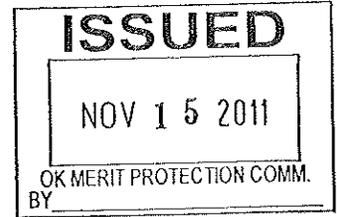


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA

BRETT NELSON,)
Appellant)
vs.)
DEPARTMENT OF CORRECTIONS,)
Appellee.)

CASE NO. MPC 11-096



FINAL ORDER

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on October 27, 2011 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Brett Nelson, appeared in person and was represented by Jim Dowell, Esq. Appellee, Department of Corrections (hereinafter referred to as "DOC"), appeared by and through its Counsel Gary Elliott, Assistant General Counsel, and agency representative Marvin Vaughn, Warden of the William S. Key Correctional Center in Fort Supply, Oklahoma.

Appellant, a correctional officer at William S. Key Correctional Center in Fort Supply, Oklahoma, filed this grievance after his employment was terminated for violation of DOC Policy OP-110215, *Rules Concerning the Individual Conduct of Employees*, Section I A(3) and (4), for alleged sexual battery and rape by instrumentation of a female while at a party at the home of a fellow correctional officer.

Appellant sought to call two new witnesses previously unlisted by Appellant, but originally listed by Appellee, two weeks before the hearing and after discovery cut-off

and the deadline for final witness lists had passed. Appellee objected. After hearing argument by the parties and considering all filings of the parties, the undersigned found that Appellant failed to present any compelling reasons for his late witness submissions and denied his request.

Whereupon, the sworn testimony of witnesses for both Appellee and Appellant was presented, along with Joint Exhibits 1 through 16 and Appellee's exhibits 17 and 18, which were admitted and 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 FACT

Appellant, a lieutenant at William S. Key Correctional Center in Fort Supply, Oklahoma, has been a correctional officer since 1994, with the exception of approximately eight months when he resigned and was later reinstated. On the evening of August 27, 2010 Appellant was the guest of honor at a birthday party given at the home of Derrick and Misty Edwards in Woodward, OK. Derrick Edwards is a friend of Appellant's and a correctional officer under his supervision. Also present at the party were Edith "Edie" Hanson and her boyfriend Justin Mayes, Jack Morris, and Sarah and Michael Hasten. Everyone was drinking heavily and reportedly became drunk. Just before 2:00 am Derrick Edwards, Justin Mayes, Michael Hasten, and Appellant left the party to get more beer. Since the stores were closed, they went to a bar owned by Jack

Morris to restock the party. They loaded up the beer, and Jack Morris, and headed back to the party.

Soon after returning with the beer, the Hastens left the party and Misty Edwards retired to her bedroom, "drunk and tired". Edith Hanson came into Misty's room and told her that Appellant had made her cry. Seeing that Edith, too, appeared drunk, Misty told her to go upstairs and go to bed. The men – Derrick, Justin, Jack, and Appellant – were all in the back yard of the house, drinking and talking. Misty was awakened some time later by Appellant entering her bedroom and asking "Where's old girl? Where's Edie?" Misty told him that Edie was upstairs. Appellant left her room and Misty heard heavy footsteps going upstairs.

Edith Hanson was sleeping in an upstairs bedroom when she was awakened by the feel of hands and a mouth moving over her breasts. As she realized that the person on the bed with her was not her boyfriend, Justin Mayes, but was Appellant, she told him to stop. In spite of her protests, he slid his hand into her pants and his fingers into her vagina and continued fondling her breasts with his mouth. Ms. Hanson continued to protest and call out for Justin. Misty Edwards testified that she heard voices and noises coming from upstairs. As Appellant left the room and headed downstairs, Ms. Edwards heard loud sounds on the stairs as if someone was falling down the stairs.

About this time Justin and Derrick were entering the house from the back yard. Justin was heading up the stairs when he was met by Appellant coming downstairs. Justin testified that Appellant was running down the stairs so fast, he nearly knocked him (Justin) down, and passed by saying, "I'm going. I'm going." Derrick testified that he was coming in the back door when Appellant rushed by him out the back door

heading for his truck and said, "There's a little too much drama here for me. I'm leaving." Appellant called to Jack and the two of them left together in Appellant's truck.

When Justin got upstairs and entered Edith's bedroom, he found her crying and fastening her pants. He asked what was wrong and she wouldn't tell him at first. When he kept prodding and grew angry at her silence, she finally told him that Appellant had sexually assaulted her when she was sleeping. Justin ran downstairs after Appellant to "correct" him, but Appellant and Jack had left. When Misty and Derrick were told what had happened, they encouraged Edith to report the matter to the police.

Edith Hanson filled a police report on the morning of August 28, 2010, which led to felony charges of sexual battery and rape by instrumentation being filed against Appellant in Woodward County District Court. (Appellee Exhibit 17) On September 23, 2010 Appellant was advised by Appellee that his employment was being considered for termination because of sexual battery and rape by instrumentation of Edith Hanson on the morning of August 28, 2010, and that a pre-termination hearing was scheduled for October 12, 2010 at 10:00am. (Joint Exhibit 3)

Appellant was represented at the pre-termination hearing by the same defense attorney who was representing him on the criminal charges. Appellant denied that he ever was upstairs that night, according to his attorney, who stated, "Brett says he didn't go up there at all." (Appellee Exhibit 18) When Warden Marvin Vaughn asked Appellant if he had anything further to add, Appellant, referring to his attorney, replied, "I guess he said it all." (Appellee Exhibit 18) In response to the Warden's direct question whether he went upstairs, Appellant stated, "I didn't mess with that girl." (Appellee Exhibit 18)

Prior to making a final determination to terminate Appellant's employment, Warden Vaughn interviewed the complaining witness, Edith Hanson, as well as Justin Mayes, Derrick Edwards, and his wife Misty Edwards. In addition to Edith Hanson, two of the other witnesses placed Appellant upstairs on the morning of August 28, 2010. Misty Edwards heard heavy footsteps on the stairs after he left her room looking for Ms. Hanson, then heard talking coming from the bedroom where Ms. Hanson had been sleeping, and heard what sounded like someone falling down the stairs. (Testimony of Misty Edwards; Joint Exhibit 7) Justin Mayes was nearly knocked down by Appellant running down the stairs as he was on his way up. (Testimony of Justin Mayes; Joint Exhibit 6) Derrick Edwards testified that Appellant rushed out of the house and went straight to his truck and left, without any conversation with him, which was unusual, as on prior occasions Appellant always lingered and spoke with him before leaving his home. He thought something must have happened inside the house. (Testimony of Derrick Edwards; Joint Exhibit 7).

After interviewing the complaining witness and the other three witnesses, and considering evidence presented by Appellant at the pre-termination hearing, Warden Vaughn determined that Appellant's denial that he was upstairs was not supported by the testimony of the four witnesses, and, in fact was directly contrary to the testimony of at least three of them. Based on all the evidence, Warden Vaughn determined that there was just cause to terminate Appellant's employment. This Administrative Law Judge concurs, and finds that a preponderance of the evidence supports Appellant's termination for violation of DOC Policy OP-110215, *Rules*

Concerning the Individual Conduct of Employees, Section I A(3) and (4), by sexually battering and raping by instrumentation Edith Hanson.

This is a case of “he said / she said.” At the trial before this Administrative Law Judge, Appellant called into question Ms. Hanson’s veracity, pointing out inconsistencies in her recollection of how and when she was first invited to the party (either by e-mail invitation or when she ran into the Edwards at WalMart); the type of party she recalled this to be (either a women’s lingerie party or a birthday party for Appellant); and whether or not tattoos were being given at the party. Appellant called into question Ms. Hanson’s character, with evidence that she flirted with and flashed her breasts at Jack Morris during the party, where her boyfriend was also in attendance; evidence that prior to arriving at the party and engaging in drinking, she took a lortab pill, a narcotic pain reliever, which her boyfriend had bought her from her mother; testimony from the Edwards that her boyfriend, Justin Mayes, stated without explanation, that this was the second time she had done this; testimony from Misty Edwards that Edith Hanson said to her that “we got caught” after the incident.

Taking into consideration the totality of the evidence presented, this administrative law judge gives the greatest weight to testimony concerning the incident itself. The complaining witness has related a consistent story throughout the 13 months since this incident first occurred and throughout the trial in this matter. On the contrary, and most compelling, Appellant has made a 180 degree change from his initial claim at the pre-termination hearing that he was never upstairs and never touched Edith Hanson, to his testimony at this trial¹ that not only was he upstairs, but that the sexual

¹ After discovery was conducted and Appellant learned of the testimony from credible witnesses such as the Edwards, Appellant’s testimony changed so as not to be inconsistent with their testimony.

acts occurred, they were consensual, and they were initiated by Edith Hanson. More than a mere inconsistency, Appellant's about-face makes his entire testimony unreliable.

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 455:10-11-14 states that a permanent classified employee may be discharged for misconduct, willful violation of the Oklahoma Personnel Act and Merit Rules, conduct unbecoming a public employee, and any other just cause.

4. Merit Rule 455:10-9-2(f)(1) states that the Appellee bears the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for adverse action and that the discipline imposed was just.

5. DOC Policy OP-110215, Section I A(3) *Rules Concerning the Individual Conduct of Employees*, requires employees to refrain from conduct that is corrupt, illegal, or serves to denigrate, demean or disregard the welfare of others.

6. DOC Policy OP-110215, Section I A(4) *Rules Concerning the Individual Conduct of Employees*, requires employees to promote and model exemplary, law abiding behavior.

7. DOC Policy OP-110215, Section VI and VI A. *Illegal Activity*, prohibits employees from engaging in any illegal activity, whether on or off duty, and defines

'illegal activity' as any activity prohibited by federal, state, or municipal criminal laws (except minor traffic violations), as well as any other laws governing the conduct of state employees.

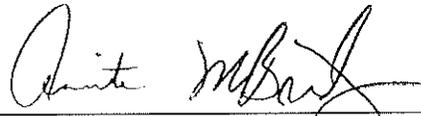
10. Appellee, Department of Corrections, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Appellant Brett Nelson for sexual battery and rape by instrumentation against Edith Hanson.

11. Appellee, Department of Corrections, has met its burden to prove, by a preponderance of the evidence, that the discipline imposed – termination of Appellant's employment with DOC – was just under the circumstances.

ORDER

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

DATED: this 11th day of November, 2011, *nunc pro tunc* November 15, 2011.



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