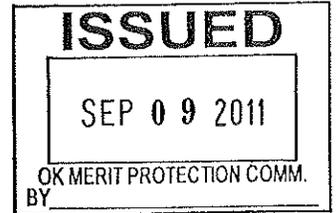


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**



JAMES R. WHALA,)
)
 Appellant,)
)
 v.)
)
 DEPARTMENT OF CORRECTIONS,)
 SERVICES,)
)
 Appellee.)

Case No. MPC 11-128

FINAL ORDER

This matter comes on for hearing on August 24, 2011 before the undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, James R. Whala (hereinafter "Whala"), appears by and through his attorney, Larry Stewart. The Appellee, Oklahoma Department of Corrections (hereinafter "DOC"), appears by and through counsel, Michelle Miniotta. Also present for Appellee was Table Representative, Warden Randall Workman.

Appellant Whala was a permanent, classified employee of DOC, appealing an adverse disciplinary action of discharge. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Exhibits 1 through 9 were offered as Joint Exhibits with no objections, and were admitted into the record. Accordingly, all exhibits presented and admitted are incorporated herein and made a part hereof.

After careful consideration of the record, including all relevant evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Appellant Whala was a permanent, classified employee of the Appellee, DOC. He appeals an adverse action of discharge from his position as a Correctional Security Lieutenant I, effective December 8, 2010.

2. Whala had no prior incidents of either formal or informal discipline.
3. On August 24, 2010, Whala was asked to give testimony in a deposition regarding a sexual harassment lawsuit filed by former DOC employee Susan Key. (See Exhibit #3). Prior to the deposition, the Assistant Attorney General defending the case, Sue Nolan Johnson, advised Whala that “he would not get into trouble” or that there could be no “retaliation” for telling the truth in the deposition. Whala then disclosed that he and Key had a romantic personal relationship. Although the exact verbiage of the discussion is in dispute, Whala believed he was granted immunity from any adverse action relating to the subject matter of his testimony. Whala’s testimony was very helpful to the defense of the lawsuit, which was subsequently resolved. Later, the DOC General Counsel sent a copy of the deposition to Warden Workman at Oklahoma State Penitentiary (hereinafter “OSP”), with directions to take action regarding the relationship. On November 17, 2010, Whala was provided written notice of the proposed disciplinary action, stating DOC’s intention to discharge him from his position. (See Exhibit #4). The stated causes for this proposed disciplinary action were violations of the policy on employee conduct, duties and responsibilities and prohibited relationships. The sole evidentiary basis for this action was Whala’s testimony in the deposition.
4. A pre-termination hearing was scheduled and was held on November 29, 2010. Whala again asserted that he was promised that he would not get in trouble for telling the truth. No other information or evidence concerning the pre-termination hearing was provided and there is no reference to the hearing or any mitigation in the final notice.
5. On December 7, 2010, DOC gave Whala notice of the final disciplinary action, terminating him from his position effective December 8, 2010. (See Exhibit #5). Whala timely appealed the disciplinary action and this proceeding was held.

ISSUES

1. Did the DOC have cause to impose discipline in this matter?
2. If so, was the discipline imposed just and appropriate under the circumstances pursuant to the statutes, policies and procedures?
3. Was there a promise of immunity and what effect does that promise have in the subsequent disciplinary action?

DISCUSSION

DOC argues that based on Whala's own admissions, he engaged in a personal, romantic and sexual relationship with a subordinate employee. DOC further argues that any promises of immunity related only to protection from harassment or retaliation for providing the testimony and was never intended to include protection from discipline resulting from his violations of policy. DOC also argues that the nature of the policy violation is so serious that it justifies termination without progressive discipline.

Whala argues that he only provided his testimony because of the promise of immunity, that DOC only became aware of the relationship because of his testimony, that the relationship had ended almost 2 years prior to the disciplinary action, and that DOC had not terminated others who engaged in similar behavior, constituting disparate treatment.

DOC called Sue Nolan Johnson as Witness #1. Johnson testified that she was the Assistant Attorney General (hereinafter "AAG") assisting in defending DOC in the Key case. She stated that Key's sexual harassment case had nothing to do with Whala and he was not a named party to the suit. She testified that she met with Whala and other witnesses in pre-deposition interviews where she advised all witnesses of their rights and that if they cooperated with either side in the lawsuit, DOC could not retaliate against them. After he disclosed his relationship with Key, the AAG stated that she told Whala not to "volunteer" information about his relationship with Key unless specifically asked. Johnson testified that she doesn't remember a discussion about "immunity". She also stated that she represented DOC, not the witnesses but she never advised Whala that he may need to consult his own counsel. She also testified that Whala did not seem to know that such a relationship was prohibited and that he did not think he had violated policy. (See Exhibit #3, pg. 29, lines 8-25).

Witness #2 was Warden Randall Workman, who has 26 years of experience with DOC. Workman discussed the chain of command at OSP and stated that at the top of the chain was the Warden and Deputy Warden, next was the Chief of Security, followed by the Lieutenants and Captains, Shift Supervisors, Sergeants, Corporals, then Cadets. He testified that Whala was a Lieutenant, which is considered a supervisory or management position, while Key was a Corporal, and was under his direct supervision. He testified that he had no knowledge about Whala's relationship with Key until the DOC General Counsel sent him the deposition.

Workman testified that Whala also violated policy by failing to report this relationship to him. He said that Whala also violated policy by loaning Key \$500 to obtain an attorney for her divorce, which constituted an improper "business transaction". Workman stated that he felt that any relationship between a supervisor and subordinate was prohibited and he had no choice but to terminate Whala. He testified that this was standard procedure across the state in all DOC facilities. Workman stated that he did not consider any mitigation nor did he consider any lesser form of discipline. He stated that there are situations where there are personal relationships or marriages, but steps are taken to separate the employees to prevent one from supervising the other. Workman testified that he was aware of two other situations where supervisors had personal relationships with subordinates and both were terminated. He also stated that he believed Whala was a very honest, excellent officer and he otherwise had no reservations about Whala's performance. Workman testified that he was aware that the Chief of Security had a personal relationship with a subordinate and subsequently married her but he was not the Warden at the time. He was also questioned about several other employees who had relationships at OSP, and who were not terminated as a result. Workman then explained that the prohibition was applied not necessarily to the "chain of command" but in relation to whether there was actual or direct line of supervision, and in some cases, related to who performed the performance evaluations, approved leave or engaged in informal counseling. Workman testified that there was no detriment to the agency as a result of the relationship between Whala and Key, that apparently it was discreet and no one was even aware of it. He said he struggles with the immunity issue and that it seemed that Whala was being punished for being honest and helping the DOC with his testimony. There was some confusion regarding "chain of command" which Workman interpreted as anyone who directly supervises another. He admitted that every employee of the facility is under the "chain of command" of the Warden, Deputy Warden and Chief of Security, even though these individuals do not directly supervise all of the employees. He also admitted this "interpretation" is not reflected directly in the policy.

Whala called Witness #3, Sergeant Deborah Gardner as his first witness. Gardner testified that she has worked at OSP for 14 years. She is married to Sergeant Steven Gardner who also works for DOC. She testified that, in October, 2009, as a result of some text messages, she became aware that her husband was having a personal, sexual affair with Corporal Ballard, another DOC employee. Gardner testified that her husband supervised Ballard. She said that

she reported the relationship to the Chief of Security and to Warden Workman. Gardner testified that they received "Cease and Desist" letters, ordering all involved to stop the behavior, but no other discipline. She further testified that the relationship continued for "a while" despite the Cease and Desist Order, which she brought to the attention of her supervisors. Ballard voluntarily left DOC, but the witness and her husband continue to work there. Gardner testified that no disciplinary action was taken against her husband as a result of his relationship with a subordinate employee. Gardner was told that her husband was not terminated because he didn't do Ballard's performance evaluation, however, she stated that as a Sergeant, he could have been involved, depending on shift assignments.

Whala was Witness #4 and the final witness in the hearing. He stated that he has been unemployed since his termination. He has worked for DOC since June, 1998, first at Stringtown, and, for the last ten years, at OSP. Whala stated that he has been honest about the relationship, which he said ended in December of 2008 when Key left DOC employment. He stated that he was told that, as Key's supervisor, he would need to testify about Key's claims of sexual harassment. He said this discussion occurred in early 2010 in meetings with the AAG. He stated that Sue Nolan, the AAG, told him that "anything" he said would not be used against him and that he would not "get into trouble" if he told the truth. Whala stated that he believed the AAG was acting as his counsel, since she provided him with advice, made objections on his behalf, prepped him and attended the deposition with him. He said he was never advised that he should consult his own attorney about these possible violations of policy. Whala stated that the AAG told him that Key denied the relationship and his testimony was critical to show her as a liar. He said that he testified at the deposition to help the agency. He also said that there was no further discussion of his testimony until November, 2010, when the Warden called him in to provide him with the notice of proposed termination. Whala testified that he was not aware of anyone at OSP who had been terminated for this type of personal relationship and he was unaware that the DOC policy prohibited the relationship. He testified that under a previous policy, such a relationship was discouraged, but not prohibited. He testified that he and Key were both married at the time of the affair. He said that his wife had filed for divorce, but became ill and dropped it. His wife subsequently passed away in September, 2008 while the relationship was going on. Whala testified that it was a very difficult time for him and he was vulnerable to a need for that

type of relationship. Although he supervised Key's shift and sometimes counseled her on her behavior, he never conducted her evaluations.

The preponderance of the evidence and Whala's own testimony demonstrates that there was a personal relationship between himself and his subordinate employee. He also admits that he did not tell anyone about the relationship until his deposition, and that he admitted that he gave Key \$500 to help pay for her divorce. Each allegation in the termination notice will be addressed and discussed below.

The Notice of Termination (See Exhibit #5) alleges that Whala violated the rules on conduct which requires that employees "promote and model exemplary, law-abiding behavior", "conduct work in a manner which contributes to and supports a safe and healthful work environment" and "promptly and truthfully report any improper actions which violate department policies and procedures, endanger others, or undermine the principals" contained in the policy. The evidence clearly showed that no one ever complained about the relationship and that it appeared that no one was even aware of it. There was no evidence that the relationship was illegal. Warden Workman testified that he was not aware of any adverse effect to DOC as a result of the relationship. Whala volunteered information and then testified honestly about the relationship when he was questioned about it. While it is clear that he never reported the relationship while it was going on, there is also mitigating evidence that he was not aware at the time that it was a violation of policy. It is an employee's responsibility to become familiar with agency policies and to comply with those policies. (See Exhibits #1 and #2, each at pg. 2, II. 1.). DOC did not, however, offer evidence of any "Acknowledgement of Receipt" signed by Whala. Such acknowledgement is required by the same DOC policy and would have clearly demonstrated that Whala should have known about this prohibited activity. (See Exhibits #1 at pg. 19, X., and #2 at pg. 18, X.) This lack of required acknowledgement also raises the question of whether this change of policy was adequately and appropriately communicated to Whala.

Prohibited activity and relationships include "intimate, romantic or personal relationships between a supervisor and a subordinate at any level within the chain of command" and "business transactions between a supervisor and a subordinate". (See Exhibits #1 at pgs.15 & 16, VIII. A. 1 & 3, and #2, at pgs.14 & 15, VIII. A. 1 & 3). The prohibition on romantic relationships applies to supervisors and subordinate *at any level* within the chain of command, but fails to contain the interpretation applied by DOC. Specifically, Gardner's testimony regarding disparate treatment

for similar violations was not refuted by DOC. The evidence presented clearly indicates that DOC does not impose discipline for every instance of personal relationships within the chain of command. There are conflicting results depending on whether there is direct supervision or where the employee evaluations are involved. There was direct and uncontroverted evidence that the Chief of Security had a romantic relationship with a subordinate in his "chain of command" and that Gardner also had such a relationship, without resulting in any disciplinary action. This could easily result in inconsistent application and also could be perceived by employees as not being an absolute prohibition. DOC cannot permit or condone some relationships while imposing strict discipline for others without a clear delineation of the application of this prohibition. Furthermore, the prohibition on "business transactions" can also be problematic as a personal gift or loan of money can reasonably be interpreted as not being a "business" transaction. This wording is not clear to be a prohibition of this type of behavior.

DOC also has taken the position that violations of these policies mandate a higher level of discipline and that termination is the only acceptable level given the serious nature of the offense. This position is also very problematic when addressing the disparate treatment of various employees. DOC policy clearly states that sanctions for violations of the code of conduct "may" subject the employee to disciplinary action. (See Exhibits #1 and #2, each at pgs.1 & 2, I. B.). This indicates that there is no predetermined level of discipline to be imposed for such violations. Further, there is no indication that there is "zero tolerance" for violations of the personal, romantic relationship prohibition, which would justify skipping lower levels of progressive discipline. Clearly, if this is the intention of DOC, the policy could easily so indicate. For example, the policy clearly provides that there is "zero tolerance" for protected class harassment or discrimination or for violations concerning drug and alcohol use. There is no such indication for the violations alleged to be committed by Whala. As a result, DOC must show, by a preponderance of the evidence, that termination is the appropriate level of termination, given all the circumstances.

It must be noted that it took less than 3 hours to conduct the entire hearing. Based upon the evidence presented at the hearing, it was proven by the preponderance of the evidence that Whala violated DOC policy by engaging in an intimate, romantic and personal relationship with a subordinate within his chain of command. There was insufficient evidence that the personal loan or gift of money to this subordinate constitutes a prohibited "business transaction". There

was no evidence as to the application or interpretation of this prohibition to include this type of personal loan. There was also conflicting or insufficient evidence on the other alleged violations of the code of conduct.

Regarding the appropriateness of the level of discipline, it is clear that discipline must be designed to correct work performance or behavior. See OAC 455:10-11-3. DOC's own progressive discipline policy states that the goal is to redirect employees towards improved job performance and conduct which complies with policy. It states that progressive discipline is intended to be consistent, impartial and predictable, while preserving flexibility to respond with varying penalties if justified. DOC policy also provides that progressive discipline is not required to be applied without regard for individual differences or mitigating circumstances. (See Exhibit #6, pg. 2). According to the testimony of Warden Workman, no lesser level of discipline was even considered, and he believed that he had no alternative to termination. As a result, there was no consideration of any mitigating circumstances. As discussed earlier, there was evidence of differing levels of discipline for similar violations, and in some cases, no discipline at all. There was no evidence that the violation impacted the agency adversely¹. There was no evidence that the imposition of a lesser level of discipline would not correct or remedy the behavior. Indeed, the evidence indicates that the improper behavior occurred at least two years before this action and had already ceased long before the violation was disclosed. There was no evidence that the behavior or violation had reoccurred or continued. In further mitigation, DOC did not consider Whala's emotional condition at the time or any other factors related to this situation.

Most importantly, there was no consideration of Whala's performance evaluations and ratings. DOC policy, as well as state statutes, requires that these evaluations "must" be considered in any decision to discharge an employee. (See Exhibit #6, pg. 1, and 74 O.S. §840-4.17). It is incumbent upon the agency to indicate why this mandate is not applicable. Here, there was no mention of them at all. Whala's latest evaluation indicates overall accountability and performance ratings of "Exceeds Standards". Warden Workman testified that Whala was an excellent employee. This evidence should have been considered absent an unqualified "no tolerance" policy for this violation.

¹ This statement is specific to this hearing and deals only with the lack of testimony and evidence herein.

It is clear from the testimony and evidence that the promise of immunity was a factor in Whala's decision to disclose this violation. Whether true "immunity" was promised may be debated, however, it is clear that a lay person could easily consider the promise that he would not get into any trouble as such. It is also clear and undisputed that Whala relied upon this promise when he disclosed his relationship with Key. While the promise may not operate as absolute immunity, it should have carried substantial weight as a mitigating circumstance to be considered in this disciplinary action.

The undersigned has considered all of the facts and circumstances of this case and the testimony of the witnesses. It is undisputed that Whala violated DOC policy by engaging in an intimate personal relationship with a subordinate. Given the totality of the circumstances, the discipline of termination is not justified for this violation. Therefore, a reduction of the discipline is appropriate. Considering that this violation is serious, however, that Whala has never been subject to any form of discipline before and that other violations of this prohibition have received various levels of discipline, the imposition of a lesser level of formal discipline seems appropriate. There is no reason to believe that a letter of reprimand would not have the desired result of correcting the behavior and preventing it from reoccurring as required by the progressive discipline policy. Given the seriousness of the violations, together with consideration of all of the mitigating circumstances set out herein, a letter of reprimand seems to be an appropriate and just discipline.

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. Title 74 O.S. §840-6.5 and OAC 455:10-9-2 states that the Appellee DOC 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. OAC 455:10-11-11 indicates that a written reprimand may be given to correct violations of policy.
5. The preponderance of the evidence shows that Whala's behavior of engaging in a personal relationship with a subordinate violated DOC Policy OP-110215.
6. Appellee DOC, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Whala for his violation of policy and his appeal on that ground is denied.
7. Appellee DOC, has failed to meet its burden to prove, by a preponderance of the evidence, that Whala violated any of the other policies set forth in the Notice of Termination as discussed herein and his appeal on those grounds is sustained.
8. Appellee DOC, has failed to meet its burden to prove, by a preponderance of the evidence, that the discipline imposed was just under all of the circumstances and considering the mitigating circumstances. The discipline imposed is unduly harsh and unfair given the totality of the evidence and constitutes disparate treatment considering other similar violations and discipline.
9. In accordance with OAC 455:10-9-2 (f) (1) (C), upon the finding that just cause existed for the adverse action, but did not justify the severity of the discipline imposed, the undersigned is ordering a reduction of the discipline. In ordering the reduction of discipline, the undersigned considered, at a minimum, the seriousness of the conduct as it relates to Whala's duties and responsibilities; the consistency of action taken by DOC with respect to similar conduct by other employees; the previous employment and disciplinary records of Whala; and other mitigating circumstances as discussed herein.
10. The record herein supports imposition of formal discipline in the form of a letter of reprimand as just and appropriate considering all of the facts and circumstances.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant James. R. Whala, MPC 11-128 be SUSTAINED IN PART. The discipline imposed upon Appellant is reduced to a Letter of Reprimand consistent with this Order. Appellant is to receive all pay and benefits consistent

with this Order and Appellant's personnel records are to be expunged of all records except for a Letter of Reprimand consistent with this Order.

This Order entered this 6th day of September, 2010.

A handwritten signature in cursive script that reads "Lydia Lee". The signature is written in black ink and is positioned above a horizontal line.

Lydia Lee
Administrative Law Judge