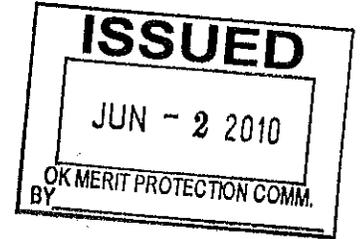


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

JAMES HAWKINS,)
)
 Appellant,)
)
 vs.)
)
 DEPARTMENT OF CORRECTIONS,)
)
 Appellee.)

Case No. MPC-10-202



CORRECTED FINAL ORDER¹

This matter came on for hearing before Jami J. Fenner, Administrative Law Judge, on May 25, 2010, at the Oklahoma Merit Protection Commission's office in Oklahoma City, Oklahoma. Appellant James Hawkins appeared in person and through his counsel, Michael J. Corrales. Appellee Department of Corrections ("DOC"), appeared through its counsel, Larry Foster II, Assistant General Counsel, and through the party-representative, C. Wayne Smith.

Appellant was a permanent, classified employee of Appellee, appealing from an adverse disciplinary action of discharge. 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. 1-8. Appellant offered no exhibits into evidence. After receiving all evidence and counsels' closing arguments, the undersigned closed the record on May 25, 2010.

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 has worked for DOC for approximately three years. At the time of

¹ On the original Final Order, the undersigned incorrectly identified the case number as MPC-09-186.

the adverse action, Appellant held the position of Correctional Security Officer III assigned to the Lawton Community Corrections Center ("LCCC"). On December 22, 2009, DOC issued a "Notice of Pre-Termination Hearing," notifying Appellant that DOC was considering termination of Appellant's employment. (Appellee's Exhibit 6). District Supervisor, C. Wayne Smith, conducted a pre-termination hearing, and sent a letter to Appellant, terminating his employment effective January 4, 2010. (Appellee's Exhibit 7).

According to the Notice and the letter regarding the termination of Appellant's employment, the basis for the adverse action was Appellant's violating several provisions of the DOC Policy OP-110215 entitled "Rules Concerning the Individual Conduct of Employees." (Appellee's Exhibit 1). More specifically, the Notice and letter state Appellant violated the policy by sending to his supervisor a text message containing a photograph of a hangman's noose with the words "for sale nigger swing set," which the supervisor found inappropriate and offensive. Appellant contends his uncle is the one who forwarded the text message from Appellant's cell phone, and Appellant did not do so.

The Notice and letter specifically identify no aggravating or mitigating circumstances considered in administering the discipline. *See* 74 O.S. § 840-6.3(C). They, however, do state Appellant had prior discipline in the form of a suspension without pay on October 23, 2009, and a letter of reprimand on November 9, 2009, for failure to report for duty. *See* OAC 455:10-11-17(c)(5). Additionally, Mr. Smith testified he, in determining to discharge Appellant, considered the grievous nature of the offense, which could be construed as a threat of death or physical harm, the prior discipline, and the proximity in time between the prior discipline for a similar offense and the current offense.

The evidence showed, by a preponderance of the evidence, Appellant sent the text

message in question to his supervisor, Lt. Tommy Porter. It is undisputed the message was sent from Appellant's cell phone to Lt. Porter's phone. Three different DOC employees testified Appellant admitted he is the one who had sent the message. They testified Mr. Smith called in Appellant to place him on suspension with pay pending an investigation and pre-termination hearing, and Mr. Smith showed Appellant the memorandum from Lt. Porter (Appellee's Exhibit 3). The memorandum contains a copy of the photograph sent via text from Appellant's phone. They further testified Appellant said "this is ridiculous," he thought the picture was a joke, he had forwarded it to a lot of people, and he did not think Lt. Porter would be offended by it.

The testimony of Appellant and his uncle, Johnny Pennington, with whom Appellant has lived since he was seven years old, that Mr. Pennington is the one who forwarded the message is not credible in light of the demeanor of each and other evidence. For example, Appellant testified the first time he had seen the picture in question was the day of the hearing, May 26, 2010, and then said it was at the pre-hearing conference in this matter. Mr. Pennington testified, however, he previously had seen the picture and believes it was the day DOC sent Appellant home (presumably on the suspension with pay pending the hearing). Additionally, several other witnesses testified Appellant was shown the picture at least twice – on December 22, 2009, and at the pre-termination hearing. Moreover, during Appellee's case in chief, when Appellant's counsel asked Appellant if he was home asleep when the text message was sent to Lt. Porter, Appellant said, "yes." Later, Appellant testified again and stated he was in the shower..

The photograph Appellant sent via text message is unquestionably inappropriate and offensive. The evidence showed Appellant's conduct in sending the message to his supervisor violates each of the provisions of the DOC policy cited by DOC – Section I(A) regarding Code of Conduct, Section IV(b)(2) regarding zero tolerance of demeaning conduct toward a member

of any protected class, Section VIII(B) regarding workplace violence, and Section IX(D) regarding employee communications. The photograph is disrespectful, demeaning, potentially threatening and harassing. Violation of these policy provisions constitutes just cause for formal discipline.

The evidence further showed the discipline DOC imposed – discharge – was just. DOC utilized progressive discipline with Appellant. Additionally, the evidence did not show, as Appellant apparently contends, that DOC failed, as required, to ensure consistency in administering its progressive discipline policy.

DOC previously had disciplined Appellant for violating some of the same policy provisions as those cited in the termination letter by engaging in similar behavior. Appellant received a three-day suspension without pay for sending sexually inappropriate text messages on August 26, 2009, to a female co-worker who considered the messages inappropriate. (Appellee's Ex. 4). After the August 26, 2009, incident, the Chief of Security held a meeting with Lt. Porter's team and admonished the team about sending inappropriate text messages.

Appellant claims the discipline imposed on him was not just because DOC was not consistent in the action it took with respect to similar conduct by other employees of the agency. The evidence showed DOC management was not aware of any other employee who had sent or made racially derogatory communications to his co-workers. Appellant presented evidence that Lt. Porter had sent sexually explicit photographs to Appellant via text, but DOC had not imposed formal discipline on Porter. Appellant did not testify he was offended by the photographs. In any event, the evidence revealed DOC did not know about Porter's conduct until Appellant's pre-termination hearing. The evidence also showed Mr. Smith believed Lt. Porter had sent the sexually explicit photographs before the team meeting in which Lt. Porter and others were

warned about sending such text messages. Mr. Smith testified he believed Lt. Porter's supervisor had already handled the situation, and Lt. Porter did not send the sexually explicit photographs after being warned not to do so.²

Based on a preponderance of the evidence, the undersigned Administrative Law Judge finds just cause existed to discipline Appellant and the discipline imposed was just.

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. 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. 74 O.S. § 840-6.5(C); OAC 455:10-9-2.
4. 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.
5. 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

² The parties presented no evidence of exactly when the meeting was held, although it was clear the meeting was after August 26, 2009, when Appellant sent inappropriate text messages to a female co-worker. While Lt. Porter testified that it was "shortly" after the August 26, 2009, incident, the exact date is irrelevant because – right or wrong – Mr. Smith believed Lt. Porter did not send improper text messages after being counseled not to do so. Accordingly, Mr. Smith's treatment of Lt. Porter does not demonstrate a lack of consistency, evenhandedness or predictability in discipline. *See* OAC 455:10-11-5.

lower steps. OAC 455:10-11-4.

6. An agency may impose formal discipline on an employee to correct violations of statute, rule, policy, practice or procedure regarding work performance or behavior. OAC 455:10-11-11.

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.

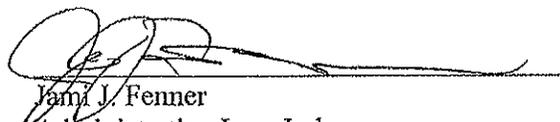
8. Appellee met its burden of proof that just cause existed to discipline Appellant for violating DOC Policy OP-110215 entitled "Rules Concerning the Individual Conduct of Employees."

9. Appellee met its burden of proof that just cause existed for formal discipline.

10. Appellee has met its burden of proof that the discipline imposed -- discharge -- was just.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the decision of the Department of Corrections to discharge Appellant is affirmed and Appellant's appeal is hereby **NOT SUSTAINED**.

Signed this 2nd day of June, 2010.


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