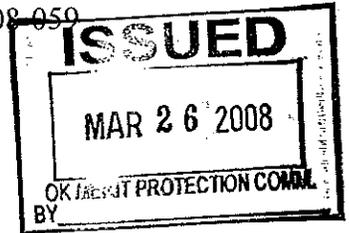


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

TERRY L. CODY,)
Appellant,)
)
v.)
)
DEPARTMENT OF CORRECTIONS,)
Appellee.)

Case No. MPC 08-059



FINAL ORDER

This matter comes on for hearing on March 10, 2008 before the undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Terry L. Cody, appears personally, pro se. The Appellee, Department of Corrections, appears by and through counsel, Michelle Minietta. Also present for Appellee was Table Representative, Warden Eric Franklin.

Appellant Terry L. Cody, was a permanent, classified employee of the Department of Corrections. He is appealing an adverse disciplinary action of discharge. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the parties offered Joint Exhibits 1 through 25 and they were admitted into the record. Appellee offered Appellee's Exhibits 27 and 28 with no objection and they were admitted. Accordingly, all exhibits presented and admitted are incorporated herein and made a part hereof.

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

The facts of this case are generally undisputed. Appellant, Terry L. Cody (hereinafter "Cody") was a classified employee of the Department of Corrections (hereinafter "DOC"). Cody was last employed with DOC as a Correctional Security Manager I at the Oklahoma State Reformatory. June 6, 2006, was Appellant Cody's last day physically on the job with DOC. As

a result of non-work related illnesses, he was unable to return to his duties. He was placed on various forms of leave until his leave was exhausted and then was permitted to use shared and donated leave and/or leave without pay until his termination in September, 2007. Cody never requested leave without pay, and never submitted the appropriate forms. However, DOC permitted him to have periods of leave without pay from October, 2006 to September, 2007.

On August 8, 2007, DOC notified Cody that he had exhausted all leave and that his leave without pay would end on August 17, 2007. He was required to return to work by August 20, 2007. (Exhibit 5). Cody did not return to work as directed and a pre-termination hearing was scheduled. (Exhibit 6). The hearing was re-scheduled at Cody's request. (Exhibits 7 and 20). On September 13, 2007, a pre-termination hearing was held. On September 27, 2007, DOC provided Cody with notice of his termination. It was concluded that Cody failed to appear for work as directed and that he was unable to perform the duties of his position. Cody's employment with DOC was terminated effective September 30, 2007. (Exhibit 8). The notice also contained a reference to one prior disciplinary action. Cody appealed and this proceeding was held.

The Testimony

DOC offerered the testimony of three (3) witnesses in support of its disciplinary action.

Christie Miller was the first witness. Miller is a Human resources Management Specialist at the Oklahoma State Reformatory. She testified that approximately 10 employees donated leave for Cody. DOC had posted the request on its website and on the bulletin board at the facility. She further testified that Cody's leave usage and time slip information was either mailed to Cody at the end of each month or given to his brother to deliver. (Mr. Cody's brother was also an employee at the facility.) She stated that she frequently discussed the leave and insurance issues with Cody, even going to his home on occasion. She testified that she sent the leave without pay forms to Cody, but he never returned them to her. She stated that she calculated Cody's use of leave on an intermittent basis in order to continue agency payment for Cody's insurance benefits and to minimize the offsets to his disability benefits. She stated that Cody appeared to understand this and this practice was to his benefit. In April or May, the use of leave was slightly increased (from 1 hour to 3 hours per month) in order to cover Cody's share of his life insurance premium.

Cynthia Grady is also a Human Resources Management Specialist, working in the central personnel unit for DOC. She is responsible for maintaining the time and leave records and management of the shared leave program. She testified that shared leave is to be used prospectively only after it is approved and donated. In Cody's case, it was incorrectly used retroactively in June, 2006 to avoid him having a short payroll period. She testified that often the agency attempts to help employees by allowing sporadic leave use, together with leave without pay, to extend an employee's accrued and donated leave over a longer period of time. She stated that this is always to the employee's benefit because it results in the agency continuing to pay the full amount of the employee benefit allowance and keep the health, dental and life insurance in force. She testified that Exhibits 27 and 28 accurately reflect Cody's use of leave for the period of June, 2006 through September, 2007.

Warden Eric Franklin, a 23 year DOC employee, testified that he had been the Warden at Oklahoma State Reformatory for the last two and one-half years. He stated that he is responsible for all operations at the Reformatory and it is his job to ensure that the facility meets its mission of protecting the employees, the public and the inmates. He stated that when he became the Warden he was aware that Cody had medical issues and was unable to work. Once Cody had been off work for a full year, Franklin testified that he determined that he could no longer hold Cody's position open. Franklin testified that the Reformatory is a medium security facility, and has approximately 1200 inmates, with 500 of those who should be classified as maximum security. He stated that he believed it was one of the most dangerous facilities. He stated that recruitment and retention is very difficult and that it was imperative that the Reformatory be fully staffed. As a result, he made a "very difficult" decision to terminate Cody. He said that it was not done in the nature of a true "disciplinary" action or as punishment, but he realized that there was no reasonable alternative. Cody indicated to him that no medical release would be forthcoming and he may not ever be in a position to return to work.

Franklin testified that the leave without pay was never formalized and was never approved as required by DOC policy, but it was done at Cody's oral request and the forms were overlooked due to the complicated situation regarding the sporadic leave usage. He said that the leave use was always to Cody's benefit. He testified that, as the appointing authority, he made the decision to terminate Cody when he was unable to return to his position after a year.

On cross-examination, Franklin admitted that there were no performance issues with Cody and that this was not a classic disciplinary action. He stated that Cody was often rude and belligerent to employees and he received many complaints about Cody's abusive telephone calls and tone of voice. He said that despite this, he did not want to penalize Cody and that the violations of policy helped Cody tremendously.

Cody offered no witnesses or testimony in support of his appeal.

ISSUES

1. Did Appellee DOC violate its policies and procedures in placing Appellant Cody on leave without pay?
2. If so, what is the consequence of those violations?
3. Was the Appellant's termination just and appropriate under the circumstances pursuant to the statutes, policies and procedures?

DISCUSSION

There is substantial evidence that the Appellee did not follow its policies regarding the use of leave and leave without pay. OP-110355, DOC's attendance and leave policy requires that leave without pay be requested and approved through the use of an OPM-14 form. (Exhibit 3). This was clearly not done. The weekly time reports were not routinely signed by the employee or the supervisor. Shared leave was allowed to be used retroactively.

DOC admits that it did not follow to the letter its written policies and procedures regarding the use of leave. It is clear, however, that this action was to the benefit of Cody. DOC "bent the rules" numerous times in an effort to accommodate Cody, using only a few hours of leave in some months in order to have DOC pay his insurance premiums. This alone resulted in thousands of dollars paid for Cody's benefits. DOC's actions also maximized Cody's monthly benefit payments through the state disability insurance program by reducing any offsets.

Cody offered no arguments or evidence as to any adverse effect that was caused by DOC's policy violations. There is no evidence that Cody was prejudiced or harmed in any way by DOC's policy violations. Furthermore, the policy that Cody complains that DOC has violated requires the employee to request leave without pay when they are to be absent and have

insufficient leave accrued. Cody was well aware of his leave situation and knew that he had insufficient leave accrued, but he made no attempt to follow the appropriate procedure. He is as culpable as DOC in these violations. Since both parties are at fault, the violations of the leave policy are considered to be harmless error and have no effect on the outcome of this appeal.

The last issue for determination is whether Cody's termination was just and appropriate under the circumstances. It is uncontroverted that Cody was unable to return to his employment with DOC. The evidence is also clear that Cody failed to request Leave Without Pay even though he was provided with the correct forms.

Cody offered no evidence in this case. He argued he should not be punished for his health conditions. He simply asks that he remain on the DOC payroll indefinitely.

. He fails to recognize that he must be able to perform the essential duties of his job in order to remain employed. Warden Franklin determined that the situation with Cody could not continue indefinitely. He further decided that his obligation to adequately staff the facility at the taxpayer's expense required him to take this disciplinary action. The undersigned has considered the facts and circumstances of this case and the testimony of the witnesses. Based upon the entire record, it is clear that DOC has met its burden of proof that the termination was just and appropriate. Given the nature of this case, there is no lesser discipline that is appropriate.

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. Title 74 O.S. §840-6.5 and 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. 74 O.S. §840-6.5 and Merit Rule 455:10-11-14 states that a permanent classified employee may be discharged for the reasons of 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. DOC Policy OP-110215 and OP-110355 further requires that employees must report for duty as directed, unless on approved leave or approved leave without pay, and lists the failure to do so as cause for disciplinary action.

6. The preponderance of the evidence shows that Cody's health condition resulted in his "inability to perform the duties of his position". The preponderance of the evidence also shows that Cody had exhausted all accrued leave and failed to request or receive leave without pay in a proper and appropriate manner.

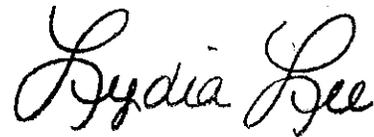
7. Appellee, DOC, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Cody as set forth in the Notice of Termination.

8. Appellee, DOC, has met its burden to prove, by a preponderance of the evidence, that the discipline of termination imposed was just under the totality of the circumstances.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Terry L. Cody, MPC 08-059 be DENIED.

This Order entered this 21st day of March, 2008.



Lydia Lee
Administrative Law Judge