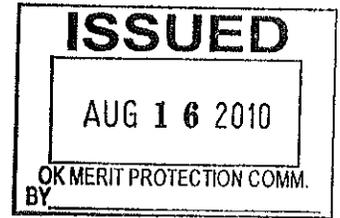


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA



PHILLIS J. HUGHES,)
Appellant)
vs.)
DEPARTMENT OF CORRECTIONS,)
Appellees.)

CASE NO. MPC 10-080

ORDER

This matter comes before the undersigned pursuant to this Administrative Law Judge's Order denying Appellee's July 9, 2010, Motion to Dismiss Appeal for Lack of Jurisdiction with Brief in Support, and directing the parties to file briefs addressing the question of whether the appeal, as framed by the April 26, 2010 Executive Director's Scheduling Order, states a claim for which, under the Merit Rules, relief can be granted. Appellant filed a Bench Brief in Support of Legal Remedies and Appellee filed Appellee's Motion to Dismiss Appeal for Failure to State a Claim for Which Relief Can Be Granted with Brief in Support. Oral arguments on the briefs were heard on July 29, 2010.

FINDINGS OF FACT

The material facts in this case are not in dispute:

1. On May 20, 2009 Appellant, an administrative assistant with the Department of Corrections (hereinafter referred to as "DOC") received a Letter of Concern dated May 18, 2009, from Deputy Warden Glynn Booher at the Northeast

Oklahoma Correctional Center (hereinafter referred to as "NOCC") in Vinita, Oklahoma, for driving a state vehicle in a reckless and careless manner.

2. The Letter of Concern was based on a report by two individuals that a car driven by Appellant ran their car off the roadway on I-35 near Frontier City amusement park in Oklahoma City on April 30, 2009. The individuals observed Appellant reading something that was held against the steering wheel when she veered into their lane, causing them to swerve out of their lane of traffic to avoid a collision with her. No citations were issued or police reports filed.

3. The individuals identified the veering car as a state vehicle and they wrote down the license plate number. The car was traced to NOCC, and the facility vehicle log showed that Appellant had checked out the vehicle on that day.

4. Appellant was advised that in the future she was not to read any material while driving a state vehicle on the roadways and that she should be aware of the Oklahoma state laws at all times while driving a state vehicle. Two state statutes were cited: Title 47, Section 15-516, *Inattention to Driving*, and Title 47, Section 11-804(a), requiring persons to drive vehicles at a careful and prudent speed.¹ Appellant was advised that future violations of the same or similar nature may lead to progressive disciplinary actions, up to and including termination.

5. The Letter of Concern, the first phase of informal discipline, was provided to Appellant and is maintained in Appellant's supervisor's file. It is not placed in Appellant's personnel file.

6. On June 8, 2009 Appellant filed an internal agency grievance seeking to have the Letter of Concern withdrawn as inappropriate, unwarranted, and without

¹ Counsel for Appellant stated in her oral argument that she was unable to find the referenced Section 11-804(a) in the Oklahoma Statutes

cause, as she had no recollection of the incident and didn't believe it happened because the other driver would have honked at her and would have called the police instead of the Department of Corrections.

7. Appellant's grievance was investigated by Warden II Haskell Higgins, of the Jim E. Hamilton Correctional Center. Among other things, Warden Higgins reviewed the Internal Affairs investigation and, based upon the factual and explicit details given in the citizens' report, determined that the letter of concern was warranted and the discipline appropriate.

8. On August 20, 2009 Appellant filed the instant appeal alleging that the grievance decision was incorrect because Warden Higgins failed to consider any statements or documentation Appellant had provided.

9. The Executive Director Scheduling Order, issued April 26, 2009, concluded:

The Appellant was given a Letter of Concern for violating two state statutes: 47 O.S. § 14-516, Inattention to Driving, and 47 O.S. § 11-804, Rules of the road. She was not given the opportunity to confront her accusers, nor was there a police report of the alleged incident. ...

Appellant had no way of refuting the allegations because of the manner in which the grievance was processed. It is difficult to determine whether the Letter of Concern was supported by evidence, because of the general lack of specificity. Since the Appellant was advised that further infractions of a similar nature would subject her to progressive discipline up to and including termination, there is a basis for concluding the grievance procedure failed to provide sufficient notice and opportunity to be heard. There is a due process issue that necessitates the Appellant be given an opportunity to know the specific facts that led to the Appellee's decision to informally discipline.

ISSUE

The dispositive issue here is whether the appeal, as framed by the April 26, 2010 Executive Director Scheduling Order, states a claim for which, under the Merit Rules, relief can be granted.

DISCUSSION

The Scheduling Order states that Appellant was not afforded due process that would provide her with sufficient notice and opportunity to be heard, or an opportunity to confront her accusers. The question is whether due process is required prior to the issuance of a Letter of Concern and, if so, how much process is due. Due process may be mandated by statute or by the Merit Rules or other procedures governing the issuance of informal discipline and Letters of Concern. Under certain circumstances, due process may also be mandated by the Due Process Clause of the United States Constitution.

The Oklahoma Merit Rules provide that informal discipline may be administered verbally or in writing, as in a letter of concern, for the purpose of bringing potential problems to an employee's attention before such problems escalate. Merit Rule 455:10-11-10(a); DOC OP-110415 I. A. 1. The Merit Rules further delineate how informal discipline may be administered and require, as a minimum:

1. The employee must be told the nature of the problem and steps which must be taken to resolve the problem (Merit Rule 455:10-11-10(b)(1));
2. The employee must be told the consequences of repeated infractions or continuing deficient performance or behavior (Merit Rule 455:10-11-10(b)(2));

3. Documentation of informal discipline may be maintained by the supervisor and the employee (Merit Rule 455:10-11-10(a)).

These requirements (also reiterated in DOC OP-110415 I. A. and B.) constitute the due process required when administering informal discipline to state employees; and these requirements were met in administering the Letter of Concern in the instant case. The Merit Rules do not require notice or an opportunity to be heard or an opportunity to confront accusers prior to administering informal discipline. There are no Oklahoma State Statutes requiring such notice, opportunity to be heard, or opportunity to confront accusers prior to administering informal discipline.

The Due Process Clause of the United States Constitution requires certain due process prior to governmental action that adversely affects an individual's important interests. What constitutes adequate due process varies depending upon the circumstances. The more one has at risk to lose, the greater the due process required. The United States Supreme Court has spoken to this on a number of occasions and stated, "The extent to which due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,'" *Goldberg v Kelly*, 397 U.S. 254, 262 (1970).

The law is clear, for example, that where one is at risk for criminal penalties, an individual is afforded strict due process protections such as notification of the right against self incrimination, the right to an attorney, notice that what is said may be used against him/her in a court of law, the right not to self-incriminate, and the right to confront accusers and to cross examine witnesses.

In civil matters, where the government is taking adverse action that affects an individual's important interests, certain due process requirements must be met. It is

settled, for instance, that due process is required prior to the withdrawal of public assistance benefits, disqualification for unemployment compensation, denial of a tax exemption, and discharge from public employment. *Goldberg v Kelly, supra* at 262. In each of these instances an important private interest is affected by governmental action and the affected individual may suffer "grievous loss". And in such instances, before the governmental action is taken due process requires that the individual be provided with adequate notice, an opportunity to be heard, and an opportunity to confront and cross-examine adverse witnesses. *Goldberg v Kelly, supra* at 266-270.

In the matter presented here Appellant has no important interests that are affected by the issuance of the Letter of Concern. Indeed, the only governmental action here is to provide Appellant with notice that certain behavior is unacceptable and can lead to discipline. This is not a case where Appellant's employment is being terminated or where she has received any disciplinary action resulting in any loss to her. Appellant has merely been given notice of inappropriate behavior, and that notice is documented in writing should any future such behavior occur. Furthermore, the documentation has not been placed in her personnel file, where it might arguably affect future interests such as opportunities for promotion.² As Appellant has suffered no loss as a result of the Letter of Concern, she has no Constitutional right to due process prior to the issuance of the letter.

Appellant has argued that the mere citing of motor vehicle law enforcement statutes in the letter of concern triggers due process protection. This Administrative Law Judge rejects that argument. The mere citing of a law enforcement statute in the Letter of Concern poses no threat of prosecution to Appellant. Appellant has not been

² Even so, the courts have not found that speculative, future interests are to be afforded the Constitutional protections of due process afforded the loss of an important private interest or benefit.

charged with or accused of violating such laws, and the letter of concern does not cite such statutes as the basis for its issuance. Employer, Department of Corrections, has no enforcement authority and no prosecutorial authority when it comes to state motor vehicle laws.

The due process requirements of notice, opportunity to be heard, and opportunity to confront accusers prior to administering informal discipline of a letter of concern is not mandated by State statutes, Merit Rules, or agency policies and procedures, and is not constitutionally mandated pursuant to the Due Process Clause. The Letter of Concern complied with the requirements of the Merit Rules and DOC operating procedures, and Appellant was afforded all the due process to which she was entitled. Therefore, the appeal, as framed by the April 26, 2010 Executive Director Scheduling Order, fails to state a claim for which, under the Merit Rules, relief can be granted, and thus must be dismissed.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled matter.

2. Any findings of fact that are properly conclusions of law are so incorporated herein as conclusions of law.

3. A petition generally can be dismissed only where (1) it lacks any cognizable legal theory to support the claim, or (2) the facts are insufficient to support a cognizable legal theory. *Lockhart v Loosen*, 943 P.2d 371, 375 (OK, 1997)

4. Merit Rule 455:10-11-10(a) states that the purpose of informal discipline is to streamline the progressive discipline system and to give notice to employees of potential problems before those problems escalate.

5. Merit Rule 455:10-11-10(b) requires that in administering informal discipline, an employee must be told the nature of the problem, the steps which must be taken to resolve the problem, and the consequences of repeated infractions or continuing deficient performance or behavior.

6. Merit Rule 455:10-11-10(a) provides that documentation of the informal discipline may be noted and maintained by the supervisor and employee.

7. DOC Policy OP-110415 I.A. 2. and 3. state that written documentation of informal discipline, such as a letter of concern, will not be placed in an employees' personnel file but will be maintained in the supervisor's file and a copy will be provided to the employee.

8. DOC Policy OP-110415 I.B. states that informal discipline must inform the employee of the nature of the problem, steps that must be taken to resolve the problem, and the consequences of repeated infractions or continuing deficient performance or behavior.

9. The Due Process Clause of the United States Constitution requires that notice, opportunity to be heard, opportunity to confront accusers, and opportunity to cross-examine witnesses be provided prior to governmental action that adversely affects an individual's important interests such as the withdrawal of public assistance benefits, disqualification for unemployment compensation, denial of a tax exemption, and discharge from public employment. *Goldberg v Kelly*, 397 U.S. 254 at 262 (1970).

10. The Letter of Concern issued by Appellee, Department of Corrections to Appellant Phillis Hughes on May 20, 2009 complied with the requirements of Oklahoma State Statutes, the Merit Rules, and DOC policies and procedures.

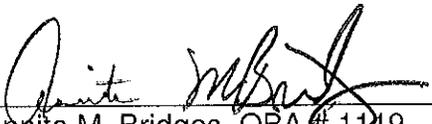
11. The Letter of Concern issued by Appellee, Department of Corrections to Appellant Phillis Hughes on May 20, 2009 did not adversely affect important interests which would trigger due process requirements of the Due Process Clause of the United States Constitution.

12. Appellant's appeal, as framed by the April 26, 2010 Executive Director Scheduling Order, fails to state a claim for which, under the Merit Rules, relief can be granted.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant is hereby **DISMISSED** for failure to state a claim for which relief can be granted.

DATED: this 13th day of August, 2010.



Annita M. Bridges, OBA # 1119
Administrative Law Judge
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PROTECTION COMMISSION
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