

was unable to produce the separation agreement and the Motion to Dismiss was denied.

On December 15, 2010 Appellee filed its Second Motion to Dismiss incorporating the arguments and exhibits from the first Motion to Dismiss. In her Response Appellant states, "Appellant strongly denies signing a separation agreement". As neither party presented any affidavits in support of the representations made in their motions and responses, their contradictory representations could not be accepted as evidence upon which the undersigned administrative law judge could make any findings, therefore, the Motion to Dismiss was set for hearing.

Whereupon, the sworn testimony of witnesses for both Appellee and Appellant was presented, along with Exhibits, which were admitted and are incorporated herein and made a part hereof. Accordingly, after careful consideration of all evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The evidence is uncontroverted that in September and October, 2009 Appellee instituted a reduction-in-force (RIF) in which five agency positions were eliminated. Appellant's position, Public Utility Regulatory Analyst, was one of the five eliminated positions. The parties both agree that Appellant received a separation package totaling \$9,951.76, which included 18 months of health insurance premium, longevity payment, and accrued annual leave payment (less tax, for a net payment of \$6,223.61). Human Resources Director Christine Jolly testified that, in accordance with the agency's procedure, Appellant returned a signed Reduction-in-Force Separation Agreement and Full and Final Release of Claims prior to receipt of the separation package. (Appellee

Ex. 3) By e-mail on September 28, 2009, Appellant acknowledged to Ms. Jolly that she returned the signed agreement to Andrew Tevington. (Appellee Ex.10) Ms. Jolly testified that she asked Andrew Tevington about the agreement and he indicated that he had given it to Carolyn Schultz; she then obtained the agreement from Ms. Schultz. Ms. Jolly indicated that she had the signed agreement from Appellant in her office, but when her office was moved after the RIF, the agreement was misplaced. She has been unable to locate it.

Appellant testified that she did not recall signing the agreement; that she did not now know what she had referred to in the e-mail of September 28, 2009 that she signed and gave to Andrew Tevington; that she did not know she had a right to refuse separation benefits and exercise her right to sue; and that she is sure that if she had read the agreement indicating that she was waiving her rights against Appellee, she would not have signed the agreement.

This administrative law judge finds that a preponderance of the evidence indicates that Appellant did sign the Reduction-in-Force Separation Agreement and Full and Final Release of Claims releasing Appellee from all claims and causes of action which might arise under federal or state laws governing the employment relationship between Appellant and Appellee. Testimony from Christine Jolly that she saw, and once had in her possession, the signed agreement, Appellant's declaration in the September 28, 2009 e-mail (Appellee Ex. 10) that she signed and returned the agreement, and Appellant's acknowledged receipt of the RIF package, constitute evidence of the agreement between the parties. Consequently, this administrative law judge will apply the doctrine of equitable estoppel to enforce the terms of the agreement.

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.

3. 74 OS §840-2.27E **Separation Agreement – Forms** requires that any affected employee who receives severance benefits pursuant to the State Government Reduction-in-Force and Severance Benefits Act shall execute a separation agreement with the employing agency, on forms to be prescribed by the Administrator of the Office of Personnel Management.

4. The Reduction-in-Force Separation Agreement and Full and Final Release of Claims states that Appellant “freely and without coercion” agrees:

2. to the extent allowed by federal or state law, to release the State of Oklahoma and the Oklahoma Corporation Commission from all past and present claims, liabilities, demands, and causes of action known or unknown, fixed or contingent, equitable, legal or administrative, except unemployment insurance; and

3. to the extent allowed by federal or state law, to release the State of Oklahoma and the Oklahoma Corporation Commission from any claim or cause of action which might arise under federal or state laws governing the employment relationship, ...

4. that receipt of severance benefits is in exchange, to the extent allowed by federal or state law, for any rights I may have had to:

a) continued employment with any state agency, and

b) future employment with the Oklahoma Corporation Commission for a period of one (1) year from the date of this agreement. ...

5. that I may refuse to accept the severance benefits provided pursuant to this agreement and exercise my right to sue the above named agency; and

6. that I must repay any severance benefits I receive pursuant to this agreement in the event I file a claim or lawsuit in violation of this agreement;

5. Equitable estoppel is a legal principal that bars a party from adopting a position in court that contradicts his or her past statements or actions when that contradictory stance would be unfair to another party who relied on the original position. LegalDefinition.us (on-line legal dictionary).

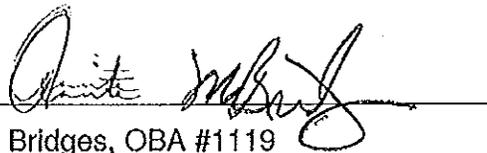
6. Merit Rule 455:10-3-13 provides that a petition for appeal may be dismissed if it is moot. Under the circumstances, the Appeal as filed by Appellant is moot and fails to state a cause of action that would allow it to proceed.

7. No judge or tribunal can create a right where none otherwise exists. *In Re Estate of Redwine*, 445 P.2d 275,278 (Okla. 1968). And no judge or tribunal has jurisdiction to render judgment where no cause of action exists. *In Re Estate of Redwine, supra* at 278.

ORDER

IT IS THEREFORE ORDERED, that the Appeal filed by Appellant Lillie Simon is hereby denied and the instant case is **DISMISSED** with prejudice in accordance with Merit Rule 455:10-3-13(a)(1). The hearing on the merits scheduled for March 30, 2011 is vacated.

DATED this 7th day of April, 2011, *nunc pro tunc* March 30, 2011.



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