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I. The charges advanced by the Department of Social and Health Services were not proven.

Mr. Henn at trial went through every CIR to establish the true basis for the termination. Ultimately, Mr. Kraft testified at RP 853 as follows with respect to why Mr. Henn was terminated:

MS. STAMBAUGH: Can you tell us . . . just in summary, why you concluded that dismissal was the appropriate action in this case?

MR. KRAFT: Because that I believed . . . well, two things. One is that I believed that the omissions involved in all of these cases were very egregious in nature in terms of practice. And then also his statements . . . statement about . . . that it was intentional.

Mr. Kraft did not take the position that a failure to obtain a police report or to do a face to face contact within twenty-four hours, in other words, a possible neglect of duty or failure to follow a rule, would have resulted in termination. His justification for the termination was that he believed with respect to each of the incidents that Mr. Henn had been guilty of the most serious of violations. He believed Mr. Henn was not only guilty of gross misconduct, but that, in fact, he had committed the acts intentionally.

The P.A.B. rejected the claim that Mr. Henn had acted intentionally. The employer did not appeal that finding to the trial court. The employer has not appealed that finding to this court. It is a verity on appeal. Likewise, the trial court found that gross misconduct had not been

established. Again, the employer has not appealed the trial court's decision. That decision is a verity on appeal as well.

Under these circumstances, Mr. Henn submits that the termination cannot be affirmed because the employer has not met its burden of proof. The P.A.B. in its initial decision and on remand has ruled that termination is still appropriate on grounds different from those alleged by the employer. The P.A.B. does not have such authority and the trial court erred in upholding the termination.

This case should be decided on the same grounds as *In Re Smith*, 30 Wn. App. 943, 639 P.2d 779 (1982). The employer has the burden of proving its allegations and once those allegations were rejected, Mr. Henn was entitled to full reinstatement.

II. The P.A.B. precedent alleged to exist by the employer does not change the result herein.

The employer has cited the court to a series of P.A.B. decisions, which really rely initially on one decision, that being *Holladay v. Dept. of Veterans Affairs*, PAB Case No. D91-084 (1992). (See Brief of Respondent at p. 28)

In *Holladay* the employee was terminated based on numerous charges of inappropriate behavior. Some of the charges were not proven. Some of the claims were not part of specified charges. And one of the

charges was proved. In paragraph VIII of the P.A.B. decision, a paragraph dealing with whether the sanction was appropriate, the P.A.B. states in part as follows:

“ . . . An action does not necessarily fail if one cause is not sustained unless the entire action depends on the unproven charge.”

The P.A.B. did not cite its authority for such a premise. The P.A.B. did, however, reverse the termination and imposed a short suspension.

Following the P.A.B.'s decision in *Holladay*, the P.A.B. has frequently cited *Holladay* as authority for the aforementioned proposition. See *Ross v. Community Colleges of Spokane*, P.A.B. case No. DISM-00-0073, *Griffin v. Dept. of Social and Health Services*, P.A.B. Case No. DEMO-01-0012 (2003) and *Frederick v. Office of Secretary of State*, P.A.B. Case No. DISM-02-0030 (2003). (All cases cited by respondent at p. 28 of its brief)

Mr. Henn's position is that this authority is not found in any statute or regulation governing the conduct of the P.A.B. In a similar situation, the Court of Appeals in *In Re Smith*, 30 Wn.App. 943, 639 P.2d 779 (1982) unanimously determined that the employer did have to prove its charges and if it failed to do so, the reviewing authority could not substitute other reasons to sustain the action.

Acceptance of *Holladay v. Dept. of Veterans Affairs* as a valid precedent allows the P.A.B. to substitute its judgment for the judgment of the firing authority.

III. Mr. Henn has preserved the issues properly addressed in this appeal.

At page 12 of Respondent's Brief, the Respondent states that Mr. Henn did not appeal the Superior Court's order of April 2005 within 30 days. This same argument was made at page 29 of Respondent's Brief where the Respondent cites the Court to *Crispen v. DSHS*, 15 Wn.App. 448, 549 P.2d 1158 (1976).

RAP 2.2 addresses the decisions of a Superior Court which may be appealed. RAP 2.2(a)(1) is the relevant rule which requires a final judgment.

Here the trial court reversed the gross misconduct findings the P.A.B. had made with respect to each of the incidents. The trial court ordered that the matter be remanded to the P.A.B. for further consideration based on her decision. No party disputes that the trial court had the authority to order such a remand. And the order drafted by the Respondent herein did not contain any language to indicate that the parties believed that the lower court review was completed and/or that a final

order was being filed at that time. The matter was remanded and now has made it's way to this court. Mr. Henn has properly preserved his rights.

Furthermore, the *Crispen* case cited by Respondent does not support the Respondent's position. In *Crispen*, it appears that the Court's conclusions did contain finality language. Furthermore, there was no assignment of error to the Court of Appeals. The *Crispen* decision is inapposite. In the present case, the trial court's April 2005 order was not a final order and Mr. Henn has assigned error to various findings and conclusions.

IV. The Sanction of Termination should be reversed.

There was really no dispute that prior to the issuance of the CIR's Mr. Henn was an outstanding employee of the D.S.H.S. His direct supervisor viewed him as a valuable employee of the unit. (RP at 742). It was uncontroverted that Mr. Henn had never been the subject of any disciplinary action of any kind prior to this particular timeframe. He had not been the subject of so much as a verbal warning.

Looking at the incidents which resulted in his discipline, each and every one could easily be addressed by way of counseling, training and/or further instruction.

With respect to Emylie and the failure to provide information to Ms. Hamasaki, it is respectfully submitted that everyone involved in that

case knew of the allegation and specifically, Ms. Hamasaki knew, and furthermore, she knew that was why the interview was being conducted. (RP at 606). If Mr. Henn did something wrong, it is respectfully submitted that such a mistake could have been easily rectified by simply addressing the issue with those involved and establishing a practice as to what to do under similar circumstances in the future.

With respect to the police report, it was established that Mr. Henn had not obtained a report. As the State's investigator acknowledged, that what is normally done is that a criminal history is obtained. (RP at 411). Mr. Henn attempted to obtain the police report, but he made the request of the wrong county. Again, it was undisputed that Mr. Henn had never previously had any similar problem. The Court should remember that when Mr. Henn was assigned this particular case, his instructions were that the investigation was complete, including the criminal history and he was to return the child to her father.

With respect to Gage, it was difficult determining the nature of the charge. He had the child seen by appropriate healthcare providers. There was no claim that the child was of an age to be interviewed. (RP 159). The matter went to a CPT. Although Mr. Henn had not reviewed a medical record, his supervisor had.

So again, if he did something wrong, any shortcoming could have been easily corrected.

Finally, with respect to Fernando, there was no claim that Fernando could be interviewed. Mr. Henn made sure the child was seen by his doctor.

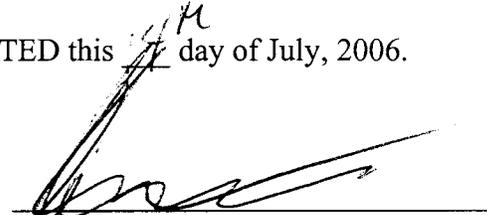
Pursuant to the rules that is what was expected of him.

But again, if Mr. Henn's conduct was not acceptable it is submitted that any such shortcoming could easily be corrected.

V. Conclusion.

Mr. Henn was a good employee. He was terminated based on claims that were not proved. He should be fully reinstated.

RESPECTFULLY SUBMITTED this ¹¹~~7~~ day of July, 2006.



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