

**BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD**

<b>ELIZABETH HULITT</b>	<b>FILED</b> <b>OCT 25 2013</b>	<b>APPELLANT</b>
<b>VS.</b>		<b>DOCKET NO. 13-040</b>
<b>MISSISSIPPI DEPARTMENT OF REVENUE</b>	<b>EMPLOYEE APPEALS BOARD</b>	<b>RESPONDENT</b>

**ORDER**

Before the Mississippi Employee Appeals Board is the appeal by Elizabeth Hulitt (hereafter “Hulitt” or “Appellant”) for being placed under a Performance Improvement Plan by the Mississippi Department of Revenue (hereafter “MDOR”). A hearing was held on Hulitt’s appeal on September 27, 2013. Hulitt represented herself. The MDOR was represented by Abigail Marbury.

Hulitt contends that the MDOR was in error in placing her under a Performance Improvement Plan. Hulitt timely grieved her complaint through the agency process. Upon receiving the final denial of her request that she be removed from under the Performance Improvement Plan, she timely appealed her grievance to the Mississippi Employee Appeals Board.

**CONCLUSIONS OF LAW AND FINDINGS OF FACT**

As the Appellant and employee, Hulitt has the burden of proof/persuasion to prove that her ability to perform her job was satisfactory to the extent that it was unnecessary that she be placed under a Performance Improvement Plan.

The Mississippi Supreme Court has made clear that the administrative rule which places the burden of proof/persuasion on the employee is not merely semantics. In *Richmond v. Mississippi Department of Human Services*, 745 So. 2d 254 (Miss. 1999) the court stated:

The statute and administrative regulations clearly place the burden of persuasion on the aggrieved employee to demonstrate that the reasons given are not true. Rule 17, Administrative Rules of the Mississippi Employee Appeals Board; Miss. Code Ann. § 25-9-127 (1972). ... This is not mere semantics. Under our scheme, in a nutshell, ties go to the appointing authority. That is, unless the employee carries the burden of persuasion that the alleged conduct did not occur, the employee has no right to have the employment decision overturned. *Mississippi Employment Security Commission v. Collins*, 629 So. 2d 576, 580 (Miss. 1993); Miss. Code Ann. § 25-9-127.

Having considered the testimony of all the witnesses who testified at the appeal hearing and all exhibits introduced into evidence, this tribunal finds that Hulitt failed to meet her burden of proof that she should have been removed from the Performance Improvement Plan. The reasons for my decision follow.

On January 13, 2013, Hulitt was transferred from another State position to Data Solution. Hulitt's job title within Data Solution was "Tax Processor II." A Tax Processor II employee is required to review returns, perform key punch functions, correct errors and work on limited data returns.

On or about January 28, 2013, Hulitt began working by herself in "MARS." MARS is a data system that has all of a taxpayer's information in one place. MARS was initially launched in October of 2012 for all employees of Data Solution. Hulitt was required to process a certain number of tax returns on a daily basis. It is imperative for a Tax Processor II to timely and properly complete their respective quotas so taxpayers that are due a refund receive their tax refunds timely. Further, if a taxpayer owes taxes, the State must be able to timely collect any additional taxes that are owed.

The testimony of Hulitt's supervisor, Sylvia Coley, established that Hulitt was unable to meet her quota, after being counseled and after being provided a number of opportunities to correct her quota deficiencies. For this reason, on or about May 30, 2013, Hulitt was placed under a Performance Improvement Plan by her supervisor Sylvia Coley.

The June 1, 2013, Performance Improvement Plan provided the following summary of Hulitt's deficiencies:

You are not processing returns at the required acceptable level in MARS. You are working at a level below the volume of work list items expected. You are averaging 84 returns a day for a week's time (numbers for returns worked in May) and you are able to work all day without any distraction.

The Performance Improvement Plan was for a three month period – June, July and August, 2013. Although there were sporadic improvements by Hulitt during the June through August period, the improvement was transitory and short lived. Ms. Coley testified that during the Performance Improvement Plan time period, Hulitt continued to have difficulties in meeting the required goals and that Hulitt was distracted and not focused on her work.

Specifically, Hulitt was noticed by Coley, on a number of occasions, staring at the computer with her hand resting on the computer mouse. Another time Coley noticed Hulitt staring into space and twisting her hair. Coley's testimony established that while Hulitt had some days during the ninety day Performance Improvement Plan period when she seemed to improve in job duties, overall Hulitt did not significantly improve to the extent required by the May 30, 2013, Performance Improvement Plan. I find Coley's testimony credible in all material respects.

While Hulitt, at the appeal hearing, took issue with the comparison that Coley made with Hulitt and other Data Solution employees, overall Coley's comparison of Hulitt's work statistics to other Data Solution employees were sufficiently comparable. The evidence established that Hulitt was unable to consistently timely and correctly perform her work assignments.

Hulitt testified that she was unilaterally transferred to Data Solution and that she had excelled in her job before Data Solution. While this tribunal is sympathetic to Hulitt's contention that she was unilaterally transferred from another job where – so far as the record shows – Hulitt met all required work requirements satisfactorily and performed her job in a competent manner, that does not provide a basis for this tribunal to set aside MDOR's determination that Hulitt should have been placed under the Performance Improvement Plan, or that MDOR was in error in determining that Hulitt failed to successfully complete the Performance Improvement Plan.

At the conclusion of all the evidence, the MDOR moved to dismiss any claim by Hulitt that she was placed under the Performance Improvement Plan because of her race, color, sex, religion, national origin, age, disability, genetic information, religious creed or political affiliation, in violation of the *Mississippi State Personnel Board Policy and Procedures Manual 10.2(D)* effective 7/1/2013. This tribunal does not read Hulitt's appeal to specifically allege that she was placed under the Performance Improvement Plan because of her race, color, sex, religion, national origin, age, disability, genetic information, religious creed or political affiliation. Rather, Hulitt's Notice of Appeal to the Mississippi Employee Appeals Board stated that she was "being targeted." To the extent Hulitt contends that she was targeted because of her race, color, sex, religion, national origin, age, disability, genetic

information, religious creed or political affiliation, this tribunal finds as a fact that Hulitt was not placed under the Performance Improvement Plan because of her race, color, sex, religion, national origin, age, disability, genetic information, religious creed or political affiliation. Hulitt did not meet her burden of proof that she was “targeted” in any respect. As explained in more detail in this opinion, Hulitt was placed under the Performance Improvement Plan because she failed to perform her job satisfactorily and competently and not because of her race, color, sex, religion, national origin, age, disability, genetic information, religious creed or political affiliation.

For these reasons, Hulitt’s request to the Mississippi Employee Appeals Board that it vacate the May 30, 2013, Performance Improvement Plan is denied and Hulitt’s appeal is dismissed, with prejudice.

SO ORDERED, THIS THE 24 DAY OF OCTOBER, 2013.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By: Michael N. Watts  
MICHAEL N. WATTS  
Presiding Hearing Officer