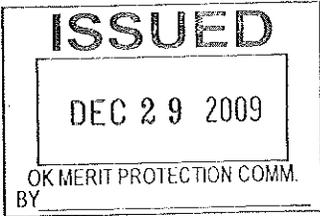


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

AARON GREY,)
)
 Appellant,)
)
 vs.)
)
 OKLAHOMA DEPARTMENT OF)
 AGRICULTURE, FOOD AND)
 FORESTRY,)
)
 Appellee.)

Case No. MPC-09-186



FINAL ORDER

This matter came on for hearing before Jami J. Fenner, Administrative Law Judge, on December 8 and 9, 2009, at the Oklahoma Merit Protection Commission's office in Oklahoma City, Oklahoma. Appellant, Aaron "Abe" Grey, appeared in person and through his counsel, Daniel J. Gamino. Appellee, Department of Agriculture, Food and Forestry ("ODAFF"), appeared through its counsel, Larry H. Harden, General Counsel, and through the party-representative, John Burwell.

Appellant is a permanent, classified employee of Appellee, appealing from an adverse disciplinary action of a 45-day suspension without pay. The undersigned heard the sworn testimony of witnesses, viewed the exhibits admitted into evidence, and heard argument from counsel. The undersigned admitted into evidence Appellee's Exhibit Nos. 1, 2, 4, 10, 11, 12, 16 and 17, and Appellant's Exhibit Nos. 6, 8, 9, 10 and 11. At the conclusion of the evidentiary hearing, the undersigned held the record open and granted the parties eight days, until December 17, 2009, to file written closing arguments. The parties filed their closing arguments on December 17, 2009, whereupon the record was closed.

Upon consideration of the record, 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 testified he began his employment with ODAFF on November 23, 1993. At the time of the adverse action, Appellant held the position of Forest Resource Protection Specialist. On March 13, 2009, ODAFF issued a "Notice of Pretermination Hearing," notifying Appellant of ODAFF's intent to discharge Appellant from his position. The appointing authority's designee conducted a pre-termination hearing on April 1, 2009, and subsequently recommended a 45-day suspension without pay. On April 14, 2009, the appointing authority, Terry Peach, Commissioner of Agriculture, issued his "Notice of Final Action," adopting the recommendation and suspending Appellant for 45 days, from April 15 through May 29, 2009.

According to the Notice of Final Action, the grounds for the adverse action were misconduct and violation of ODAFF's policy prohibiting personal use of state vehicles and ODAFF's policy regarding dishonesty. More specifically, ODAFF determined Appellant engaged in misconduct and violated these policies by submitting time cards for March 5 and March 11, 2008, to ODAFF and to Appellant's private, part-time employer for the same time period and same work and accepting duplicate pay for those time periods and by Appellant's use of the state vehicle for personal business (i.e., feeding his cattle).

The Notice does not specifically cite the aggravating or mitigating circumstances ODAFF considered in determining the proper disciplinary action. However, the evidence showed John Burwell, the person in Appellant's supervisory chain who initiated disciplinary action, and Rick Maloney, the appointing authority's designee who conducted the pre-termination hearing, considered the nature of the offense as an aggravating factor and considered the following as mitigating factors: Appellant's PMPs (performance management processes or evaluations); the

fact Appellant had no prior discipline; and community support for Appellant.

On December 8, 2009, at the commencement of the hearing, the parties stipulated to the following facts:

1. On the morning of March 5, 2008, Appellant drove his state pickup on state time to the Lost Spur Ranch to make recommendations related to a controlled burn on lands owned by Lindmark Land and Cattle Company.

2. Subsequently, Mr. Grey submitted a time card to ODAFF covering “those [sic] four hours.”

3. On March 11, 2008, Appellant drove his state pickup on state time to Burris Valley, and met Eddie Walden, an employee of Lindmark.

4. Subsequently, Appellant submitted a timecard to ODAFF covering “those [sic] 3 hours.”

5. On March 5 and 11, 2008, Mr. Grey was also a part-time employee of Lindmark.

6. The document introduced as the second page of Appellee’s Exhibit 4 is a true and correct copy of the timecard Appellant submitted to ODAFF for March 5 and 11, 2008.

7. The document introduced as the second page of Appellee’s Exhibit 1 is a true and correct copy of the timecard Appellant submitted to Lindmark for March 5 and 11, 2008.

8. On or around February 12, 2009, Mr. Grimes, an investigator for ODAFF, interviewed Appellant.

9. During that interview, Appellant admitted on one occasion he used his state truck for feeding cattle in January 2009.

10. When Mr. Grimes interviewed Appellant on January 23, 2009, Appellant admitted he “now knows” that use of a state vehicle as set forth above is contrary to policy.

11. ODAFF policy does not prohibit ODAFF employees from working part time for a “private landowner.”

Based on the stipulated facts, Appellant engaged in misconduct and dishonesty and violated the policy prohibiting personal use of state property by claiming he was working for two employers at the same time on March 5 and 11, 2008, receiving duplicate pay from each employer, and using the state vehicle to perform work he claimed was on behalf of a private employer. Additionally, the stipulated facts establish Appellant violated the policy prohibiting personal use of state property by using the state truck issued to him for personal business.

Although Appellant claimed to be unaware of other ODAFF policies, he did not claim he was unaware of the ODAFF policy regarding dishonesty and prohibiting the making of false reports. Thus, for purposes of the two grounds for the adverse action related to the submission of duplicate pay, it is irrelevant whether Appellant was ignorant of a policy prohibiting outside employment during regular working hours. Nonetheless, the evidence indicated Appellant was aware his actions were prohibited and took steps to conceal them. Appellant testified he did not identify the activities he performed in relation to Lindmark on his ODAFF weekly report of activity. His testimony that he did not intentionally omit this information and that the reports are rarely completed accurately by any employee was not credible. Appellant’s PMPs (Appellants Ex. No. 6) indicate he is required to do a weekly report giving a “complete account of each day’s activities with supporting documentation.”

In any event, Appellant’s testimony that he was ignorant of the policies because he did not attend orientation also was not credible. Appellant is a 16-year employee of ODAFF, and his PMPs have several references to his responsibility to know and follow policy (e.g., Items 1, 3 & 5 of Accountabilities). Moreover, Appellant’s own witnesses testified it is dishonest to accept a

paycheck from the State and a paycheck from a private employer for the same work.

Appellant's claim that his original timecards submitted to Lindmark did not include the time he claimed to be working for the State is irrelevant. Appellant admits at some point he submitted a timecard to Lindmark for the same time included on a timecard submitted to the State and admits he received payment from each employer for the same time. Nonetheless, his testimony regarding the original timecards also was not credible. Appellant did not keep or produce the original timecards. Nor did he call anyone from Lindmark to testify in support of Appellant's claim, despite listing Trent Lindmark as a witness and, according to the Notice of Issuance of Subpoenas for Appellant, having the Merit Protection Commission issue a subpoena to Mr. Lindmark.

Appellant claimed he was prejudiced because the investigation report reviewed by Mr. Maloney contained information unrelated to the grounds for discipline stated in the pre-termination hearing notice. However, the evidence showed the Commissioner, based on the recommendation of Mr. Maloney, decided to suspend rather than terminate Appellant, and did so based on the three grounds stated in the notice.

The evidence showed the source of the complaint that generated the investigation of Appellant was David Spears, another ODAFF employee with whom Appellant had had disagreements in the past. Appellant testified Mr. Spears is "responsible for this" -- presumably meaning the discipline against Appellant. However, the fact remains it is Appellant's actions that constitute misconduct and violation of policy regardless of the source of such information; no one forced Appellant to engage in the conduct at issue.

While the stipulated facts and a preponderance of the evidence established Appellant engaged in misconduct and violated policy, on the other hand, ODAFF did not establish by a

preponderance of the evidence it followed the requirement to ensure consistency in administering its progressive discipline policy.¹ The evidence showed ODAFF did not consider consistency specifically until after the discipline was final and Appellant had appealed to the Merit Protection Commission. Mr. Burwell, who initiated the disciplinary process against Appellant, testified he considered Appellant's actions to be theft and he has never had a situation identical to this one. Mitchell L. Broiles, the Director of Administrative Services, did not look prior to the issuance of the Notice of Pretermination Hearing at discipline given for similar conduct by other employees of ODAFF. He only talked to the Human Resources Director, who pulled a report that is submitted to the Office of Personnel Management. Mr. Maloney testified he took into consideration similar conduct by other employees, but admitted, on cross-examination, he never had another employee who had received a 45-day suspension and could point to no other cases to show consistency.

Additionally, the evidence showed ODAFF previously had disciplined two other employees for engaging in dishonesty and another employee for using the state vehicle for improper purposes. One employee engaged in dishonesty unrelated to her duties² by making a false report that she was related to an individual in order to obtain state benefits for that individual, and received a 20-day suspension without pay. The other employee who engaged in dishonesty did so by accepting payment from a private individual for the performance of the employee's duties as a state employee. ODAFF discharged the employee because it was the second offense of that nature; the employee previously received a written reprimand. Finally, an employee who used the state vehicle to stop at a convenience store and purchase personal items received a 2-day suspension without pay.

¹ ODAFF did not list its progressive discipline policy as an exhibit or offer it into evidence.

² Appellant's dishonesty relates directly to his duties.

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. Appellant's violation of policy constitutes misconduct and just cause for formal discipline. However, considering the circumstances – the seriousness of the Appellant's conduct as it relates to his duties and responsibilities; the action taken by ODAFF with respect to similar conduct by other employees of the agency; acceptable ratings on Appellant's PMPs; and Appellant's disciplinary record – a reduction in the discipline is appropriate. While Appellant's failure to take responsibility for his actions and apparent attempt to conceal his conduct serves as aggravating factors, ODAFF's progressive discipline policy must contain requirements to ensure consistency and evenhandedness. Accordingly, a suspension without pay for 30 days 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 the discipline imposed was just. OAC 455:10-9-2.
4. Upon a finding that just cause existed for adverse action but did not justify the severity of the discipline imposed the presiding official must consider the following: the seriousness of the conduct as it relates to the employee's duties and responsibilities; the consistency of action taken with respect to similar conduct by other employees of the agency; the

previous employment and disciplinary records of the employee; and mitigating circumstances. OAC 455:10-9-2(f)(1)(C).

5. 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.

6. 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.

7. An agency may discharge, suspend without pay for period not to exceed 60 days, or demote a permanent, classified employee 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. The Personnel Act and Merit Rules do not require a hearing prior to a suspension without pay. Nor is an appointing authority prohibited from seeing information unrelated to the grounds for the discipline. The employee must receive notice of the proposed action, which shall include the reasons for the proposed action and the rule, policy, etc., violated, and the employee must be given an opportunity to respond to the proposed suspension either in writing or orally. 74 O.S. § 840-6.4; OAC 455:10-11-15.

9. Appellee has met its burden of proof that just cause existed for the adverse action.

10. Appellant's conduct justified proceeding to a higher step of discipline before

going through the lower, informal steps.

11. Appellee has failed to meet its burden of proof that the discipline imposed was just under the circumstances when considering the seriousness of the Appellant's conduct as it relates to his duties and responsibilities, the action taken by ODAFF with respect to similar conduct by other employees of the agency, acceptable ratings on Appellant's PMPs, and Appellant's disciplinary record.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Appellant's appeal shall be **sustained** in part.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Appellant's discipline shall be reduced to a suspension without pay for 30 days, and Appellee shall pay Appellant back pay for 15 days less all income received by Appellant during the time period of the suspension, April 15 through May 29, 2009.

Signed this 29th day of December 2009.


Jami J. Fenner
Administrative Law Judge
Oklahoma Merit Protection Commission
3545 N.W. 58th Street
Oklahoma City, OK 73112