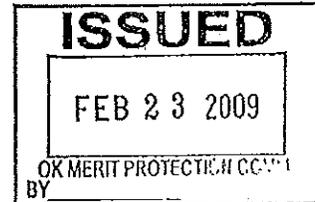


BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA

KARLA TARANGO, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 OKLAHOMA DEPARTMENT OF )  
 LABOR, )  
 )  
 Appellee. )

Case No. MPC-09-035



FINAL ORDER

This matter came on for hearing before the undersigned Administrative Law Judge on February 12, 2009, at the Oklahoma Merit Protection Commission's office in Oklahoma City, Oklahoma. Appellant, Karla Tarango, appeared in person and by and through her counsel, Phillip L. Watson of Hammons, Gowens & Associates. Appellee, Oklahoma Department of Labor, appeared by and through its counsel, Bill Settle, General Counsel, and Tiffany J. Wythe, Assistant General Counsel.

Appellant is a permanent, classified employee of Appellee, appealing from an adverse disciplinary action of discharge. The undersigned heard the sworn testimony of witnesses, viewed the exhibits admitted into evidence, and heard argument of counsel. The undersigned admitted into evidence Appellee's Exhibit Nos. 1-45, 58, 60, 62, 63, 65-67, 69-71, 73, 74, 76-81, 83-87, 89, 90, 92-100 and Appellant's Exhibit Nos. 1 and 11; the undersigned refused admission of Appellee's Exhibit Nos. 46-57, 101 and 102. After receiving all evidence and counsels' closing arguments, the undersigned closed the record on January 13, 2009.

Upon consideration of the record, including all testimony and exhibits admitted into evidence, the undersigned Administrative Law Judge issues the following findings of fact and

conclusions of law pursuant to 74 O.S. § 840-6.7(B).

#### FINDINGS OF FACT

Appellant began her employment with the Oklahoma Department of Labor as an Executive Secretary I on September 11, 1995. Appellant assumed the position of Labor Compliance Officer ("LCO") II on November 1, 2007. Appellant held the position of LCO II at the time of her termination on July 28, 2008.

According to the Notice of Pre-termination Hearing dated July 17, 2008, the grounds for Appellee's termination of Appellant were unwillingness to follow supervisor directives, insubordinate attitude, disregard for authority, and inability to treat co-workers and customers/claimants professionally and with courtesy. The Notice states the inappropriate behavior continued despite the agency's having taken disciplinary action and further attempts to correct the offensive behavior were deemed futile. Although the Notice does not specifically cite this as an aggravating factor (see 74 O.S. § 840-6.3(C)), Mannix Barnes, Appellee's Chief of Staff, testified the agency considered this factor in deciding to proceed to discharge of Appellant's employment.

The grounds for the termination identified in the Final Notice of discharge are conduct unbecoming a public employee, insubordination, inefficiency, inability to perform the duties of the position and misconduct. According to the Final Notice, the appointing authority's designee, in reaching a decision, "considered only those actions that had taken place since Commissioner Lloyd L. Fields assumed office on January 8, 2007."

Between January 8, 2007, and July 28, 2008, the date of Appellant's discharge, Appellee conducted two Performance Management Processes ("PMP") for Appellee. During this time period, Appellant also received a "Disciplinary Warning" dated December 27, 2008, and a

Written Reprimand dated February 22, 2008. The Written Reprimand included a "Corrective Action Plan."

The disciplinary policy for Appellee found at pages 11 and 12 of the Handbook introduced at the hearing as Appellee's Exhibit 99<sup>1</sup> provides supervisors will take disciplinary action through a program of progressive, corrective discipline, which "utilizes performance rating and a system of informal counseling, letters of counseling and letters of reprimand." Accordingly, the PMPs are considered part of Appellee's progressive discipline program. The testimony and Appellant's PMPs establish that, in her position as an LCO, Appellant worked closely with members of the public, mostly in relation to alleged violations of wage and hour standards made by employees against employers.

Appellant's first PMP during the relevant time period covered the period of January 10, 2007, through September 11, 2007. On that PMP, Appellee received "meets standards" ratings on all Accountabilities and Behaviors, including specifically "Customer Service Behavior" and "Teamwork." Thus, apparently no significant concerns existed regarding Appellant's behavior during that period, and the 1/10/07-9/11/07 PMP did not place Appellant on notice of a need to correct her behavior. Nor did Appellee otherwise discipline Appellant during that time period.

The second PMP during the relevant time period covered the period from September 12, 2007, through June 30, 2008. According to this PMP, Appellant received the Written Reprimand at the time of the mid-year review. The agency closed the PMP on July 3, 2008, giving Appellant "does not meet standards" ratings on "Customer Service Behavior" and "Teamwork." Because the agency closed the PMP the same month it terminated Appellant, Appellant did not have an opportunity to correct her behavior based on the PMP.

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<sup>1</sup> Appellee's counsel identified this handbook provision as the agency's progressive discipline policy, although it is not specifically identified as such and is not on file with the Merit Protection Commission as required by OAC 455:10-11-5(a).

Appellee presented evidence of three instances of insubordination by Appellant and approximately eight instances of unprofessional and/or inappropriate behavior by Appellant over the course of the approximate one and one-half year relevant time period.

In November 2007, Appellant questioned newly established work hours, and, because she did so more than once, Appellee considered such behavior insubordinate. Appellant testified she questioned the policy regarding work hours because she did not understand it. On December 27, 2007, Appellee disciplined Appellant with a "disciplinary warning" for apparently failing to follow the chain of command on December 17, 2007. Appellee presented evidence that Appellant continuously failed to follow the chain of command by calling the chief of staff, the division director or the legal division without first going through Appellant's supervisor. However, Appellee did not present any evidence of the conduct alleged to have occurred on December 17, 2007. Finally, on July 8, 2008, Appellant's supervisor, Mary Bebout, instructed Appellant, not to survey her co-workers about their feelings toward Appellant, but Appellant did so anyway. The evidence shows Appellant committed insubordination by going outside the chain of command and by refusing to follow her supervisor's directive on July 8, 2008.

Appellee's discipline policy does not list "disciplinary warning" as a step in the progressive discipline process; thus, it is unclear whether the warning was considered informal discipline (OAC 455:10-11-10) or formal discipline (OAC 455:10-11-11). Nonetheless, because informal discipline, such as a "verbal warning," generally is required first when an employee commits a particular offense, it is presumed, the disciplinary warning constituted informal discipline. Although Appellee presented evidence the failure to follow the chain of command continued after the issuance of the disciplinary warning, Appellee did not subject Appellant to any other discipline for the offense of insubordination until it initiated the discharge.

Regarding unprofessional and/or inappropriate behavior by Appellant, Appellee presented evidence of specific behavior alleged to have occurred on June 19, 2007, January 29, 2008, February 21, 2008, May 19, 2008, June 11, 2008, July 3, 2008, and July 7, 2008, as well as one instance for which the date was not mentioned or known. Two of these incidents involved alleged mistreatment of or unprofessional behavior toward a co-worker by Appellant, and the others involved alleged rude and/or unprofessional behavior toward claimants or employers, i.e., the public. In addition, several witnesses called on behalf of Appellee testified, without reference to any particular event, that Appellant regularly was rude, hateful, loud and unprofessional when dealing with the public.

Appellee did not present evidence showing it discussed with Appellant the incidents occurring on June 19, 2007 (involving employer, Danny Williamson), or May 19, (involving employer, Ed Hicks), June 11 (involving Mr. Groves), or July 3 (regarding a claimant seeking overtime pay).<sup>2</sup> Nor is there any evidence it subjected Appellant to any form of discipline for these incidents or for the July 7, 2008, incident (involving Rick Stephens). Appellee issued a written reprimand to Appellant for the incidents that occurred on January 29, 2008, and February 21, 2008, as well as for a complaint received on February 22, 2008, regarding Appellant's telephone behavior. However, no evidence was presented regarding the cause of the February 22, 2008 complaint. Appellee asserts Appellant engaged in unprofessional conduct toward two separate claimants on January 29, 2008. However, the evidence showed one of those claimants, Edmund Clifton, and his father denied Appellant had been unprofessional with them. In fact, Mr. Clifton gave the agency a very positive review on the customer service survey based on the service he received from Appellant. The other claimant, Danny Melton, when contacted by Ray

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<sup>2</sup> In an email dated November 5, 2007, Appellee advised all employees in the Wage and Hour division generally about the need to be professional, and management held a meeting with the employees in the Tulsa office and warned them about treatment of the public and co-workers and the need to be more professional.

Andrews, confirmed Appellant had been rude. The evidence showed Appellant also had been rude toward her co-worker, Kevin Trent, on January 29 as well as February 21, 2008.

Appellant testified she had not been unprofessional or rude on any of the occasions presented by Appellee and that all of Appellee's witnesses had "lied." She further testified the PMPs were "worthless."

The evidence established Appellant engaged in misconduct and conduct unbecoming a public employee when she was rude and unprofessional toward the public and her co-workers. Appellant's refusal to admit that reflects a lack of commitment to correct her deficient behavior. It also indicates progressive discipline may not be effective in correcting Appellant's behavior.

On the other hand, the evidence did not show Appellee or Appellant's supervisor warned Appellant or used prompt, positive corrective measures to encourage her to change her behavior and avoid more serious discipline (OAC 455:10-11-6). Appellee proceeded directly to formal discipline -- written reprimand -- for Appellant's offenses of misconduct and conduct unbecoming a public employee. The prior discipline issued on December 27, 2007, even if considered informal, was for a separate offense of failure to follow the chain of command, which Appellee apparently considered to be insubordination. Appellee offered no explanation for why it skipped over informal discipline to formal discipline for the offense(s) related to the unprofessional conduct toward the public and co-workers.

Additionally, the evidence showed another LCO in the Tulsa office, Bob Gann, also engaged in unprofessional conduct. Mr. Gann used profane language and racially derogatory language (the "n" word). Mary Bebout, who supervised both Mr. Gann and Appellant, testified she talked to Mr. Gann about his language but did not discipline him. Appellee's failure to discipline Mr. Gann certainly could have indicated to Appellant that her conduct was acceptable.

Based on a preponderance of the evidence, the undersigned Administrative Law Judge finds just cause exists for discipline of Appellant, but the facts do not justify the severity of the discipline imposed. Considering the circumstances – acceptable ratings on Appellant’s PMP until the month of her discharge, the failure of Appellee to apply progressive discipline, disciplining Appellant for conduct of which she was not guilty (i.e., the Clifton matter), and the failure of Appellee to discipline another employee for similar conduct – a reduction in the discipline is appropriate. While Appellant’s failure to acknowledge she has acted unprofessionally and needs to correct her behavior serves as an aggravating factor, Appellant has not yet had a legitimate opportunity to correct her behavior. Moreover, had Appellee applied progressive discipline for Appellant’s unprofessional behavior, it would have first subjected Appellant to informal discipline and then proceeded to a written reprimand for the next offense. Accordingly, a suspension without pay is appropriate under the circumstances.

#### CONCLUSIONS OF LAW

1. Any finding of fact that is properly a conclusion of law is hereby incorporated as a conclusion of law.
2. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause.
3. Under the Merit Rules, the burden of proof in this matter was on Appellee to show by a preponderance of the evidence that just cause existed for the adverse action and discipline imposed was just. OAC 455:10-9-2.
4. An appointing authority is required to establish a written progressive discipline policy designed to ensure consistency, impartiality and predictability with penalties ranging from informal discipline to formal discipline, up to discharge. 74 O.S. § 840-6.3; OAC 455:10-11-4 –

455:10-11-11. In administering progressive discipline, supervisors generally, with certain exceptions, are prohibited from considering incidents that occurred longer than four (4) years prior to an offense in order to move to a higher level of discipline. 74 O.S. § 840-6.3(D).

5. Absent mitigating circumstances, repetition of an offense generally is accompanied by progression to the next higher level of discipline, but, dependent on the circumstances, a single incident may justify proceeding to a higher step before going through the lower steps. OAC 455:10-11-4.

6. Absent aggravating circumstances, formal discipline normally is administered after informal discipline has failed to produce acceptable results. Formal discipline includes written reprimand, suspension without pay and discharge. OAC 455:10-11-11.

7. A permanent, classified employee may be discharged for, among other things, misconduct, insubordination, inefficiency, inability to perform the duties of the position, willful violation of the Oklahoma Personnel Act or the Merit Rules, conduct unbecoming a public employee or any other just cause. OAC 455:10-11-14.

8. Appellee has met its burden of proof that just cause existed to discipline Appellant for violating the Merit Rules by engaging in unprofessional and rude behavior with co-workers and the public. OAC 455:10-9-2(f)(1).

9. Appellee has failed to meet its burden of proof that the discipline imposed was just under the circumstances when considering the seriousness of the conduct as it relates to Appellant's duties and responsibilities, consistency of action taken with respect to similar conduct by other employees of the agency, the employment and discipline record of Appellant, and mitigating circumstances. OAC 455:10-9-2(f)(1)(C).

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Appellant's

appeal shall be sustained in part; the discharge is not upheld, and Appellee shall reinstate Appellant to her position of Labor Compliance Officer II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Appellant's discipline shall be reduced to suspension without pay for 30 days, and Appellee shall pay Appellant back pay for the period from August 29, 2008, through the date Appellant is reinstated less all income received by Appellant during such time period.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Appellee shall expunge Appellant's personnel file to remove all references to the discharge.

Signed this 23<sup>rd</sup> day of February 2009.

  
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Jami L. Greener  
Administrative Law Judge  
Oklahoma Merit Protection Commission  
3545 N.W. 58<sup>th</sup> Street  
Oklahoma City, OK 73112