BEFORE THE MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

ISSUED
AUG - 9 2007
OK MERIT PROTECTION COMM.
BY

MPC 07-076
Gary L. Spencer v. Office of Juvenile Affairs

ORDER

Hearing on this matter was held on April 13 and June 27, 2007 before the duly appointed, undersigned Administrative Law Judge at the Oklahoma Merit Protection Commission office in Oklahoma City, Oklahoma and the Central Oklahoma Juvenile Center in Tecumseh, Oklahoma. The second day of hearing was held at the Appellee's facility in Tecumseh, Oklahoma, by agreement of both parties.

Present at this hearing for Office of Juvenile Affairs (hereinafter "Appellee" or "OJA") was Assistant Attorney General Wayne Johnson and Table Representative Tamara Steele. Present was Appellant and his legal counsel, Melinda L. Alizadeh-Fard.

Appellant was a permanent, classified employee working as a Construction Maintenance Technician II at the time of his ten (10) day suspension without pay in December, 2006. Appellant was suspended for using profane language that was unacceptable in the workplace and for refusing to change the locks on a cottage at the L.E. Rader Center, Sand Springs, Oklahoma, (hereinafter the "Center") when directed to do so by an Administrator and by a Superintendent.

Whereupon the hearing began and the sworn testimony of witnesses for Appellee and Appellant was presented, along with exhibits, which are incorporated herein and made a part hereof. At the beginning of the hearing, the parties stipulated to the admissibility of Appellee's exhibits 1 through 28 which were admitted as joint exhibits. In addition, at the conclusion of the hearing, the parties agreed that the record would remain open to allow the parties to file written closing arguments.

After careful consideration of all evidence, testimony and exhibits, the undersigned Administrative Law Judge issues the following findings of facts, conclusions of law, and order.

FINDINGS OF FACT

On November 9, 2006 Perry Guthrie, a Youth Guidance Specialist at the Center, was present in the canteen area along with Appellant. Mr. Guthrie observed that Appellant seemed angry and upset that some of the Juvenile Specialists were not doing their jobs. The

Appellant used profane and obscene language to express his anger in an unprofessional and inappropriate way. Although Appellant has admitted his use of profanity, he maintains other employees have used profane language in the past in a much more offensive context and not been subject to the level of discipline that he received.

The second occurrence which resulted in the discipline of Appellant occurred on Friday, November 10, 2006 at the Center. On that date Deputy Superintendent LeAnne Saunders received a call from Ernest Lynch, Institutional Programs Supervisor, informing her that he (Lynch) had forgotten to have the locks changed on one of the units as directed to do so earlier in the week.[1]

Deputy Superintendent Saunders directed Supervisor Lynch to call the Administrator on Duty ("AOD") who, on that date, was Mike Hayden. The Administrator on Duty, or AOD, is the person who acts as Superintendent at the Rader Center when the actual Superintendent or Deputy Superintendent are not present. The name of the AOD is posted at the Center so that all employees know who the AOD is at all times. There is a weekly rotation schedule for the AOD and notice of who is serving as AOD is posted in two places including the campus control center.

Supervisor Lynch, as ordered by Deputy Superintendent Saunders, contacted AOD Hayden and told him that the keys to Friendship Unit had been lost the week before and he had been instructed to have the locks changed on the unit. AOD Hayden spoke with Deputy Superintendent Saunders to confirm that the locks needed to be changed.

AOD Hayden then called Appellant in the maintenance unit and instructed Appellant to change the locks on Friendship Unit. Appellant's response to AOD Hayden was that the job was not going to get "fucking done today" and if Deputy Superintendent Saunders had a "fucking problem" with that she could call him directly. Appellant also stated it would take a long time to change the locks and that he needed additional "key blanks". It is important to note however that at no time did Appellant question AOD Hayden's authority to give him the directive to change the locks. Although AOD Hayden talked to Appellant for a short period of time, Appellant did not change his mind.

At the conclusion of their telephone conversation, AOD Hayden called Deputy Superintendent Saunders explaining that Appellant was refusing to change the locks and was "being pretty fluent with the f word".

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[1] The Unit in question was the "Friendship Unit" which houses 20-24 adjudicated sex offenders.

Thereafter, Deputy Superintendent Saunders called Appellant and give him a direct order to change the locks on Friendship Unit. During the course of this telephone conversation, Appellant did not say anything to Deputy Superintendent Saunders about her lack of authority to order him to change the locks or about his need for a work order. He also did not argue that overtime would need to be authorized to compensate for the amount of time it would take for him to complete the job.

At approximately 6:00 p.m. that evening, Supervisor Lynch again contacted AOD Hayden and informed him that the locks on Friendship Unit had not been changed. At that time, AOD Hayden called Appellant who said the locks would not be changed and the job would not be completed until the following Monday, November 13, 2006. AOD Hayden then contacted Deputy Superintendent Saunders who contacted the Rader Center Superintendent, Jimmy Martin, telling him that Appellant had refused to change the locks on Friendship Unit. William Sharp, Appellant's immediate supervisor, was also contacted and Supervisor Sharp telephoned Appellant. Supervisor Sharp told Appellant that he was to return to the Center and change the locks on the Unit. Appellant told Supervisor Sharp that "it was not going to happen".

Sometime later that evening, Appellant contacted Superintendent Martin arguing with him about the need to change the locks and refusing to change them. At that time, Superintendent Martin ordered Appellant to return to the Center and change the locks. Appellant refused. Instead, Leroy Nichols, Construction Maintenance Technician II, was called to the Center where he proceeded to change the locks on Friendship Unit. The process of changing the locks took approximately four (4) hours.

Although Appellant did not testify at this hearing, his position as presented in the pleadings has been:

(1) the request to change the locks was made by an employee whom Appellant did not recognize as having the authority to make such a request, i.e., Appellant received a verbal request from an Administrator who he did not recognize as being authorized to make such a request;

(2) the request to change the locks was made on November 10, 2006, Veterans Day, at approximately 12:00 p.m. in the afternoon. Since it was a holiday and Appellant was going off duty at 3:00 p.m., there was insufficient time remaining for him to complete the task of changing the locks;

(3) Appellant was acting as the Rader Center locksmith and standard operating procedure required that he consult with Security and Administrative personnel before

changing locks. Such personnel were not available on November 10, 2006; and

(4) the keys to the locks in question had been reported lost the week before and changing the locks on November 10, 2006 was not an emergency situation.

The preponderance of the evidence presented at this hearing does not support Appellant's position that he was unaware and/or did not recognize the authority of AOD Hayden to issue a directive to change the locks on November 10, 2006. However, even if Appellant was unaware of AOD Hayden's standing to issue such an order, there is no assertion that Supervisor Sharp, Deputy Superintendent Saunders and Superintendent Martin lacked the authority to order Appellant to change the locks. In addition, AOD Hayden, Deputy Superintendent Saunders and Superintendent Martin all testified that at no time during their conversations with Appellant, did he question their authority to give him the directive to change the locks, state his need for a work order, or request authorization for overtime to complete the job.

It is evident that Appellant's position that there was not enough time to change the locks is more truthful and accurate; Appellant simply did not want to work late on a holiday. He was told to change the locks, he was scheduled to leave the Rader Center at 3:00 p.m,. and changing the locks would have require 4 to 6 hours.

Further, the evidence does not support Appellant's position that his failure to change the locks was because he was unable to follow standard operating procedure due to the lack of Security and Administrative personnel.

Lastly, Appellant has argued that the administration was aware of the need to change the locks on November 2, 2006, and therefore the changing of the locks on November 10, 2006, one week later, was not an emergency situation.

Testimony given at this hearing shows that the following happened between November 2 and November 10, 2006:

On November 2, 2006 Willie Mae Solomon, OIGS III, came into work at the Rader Center and found that the keys for the Friendship Unit were missing. After following proper procedure, Ms. Solomon was made aware that a former employee, Ms. Dickson, was thought to have the keys. Since the keys were thought to be in Ms. Dickson's possession, no search of Friendship Unit was ordered.

Supervisor Lynch testified that he reported to work on Friday November 4, 2006 and tried, or had others try, to contact Ms. Dickson on Saturday and on Sunday. Since

Ms. Dickson was considered a disgruntled employee, Supervisor Lynch reasoned that she would get over her anger and bring the keys back on Monday. Sherlene Lambert, a Police Officer at the Rader Center, was told to contact Ms. Dickson and retrieve the keys. Officer Lambert was unable to locate Ms. Dickson and thereafter turned in a report to Supervisor Lynch that the keys were missing.

On the following Monday or Wednesday (Supervisor Lynch could not remember specifically), Supervisor Lynch called AOD Hayden and was told to contact maintenance and get the locks changed because there was a holiday coming (Veterans Day) and there would be family members visiting the Center. Supervisor Lynch failed to immediately carry out the order and later forgot to have the locks changed.

On the following Friday, November 10, 2006 Supervisor Lynch realized that he had forgotten to carry out the order and called AOD Hayden around 10:00 a.m. Supervisor Lynch was again told to have the locks changed on the Unit. [2] Supervisor Lynch then contacted Appellant.

Although Appellant has tried to distinguish this situation as a non-emergency situation, the issue is not whether or not this was an emergency situation. The issue is whether or not Appellant knowingly and intentionally disregarded a directive from not one, not two, but three supervisors. He did.

Lastly, Appellant maintains that a 10 day Suspension Without Pay is excessive. There was no evidence or testimony introduced of any other employee who has been disciplined for both the use of profanity and failure to follow the directive of a supervisor. The undersigned does not find that a 10 day Suspension Without Pay, given the facts and circumstances of this case, is excessive.

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

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[2] As a result of Supervisor Lynch s' failure to immediately have the locks changed, he received a written reprimand for his failure to follow the directive of AOD Hayden.

as a conclusion of law.

3. The burden of proof in this matter was on Appellee as the appointing authority according to Merit Rule 455:10-9-2 and Appellee has met its burden of proof.

4 OJA Policy P-03-05-801 states in part that employees whose conduct falls within the category of unsatisfactory performance are subject to progressive discipline and defines unsatisfactory performance as performance which fails to meet established criteria and standards for the position for which the employee is assigned. Unsatisfactory performance includes inefficiency and/or error and may result from willful failure to properly perform.

5. OJA Policy P-03-05-801(2)(D) states that employees whose conduct falls within the category of willful disobedience are subject to progressive discipline. Willful disobedience is the intentional disregard of supervisory directives or willful refusal to comply with such directives.

6. OJA Policy P-03-05-801(2)(E) states that employees whose conducts falls within the category of misconduct/insubordination are subject to progressive discipline. Insubordination, as distinguished from willful disobedience, means a general course of conduct evidencing disrespect, disdain, and/or contempt for administrators, supervisory personnel or other proper authorities.

7. OJA Policy P-03-05-801(2)(J) states that employees whose conduct falls within the category of neglect of duty are subject to progressive discipline. Neglect of duty is defined as including, but not limited to, absence from a proper duty station without authorization, inexcusable failure to perform an assigned duty, or inexcusable inattention to assigned duties.

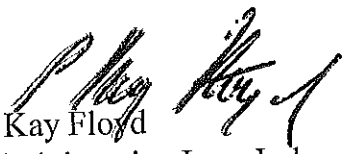
8. OJA Policy P-03-05-80(2)(K) states that employees whose conduct falls within the category of conduct unbecoming a public employee are subject to progressive discipline. Conduct unbecoming a public employee includes any failure of an employee of good behavior either during or outside duty hours, which is of such a nature that is causes discredit to the agency or his/her employer.

Appellee has shown by a preponderance of the evidence at this hearing that just cause exists for discipline of Appellant for the use of profane/obscene language and for refusing to change the locks at the Friendship Unit as directed. Appellee has shown by a preponderance of the evidence 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 case.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Jude that the appeal of Gary L. Spencer v. Office of Juvenile Affairs, MPC 07-076, be **DENIED**.



P. Kay Floyd
Administrative Law Judge
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