRATIVE PROCEDURES DIVISION  
OFFICE OF THE SECRETARY OF STATE