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VERONICA D. HURD, Grievant, v. TENNESSEE BOARD OF PROBATION AND PAROLE.INITIAL

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BEFORE THE CIVIL SERVICE COMMISSION OF THE STATE OF TENNESSEE

IN THE MATTER OF: **VERONICA D. HURD**, ***Grievant,*** ***v.*** **TENNESSEE BOARD OF PROBATION AND PAROLE.**	**DOCKET NO: 26.41-099925J**

INITIAL ORDER

By ORDER issued on November 14, 2009, the parties were given through and including December 12, 2008, to file any motions to dismiss. On December 12, 2008, the Tennessee Board of Probation and Parole (BPP) filed a Motion to Dismiss with an accompanying Memorandum in support thereof. The Grievant, who is proceeding *pro se*, filed a response on January 12, 2009. Accordingly, pursuant to RULE 1360–4–1–.09(3) 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)), the motion is deemed ready for consideration.

After consideration of the RECORD and the arguments presented, it is determined that the BPP's motion should be GRANTED. This decision is based upon the following.

FINDINGS OF FACT

1. The Grievant is employed by the BPP as a Probation and Parole Manager 1 (PPM1).

2. On February 29, 2008, the Grievant reported to James Crumble, PPM1, P33D2, that one of the employees supervised by Mr. Crumble, a Probation and Parole Officer 2 (PPO2), had been making derogatory statements about the Grievant to other employees in the office.

3. As a result of the Grievant's complaint, the BPP conducted an internal investigation.

4. Barbara Haney, the Internal Affairs Investigator for the BPP, conducted the investigation.

5. Ms. Haney interviewed the Grievant on March 10 and 13, 2008, as part of the investigation.

6. On March 24, 2008, the Grievant filed the grievance at issue because Ms. Haney insisted upon interviewing the Grievant.

7. By letter dated July 7, 2008, the BPP informed the Grievant that her grievance does not present a grievable matter, citing to Rule 1120–11–.08 of the Rules of the Tennessee Department of Human Resources, TENN. COMP. R. & REGS. ch. 1120–11 (Grievance) (May 1999 (Revised)).[1]

8. On August 6, 2008, the Grievant then filed the instant appeal.

ANALYSIS AND CONCLUSIONS OF LAW

The BPP has moved to dismiss this case because the Grievant has appealed a non-grievable issue and accordingly, she lacks standing to pursue the instant appeal. Presumably, the BPP's motion to dismiss is made pursuant to RULE 12.02(6) of the Tennessee Rules of Civil Procedure for failure to state a claim upon which relief can be granted.[2] Pursuant to RULE 12.02,

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[1] The Rules of the Tennessee Department of Human Resources still refer to the Tennessee Department of Personnel even though the Department is now named the Tennessee Department of Human Resources. *See* TENN. CODE ANN. §§ 4-3-101(3) & 4-3-1701. Herein, the Rules of the Tennessee Department of Human Resources, TENN. COMP. R. & REGS. ch. 1120-11 (Grievance) (May 1999 (Revised)), will be referred to as "DHR/DOP RULES."

[2] The Tennessee Rules of Civil Procedure are referenced pursuant to RULE 1360–4–1–.01(3), which provides:

> In any situation that arises that is not specifically addressed by these rules, **reference may be made to the Tennessee Rules of Civil Procedure for guidance** as to the proper procedure to follow, where appropriate and to whatever extent will best serve the interests of justice and the speedy and inexpensive determination of the matter at hand.

a motion to dismiss for failure to state a claim upon which relief can be granted that is supported by matters outside the pleadings, not excluded by the court, is treated as a RULE 56 motion for summary judgment. Because attachments were submitted with the memorandum filed in support of the motion, the BPP's motion to dismiss is deemed to be a motion for summary judgment.

As the movant, the BPP has the burden under RULE 56 to "show that there is no genuine issue as to any material fact and that [the BPP] is entitled to a judgment as a matter of law." TENN. RULE CIV. PRO. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). The BPP has met that burden. As the nonmoving party, the Grievant's "evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the [Grievant as the] nonmoving party." *Martin v. Norfolk S. Ry.*, 271 S.W.3d 76, 84 (Tenn. 2008). The Grievant has been given a reasonable opportunity to respond to the motion as required by RULE 12.02. To date, the Grievant has chosen not to oppose the motion other than to request that the motion be "disregarded."[3] The Grievant has set forth no legal basis by which the motion can be disregarded. Taking the facts in the light most favorable to the Grievant, there are no facts that support the Grievant's apparent position that she has stated a grievable claim.

DHR/DOP RULE 1120–11–.08(14) provides that the following types of actions, among others, are "non-grievable": "[m]atters relating to internal agency or program management which are based on discretionary decision making." The Grievant made a complaint to Mr. Crumble, which the BPP then investigated. Apparently, after the Grievant made her complaint, she decided that she did not want her complaint investigated. However, the BPP chose to complete its investigation. The decision of the BPP to complete the investigation, including an interview of the Grievant in the course thereof, is clearly a matter "relating to internal agency or

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RULE 1360–4–1–.01(3) 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)) (emphasis added).

[3]Specifically, the Grievant's response to the motion states, *in toto*:

> I, the respondent, Veronica D. Hurd respectfully request the Court to disregard the Motion to Dismiss Order [sic] rendered December 12, 2008 by The State of Tennessee Board of Probation and that the above-styled cause of action continues.

program management which [is] based on discretionary decision making." DHR/DOP RULE 1120–11–.08(14). Hence, the BBP's decision to complete the investigation into issues complained about by the Grievant is clearly a non-grievable issue under DHR/DOP RULE 1120–11–.08(14). Accordingly, it is clear from the language of DHR/DOP RULE 1120–11–.08(14) that the Grievant is not entitled to grieve the BPP's decision to investigate the issues about which she complained.

It is determined that DHR/DOP RULE 1120–11–.08(14) precludes the Grievant from proceeding to a Level V hearing under these facts.

It is determined that the Grievant has failed to state a claim upon which relief can be granted and that the BPP is entitled to judgment as a matter of law.

Accordingly, pursuant to RULES 12.02(6) and 56 of the Tennessee Rules of Civil Procedure, the BPP's motion for summary judgment is GRANTED.

It is ORDERED that the Grievant's appeal is DISMISSED for failure to state a claim upon which relief can be granted.[4]

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the _____ day of _____ 2009.

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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 19th day of March, 2009.

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THOMAS G. STOVALL, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION

[4] Because this disposition resolves the case in its entirety, the remaining issues raised by the BPP are not addressed.