

following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The Oklahoma Department of Agriculture, Food, and Forestry encompasses the Oklahoma Forestry Services. This division of the Department contains forestry service firefighters whose duties include responding to wildfires across various areas of Oklahoma.

Robert Harrel is a District Forester/Supervisor and has been Appellant's supervisor for six (6) years. On December 2, 2005, Supervisor Harrel arrived at work at Sallisaw, Oklahoma, and found two bull dozers which were inoperable in the Sallisaw and Gore, Oklahoma areas. Both of these bull dozers were used to help fight fires in the Bell, Oklahoma area. When Appellant arrived at work, Supervisor Harrel directed Appellant to take his bull dozer and go to the Bell, Oklahoma area.

Appellant had come into the Sallisaw office angry about another employee being dispatched to Henryetta, Oklahoma. When Supervisor Harrel directed Appellant to go to the Bell area with his bull dozer, Appellant told Supervisor Harrel he did not want to leave and go to the Bell area, but wanted to stay in his normal response area in Box, Oklahoma. Appellant was told a second time by Supervisor Harrel to take his bull dozer and dispatch to the Bell area at which time Appellant requested grievance forms and also requested annual leave for the rest of the day so that he could stay in his normal response area. Supervisor Harrel denied the request for annual leave and left the office to go repair a bull dozer that was broken down in the Gore area.

Sometime later that day, Supervisor Harrel received a call from the Tahlequah, Oklahoma office informing him that Appellant had stated over the radio that he was not going to dispatch to the Bell area and that he would be patrolling his normal response area

only. After receiving the call from Tahlequah, Supervisor Harrel contacted Mark Goeller, Assistant Director, and John Burwell, Forestry Division Director, and advised them of the situation with Appellant.

Mark Goeller, Assistant Director, testified at this hearing that on December 2, 2005 he did receive a call from Supervisor Harrel informing him of the situation with Appellant. Although Assistant Director Goeller was aware there were no fires in the Bell area, he was also aware that historically there had been a number of fires in the Bell area. Accordingly, in order to meet this threat of fires, firefighters would be dispatched to the Bell area.

After December 2, 2005, Assistant Director Goeller was ordered to investigate this matter. Assistant Director Goeller did not find, as alleged by Appellant, that Supervisor Harrel was angry with Appellant when he gave him the directive to go to the Bell area on December 2, 2006. Assistant Director Goeller was also aware, based on his supervisory training, that insubordination could actually require termination according to the Progressive Discipline Policy. However, after a review of Appellant's past records, Assistant Director Goeller did not recommend termination, but rather recommended a three (3) day suspension.

On February 3, 2006, Appellant was given a Notice of Predetermination Hearing recommending Appellant be suspended for three (3) days for refusing a directive from his supervisor to go to the Bell area on December 2, 2005. After hearing on the matter, Appellant was notified that he would be suspended without pay for one day for refusal to comply with the directive of his supervisor. On March 21, 2006, Appellant appealed his one day suspension to the Oklahoma Merit Protection Commission.

At this hearing, Appellant asserted that he disregarded the directive of his supervisor

on December 2, 2005 because the directive was an unlawful order in that Supervisor Harrel failed to follow the Department's Northeast Area Fire Dispatch Plan. The Forestry Division has divided the state into fire protection areas including the Northeast area which includes Adair, Cherokee, Delaware, Ottawa, Mayes, Muskogee, Wagoner and Sequoyah counties. The Northeast area follows a Fire Dispatch Plan which is a written document provided to the employees of the Forestry Division. The Plan includes Fire Operations, General Policies and Procedures, General Dispatch Guidelines, Fire Response Guidelines, Forestry Service Contacts, and Cooperating Agency Contacts. This policy describes various functions and is the fire fighting plan that was in place at the time of Appellant's alleged violation of policy.

The Fire Dispatch Plan describes "primary dispatch points" as those points established through discussion and joint agreement between the Fire Resource Protection Specialist ("FRPS"), the District Forester, the Area Forester, and the Forest Fire Control Officer ("FFCO"). During heavy fire activity, the policy states that it may become necessary to shift units ("units" are forestry employees) to temporary dispatch points and allows the FFCO full authority to shift units as necessary.

It is Appellant's position that the dispatch plan authorized only the FFCO, who was Bob McCord, to give such a directive to Appellant to go to the Bell area. The Appellee's response to Appellant's argument is that Appellant did not raise the issue of his supervisor's alleged lack of authority to issue a temporary dispatch order in Appellants' appeal.

A review of Appellant's Petition for Appeal filed with the Merit Protection Commission in March 2006, supports the Appellee's position. Specifically, Appellant's

Exhibit "A" which is attached to Appellant's Petition for Appeal states in pertinent part:

Given this information, it made no sense to me [Appellant] to have the sole firefighter at Box to leave the area and go to Bell which also had a firefighter on duty. I advised my supervisor of all this and told him I should stay in the Box area. My supervisor, ignored my concerns. I became frustrated and offered to take a day of annual leave so that I could remain in my Box area. That request was denied. After ending the conversation with my supervisor, I decided to remain in the Box area. I knew it was wrong to disobey my supervisor's direction, but I believed the direction given me was wrong for two reasons. First, I did not believe my supervisor, had a clear understanding of the situation, danger and intensity of fires in the Box area. The intensity of fires and the fire hazard was clearly greater at Box then at Bell.

Second, I believed my supervisor's directions were contrary to the safety and well fair [sic] of the residents of the Box area. ¹

It is clear from Appellant's own words that at the time he disobeyed Supervisor Harrel's direction he did not believe Supervisor Harrel had a clear understanding of the situation and believed his directions were contrary to the safety and welfare of the residents of the Box area. The Appellant does not state as a reason for disobeying Supervisor Harrel's directive that he believed it was an unlawful order or that Supervisor Harrel did not have the authority to direct Appellant to the Bell area.

While Appellant does reference Supervisor Harrel's failure to follow the Northeast Fire Dispatch Plan in his Petition for Appeal, that reference is in the context of firefighters doing a known fire line job.² Although the overwhelming majority of Appellant's cross

¹ Also, undisputed evidence at this hearing established that at no time at the predetermination hearing conducted by the Appellee in March, 2006, did Appellant maintain that the directive of Supervisor Harrel was unlawful.

²Appellants Petition for Appeal reads: "Third, my supervisor failed to follow the Northeast Area Fire Dispatch Plan. My supervisor had moved a first line firefighter out of the Bell area, on that day, to do a non-fire line job. I was being asked to leave my post as a first line firefighter in the Box area to replace a first line firefighter who had been removed from the Bell area."

examination tried to establish that the Department failed to follow its own dispatch policy, there was absolutely no evidence presented that Appellant asserted that the dispatch order was unlawful at the time he received that order from Supervisor Harrel on December 2, 2005. The fact is that the Appellant has presented no evidence that he believed at the time he disregarded his supervisor's directive that the directive was improper. Appellant is clear in his Petition for Appeal why he disregarded the directive of his supervisor and none of those reasons include that Appellant believed that Supervisor Harrel did not have the authority to order him to the Bell area.

Regarding Appellant's argument that only the FFCO, Bob McCord, could order Appellant to a temporary dispatch point as stated in the Dispatch Plan, both Assistant Director Goeller and Director of the Forestry Division, John Burwell, testified that the FFCO is not the only person in the chain of command who can dispatch employees as necessary; rather, the FFCO is one of the individuals who has the authority to dispatch.

In addition, Supervisor Harrel had reassigned FRPS to different dispatch points in the past and those actions had never been questioned. Supervisor Harrel also remembered past instances where Appellant had been shifted to a temporary dispatch point on the order of Supervisor Harrell and Appellant had not questioned those directives.

Appellant also asserted at this hearing that the Department failed to follow its own progressive disciplinary policy by failing to review certain documentation prior to Appellant's suspension. Assistant Director Goeller did answer, while on cross examination by Appellant, that he did not review Appellant's performance/service evaluations or his previous work history. However, Assistant Director Goeller's testimony taken as a whole established that he did review policy as evidenced by his answer. Also on cross

examination, he testified that he knew insubordination could actually warrant termination but, that after reviewing the past work record of Appellant, he did not recommend termination.

Director Burwell also testified that before the predetermination hearing, he reviewed documentation from Supervisor Harrel (who was familiar with Appellant's attendance) Dispatch Office records, Assistant Supervisor Goeller's investigative file, and spoke directly with Supervisor Harrel and Assistant Director Goeller. Director Burwell had also reviewed Appellant's PMP in the past and did not feel the need to go back and look at those PMPs again.³

Director Burwell also reviewed policy and considered the circumstances as required by the Progressive Disciplinary Policy, as well as the Fire Dispatch Policy. Director Burwell further testified that the policy that employees must comply with a supervisor's directive must be honored and that the directive of Supervisor Harrel on December 2, 2005 was a lawful order.

On December 2, 2005, Appellant was given a directive from his supervisor which was clear and concise. The evidence presented at this hearing, including those of Appellant himself as set forth in his Petition for Appeal, shows that Appellant knew it was wrong to disregard the order of his supervisor. He disregarded the order because he believed Supervisor Harrel did not have a clear understanding of the situation and he believed the supervisor's direction was contrary to the safety and welfare of the residents of the Box area. As Appellee has pointed out, at no time prior to this hearing had

³It is readily acknowledged by both parties that Appellants' seventeen (17) years of service evaluations all show an overall performance that meet or exceeds standards.

Appellant raised the issue that he also believed the order of his supervisor was unlawful at the time it was given on December 2, 2005.

There is no question that the fire situation in Oklahoma on December 2, 2005 was critical and that the men and women of the Forestry Division were under enormous stress. There is also no question that the Appellant has been a good employee of the Department for seventeen (17) years and the undersigned believes Appellant when he states that his decision to disobey his supervisor's direction was a difficult decision. However, the fact remains that Appellant did disregard that directive.

Under these circumstances presented, the undersigned Administrative Law Judge finds that the Department followed its own progressive disciplinary policy and further finds that just cause existed for discipline of Appellant and that the discipline of one day suspension without pay was just.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above entitled cause.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. The burden of proof in this case was placed upon Appellee, as the appointing authority, pursuant to OAC 455:10-9-2 and Appellee has met its burden of proof.
4. OAC 455:10-11-14, Causes for Discharge, suspension without pay or involuntary demotions, states in pertinent part that an employee may be suspended without pay for insubordination.
5. Oklahoma Department of Agriculture, Food and Forestry Policy DP10.1 et seq., §

10.7.2, allows for suspension without pay for five days or less.

6. Oklahoma Department of Agriculture, Food and Forestry Policy DP 10.1 et seq., § 10.5.2 states causes for disciplinary action include misconduct, which includes but is not limited to, insubordination. Insubordination is thereafter defined as "the disregard of supervisory directives or refusal to comply with such directives, conducting evidencing disrespect, disdain, and/or contempt for Department Administrators, Supervisory Personnel, and/or other proper authorities".

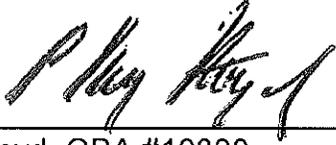
Appellee, the Oklahoma Department of Agriculture, Food and Forestry, has shown that just cause existed to discipline the Appellant when he disobeyed a direct order of his supervisor on December 2, 2005.

Appellee, the Oklahoma Department of Agriculture, Food and Forestry, has shown by a preponderance of the evidence that just cause existed for the suspension of the Appellant and that such discipline was proper. Furthermore, it is the conclusion of the undersigned that the suspension of Appellant did not constitute an abuse of discretion by Appellee under the facts and circumstances of this particular case.

ORDER

It is therefore **ORDERED, ADJUDGED and DECREED** by the undersigned Administrative Law Judge that the appeal of *Edward C. Henshaw v. Oklahoma Department of Agriculture, Food and Forestry*, MPC -06-138 **be denied**.

Dated this 4th day of December, 2006.

A handwritten signature in black ink, appearing to read "P. Kay Floyd". The signature is written in a cursive style with a large initial "P" and "K".

P. Kay Floyd, OBA #10300
Administrative Law Judge
Oklahoma Merit Protection Commission
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