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Department of Finance and Administration –
Division of Mental Retardation Services, Plaintiff
Vs. Doris Cannon, Grievant

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BEFORE THE CIVIL SERVICE COMMISSION

**Department of Finance and
Administration – Division of
Mental Retardation Services,
Plaintiff**

DOCKET NO: 26.45-067217J

Vs.

**Doris Cannon,
Grievant**

INITIAL ORDER

This matter came to be heard before Lynn M. England, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division and sitting for the Tennessee Civil Service Commission, on July 25, 2007 in Greeneville, Tennessee. Ms. Marilyn Tucker, Counsel for the Department of Finance and Administration, Division of Mental Retardation Service, represented the State. The Grievant, Doris Cannon, was represented by Mr. Mikel Dixon of Knoxville, Tennessee.

The subject of this hearing is whether the Grievant's conduct merited separation from state service.

After consideration of the record and arguments of the parties, it is determined that the Department did not show by a preponderance of the evidence that termination was the appropriate discipline for Grievant. It is therefore **ORDERED** that the termination shall be **SET ASIDE** and that Grievant Cannon's discipline shall be **REDUCED** to a five (5) day **SUSPENSION**, reinstated to her former position with an award of full back pay (less the five

days), benefits and attorney's fees. This decision is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Grievant, Doris Cannon, was terminated from employment with the Department of Mental Health and Developmental Disabilities as a Registered Nurse at Greene Valley Developmental Center on or about October 24, 2004. The termination was based on negligence in the performance of duties.

2. Greene Valley Developmental Center is a facility that serves individuals with mental and developmental disabilities.

3. Grievant served as a registered nurse in the Greenwood Cottage. This cottage is home to individuals with profound mental retardation as well as multiple disabilities and numerous health issues. All of the patients except one (1) are non ambulatory. Most cannot communicate. These individuals require a high level of care that necessitates 24 hour nursing. They are considered to be medically fragile.

4. Relevant testimony in this matter established that on August 18, 2004, at approximately 5:30 p.m., Grievant was informed by her supervisor that she would be suspended for two days for leaving a syringe on a bedside table in a patient's room and for violation of the Medication Administration Records (MAR) protocol.

5. According to the Notice of Suspension letter dated August 18, 2004, an investigation into the claim regarding the syringe was found to be

unsubstantiated. However, the letter stated that Grievant's numerous violations of the MAR protocol was sufficient to suspend her for two (2) days.¹

6. After the meeting with her supervisor, Grievant returned to work and was admittedly upset. Grievant left her shift, which was to end at 10:30 p.m. at 9:45 p.m., because her mother in law had passed away and she had to fly to Orlando.

7. Prior to leaving work that evening the Grievant placed patient "G.M." on a Bi-Pap machine for his sleep apnea. At 11:05 that evening, a technician discovered there was condensation in the line that goes into the Bi-Pap machine.²

8. The technician summoned a nurse who discovered the machine had not been turned on properly.

9. There was no testimony that the patient was placed in any harm, or that he suffered any medical repercussions from this event. However, there was testimony that the physician who examined G.M. determined the he was not in a life-threatening situation.

10. It was for this incident Grievant was terminated.

¹ Grievant's failure to properly document the MAR was turned over to the Tennessee Department of Health Board of Nursing to determine if any disciplinary measures should occur against her license. Upon completion of their investigation, the Board failed to bring any charges against Grievant's license.

² No testimony was given as to why no one had checked on the patient G.G. between 9:45 p.m. and 11:05.p.m.

CONCLUSIONS OF LAW

1. Department of Personnel Rule 1120-10-.06(2) provides that disciplinary action may result if a state employee engages in “[n]egligence in the performance of duties.”

2. In a fifth step level hearing, an administrative law judge presides to take proof and render an initial order which is subject to review by the Civil Service Commission. T.C.A. §4-5-301.

3. It is a de novo proceeding, and no presumption of correctness attaches to the action of the agency. Big Fork Mining Co. v. Tennessee Water Quality Control Board, 620 S.W. 2d 515, at 521 (Tenn. App. 1981).

4. The burden of proof rests with the agency and the agency must prove by a preponderance of the evidence that 1) the Grievant acted or failed to act as the agency alleges; 2) the Grievant’s action constitutes a disciplinary offense; and 3) the recommended discipline is appropriate for the given offense. Id. at 520.

5. Tennessee law provides that where discipline is imposed on a state employee, it must be progressive in nature:

T.C.A. §8-30-330. Progressive Discipline. - (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 or poor performance may result in more severe discipline in accordance with subsection (a).

The Grievant in this matter has been employed with the Agency since 2001. No performance evaluations were presented to show the history of her job performance. Grievant received no prior disciplinary actions prior to the notice of suspension which she received the same day she was terminated. The supervisor testified she was well aware the Grievant was upset when she returned to work after their meeting regarding the proposed two (2) day suspension. In fact, she asked her if she was ok to return to work that evening. The meeting, coupled with the death of her mother in law, should be considered when making a decision to terminate an employee based on negligence. While it is more likely than not that the Grievant improperly connected the BiPap machine to G.W., certainly an omission that caused no harm to the patient during a particularly stressful evening is not a reason to terminate an employee.

In addition, there was no evidence as to whether the Grievant served the two day suspension, only that the intent letter was presented to her.

Further her third step hearing letter dated October 20, 2004 references the MAR violations as a reason for termination. According to the testimony of the supervisor, Grievant was not terminated for the MAR violations, she was terminated for negligence in performance of her duties for her failure to properly connect the Bi-pap machine.

It is clear that the Grievant's extenuating circumstance, the death of her mother in law, was never considered when the decision was made to terminate her. As such, it is determined that termination is too harsh a sanction to impose.

It is therefore Ordered that Grievant's termination shall be SET ASIDE and the Grievant's discipline shall be REDUCED to a five (5) day SUSPENSION.

Grievant shall receive an award of attorney's fees and costs in accordance with the provisions of Tenn. Code Ann. §8-30-328(f).

This Initial Order entered this 28th day of December, 2007. England
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of
State, this 28th day of December, 2007. Stovall, Director
Administrative Procedures Division