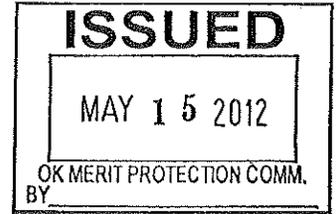


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA**

**JENNIFER ROGERS,** )  
Appellant, )  
 )  
v. )  
 )  
**OKLAHOMA DEPARTMENT** )  
**OF HUMAN SERVICES,** )  
Appellee. )  
 )

Case No. MPC 12-028



**FINAL ORDER**

This matter comes on for administrative hearing before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Jennifer Rogers, appears personally and through counsel, Daniel Gamino. The Appellee, Department of Human Services, appears by and through counsel, John Douglas. Also present for Appellee was Table Representative, Larry Reece.

Appellant Jennifer Rogers was a permanent, classified state employee appealing an adverse disciplinary action of discharge/termination of employment. The hearing was conducted on March 14, 15 and 23, 2012. A Protective Order was requested by the parties and was granted. Thereafter, the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the parties stipulated to the admission of Joint Exhibits # 1 through 33 and to Appellant's Exhibits # 1 through 25<sup>1</sup>. The Appellee offered Chapter 4 of *The Human Resource Guide to Answering ADA Workplace Questions* as Appellee's Exhibit #1 and it was admitted. Accordingly all exhibits presented and admitted are incorporated herein and made a part hereof. Following the close of the evidentiary hearing, the parties were directed to provide written summations, if desired, and the record was held open in order to receive and review these submission.

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<sup>1</sup> It must be noted that the Joint Exhibit Book prepared by the Appellee does not comply with the Supplemental Order in that there are no page numbers on the documents in each Exhibit, making it impossible to properly identify the exact pages of Joint Exhibits referred to in this Order.

After careful consideration of the record, including all relevant evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

## **FINDINGS OF FACT**

### **Background of Case**

Appellant Jennifer Rogers (hereinafter “Rogers”) was a classified employee of the Appellee Department of Human Services (hereinafter “DHS”). Rogers was an Administrative Programs Officer I in the Department Services Unit (hereinafter “DSU”), Asset Management & Accounting Division of DHS in Oklahoma City. The parties stipulated that the Merit Protection Commission (hereinafter “MPC”) has jurisdiction of this matter, that Rogers was a permanent, classified employee of DHS and to the application of Merit and DHS rules.

It is undisputed that Rogers was hired in the DHS office in Canadian County in 2007 and was promoted to her position in Oklahoma City in late 2008. Rogers had two Family Medical Leave Act qualifying events – one relating to her stepdaughter beginning in July, 2009, and one as a result of a motorcycle accident in 2009 which caused severe migraines. (Appellant’s Exhibits # 4, 9, 12, 13, 16, 19, 20 and 21 and Joint Exhibits # 23, 24, 25, 26, 27, 28 and 29). It is also undisputed that Rogers used her FMLA leave intermittently and exhausted all FMLA leave in 2010. In addition, from 2009 to 2011, Rogers was allowed approved leave without pay, work week adjustment and shared leave. Rogers claims she was denied reasonable accommodation and that she was treated differently, with personal animosity and ridicule by her supervisor.

On June 17, 2011, DHS provided Rogers with Notice of Proposed Formal Discipline, proposing to discharge her from her position, alleging Misconduct, Violation of time and leave policy and Neglect of Duty. (Joint Exhibit #3). Rogers’ prior discipline of a written reprimand in August, 2010 and a suspension without pay in April, 2011 were noted. The impetus for the proposed discharge, as well as the prior disciplinary actions, was rooted in Rogers’ excessive absences from work. The Notice

was accompanied by a number of documents supporting the allegations, including copies of her PMPs, leave usage information and time sheets. (Joint Exhibit #19).

A pre-termination hearing was scheduled and held on July 6, 2011. The hearing was conducted by a hearing officer who concluded that Rogers violated her Corrective Action Plan by calling in late on numerous occasions and for failing to call in on two occasions (Misconduct), that Rogers had excessive absences, unapproved leave and failing to properly report absences (Violations of time and leave policy), and that Rogers was released to return to work but failed to do so (Neglect of Duty). The hearing officer also addressed Rogers' allegations, finding no merit to her claims and/or defenses. The hearing officer found that DHS had met its burden of proof that Rogers intentionally violated DHS policies which warrants the proposed discharge. (Joint Exhibit #20).

On July 15, 2011, DHS provided Rogers with Notice of Final Formal Discipline, discharging her from her position. (Joint Exhibit #20). Rogers appealed this action and this matter proceeded.

#### The Testimony

At the hearing, the testimony of twelve (12) witnesses, including the Appellant, was provided.

Adele Jack is the Director of Support Services Division at DHS. The DSU is within her Division. Jack testified that the DSU provides essential services for DHS. She stated that the unit has only 4 employees, reduced by 2 employees due to budget cuts and cost savings efforts. She made the decision to discharge Rogers and felt that the discharge was appropriate given Rogers failure to address and improve her leave usage. Jack testified that she believed the supervisors went "way beyond" in trying to help Rogers and waited a lengthy time before resorting to this action, in an effort to see if her attendance would improve. She testified that no one had it "in" for Rogers, and that Rogers' supervisors had expressed concerns, but never animosity, towards Rogers. Jack discussed the various documents that she reviewed in making her decision. She said she reviewed other documents, including e-mails and spreadsheets, and that she was aware of Rogers' prior record in Canadian County. Jack admitted that she was unaware of the situation with the disabled step-child until the Suspension without Pay was imposed. She was also not aware of the motorcycle accident or the migraines suffered by Rogers until

April of 2011. Jack testified that Rogers was not disciplined for the quality of her work, but only for the absence problem. Jack stated that she did not consider the “badge swipe” reports in making her decision, nor was she aware that Rogers’ supervisor, Ms. Scowden, had audited her badge swipes several times. Jack admitted that she was aware that Scowden had also missed a great deal of work due to multiple surgeries but she denied that Scowden had any personal animosity towards Rogers. She testified that Scowden’s actions were a result of frustration with Rogers and her refusal to improve her leave issue.

Larry Reece is the Administrator of Departmental Services and supervises Rogers’ supervisor, Deborah Scowden. He reports to Adele Jack. He testified that he had general oversight of the unit and had sat in on several meetings between Scowden and Rogers. Reece stated that Rogers used significantly more leave than the other employees and was absent significantly more than other employees. He stated that he conferred with the Human Resources Department frequently about the issues with Rogers because he did not want to do anything wrong. He stated that perhaps they had waited too long to address her absences but they wanted to give her every chance to improve. Reece testified that he was aware of the motorcycle accident and the disabled child and he had no doubt that these were serious, valid problems. Reece stated that they gave Rogers work week adjustments the entire time, even though they told her it would stop in 2010. (Joint Exhibit # 19, memo dated 4-5-2010). Reece testified that he approved the badge swipe audits for Rogers at the request of Scowden. He also testified that he received ADA training and was aware that there were no “magic words” which invoked ADA protection. He stated that he was aware of a discussion of short-term and long-term disabilities for Rogers, but he thought they had addressed the issue by allowing work week adjustments. Reece discussed the hardship that Rogers’ absences caused the unit but indicated that he was not aware of any specific projects or task that failed to get done as a result of Rogers’ absences. He did state that Scowden often had to work overtime to keep the DSU caught up. Reece testified that he often observed Scowden’s frustration with the situation but never observed personal animosity towards Rogers.

Leanne Saunders is the DHS Grievance Manager. She testified that Rogers was treated consistently with others at DHS who were out of leave or who abused leave. She testified that Joint Exhibit #30 was created for use in this trial and it listed numerous

other employees who had been discharged for time and leave violations and/or medical limitations which did not allow them to perform their jobs. She acknowledged that this document was prepared after this action and was not provided to Adele Jack to assist her in making her decision. Saunders stated that granting leave without pay can be considered a reasonable accommodation and this was provided to Rogers. She also indicated that, as an accommodation, the agency continued to approve leave with pay after they told her that it would no longer be available.

Deborah Scowden is a Programs Manager at DHS. She was Rogers' direct supervisor. Scowden testified that she did not know Rogers before she applied for this position. She stated that training had to be delayed due to Rogers' absences and that some of Rogers' duties had to be reassigned to others in the unit. Scowden stated that she became friends with Rogers and was aware of the problems with Rogers' step-daughter. She allowed work week adjustment for Rogers to attend family therapy, among other things. She stated that Rogers' FMLA had been exhausted and she counseled her on the need to work the required number of hours in order to re-establish her eligibility. Scowden stated that she used the badge swipe reports to monitor Rogers' time and compliance with the Corrective Action Plan. She testified that due to Rogers' excessive absences, the unit had to change the badge process and other employees had to pitch in to do Rogers' duties. Scowden also testified that she had to work a number of overtime hours to stay caught up with Rogers' responsibilities. Scowden testified that May 4, 2011 was the last day that Rogers came to work. Scowden testified that she created Joint Exhibit #31 to compare her absences to Rogers because Rogers had made this an issue at the pretermination hearing. She also prepared Joint Exhibit # 22, a lengthy, detailed report of Rogers' absences. Scowden stated that despite several surgeries and complications which caused Scowden to be absent from work, she had never had leave without pay. Scowden admitted that she did not ask for the badge swipe reports on any other employees. Scowden complained that often Rogers was late turning in her time and leave reports, and often failed to supply the necessary documentation with them. She denied that Rogers ever requested an ADA accommodation and that she never followed up on that because she never understood Rogers to request it. She said the only discussion was a brief one where Rogers asked about the short-term disability insurance

benefits. Scowden denied calling Rogers names, specifically “piss-ant” or “peon”. She admits to saying she they need to “do anything to get rid of” Rogers but said it out of frustration and the need to get an employee who would be at the job consistently. She also admits that she occasionally makes light of Rogers’ problems to her supervisor, because she thought it was funny that she could have a migraine one day and be fine the next. Scowden denied ever asking Rogers for pain medications, never accused her of having an affair and never saw her at the Czech festival in 2011 after Rogers’ termination. Scowden admitted that Joint Exhibit #22 failed to contain events and references which were in Rogers’ favor.<sup>2</sup>

Kelly Kappleman is the financial manager for the Support Services Division and is the time keeper for the DSU. She testified that she reviewed Joint Exhibit #22 and the hours balanced with the records. She stated that on March 15, 2011, she met with Scowden and Rogers to discuss how close Rogers was to meeting FMLA qualification again. She stated that this was done in an effort to help Rogers. Kappleman testified that Rogers did not always turn in her time records by the cut-off date. She admitted telling Rogers that Scowden was “treating her just like Jean Smith” – meaning that Scowden was documenting and watching Rogers - but Kappleman stated that she was not implying that it was inappropriate and that it was just the way supervisors would document misconduct. She did admit that it was improper for Scowden to publically reveal Rogers’ error ratio to other employees. Kappleman stated that she talked with Rogers about her leave issues and that Rogers could not transfer because of them.

Shawn Thompson is employed in the DSU. He stated that Rogers was there when he was hired. He testified that he never heard any rumors of Rogers’ affairs. He said that the only time he even heard about the rumors was from Rogers herself. Thompson said that Scowden was not a very social person at work and mostly stayed in her office working. He testified that Rogers was “frequently” absent and many employees in the unit were very frustrated that she was rarely there and they had to take over her duties. He stated that the biggest problem occurred in April, May and June of 2011 when Rogers was only at work one day. Thompson said he never saw Scowden treat Rogers any

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<sup>2</sup> It was obvious from Scowden's testimony and attitude demonstrated in numerous e-mails that she was resentful of Rogers’ absences and was improperly skeptical of her condition. This was evident by her eagerness to charge “unapproved” leave and her ridicule of Rogers’ medical condition.

differently from other employees but he did see her frustration from time to time. He admitted that Rogers had helped train him for his job when he was hired and he never complained that he was overworked due to Rogers' absences. He said that he did frequently see Scowden stay late to keep caught up with the unit's duties.

Ed Stealey also works in the DSU, worked with Rogers, and that Rogers' duties included assisting him with the statewide audits. He stated that he had to occasionally delay audits because he was helping out with other duties due to Rogers' absences. He stated that his office is near Scowden and she is in her office all day, every day. He testified that he believes Scowden treats all employees equally and he never saw any indication that she treated Rogers' differently. Stealey is related to Jean Smith and he told Rogers that she was being treated in the same manner by Scowden.

Michael Rogers is the Appellant's husband. He is a supervisor at Oklahoma Department of Veterans Affairs, having previously worked at Department of Corrections and Department of transportation. He discussed his daughter's disabilities and that she was on Social Security Disability. He stated that she required 24 hour care and must be watched all of the time due to suicide attempts. He said that both he and Rogers must be present to care for her when she is in their home. Michael stated that Scowden ridiculed him for failing to care for his daughter, even though they had been advised to both be present at all times due to his daughter's mental illness and her false DHS complaints about them. (Appellant's Exhibit #17). Michael testified that his wife loved her job in Canadian County and that she received several awards for her service. She was promoted to the Oklahoma City job which included a \$12,000 per year raise in pay. He said that she also loved her job in Oklahoma City. In September of 2009, he and his wife were involved in a motorcycle accident, which resulted in back, neck and leg injuries to his wife. After that accident, she began having migraine headaches, which continued to worsen over time. He testified that Rogers would have to stay in total quiet and darkness and that the pain was debilitating. Michael testified that either he or his wife always called in every time she could not go to work. He said that he often personally delivered the doctor's reports. Michael testified that after his wife's termination, they saw Scowden at the Czech festival. She approached them and started cussing at his wife, saying "I beat you" and "you'll never get your job back", bragging that she had gotten

her fired. Michael had to step in and told Scowden to leave. Michael admitted that being on time and at your job was important, but he trusted his employees and never checked up on them. He acknowledged that he discussed his wife's grievance with her. He said that her migraines sometimes lasted for days or for weeks, but were better now. He also discussed his daughter's multiple hospitalizations and her long-term treatment facilities.

Jennifer Rogers, the Appellant, testified. She discussed the care demands of her step-daughter and that the doctors have all recommended that both parents be present with the child when she is in their home. She said that she loved her job in Canadian County but was very excited about her promotion. She said that after the motorcycle accident, she had various doctor's appointments and treatment for her injuries. Later, she began having severe migraine headaches that continued to worsen over time. Once the migraines progressed, her husband was allowed to call in for her absences. She said that Scowden told her "per HR" she needed to have her prescription and co-pay receipts attached to her leave requests so that it would look better. She just did as requested. She said she tried to use work week adjustment to meet her job duties as much as possible. Rogers said that she made a new FMLA request in March, 2011, but she wasn't eligible. She said she then requested an ADA accommodation, in general terms. She said Scowden never responded or got back with her. She also testified that Scowden called her a "piss-ant" and a "peon" and that she sent her e-mails about the name-calling. She said that Scowden told her that she had a hard time not taking the leave usage and absences "personally". She said Scowden would ask her for pain medications, would ridicule her, doubting the reality of her migraines in an accusatory manner. Rogers said as the migraines got progressively worse, the medications would keep her from functioning. She also testified about Scowden's behavior at the 2011 Czech festival, where she said she had "won" and "beat her" and called Rogers a liar. She said she always tried to be professional and always submitted the necessary documentation for her absences.

Karl Haucke was a DSU employee who served as back-up for Rogers whenever she was absent. He said that he never complained that it was too much of a burden and was not aware of any missed deadlines because of Rogers' absences. He said that he also worked with Jean Smith and Scowden treated Rogers in the same way – micromanaging

her time down to the minute, scrutinizing leave, talking down to her. Haucke testified that he believes that Rogers is truthful and has integrity.

Appellee offered the testimony of Steve Scowden and William Drapala as rebuttal witnesses. Shawn Thompson was not permitted to testify on the issue of the “fake badge” because it was not a relevant issue in this disciplinary proceeding. Steve Scowden is Deborah Scowden’s husband. He testified that he was with his wife at the Czech festival the entire time and they never saw Rogers or spoke with her. He testified that he was with his wife the entire time except for when she used the bathroom. William Drapala is the DHS Civil Rights Administrator. He testified that any time an employee brings up a disability issue, the agency’s first response should always be “how can we help you?”. He said that use of leave can be a reasonable accommodation, however leave over an extended period of time is unreasonable as an undue hardship. He said that DHS has granted numerous accommodations to Rogers, including workweek adjustment, shared leave, allowing her husband to call in for her, and reassignment or reduction of duties. He also testified that no one consulted him about this matter prior to Rogers’ termination. In his opinion, after reviewing the action, DHS had done everything necessary for Rogers.

The Appellant offered the testimony of Dr. Gregory Dennis, by admission of his deposition transcript. Appellant argued that it provided evidence related to the “excessiveness” of Rogers’ absences. It was admitted over the objection of the Appellee and is part of the record herein.

### **ISSUES**

1. Did DHS have just cause to impose discipline against the Appellant?
2. If so, was the action taken by DHS in terminating her employment appropriate under the circumstances?

### **DISCUSSION**

It is undisputed that during the 2.5 years that Rogers worked at the DHS Oklahoma City office, she was absent almost 2200 hours, excluding holidays and

administrative leave. This number includes using 319 hours of annual leave, 255 hours of sick leave and 561 hours of shared leave. It also includes 500 hours of FMLA. Most significantly, it includes using 984 hours of leave without pay, 421 hours of which was unapproved. (See Joint Exhibit #31). DHS had counseled Rogers about this excessive leave usage in her annual performance reviews (Joint Exhibits #16 and 18, and Appellant's Exhibits # 5 and 6). Previously, she had received at least two formal disciplinary actions, including a written reprimand in August, 2010 and a suspension without pay in April of 2011, as noted in the Certificate of Prior Disciplinary Action (Joint Exhibit #4). The written reprimand was not part of the record, however, the Suspension Without Pay Notice indicates that the reprimand was issued, in part, because of violations of time and leave policy (Joint Exhibit #14). That Notice also references a Performance Improvement Plan that was issued in December of 2010. The Suspension without Pay was directly related to Rogers' excessive leave usage. Despite the counseling and disciplinary efforts of DHS, Rogers' leave usage continued to increase to the point where she was absent 88% of the time during her last five months of employment.

It should also be noted that after the imposition of the Suspension without Pay in April, 2011, Rogers returned to work only one day – May 4, 2011 – prior to her termination. Therefore, Rogers was absent 100% of the time from May 4, 2011 to her termination in July, 2011. While Rogers claims that she called in each day, DHS documentation shows 11 occasions of no call-no show during that period of time (Joint Exhibit #22). There are also several medical reports which conflict with each other and seem to release her to return to work on May 16, May 18, May 20, May 25, June 6 and June 20, although she never returned to work (Joint Exhibits # 5, 7, 8, 9, 10, 11 and 21). These releases were apparently not given to DHS until June 16 and July 6, 2011. It is clear from the record and the evidence supports the allegation that Rogers had excessive absences from her job and that her behavior violated DHS policy on use of time and leave.

There is no dispute that Rogers is an individual with a disability. It is undisputed that she suffers from debilitating migraine headaches. It is also clear from some of her e-mails that Rogers' supervisor, Deborah Scowden, at times seemed to ridicule Rogers'

condition and may have improperly questioned the validity of the disability. (Appellant's Exhibit #24). While Scowden's behavior in some of these instances is inappropriate, it does not overall rise to the level of a hostile work environment or disparate treatment of Rogers given the totality of the circumstances and other efforts of DHS to accommodate Rogers, as discussed below.

Rogers claims that DHS failed in its responsibility to her regarding her request for a reasonable accommodation under the Americans with Disabilities Act. It must be noted that Rogers is asserting this as a defense, not as an alleged violation appeal. The parties seem to be in agreement that there are no "magic words" required to invoke ADA. Rogers claims that she requested accommodation in a meeting with Scowden in March, 2011. Rogers notes this in her letter to Adele Jack on April 8, 2012 (Appellant's Exhibit #22, pg. 10). Despite this, it does not appear that DHS ever formally addressed the ADA request. However, it is apparent from the evidence that DHS did, in fact, extend a number of accommodations to Rogers over the previous two year period. She was allowed work week adjustments, her duties were reassigned temporarily, she was granted leave without pay, shared leave and FMLA, and her husband was allowed to call in for her. As such, DHS failure to formally address the ADA request is minimized. Rogers has offered no evidence of any accommodations that she requested or that could have been provided to address her issues. Apparently, Rogers' accommodation was to be granted continued, indefinite leave. DHS has provided sufficient evidence that this would cause an undue hardship upon the unit, requiring others to perform Rogers' essential work duties. DHS has given a substantial amount of leave without pay over the two year period preceding her termination, with her absences increasing rather than improving. Therefore, it is not reasonable to require DHS to continue to allow leave for an indefinite amount of time, especially without any evidence that the situation would improve.

The evidence clearly supports that, except for the absences, Rogers was a good employee. It is unfortunate that her absences were caused by her medical condition and her issues with her step-daughter and were due to no fault of Rogers. There is no evidence that the absences were unnecessary or that her absences were due to laziness, however, there is no statutory or regulatory authority to mandate an agency to hold a

position open indefinitely after all leave has been exhausted. At the close of the Appellee's evidence, Appellant moved for a Directed Verdict/Summary Judgment. Summary Judgment was sustained to the charge of neglect of duty because there was no evidence of "inexcusable" inattention or failure to perform her duties or absence without proper authorization. That left only Misconduct and Violation of time and leave policy as the basis for this action. Although under the DHS policy, violation of the time and leave policy is a form of misconduct, it must be stated that the sole basis for this discharge is her unavoidable but excessive absences and not due to any intentional acts of misconduct by the Rogers.

The undersigned has considered the facts and circumstances of this case, the exhibits, the testimony of the witnesses and the written summations. Based upon the entire record, DHS has met its burden of proof that just cause existed to impose discipline as set forth in the Notice of Final Discipline. Given the nature of this action and the continuing, increasing absences of the Appellant, the undersigned cannot reasonably find that the discipline imposed was unjust given the totality of the circumstances. This considers the progressive discipline, lack of improvement in the complained-of behavior and the accommodations extended by DHS. Therefore, DHS has proven, by a preponderance of the evidence, that there was just cause to impose discipline and that the level of discipline imposed was appropriate. There is insufficient evidence that there were violations of ADA or that there was disparate treatment of Rogers. Further, although the behaviors of her supervisor may have been rude and/or inappropriate, there is insufficient evidence of harassment, hostile work environment or retaliation.

### **CONCLUSIONS OF LAW**

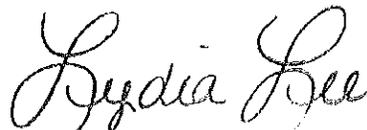
1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.

3. Merit Rule 455:10-9-2 states that the Appellee DHS has the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the adverse action and that the discipline imposed is just.
4. Merit Rule 455:10-11-17 states that a permanent classified employee may be discharged for any of the reasons set forth in 455:10-11-14, which includes misconduct, inability to perform the duties of the position in which employed or any other just cause.
5. DHS policy DHS: 2-1-7(i) and (i)(C) state the causes for disciplinary actions, to include Misconduct for Violations of time and leave policy including excessive or abusive tardiness, unexcused, unapproved or excessive absences, abuse of leave, or unauthorized leave without pay.
6. Appellee, DHS, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Rogers for her excessive absences and/or unauthorized leave without pay.
7. Appellee, DHS, has met its burden to prove, by a preponderance of the evidence, that discharge or termination is an appropriate and just level of discipline. Progressive discipline has been utilized and the behavior has not improved, despite the implementation of reasonable accommodations.
8. It is not a reasonable accommodation to provide an extended, indefinite leave of absence without an expectation of the duration. It creates an undue hardship upon the employer by requiring other employees to perform the essential duties of the Appellant's position.

### **ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition for appeal of Appellant Jennifer Rogers, MPC 12-028 be DENIED in accordance with this Order.

This Order entered this 14th day of May, 2012.



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Lydia Lee  
Administrative Law Judge