11-14-2008

# TENNESSEE DEPARTMENT OF FINANCE AND ADMINISTRATION, BUREAU OF TENNCARE, Petitioner, vs. ALICE ANN HARRIS, Grievant

**BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION**

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| **TENNESSEE DEPARTMENT OF FINANCE AND ADMINISTRATION, BUREAU OF TENNCARE, Petitioner,** | ) | |
| **v.** | ) | **Docket No. 26.09-100131J** |
| **ALICE ANN HARRIS, Grievant.** | ) | |

## INITIAL ORDER

This contested case came on to be heard on November 14, 2008, in Nashville, Tennessee before Administrative Judge Joyce Grimes Safley, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Civil Service Commission of Tennessee. Ms. Donna Tidwell, Deputy General Counsel for the Bureau of TennCare, and Ms. Betty Boner, General Counsel for the Bureau of TennCare, represented the Department of Finance and Administration (hereinafter "the Department"). The Grievant, Ms. Alice Ann Harris, was present and was represented by Ms. Laurie Lea Doty, attorney, of the Nashville, Tennessee Bar.

The parties submitted their respective "Proposed Findings of Fact and Conclusions of Law" on February 2, 2009 and February 4, 2009, making this matter ripe for consideration[1].

The subject of this hearing was Grievant's appeal of her termination from the Bureau of TennCare, Department of Finance and Administration. Grievant was terminated for allegedly violating the following *Rules of the Tennessee*

[1] It is noted that the Initial Order in this matter is due for issuance on or before ninety (90) days from the date the parties' proposed findings of fact and conclusions of law were filed. *See* T.C.A. § 4-5-314.

*Department of Personnel* (Revised May, 1999): (1) 1120-10-.06(1) –Inefficiency or incompetency in the performance of duties; 1120-10-.06(8) Conduct unbecoming an employee in the State service; 1120-10-.06(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.

The Petitioner also asserts that Grievant should be terminated "for the good of the service" pursuant to T.C.A. §8-30-326(a) which permits the appointing authority to "dismiss any employee in the authority's division when the authority considers that the good of the service will be served thereby." [*See also* Department of Personnel Rule 1120-10-.06(24): "For the good of the service, as outlined in T.C.A. §8-30-326"].

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that the Department showed, by a preponderance of the evidence, that Grievant was guilty of inefficiency or negligence in the performance of some of her duties. However, the Department failed to show, by a preponderance of the evidence, that Grievant was guilty of "gross misconduct or conduct unbecoming an employee in the state service". Nor did the Department show, by a preponderance of the evidence, that Grievant violated Rule 1120-10-.06(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.

Finally, the Department failed to show, by a preponderance of the evidence, that the termination of Grievant would comply with T.C.A. §8-30-326(a) which permits the appointing authority to "dismiss any employee in the authority's division when the authority considers that the good of the service will be served thereby." [*See also* Department of Personnel Rule 1120-10-.06(24): For the good of the service, as outlined in T.C.A. §8-30-326].

Grievant was terminated for two incidents which are set forth in the Commissioner's May 30, 2008 letter. It is noted that the Commissioner's termination letter does not mention T.C.A. §8-30-326(a), "for the good of the service", as a basis for Grievant's termination. As a matter of due process, the charge of "dismissal for the good of the service" must be dismissed.

Accordingly, considering all the facts and circumstances of this matter, it is **ORDERED** that the appropriate discipline in this matter is **ninety (90) days suspension without pay.** Grievant shall be **REINSTATED** to her job.

## FINDINGS OF FACT

1. Grievant Alice Ann Harris was first employed by the State of Tennessee, Bureau of TennCare, in February 2005. She was employed as a Public Health Nurse Consultant 1 (PHNC 1).

2. At the time of the contested case hearing, Grievant had been licensed as a registered nurse (R.N.) in the State of Tennessee for forty years.

3. When Grievant was first employed as a PHNC 1 for TennCare, she worked in the Long Term Care Department reviewing Pre-Admission Evaluations (PAE's)[2] for nursing facilities or nursing homes.

4. When the Department or TennCare hires a nurse as a PHNC or "PAE nurse", the newly employed PAE nurse is trained or oriented by other PAE nurses.

5. Pre-Admission Evaluations (PAE's) are long-term care medical eligibility admission forms used for the purpose of obtaining Medicaid coverage or eligibility.

6. TennCare's Public Health Nurse Consultants, or "PAE Nurses" are responsible for reviewing the submitted PAE's and determining whether such PAE's should be "approved" or not.

7. Nursing facilities complete and submit a PAE to TennCare in order to obtain approval for Medicaid reimbursement.

8. When a TennCare PAE nurse receives and reviews the submitted PAE, the nurse may either "deny" the PAE; "approve" the PAE; or communicate with the nursing facility to resubmit the PAE after it makes changes or furnishes additional information in the PAE.

9. A PAE nurse "approves" a PAE based upon the nursing facility's requesting coverage or reimbursement for a patient, and the patient meeting certain criteria. Whether or not a patient or resident meets criteria for the requested level of care depends upon the supporting documentation that is submitted.

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[2] Approximately thirty-two thousand PAE's are processed each year by the TennCare PAE unit.

10. Level 1 nursing care is “intermediate care”.

11. Level 2 nursing care is “skilled care”. “Level 2” care receives a higher reimbursement from Medicaid than “Level 1” care.

12. Depending on the level of care (Level 1 or Level 2) which is requested via PAE, and the approval or denial of the PAE by TennCare’s “PAE nurses”, Medicaid reimburses the nursing facility for the services to the individual who is the subject of the PAE submitted.

13. If the PAE nurse makes errors in the PAE review and approval process, it can result in TennCare (Medicaid) covering non-covered nursing services, or, conversely, necessary care might be “denied”.

14. After Grievant worked around four months in the Long Term Care PAE Department, she transferred to TennCare’s DDSMR to do waivers for the mentally ill and the developmentally disabled.

15. In June 2007, Grievant transferred back to TennCare’s Long Term Care unit when the two units’ workforce was combined.

16. Grievant’s new job assignment was to review Level 1 and Level 2 PAE’s.

17. At all relevant times, Debbie Coleman, RN, Public Health Nurse Consultant (PHNC) Manager was the supervisor of the nurses who do PAE reviews. She was responsible for overseeing Grievant’s training and orientation to the PAE unit, and was responsible for supervising Grievant’s and the other PAE Nurses’ work.

18. When Grievant transferred back to TennCare’s “PAE Unit”, Manager Coleman assigned a “PAE Nurse”, Reba Hitchcock, RN, to train and

reorient Grievant to the PAE review process. As part of the orientation, Ms. Hitchcock provided Grievant with a copy of the "new employee packet" which contained information given to each new nurse hired to work in the PAE unit. Grievant was given a "Job Performance Plan" on June 29, 2007 which outlined job responsibilities and expectations for her job as a PAE Nurse.

19. After Grievant had oriented or trained with Ms. Hitchcock for two or three weeks, Grievant's orientation or training was then assigned to "PAE Nurse" Kaye Swindell, RN[3].

20. Thereafter, Grievant began orienting or training with Ms. Swindell.

21. According to Manager Coleman, PAE nurses are never released for independent PAE review (without a training PAE nurse's review and supervision) until "we have complete one hundred percent confidence in their ability to accurately disposition those PAE's and approve them only if they meet the level of care criteria."

22. Manager Coleman elaborated: "No one is released from training to do that independent review until we have that comfort level that they are making accurate decisions…[.]"

23. After a period of time, Grievant was "released" to perform Level 1 PAE's independently. Manager Coleman agreed with PAE Nurse Swindell that Grievant was ready to release for independent review of Level 1 PAE's.

24. When Grievant was "released" to perform Level 1 PAE's, she was "doing a sufficient job", and made "routine" errors such as forgetting to put a date in the correct place, forgetting to initial an entry, or "human errors".

[3] Grievant's "trainer" was re-assigned after two or three weeks because a new nurse had been hired into the PAE unit, and Ms. Hitchcock was assigned to orient the newly hired nurse.

25. Manager Coleman noted: "We can't expect people to be perfect".

26. Shortly after Grievant was released to perform independent Level 1 PAE's, Manager Coleman and PAE Nurse Swindell became "concerned" about Grievant's work, and began reviewing Grievant's PAE work again.

27. After Manager Coleman and PAE Nurse Swindell began reviewing Grievant's work, they discovered "quite a few errors". Thereafter, they "continued to review every PAE that [Grievant] processed from that day forward."

28. Eventually, Manager Coleman and PAE Nurse Swindell discovered two PAE's which appeared to have been "altered" by Grievant.

29. The "altered" PAE reviews occurred four days apart.

30. The "alterations" involved Grievant using "white out" and changing entries on the PAE.

31. Manager Coleman was notified of the first PAE "alteration" made by the Grievant when Nurse Swindell brought the PAE to Manager Coleman and drew her attention to the alteration.

32. The PAE at issue was dated as having a 3/12/2008 "approval date", with an "end date" of 3/18/2008, and the reviewer was "AHarrisRN". The PAE was submitted by the nursing facility on patient "R.B."

33. The "R.B." PAE, which Nurse Swindell showed to Manager Coleman, had "white-out" areas with original ink writing over the "white- out"; there was a change in the PAE provider number; and the "service requested" had been "whited-out", with "Level 1", "Level 2", "HCBS Waiver", and "PACE Program" "white-out", with "ink markings" made on Level 2 and PACE program.

The PAE form appeared to have had "Level 1 service" requested and originally marked, but then covered up with "white-out". Additionally, original "writing" in ink was written under the "Nursing and Rehabilitative Services" section.

34. PAE's are customarily "faxed" into the PAE unit by the Nursing Facility requesting pre-admission approval for Medicaid. For this reason, if the PAE has additional writing on it (ink or pencil), it is obvious that the additional writing did not originate before the PAE document was faxed.

35. Manager Coleman acknowledged that there was no "written rule" in the PAE Unit against using "white-out" on the PAE forms. She stated: "We don't have a policy that we distribute about the White-Out."

36. There is a manifest problem with a PAE nurse "altering" a PAE.

37. The nursing facility submits the PAE on a patient to obtain Medicaid reimbursement for Level 1 (intermediate) or Level 2 (skilled) nursing care at the facility. The PAE form must be signed by a physician, nurse, or physician's assistant at the nursing facility who certifies that the PAE information furnished is "accurate for the requested date of service".

38. If a PAE nurse alters the PAE form from the original submission by the nursing facility, she or he alters information which has been "certified" by the provider as "accurate". In other words, a legal document which seeks Medicaid reimbursement has been altered in such as way that the "certification" may no longer be valid.

39. Manager Coleman discussed the altered PAE for patient "R.B." with Grievant, and asked Grievant to explain what had transpired with "R.B." 's PAE.

40. At first Grievant told Manager Coleman that she had not made the alterations. Grievant then stated that she had made the alterations after she had contacted someone at the nursing facility and had requested that the facility make the needed changes to the PAE.

41. When Manager Coleman talked with the nurse at the nursing facility that had completed and submitted the PAE to TennCare, she learned that the nursing facility had intended to request "skilled service" but had failed to mark the correct box on the PAE form.

42. The nursing facility later "re-faxed" TennCare the relevant sections of "R.B." 's PAE with the correct notations made on the form.

43. Manager Coleman counseled Grievant regarding the alterations. This meeting took place on April 4, 2008 and is memorialized in writing. Manager Coleman emphasized to Grievant that only the nursing facility must make any corrections to the PAE. After any corrections, the facility may then resubmit the corrections to TennCare.

44. Manager Coleman additionally instructed Grievant that if a PAE is submitted and is not correctly completed (such as if the facility neglected to mark or check the level of nursing service being requested), the PAE nurse can either technically "deny" the PAE because it was not submitted in the correct form, or the PAE nurse can telephone the facility and discuss it with the person at the facility who submitted the PAE. The facility then can make any necessary changes or additions and re-submit the PAE.

45. A few days after the April 4, 2008 meeting between Manager Coleman and Grievant, Nurse Swindell, Grievant's "trainer", brought another of Grievant's PAE's to Manager Coleman's attention.

46. A PAE submitted on March 26, 2008 for patient "G.D." had been "reviewed" by Grievant and was "denied" by Grievant on March 31, 2008.

47. PAE Nurse Swindell noticed that the PAE submitted on "G.D." had been altered, as evidenced by original ink writings on page one of the PAE, and the provider number had been changed. Additionally, the original PAE submitted via fax had not had information about "aggressive behavior" circled, but the information had later been added with original ink.

48. After Nurse Swindell brought the Grievant's second incident of PAE alternations to Manager Coleman's attention on April 9, 2008, Manager Coleman and Director Santel met with Grievant on April 11, 2008 to discuss the alterations made to "G.D." 's PAE.

49. In response to Manager Coleman's and Director Santel's questioning regarding the second PAE alterations, Grievant replied "it had not tracked yet."

50. Manager Coleman believed Grievant's "it had not tracked yet" response meant that "the inappropriateness of her actions had not yet registered with her [Grievant]."

51. At the hearing of this matter, Grievant did not offer a clear explanation or reason for "whiting out" and altering the two PAE forms. She testified, in pertinent part, with regard to the first altered PAE:

> I called the facility…and spoke to someone and asked them have (sic)---please, tell them I have the PAE, that they had not filled in Page 3; that I needed someone to fill the page in properly, and to fax it back to me so that I could approve the PAE for Level 2.

52. Grievant further explained:

> But what I did was, I had written on here what I need to get back from that fax page, and I had just scribbled it, and that's where I made my mistake, I shouldn't have written it here, I should have written it off somewhere else. And I should have left this page blank, but I didn't, that was the mistake I made, I wrote on this with a black pen.
>
> So, I did write on this and I shouldn't have, but I put it in the hold file. During the process of that day somehow or another it went to the outgoing box. I don't know how it got in there, it was by mistake, it was not meant to go into the outgoing box. [….] [I]t was not an intentional thing.

53. With regard to the second PAE which was altered by Grievant, the "G.D." PAE reflects that it was faxed to TennCare on March 26, 2008.

54. The "G.D." PAE further reflects that Grievant reviewed the PAE on March 31, 2008. Grievant wrote "Deny" on the PAE, and did not follow the proper procedure and write in an "end date".

55. The facility requesting the PAE for "G.D." submitted the PAE via fax. The provider number originally was written as "0445433". The faxed copy received by TennCare showed that the facility had drawn a line through the "0445433" number, and had written in "7440365" as the provider number. The facility also drew a line through "Level 2" and requested "Level 1" care.

56. After Grievant received the "G.D." PAE, Grievant wrote "error" on the "Service Requested", wrote in the number "0445433", circled "No" on the "aggressive behavior" section of the PAE, and changed the request for Level 1 to a Level 2.

57. It appears from the record that when Grievant made the changes on the second PAE at issue, "G.D.'s" PAE, she made changes on the re-submitted or re-faxed PAE which was faxed into TennCare on April 7, 2008. Grievant wrote in a "review date of March 31, 2008, and also wrote in a second review date of April 8, 2008. After the first review, Grievant "denied" the PAE. When Grievant reviewed the re-submitted PAE on April 8, 2008, Grievant made changes to "G.D." 's re-submitted PAE.

58. Grievant explained at the hearing that the nursing facility had sent in the documents she requested following the "denial". Thereafter, she made the alterations and approved Level 2 care.

59. Grievant was informed by Manager Coleman after the meetings on April 4, 2008 and April 11, 2008 that "discipline would follow".

60. On May 30, 2008, the Commissioner of the Tennessee Department of Finance and Administration issued a letter to Grievant which terminated Grievant's employment.

61. The May 30, 2008 termination letter from the Commissioner stated that the basis for Grievant's termination was the two incidents of Grievant's altering PAE's.

62. The Commissioner's May 30, 2008 letter informed Grievant that the termination action was taken pursuant to violations of the following Rules:

> (1) Rule 1120-10-.06(1) –Inefficiency or incompetency in the performance of duties; Rule 1120-10-.06(8) Conduct unbecoming an employee in the State service; Rule 1120-10-.06 (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.

63. Grievant received the Commissioner's letter of termination on June 10, 2008.

64. Grievant timely appealed her termination.

## CONCLUSIONS OF LAW

1. The Department bears the burden of proof in this matter to show that Grievant violated the *Department of Personnel Rules* set forth in letter of termination. The Department also has the burden of proof to show that the discipline imposed was the appropriate discipline for any violation of such rules.

2. Rule 1120-10.02 of the *Rules of the Tennessee Department of Personnel* provides as follows:

> A career [civil service] employee may be warned, suspended, demoted or dismissed by his appointing authority *whenever legal or just cause exists.* The degree and kind of action is at the discretion of the appointing authority, but must be in compliance with the intent of the provisions of this rule and the Act. An executive employee serves at the pleasure of the appointing authority. (Emphasis added)

3. As defined by the *Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies,* Rule 1360-4-1-.02(7), "preponderance of the evidence" means the greater weight of evidence, or that, according to the evidence, the conclusion sought by the party with the burden of proof is the more probable conclusion.

4. The Department or Petitioner charges Grievant with the following violations:

> *Rules of the Tennessee Department of Personnel* (Revised May, 1999): 1120-10-.06(1) –Inefficiency or incompetency in the performance of duties; 1120-10-.06(8) Conduct unbecoming an employee in the State service; and 1120-10-.06(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.

5. The Department also asserts that Grievant should be terminated "for the good of the service" pursuant to T.C.A. §8-30-326(a) which permits the appointing authority to "dismiss any employee in the authority's division when the authority considers that the good of the service will be served thereby." [*See also* Department of Personnel Rule 1120-10-.06(24): "For the good of the service, as outlined in T.C.A. §8-30-326"].

6. Grievant clearly altered the two PAE documents in question. While her testimony was credible that she did not "intend" to "falsify" documents that is exactly what she did, whether out of negligence or ignorance.

**Due Process**

7. T.C.A. §8-30-331 provides that civil service employees (who have successfully completed their probationary period) have a property right to their positions.

8. 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. 2007).

9. The requirements for "minimum due process" include proper notice. Sanford v. Tennessee Dept. of Environment, 992 S.W. 2d 410, 414 (Tenn. Ct. App. 1998), *App. for Perm. to Appeal Denied* (Tenn. 1999).

10. 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.

11. T.C.A. §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 be come effective until minimum due process is provided as outlined below.

12. T.C.A. §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.

13. 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 Service Commission, 15 S.W. 3d 486, 491 (Tenn. Ct. App. 1999), *App. for Perm. to Appeal Denied* (Tenn. 2000).

14. Procedural due process does not require "perfect, error free governmental decision-making". Qualls v. Camp, 2007 WL 2198334 *4 (Tenn.Ct. App. 2007). However, it does require affording a Grievant a "relatively level playing field in a contested case hearing". *Id.* at 4.

*Due Process: For the Good of the Service*

15. At the hearing, the Department argued that Grievant should, in addition to the other reasons cited for her termination, be terminated "for the good of the service".

16. T.C.A. §8-30-326(a) provides:

> An appointing authority may dismiss any employee in the authority's division when the authority considers that the good of the service shall be served thereby.

17. T.C.A. §8-30-326(b) sets forth:

> Whenever an employee is dismissed "for the good of the service," the notice of termination must outline in detail how the service will be benefited by such termination.

18. "For the good of the service" may, in proper cases, justify or require discharge of public employees when their efficiency or usefulness in their positions has been seriously impaired by their own fault, by the fault of others, or by blameless misfortune. Reece v. Tennessee Civil Service Commission, 699 S.W. 2d 808, 813 (Tenn. Ct. App. 1985).

19. However, the Commissioner's letter or notice of termination of Grievant Harris does not state that one of the grounds for her termination is "for the good of the service."

20. Accordingly, the Department's argument that Grievant should be terminated "for the good of the service" must fail for lack notice or due process.

*Due Process: Other Misconduct*

21. The Commissioner's termination letter cites the two PAE incidents as the basis for Grievant's termination. No mention is made of any other misconduct serving as grounds for Grievant's termination, or as a

consideration for discipline imposed. The termination letter refers to "incompetency", however, the only facts cited in support of "incompetency" are the two "altered PAE" incidents.

22. The purpose of "due process" requirements is to notify the Grievant in advance of the charges in order to allow the grievant adequate preparation and to prevent unfair surprise.

23. At the contested case hearing, the Department stated:

> The sole issue that's before us today is the validity of the termination by the Bureau of Ann Harris…that she altered a Pre-admission Evaluation to make it approvable; that she was counseled as to the impropriety of that action; and that after that counseling, altered a second PAE to make it approvable within four days after the first counseling.

24. At no time did the Notice of Charges allege any other misconduct by Grievant as the basis for her termination. The Commissioner's letter of termination makes it clear that Grievant was being terminated for altering the two PAE's in question, which were attached to the letter of termination.

25. Counsel's opening statement additionally made it clear that Grievant was terminated for altering the two PAE's in question.

26. Manager Coleman testified that she was advised "to initiate termination based on these two incidents."

27. At the close of the Department's proof, the Grievant moved to dismiss the charges against Grievant for "failure to prove that the situation warranted termination." In response to the Motion to Dismiss, the Department again argued that Grievant was terminated for the two PAE incidents.[4]

[4] The undersigned reserved ruling on the Motion to Dismiss at the end of the Department's proof. It is determined that the Grievant's Motion to Dismiss with regard to the Grievant violating certain personnel rules should be denied.

**Other Charges Against Grievant**

28. The Department also argues that Grievant violated the following Department of Personnel Rules:

> (1) Rule 1120-10-.06(1) –Inefficiency or incompetency in the performance of duties; (8) Conduct unbecoming an employee in the State service; (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.

29. The Department proved, by a preponderance of the evidence, that Grievant's alteration of the two PAE's did violate Rule 1120-10-.06(1) – Inefficiency or incompetency in the performance of duties.

30. At the very least, Grievant made unintelligent choices to alter PAE documents.

31. Grievant maintained that she didn't intentionally "falsify" such documents. Grievant's testimony was credible on the issue of "intentionally falsifying"[5].

32. However, with Grievant's years of nursing experience and training, and her training in the PAE unit of TennCare, she simply should have known better than to "mark up" or "white-out" a legal document submitted by a health care facility for the purpose of obtaining Medicaid reimbursement.

33. Did the Department prove, by a preponderance of the evidence, that Grievant's actions in altering the two PAE's constituted a violation of Rule 1120-10-.06(8) –Conduct unbecoming an employee in the State service?

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However, the undersigned agrees with the Grievant that the charged offenses, without more, do not support termination.

[5] Had there been any showing that Grievant had intentionally altered the PAE's with the idea of defrauding Medicaid; the outcome of this case would be very different.

34. A review of Tennessee statutes, regulations, and case law does not reveal a definition of "conduct unbecoming an employee in the State service." However, cases which have found violations of Rule 1120-10-.06(8) have typically dealt with employees who committed crimes, were guilty of assault, abuse, or sexual harassment, or who committed gross misconduct. There is no allegation that Grievant committed a crime, was guilty of assault, abuse, or sexual harassment, or that she committed gross misconduct.

35. Rule 1120-1-.01(42) of the *Rules of the Department of Personnel* defines "gross misconduct" as "any job related conduct which may subject an employee to criminal prosecution." There was no allegation that Grievant committed any acts which would subject her to criminal prosecution.

36. Grievant's acts in altering the PAE, despite what her good intentions may have been, were ill-advised and negligent. Such acts, however, did not rise to the level of "conduct unbecoming an employee in state service" or "gross misconduct".

37. Finally, did Grievant's alteration of the two PAE documents amount to a violation of Rule 1120-10-.06(12)[6] ?

38. Grievant's alteration of the two PAE's necessitated her supervisor's telephone calls to the affected nursing facilities. The two PAE's had to be resubmitted. Grievant's supervisor and manager had to take the time to investigate the matter and to meet with Grievant. PAE Nurse Swindell had to review Grievant's PAE reviews. While Grievant's acts inconvenienced her

[6] 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.

supervisors, and perhaps took time away from their other duties, the evidence does not preponderate that Grievant's acts in altering the two PAE's "*seriously* disrupted or disturbed the normal operation" of the PAE unit.

**Appropriate Discipline for Grievant**

39. Rule 1120-10-10.22 of the *Rules of the Tennessee Department of Personnel* provides as follows:

> A career [civil service] employee may be warned, suspended, demoted or dismissed by his appointing authority whenever legal or just cause exists. The degree and kind of action is at the discretion of the appointing authority, but must be in compliance with the intent of the provisions of this rule and the Act. An executive service employee serves at the pleasure of the appointing authority.

40. The legal standard which constitutes "just cause" to terminate civil service employees is concisely stated in 67 C.J.S., *Officers and Public Employees,* § 137, cited by the Court in Knoxville Utilities Board v. Knoxville Civil Service Merit Board, 1993 WL 229505 (Tenn. Ct. App. 1993), p. 10. "Just cause" is defined as follows:

> "Just cause" is a ground for removal. In this respect, "just case" implies a cause sufficient in law, and is any cause which is detrimental to public service. It may be established by a showing of conduct indicating that the employee lacks the competency and ability to perform the duties of his office.
>
> Where lawful grounds for dismissal of a civil service employee exist, the character and work record of the employee involved is of no importance, and the fact that he has previously received a general rating of satisfactory does not bar his removal.

41. Rule 1120-10-.01(45) of the *Rules of the Department of Personnel* provides that causes for disciplinary action fall into two categories:

(1) Causes relating to performance of duties.
(2) Causes relating to conduct which may affect an employee's ability to successfully fulfill the requirements of the job.

42. Grievant's acts in altering the two PAE's falls within the "causes relating to performance of duties" category.

43. Tennessee's Civil Service statutes and rules incorporate the doctrine of progressive discipline. Accordingly, state supervisors are expected to administer discipline beginning at the lowest appropriate step. Kelly v. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. 1999). Further, at least one court, in expressing approval of the progressive discipline system, has stated that the legislative mandate for progressive discipline should be "scrupulously followed". Berning v. State of Tennessee, Department of Correction, 996 S.W. 2d 828, 830 (Tenn. Ct. App. 1999).

44. T.C.A. §8-30-330 sets forth the state's civil service progressive discipline system as follows:

> (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 may result in more severe discipline in accordance with subsection (a).*** (Emphasis added.)

45. The Court in Berning v. State Department of Correction notes that the "key word in the statute [T.C.A. §8-30-330] is *appropriate".* Berning v. State Department of Correction, 996 S.W.2d 828, 830 (Tenn. Ct. App. 1999), *Perm. to appeal denied* (Tenn. 1999). "The language of these provisions does not mandate application of discipline in a routine fashion without regard to the nature or severity of the behavior it is intended to address." Id. At 830, *quoting the chancellor's order with approval.*

46. An employee's prior conduct, both good and bad, along with his entire work history, can be considered when determining what the appropriate disciplinary action should be. Kelly v. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. 1999).

47. At the hearing, the Department attempted to introduce a May 27, 2008 memorandum to Grievant into evidence as "rebuttal". The memorandum addressed suggestions made to Grievant during her April 10, 2008 performance evaluation, and is titled "Response to your Request for a Plan of Action". The memorandum concerned Grievant's attendance and punctuality, her cooperation with co-workers, her use of working time, her communication skills, and her processing of PAE's.

48. Grievant objected to the introduction of the May 27, 2008 memorandum on the basis that it was not proper "rebuttal". Grievant further objected on the basis that the memorandum was "irrelevant".

49. Grievant's objection was sustained. The May 27, 2008 memorandum was excluded on the basis of its lack of relevance and the fact that it was not proper "rebuttal". Neither the memorandum at issue nor any of

Grievant's performance evaluations were introduced into evidence during the Department's case in chief. The facts detailed in the Memorandum were not referenced or mentioned in the Commissioner's letter of termination as a basis for Grievant's termination, making the Memorandum irrelevant pursuant to Rule 401, *Tennessee Rules of Evidence*.

50. Additionally, the memorandum was excluded because it was not listed on the Department's proposed exhibit list.

51. The "Prehearing Order" issued on October 3, 2008 specifically states:

> *Failure to supply requested exhibits for review or failure to disclose anticipated witnesses will likely result in the exclusion of a witness or exhibit that was not properly disclosed.* (Emphasis in the original.)

52. Finally, it is the undersigned's determination that a serious violation of the Grievant's due process rights would have occurred if the May 27, 2008 memorandum had been entered into evidence. The memorandum was excluded from evidence, and was not considered.

53. With the exception of one "Interim Work Review" dated March 7, 2008[7], Grievant's work evaluations, work history, and prior conduct were not entered into evidence during the Department's case in chief. Nor was there any evidence entered that Grievant's work history, her evaluations (including the interim evaluation), or her prior conduct (with the exception of the two

[7] The "Interim Work Review" noted that Grievant was told to return from meals/breaks at the appropriate time. It stated: "Since that time, you have shown improvement in this area. Your performance in the area is good". The "Interim Work Review" also noted that Grievant made an "unacceptable amount of errors" on PAE's. It concludes by stating, "You must show improvement in this area by consistently applying PASRR rules and make appropriate referrals."

incidents of altering PAE's) were considered in the decision to terminate Grievant.

54. For this reason, the undersigned has no other work evaluations or other facts supporting "misconduct" in determining the appropriate discipline for Grievant in this matter.

55. An additional consideration for determining the appropriateness of the discipline to be imposed is whether the punishment imposed upon the Grievant is different than discipline used with other employees who have engaged in the same conduct. Gross v. Gilless, 26 S.W. 3d 488, 495 (Tenn.Ct. App. 1999), *Perm. to Appeal Denied* (Tenn. 2000).

56. No evidence was submitted by either the Department or the Grievant of other instances of discipline for PAE nurses who made errors or alterations in PAE's. The only reference to Grievant's or other PAE nurses' errors was the testimony by Manager Coleman that when Grievant was "released" to perform Level 1 PAE's, she was "doing a sufficient job", and made "routine" errors such as forgetting to put a date in the correct place, forgetting to initial an entry, or "human errors". Manager Coleman also testified: "We can't expect people to be perfect".

57. Grievant asks that lesser discipline be imposed. She argues that termination is too harsh.

58. If the Department had shown that Grievant intentionally altered the PAE's for the purpose of defrauding Medicaid, the undersigned would agree that the appropriate discipline is termination. However, the evidence does not support that Grievant's "white-outing", "marking up", or changing PAE's

information was done with the intention of defrauding Medicaid or the federal government.

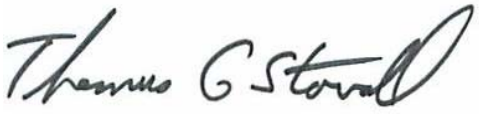
59. After considering the totality of the circumstances in this matter, it is determined that the appropriate discipline in this matter is a ninety (90) day suspension. While the "Interim Evaluation" supported that Grievant made some "errors" in processing PAE's, none were deemed so serious that the Department issued her a written warning or suspension for the "errors". Further, the "Interim Evaluation" stated that Grievant had "shown improvement" in attendance and punctuality. The Department has not shown that progressive discipline was utilized in this matter.

60. Termination is too harsh a discipline for Grievant's negligence or lapse in judgment in altering two PAE's. However, the seriousness of Grievant's lack of thinking in altering two legal documents (submitted by nursing facilities to obtain federal funds or Medicaid reimbursement) supports a significant suspension in this matter.

. 28. **THE DISCIPLINE IMPOSED IS A SUSPENSION OF NINETY (90) DAYS WITHOUT PAY. GRIEVANT SHALL BE REINSTATED TO HER POSITION AS A PAE NURSE.**

It is so ordered.

Entered and effective this 25th day of February, 2009.



Thomas G. Stovall, Director
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