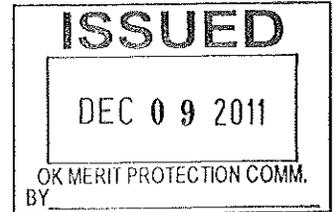


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

JILL KINNEY,)
)
 Appellant,)
)
 v.)
)
 DEPARTMENT OF HUMAN SERVICES,)
)
 Appellee.)

Case No. MPC 11-138



FINAL ORDER

This matter comes on for hearing on November 9 and 10, 2011 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Jill Kinney, appears personally, pro se. The Appellee, Department of Human Services, appears by and through counsel, John Douglas, and Table Representative, Mark L. Jones. Appellant, Jill Kinney, failed to appear for the second day of the hearing, although she had proper and sufficient notice.

Appellant Kinney was a permanent, classified state employee appealing an adverse disciplinary action of discharge. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the Appellee offered its Exhibits 1 through 30, with no objection and they were admitted into the record. The Appellant offered no Exhibits.

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

Background of Case

Appellant Jill Kinney (hereinafter "Kinney") was a classified employee of the Appellee Department of Human Services (hereinafter "DHS"). Kinney was a Programs Field Representative I in the DHS Office of Client Advocacy (hereinafter "OCA") in Oklahoma City.

DHS alleged that, over an extended period of time, Kinney engaged in a pattern of improper behavior and went to great extremes to hide her misconduct and mislead her supervisors.

In November of 2008, Kinney accepted outside employment with the Office of the Medical Examiner (hereinafter "ME") to conduct an investigation into sexual harassment at the ME's Tulsa office. DHS alleges that Kinney failed to obtain prior approval for this employment. During the investigation, Kinney became aware of the possibility of a number of labor and wage violations. DHS alleges that she began to solicit clients from the ME's office for her personal consulting business, without disclosure or approval. DHS also alleges that she sent numerous inappropriate e-mails from her work computer and that she falsely or improperly reported her time records while engaging in personal business on state time, or while on sick leave. DHS also alleges that once Kinney was confronted with concerns about her behavior, she was dishonest in her responses and misled her supervisors about her activities. Specifically, Kinney denied that she had her own personal consulting company or that she was involved at all in the company, K-Hill Consulting.

After a full investigation was completed, on November 19, 2010, DHS provided Kinney with a Notice of Proposed Discharge (Appellee's Exhibit "1"). The Notice detailed the numerous allegations which were the basis of the proposed discipline. The exhibits offered at the hearing were provided to Kinney as part of the Notice, as well as a list of prior discipline. (Appellee's Exhibit "5" through "22"). A pre-termination hearing was scheduled and held on December 17, 2010. On January 4, 2011, DHS provided Kinney with Notice of Final Formal Disciplinary Action – Discharge (Appellee's Exhibit "24" through "30"). The Notice states that there are sufficient grounds that Kinney's behavior constitute misuse of state property or equipment, dishonesty, conduct unbecoming a state employee and is a violation of employee ethics for failing to devote full time and attention to her job, engaging in other employment without approval, engaging in other employment while on DHS time, using state property for personal use, making false time reports, withholding official information and providing materially false information in the course of an investigation. Kinney timely filed an appeal of the adverse action of discharge with the Merit Protection Commission.

The Testimony

The testimony of seven (7) witnesses was provided by DHS in support of the disciplinary action. The Appellant offered no witnesses nor did she testify on her own behalf. All witnesses were properly sworn and provided testimony under oath.

The first witness was Lance Watson, an employee of Advansic E-Discovery & Digital Forensics. Advansic was retained by DHS to examine the Appellant's DHS computer to find and produce any files which were related to the charges against her. DHS also had paper copies of certain e-mails which were provided to DHS by news and media sources in an attempt to connect them with Kinney. Watson supervised all of the lab employees and technicians at Advansic and verified all the findings and results. He testified that generally e-mails are stored on the internet, not the individual computer hard drives. Watson testified that he found references to the ME's office in various files on Kinney's computer. The documents that were found were included in the report submitted to DHS in May, 2010 (Appellee's Exhibit "7.2"). Watson provided testimony regarding the items which were "carved" from free space on the computer, enabling him to recover deleted documents. He testified that a number of such documents were located which related to K-Hill Consulting, including log-in information to a Yahoo e-mail account, but he was not able to identify the number of log-ins or the dates. He testified that Kinney had "triple-deleted" documents in an attempt to hide their existence.

Debra Mordecai, a Division Supervisor in the ME's Tulsa office, testified that she oversees all clerical needs of the office. She stated that she met Kinney during the investigation of the sexual harassment allegations in late 2008. Mordecai testified that she was interviewed in October, 2010 regarding her interactions with Kinney. She provided a written statement indicating that she met with Kinney on November 14, 2008 at 3:00 pm, as well as providing copies of e-mails (Appellee's Exhibits "23, 23.1, and 23.2"). She testified that Kinney did not solicit her regarding any wage and hour claims prior to the submission of the harassment report on December 23, 2008, but that Kinney did so afterwards. Mordecai testified that it was always unclear to her whether Kinney or K-Hill Consulting was representing her. She testified that she received numerous e-mails from Kinney under various names, such as CID, Cindy, or Me. Mordecai testified that ultimately the sexual harassment charges were presented to a Grand Jury in the summer of 2009. She also said that Kinney advised her that she was representing other ME's office employees on wage claims. Mordecai testified that she signed a contract with

Kinney which provided a contingency fee to be paid on any monetary awards. She testified that she never paid a fee to Kinney because her claim was resolved at the agency level and she was given comp-time.

Kristen Osgood is an investigator for the ME's office. She was also interviewed by DHS investigator in October, 2010. She provided a copy of her desk calendar showing her appointment with Kinney on November 19, 2008 (Appellee's Exhibit "23.3"). She testified that Kinney interviewed approximately 4-6 other ME employees in Tulsa that same day. She had no recollection of being solicited by Kinney regarding a wage claim.

Idalia Harris is an Investigator in the Office of the Inspector General at DHS. She was present when Investigator Robin Glenn interviewed Kinney. Glenn is no longer employed at DHS, having taken a position with the FBI. Harris testified that Glenn's report was a true and correct account of the interview with Kinney (Appellee's Exhibit "7"). She testified that they learned that "K-Hill" was Kinney's father's cattle brand. She stated that Kinney initially stated that K-Hill consulting belonged entirely to Cindy Walker and Walker's husband, who were friends with Kinney and that she didn't know how they came up with the name. She also denied doing any work for or receiving any compensation from K-Hill Consulting. She said she occasionally helped Cindy Walker, but didn't expect to get paid.

Diana Smith is the acting Advocate General. She has worked for DHS for 38 years and had been Kinney's supervisor since 2006. She discussed the role of OCA and the need for independence and trust for all of the employees in that office. Smith testified that Kinney was aware of the policy on the use of DHS computers and she had signed for her copy in 2000 (Appellee's Exhibit "8"). The policy specifically provides that DHS computers are not to be used for outside business interests or for sending vulgar or offensive e-mails. Smith also testified to Kinney's prior discipline of two oral reprimands in 2008 and in 2009 for using state computers excessively and inappropriately (Appellee's Exhibit "5"). Smith testified that DHS requires its employees to obtain approval for outside employment and if that employment is with another state agency, it requires the approval of the division director (Appellee's Exhibit "18"). She stated that Kinney was well aware of this requirement as she had submitted the necessary forms in 2005 for approval of her employment at Starbuck's (Appellee's Exhibit "9"). She stated that Kinney never completed the proper form ADM-42 for her work for the ME's office or for her

work with K-Hill Consulting. She also testified that Kinney did not have authorization to use her state computer for any business activity.

Smith testified that she received a call about Kinney's involvement in the ME's office investigation in late December, 2008. She discussed it with Kinney, who admitted to having completed the investigation and having failed to submit the ADM-42. Kinney indicated that the matter was now closed and she was no longer doing any outside work. In April, 2009, DHS received an open records request from Channel 25 for all e-mails sent, received or deleted regarding Kinney. She stated that they believed that Kinney was a victim of harsh media reporting and believed her when she stated that she had nothing to do with K-Hill Consulting. The news reports continued regarding Kinney and allegations of improper use of state time. Kinney was questioned several times and always denied all allegations. Finally, News9 submitted paper copies of e-mails to DHS, asking for verification and comment. DHS reviewed these e-mails and discovered that Kinney sent e-mails under a number of names and e-mail addresses using K-Hill Consulting, K-Hill Creations, David Walker, Cindy, Cid and Me (Appellee's Exhibit "7.1"). Some of the e-mails were from Kinney's DHS e-mail address (Appellee's Exhibit "7.1", pgs. 79-82). The e-mails included sexually explicit stories and language (referred to as the "gross-out game"). Kinney continued to deny her involvement. Smith testified that DHS chose to retain Advansic to examine Kinney's computer after the DHS Data Services Division was unable to recover the deleted documents. After the recovery by Advansic, they learned of numerous inappropriate e-mails, many from Kinney's DHS e-mail, including threatening messages soliciting guns (Appellee's Exhibit "12"). Smith compared these e-mail messages to Kinney's time records and confirmed that the majority of them were sent while Kinney was on state time (Appellee's Exhibit "10"). Among other things, the e-mails referred to the ME's employees as Kinney's "clients" (Appellee's Exhibit "12", pg. 503), referred to "us here at K-Hill" (Appellee's Exhibit "12", pg. 512), discussed Kinney's "commission" payments (Appellee's Exhibit "12", pgs. 412, 525), and contained admissions that the e-mails are in fact from Kinney (Appellee's Exhibit "12", pg. 474).

Smith also provided testimony about Sarah Kennedy, a case manager at DHS. She stated that Kinney never disclosed that she was acting as representative for Kennedy and failed to obtain permission to do so. Smith testified that the OCA division worked closely with Kennedy's division and they work with a lot of the same clients. She stated that the

representation was inappropriate because there was a higher risk of perceived conflict. Kinney entered her appearance as representative at MPC on three appeals (MPC 10-132, 10-170 and 10-218). Kinney performed this representation on state time and using her state computer (Appellee's Exhibit "14"). Smith also testified that Kinney assisted another DHS employee, Judy Elwell, without approval and on state time. (Appellee's Exhibit "15"). It appeared that this representation and assistance was for compensation, in the form of payment for leave time used.

Smith also testified about disturbing e-mails sent by Kinney on state time and from her work e-mail discussing the wage claims as well as threatening to harm a ME's office employee, (Rowland, the subject of the sexual harassment investigation). The e-mail made reference to having a Glock 40, using Rowland for target practice and transporting his body without being caught (Appellee's Exhibit "16", pg. 764). Smith also stated that she discovered that Kinney sent an e-mail to non-DHS employees discussing a DHS client (Appellee's Exhibit "16", pg. 766). She also sent an e-mail discussing where to buy a gun, discussing a DHS client's problems with her ex and Kinney's desire to teach her to shoot as a "civic duty" (Appellee's Exhibit "16", pg. 879). Smith testified that Kinney's behavior constitutes a serious breach of trust and violation of policy.

Smith testified that News9 posted some of the e-mails on its website, including the sexually explicit e-mails that made up the "gross-out" game (Appellee's Exhibit "16", pgs. 773-775) and Kinney's time records show she was at work on June 5, 2009 at 1:08 pm when the e-mail was sent (Appellee's Exhibit "10", pg. 332). She stated that Kinney's e-mails reflected very poorly upon DHS, even the ones sent from non-DHS e-mail accounts. She also stated that Kinney repeatedly stated that she did not have a computer or internet at home so that would come to her DHS office after hours to use the computer. Smith testified that she was also concerned about the possibility of fraud in the ME investigation, when Kinney referred to "pretending that NO SEX ever occurred at OCME" in exchange for assistance on the later wage claims (Appellee's Exhibit "16", pg. 875). She also sent e-mails encouraging the ME employees to call her at her DHS office number (Appellee's Exhibit "16", pgs. 877-878).

Smith denied that Kinney's actions were the same as other employees who have Avon catalogs or Mary Kaye products and sell to their co-workers. She also distinguished Kinney's actions from Smith's own participation in a group mail-order shopping club. Smith testified that those activities do not take substantial time from work duties and are generally done on breaks or

after hours. She also testified that she was concerned because Kinney used little caution even after her behavior became public and continued to use vulgar language in e-mails. Smith testified that Kinney could access her DHS e-mail off-site.

George Tipton is the Chief Agent in the Office of the Inspector General at DHS and supervised the investigation division. He said that Michael Fairless was the Inspector General, but retired. Tipton stated that he approved the final report on Kinney (Appellee's Exhibit "7"). He testified that he was not aware of any tape recordings related to the Kinney investigation.

Mark L. Jones was the final witness. He was the Advocate General at the time of Kinney's discharge. He testified that he received a call from the media in December, 2008 regarding the ME's investigation, which began this action. He stated that the OCA carefully safeguards its integrity because of the nature of the division and the need to be independent and impartial. As a result, actions of employees in that division need to be carefully examined carefully to avoid conflicts. He said that Kinney's behavior and actions reflected very poorly upon the OCA and DHS. Her qualifications and background were aggressively challenged in the resulting ME criminal actions. Jones testified that initially he was sympathetic to Kinney as a result of the media attacks on her, and because of her denials of wrong-doing.

Jones stated that when they received the copies of the e-mails from News9, he contacted the DHS Data Services Division to examine Kinney's computer. While they were examining the computer, they could detect Kinney attempting to delete documents and e-mails. As a result, he retained Advansic and requested a full investigation. After the full story was discovered and Kinney's actions became known, these documents and e-mails were compared to Kinney's time records and Jones was able to determine that most of the work was performed on state time and using state resources. He also testified that Kinney took sick leave for the days she was in Tulsa interviewing the ME's office employees in November, 2008. As a result of the monumental amount of evidence uncovered, he made the decision to begin termination proceedings. Jones gave proper notice of the disciplinary action, properly considered her PMPs and her prior discipline history. He stated that all documents used in this hearing had been provided to Kinney as part of the Notice of Proposed Discipline (Appellee's Exhibit "6").

ISSUES

1. Was there just cause to impose discipline in this matter?
2. If so, was the discipline imposed appropriate and just under the circumstances?

DISCUSSION

DHS presented a very thorough case, covering every piece of evidence used in support of its allegations. It must be noted that Kinney made very little effort to refute the allegations against her. She conducted very little cross-examination of DHS's witnesses and offered no evidence of her own. At the Prehearing Conference on July 11, 2011, DHS indicated that two days would be necessary for the trial of this matter and two dates were chosen by the parties. At the close of the first day of the hearing, Kinney announced that she was unable to attend the following day because she had scheduled a medical appointment. At no time did Kinney request a continuance of the second day, nor did she discuss this conflict with counsel for DHS or with the ALJ. She also announced that she would be calling no witnesses, would not testify herself and would not have any exhibits to offer. In any case, the hearing on the second day was delayed 2 hours to accommodate Kinney. However, Kinney failed to appear on the second day and failed to make any attempt to contact MPC to request additional time. As a result, the hearing was concluded without her.

All of the witnesses offered by DHS were credible and consistent with the evidence. The documentary evidence offered by DHS was more than sufficient to support each and every allegation against Kinney. The evidence clearly supports that Kinney conducted an investigation for the ME's office, without proper approval, for compensation and improperly reported her time to DHS, taking sick/enforced leave while conducting the investigation. The evidence also clearly supports that Kinney was dishonest about her role in K-Hill Consulting and that she improperly used state property in conducting her personal consulting business. The evidence further supports DHS allegations that Kinney's conduct is unbecoming a state employee, especially considering her position as an investigator in the OCA. It is also important to note that all of this evidence was largely unrefuted by Kinney.

There is apparently no factual dispute regarding the actions of Kinney. Kinney, in her opening statement, argued only that her actions were relatively minor violations and do not warrant termination. This argument is not persuasive, especially given Kinney's dishonesty and the extent to which she attempted to secret her identity by using various names and e-mail addresses. In fact, to the contrary, her refusal to accept responsibility for the seriousness of her violations demonstrates the need for this disciplinary action. DHS has met its burden to show that there is sufficient, undisputed evidence that there was just cause to impose discipline in this matter.

Kinney argues that the discipline of termination is too harsh for the allegations against her. Unfortunately, she underestimated the seriousness of her misconduct. As a trained civil rights investigator, she knew or should have known that her behavior was grossly inappropriate and would not be tolerated. This is demonstrated by her elaborate attempts to hide her identity and involvement and her dishonesty when confronted. 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 complete lack of mitigating circumstances to justify a reduction of the discipline imposed in this matter. Given the seriousness of the violations and Kinney's lack of a defense to the charges, there is no justification to reduce the discipline. Based upon the record, the undersigned finds that DHS has met its burden of proof that just cause existed for the discipline imposed and DHS 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

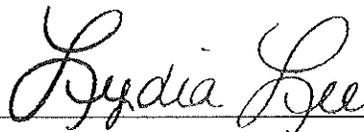
1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. Merit Rule 455:10-9-2 states that the Appellee DHS 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 supports each allegation against Kinney as set forth in the Notice of Final Formal Disciplinary Action – Discharge.
6. Appellee DHS has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Kinney for her misconduct, dishonesty, misuse of state property and conduct unbecoming a state employee.
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, but those did not justify a reduction in the severity of the discipline imposed. There was no evidence of mitigating circumstances.
8. Appellee DHS 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.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Jill Kinney, MPC 11-138 be DENIED.

This Order entered this 22nd day of November, 2011.



Lydia Lee
Administrative Law Judge