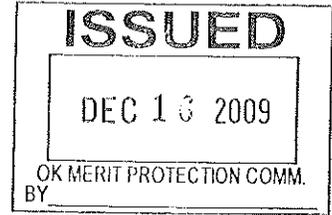


**OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA**

**GLEND A J. BROOKS,** )  
 )  
 **APPELLANT,** )  
 )  
 v. )  
 )  
 )  
 **OKLAHOMA DEPARTMENT OF** )  
 **CORRECTIONS,** )  
 )  
 **APPELLEE.** )

**MPC-09-189**



**FINAL ORDER**

**FINDINGS OF FACT**

**I. History of the Case**

Appellant was a permanent, classified employee appealing her termination by Department of Corrections (hereinafter "DOC" or "Appellee"). The Appellee discharged Appellant because as of February 12, 2009, the date of Appellant's pretermination hearing letter, Appellant had not reported for duty as a Correctional Officer IV since receiving an off-duty injury in March 20, 2007.

Prehearing on this matter was held July 24, 2009, at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. Appellant appeared *pro se*. Present for Appellee was Assistant General Counsel Michele Miniotta. Discovery was discussed, deadlines were established, and the hearing was scheduled for October 7, 2009.

Following the prehearing, Appellee filed numerous pleadings attempting to get Appellant to respond to Appellee's discovery request. Appellant partially responded to Appellee's discovery request on September 24, 2009.

Hearing on this matter was convened on October 7, 2009. Present at the hearing was Appellant and her newly retained attorney, Jeff Belote.<sup>1</sup> Present for Appellee was Ms. Miniotta, Licensed Legal Intern Larry Foster, and table representative Warden Emma Watts.

Whereupon the hearing began and sworn testimony of witnesses for Appellee and Appellant was presented. At the conclusion of the hearing, Appellee again objected that

<sup>1</sup> Mr. Belote was retained by Appellant less than three days before the hearing.

Appellant had not responded completely to discovery requests and that Appellant's responses regarding her physical limitations were vague and incomplete. Appellee also raised questions about a Workers Compensation Court order filed May 22, 2009, which found Appellant permanently partially disabled. The undersigned granted additional time to both parties to present evidence regarding Appellant's physical condition.

Hearing on the matter was reconvened on December 3, 2009, and Appellee again asserted that Appellant had not responded fully to Appellee's discovery request. The record was closed December 3, 2009.

## **II. The Hearing**

Appellant was a Correctional Officer IV working at the Jackie Brannan Correctional Center ("JBCC") in McAlester, Oklahoma in March, 2007. Appellant was also working part-time at the Cinema 69 Theater where she received an on-the-job injury.

After being injured while working at her second job, Appellant notified Appellee's Human Resource Manager ("HRM") Linda Jefferson of her injury and her resulting workers compensation claim. Appellant would thereafter periodically submit reports from her doctor regarding her medical condition.

After Appellant exhausted all of her annual leave, sick leave, donated leave and family medical leave, Appellant was placed on leave without pay status after submitting a report from her doctor stating that she had various physical restrictions. Appellant did not request to be placed on leave without pay status and Appellee did not grant Appellant's leave without pay status in writing.

Appellant remained on leave without pay status for over 12 months and during that time was informed she had the option to apply for other positions within the agency for which she was qualified. Appellant did not apply for any other positions.

On September 4, 2008, Appellant provided a patient status report from her doctor, Dr. John Munneke, discussing Appellant's medical condition and explaining the level of work which Appellant could perform. In that explanation, Dr. Munneke stated Appellant could return to "Light duty" status. Light duty was defined in the doctor's report as:

"Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly to move objects. Physical demand requirements are in excess of those for Sedentary work. Light work usually requires walking or standing to a significant degree. However, if the use of arm and/or leg control requires exertion of forces greater than that for Sedentary work and the worker sits most of the time, the job is rated for Light work."

Dr. Munneke's patient status report was the last document submitted by the Appellant prior to her discharge by Appellee.

HRM Jefferson testified that Correctional Officers must meet certain physical requirements in order to safely perform essential job functions. Those physical requirements are set forth in DOC policy OP-140116 and include heavy lifting (being able to lift 45 pounds or over) and heavy carrying (being able to carry 45 pounds or over). A Correctional Officer must also be able to pull hand over hand, reach above the shoulders, predominantly walk for eight or more hours, predominantly stand for eight or more hours, climb with the use of arms and legs, and repetitively bend, crawl, or kneel. According to her doctor's report, Appellant was unable to do those essential job functions.

In addition, the job description for the job family of Correctional Security Officer states that the officer must be willing and able to work any assigned shift or day of the week, and additional shifts as required. According to her doctor's report, Appellant was unable to do those duties as set forth in the job description.

HRM Jefferson also testified that in Dr. Munneke's September 4, 2008, patient status report, he projected Appellant's maximum medical improvement would be reached in three to four months. Based on that information, HRM Jefferson believed Appellant would reach maximum medical improvement by January, 2009.

Thereafter, Appellee received no new information from Appellant and no request for an extension of leave without pay. Appellee, on its own volition, extended the Appellant's leave without pay status but not to a specific date.

In February, 2009, Emma Watts, Warden at JBCC, decided to go forward with discharge based on Dr. Munneke's September 4, 2008, report that Appellant was unable to perform the job duties of a Correctional Officer due to medical restrictions.<sup>2</sup>

On February 12, 2009, Warden Watts sent a notice of pretermination hearing to Appellant by certified mail scheduling the hearing for March 12, 2009. The notice was sent to Appellant's last known address however Appellant failed to pick up the certified letter at the post office.<sup>3</sup>

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<sup>2</sup> It is undisputed that Appellant was a long time employee of Appellee whose job performance, prior to her injury, was never at issue.

<sup>3</sup> Appellant testified that after she learned she had been discharged, she went to the post office and they were able to find the notice of pretermination hearing.

On March 12, 2009, the pretermination hearing was held without Appellant and at the conclusion of the hearing, Warden Watts issued a notice of termination of employment effective March 13, 2009.

Three days after Appellant was discharged, Warden Watts received a copy of a letter dated February 23, 2009, which Dr. Munneke had sent to the workers compensation attorneys. Warden Watts testified she did receive and reviewed the letter however it did not change her perception that Appellant was unable to return to her duties as a Correctional Officer.<sup>4</sup>

### **III. The Parties Position**

Appellant argues that Appellee failed to follow OAC 530:10-15-47 from the time Appellant was placed on leave without pay status until the time of her discharge and Appellee should have accorded Appellant the right "to a position and level of original position unless waived by the Appellant".<sup>5</sup>

Appellant also maintains that her physical condition and ability to perform the duties of a Correctional Officer are not issues properly before this Court and even if they were properly before the Court, Dr. Munneke's February 23, 2009, letter which was given to Warden Watts released Appellant to return to work and perform the duties of a Correctional Officer.

Appellee's position is that neither Appellee nor Appellant followed DOC policy and OAC Rules and any error made by Appellee is harmless error.

The Appellee asserts it is harmless error that Appellant was not given written notice to return to work since Appellant was not able to perform the duties of a Correctional Officer and therefore would not have been able to return to work had notice been given.

Appellee also asserts the last document filed by Appellant prior to her discharge was filed in September, 2008, and that document did not release Appellant to return to duty. Regarding Dr. Munneke's February 23, 2009, letter, that letter stated Appellant no longer needed ongoing medical management; the letter did not negate or withdraw the restrictions place upon Appellant by Dr. Munneke in September, 2008.

Lastly, Appellee argues that Appellant's own statements made at the prehearing conference before the undersigned as well as a May 22, 2009, Workers Compensation Court

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<sup>4</sup> In Appellant's objection to Appellee's first motion for summary judgment, she attached a copy of a February 23, 2009, patient status report purportedly prepared by Dr. Munneke. This report was not attached to the February 23, 2009, letter provided to Warden Watts three days after Appellant's discharge. Admission of the report at this hearing was objected to by Appellee and that objection was sustained.

<sup>5</sup> Quoted from Appellant's response to Appellee's second motion for summary judgment. The actual language found in Rule 530:10-15-47 (b) allows the employee to return "to a position in the same job family and level as the original position."

order establishes that Appellant was, and is, unable to perform all the duties of a Correctional Officer.

#### IV. Analysis of the Court

Warden Watts has been warden at JBCC since July, 2007, and testified that during the two years Appellant was absent from work, Appellee did everything possible to help Appellant return to her previously held position. The evidence presented at this hearing supports that testimony.

Warden Watts testified Appellant was discharged based on language found in DOC policy OP-110355 "Procedures for Employee Attendance and Leave" and OAC 530:10-15-47:

DOC policy OP-110355 states in pertinent part:

"The facility/unit will terminate an employee who is absent from work after the employee has exhausted all sick and annual leave accumulations unless such absence is in accordance with rules concerning family and medical leave, military family leave, or pursuant to workers' compensation claim or the employee is granted leave without pay in accordance with Merit Rule 530:10-15-47 and these procedures. Any termination of a permanent classified employee is subject to the requirements of due process [Merit Rule 530:10-15-10(f)]."

OAC 530:10-15-47 **Leave of Absence without Pay** as cited in OP-110355 states in pertinent part:

**"(a) Conditions and provisions.** An Appointing Authority may approve a request for a permanent or probationary employee for leave without pay. The request shall be in writing and shall include the reasons for the leave and the estimated length of the leave requested by the employee. The approval of the leave shall also be in writing, and it shall specify the date the employee is to return to work. Leave without pay is subject to the following conditions:

(1) Leave without pay shall not be approved for more than 12 months. However, an employee on leave without pay may submit a written request for an extension before the end of the approved leave period. The Appointing Authority may grant extensions if the total length of the original leave without pay, plus any extensions does not exceed 2 years. Any extension granted shall be to a specific expiration date.

(5) The Appointing Authority may cancel leave without pay any time and require the employee to return to work before the specified date of return. The employee shall be notified of the reasons for cancellation by certified mail or personal service and given seven calendar days to return to work. Failure of a classified employee to return to work as directed shall be cause for disciplinary action.

(b) **Rights upon return from leave of absence without pay.** A properly executed leave of absence without pay shall accord the employee the right to be returned by the Appointing Authority to a position in the same job family and level as the original position in the same geographical area unless waived by the employee.”

There is no dispute that Appellee granted leave without pay even though Appellant did not request it, that Appellee did not grant leave without pay in writing, that Appellant failed to request additional leave without pay after the original 12 months had expired, that Appellee failed to set forth a specific expiration date when it granted an extension of leave without pay and, that Appellee did not give Appellant opportunity to return to her position prior to her discharge.

If the parties had followed DOC policy and the OAC, Appellant would have requested leave without pay status, Appellee would have granted leave without pay status in writing, Appellant would have requested an extension of leave without pay after 12 months, Appellee would have granted that request setting forth a specific expiration date, and Appellee would have "accorded the employee [Appellant] the right to be returned by the Appointing Authority to a position in the same job family and level as the original position and in the same geographical area unless waived by the employee [Appellant]”.

Errors were made by both parties. However, were those errors made by Appellee harmless as Appellee has argued? Although both parties failed to follow the provisions set forth in OAC 530:10-15-47, was Appellant harmed by that failure? It appears that although Appellant did not request leave without pay or, later, an extension of leave without pay, both were granted by Appellee to the benefit of Appellant.

The question then becomes was the failure of Appellee to give Appellant the opportunity to return to her position in February, 2009 prior to her discharge harmless error as asserted by Appellee? To find the answer the Court must consider the Appellant’s ability to return to work and perform the duties of a Correctional Officer.

Appellee has submitted a May 21, 2009, Workers Compensation Court order finding the Appellant permanently partially disabled. The Workers Compensation Court order states in part that in March, 2007 Appellant sustained personal injury to the left shoulder, neck, lumbar back, left hip, left leg, and left foot. The order states that as a result of the injury, Appellant sustained 18% permanent partial disability to the left shoulder, 10% permanent partial disability to the neck, 6% permanent partial disability to the lumbar back, and 20% permanent partial disability to the left leg.<sup>6</sup>

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<sup>6</sup> Although requested, Appellant did not provide this information to Appellee requiring Appellee to use an open records search to retrieve the information.

Also, Appellant, at the July 24, 2009, prehearing conference before the undersigned, stated she was unable to return to duty as a Correctional Officer without restrictions. Appellant said she was unable to crawl under bunks, unable to “run the stairs” and Appellant demonstrated that she could not lift her left arm above the shoulder.

Appellant is now reversing her position and claiming that she is able, and was able in February, 2009 to perform all the duties of a Correctional Officer IV. In support of this new position, Appellant points to Dr. Munneke’s February, 2009 letter and asserts that letter proves she was capable of returning to her position and performing Correctional Officer duties.

Although under no obligation to do so, Warden Watts considered Dr. Munneke February, 2009 letter three days after Appellant's discharge. Warden Watts testified that although she reviewed the letter, it did not change her perception that Appellant was unable to return to her duties as a Correctional Officer. The undersigned has reviewed Dr. Munneke’s February, 2009 letter and agrees with Warden Watts.

Lastly, although both parties were given additional time after the first day of hearing to present evidence as to Appellant’s physical condition, Appellant provided no additional evidence.

The undersigned finds that had Appellee required Appellant to return to work in February, 2009 the evidence presented establishes Appellant would not have been able to perform the duties of a Correctional Officer due to physical restrictions.

Both the Oklahoma Supreme Court and Oklahoma Court of Appeals have held that “neither the law nor equity will require the doing of a vain and useless act”. *See Dewey v. State ex. rel. Oklahoma Firefighters Pension & Retirement System, 2001 OK 40, 28 P.3d 539; Parker v. McCauley, 1964 OK 86, 393 P.2d 527 Fitts v. Standard Life & Accident Insurance Co. 1974 OK 60, 522 P.2d 1040; Apache Corp .v. State ex rel. Oklahoma Tax Commission, 2004 OK 48, 98P.3d 1061; and, Mullins v. Oklahoma Public Employees Retirement System, 2005 OK CIV APP 67, 122 P.3d 872.*<sup>7</sup>

It would have been a vain and useless act for Appellee to require Appellant to return to work when Appellant was unable to perform the duties of a Correctional Officer because of her physical condition and restrictions.

Therefore the undersigned finds that the failure of Appellee to give Appellant the opportunity to return to her position in February, 2009 prior to her discharge is harmless error.

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<sup>7</sup> While this principle is often applied in cases dealing with the interpretation of legislative language, case law supports its use for non legislative issues. *See Bankoff v. Board of Adjustment of Wagoner County, 1994 OK 58, 875 P.2d 1138; Apache Corp .v. State ex rel. Oklahoma Tax Commission, supra; Parker v. McCauley, supra; Fitts v. Standard Life & Accident Insurance Co. supra.*

## CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above entitled cause.
2. Any finding of fact which is properly a conclusion of law is incorporated herein as a conclusion of law.
3. DOC policy OP-110355, "Procedures for Employee Attendance and Leave" states in pertinent part:

"The facility/unit will terminate an employee who is absent from work after the employee has exhausted all sick and annual leave accumulations unless such absence is in accordance with rules concerning family and medical leave, military family leave, or pursuant to workers' compensation claim or the employee is granted leave without pay in accordance with Merit Rule 530:10-15-47 and these procedures. Any termination of a permanent classified employee is subject to the requirements of due process [Merit Rule 530:10-15-10(f)].

4. 530:10-15-47 **Leave of Absence without Pay** states in pertinent part:

**"(a) Conditions and provisions.** An Appointing Authority may approve a request for a permanent or probationary employee for leave without pay. The request shall be in writing and shall include the reasons for the leave and the estimated length of the leave requested by the employee. The approval of the leave shall also be in writing, and it shall specify the date the employee is to return to work. Leave without pay is subject to the following conditions:

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(5) The Appointing Authority may cancel leave without pay any time and require the employee to return to work before the specified date of return. The employee shall be notified of the reasons for cancellation by certified mail or personal service and given seven calendar days to return to work. Failure of a classified employee to return to work as directed shall be cause for disciplinary action.

**(b) Rights upon return from leave of absence without pay.** A properly executed leave of absence without pay shall accord the employee the right to be returned by the Appointing Authority to a position in the same job family and level as the original position in the same geographical area unless waived by the employee."

5. The job description for the job family of Correctional Security Officer states that the officer must be willing and able to work any assigned shift or day of the week, and additional shifts as required.

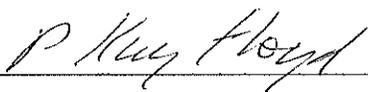
6. DOC policy OP-140116 states that Correctional Security Officers have additional medical requirements. The essential job functions for correctional security officers require certain physical requirements be met in order to safely perform essential job functions including heavy lifting (45 pounds or over), heavy carrying (45 pounds or over), pulling hand over hand and reaching above the shoulders, predominantly walking for eight or more hours, predominantly standing for eight or more hours, climbing with the use of arms and legs, and repetitively bending, crawling, or kneeling.

7. OAC 455:10-11-14, list the causes for discharge including misconduct, conduct unbecoming a public employee or any other just cause.

The Appellee has shown by a preponderance of the evidence that just cause existed for the discharge of the Appellant and that discharge was proper. Furthermore, it is a conclusion of the undersigned that the discharge of Appellant did not constitute an abuse of discretion by Appellee under the facts and circumstances of this case. It is further held that Appellee's failure to give Appellant the opportunity to return to her position in February, 2009 prior to her discharge is harmless error as asserted by Appellee.

### **ORDER**

Is therefore ORDER, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the appeal of the Appellant Glenda Brooks v. Oklahoma Department of Corrections, MPC 09-189 be Denied.

 12-14-09

P. Kay Floyd, OBA 10 300  
Administrative Law Judge  
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