6-17-2008

Eureva Elmore

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BEFORE THE CIVIL SERVICE COMMISSION OF THE
STATE OF TENNESSEE

IN THE MATTER OF:

Eureva Elmore

DOCKET NO: 26.43-094733J

INITIAL ORDER

This matter was heard on June 17, 2008, in Nashville, Tennessee, before Joyce Carter-Ball, Administrative Judge, assigned by the Secretary of State to sit for the Civil Service Commission of the State of Tennessee. Kristi M. Faulkner and Julie R. Pablo, Staff Attorneys, represented the Tennessee Department of Children’s Services (herein after referred to as the “Department”). Eureva Elmore (hereinafter referred to as “Grievant”) was represented by Attorneys David L. King and Nicholas Bailey.

The parties entered into a Mediated Settlement Agreement on May 10, 2007. The issues of this hearing are (1) whether Grievant has been made whole by the Department and (2) the amount to be awarded in attorney’s fees.

After consideration of all of the evidence, arguments of counsel and the entire record in this matter, it is determined that (1) Grievant has not been made whole by the Department and (2) the amount of attorney’s fees shall be eighty five dollars ($85.00) per hour, including an interest rate of eighteen percent (18%) on the unpaid balance of the fee which has been awarded.

This decision is based upon the following:
PROCEDURAL HISTORY

Grievant was employed with the Department. In 2003, Grievant was terminated from her position with the Department. In 2004, an Agreed Order of Settlement was reached between the Department and Grievant. The Department agreed to reinstate Grievant to her employment effective June 18, 2007.

The parties agreed that Grievant “shall be made whole, receiving all back pay, benefits, sick leave, annual leave, bonuses to which she would have entitled from July 12, 2006 until the date of her reinstatement. The calculations will be done in accordance with the made whole provisions of the law as approved by the Tennessee Department of Personnel.”

The parties further agreed that Grievant “shall be made whole within thirty (30) days from the date TDOP has approved calculations, and that the Department would pay “reasonable attorney fees in accordance with TCA §8-30-328(f) and TDOP Rule Chapter 1120-13.”

FINDINGS OF FACT

1. The 2004 Agreed Order of Settlement awarded the reinstatement of annual and sick leave balances and the reinstatement of compensatory time.

2. Grievant took Family Medical Leave in 2006, and upon Grievant’s return from Family Medical Leave in January 2007, Grievant was terminated from State service.

3. On May 10, 2007 a Mediated Settlement was reached and Grievant’s annual and sick time was reinstated. The Department was correct in not reinstating Grievant’s compensatory time.

4. Ms. Jessica Gray, Human Resource Analyst for the Department, testified that compensatory time is not a benefit such as sick or annual leave. Compensatory time is overtime
(hours worked past the required 7.5) that a supervisor must approve before an employee can
accrue it.

5. Ms. Gray testified that there is no rule that allows an employee to choose how his leave is
used or reinstated.

6. Ms. Gray testified that these rules are uniformly applied to every State employee.

7. Grievant received the value of her compensatory time from August 1, 2006 through
October 30, 2006.

8. The Mediated Settlement Agreement was signed on May 10, 2007. The Department
reinstated Grievant’s annual and sick leave balances on November 7, 2007. However, this
reimbursement was delayed five (5) months beyond the limit set forth in T.C.A. §8-30-328(i).

9. Grievant’s annual leave was properly transferred to sick leave, pursuant to Rule 1120-6-
.11(3).

10. It is the Department’s position that Grievant has been fully compensated for everything
laid out in the Mediated Settlement Agreement, including back pay and insurance. Ms. Gray
testified that she could not address the insurance issue, because she was not involved in this
matter.

11. There is no federal definition of “made whole,” therefore this matter was decided
pursuant to the Rules of the Tennessee Department of Human Resources (DOHR), and the
Tennessee Code Annotated (T.C.A.).

CONCLUSIONS OF LAW

1. 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.
2. As the Petitioner, the Department bears the burden of proof, which is a preponderance of the evidence standard, to show that Grievant has been made whole by the Department.

3. **1120-6-.06 COMPENSATORY TIME.** Compensatory time is leave credit earned by an exempt or non-exempt employee when compensable overtime hours are worked and are not compensated in cash. Compensatory time is accrued on a weekly basis. The Commissioner will establish policy and procedures.

(3) *Transfer of Annual Leave to Sick Leave.* Leave earned in excess of the maximum allowable accumulation for a group code will be transferred to the employee's sick leave account annually.

Rule 1120-6-.11

(i) **T.C.A.§8-30-328:** In any case in which a successful grievant has been awarded reinstatement, back pay or attorney’s fees, the governmental department involved shall have a period of thirty (30) days from the date of the final order within which to provide reinstatement, back pay and/or attorney’s fees. In the event that this time limit is not met by the governmental department involved, the grievant shall be entitled to an additional day of pay for each work day that reinstatement or payment is delayed beyond the limit set forth above.

**ANALYSIS**

1. Having considered and reviewed the entire record in this case, and having carefully evaluated the testimony of each and every witness, it is determined that the Department has not proved, by a preponderance of the evidence, that Grievant has been made whole by the Department.

2. It is concluded that Grievant received the value of her compensatory time from August 1, 2006 through October 30, 2006. It is concluded that the Department’s figures in reinstating Grievant’s annual and sick leave balances are correct. Grievant’s reimbursed back pay, annual and sick leave balances comply with the regulations. However, the reimbursement was delayed five (5) months beyond the limit set forth in T.C.A.§8-30-328(i).
3. Therefore, based on the above, it is concluded that, to be made whole, pursuant to T.C.A.§8-30-328(i), Grievant is entitled to an additional day of pay for each work day that reinstatement or payment was delayed beyond the limit set forth above.

4. As explained in the order entered on September 17, 2008, June 10, 2007 is determined to be the date the calculations were approved by TDOP.

5. Accordingly, it is ORDERED that the Grievant shall receive an additional day of pay for each work day that reinstatement or payment was delayed, beginning June 10, 2007 and ending November 7, 2007.

6. It is further ORDERED that, pursuant to Rule 1120-13-.01 (b)(1) the attorney for Grievant is entitled to a maximum rate of eighty five dollars ($85.00) per hour. Also, pursuant to T.C.A. §8-30-328(i), the attorney for Grievant is entitled to an annual interest rate of eighteen percent (18%) on the unpaid balance of the fee which has been awarded.

This Initial Order entered and effective this 15th day of October, 2008.

Joyce Carter-Ball  
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 15th day of October, 2008.

Thomas G. Stovall, Director  
Administrative Procedures Division