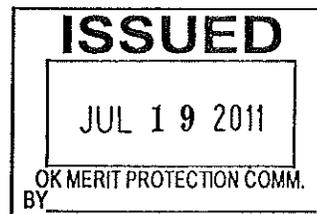


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA



CHRISTOPHER DeCLOUD,)
Appellant)
vs.)
DEPARTMENT OF PUBLIC SAFETY,)
Appellee.)

CASE NO. MPC 11-017

FINAL ORDER

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on July 8, 2011, at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Christopher DeCloud, appeared in person and was represented by Daniel Gamino, Esq. Appellee, Department of Public Safety (hereinafter referred to as "DPS" or "Appellee"), appeared by and through its Counsel, Stephen Krise, General Counsel.

Appellant, an Absolute Preference Veteran, was certified by the Office of Personnel Management as meeting the qualifications for the position of Fire Prevention and Security Officer III, Job Code J41C, which DPS was seeking to fill. During his interview for the position, Appellant was observed to have a tattoo on his right hand. Appellee has a directive prohibiting tattoos on the hands and on other visible body areas of all sworn and non-sworn personnel and patrol employees and applicants. After determining that Appellant was in violation of this directive, Appellee sent a letter to the Office of Personnel Management (OPM) requesting that Appellant be disqualified from

the list of persons eligible for the Fire Prevention and Security Officer position because of the violation. OPM granted DPS's request and disqualified Appellant because he "has failed part of an Appointing Authority's background investigation." Appellant filed this appeal alleging that (1) he did not fail a background investigation, as no background investigation was conducted, and (2) as "The Chief's Directive," the directive is temporary and is subject to change with a new Chief.

Prior to the hearing, argument was heard on Appellee's Motion to Quash Appellant's Subpoenas of DPS Commissioner Mike Thompson and Zone Commander Major Barry Ross. Upon stipulation by Appellee that Major Ross did not participate in, and had no knowledge of, the OPM disqualification of Appellant, Appellant withdrew his subpoena. Upon Appellee's stipulation and representation that Commissioner Thompson, likewise, had no involvement in either the decision to seek disqualification or OPM's decision to disqualify Appellant, Appellee's motion was granted.

Whereupon, the sworn testimony of witnesses for both Appellee and Appellant were presented, along with exhibits, which are incorporated herein and made a part hereof. 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 FACTS

Appellant was certified by the Office of Personnel Management as an Absolute Preference Veteran on the list of eligible applicants to fill the position of Fire Prevention and Security Officer for Appellee DPS. As an Absolute Preference Veteran, Appellant

appeared at the top of the register and could not be passed over or denied employment except for cause, as approved by the Office of Personnel Administration (OPM).

On June 10, 2010 Appellant was interviewed at DPS for the Fire Prevention and Security Officer position. The three-person interview panel was chaired by Captain Rodrick (Pete) Norwood, and included Human Resources Programs Manager Shelly Forshee. During the course of the interview, Captain Norwood noticed a tattoo on Appellant's right hand, which he learned extended from Appellant's arm down onto his hand. Captain Norwood advised Appellant that he appeared to be in violation of a written policy prohibiting body art, including tattoos, on the hands, neck, face, or other visible body areas. Captain Norwood gave Appellant a copy of the policy and told him he would check with his superiors and let Appellant know whether his tattoo would disqualify him from the position. After checking with a higher ranking officer about the matter, Captain Norwood called Appellant later that day and told him that his tattoo was in violation of DPS policy and would not allow him to serve in the interviewed position.

That same day Ms. Forshee sent a letter to Tom Impson, Director of Applicant Services Division at OPM, seeking to disqualify Appellant from the list of eligibles for the Fire Prevention and Safety Officer position because Appellant "was in violation of the Department of Public Safety's Chief's Directive dated: 12/18/09 on Body art (sic), specific to section IV(c)." Ms. Forshee included a copy of the directive with her letter. (Joint Exhibits 3, 6 & 7) Mr. Impson sent a letter to Appellant, dated June 16, 2010, advising him of DPS's request to pass him for cause, enclosing the June 10, 2010 letter from DPS, along with the Chief's Directive, and encouraging Appellant to submit any

information he wished OPM to consider in making its determination. (Joint Exhibits 5, 6, & 7) On June 25, 2010 Appellant replied stating:

The only additional information that I could add is that my tattoo is a memorial to my buddy and team member who was killed in Iraq. The tattoo is not offensive, extremist, sexist, or racist. The tattoo is in accordance with current U.S. Army policy (2006 to present). The tattoo is located on my right forearm and extends to the back of the hand.

... I won't be getting it removed anytime soon though. ...

... Sometimes when a buddy dies a senseless and violent death, a person feels that there is nothing that they can do. Many soldiers have dealt with this "there's nothing I can do" aspect in extreme measures, but others like myself, have chosen to take action in the form of a tattoo. In my case, this has been at least one of the only ways I deal with what the psychiatrist call "survivors guilt". (sic)

Joint Exhibit 8

OPM forwarded a copy of Appellant's response to DPS and inquired whether anything stated would lead DPS to reconsider its request to disqualify. It did not. On June 28, 2010 OPM sent a letter to DPS disqualifying Appellant and stating:

Having reviewed your request, I am approving your proposed action to pass Mr. DeCloud as provided by Merit Rule 530:10-9-9(a)(3).

According to the letter, Mr. DeCloud has failed part of an Appointing Authority's background investigation.

Joint Exhibit 10

Appellant, also, was notified by OPM:

Your name is being removed from consideration only for Department of Public Safety. This will not affect your eligibility for consideration with other state agencies.

...

Specifically, the Appointing Authority has asked that you be disqualified for consideration for the following reason:

(3) the person fails any part of an Appointing Authority's background investigation.

Appellant filed an appeal with this Commission alleging that (1) no background investigation had been performed, as he had not signed and returned the Biographical Questionnaire authorizing a background investigation, and (2) the Chief's Directive # 2009-09 is a directive from the current chief, but is subject to change when a new chief is appointed.

DISCUSSION

The Merit Rules delineate 13 different reasons that may serve as a basis for the Office of Personnel Management to refuse to certify, disqualify, or remove a person's name from a register. Appellant alleges that Appellee DPS violated Merit Rules by failing to cite any one of the 13 reasons in its letter to OPM requesting Appellant's disqualification. Further, Appellant contends, Appellant's violation of the DPS tattoo policy does not fall within the meaning of "failing any part of a background investigation" as stated by OPM, and does not fall within any of the 13 reasons listed as grounds to disqualify an Absolute Preference Veteran. "Failing a background investigation" creates a cloud on his record, Appellant contends, that will follow him in every job he applies for and prevents him from ever getting the type of federal or state job for which he is trained and qualified.

The issue presented here is whether Appellee DPS violated any state statutes, federal laws, or Merit Rules in seeking to have Appellant disqualified as an Absolute Preference Veteran for the position of Fire Prevention and Security Officer. Appellant has the burden of proof, by a preponderance of the evidence. First, Appellant contends,

Merit Rule 530:10-9-131(c)(2) requires DPS to identify which of the 13 reasons delineated in Merit Rule 530:10-9-9 Appellant violated. This administrative law judge disagrees. Merit Rule 530:10-9-131(c)(2) provides that a request for OPM to disqualify an Absolute Preference Veteran shall include a detailed written explanation and justification documenting why it is necessary to disqualify the applicant because of one or more of the 13 listed causes. This rule requires the specific factual basis giving rise to the request, not the conclusive basis delineated in Merit Rule 530:10-9-9. DPS has complied with these requirements by stating in its letter to OPM:

The reason for this disqualification is that the above named applicant was in violation of the Department of Public Safety's Chief's Directive dated: 12/18/09 on Body art, specific to section IV(C).

Joint Exhibit 3

Appellee included in the letter a copy of the Chief's Directive. Oscar Jackson, OPM Administrator and Cabinet Secretary of Human Resources and Administration testified that Merit Rule 530:10-9-131(c)(2) requires an appointing authority seeking to disqualify an Absolute Preference Veteran to provide sufficient underlying facts for OPM to determine whether the veteran should be disqualified in accordance with Merit Rule 530:10-9-9. The final determination, stated Mr. Jackson, lies with the OPM. In this instance Appellee stated facts sufficient for OPM to determine that Appellant should be disqualified.

Appellant also claims that exhibiting a tattoo in violation of a DPS directive does not constitute failing any part of a "background investigation," as stated in Merit Rule 530:10-9-9(a)(3). While Appellant makes this argument, he has presented no evidence or authority to support it. There were no written definitions either party presented to define what is meant by "background investigation." However, Captain Norwood

testified that according to DPS practice, once an applicant makes contact with DPS, any information gathered and any evaluations made are considered part of the background investigation. Shelly Forshee testified that "background investigation" includes anything found about the applicant that would keep him from being hired, starting from the time the applicant calls and schedules an interview. It would include his demeanor and interactions with a receptionist when scheduling an interview, information gathered from a background questionnaire, an NCIC check and driver's license check. Mr. Jackson testified that "background information" includes all information obtained by an appointing authority about an applicant. Absent any statutory or judicial definition to the contrary, Mr. Jackson is the authority on matters of state personnel and on the rules promulgated by The Office of Personnel Management, and is the preeminent authority on what constitutes "background investigation" within the meaning of the applicable Merit Rules.

This Administrative Law Judge finds that Appellant has failed to show by a preponderance of the evidence that Appellee Department of Public Safety violated any state or federal statutes, Merit Rules or agency policies and procedures when it requested OPM disqualify Appellant as an Absolute Preference Veteran for the position of Fire Prevention and Security Officer.¹

While discussion of this matter might end here, the circumstances of this case deserve further attention. Appellant, a young man, is a war-time veteran of Iraq,

¹ The Chief's Directive includes an exception for persons who had tattoos prior to December 18, 2009, the effective date of the Directive. Appellant has never indicated or argued that he fell within this exception, neither at the time he first received a copy of the policy during his interview, nor when he received the policy again from OPM and was given an opportunity to present information to counter his proposed disqualification, nor when this appeal was filed with MPC. The exception issue was first raised by this ALJ who questioned Captain Norwood and Ms. Forshee about the application of the exception. Thereafter, Appellant testified that his tattoo preceded the directive and that Appellee had an obligation to raise this question with him prior to seeking his disqualification. This ALJ rejects this argument and finds that Appellee had no duty to raise this question with Appellant. Appellant had multiple opportunities to raise this issue if, in fact, he actually fell within the stated policy exception.

honorably discharged, a recipient of the Purple Heart. He entered military service with the intent of making it his career, with the intent of dedicating his life to his country, and prepared to give his life for his country. Appellant now finds himself with service-connected disabilities that render him unable to serve in the military. Now, as a result of this disqualification as an Absolute Preference Veteran, he is saddled with a cloud over his head because the tattoo he wears as a memorial to his friend and comrade who was killed in Iraq violates a Department of Public Safety policy against visible tattoos.

The DPS policy against visible body art, including tattoos, is not unreasonable and has a legitimate, articulable purpose. This ALJ also accepts the broad meaning given to the term "background investigation" by the DPS and OPM. However, this ALJ takes judicial notice that the term "background investigation" is more narrowly understood by the general public. A job applicant who fails a background investigation may be thought to have a criminal record or poor credit history or failure to pay child support or restraining order taken out against him, a poor driving record, history of violence, or some undesirable behavior which might make the applicant an undesirable, or at least risky, employee. Having a visible tattoo which is not profane, vulgar, offensive, racist, sexist, profane, discriminatory, pornographic, or anti-government would not be thought of as undesirable behavior which would disqualify an applicant for failing a background investigation.

To a military man with an impeccable record, who perhaps places a higher regard for honor than the average non-military individual, failing a background investigation because of a tattoo would be difficult to accept. Indeed, the average person would likely feel the same way. In this case, to leave such a blight on the

otherwise pristine record of a person who has given so much to this country – one of our national heroes – is a grave injustice.

Both Appellant's disqualification and his designation as "failing a background investigation" were determined by OPM. However, OPM is not a party to these proceedings and is not under the jurisdiction of the Commission or this ALJ. Nonetheless, this ALJ strongly recommends that the OPM consider modifying Appellant's disqualification in the instant matter to include in that disqualification language addressing the specific reason why Appellant failed the background investigation – *i.e.* he has a tattoo on his hand that violates the DPS policy prohibiting body art on hands and other visible body areas.

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. Merit Rule 455:10-9-2 (f) (2), **Alleged Violation Appeal**, states that the burden of proof in an alleged violation appeal is on the Appellant to prove his case by a preponderance of the evidence.

4. Merit Rule 530:10-9-130 (3), **Veterans preference on lists of eligibles**, provides that a veteran receiving benefits payable at the rate of 30% or more because of a service-connected disability is an Absolute Preference Veteran who shall not be denied employment and passed over for others without showing cause.

5. Merit Rule 530:10-9-131(c)(2), **Pass for cause of an absolute preference veteran**, states that a request to disqualify an absolute preference veteran shall include a detailed written explanation documenting why it is necessary to disqualify the applicant because of 1 or more of the causes for disqualification listed in 530:10-9-9.

6. Merit Rule 530:10-9-9, **Disqualifications**, states that a person may be disqualified and his name removed from the register if the person fails any part of an appointing authority's background investigation. It further states that the final approval for a disqualification lies with the Administrator of the OPM.

7. DPS Chief's Directive No. 2009-09, **Body Art Standards**, IV.C. states that body art is not permitted on the neck, face, head, hands, exposed legs or any area of the chest visible in any authorized uniform or attire.

8. Appellant has failed to prove, by a preponderance of the evidence, that Appellee Department of Public Safety violated Merit Rules 530:10-9-131(c)(2) or 530:10-9-9 in the disqualification of Appellant as an Absolute Preference Veteran from the list of eligible for Fire Prevention and Security Officer because of failure of any part of DPS's background investigation.

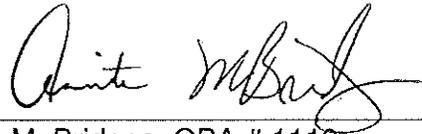
ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant is hereby **DENIED**.

IT IS FURTHER ORDERED that a courtesy copy of this Final Order be sent to Oscar B. Jackson, Jr., Administrator of the Office of Personnel Management and

Cabinet Secretary for Human Resources and Administration for whatever use he may make of it.

DATED: this 18th day of July, 2011.



Annita M. Bridges, OBA # 1119
Administrative Law Judge
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