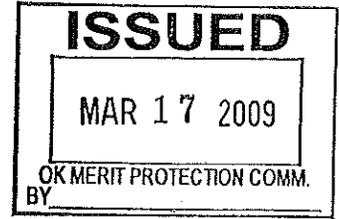


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

JOHN P. ESTES,)
Appellant,)
)
v.)
)
COMPSOURCE OKLAHOMA,)
Appellee.)
)
)

Case No. MPC 09-074



FINAL ORDER

This matter comes on for hearing on February 25, 2009 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, John P. Estes, appears personally, and by and through his attorney, Steve Estes. The Appellee, CompSource Oklahoma, appears by and through counsel, Robert Mitchell.

Appellant Estes is a permanent, classified state employee appealing an adverse disciplinary action of suspension without pay for three (3) days. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, Appellant's Exhibits 1 through 7 and 9 through 21 were offered with no objection and they were admitted. Appellant's Exhibit 8 was offered and admitted over the Appellee's objection to the relevance of the document. Appellee's Exhibits 22 through 32 were offered with no objection and they were admitted. Following the evidentiary hearing, the record was closed.

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 John Estes (hereinafter "Estes") is a classified employee of the Appellee CompSource Oklahoma (hereinafter "CSO"). Estes is employed as an Administrative Programs Officer. Estes' job duties include responsibility for all agency copiers and fax machines. Estes was under certain medical restrictions. On June 27, 2008, two new copiers were ordered and set to be delivered. Gordon Karber, a supervisor at CSO, stated that he told Estes not to move the copiers himself, however, Estes denies that the discussion occurred. On Friday, June 27, 2008, in preparation for delivery of the new copiers, Estes used his foot to push against the corner of one of the old copiers to determine if the machine was on rollers or stationary feet. As a result of this action, Estes' leg began to ache and by Sunday, Estes notified his immediate supervisor, Kay Addington, that he had injured his leg and he would not be at work in order to seek medical attention. Ms. Addington e-mailed Mr. Karber that Estes had injured his leg the previous Friday moving the copiers and would not be at work. Estes has several medical conditions including Von Willebrand's Disease and Diabetes. Estes was absent from work for 30 days.

On August 7, 2008, CSO provided Estes with notice of the proposed disciplinary action, advising him that he was being considered for a three (3) day suspension with out pay. The notice advised Estes that his action constituted insubordination and serious misconduct for blatant disregard for his supervisor's direct instructions. (Exhibits 9 and 22). A pre-suspension hearing was held on August 18, 2008. Debbie Willingham was assigned as hearing officer and she filed a written recommendation on August 28, 2008. (Exhibits 10 and 24). Ms. Willingham found that Estes blatantly ignored his director's supervisory directive, constituting an act of insubordination. She recommended imposition of the three (3) day suspension without pay. On September 2, 2008, CSO provided Estes with notice of adverse action, imposing discipline of a three (3) day suspension without pay for the June 27, 2008 incident (Exhibit 11 and 23). In the notice, CSO states that Estes blatantly disregarded his supervisor's direct instructions and written directives relating to his medical restrictions, which constituted insubordination and serious misconduct. The notice fails to include a citation of any other informal or formal discipline which was used in the decision to administer the suspension without pay, as required by 455:10-11-15 (b)(5). The parties agree that there are no prior disciplinary actions for Estes, who has been employed at CSO for 31 years.

The suspension without pay was served on September 11, 18 and 25, 2008. As a result of this disciplinary action, Estes was deemed ineligible for the agency's 5% incentive bonus payment. Estes timely appealed the disciplinary action to the Merit Protection Commission.

The Testimony

The record includes the testimony of seven (7) witnesses; namely, Sharon O'Connor, Debbie Willingham, Kay Addington, Gordon Karber, Nolan Roper, Jim Wimpy and John Estes.

Sharon O'Connor is the Director of Human Resources. She testified that she reviewed all procedures in this disciplinary action and she prepared both the notice of proposed action and the notice of final action. (Exhibits 9, 11, 22 and 23). She testified that Estes' Workers Compensation case and/or his numerous absences from work due to medical issues were not factors considered in this action. O'Connor testified that CSO has an unwritten practice of always imposing a three (3) day suspension without pay for insubordination. She further stated her opinion that "insubordination" required willful, deliberate action.

Debbie Willingham is a CSO employee and acted as the pre-suspension hearing officer. She stated that she investigated the charges and issued a written recommendation. (Exhibits 10 and 24). She testified that the "hearing" consisted of a tape recorded interview of Estes. A transcript of that interview was made. (Exhibit 29). Willingham stated that she also talked with Nolan Roper, Jim Wimpy and Gordon Karber, but did not tape record those interviews. She stated that after she talked with Roper, she prepared a written statement and had him sign it. (Exhibit 31). This summary details the general process of moving copiers at CSO. It contains no information about the actual events of June 27, 2008. Willingham testified that she reviewed Estes' personnel file and noted some problems with supervisors in the past and notations about his many absences. She said that she did talk with Jim Wimpy, although he was not mentioned in the summary of supporting evidence. She stated that she felt the issue of who actually moved the copier was not relevant because of Karber's directive and Addington's e-mail. She also stated that she did not speak with Kay Addington, to determine exactly what Estes had told her when he reported the injury.

Kay Addington is the Information System Manager at CSO. She stated that she is Estes' supervisor. She testified that Estes called her at home on June 29, 2008 and told her about his injury. When she arrived at work the next morning, she sent an e-mail to document his absence.

(Exhibits 5 and 30). She stated that she received no response from Karber and that no one ever discussed the e-mail or asked her to clarify or expand on her phone call from Estes. She also stated that she had no physical description of exactly what Estes had done to injure his leg.

Gordon Karber was the Information System Director at CSO until his recent retirement and was Addington's supervisor. He testified that on Friday, June 27, 2008, he was getting ready for a meeting and Estes came by and mentioned that he was preparing to move copiers. Karber stated that he specifically told Estes to use the maintenance department and not to move the copiers himself. On July 25, 2008, almost a month after the incident, Karber drafted a memo alleging that Estes' actions were insubordination and recommended a suspension without pay. (Exhibits 6 and 25). Karber admitted that he made no attempt to investigate the facts on his own and did not talk with either Addington or Estes before making this disciplinary recommendation. He stated that he took Addington's e-mail at face value and relied solely upon it in making his decision. Karber admitted that he did talk to the maintenance department and they confirmed that they had been moving the copiers at Estes' request. Karber provided testimony concerning his steps to stop Estes from receiving a promotion in 1994 and stated that it was based only on a concern about Estes' lack of qualifications. Karber testified that his exact directive to Estes on June 27, 2008 was for Estes "not to move the copiers himself, but to get maintenance to do it".

Nolan Roper works in the Maintenance Department of CSO. He testified that he signed a memo prepared by Willingham concerning the process involved in moving copiers. (Exhibit 31). He testified that copy machines are usually on rollers, however sometimes they are on "feet" that can be screwed down from underneath the copier in order to stabilize the copier. He stated that if they are on feet, the copier wouldn't move and the feet would need to be screwed up to move the copier. He testified that you could determine if they were on rollers or feet by getting down on the floor and looking underneath the copier or by slightly pushing or rocking the copier.

Jim Wimpy is the Material Management Officer for CSO. He testified that he received a written request from Estes to have the copier in question moved. (Exhibit 4). He testified that he and John Hooper moved the copier and that he had confirmed this fact in an e-mail. (Exhibit 4, page 3). He also testified that if the copier were on "feet", he might have to use tools before moving the copiers. He stated that his tools were in his department and that he normally did not carry them with him when moving copiers.

John Estes testified that he had worked at CSO for 31 years. He adamantly denied that the alleged discussion with Gordon Karber occurred on June 27, 2008, and specifically denied that Karber “directed” him not to move the copiers. He further testified that he had never at any time had a conversation with Karber regarding his medical condition or his medical restrictions. Estes was subject to work restrictions imposed by his physician on June 12, 2008, following surgery to his right shoulder. These restrictions were “no lifting, pushing or pulling greater than 10 lbs., restricted reaching above chest, overhead or away from the body and not to climb ladders”. (Exhibit 7). On June 27, 2008, he received notice that the new copiers were to be delivered. In order to make room for the new copier, the existing copier needed to be moved to another area. He stated that he submitted a request to the warehouse department to “move copier from Collections Department to warehouse for future surplus” and to “Move existing copier in Comm/Media to Collection Department”. (Exhibit 4). Estes testified that he placed his foot against the bottom of the copier and stated he “pushed lightly” to determine if the copier was on rollers. He stated that he did so in order to advise the movers if they needed to bring tools with them. When Estes pushed, he stated he felt a “pop” in his leg. Over the next two days, his calf began to swell and became very painful. Estes testified that he was concerned about developing “compartment syndrome”, a potentially life-threatening medical condition. Because he has diabetes and Von Willebrand Disease, he felt he needed to seek medical treatment. He called his supervisor and advised that he would not be at work pending this treatment. He was subsequently off work for 30 days. Estes stated that he never intended to move the copier. He denied that Karber issued him the directive. Estes further testified that the light push with his foot would not be considered moving a copier. Estes stated that he felt it was his responsibility to prepare the copiers for the move and his action was consistent with that. He stated that he felt the push with his foot was more appropriate than crouching down, since that movement would put stress on his shoulder. He further stated that his action was consistent with his medical restrictions. His physician confirmed that he was not under any restrictions on the use of his leg. (Exhibit 8). Estes testified that he believed that Karber resented him because of his medically necessary absences and that Karber had a grudge against him going all the way back to the 1994 promotion.

ISSUES

1. Was there just cause for the imposition of discipline; namely, did the actions of the Appellant constitute insubordinate and serious misconduct?
2. If so, was the discipline imposed just, appropriate and in compliance with the progressive discipline policy?

DISCUSSION

There is conflicting testimony regarding whether Gordon Karber and John Estes had a discussion on June 27, 2008 and whether Karber issued a directive to Estes to “not move the copiers himself”. Karber testified that the directive was given. Estes denied that the entire conversation occurred. There was evidence presented regarding Karber’s “badge-in” times that tends to indicate that he was not present in his office when he alleges that the directive was given. CSO took it as “fact” that the directive was given and completely disregarded Estes’ denial. There is no reference to Estes’ denial in the hearing officer’s memo or in the notice of final action. In fact, the hearing officer’s memo fails to even mention John Estes’ interview or his version of the events. Only two individuals have knowledge of this issue, and with each giving conflicting testimony, it is difficult to find that the preponderance of the evidence supports that the directive was given.

However, even if the oral directive was given, Karber made absolutely no attempt to verify the facts prior to alleging insubordination and recommending discipline. He said he based his recommendation solely on Addington’s e-mail. He never talked to Addington or to Estes, to determine exactly what Estes told Addington during that call on June 29, 2008. Addington’s e-mail appeared to be more of a notice of injury, as she states in the subject line and the closing remark. Without being privy to the alleged directive given by Karber, it is very possible that Addington’s choice of words could have been inadvertent rather than an attempt at a direct quote. She was unaware of the importance of the use of the words “he told me he was moving a copier”. Neither Karber nor the hearing officer made any attempt to verify the facts or to ask Addington if her e-mail was a quote or her paraphrase of the conversation with Estes. A charge

of insubordination is very serious. Karber's refusal to obtain all of the facts prior to making his recommendation tends to support Estes' claim that Karber had a grudge against him.

Also, it is important to consider the previous exchanges between Karber and Estes. In 1994, Estes and another employee, Amy Dyer, applied for the Data Processing Planning Specialist position vacancy. Estes was approved as meeting the minimum requirements of that position by OPM. (Exhibit 18). On November 29, 1994, Dyer was notified that Estes was selected for the position. (Exhibit 20). On November 30, 1994, Commissioner Clingman notified Gordon Karber that Estes had been selected for the promotion to Planning Specialist, effective December 1, 1994. (Exhibit 18). Karber immediately wrote a lengthy memo to Commissioner Clingman objecting to the selection. (Exhibit 19). This memo was extremely critical of Estes and claimed that Estes was not qualified. As a direct result of Karber's memo, Estes' promotion was vacated and Dyer was given the position. Although this series of events is somewhat remote, it is supportive of Estes' argument that Karber has always disliked him and that this disciplinary action was a result of that attitude.

Further, the memo of the hearing officer is extremely troubling. It appears to be just a recitation of the information contained in the notice of proposed action. The "Summary of Supporting Evidence" listing in the memo fails to even note John Estes' statement. Willingham acknowledged considering other evidence and interviews which were not listed. The memo contains no discussion of the evidence or the facts. She stated that she made no attempt to verify that maintenance had actually moved the copier. It appears that she completely disregarded Estes' version of the events, without explanation. There was no indication that she considered any mitigating evidence or that she considered the appropriateness of progressive discipline or the consistency of the discipline imposed. Despite this, her findings were that "John Estes blatantly ignored and failed to comply with his director's supervisory directive".

The final notice of adverse action states that Estes' action was blatant disregard for his supervisor's direct instructions and written directives related to his medical restrictions. The medical restriction violation was not included in the notice of proposed action and was not a part of the recommendation of the hearing officer. It appears that this allegation improperly appeared for the first time in the final action. Estes was never given notice that discipline was considered for violating his medical restrictions and he was never given the opportunity to respond. As such, it will not be considered as just cause for the imposition of discipline in this matter.

Even if the directive was given, there is insufficient evidence that Estes' "blatantly" ignored it, which would give rise to insubordination. The evidence supports that Estes' made arrangements for the copier to be moved by the proper department. This is not consistent with a finding that Estes blatantly ignored a directive and moved the copier himself. It is a stretch to find that placing one's foot against a copier to see if it is stationary or on rollers is "moving" a copier. If Estes' action violated Karber's alleged directive, it was unintentional at best. Nothing in the record supports CSO's finding that Estes' deliberately or "blatantly" ignored Karber. There is also nothing to support the charge of serious misconduct.

Finally, given the facts and circumstances of this case, it is unreasonable that an employee with tenure of 31 years with no prior disciplinary action would be given a three (3) day suspension without pay for this first incident. This action is inconsistent with progressive discipline. There appears to be no consideration of Estes' job performance, personal situation and tenure in imposing the suspension. However, because there is insufficient evidence to support the imposition of discipline, the level of discipline need not be addressed further.

CONCLUSIONS OF LAW

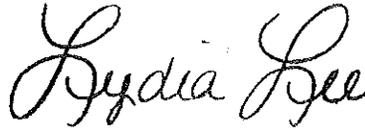
1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. Merit Rule 455:10-9-2 states that the Appellee CSO 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. Appellee has failed to meet its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Estes for insubordination. There is insufficient evidence that Estes blatantly ignored a supervisor's directive.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant John Estes, MPC 09-074 be **SUSTAINED**. The discipline imposed upon Appellant is **RESCINDED** consistent with this Order. All documentation concerning the adverse action shall be expunged from any and all of the employee's personnel records, together with reinstatement of all pay and all appropriate benefits accorded thereto.

This Order entered this 9th day of March, 2009.



Lydia Lee
Administrative Law Judge