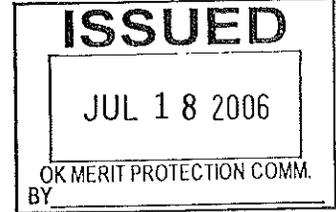


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

KENNETH MORGAN,)
Appellant,)
)
v.)
)
DEPARTMENT OF CORRECTIONS,)
Appellee.)
)

MPC 06-129



FINAL ORDER

This matter comes on for hearing on June 8 and June 26, 2006 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Kenneth Morgan, appears personally and by counsel, Daniel J. Gamino. The Appellee, Department of Corrections, appears by and through counsel, Michele J. Minietta. Also present for Appellee was Table Representative, Mike Carr.

Appellant Morgan is a permanent, classified state employee appealing an adverse disciplinary action of involuntary demotion. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the Appellee offered Exhibits No. 1 through 26, which were admitted with no objection. The Appellant offered Exhibits 27 through 30 and 32, which were admitted with no objection. 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 July 6, 2006. The record was closed on July 6, 2006.

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

Background of Case

Appellant Kenneth Morgan (hereinafter "Morgan") is a classified employee of the Appellee Department of Corrections (hereinafter "DOC"). Morgan was a Captain, in charge of the Elk City Community Work Center. In December 2005, DOC received an unsigned letter complaining about Morgan, and among other things, accusing Morgan of falsifying his time records, misusing the state Fuelman card and filing false insurance claims. DOC immediately suspended Morgan pending an investigation. It is important to note that Mike Carr made an attempt to immediately demote Morgan on December 9, 2005 by taking Morgan's badge and keys. On February 9, 2006, DOC provided Morgan with notice of the proposed disciplinary action (Exhibit 4). Morgan was accused of failing to accurately report his time worked on 7 separate dates and improper use of his state issued cell phone. Morgan was given an opportunity to respond and on February 16, 2006, he filed a written response to the proposed discipline (Exhibit 5). In his response to the proposed discipline, Morgan admitted that he made a mistake on his November 8, 2005 time sheet, but that the mistake was unintentional and further that he had permission to use his cell phone for some personal calls so long as the allotted minutes were not exceeded (Exhibit 5). Morgan also stated that his job duties required him to be away from the Center on a daily basis.

On March 1, 2006, DOC provided Morgan with notice of discipline, imposing an involuntary demotion from Correctional Security Manager II to Correctional Security Officer IV (Exhibit 6). As a result of the demotion, he was transferred from the Elk City facility to the Sayre Community Work Center. In the notice, DOC sets forth certain actions by Morgan which were considered to be misconduct and conduct unbecoming a public employee. DOC found that on at least seven (7) occasions, Morgan failed to accurately record his hours worked and that for a period of six (6) months he used his business cell phone for prohibited personal calls. The notice also contained a finding that there had been no prior disciplinary action.

The Testimony

The testimony of five (5) witnesses was provided in support of DOC's case. Mike Zarrella, an Assistant District Supervisor for DOC, testified that he was Morgan's supervisor. He explained that a Captain at a work center is equivalent to a warden and is responsible for all aspects of the work center. He testified about the anonymous letter that Mike Carr had received and the meeting held on Dec. 9, where they discussed Morgan's possible demotion because he had been "dishonest". He further testified that, at that point, no investigation had been conducted, but one was instituted after Morgan refused to take a voluntary demotion. Zarrella also testified that he encouraged Morgan to continue with his education in order to be eligible for additional promotions and agreed to permit Morgan to attend college classes during the day on Tuesdays and Thursdays, although the letters given to Morgan incorrectly stated Tuesdays and Wednesdays. On cross-examination, Zarrella stated that Captains have many responsibilities away from the work centers and that not being present at the Center did not necessarily mean that Morgan was not working. He said that the Captain would be required to check on approximately 60 inmates working at various job sites in the community, as well as getting supplies and working on new job site prospects. He further stated that he had no formal policy on cell phones stating in writing the limitations for personal use and that he does permit employees to use their DOC cell phones to make personal calls in some instances, such as when they will be late. He admitted that he told Morgan that the cell phone usage was "no big deal", that it was probably just bad judgement that would have warranted counseling at most. He also admitted that the personal calls were within the allotted minutes for the phone and Morgan's personal calls did not cost the agency any additional money. He stated that he could not say with certainty exactly which calls were personal, he could only make a guess or an assumption.

Witness Dan Hix testified that he conducted the investigation of the allegations regarding Morgan, but that he had no role in the disciplinary action other than that. He stated that his primary emphasis in the investigation was matching the sign-in/sign-out sheets and control room logs to Morgan's time sheets. Kay Tharp testified that she was an employee at the Elk City Center. She stated that she and three other employees discussed Morgan's absences and what they could do about them. She admitted that

Morgan had duties outside the facility and she did not always know where he was, but she could always reach him by phone. She testified that there was a lot of discussion among several of the employees about Morgan's situation, especially Sherry Bull who wanted to be promoted to Captain. Sherry Bull testified as to her incident reports (Exhibits 16 and 17).

Mike Carr testified that he was the DOC supervisor who made the final decision regarding Morgan's discipline. Carr testified that he promoted Morgan to the rank of Captain. He testified that he made initial inquiries to Kay Tharp because he trusted her and asked her to keep his questions confidential. He was very surprised to hear her state that she told the other employees at the Center about Morgan's trouble. He testified that he believed that Morgan was held to a higher standard than other employees and he felt that his mistakes on his time sheets breached the trust Carr placed in him. He said he considered all of the history and the commendations that Morgan had received, and imposed a demotion rather than a termination. He demoted Morgan to Sergeant and moved him to the Sayre facility because he felt that Morgan's authority and position had been compromised by the employees and the inmates' knowledge of this disciplinary action. On cross-examination, Carr admitted that there was no written DOC policy regarding the higher standard for Captains, nor was there a requirement that Captains keep detailed logs of their activity. He stated that his decision was based upon the sign-in/sign-out sheets and control room logs, the investigative report and the incident reports of other employees. He admitted that other than this instance, he had been pleased with Morgan's performance.

All of the witnesses testified that the sign-in/sign-out sheets and control log were not consistently or accurately completed. These documents, by themselves, could not be relied upon to indicate whether a person was on the premises or working on DOC business.

Dan Erwin testified that he was employed at the Elk City Center. He stated that Sherry Bull had stated that she was out to get Morgan's job and that he had warned Mr. Carr of this in April 2005. He testified that Bull was telling other employees what dates to use in incident reports and that he had seen her going through personnel files and time

sheets. His testimony was confirmed by witness Earnest Washington, another employee at the Center.

Guy Hilton, the City Manager for Elk City testified that he interacted with Morgan on a regular basis and that Morgan was always available by phone or in person. He stated that his dealings with Morgan were always professional and he considered Morgan to be "top-notch". Mike Maddox testified that he was the Superintendent of Canute schools and Morgan served as a school board member. He stated that he had the highest level of trust in Morgan. Neither Hilton nor Maddox had personal knowledge of Morgan's work hours or the dates involved in this disciplinary action.

Finally, Morgan testified in his defense. He stated that this demotion had cost him \$485.00 per month in salary, and that he had no previous disciplinary action. He stated that he had made considerable improvements at the Center during his tenure there and was primarily responsible for establishing the work release program at the Center. He testified that he had received the DOC Supervisor of the Year award in April of 2005 and Employee of the Month for May, 1999. He testified that he was frequently off-site checking on inmates or talking with current and potential employers about the work program. He testified that the sign-in/sign-out logs and control room logs were not as accurate as he wanted and he was attempting to improve that. He admitted making an error on his time sheet on November 8, 2005 but that it was carelessness and not an intentional or willful act on his part. He admitted that the August 8 sign-in/sign-out sheets and control room logs were not consistent. He stated that he worked the hours reflected on all other dates in question. He stated that on December 9, Carr attempted to force him to take a voluntary demotion under threat of termination, and Carr took his Captain bars, badge and keys from him at that meeting, indicating that Carr had already made up his mind.

ISSUES

1. Whether Morgan failed to accurately reflect his time worked and if he violated DOC policy regarding personal use of a DOC cell phone.

2. If so, whether the discipline imposed is appropriate under the circumstances and whether DOC appropriately followed its progressive discipline policy.

DISCUSSION

At the close of the DOC case, it was clear that there was no specific policy regarding the use of agency cell phones for personal calls. The general DOC policy cited by the Appellee is a prohibition for misuse of state property in general states that employees will conserve and prevent excessive waste of DOC resources and not use state property for personal benefit or gain. DOC's own witnesses offered testimony that employees are permitted to use these cell phones on occasion for personal use and that no damage occurred to the phone, nor were state funds wasted or expended as a result of Morgan's personal calls. Further, DOC could not state with certainty which of the calls were personal and which were business related, only that Morgan's phone had more usage than other cell phones at the facility. Appellant made a Motion for Summary Judgment at the close of DOC's case, arguing that DOC had failed to meet its burden of proof regarding the allegations against Morgan. This Judge agreed and granted Summary Judgment in favor of Appellant Morgan on the cell phone issue only.

Morgan admits that there may have been errors on his time sheets; however he had many duties outside the facility. The uncontroverted testimony was that the sign-in/sign-out sheets and control logs were not accurate and could not be relied upon to indicate whether a person was working. At the least, these showed only when an individual was on-site and even at that, they were not accurate. Morgan's absence from the Center did not prove that he was not working on DOC business at other locations. These inaccurate records formed the basis of the majority of DOC's case against Morgan. DOC offered no evidence to show that on any of the complained of dates that Morgan was in fact not working, rather they attempted to shift the burden to Morgan.

Further, DOC witnesses discussed the higher standard that they wished to hold Morgan to and that the demotion was proper because he had compromised his position at the Center. The preponderance of the testimony indicates that Kenneth Morgan is an excellent employee and Captain. In fact, DOC compromised Morgan's position by

informing his subordinates of the allegations and by encouraging the “gossip” at the Center.

It is clear from the evidence and testimony that Morgan made an error on his time reports on possibly two occasions, but that those errors were not willful. DOC has failed to prove, by a preponderance of the evidence, that this disciplinary action was consistent with its progressive disciplinary procedure. Based upon the record, the undersigned finds that the preponderance of the evidence supports a finding that there is cause for discipline regarding submission of inaccurate time records; however, DOC has not proven, by a preponderance of the evidence, that the level of disciplinary action imposed was just and the facts do not support the level and severity of discipline imposed.

Given Morgan’s lack of previous disciplinary actions and his exemplary performance so far, there is no reason to believe that a letter of reprimand would not have the desired result of correcting the deficient behavior as required by DOC’s progressive disciplinary procedures (Exhibit 3). Although the time record errors were not willful, the negligent completion of time reports is not to be taken lightly and does deserve formal disciplinary action.

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 DOC 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 455:10-11-16 states that a permanent classified employee may be involuntarily demoted 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. Appellee DOC has failed to meet its burden to prove, by a preponderance of the evidence, that Morgan used his state issued cell phone for personal use and gain or that he violated any policy or directive of DOC if he did use his cell phone for personal calls.

6. Appellee DOC has met its burden to prove, by a preponderance of the evidence, that Morgan violated DOC's policy OP-110215, entitled "Rules Concerning the Individual Conduct of Employees", which provides that "Employees and supervisors will submit timely, accurate and truthful time/leave sheets" wherein he failed to insure that his time records were reported accurately on two occasions on August 8, 2005 and on November 8, 2005.

7. Appellee DOC has met its burden to prove, by a preponderance of the evidence that just cause exists to discipline Morgan for failing to comply with the above referenced DOC policy.

8. Appellee DOC has failed met its burden to prove, by a preponderance of the evidence, that it followed the DOC Progressive Disciplinary Procedure.

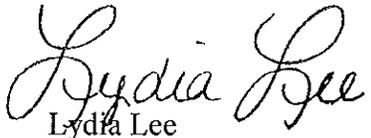
9. Appellee DOC has failed to meet its burden to prove, by a preponderance of the evidence, that the discipline imposed was just under the circumstances considering the seriousness of the conduct as it relates to the employee's duties and responsibilities; the consistency of action taken with respect to similar conduct by other employees of the agency, the previous employment and disciplinary records of the employee and other mitigating circumstances. The discipline imposed is unduly harsh and unfair given the totality of the evidence, and a disciplinary action in the form of a formal letter of reprimand is just and appropriate.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Kenneth Morgan, MPC 06-129 be **SUSTAINED IN PART**. The discipline imposed upon Appellant is reduced to a formal letter of 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, together with reinstatement of all pay and all appropriate benefits accorded thereto.

This Order entered this 17th day of July, 2006.



Lydia Lee

Administrative Law Judge
Oklahoma Merit Protection Commission
3545 NW 58th Street, Suite 360
Oklahoma City, Oklahoma 73112