

9, 2009, Linda Murillo, another ODVA employee, filed a complaint of sexual harassment against Mike Oliver. On December 10, 2009, Baltierra approached Ms. Murillo and stated that he "heard she had an incident yesterday". Ms. Murillo was dismayed that this information was being discussed and told her supervisor, Rebecca Thorpe, who in turn informed the facility Administrator, Regeana McCracken. Ms. McCracken, along with the Human Resources Manager, LaQuitta Dorsey, held a meeting with Baltierra to discuss his comments to Ms. Murillo. Ms. McCracken explained to Baltierra that there was a pending harassment complaint and any breaches of confidentiality were to be taken very seriously. Baltierra responded that he heard some of "the guys" talking but that he didn't know the details. He also agreed to get the names of these guys for Ms. McCracken so that she could investigate further. The next day, she reminded him that she needed the names and he responded that he was "working on it". Additional gossip regarding Ms. Murillo was circulating in the facility, particularly in the maintenance division. In order to quash this gossip, Ms. McCracken called a meeting of the maintenance staff to advise everyone that this type of activity was prohibited and not appropriate. During that meeting, she again asked Baltierra for the names, whereupon he refused, stating that "he wasn't going to rat anyone out". She advised Baltierra that this was a serious matter and that his refusal of her directive was insubordination. He continued to refuse to provide the requested information.

On December 18, 2009, ODVA provided Baltierra with a Notice of Pre-Termination Hearing and Opportunity to Respond (Appellee's Exhibit "2-A"). Baltierra was placed upon Suspension with Pay pending a final decision. A pre-termination hearing was scheduled and held on December 29, 2009. At the pre-termination hearing, Baltierra did not address the allegations against him, but voiced a complaint of racial discrimination. This complaint was investigated independently of the discharge proceedings, resulting in a finding that there was insufficient evidence of discrimination. Meanwhile, on December 29, 2009, ODVA hand-delivered the Notice of Final Action -- Discharge to Baltierra (Appellee's Exhibit "3-A"). The Notice sets forth the specific actions taken by Baltierra and contained a finding that these actions constituted misconduct, inefficiency, insubordination and conduct unbecoming a public employee, justifying termination of his employment. The Notice also contained references to Baltierra's position as a management professional and supervisor as aggravating factors, as well

as a list of prior discipline. Baltierra's discharge was effective December 31, 2009. Baltierra timely filed an appeal of the adverse action of discharge on January 4, 2010.

During the course of the hearing, Baltierra complains that he was never advised that his refusal to provide the requested information could result in his termination. He argues that the consequences of his refusal were never fully disclosed to him. He also states that the discipline was too harsh and not in compliance with the progressive discipline policy.

The Testimony

The testimony of six (6) witnesses was provided by ODVA in support of the disciplinary action. The Appellant objected to the testimony of the first witness, Brian Kirtley, the investigator for the discrimination complaint. The Objection was overruled and Mr. Kirtley testified that he is the Human Resources Manager for the Oklahoma Department of Transportation. He stated that he has conducted hundreds of investigations relating to allegations of discrimination. He stated that Baltierra also made a complaint regarding the lack of progressive discipline in this matter. Mr. Kirtley testified that he found no evidence of any violations. He also stated that he agreed that the level of seriousness of this insubordination justified a higher level of discipline. He agreed that the ODVA could have used lesser forms of discipline, gradually increasing in severity, in order to coerce Baltierra into disclosing the requested information, but that wasn't mandatory. Mr. Kirtley testified that it sets a very bad precedent to permit a department head to refuse an order or directive in front of his subordinates.

Linda Murillo testified that she is an Accounting Technician at the ODVA Lawton facility. She said that she reluctantly filed a sexual harassment complaint against a co-worker in December of 2009. She said she was "shocked" when Baltierra asked her if she had an "incident", assuming that he was referring to the complaint. She was very upset that he made this inquiry as she had been assured that the complaint would be kept confidential. She reported the comment to her supervisor.

Rebecca Thorpe is the Business Manager at the ODVA Lawton facility and is Ms. Murillo's supervisor. She testified that on December 10, 2009, Ms. Murillo reported Baltierra's comments to her. She said that Ms. Murillo was visibly upset, was shaking and appeared to be about to cry. She stated that she was present in the meeting with Ms. McCracken and Ms. Dorsey, when Baltierra was first asked about his comments. She testified that Baltierra stated

that he overheard some of the guys on his staff talking. He did not deny making the comment to Ms. Murillo. Ms. Thorpe stated that Baltierra agreed to get the names.

LaQuitta Dorsey is the Human Resources Manager at the Lawton facility. She testified that she was present at the meeting on December 10 where Ms. McCracken first confronted Baltierra about his comment to Ms. Murillo. She stated that they discussed that the Sexual Harassment policy required that this matter be kept confidential and that they considered this to be a very serious matter. She confirmed that Baltierra stated that he had gotten the information from "some of my guys". Baltierra also told them that he and Ms. Murillo were friends and he thought it was okay to ask her about the "incident". She testified that Baltierra told Ms. McCracken that he would get the names for her. Ms. Dorsey testified that she attended a meeting on December 15 with the maintenance staff to advise all of the employees to stop any and all gossip. She stated that Mike Strawn was at the meeting and admitted to making some comments. Ms. Dorsey testified that Ms. McCracken again asked Baltierra to reveal the requested information, and that Baltierra refused to do so, stating that "he was not going to rat out anyone". The next day, on December 16, Ms. Dorsey testified that she again attended a meeting with Ms. McCracken and Baltierra. At this meeting the seriousness of his conduct was again discussed and Ms. McCracken told Baltierra that she was giving him a "directive" not a request, and that discipline would be imposed if he continued to be insubordinate. Baltierra asked what type of discipline and was told that it could be a suspension. He refused to disclose the information. Ms. Dorsey testified that Baltierra was told on four occasions that his refusal to comply with the directive could result in disciplinary action, although the level of discipline was not specifically discussed. Ms. Dorsey testified that Baltierra was also clearly told that there was not going to be action taken against whoever told him the information and that the need for the name or names was to allow Ms. McCracken to counsel the employees about the need to keep the information confidential and avoid gossip. Ms. Dorsey testified that ODVA was trying to find out the source of the breach of confidentiality and Baltierra's refusal to cooperate was seriously impeding the investigation. Ms. Dorsey stated that Ms. McCracken never appeared upset or displayed anger toward Baltierra. She testified that ODVA followed its progressive discipline policy which provides that in certain circumstances, a single incident can warrant higher levels of discipline without proceeding through the lower steps. (Appellee's Exhibit "2-

C"). Ms. Dorsey also testified that she has received complaints about Baltierra's leadership from some of his staff.

Regeana McCracken is the Administrator at the Lawton ODVA facility. She testified that on December 10, 2009, Ms. Thorpe reported Baltierra's comments to her and that she called Baltierra into a meeting. She confirmed that Baltierra was told about the seriousness of the breach of confidentiality and he said he would get her the names. She testified that she saw Baltierra later and reminded him that she needed the names, and he replied that "he was working on it". On the following Monday, Baltierra told her that he spoke with his staff and they would not tell him who told them the information. Ms. McCracken then questioned several of his staff, all of whom denied knowledge of the information. Ms. McCracken testified that on December 15, she received another report of comments about Ms. Murillo, and called the meeting with the maintenance staff to stop the gossip. Again, at that meeting, Baltierra was asked for the names and he refused to disclose the requested information. The next day, she gave him an additional opportunity to comply, and he once again refused to comply with her directive. Ms. McCracken stated that she was very concerned about Baltierra's refusal, but she was not angry. She stated that she considered this to be a very serious violation, primarily because of Baltierra's position as a department head and he knew or should have known the consequences of his behavior. She stated that he appeared to make a conscious decision to accept discipline to protect another person. She later found out that he lied about the source of his information and was protecting his girlfriend. Ms. McCracken testified that she made the decision to terminate Baltierra because of the seriousness of his behavior and because he was given four or five opportunities to comply with her directive, and he intentionally refused.

Susan McClure is the Human Resources Program Director at the Central Office for ODVA. She testified that any formal discipline proposed at ODVA is required to be reviewed. She testified that she reviewed the discipline in this case and approved it. She stated that it was in compliance with all ODVA policies. Ms. McClure was recalled on the second day of the hearing. She testified that the original draft of the proposed discipline notice contained the word "reprimand", which was struck through and replaced with the word "discipline". (Appellant's Exhibit "17"). She stated that she advised Ms. McCracken to confirm and use what was actually said.

Following the testimony of these witnesses, the Appellee rested its case. Appellant offered the testimony of twelve (12) witnesses in his defense.

Fred Baltierra testified on his own behalf. He stated that he has four children and is going through a divorce. He testified that he graduated high school and has approximately 40 hours of college. He admitted that he has been counseled periodically at ODVA, primarily about his absences. He testified that on December 10, 2009, he was told by a co-worker that Mike Oliver and Linda Murillo had a big argument at work. He wasn't told the details and he mentioned it to Murillo innocently. He stated that he had no idea at that time that the argument had resulted in a sexual harassment complaint. He said he asked Murillo if she had a "tiff" the day before. She did not respond and left the area. He admitted that when he was asked about this remark by Ms. McCracken, he lied and told her he had heard it from the "guys". He stated that he would ask the "guys" where they had gotten this information. He denied that he was told why this information was needed. Baltierra testified that during the meeting on December 15, his entire staff was present. He said that another employee told Ms. McCracken that he had heard Murillo was having an affair. He admitted that he refused to disclose the source of his information, even after he was informed of the possibility of disciplinary action against him, but that he believed he would only be suspended without pay. Baltierra admitted that Leah Nealis was the employee who gave him the information, and that he knew that the information had come from Mike Oliver. He stated that he and Ms. Nealis were dating. He admitted that he lied to his supervisor when she asked him for this information. He also admitted that he was told of the serious nature of this matter and of the need to maintain confidentiality of harassment complaints.

Eleven additional witnesses were presented by the Appellant regarding Exhibits 6 through 16. Derven Hunter (Appellant's Exhibit "6") testified that she wrote this letter of recommendation for Baltierra at the request of her friend and co-worker, Leah Nealis. Patrice Mooney (Appellant's Exhibit "7") testified that Leah Nealis requested this letter of recommendation for Baltierra and that she was not aware of the details of this disciplinary action. Ronald Mitchell (Appellant's Exhibit "8") testified that Baltierra asked him to write this letter. He stated that he thought it was going to be used for a job application. He stated that he knew Baltierra was in trouble and that he could not remember when he wrote the letter. Mike Strawn (Appellant's Exhibit "9") testified that Baltierra asked him to write this letter because he might

be going to court. He testified that he worked for Baltierra in the maintenance department. Janessa Griggs (Appellant's Exhibit "10") testified that both Baltierra and Nealis asked her to write this letter and that she thought it was going to be used for another job. Lacinda Bradford (Appellant's Exhibit "12") testified that Baltierra asked her to write this letter as an employment reference. Morris Doug Gibson (Appellant's Exhibit "13") testified that he typed this letter at the request of a co-worker. He stated that he worked with Baltierra for about 3 months in 2009. Mike Bailey (Appellant's Exhibit "14") testified that Baltierra asked him to write this letter. He admitted that he had voiced complaints about Baltierra's role as a supervisor in the past and he also admitted that Leah Nealis is his daughter's supervisor. He denied any coercion to write letter. Louis "Skip" Lamkin (Appellant's Exhibit "15") testified that Baltierra asked him to write this letter and that he thought Baltierra was the best supervisor he had ever had. Overall, ten employees produced letters of recommendations for Baltierra (Appellant's Exhibits "6 -15"), however, it appears that only three had actually worked directly for/with Baltierra.

Leah Nealis (Appellant's Exhibit "11") testified that on December 9, 2009, she had a discussion with Mike Oliver during which he told her that he had "gotten into it" with Linda Murillo. She admitted telling Baltierra this information but that neither of them was aware that there had been a sexual harassment complaint filed. She admitted that she was dating Baltierra. She also admitted that even though she was aware of the trouble that Baltierra was in, she never came forward and told anyone that she was the person who gave him the information. She testified that Mike Oliver agreed to come forward but that he never did.

Mike Oliver testified that he received a reprimand for the incident with Linda Murillo on December 9, 2009. (Appellant's Exhibit "16"). He testified that he had a conversation with Leah Nealis on December 9, 2009 about the argument, but that he was not aware at that time of the complaint. He stated that Ms. McCracken questioned him about the incident and that he never disclosed his discussion with Nealis. He testified that he was only asked if he had ever talked with anyone in maintenance department about the incident and he replied that he had not. He was then told of the complaint and the need for confidentiality. Oliver denied that he was ever asked to come forward and disclose his conversation with Nealis

ISSUES

1. Was there just cause to impose discipline and did the actions of Appellant Baltierra constitute conduct unbecoming a state employee, inefficiency, misconduct and/or insubordination?
2. Was there, in fact a breach of the sexual harassment confidentiality policy?
3. If so, was the discipline imposed appropriate under the circumstances?

DISCUSSION

First, the evidentiary hearing was continued from May 13 to June 1 to address Baltierra's objections and to ensure due process and a fair hearing to both parties. See the Interim Order issued on May 12, 2010. On June 1, Baltierra did not express any further objections or indicate any impediments to completing a full hearing.

There is no factual dispute regarding the actions of the Appellant in refusing a directive from his supervisor. Baltierra readily admits that he refused to comply with a directive from his supervisor, and that he, in fact, lied to her in response to her inquiry about his comments made to a co-worker. The Notices given to Baltierra clearly set out the basis for this disciplinary action and the testimony at the hearing supports the factual recitations contained in those Notices. There is sufficient, undisputed evidence that Baltierra was directly and willfully insubordinate and that his behavior constitutes misconduct and conduct unbecoming a public employee.

There was little to no evidence supporting any serious performance issues or to the allegations of "inefficiency". The evidence at the hearing showed that the discussion about Baltierra's poor performance in the Notice of Final Action was erroneous, and was taken directly from the 2008 PMP, although it indicates a 2009 date. (Appellee's Exhibit "3-A", page 3 and Joint Exhibit "3", page 9). As such, the charge of inefficiency is not supported by the evidence, but this was but a minor part of this disciplinary action.

Although Appellant asked that the breach of confidentiality issue be made a part of this case, it really is not relevant to the discipline imposed upon the Appellant. There was never an accusation that Baltierra breached the confidentiality policy. The sexual harassment policy is relevant only because it forms the basis for the need to request the name of the person who was

discussing this matter. The ODVA policy states that confidentiality should be maintained, that only those with a need to know about such a complaint should be aware of its existence and that employees should cooperate with the investigation. (Joint Exhibit "1").

Baltierra argues that ODVA should have disciplined him earlier, with a lesser form of discipline each time he refused to comply with the request for the names, and continue to increase the severity of the discipline to induce him to disclose the information. He argues that this is the appropriate application of progressive discipline. This argument is not persuasive, especially since Baltierra himself perpetuated his lies by agreeing "to get the names" and indicating that he was "working on it" the first few times he was asked for them. Further, Baltierra clearly knew at each meeting that this was being considered a serious matter. Even when he was told that his refusal constituted insubordination, he continued to refuse to comply with the directive. Baltierra made a conscious decision to risk discipline in order to protect his girlfriend.

Appellant is making the same unsuccessful argument set out by the employee in *Cox v. Department of Human Services*, 2004 OK 17, 87 P.3d 607. This argument is essentially that ODVA erred by not utilizing lesser alternative punishment to address the problem and that it is improper to discharge Baltierra before he was given the opportunity to correct behavior through the progressive disciplinary process. The Supreme Court rejected that argument, finding that neither statutes nor merit rules impose such a burden on the employer. The Court further went on to find that there is no requirement for employers to affirmatively demonstrate that some lesser disciplinary act would be ineffective before imposing a more stringent penalty.

Baltierra complains that he is being held to a higher standard because he is a department head. He argues that this is reversible error and that it is improper for ODVA to expect more from him because of his position. Baltierra has offered no authority on this issue. To the contrary, Baltierra's insubordination in front of his staff causes his behavior to be more egregious because of the precedent it sets. If subordinate employees directly observe this type of willful behavior, without serious and immediate consequences, it creates an untenable and unacceptable work environment, one where the employer becomes impotent.

Further, there is no evidence to support Baltierra's claim that Ms. McCracken acted out of anger or resentment towards Baltierra. There was ample evidence that there was a great deal of gossip at the facility. The actions of Ms. McCracken were an attempt to stop that gossip and

to protect her employees. All of the witnesses were credible and consistent in their testimony. Ms. McCracken was particularly mild mannered. Based upon the totality of the record, the undersigned finds that ODVA has met its burden of proof that Baltierra's actions in refusing his supervisor's directive constituted conduct unbecoming a state employee, misconduct and insubordination. There is further substantial evidence that Baltierra's actions were willful and intentional.

Baltierra's conduct, as a supervisor, in blatantly and directly refusing to comply with the facility Administrator's directive, especially in front of other staff members constitutes a very serious infraction. This type of behavior cannot be condoned. Baltierra made a conscious decision to face possible disciplinary action in order to protect his girlfriend. He took a gamble. Unfortunately, he underestimated the seriousness of his behavior. As a department head, he knew or should have known that his behavior was grossly inappropriate and would not be tolerated. The Merit Rules recognize that a single incident may justify a higher step of discipline without proceeding through lower steps of discipline. *See* OAC 455:10-11-14. There is a lack of mitigating circumstances to justify a reduction of the discipline imposed in this matter. Given the seriousness of the violations, Baltierra's lack of previous formal discipline does not justify a reduction of the discipline. Based upon the record, the undersigned finds that ODVA has met its burden of proof that just cause existed for the discipline imposed and ODVA has proven, by a preponderance of the evidence, that this level of discipline was just and appropriate under the circumstances and not a violation of its progressive disciplinary procedure.

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 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 455:10-11-17 states that a permanent classified employee may be discharged 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. The preponderance of the evidence, including Baltierra's admissions, supports that he lied to the facility Administrator on December 10 and 11, 2009, about the source of his information regarding Ms. Murillo. The preponderance of the evidence, including Baltierra's admissions, supports that he refused to comply with a directive from the facility Administrator on December 14 and 15, 2009 to disclose the source. There is insufficient evidence that Baltierra had performance deficiencies.

6. Appellee has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Baltierra for misconduct, insubordination and conduct unbecoming a state employee. Appellee has not met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Baltierra for inefficiency.

7. Pursuant to OAC 455:10-9-2(C), having found that just cause existed for the adverse action, the undersigned considered the seriousness of the conduct relating to the employee's duties and responsibilities, the previous employment and disciplinary records of the employee, and other mitigating circumstances, but those did not justify a reduction in the severity of the discipline imposed.

8. Appellee has met its burden to prove, by a preponderance of the evidence, that the discipline imposed was just under the circumstances considering the seriousness of the conduct as it relates to the employee's duties and responsibilities and other mitigating circumstances.

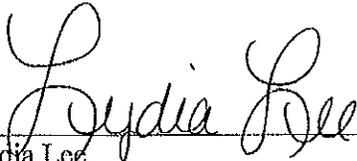
9. There is no progressive discipline violation. The Merit Rules give agencies the flexibility to vary penalties if justified by aggravating or mitigating conditions, and OAC 455:10-11-4 specifically provides that one incident may justify a higher step of discipline without proceeding through lower steps. Therefore, progressive steps need not always be imposed when disciplining an employee. There is no requirement that employers must utilize less severe discipline in all cases or affirmatively demonstrate that some lesser disciplinary act would be ineffective before

imposing a more stringent penalty. *Cox v. Department of Human Services*, 2004 OK 17, 87 P.3d 607.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Fred Baltierra, MPC 10-184 be DENIED.

This Order entered this 10th day of June, 2010.



Lydia Lee
Administrative Law Judge