IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
BELLSOUTH TELECOMMUNICATION'S	)	
TARIFF FILING TO REDUCE GROUPING	)	
RATES IN RATE GROUP 5 AND TO	)	DOCKET NO. 00-00041
IMPLEMENT A 3 PERCENT LATE	)	
PAYMENT CHARGE.	)	

REPLY TO BELLSOUTH'S RESPONSE TO TENNESSEE CONSUMERS'S SECOND PETITION FOR STAY OF EFFECTIVENESS AND PETITION FOR RECONSIDERATION

BellSouth argues only that the Petition for Stay should be denied. The company does not contest the need for reconsideration, although it has not made such a motion. Since the company has not contested reconsideration, the reply of Tennessee consumers reply is limited to BellSouth's arguments going to the Petition for Stay.

Other BellSouth concessions.

BellSouth concedes that its tariff "constitutes a rate increase" for basic local exchange service and consumers of other telephone company service providers or aggregators for whom it bills. (BellSouth Response at p. 8). BellSouth does not dispute that Tennessee consumers will be denied access to E911 calls and services unless they pay the charge. BellSouth does not dispute that Tennessee consumers will be denied basic local exchange service unless they pay the charge. BellSouth does not dispute the fact that consumers may not have the financial wherewithal to pay the new charge.[1] BellSouth does not dispute the fact that the record is undeveloped regarding its

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[1]All of these items are facts which relate to BellSouth's tariff which should have been considered in evidence.

affiliate, BellSouth Billing's role in billing and collection or that the Hearing Officer found that other matters should be proved by facts. BellSouth concedes that the record is undeveloped regarding billing for aggregators. Finally, BellSouth concedes that it suffers no harm since it is merely shifting money from basic local exchange service and other customers to offset planned reductions in the hunting services.[2]

Argument

After pretending that it is necessary that a Petition for Stay "discusses the standards," BellSouth provides a flawed analysis alleging that Tennessee consumers cannot satisfy a Petition for Stay. At the same time, the company concedes that it will not be harmed by such a stay.

Although there are no clear and unequivocal standards for showing that a stay of effectiveness is warranted, BellSouth's suggested "standards" can be of some use. Therefore, the Consumer Advocate Division will discuss them in the same order presented by BellSouth.

1. Likelihood of success on the merits

Tennessee consumers have a high likelihood of success on the merits. Under the law the majority decision will be reversed upon a finding of arbitrary and capricious conduct or that the decision is clearly erroneous.

In *McCallen v. City of Memphis*, 786 S.W.2d 633, 640-41 (Tenn. 1990), the Tennessee Supreme Court defines an abuse of discretion as being an action "in opposition to the intent and policy of the statute and of the ordinance adopted conformably to its provisions, as applied to the facts and circumstances of the case." *McCallen*, 786 S.W.2d at 641. The Court also noted that

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[2]BellSouth brief at p. 9.

"abuse of discretion, arbitrariness, capriciousness, and unreasonableness are terms often used interchangeably."

The Court further stated that "agency decisions with adequate evidentiary support may still be arbitrary and capricious if caused by a clear error in judgment." *Jackson Mobilphone v. Tennessee Public Service Commission*, 876 S.W.2d 106, 110 (Tenn. App. 1993). The *Jackson Mobilphone* Court explained that "an arbitrary decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Jackson Mobilphone*, 876 S.W.2d at 111.

Review of the agency decision when governed by the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-322(h)(5), *requires* the courts to reverse a final administrative decision that is "unsupported by evidence which is both substantial and material in the light of the entire record." *Sanifill of Tennessee, Inc. v. Tennessee Solid Waste Disposal Control Board*, 907 S.W.2d 807, 810 (Tenn. 1995). The record is reviewed to determine whether the administrative decision is based on "such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." *Southern Railway Company v. State Board of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984).

Tennessee consumers' respectfully submit that the TRA majority's decision disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion. Alternatively, or in addition, the decision is arbitrary and capricious or clearly erroneous.

At the hearing on the Initial Order, the Hearing Officer amended and superceded his prior Initial Order and provided the written amendment. As a result, the amended Initial Order was the actual Order before the agency. The majority of the directors orally voted to reverse the amended Initial Order.

In its August 3, 2000 Order, however, the agency used the Hearing Officer's finding in his prior Initial Order, not the amended Initial Order. Although the amended Initial Order also found that BellSouth's tariff was a telecommunications service, the Hearing Officer also made findings of fact and reached the legal conclusion that the tariff would cause an impermissible increase in the basic local exchange service rate. Therefore, the fact[3] and law decisions were resolved in favor of Tennessee consumers, not BellSouth. The majority therefore did not merely reverse legal conclusions, the agency reversed factual conclusions.

In *Phillips v. State Board of Regents*, 863 S.W. 2d 45, 50 (Tenn. 1993), Phillips contended that she was denied due process because she was not informed of the specifics of what would be heard. The Tennessee Supreme Court found that:

> A fundamental requirement of due process is notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950); *In Re Riggs*, 612 S.W.2d 461, 465 (Tenn. App. 1980). The purpose of notice is to allow the affected party to marshal a case [in opposition.] *Bignall v. North Idaho College*, 538 F.2d 243, 247 (9th Cir. 1976). Due process is flexible and calls for such procedural protections as the particular situation demands." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). In determining what process is due in a particular situation, three factors must be considered: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, (3) the government's interest, including the

[3]If the TRA disagrees with the facts as found, there is obviously a dispute of fact and the majority's decision is premature and denied due process.

> function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976). Moreover, the component parts of the process are designed to reach a substantively correct result. Elaborate procedures at one stage may compensate for deficiencies at other stages. *Bignall*, 538 F.2d at 246.
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> The Court went on to find that Phillips received notice of the allegations supporting the charge against her in the documentation attached to the letter instituting the proceedings. *She was afforded the benefit of both an informal and formal hearing*, in which further specific details of the allegations were developed. Finally, Phillips had a de novo hearing. See *Bignall*, 538 F.2d at 248 (although the notice prior to the hearing was defective, by the time of the trial de novo there was ample notice to satisfy due process). Given the availability of the hearing de novo in which Phillips was allowed to present further evidence to refute the specific details of allegations of which she may not have been aware at the time of the formal hearing, and the fact that there is no presumption of correctness afforded the decision of the administrative board, we conclude that the component parts of the process afforded a substantively correct result.

In this case Tennessee consumers had no notice that the TRA intended to decide all issues of the case nor any opportunity to marshall a defense. In addition, there is no opportunity for a formal de novo hearing and discovery to assure an appropriate outcome. As a result the component parts necessary for procedural due process do not permit reaching a correct result and Tennessee consumers are likely to prevail on the merits.

In *Crump v. Tennessee*, Appeal No. M1999-02677-COA-R3-CV, filed February 29, 2000 (Tn. Ct. App. M.S.), Crump, a terminated former state employee asserted that there was no substantial and material evidence to support the Civil Service Commission's affirmance of an Administrative Law Judge's Initial Order and that the affirmance denied her due process. The Court found that there was substantial and material evidence to support the ALJ's decision which

gave credibility to Crump's former manager and therefore the state prevailed. The Court further held that:

> Her [Crump's] assertions of due process violations could only be valid if the ALJ chose to believe the testimony of Ms. Crump in preference to the testimony of Mrs. Eddings. Clearly, she did not do so.

Thus, if the ALJ believed the testimony of Crump but the Civil Service Commission found in favor of the state, plaintiff Crump's complaint of due process violations would have been valid.

In this case, the officer equivalent to an ALJ, the Hearing Officer chose to believe the evidence of Tennessee consumers and found in their favor.[4] The TRA majority, however, contrarily chose to believe BellSouth. As a result, Tennessee consumers due process rights were violated under the *Crump* standard.

In addition, the Hearing Officer agreed that facts were necessary to decide other issues in the case which his Initial Order did not decide. Tennessee consumers due process rights therefore have clearly been denied and they should prevail.

Furthermore, Tennessee consumers should prevail because even the TRA's decision demonstrates the illegality of BellSouth's tariff. The TRA held that the late payment charge *itself* is a nonbasic service. Obviously the charge must provide some benefit or companies could simply make money by merely submitting charges which provide no consumer benefit.

Once the agency or the Hearing Officer made the finding certain consequences flow from the decision. In fact, the Hearing Officer reserved these consequences for a fact hearing. The

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[4]He found that if BellSouth's intent is to integrate the late payment charge into basic local exchange services tariffs, e.g., through the GSST or any mechanism then it unlawfully increases the basic local exchange service rate.

majority, however, disregarded the facts, circumstances or consequences regarding privity of contract, or subscriber authorization.

BellSouth's tariff, for example, would charge end-users of a service provided by other companies without the consumer ever ordering the service or authorizing BellSouth to bill and charge them. BellSouth, in its Response brief, concedes *the fact* that it will be billing and charging for the TRA defined nonbasic service even though there is no subscriber authorization or confirmation.

Tenn. Code Ann. § 65-4-125 (b), however, has the legislative intent of prohibiting any telephone company from billing or collecting for any service when a subscriber has not subscribed to the service. Tenn. Code Ann. § 65-4-125 (d) expressly requires that subscriber authorization be "obtained and confirmed."[5]

The TRA promulgated Tenn. Admin. Rule 1220-4-2-.58 in response to Tenn. Code Ann. § 65-4-125 (d). The rule requires the existence of an "authorized individual"[6] "who approved the charge and the date of approval.[7] Every telecommunications company is prohibited from submitting charges for services without first having obtained the prior consent of an authorized individual for such charges to appear on the telephone bill.[8] Cramming occurs when the charge is unauthorized or without prior consent.

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[5]Tennessee consumers also contend that extortion occurs when BellSouth compels Tennessee consumers to pay for any service to which they have not specifically subscribed and authorized.

[6]Tenn. Admin. Rule 1220-4-2-.58 (1) (b).

[7]Tenn. Admin. Rule 1220-4-2-.58 (2) (d).

[8]Tenn. Admin. Rule 1220-4-2-.58 (3).

BellSouth suggests that its General Subscriber Services tariff (GSST) supercedes Tenn. Code Ann. § 65-4-125 and that Tennessee consumers it bills or charges need only be "aware"[9] that the charges will appear on their bill. BellSouth's position completely negates Tenn. Code Ann. § 65-4-124 (b) and Tenn. Code Ann. § 65-4-125 (d) and cannot stand. As a result, Tennessee consumers are likely to prevail on the merits.

Furthermore, the Hearing Officer's Initial Order left for an evidentiary hearing the fact that BellSouth tariff in certain situations provides no true service to the consumer at all. For example, *if the result is that a customer's services will be terminated despite being assessed the late payment charge, then no true service is being provided.* Thus, the charge would be misleading and deceptive.[10] A fact hearing which considers the actual operation of the tariff after the findings of the majority and the Hearing Officer is necessary to flesh out the facts in these regards.

Next, BellSouth intentionally evades the point of Tennessee consumers assertion about the improper comparison of United Telephone-Southeast and BellSouth. United Telephone-Southeast was not a party to this proceeding and any challenge or non challenge of UTSE is not relevant. The mere fact that United Telephone-Southeast or any CLEC charges a separate late payment charge is not relevant.

Tennessee consumers submit that as a matter of law UTSE's late payment charge, to the extent that it is applied to basic local exchange service, *must* come within the ambit of Tenn.

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[9]BellSouth brief at p. 3.

[10]Tenn. Admin. Rule 1220-4-2-.58 (3)(a).

Code Ann. § 65-5-208 (a) (1). There is no credible evidence that UTSE's charge was not one of "all" charges.

Just like the fact that there has not been a contested case on the issue of anticompetitve special contracts, there has not been a contested case on the issue of UTSE's late payment charge. If Director Greer had given Tennessee consumers' notice and an opportunity to refute, Tennessee consumers would have explained that position.

No rule, statute, or procedure requires Tennessee consumers to implement a trial strategy in one particular case as if it were trying all possible cases. Tennessee consumers' have contested or appealed all improper rate increases by UTSE of which we have knowledge. Furthermore, in the UTSE cases UTSE, *never sought to increase any late payment charges associated with basic local exchange service*. BellSouth is attempting to increase late payment charges associated with basic local exchange service here, which warranted our intervention.

Tennessee consumers challenged UTSE, for example, when it sought to add charges associated with basic local exchange service installation to the non-basic services pool and this agency prohibited UTSE from implementing such changes. Here BellSouth is seeking to add charges associated with basic local exchange service to the non-basic services pool.

Moreover, even if a CLEC charged a separate late payment charge on top of any basic local exchange service charge it would not warrant BellSouth assessing such a charge. CLEC's set their prices differently. If the CLEC chose to set its basic local exchange service rate so that it did not include the expenses due to late payment charges, so that its actual service rates would be lower, it is free to do so. BellSouth's rates were set to include late payment charges and Tenn.

Code Ann. § 65-5-208 (a)(1) mandates that all charges are included in basic local exchange service rates.

BellSouth's arguments that unregulated billing aggregators collect late payments independent of the contract should be expressly rejected. The company provides no authority or facts in support of such a proposition and in fact the authorities are contrary to BellSouth's position. BellSouth's arguments that the tariff serves as a contract between the company and its customers are misplaced or missing an essential predicate. While the tariff describes the contract the company wants with the consumer, the consumer must expressly assent to that contract.

The General Assembly requires that the customer subscribe to the service and that the subscriber's authorization must be obtained. There is no subscription or authorization regarding BellSouth's "late payment charge service."[11]

Tennessee consumers further contend that Tenn. Code Ann. § 65-4-125 restricts the TRA's authority. Under the statute, subscribers must subscribe to the services billed. The TRA's role in this process is to specify, *by rule*, how the subscriber's authorization can be obtained[12] and to enforce the statute and rule.[13] BellSouth's tariff and BellSouth's processes do not comport to the statute or the TRA's rules for obtaining subscriber authorization or confirmation.

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[11]If BellSouth is seeking to modify the GSST which provides the basic local exchange service tariff from what it was on June 6, 1995 in order to insert the late payment service, the modification is clearly an increase in basic local exchange service rates. See, e.g., the Hearing Officer's Initial Order.

[12]Tenn. Code Ann. § 65-4-125 (e).

[13]Tenn. Code Ann. § 65-4-125 (f).

BellSouth also argues that Tennessee consumers did not send the company an interrogatory about discrimination. Tennessee consumers respectfully submit that they are not required to limit their discovery solely to interrogatories or any other single method. We had expressly requested the Hearing Officer to permit depositions. The Hearing Officer held his decision in abeyance. The requested depositions could be the source of additional discovery regarding rate discrimination. BellSouth's position regarding discrimination, merely points out the obvious, the TRA majority prematurely terminated the proceeding in its early stages.

The TRA clearly has not developed the record regarding BellSouth's unregulated affiliate, BellSouth Billing, and its role in the billing process. As a result, it surely has no record upon which it can find that any consumer has authorized BellSouth Billing to provide any service to them. If the TRA is relying upon some undisclosed knowledge it has a duty to disclose such information. Therefore, Tennessee consumers are likely to prevail on appeal.

Tennessee consumers' respectfully submit that the foregoing arguments show that it is likely that they should prevail on the merits. Permitting BellSouth's tariff to bill and charge consumers without their content is in opposition to the intent and policy of the statute and rules as applied to the facts and circumstances of the case, and is therefore arbitrary and capricious or a clear error in judgment.

2. Irreparable Injury.

BellSouth does not deny that the charge itself will result in Tennessee consumers who have their services terminated or will prohibit Tennessee consumers from restoring service. Moreover, BellSouth does not deny that an inability to pay the charge itself will result in Tennessee consumers being denied access to E911 services. This injury is not correctable in the customary

sense because the lack of late payment money to pay BellSouth during the period of appeal permits BellSouth to cause the injury. The injury is or will be irreparable to those who are not permitted access to E911 services because of the charge.

3. The prospect that others will be harmed if the stay is granted.

BellSouth does not allege that it will be harmed if a stay is granted.

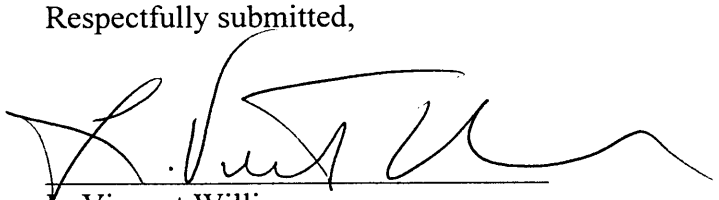
4. Public Interest

BellSouth, in a remarkable disdain for life and safety, argues that reducing hunting charges for selected group 5 business customers is of greater public interest than maintaining access to E911 services to Tennessee consumers who may be temporarily unable to pay BellSouth's late payment charge. Apparently, it believes the lives and safety of the permanently poor, for example, are of greater value than the life and safety of the temporarily poor or the working poor. Tennessee consumers respectfully disagree. We respectfully submit that this agency should be decreasing barriers to E911 service instead of increasing the barriers to E911 service.

Conclusion

Tennessee consumers respectfully submit that the TRA should grant a stay and should reconsider its decision.

Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Document has been faxed and mailed postage prepaid to the parties listed below this 21st day of August, 2000.

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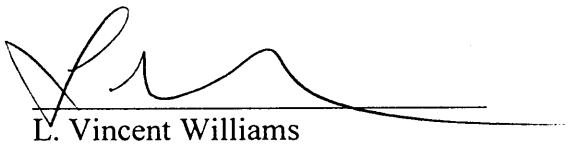

L. Vincent Williams

2000 Tenn. App. LEXIS 128 CRUMP V. TENNESSEE CIV. SERV. COMM'N (Ct. App. 2000)

MARIE CRUMP, Plaintiff/Appellant,

vs.

THE TENNESSEE CIVIL SERVICE COMMISSION and THE TENNESSEE DEPARTMENT OF MENTAL HEALTH and MENTAL RETARDATION, Defendants/Appellees.

Appeal No. M1999-02677-COA-R3-CV
COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE
2000 Tenn. App. LEXIS 128
February 29, 2000, Filed
APPEAL FROM THE CHANCERY COURT FOR DAVIDSON COUNTY, AT NASHVILLE, TENNESSEE.
THE HONORABLE ELLEN HOBBS LYLE, CHANCELLOR. No. 97-3372-III

COUNSEL

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JUDGES

WILLIAM B. CAIN, JUDGE. CONCUR: WILLIAM C. KOCH, JR., JUDGE, PATRICIA J. COTTRELL, JUDGE.

AUTHOR: CAIN

OPINION

This is an appeal from an administrative termination under the UAPA. **See** Tenn. Code Ann. § 4-5-101 et seq. (1998). Prior to her termination on July 24, 1995, Ms. Marie Crump was employed by the Tennessee Department of Mental Health and Mental Retardation in its Cloverbottom Development Facility. Her termination stemmed indirectly from an altercation resulting from a notation on Ms. Crump's timecard. On July 6, 1995, Ms. Crump reported for work at Cloverbottom for a regular shift commencing around 3:00 p.m. Her time card bore a notation on the back stating "no work for July the 4th". This meant Ms. Crump had been scheduled to work on July 4th but did not show up and did not provide any reason or excuse for being absent. Apparently, Ms. Crump was originally scheduled to be off work on July 4th and 5th but rescheduled to be off on July 5th and 6th. Ms. Crump was unaware of the change and did not show up for work on July 4th. Ms. Crump became very upset about the notation on the time card because it indicated she had intentionally stayed off the job without any good reason. She went immediately to her supervisor, Ms. Linda Mangrum, to explain and prevent disciplinary action from being taken. Ms. Mangrum told Ms. Crump she could not attend to the matter at that time and would speak with her later. Ms. Crump left but returned in a few minutes and asked Ms. Mangrum to address the situation. Again Ms. Mangrum chose to defer the matter. Ms. Crump became angered and shouted at Ms. Mangrum "f-- you, bitch" and departed the premises.

When Ms. Crump reported for work on July 7, 1995, she was instructed to see Mrs. Dorothy Eddings who was the superior of Ms. Mangrum and was supported living facilitator for Cloverbottom. Ms. Crump met with Mrs. Eddings prior to the beginning of her shift. Mrs. Eddings told Ms. Crump that she intended to recommend that Ms. Crump be terminated. At this point a dispute arose between the testimony of Mrs. Eddings and Ms. Crump. Mrs. Eddings testified that she was careful to explain to Ms. Crump that she was only making a recommendation and encouraged Ms. Crump to remain on the job for two weeks until the recommendation could be acted upon. Ms. Crump denied that Mrs. Eddings stressed that she was only making a recommendation but rather that she was in fact firing Ms. Crump and giving her a two week grace period. After this meeting Ms. Crump left Cloverbottom and never returned.

In a letter dated July 24, 1995, and signed by Ms. Margaret Lewis and Ms. Eddings, Cloverbottom informed Ms. Crump that she was terminated for leaving work without permission and conduct unbecoming an employee in state service. The letter further stated the following:

> This decision may be appealed under the State's grievance procedure, in which case notice of the grievance should be filed within fifteen (15) working days. Assistance in filing an appeal may be received by contacting Alan McLeod, Employee Relations Officer, at extension 5125.

Ms. Crump pursued an appeal from the termination, and in March 19, 1997, a hearing was held before Administrative Law Judge Margaret Robertson. The ALJ issued her initial order affirming the termination on June 27, 1997. Thereafter the Civil Service Commission heard Ms. Crump's appeal from the ALJ's action, and on August 11, 1997, the commission adopted the initial order as a final determination. Ms. Crump sought judicial review of the commission's action in chancery court pursuant to the UAPA, Tennessee Code Annotated section 4-5-322. The court, by memorandum and order dated January 19, 1999, affirmed the action of the Civil Service Commission. From the chancellor's order Ms. Crump appeals to this Court, urging the following issues:

1. The administrative action complained of below is not supported by substantial material evidence;

2. Ms. Crump was not afforded the minimum due process as required by Tennessee Code Annotated section 8-30-331 and Tennessee Rules and Regulations Rule 1120-10-.03(2).

Ms. Crump has not persuaded this Court that the actions of the ALJ and the Commission are not supported by substantial and material evidence. In the proceeding before the ALJ, Ms. Crump admitted using foul and disrespectful language to her supervisor. The ALJ accepted the testimony of Mrs. Eddings in preference to the testimony of Ms. Crump as to what actually happened at the July 7, 1995 meeting. Ms. Crump left the meeting and the Cloverbottom premises before the end of her shift and never returned.

Our task is to determine whether or not "substantial and material evidence" appears in the

record to sustain the judgment of the ALJ.

> In reviewing an administrative decision, a court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." T.C.A. § 4-5-322(h)(5). Factual issues are reviewed upon a standard of substantial and material evidence, and not upon a broad, de novo review. **CF Industries v. Tennessee Public Service Commission,** 599 S.W.2d 536, 540 (Tenn. 1980). Substantial and material evidence is "'such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.'" **Sweet v. State Tech. Institute at Memphis,** 617 S.W.2d 158, 161 (Tenn. App. 1981) (quoting **Pace v. Garbage Disposal District of Washington County,** 54 Tenn. App. 263, 390 S.W.2d 461, 463 (1965)). A court will not disturb a reasonable decision of an agency with expertise, experience, and knowledge in the appropriate field. **Griffin v. State,** 595 S.W.2d 96, 99 (Tenn. Crim. App. 1980).
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> **Southern Ry. Co. v. State Bd. of Equalization,** 682 S.W.2d 196, 199 (Tenn. 1984).

Clearly, the action of the ALJ was supported by "substantial and material evidence" and neither the trial court nor this court may "... substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Tenn. Code Ann. § 4-5-322(h)(1998).

Ms. Crump's claims concerning due process are equally infirm. She argues that her termination took place without notification of charges and an opportunity to be heard. **See** Official Comp. of Tenn. R. & Regs., R. 1120-10-.03(2); **See also** Tenn. Code Ann. § 8-30-331. Her assertions of due process violations could only be valid if the ALJ chose to believe the testimony of Ms. Crump in preference to the testimony of Mrs. Eddings. Clearly, she did not do so. Thus Ms. Crump had not been terminated as of the July 7, 1995 meeting with Mrs. Eddings, and indeed, no adverse employment action had been taken prior to July 24, 1995 when Ms. Crump was terminated and advised as to proper grievance procedure.

The statute governing judicial review under the UAPA is plain:

> (h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322 (1998). Ms. Crump has failed to show that any of these circumstances exist.

In such a case, the findings of fact and conclusions of law of the administrative tribunal should be and are affirmed in all respects. The cause is remanded for such further proceedings as may be necessary below. Costs on appeal are taxed against the appellant.

WILLIAM B. CAIN, JUDGE

CONCUR:

WILLIAM C. KOCH, JR., JUDGE

PATRICIA J. COTTRELL, JUDGE

DISPOSITION

AFFIRMED AND REMANDED.