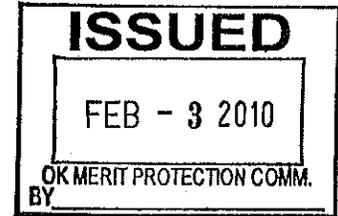


**OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA**

**KARLA TARANGO,** )  
 )  
 **APPELLANT,** )  
 )  
 **v.** )  
 )  
 **OKLAHOMA DEPARTMENT OF** )  
 **LABOR,** )  
 )  
 **APPELLEE.** )

**MPC-10-020**



**FINAL ORDER**

Hearing on this matter was held December 16, 2009, and January 15, 2010, before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. Present at the hearing was Appellant who was represented by legal counsel, Carole Houghton. Present for Department of Labor (hereinafter "DOL" or "Appellee") was General Counsel, Bill Settle. Also present for Appellee was Commissioner Lloyd Fields.

Appellant was a permanent, classified employee appealing her discharge by Appellee effective July 17, 2009, for violation of OAC rule and the DOL employee handbook.<sup>1</sup>

At the beginning of the hearing, the parties submitted a joint trial notebook containing forty five (45) exhibits: three (3) joint exhibits, twenty-eight (28) exhibits for Appellee and thirteen (13) exhibits for Appellant.<sup>2</sup> Not all exhibits in the trial notebook were presented for admission.

At the conclusion of the hearing, the parties were given seven days to submit closing arguments in writing and the record was held open for that limited purpose. The record was closed January 22, 2010.

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<sup>1</sup> Appellee did not introduce the DOL employee handbook at this hearing or present any testimony regarding specific pages or sections in the DOL employee handbook.

<sup>2</sup> The joint exhibits are numbered 1, 2 and 3. Appellee's exhibits are marked as "Appellee's exhibits" and are numbered 4 through 32. Appellant's exhibits are marked "Appellant's exhibits" and are numbered 1 through 13.

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**

Appellant began employment with the Oklahoma Department of Labor as an Executive Secretary I in September, 1995. Appellant was promoted to Labor Compliance Officer II in November, 2007, and held that position until she was terminated by DOL in July, 2008.

Appellant appealed that termination to the Oklahoma Merit Protection Commission and hearing was held before Administrative Law Judge Fenner on February 12, 2009.<sup>3</sup> On February 23, 2009, Judge Fenner ordered Appellant reinstated to her previously held position and her discipline reduced to a thirty (30) day suspension without pay. Appellant returned to work on April 1, 2009.

On the day Appellant returned to work, she met with Chief of Staff Mannix Barnes, Director of Employment Standards Division Ray Andrews, and Appellant's immediate Supervisor, Mary Bebout. At that meeting, Appellant was given a short memorandum regarding matters addressed in Judge Fenner's Final Order and DOL's expectations of Appellant as she returned to her position.

On April 15, 2009, Director Andrews issued a written reprimand to Appellant in response to a complaint by a citizen, Rigoberto Lopez. Appellant met with Chief Mannix, Director Andrews, and Supervisor Bebout and was given the written reprimand but refused to sign the reprimand stating she wanted time to respond.

On June 25, 2009, Appellant was handling the case of an Oklahoma business operated by Ms. Starr Stanley. Appellant first spoke by telephone with Ms. Stanley's assistant and then with Ms. Stanley directly. The telephone conversation was not going well and so Supervisor Bebout took over the telephone call and spoke with Ms. Stanley.

Ms. Stanley later filed a complaint against both Appellant and Supervisor Bebout however, no formal or informal disciplinary action was taken against Supervisor Bebout.

On June 29, 2009, Supervisor Bebout was printing case notes from one of Appellant's files. Appellant took the copy of the notes off the printer and told Supervisor Bebout that she [Appellant] was not finished correcting the notes. Supervisor Bebout requested the notes from Appellant twice but Appellant refused to give her the notes. Supervisor Bebout then told Appellant to put a copy of the notes in her inbox when she was through proofing reading them.

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<sup>3</sup> Case No. MPC-09-035

A second incident occurred on June 29, 2009. That incident arose when Appellant asked Supervisor Bebout to review an administrative order of determination ("AOD") that Appellant had prepared. The AOD was for a wage claim submitted by claimant Eric Brown on June 4, 2009. Supervisor Bebout reviewed the file and saw a handwritten note on the wage claim form which read "see attached for more dates". This note, made by the claimant's wife when she submitted the form, was written between the column on the form which read "Use this space to explain claim including dates" and the column on the form which read "Gross amount of your claim". In the column "Use this space to explain claim including dates", the claimant had written "01/16/09". In the column which read "Gross amount of your claim", the claimant had written "\$1007.41".

As Supervisor Bebout reviewed the file, she found that the claimant had attached additional pages showing "Gross amount of your claim" for five additional dates. Supervisor Bebout then changed the information in the "Use this space to explain claim including dates" column adding the five additional dates and changed the information in the "Gross amount of your claim" column from the total amount claimed of \$1007.41 to a total claim of \$6,499.96. Supervisor Bebout then returned the file to Appellant's inbox with a notation on the database notes which read:

"Karla - Claimant has identified 5 additional pay dates and dollar amounts on his attachments. The one on the form is #1 of 6. You may want to verify with him and start again."

On June 30, 2009, Supervisor Bebout found Mr. Brown's file had been closed on June 29, 2009, and the AOD had been issued for the improper amount of \$1007.41.

On July 2, 2009, Commissioner Fields hand-delivered to Appellant a Notice of Proposed Discharge placing Appellant on suspension with pay pending a pretermination hearing scheduled for July 13, 2009.

On July 7, 2009, Supervisor Bebout closed out Appellant's July 1, 2008, to June 30, 2009, performance management process form ("PMP"). The PMP stated in several places "see Notice of Proposed Discharge dated July 2, 2009".

On July 8, 2009, Appellant called claimant Eric Brown and spoke to Mr. Brown's wife, Janie Cole Brown. Mrs. Brown testified that Appellant told her that she was being fired from her job at DOL because of Mr. Brown's wage claim.<sup>4</sup> Appellant also told Mrs. Brown that she needed Mr. Brown to write a letter to DOL on her behalf. After Appellant's telephone call, Mrs.

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<sup>4</sup> Eric and Janie Brown now live in Redding, California. By agreement, the parties took the trial deposition of Mrs. Brown on Tuesday, November 17, 2009. That deposition was admitted at this hearing as Appellee's Exhibit 32.

Brown called Supervisor Bebout and told her Appellant had contacted her. Mrs. Brown also talked to Director Andrews and following that conversation sent an e-mail to Director Andrews on July 9<sup>th</sup>.

On July 8<sup>th</sup> or 9<sup>th</sup>, Appellee issued an "Addition to the Notice of Proposed Discharge" stating that Appellant's July 8, 2009, contact with Mrs. Brown was unprofessional and in violation of Merit Rule and the DOL handbook. In addition, the Notice stated:

"The original Notice of Proposed Discharge dated 7-2-09 has an error. The second sentence on page two (2) refers to OAC 455:10-9-2(f)(1). The correct reference is merit rule 10-11-91(a)."

The pretermination hearing was held on July 13, 2009, and on July 17, 2009, the Appellee adopted the Hearing Officer's final decision terminating Appellant effective that day.

The final decision of July 17, 2009, sets forth eight issues and incidents which led to the pretermination hearing and resulting termination of Appellant: a disciplinary warning issued December 17, 2007; a February 22, 2008, written reprimand; a July 28, 2008, suspension without pay; an April 15, 2009, written reprimand; a June 25, 2009, informal complaint from Starr Stanley; a June 29, 2009, incident regarding the wage claim of Mr. Brown; a July 1 [June 29], 2009, refusal of Appellant to give Supervisor Bebout the printed case notes; and, a July 8, 2009, telephone call by Appellant to Mrs. Brown.

On July 20, 2009, three days after Appellant's discharge, Supervisor Bebout contacted Appellant and asked her to come to the DOL office and sign the July 7, 2009, closeout PMP which Supervisor Bebout had prepared. Appellant refused to do so. On July 23, 2009, DOL General Counsel sent a letter to Appellant enclosing a copy of a revised PMP acknowledging that since the proposed discharge dated July 2, 2009, came after the closeout PMP end date of June 30, 2009, the reference to the proposed discharge should not have been included on the PMP. The revised PMP by did not mention the notice of proposed discharge.

Appellant appealed her July 17, 2009, discharge to the Merit Protection Commission and a prehearing on the matter was held before the undersigned on September 30, 2009.

On October 20, 2009, Appellee filed a hearing brief addressing an issue raised by Appellant at the prehearing conference. Specifically, Appellee addressed the issue of whether the Final Order issued by Judge Fenner in MPC-09-035 expunged all prior disciplinary actions taken against the Appellant. Appellee argued the Final Order did not expunge all prior disciplinary actions and such actions were properly considered by DOL with respect to Appellant's July 17, 2009, termination.

Appellant filed a response to that hearing brief on November 4<sup>th</sup> arguing it was improper for Appellee to consider or rely upon the prior disciplinary actions of December 27, 2007, and February 22, 2008, with respect to Appellant's July 17, 2009, termination.

At the beginning of this hearing, the undersigned announced that after a thorough review of Appellee's hearing brief and Appellant's response, the undersigned was persuaded by Appellant's argument and authority and found that Appellee improperly relied upon the December 27, 2007, and February 22, 2008, prior disciplines with respect to Appellant's July 17, 2009, termination.

Thereafter, the hearing began and sworn testimony of witnesses for Appellee and Appellant was presented.

In order to ascertain whether the discharge of Appellant was proper, the eight issues and incidents which led to the pretermination hearing and resulting termination of Appellant must be reviewed:

**I. and II.** The disciplinary warning issued December 17, 2007, and the February 22, 2008, written reprimand. The undersigned finds that the December 17, 2007, disciplinary warning and the February 22, 2008, written reprimand were specifically addressed by Judge Fenner in her February 23, 2009, Final Order. Furthermore, as stated above, the undersigned was persuaded by Appellant's November 4, 2009, Response Brief which argued that Appellee improperly relied upon the December, 2007 and February, 2008 prior disciplines with respect to Appellant's July 17, 2009, termination.

**III.** The July 28, 2008, suspension without pay. Consideration of this discipline by Appellee with respect to Appellant's July 17, 2009, termination was proper.

**IV.** The April 15, 2009, written reprimand. At this hearing, the Appellee attempted to introduce into evidence a written statement purportedly prepared by a complaining citizen, Mr. Lopez. However, the statement was not notarized or, in any other manner, verified as a sworn statement of Mr. Lopez. In addition, Mr. Lopez was not available to testify at this hearing regarding the statement and be subject to cross examination by the Appellant.<sup>5</sup>

Without the testimony of Mr. Lopez, there was insufficient evidence presented at this hearing to establish the facts regarding his alleged complaint: a complaint, which resulted in the April 15, 2009, written reprimand.

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<sup>5</sup> On November 20, 2009, Appellee filed a motion requesting permission to take the deposition of Mr. Lopez in lieu of his personal appearance at the hearing stating his testimony was critical to the issue of Appellant's April 15, 2009, written reprimand. The motion was denied and Appellee did not request a continuance of the hearing until such time as Mr. Lopez would be available to testify.

In addition, the April 15<sup>th</sup> written reprimand stated "previous informal or formal discipline used in the decision to administer a written reprimand includes: the December 27, 2007, disciplinary warning, and the February 22, 2008, written reprimand". Appellee improperly reviewed and took into consideration the December 27, 2007, and February 22, 2008, disciplines when deciding to issue the April 15, 2009, written reprimand. That written reprimand must therefore be rescinded.

V. The complaint from Ms. Starr Stanley. Regarding the informal complaint from Ms. Stanley, the evidence presented at this hearing indicates Appellant refused to listen to complete answers and spoke to Ms. Stanley and her assistant in a rude manner. Ms. Stanley testified that Supervisor Bebout got on the telephone with the same poor attitude that Appellant had and was equally unhelpful. Ms. Stanley also sent an e-mail to DOL stating in part "I have spoken with Karla and her supervisor Mary this morning, and I have to say that I'm not quite sure I've ever been treated in a more unprofessional manner by the DOL."

The evidence presented at this hearing establishes that Ms. Stanley complained of both the behavior of Appellant and the behavior of Supervisor Bebout, however, no disciplinary action in any form was taken against Supervisor Bebout.

VI. The June 29, 2009, complaint regarding the Eric Brown wage claim. The Appellant maintains that she did not understand Supervisor Bebout's note regarding the additional pay dates since Mr. Brown had only requested wages for one day. It is unclear why, if Appellant did not understand her supervisor's instructions, she simply did not ask Supervisor Bebout to explain those instructions.

Appellant has also taken serious issue as to whether the additional wage pages which were attached were actually part of the original wage claim form submitted by Mr. Brown. On November 17, 2009, the parties took the deposition of Mrs. Brown. At the deposition, Mrs. Brown testified that she prepared the wage claim form for Mr. Brown which was submitted to the DOL. Mrs. Brown testified that she made a notation "see attached for more dates" and that she included the "extra pages" i.e. the additional wage attachments, to the original wage claim form submitted to the DOL on June 4, 2009. The undersigned believes the testimony of Mrs. Brown.

VII. The July 1 [June 29], 2009, case note incident. Supervisor Bebout's testimony regarding this incident was that she actually gave Appellant permission to take the case notes and correct them before returning the notes to her. Supervisor Bebout did not counsel or reprimand the Appellant on June 29<sup>th</sup> for her actions and the preponderance of the evidence does not establish Appellant's actions were insubordinate or improper.

**VIII.** The July 8, 2009, telephone call by Appellant to Eric Brown. The alleged improper behavior by Appellant took place during a telephone call on July 8, 2009. The Appellant's pretermination hearing was scheduled for July 13, 2009. On either July 8 or July 9, 2009, four or five days before the pretermination hearing, Appellee added this charge in an "Addition to the Notice of Proposed Discharge".

Title 74 O.S. Section 840- 6.4, **Pretermination hearing**, states in pertinent part:

Notice of a pretermination hearing shall be served by actual delivery or by certified or registered mail service at least seven (7) calendar days prior to the scheduled pretermination hearing.

OAC 455:10-11-17, **Discharge** states in (b) (2):

**Notice.** Notice of the pretermination hearing shall be provided to the employee by personal service or certified or registered mail at least seven calendar days before the scheduled pretermination hearing.

The evidence presented establishes the Addition to the Notice provided to Appellant was in violation of Title 74 O.S. Section 840- 6.4 and OAC 455:10-11-17. Even if the Addition had been sent on July 8<sup>th</sup>, it would not have been received by Appellant seven days prior to the pretermination hearing as required by state law and merit rule. Therefore, nothing in the Addition could properly be used at the July 13<sup>th</sup> pretermination hearing.

Accordingly, based on the facts above, the undersigned finds the only issues and incidents listed in the July 17, 2009, final decision that Appellee could properly consider in making its decision to discipline Appellant were the July 28, 2008, suspension without pay and the June 29, 2009, complaint regarding the Eric Brown wage claim.

The question now becomes was termination of the Appellant proper? The undersigned does not know, based on the evidence presented, how other employees in the same or similar situation as Appellant have been disciplined by Appellee for same or similar violations. The undersigned does not know, based on the evidence presented, what discipline, if any, would have been imposed if Appellee had only considered the July 28, 2008, suspension without pay and the June 29, 2009, complaint regarding the Eric Brown wage claim. Therefore, this is not a question that the undersigned can answer.

Accordingly, Appellee must reinstate Appellant to her previously held position after which time Appellee may take appropriate disciplinary action against Appellant regarding the June 29, 2009, and July 8, 2009 (with proper notice) complaints regarding Eric Brown's wage claim.

In making a determination if, and to what extent, Appellant should be disciplined, Appellee is not allowed to review or consider the following previous informal or formal

discipline in making its decision to administer discipline: the disciplinary warning issued December, 2007, the February, 2008, written reprimand, and the July 1 [June 29], 2009, refusal of Appellant to give Supervisor Bebout the printed case notes.

In making a determination if, and to what extent, Appellant should be disciplined, Appellee is not allowed to review or consider the June 25, 2009, informal complaint from Starr Stanley unless appropriate and equitable discipline is taken against Supervisor Bebout.

In making a determination if, and to what extent, Appellant should be disciplined, Appellee will be allowed to consider Appellant's PMP's including the corrected PMP of June 30, 2009, which does not contain any mention of the notice of proposed discharge and which was referenced in the July 23, 2009, letter DOL General Counsel sent to Appellant.<sup>6</sup>

Regarding the April 15, 2009, written reprimand, that written reprimand stated "previous informal or formal discipline used in the decision to administer a written reprimand includes: the December 27, 2007, disciplinary warning, and the February 22, 2008, written reprimand". Appellee improperly reviewed and took into consideration the December 27, 2007, and February 22, 2008, disciplines when deciding to issue the April 15, 2009, written reprimand. That written reprimand must therefore be immediately rescinded by Appellee.

The Appellee may, however, consider the complaint of Mr. Lopez and issue new discipline, if warranted, without reviewing or taking into consideration the December 27, 2007, disciplinary warning, the February 22, 2008, written reprimand, or any other complaints or discipline which took place after Mr. Lopez's complaint. Thereafter, in making a determination if, and to what extent, Appellant should be disciplined for the June 29, 2009, and July 8, 2009, complaints regarding Eric Brown's wage claim, Appellee may then review or consider the new discipline, if any, issued regarding the Lopez complaint.

### **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 455:10-9-2 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.

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<sup>6</sup> That PMP is discussed in this Final Order, page 4, fourth full paragraph.

4. Title 74 O.S. Section 840-6.4 states in part that notice of a pretermination hearing shall be served by actual delivery or by certified or registered mail service at least seven (7) calendar days prior to the scheduled pretermination hearing.

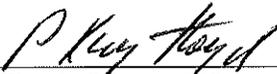
5. OAC 455:10-11-17 states in part that notice of the pretermination hearing shall be provided to the employee by personal service or certified or registered mail at least seven calendar days before the scheduled pretermination hearing.

6. OAC 455:10-11-14 states that 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 Merit Rules, conduct unbecoming a public employee or any other just cause.

7. Appellee has failed to meet its burden to prove, by a preponderance of the evidence, that just cause exists to discharge Appellant for violation of OAC 455:10-11-14 and the DOL handbook.

**IT IS THEREFORE ORDERED, ADJUDGED AND DEGREED** that Appellant's appeal shall be **Sustained**. Appellee is ordered to immediately reinstate Appellant to her previously held position as a Labor Compliance Officer II with back pay and benefits from July 17, 2009, to the date of her reinstatement. 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 July 17, 2009, discharge.

Signed this 1<sup>st</sup> day of February, 2010.

  
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P. Kay Floyd, OBA 10300  
Administrative Law Judge  
Oklahoma Merit Protection Commission  
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