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TENNESSEE DEPARTMENT OF SAFETY vs. MARILYN HOLMES, Grievant

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**BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION
OF THE METROPOLITAN GOVERNMENT
OF NASHVILLE AND DAVIDSON COUNTY**

IN THE MATTER OF:)	
)	
TENNESSEE DEPARTMENT OF SAFETY)	
Respondent)	
)	
vs.)	DOCKET NO. 26.19-107146J
)	
MARILYN HOLMES)	
Grievant)	

INITIAL ORDER

This case was heard on November 29, 2011, in Nashville, Tennessee, before Anthony Adgent, Administrative Judge, assigned by the Secretary of State, and sitting for the Civil Service Commission for the State of Tennessee. Mr. Worrick Robinson, IV, Esq. represented The Grievant. Ms. Deborah Martin, Esq. represented the Department of Safety.

The issue raised by the Grievant is that she was wrongfully terminated in violation of General Rule 222, II, III & IV, General Order 216-1 IX (3) (e), Human resources Rule 1120-10-06 (7) and (24).

Upon consideration of the record, the evidence and the arguments submitted by the parties, it is determined that the Grievant's position is well taken and her termination is set aside.

This determination is based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Marilyn Holmes (Employee) was employed for over 24 years with the State of Tennessee and had been with the Department of Safety as a Driver's License Examiner since 1997.
2. As a Driver's License Examiner with the Department of Safety, Employee administered road, knowledge, vision and skills test as well as handled monetary responsibilities such as bank deposits.
3. Employee continuously earned exceptional reviews on her Departmental evaluations.
4. In January 2008, Employee was terminated from employment with the Department for allegedly not cooperating in an investigation conducted by the Department's Office of Professional Responsibility. Employee timely appealed her termination. On January 7, 2009, Employee's contested termination case was heard before Administrative Judge Joyce Grimes Safley, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Civil Service Commission.
5. After conducting the hearing and reviewing both the Department's and Employee's "Proposed Findings of Fact and Conclusions of Law", on July 24, 2009, Judge Safley determined the Employee did not violate the rules and regulations.
6. Judge Safley ordered Employee's termination to be vacated and for Employee to be reinstated to her position as Driver's License Examiner at the Centennial Boulevard station.
7. During the time between Employee's wrongful termination and reinstatement, Employee suffered knee injury.

8. On July 29, 2009, The Department's Human Resources Director, Kerri Balthrop, sent Employee a letter informing her to return to work the next day, July 30, 2009, and listed certain restrictions Employee would be placed under at work.
9. The letter also informed Employee that she was required to do a physical on that same day and she must pass all portions of the physical in order to be eligible to return to full duty.
10. In no section of the Civil Service Commission order did it mandate Employee to take a physical exam in order to return to her position as a Driver's License Examiner.
11. Due to Employee's knee pain, she was unable to complete the 18-inch step maneuver portion of the physical. Under the Department's General Order 222, IV, if an employee fails a portion of the physical exam, they have thirty days in which to retake the physical.
12. Upon the initial physical exam, the presiding physician, Dr. Belihar, recommended that Employee not even try to retake the physical exam due to her knee issues.
13. On August 5, 2009, Employee received a letter from Department's Human Resources Director, Kerri Balthrop, advising Employee of three options Employee could choose from in regards to her employment with the Department based on her failure to pass the physical exam. The three options given to Employee were: retirement, resignation or reasonable accommodation under the Americans with Disabilities Act.
14. Employee, who had just been reinstated after over a year appeal for wrongful termination, did not want to retire or resign, and therefore requested a reasonable accommodation which would either allow her to stay in her position as Driver's

- License Examiner or place her in a less aggressive position with or without physical duty limitations.
15. Employee requested the accommodation of a step stool to help her get in and out of vehicles for road tests. Employee also suggested the accommodation she only conduct motorcycle tests.
 16. The Department refused all of Employee's accommodation requests.
 17. On November 11, 2009, Employee's counsel also sent a letter to Director of Human Resources, Kerri Balthrop, requesting a reasonable accommodation in regards to allowing Employee to conduct motorcycle road tests while maintaining her current position as Driver's License Examiner.
 18. Mrs. Balthrop responded to Employee's counsel on December 11, 2009, after termination procedures had begun against Employee, refusing this accommodation request.
 19. Upon refusing Employee's requests for accommodations, the Department informed Employee that her only option for accommodation would be to apply for two possible job openings within the Department, Safety Examiner One and Two.
 20. Employee was never told that she would automatically be accepted for one of these positions upon her application.
 21. Both of these job positions are in a lower pay range than Employee's position as Driver's License Examiner.
 22. Under Department policy Employee would also be placed on six month probation without civil service protection upon transitioning to one of these jobs.
 23. In 2006, Employee had actually applied several times for the position of Safety Examiner only to be denied the position three times and informed, by a letter from

- Human Resources Director, Kerri Balthrop, that she would be taken off the employee register.
24. Employee did not apply for the positions of Safety Examiner One and Two.
 25. Shortly after, Director Michael Hogan recommended termination of Employee for her unsuccessful completion of the fitness for duty exam and her refusal to accept a “reasonable” accommodation provided by the Department.
 26. On January 15, 2010, Director Hogan’s recommendation for termination was upheld by Deputy Commissioner Greta Dajani.
 27. Employee requested a Minimum Due Process discussion which took place February 5, 2010.
 28. The Due Process discussion was led by Major Wayne Springer who, on February 8, 2010, concluded that the original disciplinary action of termination of Employee be upheld and made this recommendation to Commissioner Dave Mitchell.
 29. On February 10, 2010, the termination of Employee was concurred by Commissioner Dave Mitchell.
 30. On February 16, 2010, Employee, once again, timely appealed the recommendation for her termination.
 31. The Step V hearing before the Civil Service Commission, the Honorable Administrative Judge Anthony Adgent took place on November 29, 2011.

CONCLUSIONS OF LAW AND ANALYSIS

1. The Department failed to carry their burden of proof that the Employee violated General Order 222, II, III & IV, General Order 216-1 IX (3) (e), Human Resources Rule 1120-10-06 (7) and 1120-10-06 (24) by her failure of the fitness for duty examination and therefore her not being able to perform the “core function” of road tests.
2. The Department failed to prove Employee acted in bad faith and/or violated any General Order or Human Resources Rule due to her refusal of the Department’s proffered reasonable accommodations.
3. The Department’s termination upon finding the Employee in violation of the Department’s General Order 216-1, II & IX, General Order 222, I, II & IV, Human Resources Rule 1120-10-06 (7) & (24) and acting in bad faith was arbitrary and capricious.
4. Pursuant to T.C.A. § 4-5-313 and T.C.A. § 49-5-501 et seq., the burden of proof rests upon the Department preferring charges against the employee, wherein, the Department bears the burden of showing that the action taken by the disciplinary board was appropriate and that the evidence was sufficient to justify its action.

TESTIMONY OF MARILYN HOLMES

- 1) Marilyn Holmes had been a Driver’s License Examiner for the Tennessee Department of Safety since 1997 and had worked at the Centennial Boulevard, Hendersonville and Lebanon service stations during her employment. (T. 17-18) Ms. Holmes’ job duties as a Driver’s License Examiner included administering knowledge, vision and road tests, inspecting vehicles and issuing driver’s licenses to existing and new residents of Tennessee (T. 18).

- 2) Upon returning to work after being reinstated after her wrongful termination, the Department made Mrs. Holmes retake the fitness for duty exam. Mrs. Holmes was unable to complete the 18-inch high step maneuver and therefore did not pass the exam (T. 23). By Department policy, Mrs. Holmes had thirty days to retake the fitness for duty exam (T. 23). Although the Department gave Mrs. Holmes thirty days to retake the exam, the doctor recommended she not retake the exam (T. 23).
- 3) Mrs. Holmes went to an orthopedist who determined she had degenerative arthritis and would not be able to perform the 18-inch step maneuver of the fitness for duty exam (T. 23).
- 4) The degenerative issue in Mrs. Holmes' knees began causing her pain during the time period she was awaiting the decision of her prior wrongful termination matter when she was forced to work two jobs to support herself while appealing the termination (T. 38-39). Mrs. Holmes was reinstated to her original position as Driver's License Examiner with knee pain (T. 39).
- 5) On August 5, 2009, after the fitness for duty exam, Mrs. Holmes received a letter from Kerri Balthrop which described three options for Mrs. Holmes to consider: disability retirement, ADA accommodation or resignation (T. 27). Mrs. Holmes responded by requesting an ADA accommodation of either staying in her position as Driver's License Examiner with restricted duties or to be placed in a less aggressive position with or without her limited physical duties (T. 28).
- 6) Mrs. Holmes also requested the accommodation of a step stool or being placed on only motorcycle road tests, which were both denied (T. 30-31).

- 7) While working as a Driver's License Examiner, prior to this matter, Mrs. Holmes was involved in an attempted robbery while depositing work funds at the bank (T. 33). After this incident, the Department was more than willing to accommodate Mrs. Holmes by not making her take the deposits to the bank (T. 33-34).
- 8) Mrs. Holmes returned to work as a Driver's License Examiner after her wrongful termination in 2009. Upon reinstatement, Mrs. Holmes was put in the testing area and was placed on restrictions such as not able to wear her uniform or drive state vehicles. Even with these restrictions, Mrs. Holmes worked full seven and a half hour days and stayed busy administering vision tests, issuing handgun permits, driver's licenses, photo Ids, etc (T. 35).
- 9) On August 10, 2009, Mrs. Holmes received an email from Susan Cook to inform her of two job openings, Safety Examiner One and Two (T. 42). The salary of these two positions was lower than Mrs. Holmes' salary as a Driver's License Examiner. Mrs. Holmes also knew that under Department policy, if she were to take one of these jobs, she would be placed on probation for six months (T. 43). No one in the Department explained or confirmed to Mrs. Holmes that she would not be placed on probation or lose her pay (T. 43-44).
- 10) In 2006, Mrs. Holmes had applied for the position of Safety Examiner Two on three separate occasions and was denied the position all three times (T. 44-45). At this time, Mrs. Holmes was told, by Kerri Balthrop, her name would be removed from the Department register because it was their policy to remove names after three attempts for job positions (T. 45).

- 11) Mrs. Holmes was never informed or asked to attend a meeting to discuss her accommodation request for a step stool or the accommodation decision of the two job transfers given to her by the Department (T. 47). There was never any feasible study done in regards to the reasonableness of a step stool or ramp as an accommodation (T. 47).
- 12) While Mrs. Holmes worked at the Centennial driver's station, they were not required do conduct road tests on modified 4x4 vehicles or on low-riders (T. 49).
- 13) Mrs. Holmes testified that if a co-worker was pregnant, had some other limiting condition or had a bad experience on a prior road test, it was common for other co-workers to step in and swap road tests with that worker to accommodate them (T. 51-52).
- 14) Mrs. Holmes testified that there was never any occasion in her years as a Driver's License Examiner where she used or needed to use the 18-inch high step maneuver (T. 56).
- 15) Mrs. Holmes testified that she would be able to complete all the functions of a Driver's License Examiner if she were approved to use a step stool. Mrs. Holmes even offered to bring her own personal step stool to work as an accommodation (T. 57).
- 16) Mrs. Holmes' work hours were 8:00 a.m. to 4:30 p.m. (T. 72). Approximately one hour of each work day was assigned to conducting road tests (T. 73). Each examiner was assigned an hour to do road tests per day. If the height of a vehicle was exaggerated or if there was any other issue with a certain vehicle, it was common practice among Mrs. Holmes and her co-workers to swap out that particular road test

(T. 75). Mrs. Holmes would conduct approximately six to seven road tests per day
9T. 73)

TESTIMONY OF KERRI BALTHROP

- 1) Kerri Balthrop has worked for the Tennessee Department of Safety and Homeland Security, Human Resources Division, for thirty years and has held the position of Humans Resources Director since 2004 (T. 80).
- 2) Mrs. Balthrop testified that the Department's procedure in regards to employee accommodations is as follows: give written notification to the employee of the accommodation option; if employee responds that they do want accommodation, the Department engages in conversation with the employee as to the types of accommodations that may be reasonable. The Department looks for other positions available in the Department in which the employee's skills and knowledge may fit. The employee must apply and test and qualify for these accommodating positions yet it is not necessary that they compete and be reachable on the Department's register (T. 82).
- 3) Mrs. Balthrop testified that Mrs. Holmes was notified of two separate occasions when possible accommodating positions in the Department were posted and that she would have to apply to be considered (T. 82-83).
- 4) Mr. Balthrop testified that the Department did look at Mrs. Holmes' requested accommodation of a step stool and felt it was not reasonable because it would create a hazard (T. 84).
- 5) Mrs. Balthrop testified that Mrs. Holmes was notified that her current rate of pay was within the range of both positions the Department offered her as an accommodation.

She explained that the Department's policy is that as long as the employee's salary is within the "range", the employee's pay would not be cut (T. 84)

- 6) However, Mrs. Balthrop also testified that the range of a Driver's License Examiner is a Grade 15 and a Safety Examiner Two was Grade 14 and by Department policy, it would have meant a one step reduction in pay in normal circumstances (T. 85).
- 7) Mrs. Balthrop testified that Mrs. Holmes was told her current salary as Driver's License Examiner was within the "range" of the accommodating position of Safety Examiner, however she was not informed of the "special" Department policy in which her salary, that would decrease under normal Department procedure, would not change under her "special" circumstances (T. 86). Mrs. Balthrop testified that Mrs. Holmes was not informed that her salary would not decrease because under Department policy, Mrs. Holmes not only had to be approved for the new position but that the "special" policy of not deducting her pay would also have to be approved after a request in writing to the Department (T. 86). Mrs. Balthrop stated, "We didn't want to verbally tell her (Mrs. Holmes) until we had it approved" (T. 86).
- 8) In regards to the basis behind the "essential job functions" required to be a Driver's License Examiner, Mrs. Balthrop testified that the Department enters into a contract with a private physician who then sub-contracts with other third parties to conduct a job study as to the physical requirements of the position. The essential functions of the job and the fitness for duty test requirement are based on this job analysis. Mrs. Balthrop did not know the exact year in which the last job study had been performed for the position of Driver's license Examiner (T. 89-90).

- 9) Mrs. Balthrop was not involved in any way with the job study for the position of Driver's License Examiner and has never observed an examiner or even spent an entire day at a driver's license station (T. 93).
- 10) The job study on which the essential functions of a Driver's License Examiner are based was not produced or turned in as an exhibit at this hearing (T. 94). Mrs. Balthrop knew of a job study done in the 1980's but could not tell the Court when the most recent job analysis was performed, only that there was one done when the Driver's License Examiner classification was created and when the Department entered into new contracts (T. 94).
- 11) Mrs. Balthrop testified that the accommodation the Department offers to an employee does not have to be the accommodation requested by the employee, but only a reasonable accommodation (T. 92). She continued by stating that the ultimate decision on the "reasonableness" of a certain employee accommodation is decided by a combination of several employees with the Department and the final ruling is made by the appointing authority (T. 93).
- 12) Mrs. Balthrop was aware of the prior wrongful termination suit involving Mrs. Holmes and knew and read a section of the prior Order by Judge Saffley that stated "Because Grievant did not violate the rules and regulations as charged....Grievant's termination is vacated. Grievant is reinstated to her position" (T. 95).
- 13) Mrs. Balthrop also read into the record Paragraph Two of the Fitness for Duty Order (Exhibit 4) which states, " Excluding military leave, it is the policy of DOS to ensure that all employees whose position requires a pre-employment physical and/or psychological examination must successfully pass a fitness for duty exam upon return

from any type of extended leave exceeding 15 weeks, to include Family Medical Leave Act, Workers' Compensation claim, sick leave, light-duty status, and fitness for duty status" (T. 96).

14) Mrs. Balthrop admitted that Mrs. Holmes' reinstatement did not fall under any of the categories requiring a fitness for duty exam that are listed in the Fitness for Duty order and that there is no mention as to any requirements for an employee that was wrongfully terminated and reinstated (T. 97-98). Mrs. Balthrop also testified that Judge Saffey's Order reinstating Mrs. Holmes to her position as Driver's License Examiner made no mention to subjecting Mrs. Holmes to a fitness for duty exam (T. 98).

15) Mrs. Balthrop testified that it was the decision of the Department's appointing authority to make Mrs. Holmes take a fitness for duty exam after being reinstated to her position as Driver's License Examiner (T. 98). Mrs. Balthrop admitted, the appointing authority of the Department who wrongfully terminated Mrs. Holmes was the same person who decided to require Mrs. Holmes to take a fitness for duty exam upon being reinstated to her position, although there is no specific language in the department's policy requiring her to do so (T. 98-99).

16) Mrs. Balthrop testified that the 18-inch high step maneuver was an essential function of the job as a Driver's License Examiner (T.101). However, when asked why the 18-inch step requirement was not listed in the Department's job description of a Driver's License Examiner (Exhibit 2), Mrs. Balthrop testified that she found it "irrelevant to put in a job description that inches have to be there specifically" (T. 101).

- 17) Mrs. Balthrop testified that upon receiving Mrs. Holmes' accommodation request she engaged in conversation with the driver's license administrators and the appointing authority at a meeting at the administrative office on Foster Avenue, at which time they denied Mrs. Holmes' accommodation request (T. 102-03). Mrs. Balthrop could not remember the exact date of the alleged meeting or who was actually in attendance at this meeting or even if there was more than one meeting (T. 103-04). Mrs. Balthrop produced no record of this alleged meeting and testified that she did not take notes on the matter, although the order stated the "process must be fully documented" (T. 107).
- 18) Mrs. Balthrop testified that under the ADA policy (Exhibit 5), a reasonable accommodation suggests a flexible interactive process that involves both the employer and the qualified individual with the disability and it required the Department to consult with the disabled individual regarding the precise job-related limitations imposed by the disability, and how these limitations could be overcome with reasonable accommodation (T. 104). Mrs. Balthrop also agreed that under paragraph 3 of the ADA policy it states, "In consultation with the individual, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position. The preference of the disabled person should be given primary consideration" (T. 105).
- 19) Mrs. Balthrop testified that Mrs. Holmes' accommodation request for a stepping stool was not reasonable due to the hazard it would inflict on not only her but the general public as well (T. 106). However, Mrs. Balthrop testified that in making this determination, no tests were done as to the safety or effectiveness of a stepping stool

and at no point did she or anyone else take the time to observe Mrs. Holmes use a stepping stool as possible accommodation. There was also no analysis or tests done as whether a ramp would be a reasonable accommodation for Mrs. Holmes (T. 106-09).

20) On November 11, 2009, Mrs. Holmes' counsel sent another accommodation request letter to Mrs. Balthrop's Department. On December 11, 2009 Mrs. Balthrop sent Mrs. Holmes' counsel a reply letter once again denying the requested accommodations. In her letter, Mrs. Balthrop did not mention anything about a meeting held to discuss the accommodations or the reasoning behind the denial of the requested accommodations (T. 130).

21) The reasonable accommodation given to Mrs. Holmes by the Department was the possibility of two different job positions, Safety Examiner One and Safety Examiner Two, both a grade down in pay than Mrs. Holmes' current title as Driver's License Examiner. Mrs. Balthrop testified she never gave Mrs. Holmes an exact amount of pay that she would receive in the new positions (T. 110).

22) Mrs. Balthrop testified she had no knowledge that in 2006 Mrs. Holmes had applied and been denied for the position of Safety Examiner Two, the same position the department suggested as a possible and reasonable accommodation to Mrs. Holmes (T. 110). A letter dated February 27, 2006 signed by Mrs. Balthrop and sent to Mrs. Holmes informing her that she was not chosen for the position of Safety Examiner Two was shown to Mrs. Balthrop who admitted it was her signature on the letter (T. 111).

- 23) When asked to explain the changes that would have taken place between 2006 and 2009 which would make Mrs. Holmes be accepted for Safety Examiner Two, Mrs. Balthrop stated, “At that point in time (2006) she had not sought after an ADA Accommodation” and that at this time, the Department would not make Mrs. Holmes compete for the position as long as she qualified and had an active score, it was hers (T. 112).
- 24) However, Mrs. Balthrop also testified that under the new practices of the Department of Personnel, all vacancies have to be posted in order for an applicant to apply (T. 113). The positions for Safety Examiner One and Two would still be posted for others to apply and Mrs. Holmes herself would have to apply for the position (T. 113).
- 25) When asked about the probationary status for a Safety Examiner One or Two, Mrs. Balthrop stated, “she would have been on a subsequent probationary status which means she can be removed without cause. However, she could not be removed as a State employee without minimum due process from her previous status as a Driver’s License Examiner, which she had successfully completed that probationary period” (T. 115). Mrs. Balthrop never explained or put in writing any explanation of the probationary status for Mrs. Holmes. Mrs. Balthrop testified that it was a possibility for Mrs. Holmes to be somewhat skeptical about the Department’s accommodations considering her prior wrongful termination that was initiated by the same Department authority (T. 116).
- 26) When asked specifics by the Court about the meeting held to discuss Mrs. Holmes’ requested accommodations, Mrs. Balthrop could not recall whether there was an

- actual meeting or just a phone conversation in regards to making the decision to deny Mrs. Holmes' request (T. 121-23).
- 27) Mrs. Balthrop testified to the Court that she could not attest to any accommodation ever being made for a Driver's License Examiner (T. 124).
- 28) Mrs. Balthrop agreed with the Court that accommodations are made during the work day at the driver's license stations (T. 124-25).
- 29) Mrs. Balthrop testified to the Court that although the fitness for duty exam is considered, in her opinion, to be an essential function of the position as Driver's License Examiner, there are exceptions made, such as for military people (T. 126-27).
- 30) Mrs. Balthrop testified that she never went to the station to observe whether or not a stepping stool or ramp would be considered a hazard to the employees and/or the public (T. 127-28).

TESTIMONY OF WANDA ADAMS

- 1) Wanda Adams has worked for the Department of Safety and Homeland Security, Driver's Services for thirty eight years. She is currently the Assistant Director for the East Bureau Operations (T. 134). As Assistant Director, Mrs. Adams is responsible for the field operations of the driver's license stations in the East Bureau of the state (T. 135).
- 2) Mrs. Adams referred to the current policy on testing procedures for Class D skills test and affirmed that the step requirement is 18 inches and stated the reasoning is to ensure that the examiner has the physical ability to perform the road test on vehicles of normal bumper height (T. 136-37).

- 3) Mrs. Adams also referred to the Driver's License Policy 1006 section that describes vehicle bumpers and mandatory items that a Driver's License Examiner must check on a vehicle. She read verbatim, "If bumpers on regular passenger cars are significantly higher than the standard (for instance 30 inches) the vehicle should fail. Also, the vehicle shall fail if the bumpers are completely outside of range for a 4x4 recreational vehicle" (T. 137).
- 4) Mrs. Adams also read the law (T.C.A. 55-9-215) on which the Driver's License Policy is based, which states, "frame heights for motor vehicles shall be as follows: Passenger cars, 22 inches. Trucks and recreational vehicles: 4,500 pounds and under is 24 inches, 4,501 to 7,500 pounds is 26 inches" (T. 138).
- 5) By reading the Driver's License Policy and the state law on which it is based, Mrs. Adams showed and testified that the step requirement of 18 inches was only used as an "average" that someone just decided on due to the height limits of certain vehicles (T. 138).
- 6) Mrs. Adams confirmed Mrs. Holmes' testimony that there was a Driver's License Examiner at the Hart Lane station who had MS and was able to perform the essential functions of his job as an examiner. Mrs. Adams does not know whether this examiner has ever asked a fellow co-worker for help with a road test or if he has asked for any type of job accommodation (T. 140).
- 7) Mrs. Adams testified that the Department of Safety has, in the past, refused to give a commercial driver's license examiner the requested accommodation of using a step stool to get in and out of commercial vehicles (T. 140). She rationalized the accommodation refusal by testifying that the step stool would have been a hazard and

- if the examiner needed a stool that showed he was unable to perform the “essential job function” of a commercial driver’s license examiner (T. 141).
- 8) Mrs. Adams testified to the Department of Human Resources Rules that the Department alleges Mrs. Holmes violated. Mrs. Adams testified that Mrs. Holmes is in violation of General Order 216-1 (IX) (3) (e) “Unbecoming Conduct” because she did not meet the physical requirements to perform the “core function” of the job by not being able to do a road test (T. 143).
 - 9) Mrs. Adams testified that Mrs. Holmes is in violation of General Order 222 “Actions Contingent on Results of Fitness for Duty Examinations (c) because she did not pass the fitness for duty exam she was forced to take upon returning to work (T. 144-45).
 - 10) Mrs. Adams testified that Mrs. Holmes is also in violation of the Department of Human Resources Rule 1120-10-06 (7) “Failure to obtain or maintain a current license, certificate, or other qualification required by law or rule as a condition of continued employment” because she did not maintain the “other qualification” which was physical fitness to perform the “core function” of road test responsibilities (T. 145).
 - 11) Mrs. Adams testified that Mrs. Holmes is also in violation of the Department of Human Resources Rule 1120-10-06 (24), “For the good of the service” because she was not able to do the “core functions” of her job, the road tests (T. 145).
 - 12) Mrs. Adams claims that building a ramp at the driver’s license station to help examiners, such as Mrs. Holmes, get in and out of vehicles is not a reasonable accommodation because it would be too expensive and the Department would have to

- build a ramp at every station, which would be limiting on where road tests could be conducted (T. 146-47).
- 13) Mrs. Adams testified that although she was part of the team that hired Mrs. Holmes as a Driver's License Examiner, she has never worked with Mrs. Holmes (T. 149).
 - 14) Mrs. Adams testified that the skills test portion and road test portion, which includes the 18-inch step requirement, are the "core functions" of the job as a Driver's License Examiner and that the ability to perform the road test, which includes the 18-inch high step, should be identified in the description of the Driver's License Examiner role (T. 149-50).
 - 15) On cross examination, when discussing the 18-inch step requirement, Mrs. Adams admitted that there is a distinction between being able to do the 18-inch step and actually having to do the 18-inch step (T. 151).
 - 16) On cross examination, Mrs. Adams agreed that General Order 222(c) which states "Failure to pass the physical fitness for duty examination may result in eventual dismissal from service" is not mandatory but instead subjective and leaves the decision of dismissal up to the Department (T. 153).
 - 17) Mrs. Adams testified that it was the law and a requirement to build ramps for handicapped people at each and every driver's license station as an accommodation (T. 153-54).
 - 18) Mrs. Adams testified that, as Assistant Director of the Eastern Bureau, she did not conduct any investigation or review of Mrs. Holmes' ability to maneuver up and down steps or step stools and was not involved in any discussions or consultations regarding accommodations for Mrs. Holmes (T. 155-56)

TESTIMONY OF MELISSA MCCLEOD

- 1) Melissa McCleod has been employed with the Tennessee Department of Safety for five years, the first two years as a Driver's License Examiner at the Hart Lane location and the last three years as Branch Supervisor Two at the driver's license station located on Centennial Boulevard (T. 158-59).
- 2) As Branch Supervisor Two, Mrs. McCleod's duties consist of supervising employees, creating the weekly schedule, assisting when needed with road tests, making calls and other day-to-day operations of the driver's license station (T. 159).
- 3) Mrs. McCleod knows Mrs. Holmes and has worked with Mrs. Holmes at the Centennial Boulevard driver's license station during the last three years (T. 159-60).
- 4) Mrs. McCleod testified that the examiners are required to take the clients' vehicles out on the road tests they conduct however, there are certain vehicles the examiners will reject such as commercial vehicles, taxi cabs and big trucks (T. 161-62).
- 5) Mrs. McCleod testified that there are occasions concerning vehicles over 12 inches high, in which an examiner may not feel comfortable conducting the road test, due to getting into and out of the vehicle. In these instances, the examiner may ask another examiner to conduct the road test for them (T. 163).
- 6) Mrs. McCleod testified that a Driver's License Examiner has to complete only one road test every thirty days in order to remain qualified as an examiner.
- 7) When asked what she would do if an examiner could not perform the essential functions of the job on a daily basis, Mrs. McCleod testified that she would contact her supervisor to find out the procedure for that issue but that there is also the "human" element to consider in those situations (T. 166-67).

- 8) Mrs. McCleod testified that although it is the examiner's job to fulfill a road test assignment, there are occasions in which an examiner who is unable to fulfill a certain road test will get another examiner to conduct the test in their stead (T. 169).
- 9) As supervisor, Mrs. McCleod is very hands on with her team who she testified works as a team and well together. She always pitches in when an examiner is out sick or for any reason they may need help and frequently conducts road tests herself (T. 169-70).

TESTIMONY OF LARRY MURPHY

- 1) Larry Murphy has been employed with the Tennessee Department of Safety for eight years. His current title is Branch Supervisor Two of the driver's license station located on Hart Lane (T. 172). Mr. Murphy's duties as Branch Supervisor Two include watching over the day-to-day performances and operations of the driver's license station. Mr. Murphy has the same job title as witness, Melissa McCleod (T. 173).
- 2) Prior to becoming Branch Supervisor Two, Mr. Murphy was a Driver's License Examiner for two years, working at the Centennial Boulevard station (T. 173). Mr. Murphy knew and worked with Marilyn Holmes during this time as a Driver's License Examiner (T. 173) Mr. Murphy described Mrs. Holmes as a dedicated worker for the Department who always wanted to do her job correctly (T. 174).
- 3) Mr. Murphy testified that during his time at the Centennial Boulevard station, he does not recall ever conducting a road test for a "jacked-up" truck and stated they did not conduct road tests on "low-rider" vehicles (T. 175).

- 4) Mr. Murphy described the comradery between the workers at the Centennial Boulevard station, the same station where Mrs. Holmes worked, as a very good working relationship. Mr. Murphy stated that the “team worked together, as far as substituting what we did for one another when it was necessary.” (T. 175).
- 5) During his employment as a Driver’s License Examiner at the Centennial Boulevard station, Mr. Murphy states there were several occasions where an employee was unable to ascend into a truck or SUV, whether pregnant, injured, physically could not comfortably fit or get into and out of a vehicle or for any other reasons (T. 175). Mr. Murphy testified that on these occasions, the examiner would simply let his supervisor or another examiner know of his/her predicament and see if someone would substitute for that examiner (T. 176). The substitution of examiners due to physical limitations is not frowned upon by the Department and happens frequently (T. 176-77).
- 6) Mr. Murphy does not believe 18-inch high step requirement is by any means a core function of his or any Driver’s License Examiner and does not prevent a Driver’s License Examiner from doing his or her job (T. 177).

TESTIMONY OF STEVEN ALLEN TYLER

- 1) Steven Allen Tyler has worked for the Tennessee Department of Safety for over thirteen years and is currently a Driver’s License Examiner at the West Nashville Driver’s License Station (T. 180). Mr. Tyler’s job duties as an examiner include issuing driver’s licenses, handgun permits, road testing renewals, duplicates, name changes, etc (T. 181).

- 2) Mr. Tyler worked with Mrs. Holmes on and off for approximately ten years and described her in his testimony as a hard worker who knew and understood her job responsibilities and got along great with her fellow co-workers (T. 181).
- 3) Mr. Tyler described the relationship between co-workers at the West Nashville driver's license station as a "working family" and related specific instances in which fellow Driver's License Examiners, would substitute for each other in cases where one examiner may not be able to perform certain road tests, due to physical limitations (T. 182).
- 4) Mr. Tyler stated in testimony that in no way was the 18-inch high step maneuver a core function of his job as a Driver's License Examiner and that whoever decided it was a core function had obviously never done the job of an examiner (T. 183). He has no recollection of any road tests being administered on "jacked-up" vehicles at the West Nashville station (T. 184-85).
- 5) During cross-examination, Mr. Tyler explained that during his initial fitness for duty test, he was told that the 18-inch high step maneuver was required due to roving crews that had to carry equipment to different stations. The Department no longer has roving crews that travel to different locations and therefore, Mr. Tyler believes the 18-inch requirement is obsolete (T. 188).
- 6) Mr. Tyler explained that it was very simple to temporarily rotate examiners out of their road test responsibilities by simply asking the supervisor (T. 184). He testified in cross-examination that he has no problem substituting road tests with other examiners (T. 186).

- 7) Like Mrs. Holmes, Mr. Tyler testified that he was also under the assumption that the step requirement by law was 12 inches (T. 188-89).
- 8) Mr. Tyler believes that a step stool is a reasonable accommodation for an examiner who may have trouble ascending into and out of a vehicle that requires an 18-inch step maneuver and even offered to bring his personal pink step stool to work (T. 184).

CONCLUSION

1. The Department failed to carry their burden of proof that the Employee violated General Order 222, II, III & IV, General Order 216-1 IX (3) (e), Human Resources Rule 1120-10-06 (7) and 1120-10-06 (24) by her failure of the fitness for duty examination and therefore her not being able to perform the “core function” of road tests.
 - a. General Order 222, II, III & IV

General Order 222, II states that an employee “must successfully pass a fitness for duty exam upon return to work from any type of extended leave exceeding fifteen (15) weeks, to include Family Medical Leave Act (FMLA), Workers Compensation claim, sick leave, compensatory leave, annual leave, administrative leave, light duty status, and fitness for duty status.” The Department claims that due to Employee’s failure to pass the fitness for duty exam, she is in violation of General Order 222, II.

However, the basis for Employee’s extended leave from work was solely due to the Department wrongfully terminating Employee. Testimony of the Director of Human Resources, Kerri Balthrop, shows that Employee’s extended leave, due solely to her wrongful termination, does not fall under any of the specific types of extended leave requiring a mandatory fitness for duty exam under General Order 222. Moreover, Mrs. Balthrop’s testimony also proved that Judge Safley’s wrongful termination Order reinstating Employee to her position as Driver’s

License Examiner made no mention to subjecting Employee to a fitness for duty exam as a prerequisite. The outcome of Judge Safley's decision on Employee's wrongful termination matter was to make the Employee whole again by reinstating her to her original position as Driver's License Examiner.

Testimony proved that the appointing authority of the Department was the sole person who decided to force Employee to take a fitness for duty examination upon reinstatement. This was the same appointing authority of the Department who had wrongfully terminated Employee. Therefore, the Department failed to prove, by their own policy, it was mandatory for Employee to take the fitness for duty examination upon her reinstatement.

Although under the Department's own policy, Employee was not required to take a fitness for duty examination, Employee nevertheless complied with the Department and took the fitness for duty exam upon her first day of returning to work. Employee was unable to perform the 18-inch high step maneuver portion of the exam.

Department claims due to Employee's failure of the physical examination and her refusal to retake the fitness for duty exam she is in violation of General Order 222, IV (c). General Order 222, IV (c) states, "If an employee fails any portion of the physical fitness for duty examination, he/she will have thirty days to return to the DOS contracted medical facility for reevaluation and attempt to pass... (2) If the employee does not pass within the thirty day allotment, he/she will be placed in an appropriate assignment or leave status...failure to pass the physical fitness for duty examination may result in eventual dismissal from service".

Upon the initial physical exam, the presiding physician, Dr. Belihar, recommended Employee not even try to retake the physical exam due the possibility of exacerbating the damage to her knees due to Employee's degenerative arthritis. Testimony showed Employee

began experiencing pain in her knees while working two jobs to support herself while terminated from the Department. The Department was notified of Dr. Belihar's recommendation.

General Order 222, IV does not rule a mandatory dismissal of an employee who fails the physical exam, but leaves the option subjective ("may") and pending on other appropriate measures that should be taken prior to dismissal. Therefore, the Department has in no way proved the Employee's inability to retake the fitness for duty examination, which she should not have been subjected to in the first place, is a violation that should lead to termination of Employee. Employee's inability to retake the fitness for duty examination is irrelevant due to the fact that under Department policy, Employee should have never initially been forced to take the exam upon reinstatement.

b. General Order 216-1, IX (3) (e)

General Order 216-1, IX (3) (e), "Unbecoming Conduct" states, "Employees shall keep physically and mentally fit and subject to duty at all times, except when on sick leave. They shall report to the place of duty mentally and physically fit to carry out their duties, at the designated time and place." The Department claims Employee did not meet the physical requirements to perform the "core function" of a Driver's License Examiner by not being able to do a road test. The Department bases their claim that Employee is unable to conduct road tests on the sole fact that Employee was unable to complete the 18-inch high step maneuver portion of the fitness for duty examination.

The importance of the 18-inch step maneuver is a subjective issue in this case. Although the witnesses for the Department, including, Director of Human Resources, Kerri Balthrop, and Assistant Director for East Bureau Operations, Wanda Adams, claim the step requirement to be a "core function" of a Driver's License Examiner, no proof was offered as to why the step

requirement was placed at 18 inches. Testimony proves the 18-inch step is actually just an average that an unidentified person created roughly based on the laws regarding the legal heights of various vehicles. Although the Department claimed the 18-inch step maneuver was essential in the job function of a Driver's License Examiner, when asked why the requirement was not placed in the job description of Driver's License Examiner (Exhibit 2), Director Kerri Balthrop testified that it was "irrelevant" (T.101).

Testimony of other employees of the Department, who had taken the fitness for duty examination, proves that never, if rarely, does a Driver's License Examiner have to step into or out of a vehicle as high as 18 inches. Testimony of employee Steven Allen Tyler shows that employees who have taken the examination are not even sure the reasoning behind the 18 inch step requirement or the relevance as to their duties as Driver's License Examiners. Mr. Tyler believes it was an old requirement for roving crews that do not even exist anymore,

Although Employee was unable to make the 18-inch one step maneuver in the fitness for duty examination, it in no way hinders her from conducting the majority of road tests as well as the other functions of a Driver's License Examiner, such as administering vision, knowledge and skills tests.

Therefore, the Department has failed, not only to prove that Employee was mandated to take the fitness for duty examination, but, additionally, to prove the significance of the 18-inch high step maneuver and its necessity as to the ability to perform the "core function" road test as a Driver's License Examiner. As a result, the Department cannot claim Employee is in any violation for her inability to perform the 18-inch high step maneuver.

c. Human Resources Rule 1120-10-06 (7) and 1120-10-06 (24)

Human Resources Rule 1120-10-06 (7) states, “Failure to obtain or maintain a current license, certificate, or other qualification required by law or rule as a condition of continued employment.” The Department claims Employee is in violation of this rule because she did not maintain the “other qualification” which was the physical fitness to perform the “core function” of road test responsibilities.

The Department claims Employee is in violation of Human Resources Rule 1120-10-06 (24) states, “For the good of the service”, because she was unable to perform the “core function” of her job, the road test.

Once again, the Department’s arguments under the Human Resources Rules are solely based on Employee’s failure to complete the 18-inch high step maneuver portion of the fitness for duty examination. As shown by testimony, the Department failed to not only prove the 18-inch step maneuver as an essential part of the ‘core’ function of the road test, but also failed to prove Employee was mandated by their policy to even take a fitness for duty examination.

2. The Department failed to prove Employee acted in bad faith and/or violated any General Order or Human Resources Rule due to her refusal of the Department’s proffered reasonable accommodations.

It is relevant to note that the Department failed to prove that Employee’s reinstatement required Employee under General Order 222 to take a fitness for duty examination and therefore any violation or act of bad faith claimed by the Department against Employee for accommodations arising as the result of the examination should be considered moot.

With that being said, Employee complied with the Department by taking the fitness for duty examination. After Employee failed the 18-inch step maneuver, the Department informed

Employee of three options in regards to her job: retirement, resignation or reasonable accommodation under the Americans with Disabilities Act (ADA). Employee followed Department protocol by sending them a written request for an accommodation. Employee even gave her own suggestions as to reasonable accommodations, such as the use of a step stool to help her conduct road tests.

Under ADA policy (Exhibit 5), a reasonable accommodation suggests a flexible interactive process that involves both the employer and the qualified individual with the disability and it requires the Department to consult with the disabled individual regarding the precise job-related limitations imposed by the disability and how these limitations could be overcome with reasonable accommodation. Specifically, ADA policy states, “In consultation with the individual, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position. The preference of the disabled person should be given primary consideration” (T.105).

Director Kerri Balthrop testified that the Department never met with Employee to discuss her accommodation requests. Director Kerri Balthrop further testified that the Department never conducted any assessments as to the different types of step stools available and how they would affect the workplace. When asked about the Department’s denial of the ramp accommodation, Assistant Director, Wanda Adams testified it would be too expensive and if they built one at Employee’s station, they would have to build one at every station (T. 146-47).

Director, Kerri Balthrop testified to having a meeting with the appropriate authorities regarding Employee’s accommodation requests. Yet when asked by Employee’s counsel, and again by the Court, as to specifics about this meeting with appropriate authorities regarding Employee’s accommodation requests, Mrs. Balthrop could not remember the parties present for

the meeting, the exact date of the meeting, if there was more than one meeting, or even if there was an actual meeting or just a phone conversation on the issue. The only correspondence with the Employee on this matter was a written denial of her requests. Therefore, by not interacting with Employee or taking the time to properly assess Employee's requested accommodations, the Department, not the Employee, acted in bad faith by not following their own policy pursuant to the ADA.

Upon refusing Employee's suggested accommodations, the Department gave Employee only two options: to be transferred within the Department, either to Safety Examiner One position or Safety Examiner Two position. Both job positions fall within a lower pay range than Employee's position as Driver's License Examiner. Under Department policy, if Employee took one of these jobs, her salary, as well as her pension, would decrease. Additionally, Department policy mandates that Employee would be placed on six month probation without civil service rights upon transitioning to one of these positions.

The Department's explanation for these unreasonable accommodations is that although it was mandatory, under standard Department policy, for Employee to apply along with other applicants for these two positions, the "special", undocumented Department policy provides for her to automatically receive one of the jobs. The Department also argued that under their "special" policy, Employee's pay would not have decreased and she would not have lost her civil service rights. However, testimony shows the Department never once took the time to inform Employee of the process or try to explain their "special" policy to Employee in regards to her salary and protections.

Testimony further showed that in 2006, Employee had actually applied several times for the position of Safety Examiner only to be denied the position three times and informed, by a

letter from Human Resources Director, Kerri Balthrop, that she would be taken off the employee register. Therefore, without knowledge of the Department's "special" policy to make Employee a shoe-in for these positions, Employee was justly wary of going through the same application process in which she had been previously denied and withdrawn.

To the Employee, who had just been reinstated after being wrongfully terminated by the Department, the accommodation of a job transfer that included less pay and no protection is not a reasonable accommodation. Due to the culmination of Employee's prior wrongful termination, the lack of communication on behalf of the Department as to the "special" circumstances of the two job postings and Employee's previous experience with trying to apply for these certain jobs, Employee did not act in bad faith by not applying for the positions of Safety Examiner One and Two.

By failing to explain the "special" circumstances and "under the table" policies to Employee, the Department's accommodations themselves were not reasonable and they never afforded Employee an opportunity to knowledgeably make a decision. These unreasonable accommodation options occurred after the Department had already unfairly denied Employee's accommodation request for a stepping stool without taking the time to assess the request following the ADA policy. Therefore, Employee did not act in bad faith or violate any Department orders or rules by choosing not to apply for the positions offered as accommodation by the Department. If anything, the proof demonstrates how the Department acted in bad faith.

3. The Department's termination upon finding the Employee in violation of the Department's General Order 216-1, II & IX, General Order 222, I, II & IV, Human

Resources Rule 1120-10-06 (7) & (24) and acting in bad faith was arbitrary and capricious.

Immediately upon Employee's reinstatement, the Department forced Employee to take the fitness for duty examination. No section of the Civil Service Commission's reinstatement Order mandates Employee take such exam and the Department failed to prove under any other policy or rule that Employee was required to take the exam.

Nonetheless, Employee acted in good faith and complied with Department's order to take the fitness for duty exam and she did not pass the 18-inch step portion. Although Department claims this step maneuver to be an essential part of the core functions as a Driver's License Examiner, nowhere in the State's own job description (Exhibit 2) is the step requirement mentioned. The Department failed to prove that the 18-inch high step maneuver portion of the fitness for duty examination is an essential function of Employee's or any other Driver's License Examiner's job. On the contrary, testimony of other Driver's License examiners proved the 18-inch high step requirement to be nonessential.

Testimony proved that the Department refused Employee's requested accommodations without following their own guidelines provided under the ADA policy. Testimony further proved that the limited accommodations offered by Department to Employee were in no way reasonable due to the Department's intentional lack of communication with Employee as to the pertinent issues of financial status and civil service rights.

Director Kerri Balthrop testified that the ultimate decision on the "reasonableness" of a certain employee accommodation is decided by a combination of several employees with the Department and the final ruling is made by the appointing authority (T. 93). Director Kerri Balthrop's testimony showed that the ultimate decision of "reasonableness" as to the

accommodation for Employee was the sole decision of the appointing authority. Once again, this is the same appointing authority who initiated Employee's prior wrongful termination and the same appointing authority whose sole discretion was to force Employee to take the fitness for duty examination upon her reinstatement

Based on the foregoing, the Department has abused their discretion in reaching their decision to terminate Employee.

For the reasons stated above it is therefore **ORDERED** that the Employee shall be reinstated in her position as Driver's License Examiner, receive back pay and any benefits attached thereto effective this date.

It is so **ORDERED** this the _____ day of _____, 2012.

Anthony Adgent

Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State this 16th day of March, 2012.