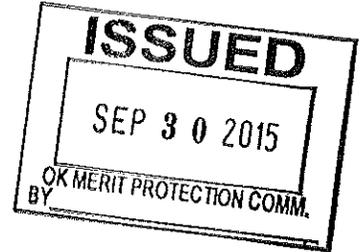


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

ELLEN KING,)	
)	
APPELLANT,)	
)	
V.)	MPC-14-203
)	
OKLAHOMA TOURISM & RECREATION DEPARTMENT,)	
)	
APPELLEE.)	



FINAL ORDER

This matter came on for hearing before R. Scott Thompson, Administrative Law Judge, on September 21, 2015, at the Oklahoma Merit Protection Commission's office in Oklahoma City, Oklahoma. Appellant Ellen King ("Appellant") appeared in person and through her counsel, Kevin Donelson. Appellee Oklahoma Tourism and Recreation Department ("OTRD"), appeared through its counsel, Brett Thomas, and through party-representative/General Counsel, Claudia Conner.

Appellant was a permanent, classified employee of OTRD, appealing from an adverse disciplinary action of discharge. The undersigned heard the sworn testimony of OTRD's two witnesses, viewed the exhibits admitted into evidence, and heard argument from counsel. The undersigned admitted into evidence Joint Exhibits 1, 24 and 30 and Appellee's Exhibits 1-3. After OTRD rested, counsel for Appellant made a demurrer to the evidence. Counsel for both parties, as well as Ms. Conner, were permitted to speak to whether the undersigned should direct a

verdict in favor of the Appellant because OTRD failed to meet its burden in its case-in-chief. The demurrer was sustained and the undersigned rendered a decision for the Appellant subject to the issuance of this Order.

Upon consideration of OTRD's case-in-chief, the undersigned Administrative Law Judge issues the following findings of fact and conclusions of law pursuant to 74 O.S. § 840-6.7(B).

FINDINGS OF FACT

The evidence presented in OTRD's case-in-chief established that Appellant began taking protected FMLA leave on December 1, 2013. Appellant provided a note to OTRD indicating she needed to be absent from work until March 3, 2014. That leave was approved. (Joint Ex. 30)

Appellant did not return to work on March 3, 2014. A Notice of Pretermination Hearing was issued on March 11, 2013 ("March Notice"). (Aplee. Ex. 3) A pretermination hearing was held and the hearing officer issued a report stating that Appellant was on protected FMLA leave until March 20, 2014, and therefore could not be terminated for not returning to work on March 3, 2014. (Joint Ex. 24). She also noted that while that date had now come and gone, leaving Appellant on leave without pay status, OTRD must provide Appellant seven (7) calendar days to return to work per 530:10-15-47(a)(5).

OTRD issued a decision on April 13, 2014. (Aplee. Ex. 2). The decision stated Appellant was not being terminated and directed her to return to work on

April 23, 2014. The letter further stated her failure to comply would result in the initiation of a new pretermination action.

Appellant did not return to work on April 23, 2014. On June 9, 2014, OTRD issued a Final Decision terminating Appellant. (Aplee. Ex. 1) The decision states a notice of pretermination was sent on May 14, 2014 (“May Notice”). It further states a hearing was held on May 21, 2014, at which neither Appellant nor a representative was present.¹

Appellee put on two witnesses and then rested its case. The first witness, former Director of Tourism, Deby Snodgrass, went through the March Notice, the decision rendered in April and the decision rendered in June. (Aplee Exs. 1-3) When the court raised the issue of the apparent lack of the May Notice in the exhibits, counsel for OTDR acknowledged that no copy of the May Notice would be introduced into evidence in the case because no copy could be found. Ms. Snodgrass had no recollection regarding the issuance of the May Notice. When the court asked whether there would be any evidence that Appellant was provided the May notice, counsel for OTRD asserted the agency’s HR Director would address that issue.

OTRD’s next and final witness was the HR Director, Denice Edwards. Ms. Edwards testified the March pretermination notice would no longer have been effective since a pretermination hearing had been held and a decision rendered.

¹ This Final Decision was not issued within ten (10) working days of the May 21, 2014, pretermination hearing as required by OAC 455:10-11-17(c).

Instead, she stated a new pretermination notice would have needed to be issued. However, she did not testify the May Notice had been provided to Appellant. Instead, she merely testified it would be agency policy to have done so. In other words, the agency's policy is to comply with the law, but in this specific case, she has no personal knowledge that it did.

OTRD rested its case after this witness, at which time counsel for the Appellant demurred to the evidence. It is clear that OTRD submitted no evidence into the record, either by document or through testimony, to establish Appellant had been provided a pretermination notice prior to the hearing that resulted in her termination, which neither she nor her representative attended.

CONCLUSIONS OF LAW

1. Any finding of fact that is properly a conclusion of law is hereby incorporated as a conclusion of law.
2. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause.
3. The burden of proof in this matter was on OTRD to show by a preponderance of the evidence that just cause existed for the adverse action and the discipline imposed was just. 74 O.S. § 840-6.5(C); OAC 455:10-9-2.
4. A permanent classified employee may only be terminated after a pretermination hearing. OAC 455:10-11-17(b).
5. Before a pretermination hearing may be held, "[n]otice of the pretermination hearing shall be provided to the employee by personal service or

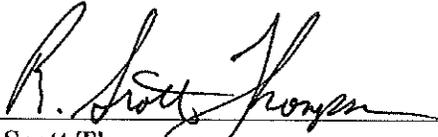
certified or registered mail at least seven calendar days before the scheduled pretermination hearing.” OAC 455:10-11-17(b)(2)

6. OTRD has failed to meet its burden of proof that just cause existed for the adverse action or that the decision to terminate Appellant was just because OTRD failed to demonstrate that Appellant was provided the legally required notice of the pretermination hearing that was held without her or her representative present.

7. In accordance with OAC 455:10-9-2(f)(1)(B), upon a finding that just cause did not exist for the adverse action, a presiding official may order the reinstatement of the employee, with or without back pay and other benefits. A presiding official may also order that documentation of the adverse action be expunged from any and all of the employee’s personnel records.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Appellant's appeal is hereby **SUSTAINED**. The discipline imposed upon Appellant is rescinded consistent with this Order. Appellant is to be reinstated to her previous position and to receive all back pay and benefits to which she is entitled. Further, Appellant’s personnel records are to be expunged consistent with this Order.

IT IS SO ORDERED this 30th day of September, 2015.



R. Scott Thompson
Administrative Law Judge