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

IN THE MATTER OF:

Elaine Macklin

DOCKET NO: 26.45-114024J

INITIAL ORDER

This matter was heard on January 11, 2012 in Arlington, Tennessee, before Joyce Carter-Ball, Administrative Law Judge, assigned by the Secretary of State to sit for the Civil Service Commission of the State of Tennessee. Fredrick Zimmerman, counsel for the Department of Intellectual and Developmental Disabilities (“Department”), was present and represented the State. Grievant was present and elected to represent herself.

The issue presented for consideration is whether the State carried its burden of proof of preponderance of evidence that Grievant’s conduct warranted the termination of her employment with the Department. Upon conclusion of the hearing, the matter was taken under advisement pending submission of the parties’ Proposed Findings of Fact and Conclusions of Law.

After consideration of all of the evidence, the testimony of the witnesses, arguments of the parties and the entire record in this matter, it is **determined** that Grievant’s termination of employment with the Department was proper and is **UPHELD**.

This decision is based upon the following:

FINDINGS OF FACT

1. At the time of her termination, Grievant was employed by the Department as a Habilitative Therapy Technician (HTT). HTTs provide direct care for service recipients. The Department operates a number of residential homes for service recipients called the West

Tennessee Community Homes. Respondent and other staff were assigned to one of these homes, located on Osborntown Rd. Osborntown was home to three service recipients at the time of the incident.

2. Marcella Dickerson, a HTT assigned to the Osborntown home, worked the 8:00 a.m. to 4:00 p.m. shift on May 31, 2011. When she arrived, she learned that earlier, one of the residents, Larry, had had an accident in which he fell, struck his head and had to be transported to the hospital. Eva Jones from the night shift had accompanied Larry to the hospital. Teresa Moore was another HTT assigned to Osborntown. Her shift had ended at 8:00 a.m., but she had not yet left the house. Approximately 8:20 a.m., Ms. Dickerson was talking with Ms. Moore near the bar area. Ms. Moore was packing her things up to leave when Grievant approached her, coming down the hallway. Grievant was complaining about Ms. Moore letting one of the service recipients stay in bed, and that the staff in the home did not work together. Grievant pointed her finger at Ms. Moore, who in turn pointed her finger at Grievant.

3. The finger pointing led to a physical altercation between Grievant and Ms. Moore. **Grievant struck the first blow.** Ms. Dickerson stepped between the two to break it up. Lester Cooper, the home manager who was in the house at the time, grabbed Grievant and moved her some distance away while Ms. Dickerson escorted Ms. Moore outside the home. According to the witnesses, Grievant was the aggressor, approaching Ms. Moore, pointing her finger at her and hitting Ms. Moore first.

4. Sandra Palmer, LPN, worked the 7:00 a.m. to 7:00 p.m. nursing shift. She testified that Mr. Cooper, the home manager, had come over because of the earlier medical emergency with the other service recipient. Ms. Palmer was sitting at the computer with Mr. Cooper standing next to her. Mr. Cooper was occupied with the incident report, and Ms. Palmer was charting

information relating to the earlier incident with Larry. Ms. Palmer heard Grievant coming down the hall fussing at Ms. Moore. She observed the finger pointing and then the physical altercation. Her observations of the altercation were consistent with those of Ms. Dickerson's. Ms. Palmer testified that it took two people (Ms. Dickerson and Mr. Cooper) to break up the fight. Grievant began cursing and kicking as Mr. Cooper intervened. Mr. Cooper testified that Grievant and Ms. Moore looked like they were wrestling or tussling, and had grabbed each other's clothes.

5. After the fighting incident, Mr. Hardaway, who was Mr. Cooper's immediate supervisor, was notified by Mr. Cooper. The matter was then brought to the attention of Lisa Guy, Deputy Regional Director and Director for the West Tennessee Homes.

6. Ms. Guy, testified that she asked Mr. Hardaway to summon Grievant and Ms. Moore to a meeting at the Baker Building that afternoon. At the meeting, **both employees admitted they were fighting on the job**. Fighting is unacceptable conduct. After conducting her investigation, Ms. Guy wrote a letter to Grievant recommending her termination. After Grievant's due process hearing, Ms. Guy wrote another letter dated July 1, 2011. On August 26, 2011, after a fourth step hearing, Commissioner James M. Henry wrote Grievant, upholding the decision to terminate her employment.

7. Ms. Guy testified that Grievant exercised all her due process rights in this matter, and that both Grievant and Teresa Moore were terminated as the result of this misconduct. July 14, 2011 was the effective date of Grievant's termination.

APPLICABLE LAW

1. In a fifth step level hearing, an administrative law judge presides to take proof and render an initial order which is subject to review by the Civil Service Commission.

2. The Department, as the party that initiated these proceedings, is the Petitioner and has the burden of proving this matter to a “preponderance of the evidence.” A “preponderance of the evidence” means the “greater weight of the evidence, or the more probable conclusion, based on the evidence presented. Rule 1360-4-1-.02(7), Tenn. Comp. R. & Regs. (1999).

3. The burden of proof is usually assigned to the party seeking a change of the status quo. Rule 1360-4-1-.02(7), Tenn.Comp. R. & Regs. (1999).

4. The grounds for termination of Grievant were the following provisions of Rule 1120-10-.05 of the Rules of the Tennessee Department of Human Resources:

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

...

(11) Conduct unbecoming an employee in State service.

...

(15) 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.

ANALYSIS

The State has demonstrated by a preponderance of the evidence that the termination of Grievant was justified. **Grievant was the aggressor** in a work-place confrontation with another employee, which escalated from angry words to finger pointing and blows being exchanged with another employee. The fight had to be broken up by two other employees. During a meeting with the Deputy Regional Director and Director for the West Tennessee Homes, **Grievant admitted that she was fighting while on the job.**

CONCLUSIONS OF LAW

1. It is **concluded** that the State has carried its burden of proof by a preponderance of the evidence that Grievant's conduct violated the provisions of the regulations and policies as set forth above.
2. It is **concluded** that Grievant violated Rule 1120-10-06: (6), (11) and (15) of the Rules of the Tennessee Department of Human Resources.
3. Based on the evidence presented, it is **ORDERED** that Grievant's termination of employment with the Department is **UPHELD**.

This Initial Order entered and effective this 9 day of April, 2012

Joyce Carter-Ball
Administrative Judge