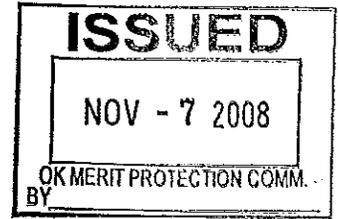


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

DANNY PICKETT,)
Appellant,)
)
v.)
)
DEPARTMENT OF CORRECTIONS,)
Appellee.)

Case No. MPC 08-127



FINAL ORDER

This matter comes on for evidentiary hearing on September 10, 2008 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Danny Pickett, appears personally, and by and through his attorney, Sue Wycoff. The Appellee, Department of Corrections, appears by and through counsel, Michelle Minietta and Legal Intern Larry Foster. Also present for Appellee was Table Representative, Karen White.

Appellant Pickett is a permanent, classified state employee appealing an adverse disciplinary action of suspension without pay for seven (7) days. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the Exhibits, the parties offered Joint Exhibits 1 through 9, found at Part I, Tab A and they were admitted. Appellee offered Exhibits 6 through 11, 13 through 21, and 55 all found at Part II, Tab D and Exhibits 23 through 50 found at Part II, Tab E and they were admitted without objection. Appellant offered Exhibits 7 through 11, 14, 16 and 19 all found at Part I, Tab B and Exhibits 6, 12, 17, 18 and 21 found at Part I, Tab C and they were admitted without objection. Following the evidentiary hearing, the parties were given the opportunity to submit written summations. Written summations were filed by each party and were received by the undersigned on October 23, 2008.

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 Danny Pickett (hereinafter "Pickett") is a classified employee of the Appellee Department of Corrections (hereinafter "DOC"). Pickett is a Probation and Parole Officer with DOC. Pickett was initially given a Letter of Concern on October 28, 2005, identifying a number of cases or files which needed action or attention (Tab D, Exhibit 13). 32 offenders lacked home visits, 53 lacked initial classification, 27 lacked reassessment and 2 lacked criminal arrest reports. In addition, 47 were identified as potential "absconders" or missing offenders who needed contact from Pickett or needed locator attempts or violation reports. 19 offenders were identified for termination of supervision and 11 to be moved to an Administration caseload. On September 2, 2006, Pickett was given a Plan of Action Letter to remedy the delinquency (Tab D, Exhibit 14). The Plan of Action identified 70 cases which needed contact or a violation report and 31 assessments were due or past due. The Plan of Action contained Pickett's agreement to attempt to take remedial action by December 1, 2006. On December 20, 2006, 15 files were identified as remaining delinquent from the 2005 Letter of Concern and Pickett was instructed to bring those files into compliance (Tab D, Exhibit 16). On September 6, 2007, another Plan of Action was developed identifying 39 offenders which needed assessments, 88 which needed home visits, 44 which needed face-to-face contacts, 9 offenders which had gone more than 2 years without contact and 13 which had gone 4 months or longer. On September 13, 2007, Pickett responded with various complaints, but primarily that he would use his best efforts to try to resolve the cases, but that he believed staffing and time constraints made the deadline "unrealistic" (Tab A, Exhibit 4). In September, 2007 one of the offenders under Pickett's supervision, Eugene Haith, was arrested for the death of his infant son. It was determined that Pickett had made no attempt to contact or supervise Haith since August, 2005. This incident resulted in a "Media report" which caused DOC to investigate/review all of Pickett's cases. In December, 2007, 15 of the delinquent files identified in the 2005 Letter of Concern remained unresolved, including Haith. Haith was also identified in each of the Plan of Action letters.

On December 26, 2007, DOC provided Pickett with notice of the proposed disciplinary action, advising him that he was being considered for suspension without pay as a result of his failure to properly supervise offenders and to resolve the prior Letter of Concern or to comply with the Plan of Action letters (Tab A, Exhibit 1). Pickett was given an opportunity to respond

and submitted a letter for consideration (Tab A, Exhibits 2, 3). In his response, Pickett does not dispute the factual allegations, but complains about the extreme workload and shortage of officers, exacerbated by DOC's refusal to allow overtime. He stated that with all of his duties and responsibilities, it was essentially impossible to keep up with his caseload and that the deficiencies were beyond his control. On February 7, 2008, DOC provided Pickett with notice of discipline, imposing a seven (7) day suspension without pay (Tab A, Exhibit 5). In the notice, DOC states that the actions of Pickett were considered to be in violation of DOC policies OP-110215 (Tab D, Exhibit 6), OP-160103, eff. 9-14-07 (Tab D, Exhibit 7), OP-160103, eff. 2-20-06 (Tab D, Exhibit 8), OP-160301 (Tab D, Exhibit 10) and OP-160801 (Tab D, Exhibit 11). The notice contained references to the prior informal disciplinary actions.

In his appeal, Pickett argues that DOC violated its Progressive Discipline Policy by imposing a Suspension without Pay and jumping over a Letter of Reprimand, which is a lower level of formal discipline. He also claims that his deficiencies are beyond his control, created as a result of DOC budget problems and understaffing, which are made even worse by the voluntary decision of DOC to participate in a national case load study. Pickett also claims that discipline is not consistent or even-handed and that he is being persecuted for his affiliation with the Fraternal Order of Police (hereinafter "FOP").

The Testimony

DOC offered the testimony of five (5) witnesses in support of its disciplinary action. First, Kenny Holloway, Administrator of Probation and Parole, testified that he is responsible for the daily oversight of the department. He testified regarding "Evidence Based Practices" (hereinafter "EBP") which are nationally recognized protocols used by approximately half of the states. Certain tools are used to predict recidivism and classify low-risk offenders for minimal supervision. Through EBP, supervision of low risk offenders is often minimal. Much testimony was given regarding certain officers having limited case loads as a result DOC participation in a national case load study, however, the study did not begin until 2008, beyond the dates of misconduct alleged in this appeal. Holloway testified that he was present at a meeting held on June 12, 2007 at the FOP lodge regarding correctional and probation and parole officer's workloads. Holloway agreed that Deputy Director Hines promised officers that if they were

making an effort to keep up, they would not be disciplined for delinquencies. Holloway noted that there was an extraordinarily high case load for the "generic" load officers such as Pickett.

Debbie Wilkerson, a DOC Team Supervisor, testified that she supervised Pickett for approximately 6 months in 2006. As a result of a review of his files and cases, she issued the October, 2005 letter of Concern (Tab D, Exhibit 13). She testified that Pickett's attitude was one of being overwhelmed but that he tried to comply with her requests. She stated that he required a lot of supervision. She further testified that she had to frequently remind officers not to work overtime and that overtime was seldom approved.

Velma Mayes, Probation Officer IV, testified that she supervised Pickett in 2006. She was not initially aware of the 2005 Letter of Concern. She testified that she tried to work with Pickett, and issued the September, 2006 Plan of Action letter (Tab D, Exhibits 14 and 15). Mayes testified that she tried to help Pickett and assigned interns to assist him, however, in 2007 some of the same cases were still delinquent. She testified that other officers with similar caseloads seem to make more effort to resolve their cases. Pickett, she stated, still used the old paper system instead of the computer data base system. Mayes stated that three years later, Pickett is still working to resolve 6 cases from the 2005 Letter of Concern. Mayes testified that certain caseloads are "specialized" – such as sex offenders, drug court cases, mental health cases and females. Officers handling specialized caseloads generally have limited caseloads with caps of 50-70 cases. Officers who have "generic" caseloads have a little bit of everything and have larger caseloads.

Kristie Phillips is an Assistant District Supervisor for DOC. She testified that some cases draw "media attention", where an offender under DOC supervision appears in the news. The standard practice following "media attention" is to require a written report and file review. The "media attention" involving Eugene Haith resulted in a review which showed that Pickett had not properly supervised Haith and others, which culminated in this discipline. Phillips testified that by October of 2007 the caseloads for generic officers began to rise. She stated that Pickett's caseload was generally higher than some of the other officers but she felt that was because his contained more low-risk offenders and that the action plans were designed to set up time frames to remedy deficiencies. She recommended the suspension because of the length of the deficiencies. Phillips admitted that over 500 cases were transferred from certain officers in preparation of the national case load study and that the officers with "generic" caseloads were

assigned these additional cases. She testified that all “generic” officers have over 100 cases and about 4 or 5 have over 200 cases.

Karen White, the DOC District Supervisor, testified that she made the decision on the level of discipline to impose in this case. She testified that Pickett’s affiliation with the FOP made no difference in imposing this discipline. White acknowledged that other officers had received lesser discipline for deficiencies but she determined that a suspension without pay was more appropriate for Pickett due to the prolonged nature of his deficiencies and the serious outcome of his failure to supervise Haith. She also considered whether the employee worked to correct the deficiencies. White denied harassing or intimidating officers who were active in the FOP or that they were encouraged to work overtime on an uncompensated basis. White identified Pickett’s violations of DOC policy as failure to devote full time and attention to his duties, failure to utilize EBP and properly assess offenders, failure to implement transition plans, failure to issue violation reports, failure to provide swift responses to offenders, and failure to try to locate absconders. White stated that she did not believe that an officer with over 20 years of experience should have these types of violations. She initially considered the possibility of termination or a fourteen day suspension, but determined that a seven day suspension without pay was the most appropriate. She stated that she imposed suspension without pay rather than a letter of reprimand because the facts of this case justified it, and previous written informal disciplinary actions had not been effective in remedying the deficiencies. White testified that Pickett showed a “callous disregard” following the death of the infant. She stated that Pickett told her that he had just put the file away and that Haith had fallen through the cracks. She said Pickett has shown no remorse or responsibility for his failure to supervise Haith. White testified generally regarding the duties of Probation and Parole Officers. She stated that pre-sentence investigations are very labor intensive and can take up to a week to complete. Officers also do home visits, evaluations, violation reports, referrals for jobs, treatment or education, locate absconders, take DNA samples, testify in court, guard the Parole Board and act as daily Duty Officer for walk-ins at the office. White testified that 6 new officers have been hired since January, 2008, however, it takes new hires up to a years to be fully autonomous. White stated that out of 76 officers, about half or 35-38 have “generic” caseloads.

Appellant Pickett offered the testimony of three (3) witness in addition to himself. Mary Langley, a Probation and Parole Officer IV, testified that she has never seen caseloads over 200 offenders and never as high as the caseloads are now. She stated that she acted as Pickett's supervisor from February to April, 2008, after the dates for which this discipline was imposed. She admitted that while Pickett was on suspension, he was assigned a pre-sentence investigation with a short turn around time. She asked that this be assigned to another officer due to Pickett's absence, but Phillips denied that request. She further stated that in addition to all other duties, in August, 2008, everyone was involved in resolving over 700 delinquent home visits, discovered as a result of a case load audit.

Ray Aldridge testified that he was a Probation and Parole Officer for DOC for the last 24 years. He is the President of the FOP Lodge 147. Aldridge stated that the officers' caseloads and other concerns were discussed in June of 2007 in a lodge meeting with Holloway and Deputy Director Hines. The understaffing and delinquencies were specifically discussed and the officers were told that there would be no discipline imposed for being behind if an officer had a high caseload and was trying to keep up. He said that Hines assured them of this again in October, 2007 at a FOP Executive Board meeting. Aldridge testified that he had never seen caseloads as high as they are now. He stated that it was "unbelievable" that there were over 700 delinquent home visits district-wide and that there were officers with caseloads over 200. Aldridge expressed concern over DOC's participation in the national study, which resulted in unequal redistribution of cases. He also stated that the FOP had concerns over EBP, because of closing supervision of low-risk offenders automatically after 90 days. He said that 6 officers who served on the FOP Executive Board had been disciplined or were under threat of discipline. Pickett serves as the chair of the Grievance Committee. Aldridge admitted that ensuring that offenders do not harm the public is the most important aspect of a Probation and Parole Officer's job and that contact with the offender was necessary to do that. He also stated that locating absconders is a priority.

Appellant, Danny Pickett testified that he is Probation and Parole Officer at DOC's Santa Fe office in the Central District. He said that he had a "generic" caseload since 1994. Pickett discussed the numerous duties of his job, outlining the time required for each. Initial visits take at least 30 minutes to an hour and the risk assessments take another hour. It takes an hour to close a file and 1-2 hours to write a violation report. He said that locator attempts are very labor

intensive. He also stated that pre-sentence investigations take a lot of leg work and can take at least a week to complete. Pickett testified that he has always received good performance evaluations of meets or exceeds standards. Pickett essentially stated that he believed this discipline was too harsh given the extenuating circumstances of understaffing and excessive caseloads.

Mark LaGreca, testified that he has worked in the same office as Pickett, and also has a “generic” caseload. He said that his caseload has been over 150 consistently since November, 2007 and that it is impossible to supervise this many offenders. He stated that he works a lot of uncompensated overtime in order to keep up. He was present when Hines told the officers that they would not be disciplined for delinquencies because of high caseloads. He received a letter of Reprimand for his delinquent caseload however, this discipline was reduced to a Letter of Concern after he filed a grievance and brought his caseload up to date. He stated that he felt that the Central District was inappropriately using EBP to “dump” or terminate supervision of cases earlier than normal.

ISSUES

1. Was there cause for imposition of discipline in this matter?
2. If so, was the discipline imposed just and appropriate under the circumstances and in compliance with the progressive discipline policy?
3. Was there retaliation due to Pickett’s FOP affiliation and his complaints regarding the caseload?

DISCUSSION

It is clear from the evidence and testimony that Pickett was seriously delinquent in his caseload. He does not dispute this. Pickett’s supervisors issued a Letter of Concern and several Action Plans over a two year period to try to address these delinquencies. Some of the same cases were addressed with Pickett year after year. Pickett’s lack of supervision of these offenders is inexcusable. His caseload may be heavy but Pickett made no attempt to prioritize his time to address some of the older files and in several cases, simply filed them away and

forgot about them. This is particularly troublesome given the outcome of the Haith matter. Pickett really offers no explanation except that he was overworked, however, the evidence showed that the excessive caseload situation did not begin until mid-to-late 2007. There is no explanation for Pickett's deficiencies in 2005 and 2006 and why he did not even attempt to address the particular cases listed in the Letter of Concern and the Action Plans. He also relies heavily on Deputy Director Hines's assurances. It is unreasonable to find that all officers were given essentially a "free pass". Hines qualified his remarks with "if an officer was trying". After being given several opportunities to remedy specific cases, Pickett simply failed to do so. Whether his actions were intentional and willful or merely negligent is of no difference. Based upon the record, the undersigned finds that DOC has met its burden of proof that just cause existed for the discipline imposed.

The next issue is whether the discipline imposed was just and appropriate under the circumstances. Although there is no direct evidence that Pickett's failure to supervise Haith resulted in an infant's death, it can certainly be said that Pickett failed to supervise him for over two years, did not know where he was and failed to attempt to locate him or issue a violation report. The undersigned concurs that Pickett showed no remorse or acknowledgment of responsibility for his actions. While an excessively high work load may be extenuating circumstances, due to the length of time that Pickett had to remedy his deficiencies, it is not persuasive.

It is unfortunate that DOC did not properly utilize the Performance Management Process to address these issues. The PMP should be used to redirect the employee toward improved job performance. There was testimony that Pickett would occasionally improve and that his performance was inconsistent. This should have been addressed in the PMP process but that failure on the part of DOC does not justify reduction of the level of discipline here.

There is substantial evidence of prior and progressive discipline. Pickett received at least three informal disciplinary actions. The purpose of progressive discipline is to impose the appropriate level of discipline to address the problem. DOC's previous attempts have simply been ignored. It appears that the discipline imposed was appropriate given all of the circumstances and DOC has proven, by a preponderance of the evidence, that the level of disciplinary action imposed was just and was consistent with DOC's progressive disciplinary procedure.

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 455:10-11-15 states that a permanent classified employee may be suspended without pay 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. The preponderance of the evidence shows that Pickett violated a number of DOC policies, namely OP-110215 (Tab D, Exhibit 6), OP-160103, eff. 9-14-07 (Tab D, Exhibit 7), OP-160103, eff. 2-20-06 (Tab D, Exhibit 8), OP-160301 (Tab D, Exhibit 10) and OP-160801 (Tab D, Exhibit 11).
6. Appellee has met its burden to prove, by a preponderance of the evidence that just cause exists to discipline Pickett for his deficiencies, thereby risking the safety of the public.
7. Appellee has met its burden to prove, by a preponderance of the evidence, that it followed the DOC Progressive Disciplinary Procedure.
8. Appellee has met its burden to prove, by a preponderance of the evidence, that the discipline imposed was just under the circumstances.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Danny Pickett, MPC 08-127 be DENIED.

This Order entered this 4th day of November, 2008.

Lydia Lee

Lydia Lee
Administrative Law Judge