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DEPARTMENT OF SAFETY v. THERESA MALONE, Grievant.

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BEFORE THE CIVIL SERVICE COMMISSION OF THE STATE OF TENNESSEE

IN THE MATTER OF: **DEPARTMENT OF SAFETY,** ***v.*** **THERESA MALONE,** ***Grievant.***	**DOCKET NO: 26.19-110936J**

INITIAL ORDER

This matter was heard on July 21, 2011, in Nashville, Tennessee, 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. Staff Attorney Deborah Martin represented the Tennessee Department of Safety and Jonathan R. Stephens represented the Grievant, Theresa Malone.

The issue is whether the Department of Safety properly terminated Theresa Malone's employment with the Department. After consideration of all of the evidence and arguments of the parties, it is determined that the termination of Theresa Malone's employment was proven to be appropriate by a preponderance of the evidence and should therefore be **UPHELD**. This decision is based upon the following.

PROCEDURAL HISTORY

The Department of Safety ("Department") terminated the Grievant Theresa Malone's employment based upon her failure to return to work after an extended absence. On November 9, 2010, the Grievant was notified that the Department considered her to have resigned from her

position due to job abandonment. On December 1, 2010, Dave Mitchell, then Commissioner of the Department of Safety, notified the Grievant that he was affirming the earlier decision to terminate the Grievant's employment due to job abandonment. The Department did not hold a Level IV Grievance hearing.

The Grievant filed her Level V Grievance hearing request with the Civil Service Commission on December 29, 2010. Thereafter, on January 11, 2011, the matter was referred to the Administrative Procedures Division in the Secretary of State's Office for a contested case hearing. By ORDER issued on February 9, 2011, the hearing in this matter was set for May 12, 2011.

The Grievant requested a continuance of the May 12, 2011, hearing. As part of the Grievant's motion to continue the hearing, the Grievant agreed to a cut-off of all back-pay as of May 12, 2011. As ORDERED in the ORDER OF CONTINUANCE issued on May 10, 2011, the hearing was continued and the Grievant's claim of back-pay was cut-off as of May 12, 2011.

On May 9, 2011, the Grievant filed a MOTION TO REMAND THIS MATTER TO THE DEPARTMENT OF SAFETY TO COMPLY WITH THE GRIEVANCE PROCEDURE. In this motion, the Grievant requested a remand to the Department so that the Commissioner could conduct a Level IV Grievance hearing. The Department opposed this motion. The Grievant's motion for remand was DENIED by ORDER issued on June 6, 2011.

The contested case was heard on July 21, 2011. The transcript was filed on October 26, 2011. On December 16, 2011, the Department filed proposed findings of fact and conclusions of law. On December 16, 2011, the Grievant filed proposed findings of fact and conclusions of law.

On February 7, 2012, the Grievant filed a MOTION TO OPEN THE RECORD AND ALLOW GRIEVANT TO FILE AN ADDITIONAL EXHIBIT. On February 14, 2012, the Department opposed the motion to reopen the record; however, in doing so, the Department filed an AFFIDAVIT OF VICKIE TAYLOR, with an attached document. Although the Department opposed the motion to reopen the record, because they filed an Affidavit in support of their opposition, the RECORD must be reopened to consider the Affidavit. Accordingly, the Grievant's motion to reopen the RECORD is GRANTED for the limited purpose of admitting the supplemental exhibit attached to the Grievant's motion to reopen as LATE FILED EX. 17 and the AFFIDAVIT OF VICKIE TAYLOR, with the attached document, as LATE FILED EX. 18. Neither of these LATE FILED EXHIBITS change the outcome of this case. The RECORD is again deemed to be closed as of February 14, 2012.

FINDINGS OF FACT

1. The Grievant was employed by the Department on August 3, 1999, as a driver license examiner in Chattanooga, Tennessee.

2. On October 20, 2009, the Grievant was involved in a work related injury. The Grievant was out on sick leave from October 20, 2009, to November 13, 2009. Pursuant to Human Resources policy, after the Grievant was out on sick leave for fifteen (15) days straight, the Grievant was placed on Family Medical Leave Act (FMLA) leave effective on November 16, 2009. The Grievant exhausted her FMLA leave on February 17, 2010.

3. During the Grievant's FMLA leave, she applied for and was granted Division of Claims Leave, i.e., Worker's Comp leave. The Grievant's Worker's Comp leave began on January 13, 2010. The Grievant's Worker's Comp and FMLA leave ran simultaneously.

4. The Grievant was out on approved leave of some form (sick, FMLA or Worker's Comp) from October 20, 2009, until April 5, 2010.

5. The Grievant was on Worker's Comp leave from January 13, 2010, to April 5, 2010. On April 5, 2010, the Department received notification from her physician dated April 1, 2010, that the Grievant could return to full-duty work with no restrictions. At that time, the Grievant's Worker's Comp leave ended.

6. It is the policy of the Department that any employee who is on leave for fifteen weeks or more pass a fitness for duty exam before returning to work on full duty. The Grievant informed her supervisor that she did not believe she could pass a fitness for duty exam.

7. On or about April 5, 2010, the Department received another notification from the Grievant's physician dated April 5, 2010, stating that she could return to work on light duty with restrictions. On April 5, 2010, the Grievant requested light duty in writing as is required by the Department. The Grievant was approved for light duty work on April 7, 2010.

8. The Grievant worked light duty from April 16, 2010, to April 26, 2010. On April 27, 2010, the Grievant went out on leave without pay. The Grievant began receiving Worker's Comp leave again.

9. On June 24, 2010, the Department received notification that the Grievant had reached maximum medical improvement and that the Grievant would no longer receive Worker's Comp leave.

10. By letter dated August 6, 2010, the Department notified the Grievant to contact Susan Cook, the Department's Human Resources Manager, by August 13, 2010, to discuss her options regarding extended leave.

11. An employee applies for extended leave by written request through the employee's chain of command. The Grievant did not apply for extended leave through her chain of command.

12. On August 13, 2010, the Grievant informed Ms. Cook that she would send in a doctor's statement from her August 18, 2010, appointment and a request for extended leave. Although the Department received a doctor's statement from the Grievant's August 18, 2010, appointment, it did not support a request for extended leave. Instead of providing the Department with a doctor's note supporting her request for extended leave, the doctor's note dated August 18, 2010, stated that the Grievant could return to work on light duty. However, in August 2010, the Grievant did not request light duty nor did she request extended leave.

13. In August 2010, the Grievant informed her supervisor that she had a doctor's appointment on September 22, 2010, and that after that appointment, she would determine if she could return to full or light duty.

14. On September 20, 2010, the Department sent a letter to the Grievant giving her until October 1, 2010, to contact Kerri Balthrop, the Director of Human Resources for the Department, in writing regarding her intentions for continued employment. This letter explained that as of September 20, 2010, the Grievant had not applied for extended leave and that she was still in a leave without pay status. The Grievant did not respond to the Department's letter dated September 20, 2010. Specifically, the Grievant did not contact Director Kerri Balthrop in writing as instructed.

15. On October 11, 2010, Director Hogan of the Driver License Division requested an update on the Grievant's status. Ms. Cook informed Director Hogan that in August 2010, the Department had received a fax requesting extended leave, but no medical information was attached. On October 12, 2010, Ms. Cook left the Grievant a message requesting updated medical information.

16. The Grievant knew that any request for leave must have a doctor's statement attached. The Grievant failed to follow the Department's procedures for requesting extended leave.

17. On October 12, 2010, Director Hogan informed Ms. Cook that if the Department had not heard from Grievant that he wanted to start the termination process based upon the Grievant's having failed to maintain communication with the Department.

18. From September 20, 2010, to October 12, 2010, the Grievant did not report to work.

19. On November 8, 2010, the Worker's Comp provider contacted the Department and informed the Department that the Grievant had not been to a doctor since September 2010 and asked what the Grievant's status was.

20. On November 9, 2010, the Grievant was notified that the Department considered her to have resigned from her position due to job abandonment.

21. On December 1, 2010, Dave Mitchell, then Commissioner of the Department of Safety, notified the Grievant that he was affirming the earlier decision to terminate the Grievant's employment due to job abandonment.

22. The Department terminated the Grievant for job abandonment after the Grievant did not return to work after her approved sick leave, FMLA leave and Workers Comp leave had been exhausted, and after the Grievant failed to request extended leave in writing with appropriate medical documentation as instructed by the Department. While there is no guarantee that a request for extended leave will be granted, an employee must at least request such leave before it will be granted.

23. The Grievant's job was to serve the citizens of the State of Tennessee. If an employee fails to report to work, the driver license station is short staffed and is not able to adequately serve the public. Extended absences without approved leave cause a hardship to the employees who do report to work because they must perform their job duties and the job duties of the absent employee.

ANALYSIS *and* CONCLUSIONS OF LAW

Civil service appeals are heard *de novo* before an Administrative Judge. The Department of Safety, 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 complies with State law.

The Department of Safety has met this burden of proof by proving by the preponderance of the evidence that the Grievant's termination of employment was proper. It is determined that the Department of Safety properly terminated the Grievant's employment and that the Department's termination decision should therefore be **UPHELD.**

TENN. CODE ANN. § 8-30-326 provides:

> Any employee who is absent from duty for more than three (3) consecutive work days without giving notice to the appointing authority or appropriate manager to include the reason for such absence, and without securing permission to be on leave, or who fails to report for duty or to the immediate supervisor, or the appointing authority within two (2) work days after the expiration of any authorized leave of absence, is considered as having resigned not in good standing, absent existing circumstances causing the employee's absence or preventing the employee's return. A regular employee who is designated resigned in accordance with these circumstances shall have the right to appeal

> such action through the grievance procedure and to be reviewed by the commission.

TENN. CODE ANN. § 8-30-326(c). *See also*, RULE 1120–02–.16(5), COMP. R. & REGS. ch. 1120–02–.16 (May 2011 (Revised)).[1] This code section authorized the Department to terminate the Grievant's employment after she repeatedly failed to return to work after her approved sick, FMLA and Workers Comp leave had ended. The Grievant was out on approved leave of some form (sick, FMLA or Worker's Comp) from October 20, 2009, until April 5, 2010. The Grievant exhausted her FMLA leave on February 17, 2010. From February 17, 2010, until April 5, 2010, the Grievant was out on Worker's Comp leave. The Grievant worked light duty from April 16, 2010, to April 26, 2010. On April 27, 2010, the Grievant went out on leave without pay, at which time she began receiving Worker's Comp leave again. The Grievant reached maximum medical improvement on June 24, 2010, at which time she had exhausted her Workers Comp leave.

After June 24, 2010, the Department expected the Grievant to return to work or to contact the Department concerning her status. The Grievant did not contact the Department until the Department sent her a letter in August, requesting that the Grievant notify the Department of her intentions with respect to her position. In August, 2010, the Grievant did not fully respond to the Department's requests. Although the Grievant finally faxed the Department a request for extended leave, she provided no supporting medical information with her request for extended leave. After this time, the Grievant did not respond to the Department's efforts to contact her.

[1] 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 the Department were those of the Tennessee Department of Personnel. TENN. COMP. R. & REGS. ch. 1120-2 (Employment Practices) (Nov. 2002 (Revised)). RULE 1120–2–.14(6), COMP. R. & REGS. ch. 1120–2–.14 (Nov. 2002 (Revised)), is found in the new Rules at 1120–02–.16(5), COMP. R. & REGS. ch. 1120–02–.16 (May 2011 (Revised)).

On September 20, 2010, the Department sent a letter to the Grievant giving her until October 1, 2010, to contact Director Kerri Balthrop in writing. The Grievant did not respond to the Department's letter dated September 20, 2010. Specifically, the Grievant failed to contact Director Kerri Balthrop in writing as instructed.

The Department could have terminated the Grievant when she failed to contact the Department after June 24, 2010, when she reached maximum medical improvement. Instead, the Department repeatedly initiated communication with the Grievant, informing her of what she should do if she wanted to request extended leave in compliance with its policies and procedures. The Grievant then ignored the Department's instructions.

The Grievant did not contact the Department after August because, as she testified, she believed that the Department had abandoned her after the Department denied her light duty request. However, the Grievant admitted that she received the September 20, 2010, letter instructing her to contact Director Balthrop by October 1, 2010. The Grievant admits that she never followed the Department's instructions in that she never contacted Director Balthrop. The Grievant's feelings of abandonment do not justify her failure to contact Director Balthrop as specifically instructed by the Department.

The court in *Grubb v. Tennessee Civil Service Commission*, 731 S.W. 2d 919 (Ct. App. 1987), *app. for permission to appeal denied* (Tenn. 1987), upheld an employee's termination for failure to return to work after the end of an approved leave. Similar to *Grubb*, the Department properly terminated the Grievant's employment after she failed to return to work and failed to apply for extended leave once she had exhausted her FMLA and Worker's Comp leave. The Grievant did not follow the Department's clear and reasonable instructions pertaining to applying for extended leave.

Based upon the forgoing, the Department of Safety has met its burden of proof by proving by the preponderance of the evidence that the Grievant abandoned her job pursuant to TENN. CODE ANN. § 8-30-326(c) when she failed to return to work after her approved leave ended and she failed to follow the Department's instructions pertaining to applying for extended leave.

Accordingly, it is hereby **ORDERED** that the Grievant's appeal is **DENIED** and the termination of her employment with the Department of Safety is **UPHELD**.

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.

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