BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

RANDY W. WHAM, Appellant,	)	
v.	)	Case No. MPC 07-074
DEPARTMENT OF CORRECTIONS, Appellee.	)	

ISSUED
AUG - 3 2007
BY OK MERIT PROTECTION COMM.

FINAL ORDER

This matter comes on for hearing on July 25 & 26, 2007 before the duly appointed, undersigned Administrative Law Judge at the Jess Dunn Correctional Center in Taft, Oklahoma. The Appellant, Randy W. Wham, appears personally, pro se. The Appellee, Department of Corrections, appears by and through counsel, Michelle Minietta. Also present for Appellee was Table Representative, Warden Mike Mullin.

Appellant Randy Wham is a permanent, classified state employee appealing an adverse disciplinary action of suspension without pay for three (3) days. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the parties stipulated to the admission of Appellant's Exhibits No. 1, 3 through 8, and 10 through 22 and to Appellee's Exhibits No. 1 through 35. No other Exhibits were offered by either party. Accordingly, all exhibits presented and admitted are incorporated herein and made a part hereof. The record was closed on July 26, 2007.

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, Randy W. Wham, (hereinafter "Wham") is a classifed employee of the Appellee Department of Corrections (hereinafter "DOC"). Wham is a correctional officer with the rank of Sergeant, employed at the Eddie Warrior Correctional Center. The parties stipulated that the Merit Protection Commission (hereinafter "MPC") has

jurisdiction of this matter, that Wham is a permanent, classified employee of DOC, and that Wham was suspended without pay for three days in December, 2006. The parties also stipulated that Wham had worked only the day shift (8 am to 4pm) at the Eddie Warrior Correctional Center from 1996 until January, 2005 when he was assigned to the evening shift (4 pm to 12 midnight).

As a general rule, all correctional officers are assigned to shifts on a rotating basis every six (6) months according to a Master Roster. There are three shifts – day (8am to 4 pm), evening (4pm to 12 midnight) and night (12 midnight to 8 am). At each rotation, the employee can request an exception to his or her rotation based upon various special circumstances, including family needs, educational requirements or medical needs. The only evidence introduced to explain Wham's long-term assignment to the day shift was testimony regarding the implementation of a less structured "team concept" from 1996 to 1999. In late 1999, Wham was instructed to rotate to the other shifts and he filed a grievance. On April 14, 2000, Wham received a grievance decision which stated that "the facility not assign you to work the midnight shift as long as you suffer from your present heart condition, atrial fibrillation and are taking the medication Rythmol. And that the facility can assign you to work either the day or evening shift. Also, as your employer, the facility can request updates regarding your medical condition at shift rotation time". (Appellant's Exhibit #8, page 2). This 2000 grievance decision was not appealed by either Wham or DOC. Wham was permitted to continue to work the day shift from 2000 to 2005, apparently without providing further medical updates.

DOC attempted to rotate Wham to the evening shift in January, 2005. Wham challenged this rotation and filed a grievance in reliance of the 2000 decision. The 2005 grievance decision states that the 2000 decision does not prohibit the rotation to evening shift and the medical documentation provided by Wham does not contain information of physical or mental restrictions which would prohibit Wham from working the assigned evening shift. (Appellant's Exhibit # 3). The 2005 grievance decision was a final determination, not appealed by either Wham or DOC. Wham worked the evening shift as instructed.

In September, 2006, Wham was notified that he would be rotated to the night shift. He challenged this directive and filed a grievance again relying on the 2000

grievance decision. His grievance was investigated and a decision was issued on October 12, 2006 stating that Wham failed to cooperate and that his existing medical documentation indicated that the only restriction was that Wham consistently take his medications every eight hours and that the day shift "works best" for Wham, but it did not absolutely limit or prohibit his assignment to night shift. (Appellant's Exhibit # 4). It further stated that Wham's failure to have his physician complete the Request for Accommodation form hindered DOC's ability to further evaluate his impairment. The 2006 decision had the effect of overruling the 2000 decision and it was appealed by Wham to MPC. Although the 2006 decision slightly mischaracterized the 2000 decision, the Executive Director dismissed his appeal, finding that Wham's claims of discrimination failed because he had not proven that he had a physical disability that would prohibit him from working the night shift. (Appellee's Exhibit #34).

Following the October 12, 2006 grievance decision, on October 17, 2006, Wham was ordered in writing by Lt. Todd Brown, Chief of Security, to report to the night shift effective October 28, 2006[1] (Appellee's Exhibit #26). Wham challenged that order, refusing to work any shift except the day shift and demanding that his "accommodation" be honored. (Appellant's Exhibit #11). Wham was then again ordered in writing, this time by Warden Mike Mullin, to report to the night shift on October 28, 2006. (Appellee's Exhibit #27). Warden Mullin again noted his failure to provide additional medical documentation to substantiate Wham's claim that he could not work the night shift.

On November 16, 2006, DOC provided Wham with notice of the proposed disciplinary action (Appellee's Exhibit 31). This disciplinary action was based upon Wham's failure to report to work for the night shift as scheduled on October 28 and 29 and November 1, 2 and 3, 2006 despite being ordered on several occasions to do so and having failed to call in to report his absence as required by DOC policy. Wham was given an opportunity to respond and on November 25, 2006, he filed a written response to the proposed discipline (Appellee's Exhibit 32). In his response to the proposed discipline, Wham challenged that the directive to work the night shift was an illegal order which he

[1] The midnight shift is actually required to report for duty 15 minutes prior to shift, which would be 11:45 pm on October 27, 2006. For purposes of this decision, only the date of the full shift will be used.

had no obligation to comply with. He again relied upon the favorable 2000 grievance decision and his pending MPC appeal to the unfavorable 2006 grievance decision. He further claimed that the proposed disciplinary action was in retaliation to his filing grievances and/or Merit Protection appeals.

On December 6, 2006, DOC provided Wham with notice of discipline, imposing a three (3) day suspension without pay (Appellee's Exhibit 33). In the notice, DOC found that Wham's failure to report to duty for five (5) days were considered to be insubordination. The notice also contained a reference to a prior disciplinary action of a letter of reprimand.

The Testimony

The testimony of eight (8) witnesses was provided in support of DOC's disciplinary action.

Lt. Todd Brown, the Chief of Security at Eddie Warrior and a seventeen (17) year DOC employee, testified regarding the Master Rotation and the mandatory shift rotation for all correctional officers. He assumed the position in October, 2006 and as Chief of Security, he is third in command and supervises all correctional officers at the facility. He stated that exceptions to the rotation are never permanent and must be requested every rotation. Lt. Brown also stated that all Master Roster exceptions for medical reasons were forwarded to the Deputy Warden for determination, including Wham's request. He stated that Wham was assigned to the night shift for the rotation that began the end of September, but the assignment was delayed until the pending grievance was resolved. Once the decision was issued, he then ordered Wham to report to the night shift and Wham failed to do so for five nights and also failed to call in to report his absences. This failure to report to work or to call in on a timely basis resulted in a officer shortage for the shifts, which poses a significant risk to the safety of the other officers on duty and to the safety of the inmates, and also generally to the public at large. He testified that following the initial five day unauthorized absence that Wham reported and worked the night shift for the remainder of the six month rotation.

Sgt. Zandra Stanfill was the acting night shift supervisor on Oct. 28, 2008. She testified that she was responsible for the shift roster that night and that Wham was listed but failed to report for work and also failed to call in to report his absence.

Sgt. Denise Engram was the acting night shift supervisor on Oct. 29, 2008. She testified that Wham was listed on the shift roster for that night but failed to report for work and also failed to call in to report his absence.

Lt. Owen Van Orden, who was shift supervisor on the night shift beginning with the September rotation, testified that Wham called and advised him on September 28, 2006 that he would not be reporting to his shift due to the 2000 grievance decision. As a result, Wham's assignment was delayed for approximately one month. He stated that Wham was expected to report for night shift on October 28 and thereafter. He testified that he was on duty Nov. 1, 2 and 3, 2006 and that Wham did not report to work and did not call in. On cross examination, he admitted that there are some exceptions to the requirement that an employee call in each day of an illness, such as if there is a know duration, if there is a hospitalization or if the employee receives permission on the first day to be off for subsequent days. He stated that he was not aware of any of those circumstances being present with Wham.

Warden Emma Watts was Deputy Warden at Eddie Warrior for approximately 18 months until her promotion to warden of a different facility in June, 2007. She stated that she questioned why Wham was not rotating shifts and she reviewed his previously provided medical documents. She stated that she did not feel that the letters from Wham's physician adequately explained why he could not maintain his medication schedule while working shifts other than the day shift. She stated that she could not locate any documentation that Wham had requested or been granted a reasonable accommodation pursuant to the Americans with Disabilities Act (hereinafter "ADA"). She testified that, in her opinion, Wham had failed to provide adequate documentation regarding the need for limiting shift rotation and that his request for day shift was a personal preference rather than a medical necessity. She also testified that she treated another similar employee, Brent Webster, consistently and required him to begin rotating shifts.

Deputy Warden Mike Murray was the Chief of Security at Eddie Warrior from April 1999 to October, 2006, when he was promoted to Deputy Warden at Mabel Bassett. He testified that prior to 1999, under a different warden, a "team concept" was utilized at Eddie Warrior rather than the Master Roster rotation. This team concept allowed for a

more flexible work environment and was possibly the basis for Wham working only the day shift from 1996 to 2000. He stated that from 1999 to 2006, he always rotated Wham's shifts on the Master Roster, but that his assignments were always adjusted by either the deputy warden or the warden. He stated that he did not know the reasons for those decisions.

Peggy Carter, the Affirmative Action Officer for DOC for the last 14 years, testified that she made the decisions on the grievances filed by Wham in 2005 and 2006. She stated that decisions issued in the grievance process could be changed over time if agency policy significantly changed. She stated that there was no evidence of a request for a "reasonable accommodation" under the ADA until January, 2005 and there was no evidence that one was granted by DOC at any time. She stated that her decisions in 2005 and in 2006 were based upon the lack of medical documentation showing a medical necessity for Wham to work only the day shift. She said that she requested that Wham have his doctor complete the request form in order to supply the needed but missing information regarding actual medical limitations and restrictions rather than preferences of the patient. She admitted that the form she asked Wham to complete was not formally approved or part of DOC policy until December of 2006, but she stated that it was used routinely in the agency in order to gather the necessary information. This was also formally admitted by the Appellee, DOC.

Warden Mike Mullin testified that he is the warden at both Jess Dunn Correctional Center and at Eddie Warrior and has held that position since January, 2006. He testified that Wham was well known to him since he had been the subject of numerous grievances and complaints lodged by Wham since he arrived at Eddie Warrior. He testified that he reviewed the Master Roster for the September, 2006 rotation and there was nothing on file to prevent Wham from being rotated to the night shift. He stated that he delayed the rotation one month in order to complete the grievance process. He stated that both the MPC appeal and the federal EEOC charge claiming discrimination on this issue were both subsequently dismissed. (Appellee's Exhibits # 34 and 35). He testified that he felt that it was very important to consistently follow policy and treat all employees equally. He said that DOC policy, as amended in February 2004, requires that the essential job functions of a correctional officer include the ability to work all shifts

and all posts and that limitation on shifts or posts is not a reasonable accommodation. (Appellee's Exhibit # 10, page 12). He stated that in compliance with that policy, he ordered both Wham and Sgt. Webster to begin to rotate shifts. He stated that he was not aware of any permanent "accommodation" granted to either officer. Warden Mullin stated that he made the decision to discipline Wham for insubordination because he failed to carry out the lawful orders of his supervisor in refusing to report for duty for five days with no explanation or call in. (Appellee's Exhibit # 28). He stated that it was a lawful order because the grievance process had been concluded and found that he had failed to provide adequate medical documentation of a medical limitation prohibiting him from working the night shift. He stated that the five days that Wham failed to report for duty were unauthorized absences and as such, he was not paid for those five days. However, the unpaid leave was not discipline, and the subsequent suspension that was imposed was the only discipline for the insubordination. DOC policy specifically provides that disciplinary sanctions can be imposed in addition to not being paid for unauthorized absences. (Appellee's Exhibit # 28). He stated that he felt that three days suspension without pay was appropriate given Wham's prior discipline and the severity of the incident. He stated that Wham's failure to show up endangered his fellow employees and the public as well as the inmates at the facility. He testified that following the initial five day unauthorized absence, Wham did work the night shift. He stated that he was not aware of any problems related to Wham working the night shift and no incident reports were filed.

Wham offered the testimony of three witnesses. Ken Klingler, a 23 year DOC employee who is the Chief of Operational Services, stated that he is the person who issued the 2000 grievance decision involving Wham. He testified that he spoke with Wham's doctor at the time he made his decision. He stated that he absolutely did not consider that decision to be a grant of an accommodation under ADA and that he left it open for DOC to reconsider Wham's medical condition at a later time. He further testified that his decision could not have been made after 2004 because the change in DOC policy regarding the essential job functions for a correctional officer. He said his 2000 decision was made because rotation of shifts was not an essential function in 2000 and the 2004 policy amendment has the effect of amending his decision.

Warden Walter Dinwiddie testified that he was the warden at Eddie Warrior from 2003 to 2006. He stated that he requested that Wham provide additional medical documentation in 2005 and that, although he permitted him to work only the day shift, that he never granted a reasonable accommodation under the ADA.

Sgt. Jerry Brent Webster testified that he had been a DOC employee for 11 years. He stated that he was aware that Wham did not work the night shift because of his medical condition. He said that approximately 6 to 7 years ago, he was given the "flexibility" to avoid the night shift rotation due to his wife's medical condition. She has brittle diabetes, which causes her to have nocturnal episodes where she goes into diabetic shock. This condition has resulted in at least 10 trips to the hospital and at least 20 to 30 other severe incidents in the home at night. Webster stated that he had several small children and his wife's condition necessitates his exemption from working the night shift. He stated that from 1999 to 2002 he worked days only. From 2002 to 2006, he worked days and evenings and he was rotated to night shift in March of 2007. He expressed that he was very displeased with this rotation and that he was attempting to find an alternate DOC position which was not required to rotate, such as in maintenance. Webster stated that he had two meetings with Chief Brown and Deputy Warden Watts in March of 2007. He said the first meeting he was told to get the medical documentation and he could get his exemption from nights approved. He testified that at the second meeting, however, he was told that "they knew he was going to be a problem" and he should "get out of uniform". He interpreted that as a threat and stated that he still feels very threatened by Chief Brown. Webster has not filed any grievances or incident reports on either the shift rotation or the perceived threats.

Warden Watts was recalled to testify as a rebuttal witness, She stated that she attended both meetings with Webster and that he was never threatened but that he may feel that way because he is disgruntled at being forced to rotate shifts. She said that the comment regarding "getting out of uniform" was merely a suggestion since Webster had expressed an interest in moving to the maintenance division. She stated that the action taken to rotate Webster was done because it was fair and consistent and had nothing to do with his being listed as a witness in this hearing. She stated that she had received numerous complaints from other correctional officers about Webster and Wham not

rotating shifts and she felt like she had to address those concerns in order to treat all employees in a consistent manner. She again stated that the previous action of not rotating Wham was not related to ADA, but was probably an oversight as a result of the frequent turnover of wardens, deputy wardens and chiefs of security at the facility.

Wham was given several opportunities to provide his own testimony, which he declined.

ISSUES

1. Was the 3 day suspension without pay a proper disciplinary action?
2. Was there a reasonable accommodation granted to Wham and if so, was it properly rescinded?
3. Was discipline imposed twice for the same offense?

DISCUSSION

Issue 1. The evidence is uncontroverted that Wham was ordered to report to duty on the night shift effective October 28, 2006. The evidence is also uncontroverted that Wham failed to report for duty on October 28 and 29 and Nov. 1, 2, and 3, 2006 and that he failed to call in to report his absence as required by DOC policy. This followed Wham's grievance decision which found that there was insufficient medical documentation to limit his ability to work the night shift. Although Wham appealed that decision to MPC, and DOC had the discretion to postpone the night assignment, it cannot be said that DOC was precluded from proceeding with his assignment pending the appeal. Wham's position that this order to report to the night shift was not a "lawful" order fails because once the grievance decision was issued, DOC was within its rights to assign duty within the guidance of that decision. There has been no authority offered to support Wham's position that the 2000 grievance decision could never be modified or revisited by DOC, or that the 2000 decision overrode or overruled the later directive from Chief Brown and Warden Mullin. Clearly, DOC policy (OP-110345) was properly amended in 2004 and that amendment operated to prohibit the type of shift rotation

exception requested by Wham and provided by the 2000 grievance decision. The 2004 policy amendment was implemented throughout the entire agency and there is no evidence that the policy was adopted to retaliate against the Appellant. Since DOC had the authority to require Wham to report to duty on the night shift, the directives from Chief Brown and Warden Mullin were lawful orders, which Wham failed to obey. 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 based upon DOC's findings of insubordination. Given the seriousness of the incident and Wham's previous discipline in the form of a letter of reprimand, the discipline of three day suspension without pay imposed herein is appropriate and was consistent with its progressive disciplinary procedure. The undersigned cannot reasonably find that the discipline imposed was unjust given all of the circumstances. Therefore, DOC has proven, by a preponderance of the evidence, that the level of disciplinary action imposed was just.

Issue 2. Wham is seeking in this appeal to revisit the previous grievance decisions in 2005 and 2006. Wham did not appeal the grievance decision in 2005 which permitted DOC to assign Wham to the evening shift. As such, that decision will not be revisited in this hearing and stands as an appropriate decision. Wham did appeal the 2006 grievance decision, however MPC has determined that there was no discrimination and dismissed his appeal, noting the same concerns voiced by DOC that Wham failed to cooperate and refused to supply additional necessary medical documentation. Those decisions are not the subject of this hearing and will not be revisited here. However, the issue of whether a reasonable accommodation was granted to Wham and whether it was properly rescinded was determined to be an issue in this matter and the previous grievances are noted and considered for that purpose only. For the period from 1996 to 2000, there is no evidence that an accommodation was requested or given. The decision maker in the 2000 grievance testified that he never considered his decision as an ADA accommodation. The first mention of "reasonable accommodation" is in 2005 when Wham was requested to complete the request form. The evidence shows that, based upon the documentation provided by Wham in 2005, no accommodation was granted. Again

in 2006, the evidence shows that DOC requested additional medical documentation in order to determine if a reasonable accommodation was necessary. This was not provided and in fact, Wham refused to cooperate in obtaining the requested information. DOC reasonably questioned the information previously provided which seemed to only recommend working day shift but did not list any limitations on working other shifts. DOC also reasonably questioned why the medication schedule could not be adjusted to coincide with the shift start and stop times, which has never been adequately answered. In his written responses, Wham indicated that he did not want to have to change his waking and sleeping hours each time the shift rotated, however, this appears to be more for his convenience rather that a medical necessity, as long as his medications were taken every eight hours. As noted here and in other decisions, the medical evidence simply does not support Wham's claims. As a result, it appears from the preponderance of the evidence that no reasonable accommodation was granted to Wham.

Wham argues that DOC's admitted action in only assigning him to the day shift from 1996 to 2005 is evidence that he was granted a de facto accommodation. However, it is clear from the evidence that there were significant administration changes from 1996 to 2005, including changes in Directors, Wardens, Deputy Wardens and Chiefs of Security. There were changes in philosophy as well as policy in the agency. It appears that DOC may have been simply negligent in not addressing Wham's situation earlier, however, that does not operate as estoppel to bind the new warden from enforcing the policy on shift rotation in a fair and consistent manner. There is no evidence that DOC intended to grant a reasonable accommodation or that one was in fact granted to Wham.

Issue 3. Wham argues that DOC refusal to allow him to take paid leave for the five days that he failed to report for work constituted one disciplinary action and that the imposition of the three day suspension was an additional penalty for the same offense. He offered no evidence in support of this position. DOC policy clearly provides that employees will not be paid for unauthorized absences in addition to any disciplinary sanctions that may be imposed. The preponderance of the evidence indicates that DOC acted properly in refusing to allow Wham to take paid leave for the periods of unauthorized leave and also in imposing discipline for insubordination.

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 drunkeness, 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. DOC policy OP-110215 II. A. 2. states that any failure to carry out the lawful orders or directives of supervisors/managers will be considered insubordination.

6. Wham clearly violated DOC's policy when he failed to report to work as assigned on the night shift or to call in to report his absence for five days.

7. Appellee, DOC, has met its burden to prove, by a preponderance of the evidence that just cause exists to discipline Wham for insubordination.

8. Appellee, DOC, has met its burden to prove, by a preponderance of the evidence, that it followed the DOC Progressive Disciplinary Procedure.

9. Appellee, DOC, has met its burden to prove, by a preponderance of the evidence, that the discipline imposed was just under the circumstances considering the seriousness of the conduct as it relates to the employee's duties and responsibilities; the consistency of action taken with respect to similar conduct by other employees of the agency, the previous employment and disciplinary records of the employee and other mitigating circumstances.

10. There is insufficient evidence to support a finding that DOC has granted a "reasonable accommodation" to Wham in the form of working only the day shift.

Further, effective February 20, 2004, such a granting would be in violation of DOC policy OP-110345, paragraph G. of Section IV.

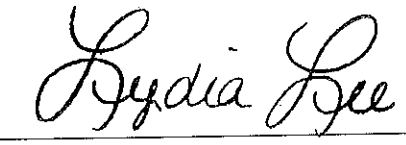
11. DOC policy OP-110215 II. B. states that employees must notify their supervisor when unable to report for duty as assigned. Failure to do so is considered an unauthorized absence. In addition to any disciplinary sanctions that may be incurred for unauthorized absences, employees will not be paid for such absence from work.

12. The discipline imposed in the form of a three day suspension without pay is proper in addition to charging unpaid leave for Wham's five day unauthorized absences.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition for appeal of Appellant Randy W. Wham, MPC 07-074 be **DENIED**.

This Order entered this 3 day of August, 2007.



Lydia Lee
Administrative Law Judge