

**BEFORE THE STATE PERSONNEL BOARD
IN THE MATTER OF**

TERA McMILLIAN,)	
)	
Appellant,)	
)	
v.)	Case No: 15-37-RCS
)	
ALABAMA DEPARTMENT OF)	
YOUTH SERVICES,)	
)	
Appellee.)	

RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD

This Recommended Order arises from an employment termination action by the Alabama Department of Youth Services (hereinafter “DYS”). DYS dismissed Tera McMillian (hereinafter “McMillian” or “the employee”) alleging she: (1) engaged in insubordinate behavior on two occasions; (2) used abusive or threatening language; and (3) failed to perform her job properly. The evidence presented by DYS during the hearing showed that more probably than not, McMillian violated multiple work rules and her dismissal from DYS was appropriate.

A hearing was held on October 27, 2015, in the Chalkville Room of Washington Hall, 1000 Industrial School Road, Mt. Meigs, Alabama. McMillian was represented by Julian McPhillips, Esq.¹ Lynne Thrower, Esq., appeared as

¹ McPhillips filed a Notice of Appearance and Motion to Continue on October 22, 2015. DYS objected to McPhillips’s Motion to Continue the hearing. A Status Conference was held on October 26, 2015 to allow oral arguments on the motion. McPhillips argued he just entered the case and needed some time to familiarize himself with the case. In fact, McPhillips represented McMillian in this matter at the departmental level as early as June 16,

counsel on behalf of DYS.

DYS introduced into evidence seven exhibits with subparts, consecutively numbered 1 – 7. McPhillips did not offer any additional exhibits.

DYS called as witnesses:

- (1) Bridget McDonald, ABSOP Campus Administrator;
- (2) Victor Black, Mt. Meigs Campus Administrator;
- (3) Thomas Dale, Youth Services Aide;
- (4) Lawrence Webster, Youth Services Child Care Worker; and
- (5) Darryl Baines, Youth Services Security Officer.

McMillian called as witnesses:

- (1) Nicholas Stewart, Counselor I;
- (2) Carl Gadson, Youth Services Aide;
- (3) Natisha Adair, Youth Services Aide; and
- (4) Debra Spann, Mt. Meigs Human Resources Manager.

McMillian testified on her own behalf.

2015. McPhillips wrote several letters on McMillian's behalf and participated in DYS's July 23, 2015 pre-dismissal conference. McPhillips was allowed to cross-examine departmental witnesses and called three witnesses on McMillian's behalf. Based upon McPhillips's participation in this case at a lower level, his Motion to Continue was denied. McPhillips renewed his motion during the hearing on October 27, 2015 and the undersigned denied it a second time. McPhillips then requested the undersigned recuse himself from the case. The undersigned informed McPhillips that pursuant to the Scheduling Order, any motions for recusal are to be directed to the Director of State Personnel. McPhillips contended the hearing officer was "pro-management" based upon a conversation he had with another lawyer in his office and an attorney for the Alabama State Employees Association. The attorneys McPhillips referenced were not present to be examined, and McPhillips offered no statistical or other evidence to support his contention. The undersigned denied McPhillips's motion and the hearing was held.

I. PROCEDURAL HISTORY AND CHARGES

McMillian began State employment in October 2002 as a Youth Services Aide when she was hired by DYS. McMillian remained in that classification until her dismissal.

By letter dated July 16, 2015, DYS Executive Director Steven Lafreniere, (hereinafter "Lafreniere") notified McMillian he had set a fact finding (pre-disciplinary) hearing regarding the following issue:

I have received a recommendation that disciplinary action, up to and/or including suspension and/or dismissal, be taken regarding your employment as a Youth Service Aide. The recommendation reveals the following alleged inappropriate conduct and work performance as the reason for the recommendation:

Violation of the Rules of the State Personnel Board (670-X-19-.01(1b-2)) (insubordination); and/or (670-X-19-.01(1b-5)) (abusive or threatening language); and/or (670-19-.01(1a-4)) (failure to perform job properly); and/or (670-X-19-.01(1b-10)) (serious violation of any other departmental rule including DYS Policy and Procedure and Mt. Meigs Complex Procedure Manual 9.6 (student movement within facilities and count) and DYS and Mt. Meigs Complex Procedure Manual 8.8 (threats to security). Specifically, on or about on or about [sic] May 13, 2015, you used insubordinate and threatening language regarding your supervisor(s); on or about May 24, 2015, you violated Policy and Procedure regarding student movement to and from facilities by failing to properly conduct your assigned duty of conducting medication call, failing to maintain eyes on supervision, failing to conduct head counts, and failing to be aware of the location of students assigned to you, and failing to immediately report students attempting to escape; and on or about June 17, 2015, you were

insubordinate when your supervisor questioned you regarding these matters.

Based on the recommendation and a review of your past history, it is my judgment a hearing be held to determine whether disciplinary action is warranted.

A fact finding hearing will be conducted on Thursday, July 23 20, 2015, at 1:30 p.m., in the Chalkville Conference Room at Washington Hall, Mt. Meigs, Alabama. The hearing will be conducted by either myself or my designee. I will review information presented and notify you of my decision regarding any possible disciplinary action. At the hearing, you may present verbal and written information, produce witnesses and be represented by counsel if you choose. I consider your attendance to be mandatory, but if you do not attend, I will be forced to make my decision based on the information available to me.

The hearing was held on July 23, 2015. After the hearing, Lafreniere notified McMillian, by letter dated August 21, 2015, that DYS was terminating her employment, effective at the close of business August 21, 2015, based upon McMillian's multiple rule violations.

McMillian timely appealed her dismissal to the Alabama State Personnel Board, pursuant to ALA. CODE § 36-26-27(a) (1975). On October 27, 2015, the undersigned conducted a *de novo* hearing ("the hearing") at which *ore tenus* and documentary evidence was received.

II. FACTUAL BACKGROUND

Having reviewed the documentary evidence and having heard the testimony presented at the hearing and having observed the witnesses' demeanor and assessed their credibility, the undersigned finds the greater weight of the evidence supports

the following findings of fact.²

A. Employee's Personnel File³

McMillian's annual performance appraisals while at DYS reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
03/15	23.0	Meets Standards
03/14	23.0	Meets Standards
03/13	17.0	Meets Standards
03/12	17.0	Meets Standards
03/11	24.0	Meets Standards
03/10 ⁴		
03/09	28.0	Exceeds Standards
03/08	28.0	Exceeds Standards
03/07	28.0	Exceeds Standards
03/06	25.0	Meets Standards
03/05	27.0	Exceeds Standards
03/04	27.0	Exceeds Standards
03/03	20.0	Meets Standards ⁵

McMillian's prior disciplinary history at DYS included:

- Written Warning on December 6, 2005 for failure to attend a staff meeting and mandatory training.
- A Verbal Counseling on June 13, 2011 for failure to report to work.
- Written Warning on December 7, 2011 for failure to follow proper call-in procedures.

² All references to exhibits and testimony are intended to assist the State Personnel Board in considering this Recommended Order and are not necessarily the exclusive sources for such factual findings.

³ See generally State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history, considered in dismissing employee).

⁴ McMillian did not have a performance evaluation ending on March 2010 in personnel file.

⁵ Final Probationary Evaluation.

- A Written Reprimand on December 30, 2011 for failure to report to work.
- A Written Reprimand on July 11, 2012 for failure to follow proper call-in procedures.
- A Verbal Counseling on December 20, 2012 for failure to conduct a count.
- A Written Warning on March 27, 2013 for failure to attend a staff meeting and possession of a personal cell phone on the premises.
- A Written Warning on March 27, 2013 for failing to adhere to a prior Corrective Action Plan by not following proper call-in procedures.
- A Written Reprimand on April 16, 2015 for unapproved leave.

B. State Personnel Board General Work Rules and DYS Policies/Procedures Forming the Basis of the Charges

State Personnel Board Employee Work Rule 670-X-19 states, in pertinent part:

...

(1) In addition to any special rules issued by the various appointing authorities for the guidance of their employees, the following standard general work rules shall apply to all classified employees:

(a) Violations that normally result in disciplinary actions of increasing severity:

...

4. Failure to perform job properly.

...

(b) More serious violations that may result in suspension or discharge on the first offense:

...

2. Insubordination – Failure to follow an order; disobedience; failure to submit to authority as shown by demeanor or words...

...

5. Use of abusive or threatening language.

...

10. Serious violation of any other department rule.

...

ALA. CODE § 36-26-27 (1975) states, in pertinent part:

- (a) An appointing authority may dismiss a classified employee whenever he considers the good of the service will be served thereby, for reasons which shall be stated in writing, served on the affected employee and a copy furnished to the director ...

....

Mt. Meigs Complex Procedural Manual states, in pertinent part:

...

- (2) Rules for student movement:

...

- (d) When moving groups, staff should position themselves first in the rear and then on the sides of the group for control and observation purposes.

- (e) A head count will be conducted before a group leaves one area and again upon the group's arrival at their destination.

...

C. Facts Forming the Basis of Dismissal⁶

Victor Black (“Black”), Campus Administrator for Mt. Meigs, recommended McMillian’s dismissal from state service based upon her actions on three separate occasions: May 13, 2015; May 24, 2015; and June 17, 2015. The incidents will be discussed chronologically.

May 13, 2015 Incident:

On May 13, 2015, McMillian was served a written reprimand by her immediate supervisor, Nicholas Stewart (“Stewart”).⁷ McMillian was upset she was disciplined and wanted to vent her frustration. Bridget McDonald (“McDonald”), Campus Administrator for the Mt. Meigs Accountability Based Sex Offender Program (“ABSOP”), was sitting in a car speaking with another employee, Michelle Sharp (“Sharp”). McDonald testified that McMillian entered the car and began an expletive laced tirade. McDonald wrote a statement that detailed the tirade and specifically recalled a threat by McMillian. McMillian stated to McDonald, “I mean if they tell me cousins or brothers they will beat they ass up.”⁸

⁶ During the beginning of DYS’s case-in-chief, DYS gave essentially a closing statement, referring to the required filings and case law. At the conclusion of DYS’s opening, Appellant asked for an opportunity to respond. The undersigned informed Appellant he could respond in a similar fashion at the beginning of his case-in-chief. Appellant declined the opportunity. For the purposes of this Recommendation, the undersigned will only consider the introduction by DYS as argument.

⁷ DYS Exhibit 4-7, Bates No. 213, and testimony of McMillian.

⁸ DYS Exhibit 4-3, Bates No. 176, written statement by McDonald.

McDonald interpreted McMillian's words as a threat against staff on campus. McDonald included her feelings in her written statement and also included it was Sharp who instructed McMillian to calm down. Sharp submitted a shorter, less detailed statement and did not testify at the hearing. Sharp noted McMillian, "... appeared upset and wanted to vent to get her frustrations out. McMillian was told to calm down and after venting for 10 minutes she got out of car."⁹

In her defense, McMillian testified she was disciplined by Stewart and he hurt her feelings. McMillian decided to complain to McDonald because she was the highest ranking supervisor on campus that day. McMillian testified she did not swear as much as indicated by McDonald's written statement. McMillian testified she does not normally speak in that manner and did not recall using such coarse language. McMillian testified she did not threaten staff; she testified she was giving McDonald an example of how she was treated and McDonald took her explanation out of context. McMillian explained she just wanted McDonald to understand how she was feeling.

May 24, 2015 Incident:

On May 24, 2015, McMillian was working in the Phyfer B Dorm. McMillian took six boys to pill call.¹⁰ After McMillian escorted the boys to the nurse station

⁹ DYS Exhibit 4-3, Bates No. 178, written statement by Sharp.

¹⁰ Testimony of McMillian and video evidence.

to receive their medication, Security Officer Darryl Baines (“Baines”) recognized two students and told McMillian they were not supposed to be at pill call. Baines testified he did not detain the two boys and sent them back to Phyfer B Dorm with McMillian and the other four boys. McMillian walked ahead of the boys. The video evidence showed McMillian entered the dorm before the boys. At that point, the two boys who were not supposed to go to pill call took off running. The other four boys walked into the dorm after McMillian. The Mt. Meigs Complex Procedural Manual governs student movement within facilities.¹¹ The manual states, “When moving groups, staff should position themselves first in the rear and then on the sides of the group for control and observation purposes.” After McMillian entered the dorm with four boys, another Youth Services Aide, Thomas Dale, noticed McMillian returned with two less students and instructed her to call security on the radio. McMillian went outside and assisted security with apprehending the two boys who ran away.

In her defense, McMillian testified she left the two boys with Baines. Baines denied this in his testimony and the video clearly showed McMillian return to the outside of the dorm with six boys. McMillian made this statement in a letter submitted by her attorney to DYS on June 24, 2015, in her pre-dismissal hearing at DYS on July 23, 2015, and in her dismissal appeal hearing. The evidence presented

¹¹ DYS Exhibit 4-2, Bates No. 165.

at both hearings clearly refuted her allegation. Substantial evidence showed McMillian left the dorm with six students and returned to the outside door of the dorm with all six. Only four of the boys followed her into the dorm. During the July 23, 2015 pre-dismissal conference, McMillian acknowledged the contradiction and stated, “And it [is] possible that I made a mistake. Because like I say, I’m going on memory and you have video.”¹²

June 17, 2015 Incident:

On June 17, 2015, Black held a fact finding hearing concerning McMillian’s actions on May 13, 2015 and May 24, 2015. Based upon the incident reports he received, Black considered charges including insubordination, use of threatening language, and violations of DYS policies regarding the movement of students. Essentially Black held the hearing to allow McMillian an opportunity to explain in her words what happened. McMillian was asked numerous times to explain what happened. McMillian referred the members of the panel to her prior written statements and then told them she would submit a written statement at a later time. McMillian read a few things to the panel from her statement, but she refused to verbally elaborate on the details and continually offered to write their questions down so she could supply a written statement addressing their questions at a later

¹² DYS Exhibit 4, Bates No. 139.

time. For example, at one point panelist James White, Youth Services Specialist, was attempting to get clarification:

White: I have just one thing to clear up for myself. So Ms. McMillian when Mr. Webster told you to call security was that the second time to call security? Had you called initially?

McMillian: I will submit a written statement to any all [*sic*] questions. What is your question?

White: [M]y question is was [*sic*] when Mr. Webster asked you to call security was that the second or first time to call security?

McMillian: I will submit a written statement to any all [*sic*] questions.¹³

Black considered McMillian's refusal to verbally answer their questions as insubordination. McMillian argued she intended to answer their questions; however, she wanted to write them down and respond in writing. McMillian argued that was not insubordination.

Following the fact finding hearing, Black recommended McMillian's dismissal from State service. Black charged McMillian with insubordination and use of threatening language for her May 13, 2015 encounter with McDonald; a serious violation of any other departmental rule; and failure to perform job properly for the May 24, 2015 incident when the boys ran off since policy dictated McMillian was supposed to be at the back of the line, not leading the boys into Phyfer B Dorm;

¹³ DYS Exhibit 7, page 5.

and insubordination for her refusal to answer any substantive questions during the June 17, 2015 fact finding hearing. Black's recommendation was approved by the Executive Director of DYS on August 21, 2015.

McMillian based her defense on disputing the facts surrounding the charges against her and challenging Black's underlying motive. McMillian believed her dismissal was pretextual because she took a significant amount of leave under the Family Medical Leave Act ("FMLA") during the last few days of her mother's life and for a number of weeks following her mother's death. McMillian's mother suffered a significant health issue on January 9, 2015 which resulted in her death on January 16, 2015. McMillian took approximately eight weeks off work from early January through May to grieve and deal with depression-related issues. In support of her contention, McMillian showed she was disciplined on May 13, 2015 for taking unapproved FMLA leave from March 10, 2015 through April 15, 2015. Furthermore, the Mt. Meigs Human Resources Manager, Debra Spann ("Spann"), testified that Black and Stewart were "not happy" about McMillian missing so much work.¹⁴ McMillian testified she felt harassed about providing her medical information to DYS. Spann also testified McMillian expressed unhappiness to her

¹⁴ Testimony of Spann.

about how things were being done with her job assignment; however, Spann did not report the incident.¹⁵

McMillian's FMLA file was not presented as evidence in this matter. McMillian's specific leave dates would have helped clarify some of the factual details. McMillian testified she was permitted to take FMLA leave.

McMillian also contended other staff members had boys run and they were not disciplined. McMillian called on several employees to testify on her behalf. Stewart, Carl Gadson, and Natisha Adair all testified they heard of instances of students running on staff and the staff was not disciplined. On cross examination, Baines testified he knew of another staff member who had a kid run on him recently and he was dismissed from State service. Baines was not aware of whether there were other issues involved or not. None of the other cases of boys running on staff were proven to be similar to McMillian's facts. Not all staff have been disciplined or dismissed for having boys run on them; however, without more facts to show similarities and differences, there is no way to ascertain whether McMillian was treated differently than those other employees. Furthermore, McMillian was not solely recommended for dismissal because she failed to properly move students, she was also charged with insubordination and use of threatening language.

¹⁵ McMillian worked in the Intensive Treatment Unit at Mt. Meigs until May 2015. At that time she was assigned to Phyfer B. Black moved McMillian when she returned from FMLA to meet staffing needs. McMillian expressed to Spann she really wanted to work in ABSOP.

III. ISSUE

Did DYS produce sufficient evidence to warrant dismissal of McMillian?

IV. DISCUSSION

Standard of Review

The purpose of the administrative appeal is to determine if the termination of the employee's employment is warranted and supported by the evidence. *Kucera v. Ballard*, 485 So. 2d 345 (Ala. Civ. App. 1986); *Thompson v. Alabama Dept. of Mental Health*, 477 So. 2d 427 (Ala. Civ. App. 1985); *Roberson v. Personnel Bd. of the State of Alabama*, 390 So. 2d 658 (Ala. Civ. App. 1980). In *Earl v. State Personnel Board*, 948 So. 2d 549 (Ala. Civ. App. 2006), the Alabama Court of Civil Appeals reiterated:

“[D]ismissal by an appointing authority ... is reviewable by the personnel board only to determine if the reasons stated for the dismissal are sustained by the evidence presented at the hearing.”

Id. at 559, quoting *Johnston v. State Personnel Bd.*, 447 So. 2d 752, 755 (Ala. Civ. App. 1983).¹⁶

In determining whether an employee's dismissal is warranted, the departmental agency bears the burden of proving the charges warrant termination by

¹⁶ The Alabama Court of Civil Appeals went further to hold: “both this court and the circuit court must take the administrative agency's order as ‘prima facie just and reasonable’ and neither this court nor the circuit court may ‘substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.’” *Id.* at 559, citing ALA. CODE § 41-22-20(k) (1975); *State Dept. of Human Res. v. Gilbert*, 681 So. 2d 560, 562 (Ala. Civ. App. 1995).

a “preponderance of the evidence.” The law is well settled that a “preponderance of the evidence” standard requires a showing of a *probability* that the employee is guilty of the acts as charged. Thus, there must be more than a mere possibility or one possibility among others that the facts support the disciplinary action at issue. The evidence must establish that *more probably than not*, the employee performed, or failed to properly perform, as charged. See *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 117 S.Ct. 1953, 138 L.Ed. 2d 327 (1997), holding that a “significant possibility” falls far short of the Alabama Administrative Procedure Act’s preponderance of the evidence standard. See also *Wright v. State of Tex.*, 533 F.2d 185 (5th Cir. 1976).¹⁷

An administrative agency must act within its constitutional or statutory powers, supporting its decision with substantial evidence. “Substantial evidence has been defined as such ‘relevant evidence as a reasonable mind might accept as adequate to support a conclusion,’ and it must be ‘more than a scintilla and must do more than create a suspicion of the existence of a fact to be established.’” *Alabama Alcoholic Beverage Control Bd. v. Tyson*, 500 So. 2d 1124, 1125 (Ala. Civ. App. 1986).

¹⁷ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

In the present case, DYS presented sufficient evidence McMillian violated State Personnel Board Rules as well as DYS Policies and Procedures. McMillian violated State Personnel Board Rule 670-X-19.01(1)(b)(2) (Insubordination) on May 13, 2015 and June 17, 2015. Insubordination is broadly defined as a failure to follow an order; disobedience; failure to submit to authority as shown by demeanor or words... McMillian failed to submit to authority on May 13, 2015 when she directed an expletive laced complaint to McDonald. McMillian failed to complain in a manner that recognized McDonald's authority on the Mt. Meigs campus. McMillian's diction was disrespectful of McDonald's position and undermined McMillian's own intention, to express a complaint that she felt needed to be addressed. McMillian's manner of expression overshadowed her true complaint and such terminology should not be used with a supervisor. McMillian also committed insubordination by steadfastly refusing to elaborate on the incidents she was asked about during the June 17, 2015 fact finding hearing. The purpose of the fact finding meeting was for the panel to hear from all parties involved to determine if discipline was warranted. McMillian acknowledged certain policies and procedures and read a few lines from her statement; however, she refused to answer direct questions with a direct answer. McMillian's act of deferring answers to various questions to a later time, in a different manner, demonstrates a clear failure to submit to the authority of the panel. McMillian wanted to participate on her

terms, not on the terms of those in authority over her.

McMillian violated State Personnel Board Rule 670-X-19.01(1)(b)(5) (Use of threatening language) on May 13, 2015. During her conversation with McDonald, McMillian made a statement about members of her family causing harm to staff at Mt. Meigs. McMillian testified McDonald took the quote out of context; however, McDonald heard the words from McMillian and interpreted what she heard. McDonald was so concerned she reported the statement. Furthermore, the other employee in the car told McMillian to calm down. Even though the threat was not directed at McDonald, McMillian's words have meaning. McMillian may have intended to convey a different message to McDonald; however, McDonald heard a threat and McMillian did not attempt to clarify her words to McDonald after she spoke them.

Finally, McMillian violated State Personnel Board Rule 670-X-19.01(1)(a)(4) (Failure to perform job properly) and 670-X-19.01(1)(b)(10) (Serious violation of any other department rule) on May 24, 2015. McMillian took six boys to pill call and only brought four boys back in the dorm. McMillian was not positioned correctly while escorting the boys. According to the Mt. Meigs Complex Procedural Manual, staff should position themselves at the rear of the student formation.¹⁸ The intent of this rule is to allow staff to keep their eyes on all the

¹⁸ DYS Exhibit 4-8, Bates No. 424.

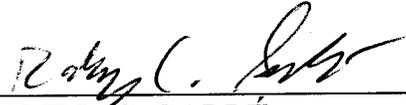
students in their care. The video clearly showed McMillian walking at the head of the line. She entered the dorm before the boys and did not know two ran off until asked by another staff member. Based upon her testimony and the video evidence, McMillian failed to recall the events of that day accurately. As a matter of fact, on three separate occasions McMillian attempted to blame a security officer, once even after the video evidence clearly showed she had all six boys outside Phyfer B after pill call. McMillian's failure to adhere to DYS policies on student movement allowed the two boys to run off unnoticed and delayed their apprehension.

McMillian's actions on May 13, 2015; May 24, 2015; and June 17, 2015 showed a clear disregard for State Personnel Board work rules and DYS policies and procedures and her dismissal is warranted based upon her violation of these charges.

The undersigned has carefully considered mitigation in this case. McMillian's claim that her discipline was pretextual for taking FMLA was not supported by the evidence. McMillian's job assignment was changed when she returned from FMLA leave for a legitimate business reason, namely, staffing needs in the facility. The limited evidence entered into the record concerning McMillian's FMLA history supported a finding that McMillian was permitted to take FMLA leave and no one interfered with her right to such leave. Even though Spann testified Black and Stewart were "not happy" about McMillian being off work so much, there was no evidence they prevented or interfered with her taking approved

FMLA leave and the evidence failed to support a retaliation claim. The undersigned finds no grounds for mitigation exist justifying a lesser employment action than dismissal. The undersigned finds the totality of the evidence warrants termination in this cause. Therefore, the undersigned recommends to the State Personnel Board that the dismissal be UPHOLD.¹⁹

Done this the 6th day of January, 2016.



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¹⁹ In recommending to uphold the dismissal, the undersigned has considered McMillian's work record. See A. Employee's Personnel File, *supra*. Having found sufficient evidence to uphold the dismissal, any/all remaining issues are moot.

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Subject: Tera McMillian v. DYS
Attachments: Recommendation.pdf

Attached is a copy of Judge Sallé's Recommended Order to the State Personnel Board. You will also receive a copy by U.S. Mail.

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