

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

TERENCE BURNS, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 OFFICE OF JUVENILE AFFAIRS, )  
 )  
 Appellee. )

Case No. MPC 10-162



**FINAL ORDER**

This matter comes on for hearing on November 3, 2010 before the undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Terence Burns appears personally pro se. The Appellee, Office of Juvenile Affairs, appears by and through counsel, Wayne L. Johnson.

Appellant was a permanent, classified employee of OJA, 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, Joint Exhibits 1 through 27, the Appellee's Exhibits 1, 4, 5, 6, and 13 through 18, and Appellant's Exhibit 1 were admitted into the record. 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**

Appellant, Terence Burns (hereinafter "Burns"), was a permanent, classified employee of the Appellee, Office of Juvenile Affairs (hereinafter "OJA"). He appeals an adverse action of discharge from his position as a Youth Guidance Specialist II effective October 31, 2009.

Burns was previously disciplined with suspensions without pay in October, 2008, June, 2009 and July, 2009. He also received two written reprimands in November, 2008 and August, 2009 and received an Involuntary Demotion in July, 2009. (See Joint Exhibit 7). The last reprimand in August, 2009 resulted in the implementation of a Corrective Action Plan (CAP). This disciplinary action incorporates Burns failure to comply with the CAP.

On September 30, 2009, Burns received the Notice of Proposed Action – Discharge, indicating OJA’s intention to terminate him from his position. The stated causes for this proposed disciplinary action were “Violation of Time & Leave and Insubordination”. (Joint Exhibit 1). A pre-termination hearing was scheduled and was held on October 19, 2009. Evidence and testimony was provided to support the proposed discipline. On October 28, 2009, OJA gave Burns notice of the final disciplinary action, discharging him from his position effective October 31, 2009. (Joint Exhibit 2). Burns timely appealed the disciplinary action and this proceeding was held.

Burns has a lengthy history of prior discipline. (See pg 2 of Joint Exhibit 1). On August 6, 2009, Burns’ Supervisor, Gwen Perry, completed a Personnel Conference Report detailing Burns’ unapproved and unscheduled absences from work August 3-5, 2009 due to “plumbing problems”. (Joint Exhibit 12). This resulted in a Written Reprimand and the CAP issued on August 18, 2009. (Joint Exhibit 13). In July, 2009, Burns was involuntarily demoted from a Youth Guidance Specialist IV to a Youth Guidance Specialist II. This prior disciplinary action was primarily performance related as a result of Burns’ inability to meet the deadlines and keep up with the required paperwork. (Joint Exhibit 23-25). In addition, he was disciplined in June, 2009 for falsifying his time sheet; in November, 2008, for failing to provide proper notice of work hour changes and failing to comply with his CAP; in October, 2008 for conduct unbecoming a state employee and violating state law; in May, 2008 for failing to perform his duties; and in August, 2006 for unsatisfactory performance.

#### The Testimony

The testimony of six (6) witnesses was provided by OJA in support of the disciplinary action.

Gary Bolin is the Chief of Staff and handles personnel issues. Bolin testified that he issued the Notice of Proposed Action – Discharge and also issued the Notice of Final Action

letter. (Joint Exhibits 1 and 2). He stated that he made the final decision to terminate Burns after he considered all of the evidence, including Burns' history of prior discipline. He specifically stated that he considered Burns' response (Joint Exhibit 15) prior to making his decision even though the Final Notice letter states that Burns did not file a written response to the action.

Marc Norvell is a Supervisor at the OJA facility, Southwestern Oklahoma Juvenile Center (hereinafter "SWOJC") where Burns was employed. He provided testimony about the staff to juvenile ratio that the facility was mandated to maintain. He stated that during waking hours there was a 1/10 ratio and during sleeping hours there was a 1/12 ratio. He stated that an employee's unscheduled absence hampers the facility's ability to meet this mandate. When an employee has an unscheduled absence, the supervisor is forced to hold over employees from the previous shift or call in other employees to cover the shift. In some cases, the supervisor must fill in for the absent employee. In any event, unscheduled absences create a hardship for the agency and the other employees, and OJA policy is meant to discourage them. OJA requires employees to report any absences at least 2 hours prior to the shift, and different facilities may also have additional policies concerning the reporting, scheduling and use of leave. (Joint Exhibit 8).

Lavonda Kopp is a Human Resource Specialist at SWOJC. She testified that she reviewed Burns' disciplinary action and that it was consistent with OJA progressive discipline policy. (Joint Exhibit 3). She testified that Burns' history of prior disciplinary actions is quite extensive; however, they only used his history from October, 2008 to time of termination in taking this action. (Joint Exhibit 7). She reiterated that OJA requires employees to report any absences in advance and that different facilities also have additional policies concerning the reporting, scheduling and use of leave. (Joint Exhibit 8).

Gwen Perry is a Unit Coordinator (Youth Guidance Specialist IV) at SWOJC. She was Burns' former supervisor from August to September, 2009. She testified that the last day Burns worked was Sept. 3 or 5 of 2009. She testified that Burns had a very negative attitude as a result of his demotion in July, 2009. She testified that on August 5, 2009, she gave Burns a direct order to report for duty as scheduled, however, he left the facility and did not return for his shift. She testified that he told her to "do what you gotta do, cause I'm gonna do what I gotta do". This was related to a "plumbing problem" at his home. She stated that this was insubordination in her opinion. She relayed these events in the Personnel Conference Report which resulted in a

Written Reprimand and a CAP. (Joint Exhibits 12 & 13). Perry testified that Burns attitude only got worse and he continued to have unscheduled and unapproved absences. She stated that he failed to report for duty when he was specifically directed to be there and that he missed required staff meetings as well. She detailed the specific facts regarding these continued violations in Personnel Conference Reports (Appellee's Exhibit 4 & 13). Perry also stated that the documentation provided by Burns regarding the absences did not justify his unauthorized, extended absences from duty. (Joint Exhibits 16 & 20). Finally, Perry testified that on September 11, 2009, Burns called her to report a health issue and that he would not be in to work. On September 12, he called her and stated that he was "probably" going to request FMLA. She stated that Burns never returned to work. She denied that she was asked to send the FMLA forms.

Junior Johnson is the Institution Programs Coordinator at OJA. He testified that he supervised Burns at one time. He stated that Burns had a "lackadaisical" attitude. He was initially an average employee, but gradually became sub-standard. He stated that Burns PMP's reflected a "Does not meet standards" rating for several periods of time. (Joint Exhibits 9 & 10, Appellee's Exhibit 5).

Cynthia Hollier is the Human Resources Administrator in the state office for OJA. She testified that she conducted the pre-termination hearing. She stated that nothing unusual presented itself. She stated that Burns was allowed to present all of his evidence and that she recommended his termination. She testified that Burns absences on September 11-16 were not covered by FMLA because Burns did not obtain medical treatment until September 16. His unauthorized and unapproved absences violated the terms of his CAP.

Burns offered only his testimony in defense of this action. He testified that he believed his sick leave for dental surgeries had been approved, however, he admitted that the leave requests were never signed and the dentist statements were insufficient to cover extended absences. (Joint Exhibits 21 & 22). Burns stated that he did not agree with the previous disciplinary actions, but did not appeal the decisions. He admitted that he missed the staff meeting because he overslept after working the night shift the previous day. He also said he missed work on Sept. 3-5 because he had car trouble and had no money to get the car fixed. Burns stated that several of the days he missed because he had dental surgery and was still in pain the next day.

## ISSUES

1. Did the Appellee OJA have just cause to impose this discipline?
2. If so, was the discipline imposed (discharge) appropriate under the circumstances?

## DISCUSSION

Prior to his involuntary demotion, Burns was a supervisor and was well acquainted with the leave policy of OJA. He was on a CAP which specifically directed Burns to “have no further unapproved, unscheduled absences”, to “not demonstrate any willful disobedience” toward his supervisor, to not “fail to adhere to his work schedule”, and to have no “undocumented absences”. (See pg. 3 of Joint Exhibit 13). Although Burns had some documentation regarding the reasons for his absences, it is undisputed that the absences were not requested or approved in advance, nor were the proper procedures followed to obtain approval for the absences after they happened. It is also undisputed that Burns was told that his leave was not approved and that he should report as scheduled. During the course of the hearing, Burns’ defense to this action was that he had good cause to be absent from work. He argued that he believed that the absences would be approved after the fact if he provided proper documentation to support the reasons for the absences. This argument, however, completely ignores the terms of the CAP. Further, it must also be noted that the documentation to support the absences is not adequate. The documents have inconsistencies regarding dates, are not full receipts or statements and lack detail about the nature of the absences. After considering all of the evidence, OJA has met its burden to prove that just cause existed to discipline Burns.

There was substantial evidence that OJA correctly applied progressive discipline for an extended period of time. Burns knew that he was on the CAP and knew that his absences from work were very troublesome to his employer. Despite this, Burns was absent from work for three full days as a result of car trouble. Burns testimony supports that he made no effort to find another means of transportation or to find a ride to work. Burns was also admits that he missed a mandatory staff meeting because he overslept. It was particularly telling when Burns came to the facility to meet with an investigator about another matter, was told by his supervisor that he

must be there for his shift and Burns left the facility and returned home, telling his supervisor that he was going to do what he needed to do regarding a plumbing problem. Burns made a conscious decision to face possible disciplinary action by refusing to report to work. His acts of insubordination are evidence of Burns' lack of interest in improving his absenteeism.

At SWOJC, each shift must be covered by adequate personnel. Burns' actions show a lack of concern for the agency mission, for his supervisors and for his fellow employees. He was given ample opportunity to improve his attendance and leave usage, and made no attempt to do so. Burns is clearly resentful that he was demoted from his supervisory position and, unfortunately, this resentment seems to have impacted both his attitude and his performance. Because the previous disciplinary actions were not appealed, the facts and circumstances leading to those actions were not before this ALJ, although they seemed to still trouble Burns greatly. On several occasions, his supervisors encouraged him to utilize the Employees Assistance Program if he needed help. OJA clearly made substantial effort to address Burns' problems prior to taking the action to discharge him. As a result, OJA has met its burden to prove that the discipline imposed herein was appropriate given the circumstances.

#### CONCLUSIONS OF LAW

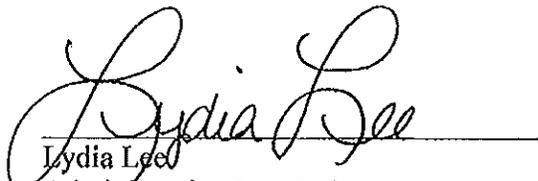
1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. Merit Rule 455:10-9-2 states that the Appellee 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 455:10-11-17 state that a permanent classified employee may be discharged for 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. OJA P-03-05-801, P-03-05-800 and P-03015-500 provide for discipline for violations of time and leave usage and for insubordination, as employee misconduct.
6. The preponderance of the evidence, including Burns' admissions, the exhibits and the testimony of witnesses support OJA's allegations that the misconduct occurred.
7. Appellee OJA has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Appellant Burns for misconduct, including time and leave violations and insubordination.
8. Pursuant to OAC 455:10-9-2(C), having found that just cause existed for the adverse action, the undersigned considered the seriousness of the conduct relating to the employee's duties and responsibilities, the previous employment and disciplinary records of the employee, and other mitigating circumstances, but those factors did not justify a reduction in the severity of the discipline imposed.
9. Appellee OJA 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 and other mitigating circumstances.
10. Appellee OJA properly applied progressive discipline. OJA attempted various means of discipline prior to this action, without significant improvement.

**ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Terence Burns, MPC 10-162 be DENIED.

This Order entered this 14th day of November, 2010.

  
Lydia Lee  
Administrative Law Judge