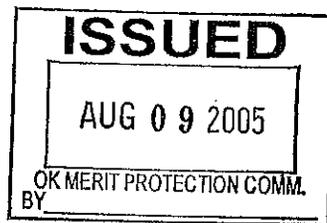


**BEFORE THE MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA**



Jonny Dodson, )  
Appellant, )  
v. )  
Oklahoma Department of Corrections, )  
Appellee. )

MPC 05-239

**DECISION REGARDING APPELLEE'S  
MOTION FOR SUMMARY JUDGMENT**

Pre-hearing on this matter was held June 17, 2005 at which time the parties agreed the only issues to be decided were issues of law. A briefing scheduling was set forth after which Department of Corrections (hereinafter "Appellee" or "DOC") filed a Motion for Summary Judgment and Brief in Support and Appellant filed a Brief in Chief. On July 25, 2005, Appellee filed a response brief responding to the Appellant's brief. Also, the parties filed joint stipulations on July 8, 2005 which are incorporated herein and made a part hereof.

A brief history of this matter indicates that Appellant was a Correctional Security Officer III working for Appellee in 2003 when he sustained a work related injury. As a result, Appellant was determined to be temporarily and totally disabled (hereafter "TTD") and went to leave without pay employment status on March 5, 2003. The parties have stipulated that the Appellant remains temporarily and totally disabled for purposes related to workers compensation.

On March 2, 2005, Appellant was sent a Notice of Pre-Termination Hearing indicating

that Appellee was considering discharge because Appellant was placed on leave without pay on March 5, 2003 and did not return to work within one year. Following a hearing regarding that matter on March 17, 2005, Appellant was terminated from his employment effective March 24, 2005.

The parties have stipulated that the termination of Appellant's employment was not imposed for disciplinary reasons, but was imposed solely under the authority of 74 O.S. § 840-2.21 and Merit Rule 530:10-15-49 for Appellant's failure to return to work after being on leave without pay for longer than one year.

The issue of this case is whether 85 O.S. § 5 prohibits a state agency from discharging/terminating a state employee under 74 O.S. § 840-2.21 and Merit Rule 530:10-15-49.

85 O.S. § 5 states in pertinent part:

**Discharge of employee-prohibited grounds**

B. No person, firm, partnership, corporation, or other entity may discharge any employee during a period of temporary total disability solely on the basis of absence from work.

74 O.S. § 840-2.21 as amended in 2002 states in pertinent part:

Notwithstanding the provisions of Section 1, et seq. of Title 85 of the Oklahoma Statutes, the employee may be separated in accordance with the Oklahoma Personnel Act and Merit Rule if the employee has not returned to the original position of the employee or some other position within the agency within one (1) year from the date of the start of leave without pay.

Merit Rule 530:10-15-49(j)(2) states in pertinent:

If an employee does not return to the original position or an alternative position within 1 year after the start of leave without pay, the Appointing Authority may terminate the employee under Section 840-2.21.

Appellee argues there is no prohibition against separating an employee and that the provisions of Title 74 and Title 85 are not in conflict. Appellee further argues that even if a conflict is found to exist, the provisions in Title 74 are more specific, later in time, and must prevail over the provisions in Title 85.

It is the Appellant's position that under 85 O.S. § 5 Appellant was protected from discharge by Appellee since Appellant was injured on the job, placed on workers compensation TTD, and unable to return to work. Appellant relies on the Oklahoma Supreme Court's decision in the year 2000 in the matter of *Upton v. State, ex rel. Department of Corrections*, 2000 OK 46, 9 P.3d 84, at which time the Supreme Court looked at an apparent conflict between Title 85 § 5 and Title 74 § 840-2.21. In that case, the Supreme Court held that because of an apparent conflict between the two statutes, agencies would not be able to terminate employees solely because of their absence from work if an employee was TTD.

However, Appellant also acknowledges that two years later, the Oklahoma Legislature added language to Title 74 in order to clarify its intent concerning the conflict of the statutory provisions of Title 85 and Title 74 which was noted in the *Upton* case. Specifically, the first line of Title 74 § 840-2.21 "Notwithstanding the provisions of Section 1 et. seq. of Title 85 of

the Oklahoma Statutes” was added by the legislature to remedy the conflict.

Appellant also maintains that § 840-2.21 does not allow DOC to “terminate” Appellant as a TTD employee, but DOC can declare Appellant “separated” from employment so that Appellant may continue to receive benefits during that separation period. Appellant is apparently arguing that a distinction should be made between “separation” and “discharge” or “termination” however he cites no authority which supports this distinction. Also, there is no citation indicating the Supreme Court made such a distinction in the *Upton* decision and the undersigned finds this argument unpersuasive.

As stated above, § 840-2.21(D) states that “an employee may be separated in accordance with the Oklahoma Personnel Act and Merit Rules”. Merit Rule 530:10-15-49 mimics the language of § 840-2.21 and states that the employee may be terminated by an appointing authority under § 840-2.21.

A reading of Title 74 § 840-2.21(D) together with Merit Rule 530:10-15-49 allows that an appointing authority may terminate an employee who does not return to his/her original position or an alternative position within one year after the start of leave without pay. Section 840-2.21 references Merit Rules. Merit Rules 530:10-15-49 allows for termination. The two must be read together.

Lastly, Appellee cites § 840-2.21(H) which provides:

All benefits, rights, and obligations contained in the section shall continue during the time the employee remains on leave without pay status, for a continuous period not to exceed 12 months.

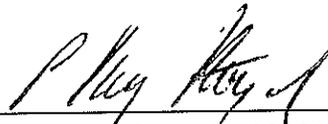
Appellee maintains that Appellant’s distinction between “separation” and “discharge”

and Appellant's position that his benefits should continue, fails in light of the statutory limitation of twelve (12) months as stated in paragraph H.

Accordingly, Appellee's argument that the discharge of Appellant was proper under Title 74 Section 840-2.21 is persuasive and the undersigned finds that Appellee was not prohibited from discharging/terminating Appellant.

Accordingly, after review of all briefs and materials submitted and considering all arguments made the undersigned Administrative Law Judge finds the Appellee's Motion for Summary Judgment is hereby **GRANTED**.

Dated this 9<sup>th</sup> day of August, 2005.



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P. Kay Floyd, OBA #10300  
Administrative Law Judge  
Oklahoma Merit Protection Commission  
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