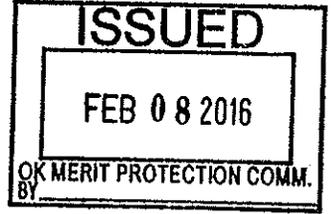


**OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA**



TRISHA WHITE, )  
 )  
 Appellant, )  
 )  
v. )  
 )  
OKLAHOMA DEPARTMENT OF )  
HUMAN SERVICES, )  
 )  
 Appellee. )

Case No. MPC 16-015

**FINAL ORDER**

This matter came on for hearing on the merits before the undersigned duly appointed Administrative Law Judge on the 1<sup>st</sup> day of February, 2016, at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Trisha White (“Ms. White” or “Appellant”), appeared in person and by representative, Leon White. Appellee, Department of Human Services (“DHS” or “Appellee”) appeared by and through counsel, Richard A. Resetaritz, and table representative, David Clifton.

Appellant, a permanent classified employee of Appellee, was terminated effective at 5:00 p.m. on July 20, 2015, pursuant to 74 O.S. § 840-6.5, OKDHS:2-1-11, and Merit Rule 455:10-11-17. The termination was made on the grounds stated in OKDHS:2-1-7(i)(9) [Dereliction of Duty] and OKDHS:2-1-7(i)(3) [Medical Limitations].

The record was opened and the hearing began. Arguments of Appellant and Appellee were heard, and the sworn testimony of three witnesses for Appellee and one witness for Appellant was received. Exhibits were introduced as Joint Exhibits 1-21 and 40-53, Appellant’s

Exhibit 3, and Protected Exhibits 1, 2, and 22-39, all of which 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 case background, summary of testimony, findings of fact, conclusions of law, and order.

### **CASE BACKGROUND**

Ms. White worked for Appellee as a Child Welfare Specialist III, and was assigned to a Permanency Planning unit in Tulsa County. Ms. White worked for DHS for more than thirteen years, had never been disciplined prior to her termination, and was, by all accounts, a good caseworker who received evaluations that indicated her work exceeded expectations.

Ms. White was injured while performing her job duties for DHS. Ms. White's injury resulted in significant medical problems that required multiple surgeries to treat. As a result of her injury and her resulting medical limitations, Ms. White was unable to perform some of the essential functions of her position.

Ms. White was initially placed on light duty, or desk duty, until she went on extended leave on October 30, 2014. While on desk duty, Ms. White was able to write court reports, make phone calls, and issue written reports related to her caseload, but was unable to go out of the office. As a result, Ms. White's co-workers did the out of office work related to Ms. White's caseload.

Ms. White went on extended leave on October 30, 2014, and did not return. Ms. White exhausted all of her accrued annual and sick leave, and all leave available to her under the Family and Medical Leave Act ("FMLA"). In addition, Ms. White used significant shared leave and was granted 521:30 hours of approved leave without pay through March 17, 2015.

On March 17, 2015, DHS sent Ms. White a letter [Joint Ex. 10] indicating that she had exhausted all of her leave and that due to staffing needs, Ms. White's leave without pay was being cancelled at the end of fourteen days. The letter indicated Ms. White was required to return to work at 8:00 a.m. on April 1, 2015. Following receipt of the letter, and prior to April 1, 2015, Ms. White submitted a completed form 14CR003E and supporting medical documentation [Joint Ex. 11] indicating that she was unable to perform all job functions. On April 2, 2015, DHS wrote Ms. White a letter approving additional leave without pay through April 14, 2015, and directing her to return to work on April 15, 2015 [Joint Ex. 12].

On April 13, 2015, Ms. White wrote a letter to DHS [Joint Ex. 14] indicating that she was not currently able to return to work, estimating she would be able to return to work in approximately four weeks, and requesting additional time for healing. Ms. White did not, however, provide medical documentation to support her request. DHS approved the request and, by letter dated May 1, 2015 [Joint Ex. 15], informed Ms. White that she was granted an additional four weeks of leave without pay. The letter directed Ms. White to return for work on May 18, 2015, and stated that no additional leave would be granted and that failure to return to work on May 18, 2015 would result in discipline up to and including termination.

Ms. White did not return to work on May 18, 2015. Rather, on May 20, 2015, DHS received a letter from Ms. White [Joint Ex. 17] requesting an additional six weeks of leave without pay in order to allow Ms. White sufficient time to recover from her medical issues. On May 21, 2015, DHS notified Ms. White by letter [Joint Ex. 18] that additional leave would not be granted and that all leave beyond May 18, 2015 would be considered unapproved leave without pay. Ms. White still did not return to work. That Ms. White was medically unable to return to work was not questioned.

On June 2, 2015, DHS sent Ms. White Notice of Proposed Disciplinary Action Discharge [Joint Ex. 1], and supporting documents [Joint Ex. 2]. Ms. White did not respond to the Notice of Proposed Disciplinary Action in writing. A Pre-termination Hearing was conducted on July 14, 2015. On July 20, 2015, DHS sent Ms. White Notice of Final Disciplinary Action Discharge and supporting documents [Joint Ex. 3]. Ms. White was terminated effective at 5:00 p.m. on July 20, 2015 for dereliction of duty and inability to perform the essential functions of her position due to medical limitations. From this action, Ms. White appeals.

### **SUMMARY OF TESTIMONY**

The testimony of four witnesses, properly sworn and under oath, was taken and was made part of the record. The first three witnesses were offered by Appellee. The last witness was offered by Appellant.

#### **Joan Gerling**

Joan Gerling (“Ms. Gerling”) has worked for DHS for twenty-one years, and at the time of Appellant’s discharge, worked as the District Director over Appellant’s division. In this capacity, Ms. Gerling oversees the management of child welfare services in her district. Ms. White was in Ms. Gerling’s line of supervision.

Ms. Gerling explained that, as a Child Welfare Specialist III, Ms. White was a lead worker and acted in a mentor capacity for others in her unit. In addition, Ms. White carried a caseload assignment working with children, families, and the judicial system.

Ms. Gerling testified that while Ms. White was on desk duty between the time of her injury and the start of her extended leave, Ms. White performed some but not all of the duties of her position. She was able to write court reports, make phone calls and perform written work. She was not, however, able to go on assignments outside of the office. She was unable to accept

new cases. Although Ms. White did not do any of her co-workers' "desk work" during this time, her co-workers did handle the work related to Ms. White's caseload that occurred outside of the office. Ms. Gerling stated that the essential job duties that Ms. White was unable to perform due to her medical limitations included being on call, holding assessments in homes, seeing children in placements, testifying in court, and transporting children. Ms. Gerling testified that Ms. White's extended absence made it impossible to formally evaluate her performance, and that her last evaluation occurred in 2013.

Ms. Gerling testified that Ms. White was continuously absent from work from October 20, 2014, until her termination, and stated that Ms. White vacated her office, leaving only a few items behind when she left. Ms. Gerling stated that Ms. White's absence created a significant hardship for DHS because other staff were bearing the burden of Ms. White's caseload and felt overwhelmed by the additional work. Other staff were working additional hours to carry Ms. White's caseload, including new cases that Ms. White was unable to accept during her absence. She testified that Ms. White's absence negatively impacted the division's ability to meet its mandatory workload standard and that she ultimately had to request a double fill, creating budget problems.

The undersigned found Ms. Gerling to be a credible witness.

**Carolyn Kelly Johnson**

Kelly Johnson ("Ms. Johnson") is the Deputy Director for Child Welfare Services over Region 5, the eight county area in Northeast Oklahoma where Ms. White was stationed. Ms. Johnson signed both the Notice of Proposed Disciplinary Action Discharge and the Notice of Final Disciplinary Action Discharge. She proposed Ms. White's discharge because Ms. White

had exhausted all of her leave and was unable to perform essential job duties, and believes Ms. White's termination was the correct decision.

Ms. Johnson identified the exhibits related to Ms. White's requests for additional unpaid leave and the agency response to each. She did not approve Ms. White's final request for an additional six weeks of unpaid leave because additional unpaid leave had been granted twice before, and DHS needed to fill Ms. White's position. Ms. Johnson testified that her alternative was to double fill Ms. White's position, which would have created a hardship for the agency and limited its obligation to meet the mandatory requirements of the Pinnacle Plan, a plan for improvement of child services entered into in the settlement of litigation in which DHS was involved.

On cross-examination, Ms. Johnson stated that she does not have authority to move employees around as she sees fit. While she does have limited authority to move employees from one position to another within Region 5, that authority would not include moving an employee to another department in the region. Rather, that authority rests with the DHS Director or the Director of Child Welfare Services. Ms. Johnson testified that she believed Ms. White had been offered another position within DHS. She was unaware of any employee in her twenty-five year employment who had moved from one department to another due to a medical situation and kept the same pay. While she is aware that Child Welfare Specialists commonly transfer laterally within their same classification and keep the same salary, she does not believe she had authority to laterally transfer Ms. White under the circumstances, and does not believe such a transfer would have been fair.

Ms. Johnson did not initially recall whether Ms. White had ever received disciplinary action prior to her termination. Upon review of the evidence admitted, however, Ms. Johnson

agreed that Ms. White had no prior disciplinary action. Ms. Johnson noted, however, that Ms. White had failed to report to work multiple times, as reflected by her responses to the Department's various letters to return on certain dates. Although Ms. White was granted additional unpaid leave on several occasions, she had not been granted additional leave when she failed to return in May, 2015.

The undersigned found Ms. Johnson to be a credible witness.

**David Clifton**

David Clifton ("Mr. Clifton") is an Administrative Field Analyst assigned to DHS Region 5, where Ms. White was employed. He has worked for DHS for twenty-one years. Mr. Clifton was present for the entire hearing as Appellee's table representative.

Mr. Clifton testified that prior to Ms. White's extended leave, he had made efforts to find a position that Ms. White could perform. He met with Ms. White to discuss available positions which DHS felt she was qualified to fill with her current medical limitations. Each option would amount to a voluntary demotion and lower pay. He stated that Ms. White initially identified a couple of positions she was interested in, but ultimately declined the positions because the pay was too low. Mr. Clifton did not look for a position that would be a lateral transfer within his authority because Ms. White was not able to perform the essential duties of any position within her classification. With regard to Joint Exhibit 53, a list of DHS employees who have been transferred without salary adjustment, Mr. Clifton indicated that it is not unusual for DHS employees to move from one job code to another, and that sometimes the change is made administratively without the employee's knowledge. Mr. Clifton testified that Joint Exhibit 53 may reflect these lateral transfers, but does not indicate any DHS employee who has voluntarily demoted and kept the same salary. He is unaware of any instance in which a DHS employee has

moved to a lower classification and kept the same salary. Mr. Clifton is also unaware of any employee moving to a lower classification and starting above the entry level salary for the new classification. Mr. Clifton believes Exhibit 19 indicates that had Ms. White taken a voluntary demotion, she would have experienced a monthly salary reduction of approximately \$1,100.00. Mr. Clifton testified that Ms. White had not been formally evaluated since 2013, because she was unable to perform enough of her job duties to be evaluated, and because she was continuously absent.

Although Mr. Clifton did not have authority to terminate Ms. White, he recommended her termination, and believes it was the correct agency action. Ms. White had been continuously away from work since October 20, 2013 at the time she was terminated effective July 20, 2015. He testified that Ms. White had not performed other employees' work while she was on desk duty, and that she was unable to perform the essential functions of her job both while on desk duty and while on extended leave. He did not see another position on Ms. White's classification level that she would be able to perform. Mr. Clifton testified that even up to the time of Ms. White's pre-termination hearing, Ms. White stated that she couldn't come back to work at her prior job because of her medical limitations.

The undersigned found Mr. Clifton to be a credible witness.

### **Trisha White**

Ms. White testified that her essential job duties included writing court reports, conducting family functional assessments, scheduling clients, attending court hearings, and setting up family visits. She stated that her medical condition allowed her to perform all of her duties except anything that required her to drive. For example, she could not transport children because it was

unsafe for her to drive while on her medication. She testified that DHS was aware she could not perform one hundred percent of her job duties because of medical documentation she provided.

Ms. White stated that after her injury she received a temporary, sixty day assignment to another position. She kept her same salary during this time, and is unsure whether DHS classified the assignment as a lateral transfer. She testified that it was not financially possible for her to take a voluntary demotion to Social Services Specialist II in the manner offered by DHS because the transfer would result in a significant decrease in pay. She believes it would have been possible for DHS to transfer her to the position, however, and lower her salary by only \$100.00 per month by starting her at the top salary for the classification. Although Ms. White stated she would have been able to accept a voluntary demotion on those terms, DHS informed her she would have to start at the entry-level salary if transferred to the position, which was not financially possible for her.

Ms. White agreed that she was continuously absent from work from October 20, 2013 until her termination on July 20, 2015. She stated, though, that she did not refuse to return to work because, except for her final request, each time she asked for additional leave without pay, DHS approved the request. She is unsure whether she had exhausted all of her leave at the time her discharge was proposed.

Ms. White testified that the position she filled at DHS is critical to the agency's child welfare services. She believes she was an excellent worker and an asset to the agency and the state. She had no disciplinary action prior to her discharge. She recited the emails from co-workers praising her work entered into evidence as Exhibits 40, 41, and 42. She wanted to be on the front line working for families. She stated that she has gone into work while on leave to do what is necessary for her families.

Ms. White testified that she believes she was terminated in retaliation for filing a grievance against a supervisor. She stated that she has been passed over for promotion about forty-three times because of her grievance. Although Ms. White is a thirteen-year employee with a master's degree, she has seen employees who have been at DHS for only nine months promoted higher than her at least once, and believes the treatment is due to the grievance she filed. Ms. White believes her termination was unjust because she was injured at work and because someone at DHS had authority to transfer her to a position in which she could perform the essential duties.

The undersigned found Ms. White to be a credible witness.

#### **FINDINGS OF FACT**

The parties stipulated that the Merit Protection Commission has jurisdiction over this matter, that the Merit Rules apply, and that this appeal was timely filed. The parties further stipulated that Appellant was a permanent, classified employee of Appellee, and that she was terminated effective July 20, 2015. All stipulations of the parties are incorporated herein as findings of fact.

In addition, the undersigned makes the following findings of fact:

1. Appellant's termination was effective at 5:00 p.m. on July 20, 2015.
2. Appellant suffered a work-related injury that required significant medical attention, including multiple surgeries and long-term medication.
3. Appellant's medication limited Appellant's ability to safely drive.
4. Although Appellant was able to perform some functions of her job, her medical condition, including the medication she was required to take, made it impossible for Appellant to perform certain essential functions of her job, including driving a car, transporting children,

being on call, holding assessments in homes, seeing children in placements, and testifying in court.

5. Appellant was unable to perform essential functions of her position, with or without reasonable accommodation, due to medical limitations.

6. Appellant had received no prior disciplinary action.

7. In her last evaluation, Appellant exceeded standards. No evaluation of Appellant's work has been completed since 2013 because of Appellant's absence.

8. Appellant was continuously absent from work from October 20, 2013, until her termination on July 20, 2015.

9. Appellant's absence created a significant hardship for Appellee, including a limitation on Appellee's ability to meet the mandatory requirements of its improvement plan.

10. Appellee took reasonable action to accommodate Appellant's medical limitations by placing her on light duty, offering her a voluntary demotion into a position in which she could fulfill the essential functions, and granting her extended leave without pay on multiple occasions.

11. Appellee offered Appellant several positions in which she could be employed and meet the essential job functions, but Appellee declined the positions due to the corresponding cut in pay.

12. Appellee directed Appellant to return to work on May 18, 2015 by letter dated May 1, 2015.

13. Appellant did not return to work on May 18, 2015. Instead, Appellant sent a letter dated May 18, 2015 to Appellee requesting additional leave. Appellee received Appellant's letter on May 20, 2015.

14. On May 21, 2015, Appellee informed Appellant by letter that additional leave was not granted and that the earlier directive to report for duty on May 18, 2015 remained in force.

15. Appellant did not thereafter notify her supervisor that she would be absent or request additional leave within three days of any absence.

16. Appellant failed to report to work as directed for more than three consecutive working days, beginning on May 18, 2015, until the date of her termination on July 20, 2015.

17. Although Appellant requested additional leave within three days of her absence (beginning on May 18, 2015), Appellant failed to report to work for more than three consecutive business days after her leave request had been denied, and Appellant made no further contact with her employer or further request for leave.

18. There is no evidence that Appellant was terminated in retaliation for filing a grievance against a supervisor.

19. Appellee was afforded all procedural rights in the process of her termination, including receipt of Notice of Proposed Disciplinary Action Discharge and supporting documentation, a pre-termination hearing, and Notice of Final Disciplinary Action Discharge.

20. The appointing authority's decision to terminate Ms. White was just, fair, and consistent with the principals of progressive discipline.

#### **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 terminated for any of the reasons set forth in Merit Rule 455:10-11-14, which include, *inter alia*, the inability to perform the duties of the position in which employed, and any just cause.

4. OKDHS:2-1-7(i) provides that Appellant takes disciplinary action for violation of agency procedure regarding work performance including dereliction of duty and inability to perform essential job functions due to medical limitations.

5. OKDHS:2-1-7(i)(9) defines dereliction of duty as an employee's failure to report to work for three consecutive working days and the employee's failure to contact appropriate supervisors or authorities during that three day period to request authorization to be absent from duty.

6. Appellant's failure to report for duty for more than three consecutive working days after her request for additional leave was denied on May 21, 2015, constitutes dereliction of duty.

7. Pursuant to OKDHS:2-1-7(i)(9), progressive discipline is not warranted for an employee who is derelict in her duty, and discharge is warranted. Because Appellant was derelict in her duty, she was not entitled to progressive discipline prior to her discharge.

8. Pursuant to OKDHS:2-1-7(i)(3), medical limitations include inability to perform the essential functions of a position with or without accommodation as a result of medical limitations.

9. 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 sufficient cause exists for the action taken and that the discipline imposed was just.

10. 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 state that 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. All procedural rights were afforded Appellant in this case.

11. Appellee, Department of Human Services, has met its burden to prove, by a preponderance of the evidence, that Appellant, Trisha White, violated OKDHS:2-1-7(i)(9) and was in dereliction of duty by failing to report for duty for three consecutive working days.

12. Appellee, Department of Human Services, has met its burden to prove, by a preponderance of the evidence, that Appellant, Trisha White's inability to perform the essential functions of her position due to her medical limitations is in violation of OKDHS2:1-7(i)(3).

13. Appellee has further met its burden to prove, by a preponderance of the evidence, that it followed all procedural prerequisites to the Disciplinary Action.

14. Appellee has further met its burden to prove, by a preponderance of the evidence that just cause exists for the action taken and that the discipline imposed was just and appropriate under the circumstances.

**ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** by the undersigned Administrative Law Judge that the petition of Appellant is hereby **DENIED** and her termination is sustained.

DATED this 2<sup>nd</sup> day of February, 2016.

  
\_\_\_\_\_  
Matt Hopkins, OBA# 16666

Administrative Law Judge  
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