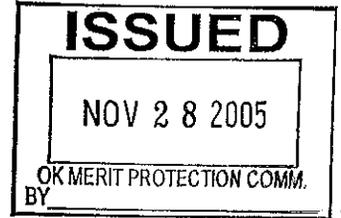


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

Eric Strong,)
Appellant,)
v.) Case No. MPC 05-282
Oklahoma Transportation)
Authority,)
Appellee.)



FINAL ORDER

This matter comes on for hearing on October 26, November 3 and November 4, 2005 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Eric Strong, appears personally and with counsel, George S. Freedman. The Appellee, Oklahoma Transportation Authority, now Oklahoma Turnpike Authority, appears by and through counsel, Rex W. Thompson. Also present for Appellee was Table Representative, Tim Stewart.

Appellant Strong is a permanent, classified state employee appealing an adverse disciplinary action of suspension without pay for five (5) days. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the parties stipulated to the admissibility of Joint Exhibits No. 1 through 46. In addition, the Appellant offered Exhibits "A" and "D", which were objected to by the Appellee. This Administrative Law Judge overruled the objections and admitted Appellant's Exhibits "A" and "D" as they were relevant to the decision at hand. Accordingly all exhibits presented and admitted are incorporated herein and made a part hereof. Written Summations/Closing Arguments were submitted by each party and the record was closed on November 15, 2005.

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

1. Appellant Eric Strong (hereinafter "Strong") is a classified employee of the Appellee Oklahoma Transportation Authority, now the Oklahoma Turnpike Authority (hereinafter "OTA"). On June 10, 2005, OTA provided Strong with Final Notice of Discipline, imposing a five (5) day suspension without pay (Exhibit No. 12). In the Final Notice, OTA incorporates by reference a number of documents, memorandums and letters. Those documents are set forth as Exhibits Nos. 6, 7, 8, 9, 10, 11, and 14. Exhibits Nos. 1, 2, 3, 4, 5, and 13 were also considered and incorporated by reference as attachments to Exhibit No. 7. The Final Notice sets forth certain actions by Strong which were considered to be "evidence" of Strong's inability to follow simple directions, his dilatory nature, his inability to communicate, his insubordinate attitude and his inability to perform the essential functions of his job. The basis for the disciplinary action was set forth under five (5) specific bullet points and occurred prior to the May 13, 2005 notice of proposed discipline (Exhibit No. 7). The Final Notice also contained many references to Strong's actions and behaviors following the May 13 notice which were not the basis for the proposed action.

2. Appellee cites 5 specific instances of behavior justifying the discipline, but complains of poor performance generally and indicates that these 5 specific instances are a "microcosm" of his performance (See Exhibit No. 7). These 5 instances or "bullet points" were instructions or directives given to Strong by his immediate supervisor, Tim Stewart. They are evaluated separately as well as taken together to review the imposed discipline. The parties have agreed that in order to be "insubordinate", the employee must intentionally ignore, disregard or refuse a lawful order from a superior.

3. Bullet Point #1 deals with a complaint that Strong needed to document the organizational structure of his division and come up with a work plan which identified the duties of each individual, and then to communicate these to the employees. This was to enable Strong to better evaluate his employees and to be able to hold them accountable for their particular responsibilities. This was also set forth in Strong's PMP as part of his Accountabilities. The method to achieve this accountability was left up to Strong and was initially a suggestion, not a directive (See Exhibit No. 2). At some point, it may

have become a directive (See Exhibit No. 3). The Notice of Proposed Action (Exhibit No. 7) speaks of specific methods being optional but the results being mandatory, and clearly refers to "recommendations" and states that Strong will continue to be held accountable. It appears from the testimony that this bullet point may actually be part of Bullet Point #3. There was no time limit imposed for this bullet point separate from the deadline for Bullet Point #3. Generally this directive appears to incorporate expanded job duties and accountabilities into each employees' Performance Management Process evaluation (hereinafter "PMP"), however it was never clearly stated as such. It appears from the totality of the evidence that Strong attempted to comply with this request from his supervisor, although clearly the results were not satisfactory from Appellee's perspective. Evidence and testimony indicated that Strong had previously worked on job descriptions and had disseminated these to at least some of the employees. Flow charts were given to Stewart on several occasions and Strong requested guidance on a number of occasions. Mr. Tomlinson, as the appointing authority testified that he was not aware that this had been done. The evidence shows that a very important part of Bullet Point #1 was to emphasize that Strong bore the ultimate responsibility for the work of his employees and the work product of the division and he would be evaluated accordingly. The evidence is clear that Strong understood and accepted that responsibility. The basis for discipline on Bullet Point #1 on its own is unclear from the evidence, and there is no evidence that Strong intentionally disobeyed an order or directive regarding Bullet Point #1. Further, the preponderance of the evidence does not support imposition of discipline on this item although it is noted that Strong did not expand or revise the PMPs as further discussed in Bullet Point #3 below.

4. Bullet Point #2 deals with a request for suggestions for a development plan for Strong's own PMP. Mr. Stewart requested Strong's suggestions on several occasions, however this specific request directed Strong to provide his suggestions for his development plan by close of business on 4/11/05. On that date, Strong replied that he was unable to come up with any suggestions that he believed would be satisfactory to Mr. Stewart (Exhibit No. 5). This response was provided to Stewart by the deadline. Strong had grieved his previous two PMPs. Mr. Stewart, Ms. O'Rourke and Mr. Tomlinson all testified that Strong was not required to "make up" suggestions if he had none. Strong

testified that he was frustrated and he was giving an honest response rather than being insubordinate in failing to come up with suggestions for a development plan. There was considerable testimony regarding the PMP Handbook (Exhibit No. 30) and the evidence generally showed that the process should be an on-going partnership, but there was no mandate that employees are required to draft the development plan. In fact, the Handbook states that the supervisor should complete the development plan (see Exhibit No. 30, pages 40 and 49) but also states that the supervisor and employee should together write the development plan (see Exhibit No. 30, pages 51 and 53). As the basis for discipline, Appellee alleges that Strong's response of "no suggestions" was insubordinate behavior. It should be noted that the majority of information under bullet Point No.2 in the June 10 Final Notice failed to address the original accusation and instead criticized Strong's behavior during the disciplinary process, rather than addressing his failure to provide suggestions for a development plan. There is no evidence that Strong intentionally disobeyed an order or directive from Stewart and the preponderance of the evidence fails to support the imposition of discipline on Bullet Point #2.

5. Bullet Point #3 directed Strong to provide Stewart with draft PMPs to closeout 2004 and to open 2005 on all of the engineering division employees by 4/18/05. This deadline was extended and it was agreed by the parties that Strong provided the drafts to Stewart by the extended deadline. The Appellee contends that although they were provided, the PMPs for the Engineering Division were not expanded, an attempt to incorporate Bullet Point #1 into #3. Strong testified that he felt, as division director, that the existing PMPs were sufficient to identify the job duties and accountabilities for the employees under his supervision. The May 13th Notice of Proposed Action complains that the time limit had to be extended, however, it is clear that the extensions were granted and the supervisor cannot complain of action that he permitted to occur. The Appellee finds that Strong's failure to expand the PMPs is evidence of his inability to perform his job and an insubordinate attitude (Exhibit No.12). Evidence was submitted that other division directors were able to meet the deadlines although there was no indication that these other directors had to expand the PMPs prior to submitting them. The evidence is clear that although the PMPs were not significantly expanded, the drafts were submitted to Stewart by the deadline, as requested. Here, Appellee attempts to

incorporate Bullet Point #1 into #3 and discipline is imposed because of the content deficiency and the lack of timeliness. There is no evidence that Strong intentionally disobeyed an order or directive. It is clear, however, from the preponderance of the evidence that Stewart wanted the PMPs for the employees expanded and Strong failed to do so.

6. Bullet Point #4 deals with a request for recommendations on discipline for one of Strong's employees. The employee, Wade Piersall, was assigned a state vehicle. When the vehicle was turned in for sale, there was damage to the truck, including dents, scratches and cigarette burns. After meeting with Stewart and others, Strong researched Piersall's personnel file and found that although there had been general comments on his previous PMPs regarding his care of agency property, he had no prior disciplinary action for this behavior. Strong issued a record of counseling and began routine inspections of the new vehicle to ensure that it was properly cared for. It is undisputed that Stewart requested recommendations, and that Strong did not provide those recommendations, but rather imposed discipline himself. As evidence that this constituted insubordination, Stewart and O'Rourke testified that all division directors and supervisors only had authority to make recommendations on disciplinary action rather than impose the discipline themselves. In support of this testimony, they rely on item B.1. on Strong's PMP which discusses his role in making such recommendations. They stated that it was important that the supervisors work with the personnel division to ensure consistent and appropriate discipline is imposed. Strong testified that his action was based on a misunderstanding or mistake on his part, and he had no intention to deliberately ignore this request. In defense, Strong testified that he had previously issued a record of counseling to one of his employees and believed he had the authority to do so here. He further testified that the discipline he imposed had been effective and the behavior complained of had significantly improved, which is the ultimate goal of the disciplinary process. It should also be noted that the agency's policy for progressive discipline fails to set out the process of routing all discipline through the personnel department. OTA Policy #039 entitled "Corrective Discipline" mentions several times the supervisor's role in imposing discipline, and never states that supervisors can only recommend the discipline (Exhibit No. 13). 74 O.S. Section 840-6.3 specifically provides that "each

supervisor" is responsible for applying discipline" and "each supervisor shall use prompt, positive action to avoid more serious disciplinary actions". Strong's actions do not therefore violate agency policy and are in line with statutes. There is no evidence that Strong intentionally disobeyed an order or directive. It is clear, however, from the preponderance of the evidence that Stewart wanted a written recommendation on possible discipline and Strong failed to provide it.

7. The final basis for discipline is set forth in Bullet Point #5. This deals with the location of the office for engineering division employee Daniel Humphreys. Testimony indicated that the engineering division space was reconfigured and remodeled in February of 2005. Humphrey's office was in an area outside of the engineering division. Strong was requested to move Humphrey and he was temporarily moved into an empty office slated for a future deputy director. Evidence is conflicting on the sequence of the moves, however, the directive from Stewart to Strong was to provide a schedule of when Humphrey was to be moved and the location where he was to be moved by April 4, 2005. The evidence is clear that Strong sent Stewart an e-mail on that date that contained the requested information (Exhibit No. 34). Appellee's attempt to discipline Strong with regard to this item is wholly without merit.

8. The evidence indicated the possibility of other issues with Strong, but they were not set forth as the basis for this discipline and will not be considered pursuant to 74 O.S. Section 840-6.5, which provides that decisions "shall be confined to the issues submitted for decision". The Appellee justified the level of discipline imposed as a result of the numerous instances of "insubordination" even though this was Strong's first disciplinary action. Many of the comments in the disciplinary documents appear to be "piling on" or "heaping" to justify a higher level of discipline. Many of these comments appear to be unfounded, and occasionally seem to be outright pettiness. Appellee criticizes Strong for failing to be proactive and in control of his division, and then criticizes him for taking control and making decisions. These conflicting messages created a sense of confusion and misunderstanding on the part of Strong. As stated above, the preponderance of the evidence fails to prove that Strong intentionally ignored the directives or orders of his supervisor. O'Rourke testified that this level was appropriate in order to send a message to Strong's employees and to improve their behavior. The further justification for this

level of discipline was that it was less than the maximum that could have been imposed. These reasons are inappropriate to justify imposition of progressive discipline at this high of a level. Furthermore, there was no evidence introduced that this level of discipline was consistent with discipline given to other OTA employees for similar infractions.

9. The undisputed evidence indicated there were at least two vacancies in the engineering division and two new employees who need further training. Despite these vacancies, the Engineering Division was commended for doing a good job in letting \$60 million in construction contracts during that time frame (Appellant's Exhibit "A"). There was no evidence that any consideration was given to any of the mitigating circumstances as set forth in the agency's corrective disciplinary policy (Exhibit No. 13, D.). Having considered these factors, the preponderance of the evidence supports a finding that there is cause for discipline regarding Bullet Points #3 and #4, however the facts do not support the level and severity of discipline imposed.

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. Merit Rule 455:10-9-2 states that the Appellee OTA 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. Merit Rule 455:10-11-15 states that a permanent classified employee may be suspended without pay for any of the reasons set forth in 455:10-11-14, which are misconduct, insubordination, inefficiency, habitual drunkenness, inability to perform the duties of the position in which employed, willful violation of the Oklahoma Personnel Act or the Merit Rules, conduct unbecoming a public employee, conviction of a crime involving moral turpitude or any other just cause.

5. There are no allegations and no proof that Strong violated any written policy or procedure of the Appellee OTA.

6. Appellee has met its burden to prove, by a preponderance of the evidence that just cause exists to discipline Strong for failing to comply with the request of his supervisor, Tim Stewart, to expand the PMPs of the employees in the Engineering Division and to provide written recommendations for discipline of employee Wade Piersall.

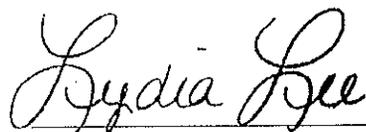
7. Appellee has failed to meet its burden to prove, by a preponderance of the evidence, that Strong's failure to comply was an intentional act constituting insubordination.

8. Appellee has failed to meet its burden to prove, by a preponderance of the evidence, that the discipline imposed was just under the circumstances considering the seriousness of the conduct as it relates to the employee's duties and responsibilities; the consistency of action taken with respect to similar conduct by other employees of the agency, the previous employment and disciplinary records of the employee and other mitigating circumstances.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Eric Strong, MPC 05-282 be **SUSTAINED IN PART**. The discipline imposed upon Appellant is reduced to a written reprimand consistent with this Order. All documentation concerning the adverse action with the exception of the written reprimand shall be expunged from any and all of the employee's personnel records and the five days pay previously suspended shall be reinstated, with all appropriate benefits accorded thereto.

This Order entered this 28th day of November, 2005.



Lydia Lee
Administrative Law Judge