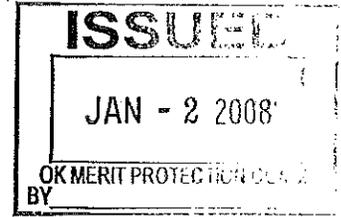


BEFORE THE MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

MPC 08-028
Tommie Ray Starnes v. Department of Corrections



FINAL ORDER

Hearing on this matter was held November 28, 2007, before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. Present at this hearing was Appellant, who was represented by attorney, Melvin Hall. Present for the Department of Corrections (hereinafter "Appellee" or "DOC") was Assistant General Counsel Gary Elliott. Also present for Appellee was Table Representative Johnny Blevins.

Appellant had been hired as a Probation and Parole Officer I in August, 2002 and two years later received a career progressive promotion to Probation and Parole Officer II. In September, 2006, Appellant received a career progression promotion to Probation and Parole Officer III but voluntarily demoted to an Internal Affairs Special Investigator II on May 21, 2007.

In June, 2007, a review of Appellant's stated owned computer which he used while employed as a Probation and Parole Officer produced evidence of pornography on his computer in violation of DOC Operations Procedure. Thereafter, Appellant was terminated for misconduct on July 31, 2007.

Whereupon the hearing began and the sworn testimony of witnesses for Appellee and Appellant was presented, along with exhibits, which were admitted and are incorporated herein and made a part hereof. Appellee's exhibits 1 through 19 were admitted at the beginning of the hearing without objection. The Appellant's exhibits 1 through 5, 7 through 10, and 15 through 19 were admitted throughout the course of the hearing.

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

FINDINGS OF FACT

In early May, 2007, Appellant approached his team supervisor, Brad Brogdon and told him he was considering accepting a position with the Internal Affairs Division of Department of Corrections.

Supervisor Brogdon supported the Appellant's decision and after Appellant left the Probation and Parole Division, Supervisor Brogdon followed standard operating procedure by conducting a one hundred percent case note review/audit of the Appellant's case load.¹

During the course of the review/audit, Supervisor Brogdon found several cases needing immediate attention where offenders had absconded and there were no reports on those offenders. The case work was behind and one case was missing a violation report which Supervisor Brogdon had ordered Appellant to do months before.

In response to the condition of Appellant's case load when he left his position as Probation and Parole Officer III, a Letter of Reprimand was issued to Appellant dated May 15, 2007. Appellant, as was his right, responded to the May 15, 2007 Letter of Reprimand objecting to the Letter and disputing Supervisor Brogdon's position.

In June, 2007, Supervisor Brogdon, in an attempt to prove that he had sent e-mails to the Appellant with instructions to correct his case work and in direct response to Appellant's challenge to his Letter of Reprimand, began an examination of the Appellant's state owned computer which was used while Appellant was a Probation and Parole Officer.

During the course of the review of the computer, Supervisor Brogdon found e-mails that Supervisor Brogdon had sent to Appellant with instructions to correct his case load and case work. Supervisor Brogdon also found personal e-mails that Appellant had sent and/or received from Ebay, E-pal, and other websites. Supervisor Brogdon also found numerous pornographic photos on the Appellant's computer.

Thereafter, Supervisor Brogdon went to his supervisor, Robert Gwin, and was instructed to have a complete review of all the data and information on the Appellant's computer conducted. Holly Ivie, Information Systems Manager, was then called and told to conduct a complete review of the Appellant's computer.

Ms. Ivie utilized a computer program used specifically for reviewing computers of sex offenders which detects sexual information on computer hardware and software. As a result of using this disk to scan

¹ It is uncontroverted that in the springtime of 2007 Mike Dunkle, District Supervisor for the Southeast District, ordered that a one hundred percent case note review/audit was to be conducted when an employee left his/her position in the Southeast District. This policy went into effect before Appellant decided to leave his position in the Probation and Parole division.

the Appellant's computer, Ms. Ivie found explicit, hardcore, pornographic pictures on the computer. In addition, there were pictures and e-mails dealing with Appellant's personal business which he was allowed to conduct only during his off duty hours.

After reviewing the material on the computer, Ms. Ivie contacted Supervisor Dunkle who, after reviewing the material, called the Legal Department and Johnny Blevins, Administrator, Internal Affairs. At the conclusion of the investigation, Appellant was terminated on July 31, 2007 for the misuse or abuse of department computer systems for tasks of a personal nature, violation of Department of Corrections OneNet/Internet standards, and violation of DOC Operating Procedure 110215.

At this hearing, Department of Corrections General Counsel Mike Oakley testified as to the Department of Corrections' policies, practice and procedures regarding unacceptable uses of state owned computers. Mr. Oakley also testified as to previous discipline of other DOC employees for violation of department policy regarding the misuse or abuse of department computer systems.

Of the similar situations occurring at DOC in the last few years, there was no evidence presented that any employees' violation of the department's policy regarding use of a state owned computer was as extreme as the abuse and misuse of the Appellant in this case. In addition, most of the cases submitted by Appellant in support of his position that he was treated differently than other employees were cases which had resulted in the employee resigning from employment in lieu of termination.

The last witness for the Appellee, Administrator Blevins, testified that he had personally recruited Appellant to come to work for him at Internal Affairs in the end of April or the first of May of 2007. Administrator Blevins was made aware of the Letter of Reprimand issued to the Appellant by Supervisor Brogdon in May but still wanted Appellant to work for him in the Internal Affairs division.

Then in June, 2007 Administrator Blevins was told about the pornographic material on the Appellant's computer. Administrator Blevins reviewed the material found on Appellants' computer which consisted of 35 pornographic photos, personal e-mails, the Turbo Tax program and various e-mails regarding Appellant's second business. Administrator Blevins also reviewed other similar cases of DOC employees and then called Appellant into his office.

After reviewing the material on the computer with the Appellant, Appellant did not deny that the material was on his computer but disagreed that he should be terminated from his employment. Appellants' employment was, however, terminated.

Appellant, testifying in this hearing, did not dispute the timeline of events given by Appellee's witnesses beginning with Johnny Blevins contacting the Appellant about working for him in Internal Affairs up until, and including the time of, his termination on July 31, 2007. Appellant does claim however that his response letter to the Letter of Reprimand in May was prompted by advise from Administrator Blevins rather than his own decision. While there is dispute between Administrator Blevins and Appellant as to Administrator Blevins' involvement, the relevance of the issue is minor.

What is relevant is that Appellant had, undisputedly, hardcore pornography on his state owned computer in violation of DOC operational procedures.

Appellant's explanation of how the pornography got on his computer is that it was "mistakenly" downloaded onto the computer. This explanation is simply not plausible given the sheer volume of pictures and materials on Appellants' computer. Specifically, Appellee found:

35 photos of a sexual nature; copies of personal e-mails sent from the Appellant listing a signature block of "Tommy Starnes, agent, International Horse Vet, LLC"; 36 photos of horses and/or horse barns pulled from internet files; documentation from Turbo Tax on line was utilized for personal usage from a state computer; documentation of Ebay being accessed from a state computer; documentation of Fantasy Football e-mails from a state computer; documentation of dating and/or personal websites being visited from a state computer; and documentation of inappropriate e-mails from a state computer with one including an inappropriate image of female genitalia sent through My Space profile.²

Under the facts and circumstances presented, the undersigned Administrative Law Judge finds that just cause existed for the discharge of Appellant.

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.

² See the July 31, 2007 Letter of Termination which was marked and entered as Appellees' Exhibit 5

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. DOC Policy OP-021001, Department of Corrections OneNet/Internet Standards states in pertinent part:

“II Employee Use

Misuse or abuse of department computer systems for tasks of a personal nature is prohibited.

“III Information Exchange

B. Unacceptable uses (includes, but are not limited to)

2. Use for any for-profit activities unless specific to the charter, mission, or duties of the DOC.
3. Use for purposes not directly related to the mission, charter, or work tasks of DOC during normal business hours.
4. Use for private business, including commercial advertising.
5. Use for access and/or distribution of indecent or obscene material.
6. Use of the Internet to access websites containing visual representations that contain actual or simulated sexual activity to include intercourse, sodomy (oral or anal), bestiality, sadomasochism, and child pornography is strictly prohibited.

5. DOC policy OP-110215, Rules Concerning Individual Conduct of Employees states in pertinent part:

“II Duties and Responsibilities

A. Compliance

1. Laws/rules/regulations/policies/procedures/directives/orders

Employees will comply with all laws, rules, and regulations which apply to any aspect of their job duties, responsibilities, or state employment.

Employees will comply with departmental policies or procedures contained in policy statements, operations memoranda, administrative memoranda, field memoranda, or other written or verbal directives including the lawful orders or directives of department supervisors and managers.

III. Other prohibited conduct

B. Misuse of state property, equipment, funds

2. Employees are responsible for complying with the guidelines for appropriate OneNet/Internet usage established in OP-021001 entitled “Department of Corrections OneNet/Internet Standards”. Employees who exhibit a pattern of behavior in violation of Section III B, item 6 of OP-021001 entitled “Department of Corrections OneNet/Internet Solutions” will be terminated.

6. Appellee, Oklahoma Department of Corrections has shown just cause existed for the discipline of Appellant for violation of DOC policy OP-021001 and policy OP-110215.

Appellee, the Department of Corrections has shown by a preponderance of the evidence that just cause existed for the discharge of the Appellant and that such discharge was proper. Furthermore, it is the conclusion of the undersigned that the discharge of the 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 Judge that the appeal of Tommy R. Starnes v. Department of Corrections, MPC 08-028, be **DENIED**.



P. Kay Floyd OBA # 10300
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