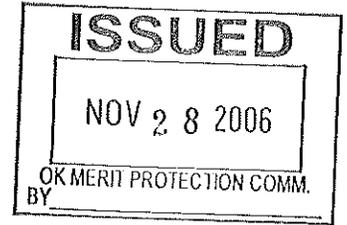


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA**



**VIVIAN M. BROWN,** )  
Appellant, )  
 )  
v. )  
 )  
**DEPARTMENT OF CORRECTIONS,** )  
Appellee. )  
 )

Case No. MPC 06-217

**FINAL ORDER**

This matter comes on for hearing on November 2, 2006 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Vivian M. Brown, appears personally, and by and through her attorney, Lewis A. Berkowitz. The Appellee, Department of Corrections, appears by and through counsel, Michael Oakley. Also present for Appellee was Table Representative, Warden Randall Workman.

Appellant Brown is a permanent, classified state employee appealing an adverse disciplinary action of suspension without pay for five (5) days. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the Appellee offered Exhibits 1 through 16 with no objection and they were admitted. The Appellant failed to exchange or submit any documentary evidence prior to the hearing as required by the Pre-Hearing Conference Order. As a result, the Appellant had no Exhibits admitted into the record. Following the evidentiary hearing, the parties were given the opportunity to submit written summations.

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, Vivian Brown, (hereinafter "Brown") is a classified employee of the Appellee Department of Corrections (hereinafter "DOC"). Brown is a Correctional Security Officer, employed at the Lexington Assessment and Reception Center (hereinafter "Center"). In February, 2006 Brown was working the 12 midnight to 8 a.m. shift at the Center. On February 17, 2006 an ice storm caused the weather and road conditions to become increasingly more hazardous. Brown left her home in Oklahoma City at approximately 9:30 p.m., about one hour earlier than normal as a result of the storm. At some point, Brown decided to return to her home due to the road conditions and, using her cell phone, called the Center to advise that she would not be at work. Lt. Sherry Sexton, called Brown at approximately midnight and advised her that she was an "essential" employee and was required to report to work. Due to the weather, several employees had called in and each was told to report to work due to the required staffing levels for the Center. Brown advised Lt. Sexton that she would be in, but would be late. Brown reported for duty after 5 a.m. on February 18, 2006.

On May 3, 2006, DOC provided Brown with notice of the proposed disciplinary action, advising her that she was being considered for discharge of her employment as a result of her failure to report for duty on February 18, 2006 as well as failing to report sick leave on February 25 and 26, 2006 (Exhibit 4). A pre-termination hearing was held on May 15, 2006, where Brown was given an opportunity to present evidence. As a result of the evidence provided by Brown, the February 25 and 26, 2006 incidents were dismissed and no disciplinary action was taken with regard to those incidents. On May 26, 2006, DOC provided Brown with notice of discipline, imposing a five (5) day suspension without pay for the February 18, 2006 incident (Exhibit 5). In the notice, DOC states that the actions of Brown in failing to report for duty as ordered were considered to be misconduct, in violation of DOC policy OP-110355 (Exhibit 2). The notice contained references to fourteen (14) prior disciplinary actions, with at least seven (7) of those being leave related or for tardiness.

## The Testimony

DOC offered the testimony of two witnesses in support of its disciplinary action. Lt. Sherry Sexton testified that Brown was required to report for duty at 11:45 p.m., 15 minutes prior to her shift to attend a staff briefing. She stated that she personally spoke with Brown sometime around midnight on February 18, 2006 and advised her of the need for her to report for duty because of the staffing levels and related security issues. She also stated that Brown was an essential employee and was required to report for duty even if there was inclement weather. She stated that Brown told her that she would come in but she would be "a little late". She documented her conversation with Brown (Exhibit 6).

Warden Randall Workman testified that the Center was the receiving and assessment center for the entire state correctional system. He stated that there were a fixed number of posts which must be staffed and each employee's training emphasizes the need for good attendance and timeliness for the safety of fellow officers. He testified that he was felt that Brown's actions warranted the suspension without pay as imposed rather than discharge as originally considered. He felt that Brown was a good employee but she had a pattern of behavior concerning her attendance and tardiness that needed to be changed. He stated that he chose a suspension without pay as an appropriate level of discipline for this incident, in order to give her an opportunity to correct her conduct and not repeat this action. He stated that he believed that the action imposed was proper and in accordance with the progressive disciplinary process given her numerous prior disciplinary actions over recent years. He stated that her attendance and timeliness had improved since the suspension without pay was imposed, a desired goal of progressive discipline.

Appellant Brown offered the testimony of one witness in addition to herself. Lt. Torrance Roane testified that he was the shift supervisor on the shift immediately before Brown's shift. He testified that Brown called him between 10:00 and 11:00 p.m. on February 17, 2006 to advise that she would not be coming to work because of the weather. He stated that he called her back and told her that she was required to try to come in. He stated that 5 or 6 employees called in and all were told to try to come in. He also testified that he had personally transported her to work on occasion in an effort to improve her tardiness and absenteeism.

Vivian Brown offered her testimony. She stated that many of the prior disciplinary actions were as a result of “miscommunications”. She stated that her job was very “high-stress” and that she suffered from migraines, sleep interruptions and reflux, although no medical evidence of these conditions was offered. She testified that she was a caregiver for her mother who recently underwent a lung transplant. She testified that she discussed family medical leave (FMLA) with her employer in January 2006 and applied for and was granted intermittent FMLA in March 2006. She stated she believed that DOC personnel resent her for taking off so much. She testified that on February 17, 2006, at approximately 9:45 p.m., she left home early to report for work. However, she decided to return home because she thought she was a safety hazard. She called Lt. Roane and admits that he advised her to try to come in, however, she returned to her home instead. She further testified that she received a call from Lt. Sexton also telling her that she was essential and needed to report for her shift. She stated that she advised Lt. Sexton that she would come in but would be late. She then testified that she returned to her home to wait for the sand trucks to condition the roads, turned off her truck and fell asleep in the front seat of the unheated vehicle parked in her driveway. She said that she slept about an hour or two, and when she awoke, she proceeded to drive to work. She admitted that although she had her cell phone with her, she did not again attempt to contact the Center to report her progress and that she did not arrive at the Center until after 5:00 a.m., almost five and one-half hours after the start of her shift. Brown specifically testified that she did not request sick leave because she was not sick nor was she caring for her mother that night and that it would have been a lie to ask for sick leave.

### ISSUES

1. Did the actions of the Appellant Vivian Brown in reporting late to work on February 18, 2006 constitute misconduct?
2. If so, was the discipline imposed just, appropriate and in compliance with the progressive discipline policy?

## DISCUSSION

It is clear from the evidence and testimony that Brown failed to report for duty on February 17-18, 2006 as instructed. Brown's delay in reporting to work is not entirely due to the hazardous weather, as she admits that she fell asleep in her vehicle, which caused the extended delay in reporting. She admits that she did not call the Center to report her progress, which could have mitigated the situation. In addition to the weather situation, Brown offers numerous excuses for her tardiness, including stress, sleep deprivation and her mother's illness. Even though Brown did not request sick leave, she asserts that DOC had a duty to offer it. She further asks that she be somehow rewarded for not lying. Brown's arguments and excuses are not persuasive given the clear evidence that she simply fell asleep rather than attempt to report for work as ordered. It is also clear from the testimony that this was considered to be a very serious incident which could have jeopardized the security of the facility. Based upon the record, the undersigned finds that DOC has met its burden of proof that just cause existed for the discipline imposed.

There is substantial evidence of prior and progressive discipline. Brown received at least three informal counseling discussions for reporting late to work, at least three letters of concern for excessive unscheduled leave (Exhibits 8, 10, and 12 ), one letter of reprimand for failing to report to work (Exhibit 15) and one suspension without pay for abandonment of her post (Exhibit 13). DOC tried informal discipline in the form of the counseling, then the letters of concern, progressing to the letter of reprimand and finally a prior suspension without pay for two days in an effort to redirect Brown toward improved job performance regarding her attendance, use of leave and abandoning her position. Brown has also received other letters of concern and letters of reprimand, as well as another prior suspension without pay (Exhibits 9, 11, 14 and 16). Given the large number of prior disciplinary actions, DOC has proven, by a preponderance of the evidence, that this disciplinary action was consistent with its progressive disciplinary procedure.

Warden Workman testified that he took Brown's job performance, personal situation and tenure into consideration in imposing a suspension without pay rather than the recommended discharge. It appears that the discipline imposed was just given all of the circumstances and DOC has proven, by a preponderance of the evidence, that the level of disciplinary action imposed was just.

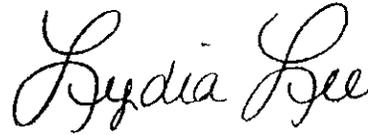
## CONCLUSIONS OF LAW

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 DOC 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 455:10-11-15 states that a permanent classified employee may be suspended without pay for any of the reasons set forth in 455:10-11-14, which are misconduct, insubordination, inefficiency, habitual drunkenness, inability to perform the duties of the position in which employed, willful violation of the Oklahoma Personnel Act or the Merit Rules, conduct unbecoming a public employee, conviction of a crime involving moral turpitude or any other just cause.
5. The preponderance of the evidence shows that Brown violated DOC's policy OP-110355, entitled "Procedures for Employee Attendance and Leave", by failing to report in a timely manner for duty on February 18, 2006 as directed by her supervisor. This policy provides that employees are responsible for reporting for work as directed or scheduled.
6. Appellee DOC has met its burden to prove, by a preponderance of the evidence that just cause exists to discipline Brown for failing to report to work as directed, thereby risking the safety of the other staff and the inmates.
7. Appellee DOC has met its burden to prove, by a preponderance of the evidence, that it followed the DOC Progressive Disciplinary Procedure.
8. Appellee DOC has met its burden to prove, by a preponderance of the evidence, that the discipline imposed was just under the circumstances.

**ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** by the undersigned Administrative Law Judge that the petition of Appellant Vivian Brown, MPC 06-217, be **DENIED**.

This Order entered this 28<sup>th</sup> day of November, 2006.



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Lydia Lee  
Administrative Law Judge  
Oklahoma Merit Protection Commission  
3545 NW 58<sup>th</sup> Street, Suite 360  
Oklahoma City, Oklahoma 73112