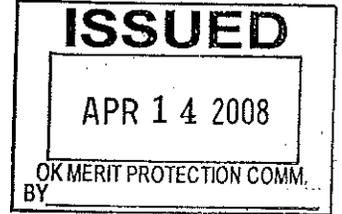


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

DARCY L. TISDALE,)
)
 Appellant,)
)
 v.)
)
 OKLAHOMA DEPARTMENT OF)
 TRANSPORTATION,)
)
 Appellee.)

Case No. MPC 08-040



FINAL ORDER

This matter comes on for hearing on March 28 and 31, 2008 before the undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Darcy L. Tisdale (hereinafter "Tisdale"), appears by and through her attorney, Daniel J. Gamino. The Appellee, Oklahoma Department of Transportation (hereinafter "ODOT"), appears by and through counsel, Tamar Graham Scott. Also present for Appellee was Table Representative, Karen Wallis.

Appellant Tisdale is a permanent, classified employee of ODOT. She is appealing an adverse disciplinary action of a two-day suspension without pay. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the parties offered Joint Exhibits 3 through 8, 10, 16, 24 through 26, 29, 35, 38 through 40, 45, 47 and 48, and they were admitted into the record. Accordingly, all exhibits presented and admitted are incorporated herein and made a part hereof.

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 Tisdale was a classified employee of ODOT, employed as an Administrative Assistant II. As a result of several alleged incidents occurring on May 18, 2007, May 30, 2007,

June 4, 2007 and August 14, 2007, Tisdale's supervisor, Patricia Liscom, proposed disciplinary action be taken against Tisdale in the form of a five-day suspension with pay. Tisdale was provided notice of the proposed action on August 17, 2007. The stated cause for this proposed disciplinary action was "inefficiency, inability to perform the duties of the position for which she was employed". (Exhibit 8). Pursuant to ODOT policy, a pre-disciplinary hearing was scheduled and was held on August 29, 2007. ODOT supervisor and engineer, Siv Sundaram, conducted the hearing. (Exhibit 5). Sundaram found that the level of discipline proposed by ODOT was too high considering the fact that the Department had not followed the PMP process as well as it should have. (Exhibit 4). She reduced the level of discipline to a two-day suspension without pay. On September 5, 2007, ODOT provided Tisdale with final notice of the disciplinary action. (Exhibit 3). The notice indicated a two-day suspension without pay would be imposed for continuing inefficiency and inability to perform the duties of the position. Documents supporting the action were attached to notice. Tisdale appealed and this proceeding was held.

The Testimony

Brian Kirtley was called as the first witness. Kirtley is a Human Resources Manager at the ODOT. He testified that Patricia Liscom and Karen Wallis had consulted him approximately 5-7 times about Tisdale and he had guided them through the disciplinary process. He said ODOT provided pre-disciplinary hearings for suspensions without pay even though it is not required by the Merit Rules. He stated that the hearing was designed so that "fresh eyes" would review the facts supporting a disciplinary action. Kirtley testified that he noticed that at least one PMP was not done at the time of the proposed discipline but that he did not feel that it would preclude the proposed action. He stated that he did not act as a mediator, but advised the supervisors not the employees.

Siv Sundaram is an assistant engineer for ODOT and acts as a disciplinary hearing officer. She testified that she was the hearing officer at Tisdale's pre-disciplinary hearing. She stated that she reviewed Tisdale's previous employment history, including her PMPs and the documents attached to the notice. She stated that the transcript was an accurate reflection of the hearing. Sundaram testified that she was concerned that the latest PMP was not done and that also the 2004 PMP was not done. Although it was not stated in her decision, she stated that she

did not consider the May 30, 2007 purchase order mistakes because there was evidence that the errors could have been caused by the mail room.

Patricia Liscom is Tisdale's immediate supervisor. She testified that she is an Administrative Programs Officer II in charge of the purchasing division. She supervises Tisdale and one buyer. She testified that Tisdale was disciplined for not meeting deadlines, which had created a log-jam in filing. She stated that she was skeptical about Tisdale's disabilities and never considered her medical issues to be a factor. She stated that Tisdale never asked for an accommodation in meeting her deadlines. She admitted that the time limits listed on Tisdale's PMP were different because the standard had been changed. She also admitted that she had not conducted an opening, mid-year or closing period evaluation of Tisdale prior to imposing this discipline. Liscom stated that she had daily visits with Tisdale to inquire about her work load. Although she denied disliking Tisdale or being biased against her, Liscom was openly hostile at times during her testimony. She testified as to the events giving rise to this disciplinary action. She further admitted that the memos attached to the disciplinary action notice were never given to Tisdale. She could not recollect ever making fun of Tisdale's medical conditions or making disparaging remarks to other employees. She denied playing a phone message for other employees regarding Tisdale's hospitalization.

Liscom testified regarding each of the four dates upon which this action is based. On May 18, 2007 she testified that Tisdale was behind on her work and was not meeting her deadlines. As a result, she ordered Tisdale to work in her office where Liscom could watch her. She stated that Tisdale was able to get caught up in three days, and returned to her own office. On May 30, 2007, she testified that she received an e-mail from ODOT Division 5, indicating that they had received misdirected Purchase Orders. The e-mail stated that it could have been a mail room mistake. Liscom stated that she believed it was Tisdale's mistake, but had no actual evidence to support that belief. Liscom testified that on June 4, 2007, Tisdale's blood pressure became very low and she left work in the afternoon to go to the hospital. After Tisdale left, Liscom went through Tisdale's desk and located work that she believed was not timely completed. She listed this work in a memo, which was not discussed with Tisdale upon her return to work. Tisdale was hospitalized and off work for several days. On August 14, 2007, Liscom testified that she found 45 purchase orders "hidden" in Tisdale's desk. She stated that these orders were not disclosed by Tisdale. Although the notice of proposed discipline listed

several incidents in 2005, those events were offered for “historical” perspective of previous performance problems only.

Stephanie Bruner is a temporary employee in the purchasing department at ODOT. She testified that she answers the telephone, logs in orders, and makes 2 delivery and mail runs per day. While she does the run, Tisdale acts as her back-up, answering the telephones. She testified that May and June were the last two months of the fiscal year, and the work load was significantly higher during that time because many divisions were trying to get orders out before the end of the year on June 30.

Samuel Mathukutty is an acquisition agent for ODOT, working for Karen Wallis. He testified that he occasionally has a delay in finding purchase order files because of a back-log in Tisdale’s area. Mathukutty stated that everything relating to a particular purchase is in those files. He further testified that Tisdale always assists him when he is seeking a file. He stated that he has never filed a complaint about this issue. He characterized Tisdale as “somewhat professional” because of her many absences.

Brian Davis is also an acquisition agent for ODOT, and is Patricia Liscom’s other employee. He primarily does fuel bids. He testified that sometimes he couldn’t find the files and that sometimes they weren’t filed. He was aware that Liscom had moved Tisdale into her office in order for her to get caught up. He stated that Tisdale is always helpful to him.

Kathy Hellum is a former ODOT employee, who was Tisdale’s previous supervisor from January to July, 2005. She testified regarding Tisdale’s performance issues in 2005, but admitted that she gave her a “meets standards” rating on her PMP and did not address those issues on the PMP. (Exhibit 16).

Karen Wallis is the ODOT purchasing manager. She was moved to head up this area in 2004 because of significant problems in purchasing. She stated that the problems were apparent and began a restructuring of the division to try to balance the workload. All areas were very behind and she set up specific time frame standards. She testified that things were getting better and that Tisdale’s timeliness was periodic, but Tisdale never requested an accommodation. She testified that Tisdale has had four different supervisors since 2004. She stated that Liscom had been Tisdale’s supervisor since August of 2006. Wallis testified that she noticed the work piling up, although she believed it would take less than 5 minutes to process a file. Based upon that, she did not believe that there was a reason why Tisdale couldn’t stay caught up. She said that

Tisdale was "overly helpful" with others instead of doing her own work. She testified that most of the time, Tisdale greatly exceeded the 3 day time standard for processing files. She testified that she had numerous undocumented counseling sessions with Tisdale regarding the need to stay caught up. Wallis denies telling other employees to watch Tisdale or to "listen for a pill bottle opening" and stated that she wanted Tisdale to succeed and be a better employee. She stated that she believed that Tisdale was "unwilling" to improve her performance and stay caught up, rather than her being "unable" to do so.

Gordon Johnson, a former ODOT supervisor, testified that Wallis approached him and asked for advice on how to handle Tisdale's performance problems. He stated that he advised her to "follow the procedure, follow the Merit Rules". He stated that Wallis expressed concern over Tisdale's health.

Patricia Foy is an ODOT contracting agent and a co-worker of Tisdale's. She stated that she sits in the cubicle across from Tisdale. She further stated that Tisdale is always very helpful and courteous. She testified that around June 4, 2007, Liscom played a message on her voice mail for Foy. The message was from Tisdale's mother stating that Tisdale was in the hospital and would be out for several days. Foy testified that Liscom stated that it sounded "rehearsed". Foy took this to mean that Liscom did not believe that Tisdale was ill or in the hospital. She stated that the voicemail message and Liscom's comment were loud enough for others to hear. Foy further testified that Wallis asked her to "watch" Tisdale, to "listen for pill bottles opening", to note when Tisdale took medication and to note "abnormal" behavior. Foy testified that she was very uncomfortable and didn't want to be involved in this. She stated that Liscom would frequently ask her how Tisdale looked or how she was doing. Foy also testified that at the end of the fiscal year, the work load almost triples. She stated that all of this work from 4 different buyers goes to Tisdale to process. She stated that this is a very stressful time for everyone. She said that the pressure from Liscom made it more stressful for Tisdale. She noted that she had observed Tisdale leaning on or against a file cabinet as if she were exhausted. She said that at other times, Tisdale would appear exhausted or distracted but never disoriented.

Susan Goff is an accountant at ODOT. She works with Tisdale on occasion and she is always helpful. She stated that in May, 2007 she found Tisdale crying and upset and stopped in the snack bar area to comfort her. She noticed Wallis watching them. Wallis went to her car and

continued to sit and watch them. She stated that she had no knowledge of Tisdale's performance or job duties.

Terry Green Wade is an ODOT employee who is acquainted with Tisdale but does not work directly with her. She testified that she overheard Liscom talking to Brian Davis about Tisdale. She heard her remark about Tisdale's absences and lack of leave, and that she was behind.

Sylvia Petrey was Tisdale's supervisor from 2001 to 2004. She testified that Tisdale was honest and had integrity. She said that she coached Tisdale and that she was always willing to work hard and listen to suggestions. She admitted that Tisdale had some problems with productivity, but that many of her performance problems were due to absences as a result of health problems. This absentee problem was noted on her PMPs from 2001 to 2004, although the last PMP indicated that she met standards in that area. (Exhibits 24, 25, 26). She admitted that Tisdale's 02-03 and 03-04 PMPs were both completed in November of 2004 in order to "catch-up" before she left.

Tisdale testified that she was hired in 1998, as a person with "severe disabilities". She stated that she has had numerous surgeries, including back surgery in 1998, neck and carpal tunnel surgery in 2001 and 2002, another back surgery in 2007. She testified that she has had at least 4 different supervisors since 2004, and each had a different style and different standards, which was stressful. She stated that she loved her job and her co-workers and tries to help and have a good attitude. Tisdale testified that the workload dramatically increased in April of 2007 in anticipation of the fiscal year end. Tisdale testified that on May 18, 2007, she was called in to Wallis' office and told that she was behind and to move into Liscom's office to get caught up. She stated that she became upset and began crying because she perceived this as a hostile, public discipline. Everyone in the office was aware of the situation. She stated that she was told to straighten her desk and prepare to move by 5 pm. She was then told by Wallis to leave the building, and was escorted downstairs by Wallis. She testified that she was crying and Wallis watched her until she left the parking lot. She stated that Wallis and Liscom frequently asked her about her health and the medications she was taking. Tisdale testified that her medications never affected her ability to do her job and that she was never "disoriented" at work. Tisdale testified that on Friday, June 1, 2007, she began to feel ill at work. She took her blood pressure three times that afternoon, and each time, it was dangerously low. Wallis and Liscom acted as if they

did not believe her. After speaking with her doctor's office, Tisdale went to the Emergency room and was thereafter admitted to the hospital. Her mother called Liscom on Monday and left a message that she was hospitalized and would be out for several days. She stated that Liscom never showed her the June 4 memo or discussed the work that was on her desk while she was ill. On August 14, 2007, she went to relieve Bruner while she went on her mail run and break. She stated that she locked her purse in a file cabinet for safe-keeping. While she was away from her desk, apparently Liscom went through the cabinets and removed orders and work. Liscom never asked her about those orders and never showed her the work that she allegedly had found "hidden" in her desk. Liscom did not furnish the PO numbers or vendors to support that this work was not done, and she had no opportunity to refute the allegations. Tisdale described her work progress and the manner in which she processed files. She frequently "stacked" paperwork to keep it organized and denied that this resulted in work not being done.

Tisdale admitted that she never asked for accommodation regarding getting her work done, and admitted that on the dates in question, her work was not completed within the specified time standard. She testified that she advised Wallis and Liscom at times that she was "swamped". Tisdale denied that her disability or health issues hampered her ability to perform her job.

On rebuttal, Liscom testified that on August 14, 2007, she pried open Tisdale's locked file cabinet without her knowledge and found the 45 purchase orders there. She admitted that the orders were not really "hidden" as she stated in the specifics of cause attached to the disciplinary action. She stated that she had a "premonition" that Tisdale was behind. Liscom was unable to provide any details on these purchase orders, such as dates, vendors or numbers. She stated that they needed to have folders made and to be filed, which she did herself. Liscom didn't recall playing the voice mail, but admitted that she may have stated that it sounded "rehearsed". Liscom was again an openly hostile witness. Liscom's ability to be an effective supervisor to Tisdale is in question given her attitude and actions.

Wallis testified that when Liscom brought her the 45 orders on August 14 that they were already in folders. She did not examine them to see the dates, numbers or vendors involved. She admitted that she may have asked Foy to watch Tisdale and to note when she took medications, but stated that she did so only out of concern for Tisdale.

ISSUES

1. Did the actions of Appellant, Darcy Tisdale, constitute inefficiency or inability to perform the duties of her job?
2. If so, was the discipline imposed just and appropriate under the circumstances pursuant to the statutes, policies and procedures?

DISCUSSION

The preponderance of the evidence and Tisdale's own testimony is that she has difficulties meeting the time standards set for performing her duties. However, there is a discrepancy as to exactly what that standard is. The PMPs seem to reflect a different standard from that which Tisdale was being held to. The testimony was that the standard for some tasks was reduced from three working days to 24 hours, however, ODOT failed to modify the PMP accountabilities to indicate this new standard. ODOT argues that even at three days, Tisdale was failing to complete her work within that time frame. The extent to which this occurred is at issue, and ODOT was unable to quantify the full extent of the backlog as the documentation and memories of the witnesses were somewhat vague. However, it is admitted that, at times, the time standard was not met. The question is whether or not this behavior constituted inefficiency or inability to perform the duties of one's job.

According to the Specifics of Cause, on May 18, 2007, disciplinary action in the form of moving her into Liscom's office was imposed. There were no details provided of the backlog and it appears that moving Tisdale was considered to be a disciplinary action. Therefore, no further discipline is appropriate for that behavior. Sundaram testified that the errors on May 30, 2007 were not considered because it was unclear if the error was Tisdale's or the mail room. I concur and no discipline is appropriate for that behavior.

On June 1, 2007 Tisdale became ill and left work. On June 4, 2007, Liscom did document the work that was not performed according to the standard. Tisdale did not deny those allegations. On August 14, 2007, Liscom pried Tisdale's cabinet open and removed certain purchase orders. There is no evidence as to the dates of those orders or to support that they were not completed within the time standards.

Based upon the evidence presented at the hearing, only one of the dates, June 4, 2007, has been supported by the preponderance of the evidence. Tisdale's failure to complete her assigned job duties in the time prescribed does constitute inefficiency, but there is insufficient evidence that there is an inability to perform her job. Regarding the appropriateness of the discipline, it is clear that discipline is designed to correct work performance or behavior. See OAC 455:10-11-3. If it was ODOT's intention to correct Tisdale's performance problems, as Wallis and Liscom testified, there should have been an ongoing, documented process. This is especially true in light of the testimony that Tisdale's performance deficiencies were periodic.

There is substantial evidence that the Appellee did not utilize the performance evaluation process as required by 74 O.S Section 840-4.17. Tisdale's PMPs for July 1, 2002 to June 30, 2003 and for July 1, 2003 to June 30, 2004 were not completed until November of 2004. (Exhibits 24 and 25). Her PMP for July 1, 2004 to June 30, 2005 was not completed until August of 2006 with a "meets standards" rating. (Exhibit 16). Tisdale's performance problems were not addressed in that PMP, and in fact, Tisdale was praised for being up to date and for being helpful to others. Tisdale's PMPs were inconsistent to say the least. There is also no evidence that Tisdale's PMPs were properly opened or that mid-year reviews were ever conducted. This performance rating process is designed to establish a dialogue between the supervisor and the employee so that expectations, by way of accountabilities and behaviors, are discussed and understood. This evaluation is a fundamental step in addressing performance related problems. While the undersigned has ruled that failure of the agency to perform the evaluations is not an absolute bar to imposing disciplinary actions, it is certainly a substantial mitigating circumstance. In this case, ODOT has completely failed in its responsibility to address performance deficiencies through the established process. This is exactly the type of performance problems that the evaluation process is designed to address. Tisdale's frequent turnover of supervisors and inconsistent standards appear to contribute to the problem.

Another significant mitigating circumstance is that the backlog seems to occur at the end of the fiscal year and several witnesses testified as to the increased workload at that time of year. Also, the events of June 4 occurred after Tisdale became ill and was hospitalized. These mitigating circumstances do not appear to be considered by the supervisors. In fact, it was clear that Liscom was openly skeptical of Tisdale's health problems.

The undersigned has considered the facts and circumstances of this case and the testimony of the witnesses. It does not appear that any amount of suspension without pay is just and appropriate under the circumstances. Given the totality of the circumstances, the discipline of suspension without pay is not justified for the events that occurred on June 1-4, 2007. Therefore, a reduction of the discipline is appropriate. 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 the progressive discipline policy. Given the mitigating circumstances set out herein, a letter of reprimand seems to be an appropriate and just discipline.

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 states that the Appellee ODOT 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. 74 O.S. §840-6.5 and Merit Rule 455:10-11-14 states that a permanent classified employee may be suspended with pay for the reasons of 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. Merit Rule 455:10-11-11 states that a written reprimand may be given to correct violations regarding work performance.
6. The preponderance of the evidence shows that Tisdale's failure to meet the time standards prescribed for her duties resulted in "inefficiency".
7. Appellee, ODOT, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Tisdale for her failure to meet the time standards prescribed for her duties on June 1, as documented on June 4, 2007 and her appeal on that ground is denied.

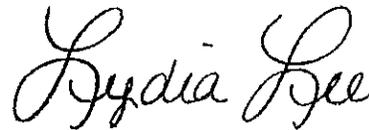
8. Appellee, ODOT, has failed to meet its burden to prove, by a preponderance of the evidence, that the behavior of Appellant Tisdale constituted "inability to perform the duties" of her job and her appeal on that ground is sustained.

9. Appellee, ODOT, 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 mitigating circumstances. The discipline imposed is unduly harsh and unfair given the totality of the evidence, and formal discipline in the form of a 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 Darcy Tisdale, MPC 08-040 be **SUSTAINED IN PART**. The discipline imposed upon Appellant is reduced to a Letter of Reprimand consistent with this Order. Appellant is to receive any pay and benefits withheld as a result of the suspension without pay. Appellant's personnel records are to be expunged of all records except those consistent with this Order.

This Order entered this 10th day of April, 2008.



Lydia Lee
Administrative Law Judge

