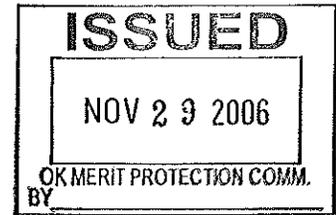


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA



DAVID C. WILLIAMS,)
Appellant)
vs.)
DEPARTMENT OF CORRECTIONS,)
Appellee.)

CASE NO. MPC 06-221

ORDER

A Pre-Hearing Conference was held in this case on August 11, 2006 before the undersigned Administrative Law Judge. Appellant David Williams (hereinafter referred to as "Appellant") was represented by Gary J. James, Esq. and Appellee Department of Corrections (hereinafter referred to as "Appellee" or "DOC") was represented by Michael T. Oakley, Assistant General Counsel. Pursuant to the Pre-Hearing Conference Order entered that date, the parties were directed to submit simultaneous briefs by October 31, 2006 addressing the issue of whether, as a matter of law, discharge was appropriate. Appellee filed a Motion to Dismiss on October 31, 2006. Appellant has filed no brief or response to Appellant's Motion to Dismiss.

FACTS

Appellant, a correctional officer at Oklahoma State Penitentiary, was injured on the job and placed on temporary total disability and on leave without pay status beginning June 1, 2004. Appellant returned to a light duty assignment from November

8, 2004 to December 14, 2004. However, on December 15, 2004¹ Appellant resumed his temporary total disability and leave without pay status, as a continuation of his earlier injury, not because of a new injury. Appellant remained on leave without pay status until his employment was terminated by DOC on June 16, 2006. Appellant has permanent medical restrictions that prevent him from performing the essential duties of a correctional officer.

Appellant claims that he was wrongfully terminated; that he was released to return to work on October 30, 2005; that he tried to return to work but was told no alternate positions were available to him. A Work Status Report dated October 31, 2005 from Appellant's physician indicated that Appellant could stand and walk for no more than two hours per shift, could not climb stairs, could not lift over 10 pounds repeatedly, and might need to lie down for 10-15 minutes every few hours worked. The Report did not release Appellant from medical care, did not indicate that he had reached maximum medical improvement, did not indicate that he was able to return to work, and did not release him from temporary total disability. Appellant did not reach maximum medical improvement until his physician's March 13, 2006 medical statement.

As a state employee injured on the job, Appellant was entitled to certain rights, including the right to supplement temporary total disability with accrued paid leave and the right of first preference to other jobs for which the employee might qualify. These rights do not exist indefinitely, and terminate one year from the start of leave without pay. Additionally, the exercise of these rights requires affirmative action on the part of

¹ On page 2 of Appellee Motion to Dismiss and again on page 6, Appellee refers to December 15, 2005, rather than 2004, as the date Appellant resumed his leave without pay status. This administrative law judge believes this reference to 2005 is a typographical mistake and that the correct year should be 2004, as is referenced in other places in Appellee's Motion.

the employee. In order to receive supplemental temporary total disability income from his paid leave, Appellant was required to complete and submit a Work Related Injury/Illness Leave Election Form. Appellant did so on May 17, 2004, and again on October 10, 2004 and December 14, 2004. In order to exercise his right to receive first preference for other positions that may become vacant, Appellant was required to submit to Human Resources (1) medical documentation that he is able to return to work and has restrictions preventing him from returning to his original position, (2) a completed First Preference Form, and (3) a completed OPM-4B form. Appellant did not do this. Regardless whether the release to return to work with restrictions was the October 31, 2004 Work Status Report or the March 13, 2006 medical statement or some other report or statement, at no time did Appellant complete and submit the First Preference Form or the OPM-4B form as required to exercise his right of first preference.² Absent his exercise of this right of first preference, Appellant, once released to return to work, could apply for any vacant position the same as any other employee.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled matter.
2. Any findings of fact that are properly conclusions of law are so incorporated herein as conclusions of law.

² Appellant knew or should have known of the requirements to exercise his right of first preference. He received such information at the time he was placed on leave without pay status, and acknowledged such receipt when he exercised his temporary total disability supplemental income election on May 17, 2004, October 6, 2004, and December 14, 2004.

3. 74 OS §840-2.21 and Merit Rule 530:10-15-49 provide that a permanent classified employee injured on the job and placed on leave without pay status is entitled to certain benefits, including first preference for any vacant position for which the employee is qualified that does not constitute a promotion, if the employee is unable to perform the duties of his/her original position.

4. 74 OS §840-2.21 and Merit Rule 530:10-15-49 provide that an employee is entitled to such benefits during the time he/she remains on leave without pay status for a continuous period not to exceed 12 months.

5. 74 OS §840-2.21 D. and Merit Rule 530:10-15-49 (j)(2) provide that if an employee does not return to the original position or an alternate position within one year after the start of leave without pay, the agency may terminate the employee.

6. DOC Policy OP-110345, Section IV. D. 2. provides that in order to exercise first preference rights, the employee must provide to Human Resources:

- a. medical documentation that the employee is able to return to work and has restrictions/limitations that prevent the employee from returning to the original position with or without reasonable accommodation; and
- b. a completed First Preference Form; and
- c. a completed OPM-4B form.

7. Appellant failed to exercise his rights to first preference in accordance with DOC Policy OP-110345, Section IV. D. 2.

8. Appellee, Department of Corrections, terminated Appellant's employment on June 16, 2006, more than one year after Appellant was on continuous leave without pay status, in accordance with 74 OS §840-2.21 D. and Merit Rule 530:10-15-49 (j)(2).

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Hearing Officer that Appellee's Motion to Dismiss is granted and the petition of Appellant is hereby **DENIED**.

DATED: this 28th day of November, 2006.



Annita M. Bridges, OBA # 1119
Administrative Law Judge
OKLAHOMA MERIT
PROTECTION COMMISSION
3545 N.W. 58th Street, Suite 360
Oklahoma City, Oklahoma 73112
(405) 525-9144