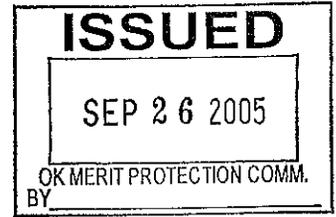


OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA



MICHAEL E. MARTIN,)
Appellant)
vs.) CASE NO. MPC 05-218
DEPARTMENT OF CORRECTIONS,)
Appellee.)

FINAL ORDER

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on September 9, 2005 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Michael E. Martin, appeared in person and was represented by Jeff Belote, Esq. Appellee, Department of Corrections (hereinafter referred to as "DOC"), appeared by and through its Counsel Michael Oakley, Assistant General Counsel, and agency representative Michael Mullin, Warden of the Oklahoma State Penitentiary (hereinafter referred to as "OSP") in McAlester.

Appellant, a Correctional Security Manager II at Oklahoma State Penitentiary, was discharged for inappropriate conduct in violation of Merit Rule 455:10-11-14 and DOC Policy OP-110215, Section I A(2) and (3), *Rules Concerning the Individual Conduct of Employees*, when he allegedly simulated sexual activity with a subordinate employee in the presence of other employees.

Prior to opening statements, Appellant made a verbal motion for continuance of the hearing, based on his inadvertent failure to timely serve subpoenas on his witnesses

and the resultant failure of several of his witnesses to appear at the hearing. Appellee objected to the continuance and was ready to proceed. Appellant's motion for continuance was denied.

Whereupon, the sworn testimony of witnesses for both Appellee and Appellant was presented, along with Exhibits, which were admitted and are incorporated herein and made a part hereof. Accordingly, after careful consideration of all evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Appellant, Michael E. Martin, a Captain at Oklahoma State Penitentiary (hereinafter "OSP"), has been employed with DOC for about 13 years. On January 20, 2005 Appellant, along with other officers, was called to assist in the lock-down of an uncooperative inmate. After getting the inmate locked down, the officers gathered in the control room. Present, in addition to Appellant, was Lt. James Jones, Sgt. Barbara Beale, Officer William Beshears, and Officer Wilford Martin Waters. Officer Waters was standing at the key box, bent over getting an aspirin for an inmate when Appellant stated, "Don't bend over like that. It's been a while." Appellant then approached Officer Waters from behind, placed his hands on Officer Walter's waist and began thrusting his pelvis against Officer Walters in a "humping" or simulated sexual motion.

The officers in the control room laughed, but Officer Walters did not. He testified that he was highly embarrassed and suffered emotionally, as Appellant's actions brought back painful memories of childhood abuse he had suffered. He turned

in a report of the incident to Chief of Security Col. Caywood. Following an investigation, Appellant was discharged for inappropriate conduct in violation of Merit Rule 455:10-11-14 and DOC Policy OP-110215, Section I A(2) and (3), *Rules Concerning the Individual Conduct of Employees*.

The facts in this case are straightforward and are not in disagreement. What is in disagreement is whether Appellant should have been disciplined for such conduct, and if so, whether the discipline imposed was too harsh. Appellant argues that his conduct was mere horseplay that all officers engage in at OSP. He likens it to guys slapping each other on their behinds after a football game. Correctional Officer Ira Cargill testified that in the 11 months she has worked at OSP, she has witnessed officers, including Officer Waters, engage in sexual horseplay. She stated that she has been the object of such horseplay, she considers it a joke, and she is not offended by it.

Appellee, on the other hand, states that this type of conduct goes far beyond mere horseplay and is unacceptable, particularly when the instigator is a supervisor and the object of the "horseplay" is a subordinate.

Lt. James Jones testified that in the 13 years he has worked at OSP, he had not witnessed anyone engaging in simulated sexual acts, as did Appellant toward Officer Waters. He noted that Officer Waters was offended by Appellant's conduct, and he was offended as well. While there is a certain amount of horseplay at OSP, he acknowledged, this went beyond what is acceptable. This is the type of behavior a supervisor would be expected to stop, not engage in.

Deputy Warden Kameron Harvanek explained that with Appellant holding the rank of captain, he is in charge of the facility after 5:00 p.m. in the absence of the

warden, the deputy warden, and the chief of security. With such a level of responsibility, Appellant is held to a higher standard than subordinate officers, and he is expected to set an example. Both Deputy Warden Harvanek and Warden Michael Mullin concurred that Appellant's behavior is unacceptable for anyone in a supervisory position.

Appellant conceded that his behavior may not have been appropriate, but countered that everyone was doing it and he was singled out because Warden Mullin wanted to get rid of him. Appellant points to a 2002 sexual harassment investigation against a husband and wife at OSP. Both were correctional officers and were found to have engaged in inappropriate behavior in violation of agency rules of conduct. Whatever discipline may have been imposed is unknown. One striking difference between Appellant and these two officers is that neither was a supervisor.

The allegation that the Warden was "out to get him" is unsubstantiated by Appellant. In fact, less than two years earlier, Warden Mullin had promoted Appellant to the rank of Captain. According to Warden Mullin, Appellant was deserving of the promotion because he had been around a long time and he knows how to work with inmates. His performance evaluations were consistently "exceeds standards" in his prior position, though in June 2004 Warden Mullin issued a letter of reprimand to Appellant for violation of the employee rules of conduct and the rules concerning workplace violence in his dealings with a subordinate officer.

It appears that Appellant is a good officer, but perhaps has been promoted beyond his capacity. As a lieutenant, Appellant was rated as "exceeds standards" in supervising subordinates and in performance management accountabilities, and was

described as one who "readily accepts the responsibility of being the role model for subordinates." (Joint Exhibit # 21) On the other hand, perhaps Appellant was under undue stress from personal matters and was not himself. In either event, this Administrative Law Judge believes that while the preponderance of the evidence supports a finding that just cause exists for discipline, the facts do not support the severity of the discipline imposed. Rather, the undersigned finds that the facts warrant that Appellant be given a second chance to either prove himself to be the good employee he once was, or prove that he cannot be redeemed.

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 455:10-11-14 states that a permanent classified employee may be discharged for misconduct, willful violation of the Oklahoma Personnel Act and Merit Rules, conduct unbecoming a public employee, and any other just cause.
4. Merit Rule 455:10-9-2(f)(1) 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 adverse action and that the discipline imposed was just.
5. DOC Policy OP-110215, Section I A(2) *Rules Concerning the Individual Conduct of Employees*, states that employees will engage in conduct which affords respect and courtesy to, and preserves the dignity of, others.

6. DOC Policy OP-110215, Section I A(3) *Rules Concerning the Individual Conduct of Employees*, states that employees will refrain from conduct that serves to denigrate, demean, or disregard the welfare of others.

7. Appellee, Department of Corrections, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Appellant Michael Martin for violating agency rules and Merit Rules when he simulated sexual activity with a subordinate employee in the presence of other employees.

8. Appellee, Department of Corrections, has failed to meet its burden to prove, by a preponderance of the evidence, that the discipline imposed was just under the circumstances when considering the seriousness of the conduct, the employment and discipline record of Appellant Michael Martin, mitigating circumstances, and action taken by Appellee in similar cases.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant is **SUSTAINED IN PART**. Appellant is hereby ordered reinstated and demoted to Correctional Security Manager Level I, the rank of Lieutenant. Appellant shall receive three (3) months back pay at the Manager Level I rate which he held prior to his promotion as Correctional Security Manager Level II, the rank of Captain. Further, Appellant's discipline shall be reduced to reflect a 45-day suspension without pay. Appellant's records shall be adjusted to reflect this Order. Appellee shall effectuate this Order within fifteen (15) after the Order becomes effective.

DATED: this ___21st___ day of September, 2005.

A handwritten signature in cursive script, appearing to read "Annita M. Bridges", written over a horizontal line.

Annita M. Bridges, OBA # 1119
Administrative Law Judge

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