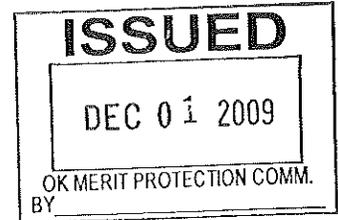


**OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

SHERRY L. BULL,)
)
 APPELLANT,)
)
 v.)
)
)
 OKLAHOMA DEPARTMENT OF)
 CORRECTIONS,)
)
 APPELLEE.)

MPC-09-150



FINAL ORDER

Hearing on this matter was held September 30 and October 14, 2009 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 legal counsel, Rex Thompson. Present for Department of Corrections (hereinafter "DOC" or "Appellee") was Assistant General Counsel Gary Elliott. Also present for Appellee was table representative Mike Carr.

Appellant is a permanent, classified employee appealing a five day suspension without pay for violation of DOC Policy 110215 "Rules Concerning the Individual Conduct of Employees". Specifically, Appellee alleges that Appellant submitted a co-employee's false report to her supervisor regarding an injury she sustained while on duty and then endorsed that false report to a DOC Safety Officer and an Assistant District Supervisor.

Whereupon the hearing began and sworn testimony of witnesses for Appellee and Appellant was presented. In addition, the parties submitted a joint trial notebook containing forty-seven (47) exhibits which were admitted and are hereby incorporated into this Final Order. At the conclusion of the hearing, both parties requested the undersigned review video and audio tapes and the record was held open for that limited purpose. The record was closed November 18, 2009.

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

I. HISTORY

The Appellant, Sherry Bull, began working for the Department of Corrections as a volunteer in January, 1993. She was thereafter hired as a secretary and after serving in various positions, was promoted to an Administrative Programs Officer I ("APO I") in January, 2005. One of Appellant's job functions while working as an APO I at the Elk City Community Work Center ("ECCWC" or "the Center") was teaching a class to inmates called "Thinking for a Change".

On July 31, 2008, after concluding her class, Appellant was proceeding down the stairs from the classroom when she missed a step, lost her balance and grabbed for the hand rail injuring her right wrist. Chief of Security Kenneth Morgan, Appellant's supervisor, was not at the Center at the time so Appellant asked Food Services Manager Daniel Irwin to fill out an incident report verifying the time and date of her injury.

Although in some discomfort immediately after the injury, it was not until the next morning that Appellant's wrist became more painful. On August 1, 2008 Appellant went to Chief Morgan and gave him a written statement which read:

"On July 31, 2008 I was coming down from the program's room and I fell down the stairs. I caught myself with my right hand. I have hurt my right wrist. This happened around 4:40 p.m. Sherry Bull."

Chief Morgan put the responsibility of gathering the documentation to be submitted regarding the accident on Appellant. Later that same day, Appellant returned to Chief Morgan's office and gave him a copy of the incident report which Officer Irwin had prepared. The incident report read:

"At approximately 4:30 p.m., I was returning from the walk-in coolers that are located on the north side of the building. At this time a class, that was being held in the northeast upstairs classroom was letting out.

I noticed APO I Bull stumble at the top of the stairs and by using the hand rail, regain her balance. Approximately 30 minutes later, while serving the evening meal, APO I Bull came to the serving line, where I was working. After briefly teasing her about falling down the stairs, she began complaining that it was funny but that she had hurt her wrist.

At approximately 5:30 p.m., APO I Bull was in the dining room handing out inmate gang pay. At this time APO I Bull was sitting at the dining room table cradling her wrist while working to pass out this money. I assisted APO I Bull but [sic] completing the money distribution, while APO I Bull gingerly massaged her wrist”.

Upon receiving the paperwork from Appellant, Chief Morgan sent an incident report to District Supervisor Mike Carr and Assistant District Supervisor John Lipsey. Later that day, Chief Morgan made the decision to review video tapes from some of the facility surveillance cameras to verify the statements of Officer Irwin and Appellant.

While viewing the surveillance tapes, Chief Morgan found inconsistencies between what the video footage showed and what Officer Irwin stated in his incident report. Specifically, video footage showed that Officer Irwin had not been near the walk-in coolers at approximately 4:30 p.m. on July 31, 2008.

Chief Morgan then went to Correctional Officer I Lonny Ritter and asked if Appellant had reported her accident to him on July 31, 2008. After his conversation with Chief Morgan, Officer Ritter looked at the surveillance tapes and talk to each inmate who had been in the Appellant's class on July 31, 2008. After speaking with the inmates, Officer Ritter prepared an incident report stating that one inmate, MH, stated that he was the last inmate to leave the class, that he walked downstairs with the Appellant, and that she did not fall. Officer Ritter left the report on Chief Morgan's desk.¹

Inmate M.H. testified at this hearing that he was approached by Officer Ritter and asked to sign a statement that Appellant had not fallen down the stairs on July 31, 2008. Inmate M.H. refused to do so clarifying that when he heard Appellant had “fallen down the stairs” he thought she had actually "tumbled" down the stairs. It was that interpretation of what he had heard which led him to initially say that he had not seen Appellant fall down the stairs.

After viewing the surveillance video, Chief Morgan sent an email to Assistant District Supervisor (“ADS”) Lipsey stating he had reviewed the video footage and did not believe that Officer Irwin had seen Appellant fall. Chief Morgan also stated he did not believe Appellant had actually hurt her wrist at the Center.²

¹ Chief Morgan later corrected Officer Ritter's report and added the comment "viewed videotape inmate H. came down the steps approximately 20 seconds in front of Ms. Bull". There is no date indicating when Chief Morgan added this correction to Officer Ritter's report.

² Appellee has not alleged that Appellant injured her wrist at a location other then the Center.

On August 4, 2008, ADS Lipsey forwarded Chief Morgan's e-mail to District Supervisor Carr and later that day, Chief Morgan submitted a second incident report including additional information regarding his review of the surveillance tapes.

On August 6, 2008, ADS Lipsey received an e-mail from Appellant stating she had been told her wrist could not be properly treated until a DOC Safety Officer came to ECCWC and issued a report. Although DOC Safety Officer John Webber had been assigned to investigate Appellant's injury, Officer Webber had not yet been to the Center.

The following day, Officer Webber met with Chief Morgan in Union City, Oklahoma and reviewed the surveillance camera videotapes from the Center. Following the meeting, Officer Webber proceeded to ECCWC.

Upon arriving at ECCWC, Officer Webber spoke to Appellant and did a visual inspection of the staircase. Officer Webber reported that the stairs were steep and narrow with a metal edging. Officer Webber testified at this hearing that if a person were not careful walking down the steps, it would be entirely possible to slip on the steps.

While Officer Webber was at ECCWC, it was Appellant's perception that he was not very interested in the matter. It is Appellant's recollection that Officer Webber did not take any notes or pictures while at the Center investigating the accident. Appellant testified that she believes Officer Webber would not have gone to the staircase had Appellant not insisted he do so. In addition, although there was a scuff mark on the wall of the stairwell which Appellant told Officer Webber was caused by her shoe when she fell, Officer Webber did not take a picture of the scuff mark.

At the conclusion of his investigation, Officer Webber prepared an accident report which he submitted to District Supervisor Carr. The report, a copy of which was admitted at this hearing, consist of four pages: page 1 and 2 are in a format with specific questions printed out for the Safety Officer to mark, and page 3 and 4 which consist of the Safety Officer's handwritten investigation summary. The original report could not be located by Appellee and was not admitted into evidence at this hearing.

On August 8, 2008, ADS Lipsey sent a memorandum to District Supervisor Carr stating he had also reviewed the surveillance videos and found discrepancies between the videos and the written statement of Officer Irwin. ADS Lipsey suggested that because of the discrepancies, further investigation was warranted. Thereafter, ADS Lipsey scheduled a meeting with Appellant and Officer Irwin for August 12, 2008.

At the August 12 meeting, ADS Lipsey first interviewed Officer Irwin while Appellant waited outside and then interviewed Appellant while Officer Irwin waited outside. No one else

was present during the interviews and no recording was made although ADS Lipsey did keep a few notes.

During his interview with Officer Irwin, ADS Lipsey showed Officer Irwin a copy of his incident report and showed him the surveillance video footage. ADS Lipsey testified Officer Irwin first said his incident report was correct then admitted, after being questioned and seeing the video footage, that he had not seen Appellant fall. ADS Lipsey further testified Officer Irwin said Appellant had approached him and asked him to lie on the incident report. Appellant allegedly told Officer Irwin that if he stated he had seen her fall, it would give her report more "umph".

ADS Lipsey testified that during his interview with Appellant, he did not show her the video but first ask if Officer Irwin had been at the bottom of the stairs and had observed her stumble. ADS Lipsey testified Appellant stated that Officer Irwin was at the bottom of the stairs and he did see her stumble. ADS Lipsey testified that after seeing the surveillance footage and being told that Officer Irwin had confessed, Appellant stated she did not ask Officer Irwin to lie for her.

ADS Lipsey testified at this hearing that during the interviews he did state that he was familiar with the disciplinary process and he did tell Officer Irwin and Appellant that he did not know what the prosecutor would do with the case.

ADS Lipsey's handwritten notes taken during the interviews contain a notation that Appellant "stuck to it" and "Did ask him [Officer Irwin] to write a statement and he did but did not ask him to lie". There was not a notation in the interview notes that Appellant told ADS Lipsey that Officer Irwin saw her fall.

Officer Irwin testified at this hearing that on July 31, 2008, Appellant came into his office, told him she had fallen, and asked him to fill out an incident report. Because numerous things were going on in the kitchen area at the time, the incident report was inaccurate and contained careless mistakes. Officer Irwin later amended the report after being directed by ADS Lipsey numerous times during his interview to "recant" his statement.

Officer Irwin testified that at the August 12, 2008, meeting he never admitted to ADS Lipsey that he had falsified any statements and he never confirmed he witnessed the Appellant fall. Officer Irwin denied ever making a statement to ADS Lipsey that Appellant asked him to write a statement saying that he had witnessed her fall to give the claim more "umph". It is Officer Irwin's testimony that ADS Lipsey continually demanded that Officer Irwin recant his statement and threatened him repeatedly with prosecution stating that he knew the disciplinary and legal process very well and had fired many people.

Officer Irwin resigned from DOC on December 5, 2008. He testified at this hearing that prior to this incident, he had made complaints against Chief Morgan, and four other employees including the Appellant. Also, Officer Irwin had received a two-day suspension without pay in 2005 based on activities of Officer Irwin which had been reported by Appellant. In addition, Officer Irwin, prior to July 31, 2008, had made reports to District Supervisor Carr against the Appellant claiming hostile work environment.

The Appellant testified that at the August 12 meeting with ADS Lipsey, he told her that he was good at discipline and told her that the district attorney was going to investigate for possible workers compensation fraud. ADS Lipsey also pressured her to change her statement and told Appellant there was an inmate who had stated he had been present and had not seen her fall.

Immediately following the August 12, 2008 meeting with ADS Lipsey, Appellant contacted the Oklahoma Public Employees Association because she believed she had been threatened with the loss of her job and with criminal prosecution.

On August 13, 2008, ADS Lipsey sent an e-mail to Officer Irwin stating "did you choose not to recant your statement? I was expecting something this morning." To that e-mail, Officer Irwin responded:

"Mr. Lipsey, I apologize about the delay. It was late when we return to the facility and I had some food service concerns to deal with that continued until this afternoon.

After returning from your office on August 12, 2008, I have sat down and reviewed my statement. After carefully reviewing my statement I need to make some clarifications regarding my statemnt [sic].

The beginning of the second paragraph should read I WAS NOTIFIED. The last sentence of paragraph 2 should read "she began complaining that it was NOT funny rather than complaining that it was funny. [no close parentheses]

Third sentence of last paragraph should read "I assisted APO I Bull BY completing the money distribution" rather than "I assisted APO I Bull BUT completing the money distribution. [no close parentheses]

I relied on spell checker and grammar check to ensure that my statement was clearly written as I was trying to do several things at once including serving the evening meal during this time.

Also sir, because of your statements made to me concerning prosecutors and attorneys deciding where this interview will go, I'm invoking my Garrity rights."³

On August 14, 2009, District Supervisor Carr received a memorandum from ADS Lipsey regarding the interviews and thereafter sent a request for an internal affairs investigation which was conducted by Investigator Larry Newell.

On September 16, 2008, Investigator Newell interviewed Officer Irwin and Appellant. In separate interviews, both Officer Irwin and Appellant denied making any admissions to ADS Lipsey. Officer Irwin denied he made statements to ADS Lipsey that Appellant had asked him to say he witnessed the fall or to lie for her. Officer Irwin asserted Officer Lipsey was lying in order to get them both fired.

During Appellant's interview, Appellant told Investigator Newell that she did not tell ADS Lipsey that Officer Irwin saw her fall but she did tell ADS Lipsey that Officer Irwin had written an incident report. Appellant also told Investigator Newell that she did not look at Officer Irwin's incident report until long after it was submitted to Chief Morgan.

After the interviews, Investigator Newell contacted ADS Lipsey and told him that Officer Irwin and Appellant had denied making any admissions to him and were claiming that ADS Lipsey was lying.

Upon finding out about the accusations that he was lying, ADS Lipsey personally contacted Chief Morgan and asked him if Appellant had ever told Chief Morgan that Officer Irwin had seen Appellant fall. The following day, Chief Morgan sent a memorandum to ADS Lipsey stating that after thinking about it, he was positive that Appellant had made a statement to him that Officer Irwin had seen or witnessed the accident although he was "not sure on [sic] the exact words she had used". ADS Lipsey told Chief Morgan to notify Investigator Newell and Chief Morgan then sent a memorandum to Investigator Newell stating Appellant had told Chief Morgan that Officer Irwin "had witnessed the accident".

In addition, ADS Lipsey personally contacted Officer Webber and asked him if Appellant had told him that Officer Irwin had witnessed her fall. This resulted in a September 22, 2008,

³By invoking the Garrity rule, an officer is invoking his or her right against self incrimination. Statements made after invoking Garrity may only be used for department investigation purposes and not for criminal prosecution purposes. See *Garrity v. New Jersey*, 385 U.S. 493 (1967).

memorandum to ADS Lipsey from Officer Webber stating that Appellant had stated that Officer Irwin had seen her fall.

The Appellant testified at this hearing that she never, at any time, told Chief Morgan, Officer Webber, or ADS Lipsey that Officer Irwin saw her fall. Appellant stated that Chief Morgan put the responsibility of gathering the documentation to be submitted regarding the accident on Appellant. Because Appellant needed medical attention as soon as possible, Appellant did not take the time to read Officer Irwin's report prior to submitting it to Chief Morgan.

At the conclusion of the internal affairs investigation, District Supervisor Carr reviewed all the information provided and directed ADS Lipsey to prepare a notice of pretermination hearing calling the Appellant to a hearing.

When ADS Lipsey prepared the notice, he inaccurately wrote that Appellant was (allegedly) asked two times if Officer Irwin had seen her fall when she was only (allegedly) ask one time, put an incorrect date of August 27 instead of August 7, and listed prior disciplinary action taken against Appellant which should not have been included in the notice. In addition, there was no reference to Officer Irwin's second statement of August 13, 2008 included in the notice.

At the conclusion of the pretermination hearing, District Supervisor Carr made the decision to discipline Appellant by issuing a five day suspension without pay for submitting a report by Officer Irwin to Chief Morgan which she knew to be false and also for endorsing Officer Irwin's false report and lying to Officer Webber and ADS Lipsey.

II. DISCUSSION

The evidence presented shows that Chief Morgan made the decision to review video footage to verify the stories of Officer Irwin and Appellant. The question Appellant raises is why would he do this when there were no perceived inconsistencies between Officer Irwin's incident report and Appellant's written statement in the first place? Although Chief Morgan testified he started his own investigation because he thought he was a safety officer, he did not perform the investigation following the proper safety officer investigation protocol. Specifically, Chief Morgan did not interview all witnesses, including the Appellant and Officer Irwin.⁴

Chief Morgan testified that while viewing the surveillance videos he did not observe Appellant massage her wrist or appear to be in pain. The undersigned has reviewed the footage from the surveillance cameras and is unable to tell whether Appellant is or is not massaging her

⁴ District Supervisor Carr testified that Chief Morgan is not a Safety Officer.

right wrist, using her hand in an unusual manner, or showing any pain. The video is simply not of such quality that an unbiased observer can ascertain if the Appellant is in pain or not.

More importantly however, Chief Morgan submitted three (3) reports regarding the Appellant's injury. The first report, submitted on August 1, 2008, did not contain any statement by Chief Morgan that Appellant told him Officer Irwin witnessed her fall. The second report, submitted later that day, did not contain any statement by Chief Morgan that Appellant told him Officer Irwin witnessed her fall. The third report, submitted on August 4, did not contain any statement by Chief Morgan that Appellant told him Officer Irwin witnessed her fall.

On September 22, 2008, after being told by Investigator Newell that Appellant and Officer Irwin denied making any admissions and were claiming that ADS Lipsey was lying, ADS Lipsey, not Investigator Newell, contacted Chief Morgan about his three reports. The following day, Chief Morgan sent a memorandum to ADS Lipsey which stated:

"Mr. Lipsey I had been thinking about what Mrs. Bull stated when she gave me Mr. Irwin's report and I'm possitive [sic] that she stated that Dan had witnessed the accident. I'm just not sure on [sic] the exact words that she had used. I have attached a copy of my statement. Did you contact Larry [Newell] and inform him that I could not remember? If so what would you like me to do?"

Chief Morgan testified he remembered Appellant's statement to him about Officer Irwin witnessing her fall only after being asked by ADS Lipsey about the matter.

In addition, Chief Morgan later sent a memorandum to Investigator Newell, stating Appellant had told him that Officer Irwin "had witnessed the accident". Apparently, by the time Chief Morgan sent this memorandum to Investigator Newell, he was sure what "exact words" Appellant had used.

It is not known exactly what was said during the conversation between ADS Lipsey and Chief Morgan on September 22. However, it is clear that ADS Lipsey raised the issue and asked Chief Morgan to recall if Appellant told him Officer Irwin saw her fall.

It is not believable that on September 23, 2008, for the first time, seven weeks after the incident and after filing three previous reports, Chief Morgan would "recall" that Appellant told him Officer Irwin witnessed the accident if not for ADS Lipsey's placing that suggestion in his mind. Accordingly, the undersigned questions the credibility of any reports issued by Chief Morgan after his conversation with ADS Lipsey on September 22, 2008.

In addition, the notice of pretermination hearing issued January 8, 2009, and the final suspension without pay order issued February 4, 2009, did not find that Appellant told Chief Morgan that Officer Irwin witnessed her fall. Those documents only find that Appellant

submitted Officer Irwin's report to Chief Morgan knowing it to be false. If Appellee believed Appellant had verbally lied to Chief Morgan, that violation should have been included in the notice and order.

Back then to the Appellant's original question: why did Chief Morgan begin his investigation in the first place? District Supervisor Carr testified that prior to July 31, 2008, the Appellant made allegations against Chief Morgan and both Appellant and Officer Irwin had later testified at a disciplinary hearing against Chief Morgan. Following that disciplinary hearing, Chief Morgan was demoted from his position of Correctional Security Manager II to Correctional Security Officer IV.

From the time of his demotion, Chief Morgan's attitude toward Appellant changed and Appellant testified Chief Morgan would not include her at meetings, neglected to send her e-mails, and refused to give her information regarding inmates which she needed to conduct her job.

Regarding CO I Ritter's testimony that he took it upon himself to review the surveillance tapes and to interview inmates from Appellant's class on July 31, 2008, the undersigned does not believe a correctional officer I would take such actions without being ordered to do so by Chief Morgan. Also, if Officer Ritter felt it was his duty to investigate the matter, he should have followed investigation protocol and interviewed Officer Irwin and Appellant. He did not.

It is also unclear why Officer Ritter would ask Inmate M.H. to sign a statement that Appellant had not fallen down the stairs when the surveillance video footage, which Officer Ritter stated he reviewed, clearly showed the inmate left the stairwell at least 20 seconds before Appellant appeared at the bottom of the stairwell.

Regarding Officer Webber's investigation, Officer Webber came to ECCWC to conduct the investigation in August, 2008, immediately after meeting with Chief Morgan, seeing the surveillance footage, and being given Chief Morgan's opinions regarding the incident. Therefore, Officer Webber came to the facility with preconceived notions regarding the incident which evidence indicates affected his ability to conduct an unbiased and thorough investigation.

Specifically, Human Resources Management Specialist Barbara Reinbold testified that DOC policy requires the Safety Officer to interview anyone who spoke with Appellant about the circumstances of her injury. Therefore, Officer Webber should have interviewed all witnesses, and his report, which listed Officer Irwin, Chief Morgan and Officer Ritter as witnesses, should have contained written statements from each. The testimony at this hearing is Officer Webber interviewed Appellant and Chief Morgan. He did not interview Officer Irwin or Officer Ritter.

Also, Officer Webber testified he did not recall seeing a scuff mark on the staircase wall. The Appellant produced a photo of a scuff mark on the wall, maintaining it was from her shoe. As of this hearing, there was no way to verify whether the scuff mark was on the staircase wall or not because after Appellant's accident, the walls of the staircase were painted.

In addition, the Appellee is unable to produce Officer Webber's original report. The original report was sent to District Supervisor Carr on August 7, 2008, and forwarded on to the Office of Internal Affairs, which received it on August 18, 2008, but now the original report cannot be found.

The Appellant has pointed out that the writing on page four of the copy of Officer Webber's report looks different from the writing on page three of the report. There is also no date on page four although Officer Webber chose to sign both page three and page four but only included a date on page three. The Appellant maintains that without being able to see the original report, it is impossible to know if page three and page four were produced at the same time or if page 4 was produced at a later time. The importance of page 4 is that it contains the only reference in Officer Webber's entire report that Appellant told Officer Webber that Officer Irwin saw her fall on the stairs.

Furthermore, ADS Lipsey personally contacted Officer Webber and asked him if Appellant told him Officer Irwin had witnessed her fall. Officer Webber testified he sent his memorandum of September 22, 2008, to ADS Lipsey, who was his direct supervisor, stating that Appellant told him Officer Irwin saw her slip after being requested by ADS Lipsey to do so. ADS Lipsey allegedly told Officer Webber that he wanted to make sure that Appellant had made that statement to Officer Webber on August 7, 2008. Page four of Officer Webber's report clearly states the Appellant told him Officer Irwin saw her slip. If that report, which was submitted August 7, 2008, contained page four, there was no reason for ADS Lipsey to request additional verification from Officer Webber seven weeks later on September 22.

After the interviews by Investigator Newell, he contacted ADS Lipsey and told him that Officer Irwin and Appellant had denied making any admissions and were claiming that ADS Lipsey was lying. From the point ADS Lipsey was informed that his truthfulness was being questioned, he should not have been involved in any way with the investigation and should not have contacted Chief Morgan or Officer Webber. Furthermore, he should not have prepared the pretermination hearing notice, which contained inaccuracies and included prior disciplinary action against Appellant which never should have been included in the notice.

Regarding the August 12, 2008 interviews of Appellant and Officer Irwin, ADS Lipsey admitted he did not give Appellant as many opportunities to tell her story as he gave Officer

Irwin but rather informed Appellant that Officer Irwin had already confessed. ADS Lipsey also failed to tell Appellant there was no inmate statement that she did not fall down the stairs. Also, there was no notation in ADS Lipsey's interview notes that Appellant told him that Officer Irwin saw her fall.

ADS Lipsey maintains that the interviews were conducted in a professional manner and were non-threatening although he is unable to explain why Officer Irwin felt the need to invoke his Garrety rights. It is ADS Lipsey's position that he did mention disciplined during the interviews but never made any threats although he did inform Appellant and Officer Irwin that he had been involved in many disciplinary actions and did mention criminal prosecution.

ADS Lipsey was unable explain how he knew that Appellant was aware the report she gave Chief Morgan was "false" as set forth in the notice of pretermination hearing which he drafted. ADS Lipsey was also unable to point to one document that proved Appellant had knowledge that the report was false. In fact, none of Appellee's witnesses, including District Supervisor Carr, pointed to any evidence presented at this hearing that Appellant knew the content of Officer Irwin's incident report before she submitted it to Chief Morgan.

Appellant asserts ADS Lipsey is lying because on May 14, 2008, ADS Lipsey sent a memorandum to Appellant stating he had assigned Chief Morgan to be her direct supervisor and to handle her performance review. Appellant had told District Supervisor Carr, following Chief Morgan's discipline in 2006, that she was concerned about retaliation and did not want Chief Morgan as her supervisor. Appellant testified she was assured by District Supervisor Carr that Chief Morgan would not be her supervisor. Appellant was therefore understandably upset when she learned that ADS Lipsey had assigned Chief Morgan as her supervisor and Appellant sent a memorandum directly to District Supervisor Carr on May 14, 2008, questioning ADS Lipsey's actions.

It is Appellant's position that ADS Lipsey lied about her statements and Officer Irwin's statements because he was angry that she went over his head to talk to District Supervisor Carr about his [ADS Lipseys'] decision to assign Chief Morgan as Appellant supervisor.

It is the Appellee's position that both Appellant and Officer Irwin are lying. On April 6, 2005, Officer Irwin received a two-day suspension without pay issued by District Supervisor Carr. This discipline was based on activities of Officer Irwin which had been reported by the Appellant. In addition, Officer Irwin, prior to July 31, 2008, had made reports to District Supervisor Carr against the Appellant claiming hostile work environment. With this history, it seems unlikely that Officer Irwin would lie for the Appellant.

However, even if Officer Irwin was lying and he did falsify his incident report, Appellee has failed to show by a preponderance of the evidence that Appellant knew the incident report was false. In addition, the evidence presented does not support the Appellee's position that Appellant told Chief Morgan, Officer Webber, and ADS Lipsey that Officer Irwin saw her fall.

Regarding discipline received by DOC employees in the past, evidence was presented by Appellant that employees working in the Northwest District had received a written reprimand for visiting a pornographic site and a five-day suspension without pay for public intoxication. Even though these actions were serious, neither of these employees was threatened with termination and no internal investigation was conducted.

District Supervisor Carr testified that in 2006, Chief Morgan had been demoted for falsifying time records. Even though there were fourteen allegations which constituted policy violations, Chief Morgan was not given a notice of pretermination hearing and no internal affairs investigation was conducted.

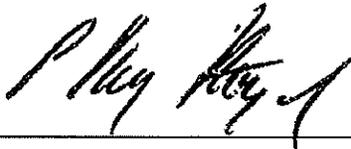
CONCLUSIONS OF LAW

1. The 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 incorporated herein as a conclusion of law.
3. OAC 455:10-11-14 states that a permanent, classified employee may be suspended without pay for, among other things, misconduct, insubordination, inefficiency, inability to perform the duties of the position, willful violation of the Oklahoma Personnel Act or Merit Rules, conduct unbecoming a public employee or any other just cause.
4. DOC OP-110215, "Rules Concerning the Individual Conduct of Employees" establishes a code of conduct for employees of the Department and sets forth duties and responsibilities of those employees, including the duty to cooperate with any department investigation. Employees failing to cooperate or making false statements during the course of an investigation may be subject to disciplinary action up to and including termination of employment.
5. OAC 455:10-9-2 states that Appellee, as the appointing authority, has the burden of proof in this case and must prove by a preponderance of the evidence that just cause exists for the adverse action and that the discipline imposed upon Appellant was just. Appellee has failed to meet its burden of proof.
6. Appellee has failed to meet its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Appellant for violation of OAC 455:10-11-14 and DOC OP-

110215. There was insufficient evidence presented at this hearing to establish that Appellant knew the report prepared by Officer Irwin that she submitted to Chief Morgan was false and establish that Appellant lied to Officer Webber and lied twice to ADS Lipsey that Officer Irwin had witnessed her fall.

IT IS THEREFORE ORDERED, ADJUDGED AND DEGREED that Appellant's appeal shall be **Sustained** and Appellant's suspension without pay immediately rescinded. Appellee is ordered to pay Appellant all pay and benefits that Appellant would have received from the start of Appellant's work shift on March 2, 2009 through the close of Appellant's work shift on March 6, 2009. Further, Appellee is ordered to expunge any and all personnel records maintained by, or under the control of, Appellee of any and all documentation and references to the suspension without pay.

Signed this 27th day of November, 2009



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