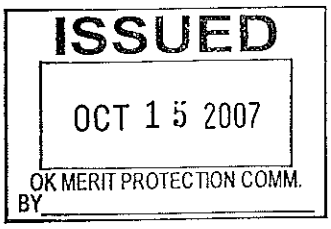
BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

HOLLY L. KELLY, Appellant,	)	
v.	)	Case No. MPC 06-120
OKLAHOMA STATE BUREAU OF INVESTIGATION, Appellee.	)	



FINAL ORDER

This matter comes on for hearing on August 21, 27, and 30, 2007 before the duly appointed, undersigned Administrative Law Judge of the Oklahoma Merit Protection Commission, in Oklahoma City, Oklahoma. The Appellant, Holly L. Kelly, appears personally and by counsel, Loren Gibson. The Appellee, Oklahoma State Bureau of Investigation, appears by and through counsel, Jimmy Bunn, Jr. Also present for Appellee was Table Representative and agency Director, DeWade Langley.

Appellant, Holly Kelly, was a permanent, classified state employee. She appeals an adverse disciplinary action of discharge. This matter was previously assigned to ALJ Annita Bridges, who entered an Order on February 28, 2007 finding that there were no legal impediments to the fitness for duty evaluation that Appellee, Oklahoma State Bureau of Investigation ordered Appellant to attend on January 10, 2006 and that there were no legal impediments to the Waiver which might excuse or justify Appellant's failure to attend the evaluation or to sign the Waiver. That Order was given full deference and those issues were not revisited in the evidentiary hearing. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the parties offered Joint Exhibits 1 through 55, which were admitted. Appellee offered Exhibits No. 1, 3, 4 and 7 which were admitted over objection from the Appellant. The Appellant offered Exhibits 1 through 4, 6 through 10, 14 through 24, 27, 28, 30, 31 and 32, which were admitted over objection of the Appellee. Accordingly, all exhibits presented and admitted are incorporated herein and made a part hereof. Following the close of the evidentiary hearing, the parties were given additional

time to file written summations. These were timely filed by each party and were received by this Administrative Law Judge on September 28, 2007. The record was closed on September 28, 2007.

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

The following is determined as the relevant facts of this case based upon the testimony and evidence presented at the hearing. Appellant, Holly Kelly, (hereinafter "Kelly") was a classifed employee of the Appellee, Oklahoma State Bureau of Investigation (hereinafter "OSBI"). Kelly was a Special Agent, level III, with the OSBI in Oklahoma City, Oklahoma. In the fall of 2005, Kelly had been investigating a murder that occurred in Wayne, Oklahoma on October 21, 2005. The Wayne Police Chief requested OSBI investigate because of possible conflicts with the McClain County Sheriff's Department (hereinafter "MCSO"). The suspect in the case was a confidential informant of the MCSO. There had been several instances of MCSO interviewing witnesses and discussing the case with the suspect while he was in the McClain County Jail. MCSO had been advised by the District Attorney to distance themselves from the investigation, essentially to "stay out of the case". On November 9, 2005, Agent Kelly learned that the suspect had been moved from the McClain County Jail. The District Attorney in charge of the case had not been made aware of the move and they were not able to locate the suspect. Kelly discussed this move with her supervisor, Robin Glenn. Glenn was concerned that Kelly was angry about the actions of MCSO, and told her to call the Sheriff and ask where the suspect had been moved and why. She further told Kelly "not to get into it with them". (Joint Exhibit 20).

Agent Kelly called MCSO and asked where the suspect had been moved. Kelly tape recorded the telephone call and it was played at the hearing. (Joint Exhibits 13 and 14). During the call, she talked to Sheriff Don Hewett and Undersheriff Jim Filipski. When she asked why the suspect had been moved, she received several conflicting answers and she pursued the line of questioning. Undersheriff Filipski was somewhat uncooperative, and at one point, asked Kelly

why she needed to know where the suspect was. The conversation got very tense, with Kelly accusing the MCSO of obstruction of justice on numerous occasions. Although she was obviously upset and angry, Kelly did not yell or curse at the Sheriff or Undersheriff and most of her comments were couched as "in my opinion" or "I may be wrong, but that is how it looks to me". After hanging up the phone, Kelly immediately told Ms. Glenn that she would "probably get a complaint" about the call and gave her the tape recording. A complaint was filed and an internal investigation was conducted. The internal investigation was apparently never concluded and no results were introduced at the hearing. Kelly was not taken off the murder case, although an additional agent was assigned to the case and she continued to perform all of her duties with the OSBI. Robin Glenn, Kelly's supervisor, testified that she had no problem with Kelly following up on the inconsistent answers and that she did not clarify what she meant by "don't get into it". She further stated that she never instituted any insubordination disciplinary proceedings. Jack Dailey, Ms. Glenn's supervisor, stated that he didn't believe that Kelly's actions were insubordination but that it was not the appropriate investigative technique and she tipped her hand too much. (Joint Exhibit 26, pg. 75, line 2-17). Assistant District Attorney Lori Puckett, the lead prosecutor on the case, listened to the tape of the call and testified that she had no concerns about Kelly's behavior and, in her opinion, that Kelly was not out of control or inappropriate during the phone call with MCSO. Similar testimony was given by Glenn Turner, the investigator for the DA's office, who stated that Kelly's conduct was neither unstable nor out of control. Chuck Jefferies, who conducted the internal investigation regarding the complaints by MCSO, testified that the telephone call did not make him think that Kelly was in need of a psychiatric evaluation. Kelly's supervisors heard the tape on November 9, 2005, but made no attempt from November 9, 2005 until January 9, 2006, to relieve Kelly from duty, to seize her weapon, her credentials or her automobile and continued to allow her to actively work on cases.

On January 9, 2006, at approximately 4:30 pm, Kelly left work to go home when she received a call to return to the office. When she arrived back at the OSBI offices, Division Director, Rusty Featherstone, and HR Manager, Susan Loftin, provided her with written notification that she was directed to take a Fitness for Duty Evaluation (hereinafter "FFDE") the next morning at 7:30 a.m. (Appellant Exhibit 4) She was told that she must sign a comprehensive release in order to have the FFDE. (Appellant Exhibit 3). She advised them that

she was not comfortable with signing the Release and she was told that it was mandatory and that she would be subject to disciplinary action if she refused. Mr. Featherstone told her to "just sign the silly thing". She was not offered a continuance nor did she request one. She was suspended with pay that evening as a result of her refusal to sign the Release. (Joint Exhibit 23). OSBI had been making preparations for this exam for some time, according to Loftin. She stated that she had been working on it for about four weeks. (Joint Exhibit 26, pg. 95, line 25, pg. 96, line 1- 8). Certain information about Kelly was forwarded to the Doctor on January 4, 2006, at least one week prior to the FFDE. (Appellant Exhibit 2). Rusty Featherstone stated that it was a conscious decision to wait until the last moment to tell Kelly of the FFDE because he was concerned about her reaction. (Joint Exhibit 26, pg. 92, line 5-15). As a result of OSBI's decision, Kelly had less than 14 hours notice of the FFDE and was deprived of the opportunity to consider her alternatives and to have a meaningful discussion about her concerns. She was also deprived of the opportunity to suggest a different professional, as provided in the OSBI policy. (Joint Exhibit 3).

On January 13, 2007, her attorney faxed OSBI a letter explaining Kelly's concerns with the Release and offering additional discussion to "resolve this matter". OSBI made no response, verbally or in writing. (Joint Exhibit 55). On January 13, 2006, OSBI provided Kelly with Notice of Pre-Termination Hearing (Joint Exhibit 5). This Notice stated that facts would be presented supporting a conclusion that Kelly's "unprofessional conduct towards Sheriff Don Hewett and Undersheriff Jim Filipski and refusal to submit to a Fitness for Duty Evaluation was direct insubordination". The grounds for the proposed action were listed as the August 29, 2003 formal reprimand, the November 9, 2005 insubordination towards Robin Glenn and the January 9, 2006 insubordination towards Director Langley.

Kelly and her attorney appeared at the Pre-Termination Hearing on January 24, 2006. OSBI was represented by Rusty Featherstone. At the Pre-termination Hearing, Mr. Featherstone stated that the only issue before them was Kelly's refusal to take the FFDE exam and sign the release. (Joint Exhibit 26, pg. 88, line 20-25, pg. 89, line 1-5). Kelly's personnel file, the certificate of disciplinary action, several memos, copies of the complaints from MCSO, a transcript of the telephone call between Kelly and MCSO, interview reports from Glenn and Dailey, and the testimony of witnesses were all presented as evidence by the agency at the Pre-

Termination hearing, although no summary of this evidence was provided to Kelly prior to the hearing as required by Title 74 O.S. § 840-6.4 and Merit Rule 455:10-11-17.

On February 7, 2006, Director Langley gave Kelly notice that her employment was terminated effective that date, based upon the same grounds as stated in the Notice of January 13, 2006. Those grounds incorrectly list the August, 2003 written reprimand as the grounds for termination, when it should have been listed as a citation of other discipline. In any event, no other formal or informal discipline is listed as being used to make the decision to terminate Kelly. (Joint Exhibit 7).

ISSUES

1. Did the actions of the Appellant, Holly Kelly, on November 9, 2005 constitute insubordination?
2. Did the actions of the Appellant, Holly Kelly, on January 9, 2006 constitute insubordination?
3. If so, was the discipline imposed appropriate under the circumstances?

DISCUSSION

There was much testimony over the course of three days regarding Kelly's previous disciplinary actions and her behavior during her employment at OSBI. No notice was ever given that those actions would be used against Kelly. In addition, the majority of those actions were more than four years prior to the current instances. Director Langley stated that he considered that information in his determination regarding Holly Kelly and his decision to require her to submit to a FFDE. It is particularly troublesome that Holly Kelly's annual evaluations were very positive, with the only exception being the 2002-2003 evaluation. There is no indication that her eight (8) previous performance evaluations were used as part of the decision to terminate Kelly as required by Title 74 O.S. § 840-4.19.

Great weight was given by Director Langley to Jack Dailey and Rick Zimmer's 2003 memos. (Appellee Exhibit 3 and 4). It is important to note that no notice was given to Kelly that these memos even existed, much less that they were being considered in the decision of the Director. These secret memos are supposedly a recitation of the numerous events that led up to the written reprimand in August, 2003. Again, none of the events described in the memos were

ever included in the annual employee evaluations of Kelly. In addition to complaints about Kelly's behavior in previous years, the memos detailed the events of August 14, 2003. According to the memos, during a routine case review meeting, Kelly became argumentative, raised her voice and became hostile. However, this was not, in fact, a routine case study because Dailey testified that the meeting on August 14, 2003 had already been determined at the onset to be a disciplinary action. Kelly and three other agents were behind in their case investigations and all four were going to receive informal oral discussions. Dailey stated that Kelly immediately became hostile and defensive, that she was irrational, screaming and out of control. A tape recording of that meeting played at the hearing clearly shows that Zimmer and Dailey's memos did not accurately reflect the conduct of the parties. Apparently, Zimmer and Dailey were unaware that Kelly recorded the meeting. Kelly can be heard repeatedly stating in a reasonable tone of voice that she was doing the best she could and that she would try to do better. Zimmer and Dailey's memos also failed to reflect that Dailey called Kelly "strange" and told her to "get out of the profession". Dailey's statements and behavior at that meeting escalated the tension and caused Kelly to ask for an HR representative because she was not comfortable being in a closed room with Dailey and Zimmer. These facts are clearly misrepresented in the memos. This meeting forms the basis for the insubordination charge and written reprimand in August, 2003. It was also during this time that Kelly received her only unsatisfactory employee evaluation. Mr. Dailey again misrepresented Kelly's behavior on August 14, 2003 during the Pre-termination hearing, stating that she just lost all emotional control, while he failed to disclose his inappropriate comments. (Joint Exhibit 26, pg. 71, line 14).

It is extremely concerning that no proper notice or summary of evidence was given to the Appellant prior to her termination. How can the Appellant be reasonably expected to present reasons why the proposed action is improper when she is denied the information crucial to presenting a defense? It is a fundamental denial of due process to make the employee guess or presume what evidence will be offered by the agency to support the grounds for disciplinary action. This is why the statutes and the administrative rules require a summary of the evidence for each ground. A simple listing of the evidence would have been sufficient notice. "Various miscellaneous documents", "supervisor's files" and "e-mails relating work issues" are too vague

and do not constitute an "explanation of the agency's evidence" (Title 74 O.S. §840-6.5) or "a summary of evidence or physical evidence to support each of the stated grounds" (OAR 455:10-11-17). Further, there is no indication to Appellant that either aggravating or mitigating circumstances were considered or appropriate.

With regard to Kelly's alleged act of insubordination by "getting into it" in the telephone call of November 9, 2005, there were several representations to the Appellant at the Pre-termination hearing that that event was not being used as part of the decision to terminate her. Also, the direction of "don't get into it" is rather vague and subject to interpretation. Kelly testified that she pursued the line of questioning because of the inconsistent answers she received. As a trained investigator, she aggressively sought the answer to "why" he was moved as she was authorized to do. Although Kelly may have been angry and may have "tipped her hand" on the obstruction issue, there is not sufficient evidence that she intentionally or willfully disobeyed the directive of her supervisor. Her behavior may have been unprofessional, but it was not insubordinate. Insubordination was the only ground listed in the notices to Kelly, and on appeal no other ground, such as misconduct or conduct unbecoming a state employee, can be considered on appeal. (Title 74 O.S. §840-6.4)

With regard to the alleged insubordination of January 9, 2006, there is sufficient evidence that OSBI had the right to require Kelly to submit to a fitness for duty evaluation. It is uncontroverted that on January 9, 2006, Kelly refused to submit to the FFDE. In determining whether the discipline imposed was appropriate, several factors must be considered. Important to this appeal are the consistency of action taken with respect to other similar conduct, and other mitigating circumstances.

Evidence was presented at the hearing that OSBI had never had an employee refuse to take a FFDE. Therefore, in order to determine consistency of discipline, other acts of insubordination or misconduct will be considered. According to the discipline history log of OSBI, only two other employees have been terminated since 1999. One female special agent was terminated for using her weapon/car during a domestic disturbance and one male criminalist was terminated for using his agency computer to view pornography. The only other employee who was charged with insubordination was given only a written reprimand.

Other instances of serious misconduct were given much less severe discipline. A level IV Criminalist who was found to have given false testimony in a criminal hearing was not terminated, but was given an involuntary demotion for her misconduct. A level I Criminalist who publicly offered to have someone killed was only given a written reprimand. Public cursing and the use of profanity warranted only a written reprimand.

It is impossible to determine the consistency of disciplinary actions from the evidence in this case. Therefore, other mitigating factors must be considered. The most important is the lack of notice to Kelly regarding the evidence to be used to support the decision to seek termination. Also, the manner in which the FFDE notice was presented to Kelly, which offered her no opportunity for meaningful consideration or discussion. The failure of OSBI to properly document past behavior issues on the employees annual evaluations is significant. This gave Kelly a mixed message and failed to provide her a meaningful opportunity to correct her deficiencies. Finally, while it has been ruled that there were no legal impediments to the waiver form, Kelly clearly had serious, reasonable concerns about the wide-reaching effect of signing the waiver form. Her act of insubordination was based primarily upon these concerns and those concerns must be taken into consideration as mitigation.

It is important to note that OSBI has a genuine and real interest in ensuring that its employees are fit for duty. Equally important is that OSBI's employees follow the lawful orders of the Director and his staff. Although there are mitigating circumstances that must be considered, the insubordination of an employee is not to be taken lightly and does deserve formal disciplinary action.

Given the totality of the circumstances, the discipline of termination is not justified for the insubordination that occurred on January 9, 2006. Therefore, a reduction of the discipline is appropriate. There is no reason to believe that a suspension without pay would not have the desired result of correcting the deficient behavior as required by OSBI's progressive discipline policy. However, given the seriousness of the charge of insubordination, the suspension without pay must be significant.

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. Title 74 O.S. §840-6.5 and Merit Rule 455:10-9-2 state that the Appellee OSBI 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. Title 74 O.S. §840-6.5 and Merit Rule 455:10-11-17 state that a permanent classified employee may be discharged for the reasons of misconduct, insubordination, inefficiency, habitual drunkeness, 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. Appellee OSBI has failed to meet its burden to prove, by a preponderance of the evidence, that Appellant Holly Kelly was insubordinate on November 9, 2005, and her appeal on that ground for termination is sustained.
6. Appellee, OSBI has met its burden to prove, by a preponderance of the evidence, that Appellant Holly Kelly, was insubordinate on January 9, 2006 when she refused to submit to a fitness for duty evaluation.
7. Appellee OSBI has met its burden to prove, by a preponderance of the evidence that just cause exists to discipline Appellant Holly Kelly, for her act of insubordination on January 9, 2006.
8. Appellee OSBI has failed to meet its burden to prove, by a preponderance of the evidence, that it properly followed the Progressive Discipline Policy.
9. Appellee OSBI 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 consistency of action taken with respect to similar conduct by other employees of the agency and other mitigating circumstances. The discipline imposed is unduly harsh and

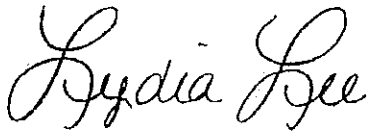
unfair given the totality of the evidence, and a discipline in the form of a suspension without pay for a period of sixty (60) calendar days is just and appropriate.

10. Appellant Holly Kelly must submit to the Fitness for Duty Evaluation prior to returning to her employment with the OSBI, as previously ordered by the Director, DeWade Langley as a condition of her return to work.
11. Merit Rule 455:10-9-2(f)(1)(D) provides that the presiding official, in this case, the administrative law judge, who orders reinstatement with back pay and other benefits may consider the deduction of any income the employee may have received for the period of time the employee was not performing her duties. Given the length of time since Appellant's termination on February 7, 2006 and her testimony that she has been employed since that time, it is appropriate to deduct any income that Kelly has received as a result of employment.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Holly L. Kelly, MPC 06-120 be **SUSTAINED IN PART.** The discipline imposed upon Appellant is reduced to a suspension without pay for a period of sixty (60) calendar days consistent with this Order. Appellant is to be reinstated, with back pay and benefits, effective February 7, 2006. Appellant's back pay and benefits are to be determined by deducting the period of suspension without pay and deducting all earned income that the Appellant has received as a result of any employment since February 7, 2006. Furthermore, her reinstatement is contingent upon satisfactorily completing a Fitness for Duty Evaluation. Appellant's personnel records are to be expunged of all references to acts of insubordination on November 9, 2005 and of her termination.

This Order entered this 9th day of October, 2007.



Lydia Lee
Administrative Law Judge
Oklahoma Merit Protection Commission