University of Tennessee, Knoxville
Trace: Tennessee Research and Creative Exchange

Tennessee Department of State, Opinions from the Administrative Procedures Division

Law

9-26-2011

DEPARTMENT OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, v. BARBARA G. LOVEJOY, Grievant

Follow this and additional works at: http://trace.tennessee.edu/utk_lawopinions

This Initial Order by the Administrative Judges of the Administrative Procedures Division, Tennessee Department of State, is a public document made available by the College of Law Library, and the Tennessee Department of State, Administrative Procedures Division. For more information about this public document, please contact administrative.procedures@tn.gov

BEFORE THE CIVIL SERVICE COMMISSION OF THE STATE OF TENNESSEE

IN THE MATTER OF: **DEPARTMENT OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES,** ***v.*** **BARBARA G. LOVEJOY**, ***Grievant.***	**DOCKET NO: 26.45-112219J**

AMENDED INITIAL ORDER

This matter was heard on September 26, 2011, in Nashville, Tennessee, before Administrative Judge Mary M. Collier assigned by the Secretary of State, Administrative Procedures Division (APD), to sit for the Civil Service Commission of the State of Tennessee. During the hearing, the Department of Intellectual and Developmental Disabilities (DIDD) was represented by Assistant General Counsel Fredrick Zimmerman, and the Grievant, Barbara G. Lovejoy, represented herself *pro se*.

The INITIAL ORDER was issued in this case on June 22, 2012. On September 6, 2012, after receiving an email from Ms. Lovejoy inquiring about the ORDER, the undersigned Judge retrieved the closed file. Upon review of the closed file, it was discovered that the APD staff had inadvertently sent the INITIAL ORDER to Ms. Lovejoy's previous address and that the INITIAL ORDER was returned to APD by the United States Postal Service marked "Attempted Not Known." It is determined that due to clerical errors, Ms. Lovejoy was not provided with the INITIAL ORDER in a timely fashion. **Accordingly, the INITIAL ORDER is hereby VACATED**

and replaced with this AMENDED INITIAL ORDER. This AMENDED INITIAL ORDER does not alter the vacated rulings contained in the INITIAL ORDER; instead, the AMENDED INITIAL ORDER provides the Grievant, Barbara G. Lovejoy, with new appeal deadlines. *See* attached NOTICE and APPENDIX A.

The issue is whether DIDD properly terminated Barbara Lovejoy's employment with DIDD. After consideration of the evidence and arguments of the parties, it is determined that the termination of Ms. Lovejoy's employment was proven to be appropriate by a preponderance of the evidence and should therefore be **UPHELD**. Furthermore, no merit is found in the Grievant's claim of discrimination under TENN. CODE ANN. § 8-50-103 and this case is therefore **DISMISSED**. This decision is based upon the following.

PROCEDURAL HISTORY

The Grievant filed her Level V hearing request with the Civil Service Commission on April 11, 2011. Thereafter, on May 12, 2011, the matter was referred to the Administrative Procedures Division in the Secretary of State's Office for a contested case hearing. The hearing in this case was held on September 26, 2011. The transcript was filed on December 19, 2011. On January 30, 2012, DIDD filed proposed findings of fact and conclusions of law. A summary of DIDD's argument was filed on January 31, 2012. An amended summary of DIDD's argument was subsequently filed on January 31, 2012. The Grievant filed a post-hearing brief on February 28, 2012.

FINDINGS OF FACT

1. The Grievant was employed by DIDD as a Licensed Practical Nurse (LPN) from February 16, 2009, until February 5, 2011.

2. The Grievant had been working at the Harold Jordan Center (HJC) on the third (night) shift until she was separated from employment in February, 2010, for disciplinary reasons. The separation was reduced to a three day suspension after a grievance hearing on May 6, 2010.

3. On May 17, 2010, the Grievant returned to work for DIDD as an LPN on the first (day) shift at the Clover Bottom Developmental Center (CBDC).

4. The HJC is a secure facility located on the campus of the CBDC in Nashville. Both facilities are developmental centers operated by DIDD and provide support and habilitative services to persons with intellectual and developmental disabilities. In January, 2011, there were 70 residents at CBDC and 7 residents at HJC. Dr. Stacey Dixon is the chief officer in charge of both facilities. CBDC will eventually close as new homes in the community are constructed for 36 of the current CBDC residents.[1]

5. Although there were 70 CBDC residents, DIDD was only budgeted to support the 36 residents who will ultimately be transferred to the middle Tennessee community based homes. Despite this limited budget, CBDC must support the additional 34 residents. Many of the residents are confined to wheelchairs and have to be frequently repositioned. Many of the residents have to be nourished by tube feeding and require administration of medications via tube as well. Two residents have tracheostomies and five receive respiratory care.

6. The medical conditions of the residents require the services of nurses for their health and safety, which DIDD is legally obligated to safeguard.

[1] Between January, 2011, and September 26, 2011, the date of the hearing, the number of residents at CBDC was reduced from 70 to 45 as some individuals have been placed with community provider agencies, and the number of persons at HJC has been reduced from seven to four. There have been reductions in force that affected the two facilities in May, 2010, and in February, 2011. DIDD as a whole has undergone a reduction in employees by 40% in the last several years.

7. When Dr. Dixon assumed her responsibilities as Chief Officer of CBDC and HJC in September, 2010, she was authorized to fill 13 LPN and 13 RN state employee positions to provide direct care to the residents. However, only 10 positions in each category were actually filled in January, 2011, due to state and departmental hiring freezes. Many additional nurses were employed as contract nurses. In January, 2011, there were 26 RN and 13 LPN contract nurses from the Columbus Organization also working at Clover Bottom. Thus, at that time there were a total of 36 RNs and 23 LPNs when both State-employed and contract nurses were counted. The cost to the State for a contracted LPN nurse is approximately $20,880 per month, which is four times as much as the $5,220 cost of a state-employed LPN.

8. All the nurses were scheduled to work full time, but on any given day, some of the state nurses were not available because they were out on sick or annual leave, workers' compensation leave and/or Family and Medical Leave Act (FMLA) leave. The state nurses who were out on leave had to be replaced by contract nurses.

9. In January, 2011, the Grievant occupied one of the ten authorized state LPN positions, but she was not on the job providing services and had not worked for many months.

10. After she returned to work on May 17, 2010, in early June, 2010, the Grievant went out on FMLA leave. At that time, the sick leave that had been restored upon the Grievant's return to work had been exhausted, and she had no accrued annual leave.

11. The Grievant extended the length of her FMLA leave several times. The Grievant's first anticipated date of return to work from FMLA leave was July 1, 2010, but on June 22, 2010, at the request of a nurse practitioner she was seeing, the Grievant's FMLA leave was extended until July 19, 2010. On July 14, 2010, a request for an additional extension of FMLA leave until August 2, 2010, was granted. A third extension of FMLA leave through

August 16, 2010, was granted by DIDD in a letter dated August 6, 2010. A fourth FMLA leave extension through September 3, 2010, was requested and granted. And, by letter dated September 9, 2010, the Grievant's fifth request for an extension of FMLA leave, through October 28, 2010, was granted by DIDD. Thus, the Grievant was out on FMLA leave from early June, 2010, until late October, 2010.

12. The Grievant took FMLA leave because of anxiety, depression and lower back pain.

13. During the Grievant's return to work in the latter part of May, 2010, she was assigned to the first (day) shift at CBDC. Prior to her separation earlier that year in February, 2010, she had been working on the third (night) shift at HJC. Sometime in September, 2010, while she was out on FMLA leave, the Grievant came in to see HR representative Darla Goad regarding a transfer to the third (night) shift. The Grievant explained that she could not adjust to the day shift. The Grievant had previously requested this change by talking to the director of nursing, but such a position was not available. In September, 2010, no third (night) shift LPN positions were available. Further, CBDC had no light duty positions.

14. Ms. Goad provided the Grievant with information on how to apply for positions with other State Departments and assisted the Grievant by calling the Tennessee Department of Human Resources (DHR) and gathering information to assist her in checking with other state agencies or facilities regarding openings.

15. Also in September, 2010, the Grievant spoke to Ms. Goad about the Americans with Disabilities Act (ADA). Ms. Goad gave the Grievant a form that included an authorization for release of medical information to the employer and a certificate of health care professional to be filled out and returned to Brenda Clark, DIDD's designated ADA officer. The Grievant was

also given a copy of her current job plan for her doctor's review. This form was filled out by a physical therapist and sent by fax to Ms. Clark on September 30, 2010, along with some records from the physical therapist.

16. On October 11, 2010, Ms. Goad wrote the Grievant, enclosing another blank ADA form and a copy of her job plan with instructions that it be filled out by a medical doctor and returned to Don Barrie, the Director of Human Resources at CBDC.

17. On November 3, 2010, a nurse practitioner at the office of Dr. N. Rao Chunduru, M.D., sent a one sentence letter stating that the Grievant "has requested 'special leave' from November 3, 2010 until December 6, 2011 [sic] due to continued anxiety, depression and lower back pain."

18. On November 23, 2010, Ms. Goad wrote the Grievant, referencing the October 11, 2010, letter, and reminding her that the documents were to be completed by a medical doctor. She enclosed another set of forms.

19. DIDD may grant "special leave" at the discretion of the appointing authority. However, the Grievant did not submit a request for special leave, had no entitlement to it and was never granted special leave by her appointing authority.

20. On December 3, 2010, Dr. Chunduru provided answers to the questions on the ADA form pertaining to the Grievant's health conditions. Specifically, the Grievant's impairments are identified as lower back pain, spinal stenosis in the lumbar spine, sciatica, radiculopathy into the right leg and treatment resistant depression with anxiety.

21. It is Dr. Chunduru's opinion that the Grievant "is unable to mentally function in her job responsibilities & this cannot be accomodated [sic] by her workplace."

22. Dr. Chunduru further explained that the Grievant cannot bend, lift, pull, stand for longer than 10 minutes, or walk for longer than 20 minutes.

23. It is Dr. Chunduru's opinion that the Grievant "doesn't have the cognitive ability, such as focusing/concentrating, that are [sic] important as a nurse," and the Grievant's "anxiety & depression impair her ability to make good decisions with her patient care."

24. It is Dr. Chunduru's opinion that the Grievant's "physical & mental impairments impair the essential job functions as listed in the State of TN Dept. documents," which were provided to Dr. Chunduru by DIDD for review with the ADA form. In support of this opinion, Dr. Chunduru stated: "She is unable to stand or walk for long periods of time, she cannot lift patients or bend over them to provide adequate patient care. She also doesn't have the focus or concentration needed to provide adequate [patient] care."

25. Based upon the medical information provided to DIDD by Dr. Chunduru, it is clear that the Grievant was unable to perform the essential functions of her job with DIDD as an LPN.

26. After reviewing the information dated December 3, 2010, from Dr. Chunduru, Don Barrie, the CBDC HR Director, spoke with the Grievant on December 17, 2010, and then wrote a memorandum to Brenda Clark dated December 29, 2010, recommending that the Grievant be separated from employment with DIDD in good standing for the good of the service.

27. As of January 11, 2011, the Grievant had exhausted all forms of leave, including FMLA leave.

28. On January 11, 2011, Mr. Barrie sent the Grievant a letter advising her that because she was unable to return to work and had exhausted all forms of leave, he was recommending that her employment with DIDD be separated for the good of the service pursuant

to TENN. CODE ANN. § 8-30-326. Mr. Barrie explained that the CBDC "must provide sufficient staff to safeguard and care for the people who live here and call Clover Bottom Developmental Center home. CBDC must ensure that the lives of individuals served are not put at risk."

29. The Grievant's due process hearing was scheduled with CBDC Chief Officer Stacey Dixon for January 20, 2011. This hearing was conducted by the CO's Designee, CBDC Employee Relations Officer, Darla Goad.

30. On January 25, 2011, Dr. Dixon sent the Grievant a letter upholding the separation of her employment with DIDD in good standing and giving her ten calendar days paid notice prior to the effective date of the termination. The Grievant's separation of employment was therefore effective on February 5, 2011.

31. Thereafter, the Grievant requested and received a level four grievance hearing before DIDD hearing officer Mike O'Neal on March 2, 2011, which upheld the action previously taken.

32. On March 22, 2011, DIDD Commissioner James M. Henry wrote the Grievant a letter notifying her that he was upholding the decision to terminate her employment.

ANALYSIS *and* CONCLUSIONS OF LAW

Level V Civil service appeals are heard *de novo* before an Administrative Judge. No presumption of correctness is attached to the agency's action. *Big Fork Mining Co. v. Tennessee Water Quality Control Bd.*, 620 S.W. 2d 515, 521 (Tenn. App. 1981). DIDD, 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. DIDD 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 DIDD properly terminated the Grievant's employment and that DIDD's termination decision should therefore be **UPHELD.**

The Grievant challenges her termination under two legal theories. First, under the procedure authorized by TENN. CODE ANN. § 8-30-328(b), the Grievant challenges her dismissal "for the good of the service" under TENN. CODE ANN. § 8-30-326. Second, as authorized by TENN. CODE ANN. § 8-30-326(a), she asserts a claim that her separation was the result of discrimination because of a mental or physical disability. Neither of these claims have merit.

With regard to the Grievant's termination for the good of the service, DIDD has met its burden of proof. TENN. CODE ANN. § 8-30-326 provides:

> (a) An appointing authority may dismiss any employee in the authority's division when the authority considers that the good of the service will be served thereby. No dismissal of a regular employee shall take effect unless, at least ten (10) days before the effective date thereof, the appointing authority gives notice to such employee and files a written statement with the commissioner. The employee shall have an opportunity to file with the appointing authority a written statement regarding the proposed dismissal, a copy of which shall be filed with the commissioner. A regular employee who is disciplined shall have the right to file a grievance as provided in § 8-30-328 or, if such employee believes that a disciplinary action or layoff is because of race, creed, national origin, religion, sex, age, or mental or physical disability, such employee may file a complaint pursuant to title 4, chapter 21 or a grievance pursuant to § 8-30-328. If the commissioner determines that the statement of reasons for a dismissal given by the appointing authority shows that such dismissal does not reflect discredit on the employee dismissed, the name of such employee shall, if the employee so requests, be placed on the appropriate reemployment list or lists.
> (b) 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.

> (c) 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. This code section authorized DIDD to terminate the Grievant's employment after she failed to return to work after her approved FMLA leave had ended and she had exhausted all other forms of approved leave. The Grievant was out on approved leave from early June, 2010, until January, 2011. During this time, DIDD extended the Grievant's FMLA leave status on multiple occasions effectively giving the Grievant more leave than the twelve (12) weeks required by the FMLA.

It is determined that DIDD complied with the statutory requirements of TENN. CODE ANN. § 8-30-326. The evidence presented at the hearing supported the employer's basis for the termination and also established that all due process procedures in place for the benefit of the employees were offered to the Grievant and that she availed herself of these procedures. The notice of intent to terminate employment letter sent to the Grievant on January 11, 2011, sets forth the specific benefit to DIDD, maintaining sufficient staff to safeguard and care for CBDC residents to ensure that they are not placed at risk.

Due to severe budgetary and personnel constraints on DIDD, the Grievant, while on leave, was occupying a position that DIDD desperately needed to be filled by an LPN who was able to attend work and provide nursing care and services to the vulnerable and medically fragile

residents of the DIDD centers. To fulfill its obligations to its residents, DIDD had to resort to contract nurses to make up for the shortage of authorized state-employed nurses, and also to provide the nursing services that would otherwise have been performed by state-employed nurses who were absent from the workplace. The financial detriment to DIDD and the taxpayers of Tennessee was very high, because contract LPNs are four times as expensive as state-employed LPNs.

Despite the increased cost, DIDD was responsive to the Grievant's repeated FMLA leave requests, granting the initial requested leave followed by five extensions. Although this leave was unpaid, the ongoing non-working status of the Grievant from early June, 2010, until January, 2011, while occupying one of a limited number of authorized state LPN positions, caused DIDD to incur much higher expense for contracted replacement nursing services during this time. Because of these high costs and the need to provide medical treatment to its residents, DIDD has shown that the Grievant's separation was justified "for the good of the service," within the statutory meaning of that term.

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. Likewise, the court in *Crawford v. Department of Finance & Administration*, 2012 WL 219327 (Tenn. Ct. App. Jan. 24, 2012), upheld a State employee's termination for the good of the service after she had exhausted all forms of leave and was unable to return to work. Similar to the facts in *Grubb* and *Crawford*, DIDD properly terminated the Grievant's employment after she failed to return to work and failed to apply for "special leave" once she had exhausted her annual, sick and FMLA leave. Similar to Ms. Crawford, the Grievant's "interpretation of civil service protection [is] a

'misconception of what the civil service rules provide' because '[o]nce one exhausts all available leave, one must report for duty or be subject to dismissal.'" 2012 WL 219327 at *10. The Grievant is not entitled to an indefinite amount of extended leave. It is determined that DIDD has met its burden of proof by proving by the preponderance of the evidence that the Grievant was properly terminated for the good of the service pursuant to TENN. CODE ANN. § 8-30-326 when she failed to return to work after her approved FMLA leave ended.

With regard to her disability discrimination claim, under the provisions of TENN. CODE ANN. § 8-30-326(a), the Grievant had the option of proceeding on her discrimination claim before the Tennessee Human Rights Commission or in this grievance proceeding.[2] The Grievant elected to pursue her disability discrimination claim in this forum.[3]

The "Tennessee Disability Act" provides:

> (b) There shall be no discrimination in the hiring, firing and other terms and conditions of employment of the state of Tennessee or any department, agency, institution or political subdivision of the state, or of any private employer, against any applicant for employment based solely upon any physical, mental or visual disability of the applicant, unless such disability to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved. . . .
> (c)(1) Any person claiming to be aggrieved by a discriminatory practice prohibited by this section may file with the Tennessee human rights commission a written sworn complaint stating that a discriminatory practice has been committed, setting forth the facts sufficient to enable the commission to identify the persons charged.
> (2) Upon receipt of such complaint, the commission shall follow the procedure and exercise the powers and duties provided in §§ 4-21-302 – 4-21-311, and the person shall have all rights provided therein.

[2] *See* ORDER issued on September 21, 2011, denying DIDD's MOTION TO DISMISS.
[3] While this claim may be similar to a claim brought pursuant to the Americans with Disabilities Act (ADA), these claims are not precisely the same. Futhermore, this tribunal does not have jurisdiction of any claim the Grievant may assert under the ADA.

TENN. CODE ANN. § 8-50-103(b) &(c). The medical opinion of the Grievant's treating physician, Dr. Chunduru, leaves no doubt that the Grievant was unable to perform the essential functions of her job as an LPN. As documented by Dr. Chunduru on December 3, 2010, it is his opinion that the Grievant "is unable to mentally function in her job responsibilities & this cannot be accomodated [sic] by her workplace." Dr. Chunduru explained that the Grievant cannot bend, lift, pull, stand for longer than 10 minutes, or walk for longer than 20 minutes. Dr. Chunduru further explained that the Grievant "doesn't have the cognitive ability, such as focusing/concentrating, that are [sic] important as a nurse," and the Grievant's "anxiety & depression impair her ability to make good decisions with her patient care." It is Dr. Chunduru's opinion that the Grievant's "physical & mental impairments impair the essential job functions as listed in the State of TN Dept. documents," which described the Grievant's essential job duties and were provided to Dr. Chunduru by DIDD for review with the ADA form. In support of this opinion, Dr. Chunduru stated: "She is unable to stand or walk for long periods of time, she cannot lift patients or bend over them to provide adequate patient care. She also doesn't have the focus or concentration needed to provide adequate [patient] care." Based upon the medical information provided to DIDD by Dr. Chunduru, it is clear that the Grievant was unable to perform the essential functions of her job with DIDD as an LPN.

The TENNESSEE DISABILITY ACT prohibits discrimination in employment decisions regarding State employees, "unless such disability to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved." TENN. CODE ANN. § 8-50-103(b). There is ample evidence that the Grievant's multiple physical, mental and emotional conditions impaired and prevented her from performing the essential duties of her LPN position with DIDD. The exception codified in the statute is

clearly applicable in this case. It is determined that DIDD did not make the decision to terminate the Grievant based upon her claimed disability but rather based upon the facts that she had exhausted all of her leave and was medically unable to return to work and perform her essential job functions as an LPN. Accordingly, it is determined that DIDD did not violate the TENNESSEE DISABILITY ACT in terminating the Grievant's employment.

Furthermore, no reasonable accommodation was available to allow the Grievant to continue working for DIDD as an LPN. The Grievant's arguments that DIDD was required to accommodate her by finding her a non-LPN job or a job in another department of State government are found to be without merit. Accordingly, no merit is found in the Grievant's claim of disability discrimination under TENN. CODE ANN. § 8-50-103.

Accordingly, it is hereby **ORDERED** that the Grievant's appeal is **DENIED,** and the termination of her employment with DIDD is **UPHELD**; therefore, this matter is **DISMISSED**.

This AMENDED INITIAL ORDER is issued to protect the integrity of the Tennessee civil service laws and applicable RULES.

It is so **ORDERED**.

This AMENDED INITIAL ORDER entered and effective this the _____ day of _____ 2012.

_____

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 _____ 2013.

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