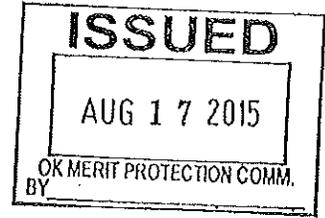


OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA



JOHNNY CHINN,)
)
 Appellant,)
)
 v.)
)
 OKLAHOMA TOURISM AND)
 RECREATION DEPARTMENT,)
)
 Appellee.)

Case No. MPC. 15-061

FINAL ORDER

This matter came on for hearing on the merits before the undersigned duly appointed Administrative Law Judge on the 12th day of August, 2015, at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Johnny Chinn (“Mr. Chinn” or “Appellant”), was present in person and by counsel, Kevin Donelson. The Appellee, Oklahoma Tourism and Recreation Department (“Department” or “Appellee”) appeared by and through counsel, Brett Thomas and Claudia Conner.

Appellant, a permanent classified employee of Appellee, was discharged pursuant to Merit Rule 455:10-11-17(c) and (3) for his alleged violation of Merit Rule 455:10-11-14, Title 74 O.S. § 840-2.20(1)(2)¹, Merit Rule 530:10-15-2, Merit Rule 530:10-15-10(f), and OTRD Policy P-104 Sec.V. The Department terminated Mr. Chinn on November 2, 2014, because it alleged he was unable to perform the essential duties of his original position, he abused leave

¹ In its Final Decision (notice of discharge), the Department identified this statute as “Title 74:84—2.20(1) (2)”. The citation is erroneous, but an apparent clerical error. It is arguable whether the Department’s citation error affords Appellant notice of the Department’s use of the actual statute. Because of the decision rendered, however, the issue is not decided.

benefits, failed to follow general leave policies regarding use of annual and sick leave, failed to request approval of leave, and had excessive absenteeism.

The record was opened and the hearing began. Exhibits were introduced as Joint Exhibits 1-19, Appellee Exhibit 5, and Appellant Exhibits 1 and 2, all of which are incorporated herein and made a part hereof. Arguments were heard, and the sworn testimony of three witnesses was provided. Denise Edwards, HR Director for the Department (“Ms. Edwards”), and Mike Vaught, former Chief Ranger for the Department (“Mr. Vaught”), both testified on Appellee’s behalf. The undersigned found both Ms. Edwards and Mr. Vaught to be credible witnesses. Mr. Chinn was the only witness for the Appellant, and the undersigned found him to be credible.

After careful consideration of the record, including all relevant evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following case background, findings of fact, conclusions of law, and order.

CASE BACKGROUND

Mr. Chinn was employed by Appellee as a Park Ranger at Bernice State Park. Mr. Chinn was a Park Ranger for twenty-five years before his termination. Prior to the time of his termination, Mr. Chinn had been mostly off work since sometime in November, 2013. The exact dates are unclear from the record. Whether Mr. Chinn worked on some days between November, 2013, and his termination, is ambiguous. Ms. Edwards testified that Mr. Chinn had been continuously off of work since November 1, 2013. Mr. Chinn testified that it was his normal course of conduct to take off of work from the middle of November until the middle of January each year, while park traffic was low, and that he was able to do so by using accrued compensatory time and annual leave. There is also reference in the record to Mr. Chinn working some days in January and February, 2014. [Joint Exhibit 11, Page 1, ¶ 4.] The final notice of

discharge issued by the Department [Joint Exhibit 16], however, indicates Mr. Chinn was absent from work from December 2, 2013, until January 31, 2014, and then again from March 6, 2014, until his termination. Accordingly, the relevant periods for determination of this appeal are: (1) December 2, 2013, to January 31, 2014, and (2) March 6, 2014, to November 2, 2014 (the “Periods of Leave”).

During the Periods of Leave, Mr. Chinn underwent rotator cuff surgery and was, subsequently, under a doctor’s care for other health issues. Mr. Chinn testified that he kept his supervisor advised of his health issues and need for leave and that he believed the leave was approved by the Department. Ms. Edwards testified that Mr. Chinn requested sick leave a few days or perhaps one work week before his surgery, and that she was unaware whether Mr. Chinn’s surgery was emergent. Mr. Chinn failed to submit written leave request forms prior to exercising the leave he believed his supervisor had approved.

The earliest indication in the record of the Department providing any notice to Mr. Chinn of application of the Family and Medical Leave Act (“FMLA”) appears in a letter from Ms. Edwards to Mr. Chinn dated July 30, 2014. [Joint Exhibit 9, Page 1, ¶ 4.] In the letter, Ms. Edwards states that Mr. Chinn’s Regional Manager, Greg Snider, provided an FMLA Certificate of Healthcare Provider form to Mr. Chinn on May 13, 2014, and that Mr. Chinn failed to return the completed certificate. However, it is apparent that Mr. Chinn never received the certificate. Ms. Edwards testified she believed the form was not delivered because Mr. Chinn had moved and failed to notify the Department of his address change. Ms. Edwards admitted, however, that she had no personal knowledge that Mr. Chinn had moved, but had simply heard from someone that he had moved. Mr. Chinn, testified that he has lived at the same address for twenty-five years. The record is absent of both any correspondence from Mr. Snider to Mr. Chinn and the

May 13, 2014 Certificate of Healthcare Provider the Department says it sent. There was also no testimony or documentary evidence to indicate the Department received any return mail from Mr. Chinn. Moreover, though Ms. Edwards' testimony suggests the May 13, 2014 certificate was sent to Mr. Chinn by mail, documentary evidence prepared by Ms. Edwards indicates the certificate was hand delivered to the Park, where Mr. Chinn was apparently not working. [Joint Exhibit 11, Page 1, ¶ 4.] There is no credible evidence that the Department provided the FMLA certificate to Mr. Chinn in May, 2014.

Despite the absence of the Certificate of Healthcare Provider, Ms. Edward's July 30, 2014, letter to Mr. Chinn indicates that the Department placed Mr. Chinn on FMLA leave for the dates November 1, 2013, to January 27, 2014. [Joint Exhibit 9, Page 1, ¶ 5.] On September 4, 2014, the Department notified Mr. Chinn that it had amended his FMLA leave dates to provide that he was on FMLA leave from March 6, 2014, until May 29, 2014. [Joint Exhibit 11.] Ms. Edwards testified that the change occurred because she originally assumed Mr. Chinn's time off in November and December of 2013 was due to medical reasons, and testified that as Mr. Chinn's employer, the Department is responsible for determining applicable FMLA dates. When she later learned that Mr. Chinn had used accrued compensatory time and annual leave for his time off in November and December, 2013, Ms. Edwards amended the FMLA leave dates. Mr. Chinn was given the benefit of his accrued compensatory time and annual leave despite the fact that he had not submitted a written leave request form prior to taking the leave. The Department also approved Mr. Chinn's FMLA leave without the medical certificate or any written request from Mr. Chinn. Ms. Edwards reminded Mr. Chinn that paid leave must be requested in writing, and noted Mr. Chinn's indication that his supervisor had requested leave for him. [Joint Exhibit 11, Page 1, ¶¶ 4, 5.]

Because the Department placed Mr. Chinn on FMLA leave from March 6, 2014, until May 29, 2014, Mr. Chinn was excused from work during this time. His absence during this period was not an abuse of leave benefits, and cannot be excessive absenteeism. Although the Department argues that Mr. Chinn failed to follow general leave policies and failed to request leave in writing, the deficiencies, to the extent they exist, cannot be applied to the period for which the Department put Mr. Chinn on FMLA leave. In addition, the Department admits that it has never provided progressive discipline to Mr. Chinn for failing to request leave in writing or for failing to follow leave policies. [Joint Exhibit 1, Page 19.] The Department approved and designated the FMLA leave. Mr. Chinn testified that he was unaware that he had ever been on or eligible for FMLA leave until he received Ms. Edwards' July 30, 2014, letter. Accordingly, the remaining periods applicable to the alleged leave abuse are: (1) December 2, 2013, to January 31, 2014, and (2) May 30, 2014, to November 2, 2014.

With regard to the remaining relevant period, Mr. Chinn did not submit a written request for sick leave until August 26, 2014, and only then after the Department had requested the form. Mr. Chinn testified that, prior to the request, he believed his supervisor had handled all leave form requirements for him, and it is apparent Mr. Chinn had operated in this manner for years. Mr. Chinn's form submission was made after he received Ms. Edwards' July 30, 2014, letter. In the letter, Ms. Edwards told Mr. Chinn that he had not returned the FMLA medical certificate (which may never have been provided to Mr. Chinn) and instructed him to contact her no later than August 18, 2014. Mr. Chinn complied and contacted Ms. Edwards on August 11, 2014. As a result of his conversation with Ms. Edwards, Mr. Chinn submitted the written request for leave on August 26, 2014, and provided the medical records sometime after August 20, 2014. In both regards, Mr. Chinn complied with Ms. Edwards' requests.

The written request for leave Mr. Chinn submitted on August 26, 2014, requested sick leave for the period July 28, 2014, until January 28, 2015. Mr. Chinn's leave request was approved by his supervisor on August 26, 2014. Ms. Edwards testified that the portion of leave that predated the request would require administrative approval for retroactive application. This approval was granted by Claudia Conner on September 4, 2014. Ms. Edwards testified that, at the time, Ms. Conner was the number two administrator at the Department. On September 5, 2014, however, Ms. Conner apparently changed her mind and noted on the leave form that retroactive leave was not approved and that leave was approved for the upcoming payroll only. Also on September 5, 2014, Ms. Edwards noted on the leave form that sick leave should be applied from August 24, 2014, until January 28, 2015, which inconsistent with the leave that was approved. [Joint Exhibit 1, Page 8.]

The Department approved Mr. Chinn's written request for leave from July 28, 2014, until January 28, 2015, when Ms. Conner signed and indicated approval on September 4, 2014. All subsequent attempts to redact the approval are irrelevant. Ms. Edwards admitted that she knows of no statute, rule, or policy that would allow the Department to reverse course after leave has been approved. In this case, it is also clear that Mr. Chinn had provided the necessary doctor's note to support his request for sick leave. [Joint Exhibit 1, Page 9.] Accordingly, the remaining periods of leave potentially applicable to the Department's termination of Mr. Chinn are: (1) December 2, 2013, to January 31, 2014, and (2) May 30, 2014, to July 27, 2014, totaling 119 days.

Not only did the Department approve Mr. Chinn's use of sick leave from July 28, 2014, until January 28, 2015, it apparently notified Mr. Chinn of the approval. On September 11, 2014, however, six days after the last action indicated on the leave request form, Ms. Edwards wrote to

Mr. Chinn to inform him that the leave approval earlier indicated to him had been modified to cover only August 24, 2014, until September 20, 2014. [Joint Exhibit 13.] In the letter, Ms. Edwards also informed Mr. Chinn that he would return to leave without pay status on September 21, 2014, that he should consider applying for short-term disability, and that Scott White could help him understand his retirement options. In the letter, Ms. Edwards indicates Mr. Chinn had been absent from work for 215 days.

Ms. Edwards testified that in all of the periods of “excessive absences”, Mr. Chinn was using either his FMLA leave, annual leave, sick leave, or vacation, and that all of the 215 days Mr. Chinn was off work were covered by one form of leave or another. Although Ms. Edwards stated that Mr. Chinn’s absence could be considered “excessive” even if it is authorized by law, she could not state any rule or statute to support her opinion. Ms. Edwards testified that as of September 14, 2014, Mr. Chinn had approximately 10 weeks of accumulated annual leave, approximately 29 weeks of accumulated sick leave, and that use of a portion of this time would have gotten Mr. Chinn past his medical return date of January 28, 2015, without being placed on unpaid leave status. Ms. Edwards testified that Mr. Chinn had been terminated because the “leave approval had been amended”. Ms. Edwards testified that Mr. Chinn was not required to perform the essential functions of his job while on sick leave, and that the only thing required for sick leave approval was a doctor’s note. Ms. Edwards testified that the Department never requested a second medical opinion regarding Mr. Chinn’s health. Ms. Edwards testified that Mr. Chinn’s leave amounts to vested property rights. Most importantly, Ms. Edwards testified that, with regard to every ground for termination stated in the Department’s final notice of termination, Mr. Chinn was protected by various leave entitlements. The undersigned agrees.

It is clear that Mr. Chinn was entitled to enough compensatory time, FMLA leave, sick leave, and annual leave to more than cover the period of time Mr. Chinn was absent from his work. It is also clear that Mr. Chinn had serious health issues and needed the time off of work that he took, and the Department never really challenged this. The Department noted Mr. Chinn's attempt to accept a commission from the Bernice Police Department to ride along as a volunteer during his leave from the Department. However, the Department presented no evidence that Mr. Chinn ever rode along with the Bernice Police Department, and no argument exists that the matter impacts Mr. Chinn's entitlement to leave from the Department.

It is equally clear that Mr. Chinn failed to submit written requests for leave prior to taking off on several occasions. It is unclear whether Mr. Chinn's absence in December of 2013 and January of 2014, was due to medical issues or the use of compensatory time and annual leave. However, all leave periods from March 6, 2014, forward, are clearly related to Mr. Chinn's health. The distinction is important. Though annual leave must be requested in writing before taken, sick leave requests may come after or during the leave is taken in certain circumstances.

The only ground for termination stated by the Department in the final termination notice that is substantiated by the evidence in the case, is that Mr. Chinn failed to submit written requests for annual or sick leave before he took the leave. Although Mr. Chinn testified that he believed his supervisor had handled the request forms and that leave was fully approved, the evidence clearly establishes that he did not personally submit forms before taking leave in some instances. However, the Department bears the burden to prove that Mr. Chinn's request forms were actually due prior to his leave. In order to do so, the Department must prove either that Mr. Chinn's leave was annual leave, or that his leave was sick leave of a type that would require and

allow written request forms sooner than Mr. Chinn submitted them. Neither conclusion can be established by a preponderance of the evidence presented.

FINDINGS OF FACT

1. The parties stipulated to the following matters:
 - (a) MPC has jurisdiction over this appeal;
 - (b) The Merit Rules apply;
 - (c) The appeal was timely filed;
 - (d) Mr. Chinn was a permanent, classified employee of the Department; and
 - (e) Mr. Chinn was terminated on November 2, 2014;
2. Any matter set forth in the case background above, or the conclusions of law below, that is properly a conclusion of fact, is incorporated herein as a conclusion of fact.
3. Mr. Chinn was off of work from December 2, 2013, to January 31, 2014, and from March 6, 2014, to November 2, 2014.
4. During all periods Mr. Chinn was off of work, he was entitled to receive leave with pay pursuant to leave rights provided by FMLA leave, sick leave, annual leave, and/or compensatory time.
5. Mr. Chinn had accumulated sufficient sick leave, annual leave, and/or compensatory time to cover all of the days he was off of work, without being placed on unpaid leave.
6. Mr. Chinn encountered health issues that entitled him to be off of work under FMLA and sick leave provisions.

7. Had Mr. Chinn exhausted his FMLA and sick leave, Mr. Chinn's accumulated annual leave would have allowed Mr. Chinn to be off of work without being placed on unpaid leave.

8. Although Mr. Chinn did not submit written requests for leave prior to every period for which he was off of work, the record is unclear as to which periods of time are impacted by the failure, and as to the type of leave involved.

9. Although the Department changed the applicable FMLA leave dates, the Department afforded Mr. Chinn all 12 weeks of FMLA leave to which he was entitled.

10. The Department approved, in writing, Mr. Chinn's written request for leave from July 28, 2014, until January 28, 2015.

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. 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.

4. The Personnel Act and Merit Rules provide that an employee must receive notice of the proposed action, which shall include the statute, rule, policy, etc., which was violated, the specific acts or omissions which are the cause of the suspension, an explanation of the evidence justifying the suspension, and the employee must be given an opportunity to respond to the proposed suspension either in writing or orally. 74 O.S. § 840-6.4; OAC 455:10-11-15.

5. Merit Rule 455-10-9-2 states that the Appellee bears the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the action taken and that the discipline imposed was just. This is an adverse action appeal.

6. To meet its burden to prove that just cause exists for the discharge, the Department must prove, by a preponderance of the evidence, that Mr. Chinn violated one of the following policies that it alleged he violated in the Final Decision (notice of discharge) [Joint Exhibit 16]:

- (a) That Mr. Chinn was unable to perform the duties of the position in which he was employed, pursuant to Merit Rule 455:10-11-14;
- (b) That Mr. Chinn failed to follow applicable Merit Rules and agency policy regarding the request and use of leave, pursuant to Merit Rule 530:10-15-2;
- (c) That Mr. Chinn was absent from work after exhausting all of his sick and annual leave accumulations pursuant to Merit Rule 530:10-15-10(f); or
- (d) That Mr. Chinn violated OTRD Policy P-104 Sec.V by failing to submit written request forms for leave at appropriate times or to provide appropriate documentation of sick leave.²

7. The Department also alleged in its Final Decision (notice of discharge), that it terminated Mr. Chinn for attendance and abuse of leave benefits pursuant to Title 74 O.S. § 840-2.20(1)(2)³. However, 74 O.S. § 840-2.20(1) (2) places no burden or requirement on Mr. Chinn,

² In its Final Decision (notice of discharge), the Department alleges that Mr. Chinn violated this Department policy by failing to file leave requests timely and by having excessive absenteeism. Because the policy cited, OTRD P-104 Sec.V, does not address “excessive absenteeism”, application of the policy is limited to whether Mr. Chinn timely made request for approval of leave.

³ In its Final Decision (notice of discharge), the Department identified this statute as “Title 74:84—2.20(1) (2)”. The citation is erroneous, but an apparent clerical error. It is arguable whether the Department’s citation error affords Appellant notice of the Department’s use of the actual statute. Because of the decision rendered, however, the issue is not decided.

and Mr. Chinn could not have violated the provision.

8. The Department failed to meet its burden to prove that Mr. Chinn violated Merit Rule 455:10-11-14. The Department presented no evidence that Mr. Chinn was unable to perform the duties of his position while he was at work. In fact, the documentation provided from Mr. Chinn's personnel file indicates he had performed well. The Department argued that Mr. Chinn was unable to perform his duties due to his medical conditions. But Mr. Chinn was protected by FMLA provisions and sick and annual leave entitlements at all times he was off. While Mr. Chinn was off of work, he was not required to perform the essential functions of his job. Whether he was then able to is irrelevant.

9. Merit Rule 530:10-15-2 requires Mr. Chinn to follow all Merit Rules and Department policy regarding the request and use of leave. In addition, the rule authorizes and requires the Department to monitor Mr. Chinn's leave usage and to take appropriate action when it has facts to show he abused leave or used leave fraudulently.

The Department has not shown, and has presented no evidence to support a claim, that Mr. Chinn abused or fraudulently used leave. Mr. Chinn was off for necessary medical treatment and recoupment. The Department did not challenge this or even seek a second opinion of his medical condition.

In order to terminate Mr. Chinn under this rule, the Department bears the burden to prove, by a preponderance of evidence, that Mr. Chinn failed to follow Merit Rules or Department policy regarding the manner in which he requested leave. Although it is clear that Mr. Chinn took leave at times without submitting written requests beforehand, as required by OTRD Policy P-104 Sec.V, the Department: (a) failed to document in its Final Decision which periods of leave were for sick leave and which were for annual leave [and the Department greatly

confused this issue by the manner in which it documented, approved, modified, and rescinded approval of leave requests], and thus failed to prove that Mr. Chinn did not submit written requests for leave prior to taking annual leave; and (b) failed to prove that Mr. Chinn did not submit written applications for sick leave at the times required by OTRD Policy P-104 Sec.V, because the Department: (i) did not present any evidence that Mr. Chinn's health matters were not unanticipated, (ii) did not present any compelling evidence that Mr. Chinn failed to notify his supervisor of his inability to work due to health issues, failed to explain his absence or indicate his return date, failed to notify his supervisor daily of his absence without a mutual understanding with the supervisor, failed to submit a request for approval of leave form immediately upon return to work from an unanticipated illness, or that Mr. Chinn's illness required advance submission of a request form because it was planned or anticipated. The Department failed to meet its burden, by a preponderance of evidence, that Mr. Chinn violated Merit Rule 530:10-15-2.

10. The Department alleges, in its Final Decision, that Mr. Chinn violated Merit Rule 530:10-15-10(f) with regard to general annual and sick leave policies. However, this provision merely states that an appointing authority may terminate an employee who is absent from work after he has exhausted all of his sick or annual leave. It is unquestioned that Mr. Chinn never exhausted his annual and sick leave. The Department admitted this through the testimony of its HR Director, Ms. Edwards. Accordingly, the Department failed to meet its burden to prove by a preponderance of evidence, that Mr. Chinn violated Merit Rule 530:10-15-10(f).

11. The Department failed to meet its burden to prove, by a preponderance of evidence, that Mr. Chinn violated OTRD Policy P-104 Sec.V by failing to submit written request forms for leave at appropriate times or to provide appropriate documentation of sick leave. This

is true for the same reasons, and by the same analysis, as stated in Conclusion of Law No. 9.

12. Because Appellee has failed to meet its burden of proof that just cause exists to impose any discipline on Appellant, no conclusion of law is necessary with regard to the justice of the discipline imposed under the circumstances.

13. The Department's position was neither without reasonable basis nor frivolous. Accordingly, the Appellant, as the prevailing party, is not entitled to recover his attorney fees from the Department.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Appellant's appeal be **SUSTAINED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the discipline imposed upon Appellant is rescinded.

IT IS FURTHER ORDERED, ADUDGED AND DECREED that Appellee shall immediately reinstate Appellant at the same employment level he had attained at the time of his discharge and pay any and all benefits lost to Appellant by imposition of the discharge.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Appellant's personnel records are to be expunged of all references to this disciplinary action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Appellant's request for attorney fees is denied.

Dated this 13th day of August, 2015.



Matt Hopkins, OBA# 16666
Administrative Law Judge
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