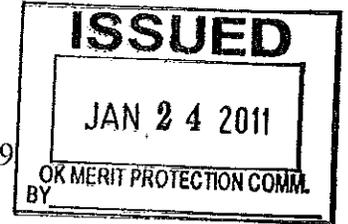


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

JESSE G. JIMENEZ,)
Appellant,)
)
v.)
)
DEPARTMENT OF CORRECTIONS,)
Appellee.)
)

Case No. MPC 11-009



FINAL ORDER

This matter comes on for hearing on January 7, 2011 before the undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Jesse G. Jimenez, 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 Jesse G. Jimenez 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 as Joint Exhibits the Appellee's Exhibits 1 through 12 and the Appellant's Exhibits 1, 4 and 8 and they were admitted into the record. Appellant offered Appellant's Exhibits 3, 5, 6 and 7 with no objection and they were admitted. Appellant offered Appellant's Exhibit 2 and it was admitted over the objection of the Appellee. 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 not in dispute. Appellant, Jesse G. Jimenez (hereinafter "Jimenez") was a classified employee of the Department of Corrections (hereinafter "DOC"). Jimenez was last employed with DOC as a Correctional Security Manager I at the

Lexington Assessment and Reception Center (hereinafter "LARC"). Jimenez suffered a work-related injury on September 8, 2009. In accordance with DOC policy, he was placed on light duty for 60 days. On December 8, 2009, he was placed on leave without pay. After one year on leave without pay, Jimenez was unable to return to work and to his duties. Thereafter, on March 25, 2010, DOC issued a Notice of Pre-termination. This notice was rescinded on April 21, 2010, to await Jimenez's medical evaluation and to resolve outstanding payroll errors. Jimenez was still unable to return to his job and on May 25, 2010, DOC once again issued a Notice of Pre-termination. A pre-termination hearing was scheduled and held on June 8, 2010. On June 18, 2010, DOC provided Jimenez with notice of his termination. It was concluded that Jimenez was unable to return to work after having been on worker's compensation leave without pay for one year. Jimenez's employment with DOC was terminated effective June 25, 2010. The notices provided that there were no prior disciplinary actions. (See Joint/Appellee's Exhibit 12). Jimenez appealed and this proceeding was held.

The Testimony

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

Patti Ormerod was the first witness. Ormerod is the Human Resources and Benefits Manager for DOC. She was not employed at DOC at the time of the termination. She testified that she had reviewed Jimenez's file and concluded that the termination was proper. She provided testimony on DOC policy OP-110345 IV. F. regarding a limit of 60 days for light duty (Joint/Appellee's Exhibit 3, pg. 13) and DOC policy OP-110345 II. B. 3. regarding the one year limit for workers compensation leave (Joint/Appellee's Exhibit 3, pg. 7). She testified that the only exception on these limits were for situations where the employee had a definite time table to be able to return to work. She stated that there were no exceptions for open-ended situations like Jimenez. Ormerod testified that the most recent medical information still contains restrictions for light duty, indicating that Jimenez is still not able to return to his duties. Ormerod provided testimony on the job descriptors for upper level correctional positions and that Jimenez could not perform the essential functions of that position with his current restrictions. (Joint/Appellee's Exhibit 10).

Reta Cottrell is the Personnel Officer at LARC. She testified that Jimenez injured his back and leg during training in 2008. She stated that he was placed on light duty for the

maximum period of time and then was placed on leave without pay. DOC permitted Jimenez to supplement his TTD workers compensation benefits to enable him to receive 100% of his salary. She stated that after Jimenez had been doing this for 12 months, the responsibility for submitting his time sheets was returned to LARC from the state office. At that time, there were inadvertent payroll errors, allowing him to use donated leave that he was not eligible for, which caused Jimenez to be in an overpaid status. According to Cottrell, Jimenez's termination was delayed until the payroll errors could be addressed. On cross examination, Cottrell stated that employee Terry Newkirk, Craig George and Lori Duhon were all on leave without pay for longer than one year. (Appellant's Exhibits 5, 6, and 7). She then clarified that these persons were all employed under the previous warden and the circumstances were not the same as Jimenez. She stated that the warden has more discretion for non-workers compensation leave.

Warden Eric Franklin is a 26 year DOC employee. He testified that he had been Warden at a number of DOC facilities over the last 11 years, including his present position as Warden at LARC for the last two years. He stated that he is responsible for all operations at LARC 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 in December, 2008, Jimenez was already on leave without pay. Franklin testified about the duties of a Lieutenant (Lt.), which was Jimenez's rank. He said that the Lt. manages the shift and reports all business to the Captain. He said that there were only 8 Lts. at LARC and at least 1-2 must be on duty for every shift, 24 hours a day, 7 days a week. He testified that this was a critical position that he could not afford to have unfilled. Franklin testified that he remembered talking with Jimenez around March, 2010 about his prognosis and ability to return to work. He denied having any agreement with Jimenez to keep his job open, but stated that he told him if he could obtain a full release, he could come back. He said that the termination was delayed because one of the doctor's statements said he may be able to return on April 20, 2010, but Jimenez could still not return after that date. Franklin denied making any promises to Jimenez, and also denied that he terminated him because he was directed to do so as a result of the payroll error. Franklin stated that the main reason that he terminated him was Jimenez's inability to provide a date that he would be able to return. He stated that he could not leave it open-ended. On cross examination, Franklin stated that the facility was staffed at approximately 68%, that he did not make this decision to terminate Jimenez out of retaliation or duress and that he needed to replace Jimenez

to maintain the safety of the facility. He testified that, as the appointing authority, he made the decision to terminate Jimenez because he was unable to return to his position after a year.

Appellant Jesse Jimenez testified on his own behalf. He stated that he had worked for DOC for 11 years and had worked his way up from an entry level to the rank of Lt. He said that he believed he had been a good employee and had always given 100%. He obtained CLEET certification, volunteered to conduct training, and always helped out. Jimenez was bi-lingual and used that as an asset for the Department. He believes this should have been taken into consideration when making the decision to terminate him or keep him on leave without pay. He doesn't think the agency worked with him. Jimenez testified that he thought he had an agreement with the Warden to continue on leave without pay status, but thinks that he was terminated because the payroll error caused problems for the agency. He points to the e-mails contained as Appellant's Exhibit 8 to support this assertion. Jimenez expressed his frustration that he had no fault in this injury and no control over the treatment or the postponement of the surgery. These factors delayed his release and his ability to return to his job. Jimenez indicated that he wants to return to his job once he receives a full release and is just asking for a second chance.

ISSUES

1. Did DOC have just cause to undertake this disciplinary action?
2. If so, was the Appellant's termination just and appropriate under the circumstances pursuant to the statutes, policies and procedures?

DISCUSSION

It is an exceedingly difficult decision to terminate a valued employee under these circumstances. By all accounts, Jimenez did a good job and there was no prior disciplinary history. Unfortunately and through no fault of his own, he was injured and has not been able to return to work. This fact was undisputed. As DOC pointed out, at the time of the hearing, Jimenez still had not been able to obtain a full release to return to his duties. This is now over six months since his termination date and over 2 years and 4 months since his injury. This

action is not done in the nature of a true “disciplinary” action or as punishment, but only because, in the Warden’s opinion, there was no reasonable alternative. All of the medical evidence supports that this opinion. (Joint/Appellee’s Exhibits 5, 6, 7, 8 and 9). There is simply insufficient evidence that the payroll error had any part in the decision to terminate Jimenez.

The policies and statutes provide that an injured employee may be placed on leave without pay for one year. All of the rights and benefits do not exceed one year. Jimenez actually was on such leave for more than one year, with DOC waiting to see if he could possibly return within a reasonable amount of time. The Merit Rules also provide that leave without pay cannot exceed 2 years. This maximum would have been met in December, 2010. Therefore, granting Appellant’s appeal would result in a violation of this 2 year maximum at this point in time. The evidence supports that action of DOC was in accordance with the statutes and Merit Rules.

The other issue for determination is whether Jimenez’s termination was just and appropriate under the circumstances. It is uncontroverted that Jimenez was unable to return to his employment with DOC and was unable to perform the essential duties of his job. Warden Franklin determined that the situation with Jimenez 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. It should be noted that if Jimenez is able to obtain a full release, he has reinstatement rights until June 25, 2011. That may afford him the second chance that he is requesting.

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

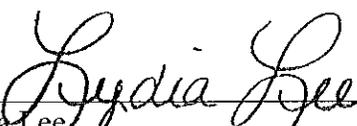
1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.

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 inability to perform the duties of the position in which employed.
5. Merit Rule 530:10-15-49 provides that an employee may be terminated if they do not return to work within 1 year after the start of leave without pay.
6. Merit Rule 530:10-15-47 (a) (1) provides that leave without pay cannot exceed 2 years total.
7. The preponderance of the evidence shows that Jimenez's injury and medical condition resulted in his "inability to perform the duties of his position". The preponderance of the evidence also shows that Jimenez had been on leave without pay for over 1 year, and was unable to return to his position at that time. Furthermore, the preponderance of the evidence also shows that Jimenez is still unable, as of the date of the hearing, to return to his position and perform the essential duties of the job, such date being more than 2 years following Jimenez being placed on leave without pay.
8. Appellee, DOC, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Jimenez as set forth in the Notice of Termination.
9. 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 Jesse G. Jimenez, MPC 11-009 be DENIED.

This Order entered this 17th day of January, 2010.


Lydia Lee
Administrative Law Judge