BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

SHAWNA NORTON, Appellant, v. **DEPARTMENT OF HUMAN SERVICES,** Appellee.	)))))))))	Case No. MPC 10-276 and 10-277

ISSUED
DEC 28 2010
OK MERIT PROTECTION COMM.
BY

FINAL ORDER

This matter comes on for hearing on December 13, 2010 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Shawna Norton, appears personally, pro se. The Appellee, Department of Human Services, appears by and through counsel, John Douglas. Also present for Appellee was Table Representative, Daron Everhart.

Appellant Shawna Norton was a permanent, classified state employee appealing an adverse disciplinary action of discharge/termination of employment (MPC-10-276) as well as filing an alleged violation appeal (MPC-10-277). The alleged violation relates to a disability discrimination claim alleging that the Appellee failed to address Appellant's request for reasonable accommodations. As stipulated by the parties, the denial of the accommodation occurred in August, 2009. It was also stipulated that the accommodation was eventually granted in October, 2009. The appeal was not filed until April 28, 2010, with Appellant alleging that the delay in granting the accommodation of allowing Appellant to drive her own high profile vehicle with lumbar support caused her disability to worsen. MPC staff conducted an investigation of the alleged violation and recommended dismissal as untimely filed. On May 17, 2010, the Appellee filed a Motion to Dismiss the alleged violation appeal or in the alternative, to consolidate the two appeals. The Appellee re-urged dismissal on June 2, 2010. The cases were consolidated on June 16, 2010. In September, 2010, the cases were reassigned to the undersigned

Administrative Law Judge. On December 9, 2010, the Appellee filed another Motion to Dismiss stressing the untimeliness of the alleged violation appeal.

The hearing was conducted on December 13, 2010. The Motion to Dismiss was the first matter taken up. The Appellant did not dispute the Motion and the alleged violation appeal was dismissed because it was not filed within twenty days and such filing period is jurisdictional. Thereafter, the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the parties stipulated to the admission of Appellee's Exhibits # 1, 2, 5, 6, and 8 through 13. 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 Shawna Norton (hereinafter "Norton") was a classified employee of the Appellee Department of Human Services (hereinafter "DHS"). Norton was an IS Planning Specialist II for the Data Services Division. The parties stipulated that the Merit Protection Commission (hereinafter "MPC") has jurisdiction of this matter, that Norton was a permanent, classified employee of DHS and to the application of Merit and DHS rules.

On December 24, 2009, DHS issued a "Fourteen-Day Notice" to Norton advising her that she had exhausted all accrued leave and exhausted her FMLA leave balance. The Notice also advised her that her leave without pay was being disapproved. (Exhibit #11). Norton was directed to report for duty within 14 days, to resign or to face discharge proceedings. On January 7, 2010, DHS issued a "Fourteen-Day Notice Addendum" granting Norton an additional 45 days to address any unresolved workers compensation claims or ADA accommodation requests. (Exhibit #10). On February 24, 2010, Norton sent an e-mail to her co-workers and peers titled "Gone for Good", advising them that she was not able to ever return to work. (Exhibit #12, page 26). On February 25, 2010,

Norton provided DHS with a medical statement from her healthcare provider stating that Norton was "not able to work, considered permanently totally disabled". (Exhibit #12, page 27).

On March 10, 2010 and amended on March 17, 2010, DHS provided Norton with Notice of Proposed Discipline, proposing to discharge her from her position. (Exhibit #8). The sole ground for the discharge was Norton's inability to perform the essential functions of her position, with or without accommodations. The Notice included copies of the DHS policies, as well as copies of the supporting documentation (Exhibit #12). DHS certified that there were no prior disciplinary actions. (Exhibit #9).

A pre-termination hearing was scheduled and held on March 26, 2010. The hearing was continued to April 6, 2010 by agreement for the submission of briefs on the application of 85 O.S. §5 and 74 O.S. §840-2.21. (Exhibits #5 and #6). The hearing was conducted by a hearing officer who concluded that the statutory provisions apply only to employees who are temporarily, not permanently, disabled. The hearing officer found that DHS had presented sufficient evidence that Norton is unable to perform the duties of her position as a result of her permanent total disability and this warrants the proposed discharge. (Exhibit #2).

On April 15, 2010, DHS provided Norton with Notice of Final Formal Discipline, discharging her from her position as a IS Planning Specialist II effective at 5:00 pm on April 15, 2010. (Exhibit #1). Norton appealed this action and the hearing proceeded. No evidence was presented as to the exact nature of the disability nor was any evidence presented as to whether the injury/disability was job related.

The Testimony

The testimony of two (2) witnesses, including the Appellant, was provided.

Daron Everhart testified on behalf of DHS. He is the HR Director for the Data Services Division and is responsible to fulfill the disciplinary policies of DHS. Everhart provided testimony regarding Exhibits 1, 2, and 8 through 12. He testified that the sole reason for the discharge was that Norton is permanently, totally disabled and is unable to perform her job. He stated that, at no time in the proceeding, did Norton dispute this determination, nor did she offer any medical evidence indicating that she may be able to

return to her position in the future. He stated that all of the information clearly showed that she was permanently disabled and would never be able to work again. He also testified that Norton refused to resign, forcing them to take this action to discharge her.

Norton testified on her own behalf. She stated that she had two pending, unresolved workers compensation claims. She admitted that she never received temporary total disability benefits from workers compensation on those claims. Norton testified that she is working with a new doctor and has had some improvement. She stated that she had three denials of Social Security disability. She admitted that, at the time of her discharge, she was not on approved leave or leave without pay for temporary total disability. Norton admits that she was unable to perform her duties at the time of her discharge and that she remains totally disabled at this time. She is seeking to be reinstated to her position, and placed on leave without pay for one year to see if she is able to return at that time. This request is based upon her "belief" that she can recover enough to return to work. Norton, however, could not provide any doctor's statements or other evidence to support this "belief".

ISSUES

1. Did DHS have just cause to impose discipline against the Appellant?
2. If so, was the action taken by DHS in terminating her employment appropriate under the circumstances?

DISCUSSION

There was substantial evidence presented by DHS to support the fact that Norton is permanently and totally disabled and cannot perform the essential functions of her position, with or without accommodations. It is unfortunate that this situation has occurred due to no fault of Norton, however, there is no statutory or regulatory authority to mandate an agency to hold a position open based upon **unsupported** hope that the permanent disability might improve. It was Norton's own health care provider that labeled her medical condition as permanent and total disability. Norton herself

acknowledged that she was told she could never return to work in her "Gone for Good" e-mail.

The undersigned has considered the facts and circumstances of this case and the testimony of the witnesses. Based upon the entire record, DHS has met its burden of proof that just cause existed to impose discipline as set forth in the Notice of Final Discipline. Given the nature of this action and the uncontested medical condition of the Appellant, the undersigned cannot reasonably find that the discipline imposed was unjust given the totality of the circumstances. Therefore, DHS has proven, by a preponderance of the evidence, that there was just cause to impose discipline and that the level of discipline imposed was 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. Merit Rule 455:10-3-1.1 provides that filing time is jurisdictional and that an alleged violation appeal shall be filed within 20 calendar days after the alleged violation occurs. It further provides that the Executive Director may extend this time limit if the appellant demonstrates that he or she filed within 20 calendar days after becoming aware of, or with due diligence, should have become aware of the alleged violation, or for other good cause shown. The alleged violation appeal in MPC 10-277 was not filed within the requisite time period nor did the Appellant request an extension or demonstrate good cause to support such a request.

4. Merit Rule 455:10-9-2 states that the Appellee DHS 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.

5. Merit Rule 455:10-11-17 states that a permanent classified employee may be discharged for any of the reasons set forth in 455:10-11-14, which includes inability to perform the duties of the position in which employed or any other just cause.

6. DHS policy DHS: 2-1-7(i) (3) state the causes for disciplinary actions, to include Medical Limitations, or the inability to perform the essential functions of the position, with or without reasonable accommodation, due to medical limitations.

7. 85 O.S. §5, which prohibits the discharge any employee during a period of temporary total disability solely on the basis of absence from work, is inapplicable because Appellant is permanently, not temporarily, totally disabled.

8. Appellee, DHS, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Norton for her inability to perform the essential duties of her position.

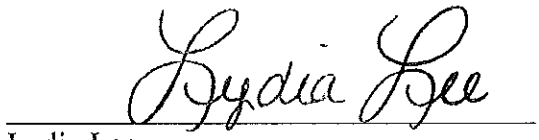
9. Appellee, DHS, has met its burden to prove, by a preponderance of the evidence, that because of the relevant circumstances of this case, discharge or termination is an appropriate and just level of discipline.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the alleged violation appeal of Appellant Shawna Norton, MPC 10-277 be DISMISSED as untimely filed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition for appeal of Appellant Shawna Norton, MPC 10-276 be DENIED in accordance with this Order.

This Order entered this 27th day of December, 2010.



Lydia Lee
Administrative Law Judge