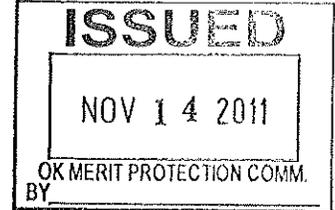


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA**

**BRYAN LANDERS,** )  
 )  
Appellant, )  
 )  
v. )  
 )  
**DEPARTMENT OF PUBLIC SAFETY,** )  
 )  
Appellee. )

Case No. MPC 11-139



**FINAL ORDER**

This matter comes on for hearing on October 26 and 28, 2011 before the undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Bryan Landers (hereinafter "Landers"), appears by and through his attorney, Gary James. The Appellee, Oklahoma Department of Public Safety (hereinafter "DPS"), appears by and through counsel, Stephen Krise and Christina Cornish. Also present for Appellee was Table Representative, Deputy Chief Greg Allen.

Appellant Landers was a permanent, classified employee of DPS, appealing an adverse disciplinary action of suspension without pay and disciplinary transfer. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Joint Exhibits 1 through 14 were offered 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 Landers was a permanent, classified employee of the Appellee, DPS. He appeals an adverse action of a one-day suspension without pay and a transfer from Troop S to Troop A Metro.
2. Landers had no prior incidents of discipline.

3. This disciplinary action began when a complaint was filed against Landers for appearing at DPS offices in OKC, while on duty and in uniform, to file paperwork associated with his personal business, Precision Driving School. As a result of this complaint, a Troop Level Investigation was conducted which identified additional allegations and issues. As a result, a Level II Review Board was conducted on October 6, 2010. The Review Board made specific findings about the 10 alleged policy violations. The Review Board made no findings regarding proposed discipline. (Joint Exhibit #4).

4. Following the Review Board, DPS elected to discipline Landers for three policy violations<sup>1</sup>: Neglect of Duty, Abuse of Position and Improper use of his Patrol Vehicle. (Joint Exhibit #3).

5. Landers does not generally dispute the Neglect of Duty allegation. As alleged, on June 10 and June 22, 2010, Landers traveled to DPS in OKC, while on duty and in uniform, to file paperwork associated with his personal business, Precision Driving School.

6. Landers also does not generally dispute the Abuse of Position allegation. Landers maintains a website to advertise his personal business, Precision Driving School. As alleged, on that website, Landers identified himself as a Highway Patrol Trooper and had not received written approval to do so. Landers removed the reference as soon as it was discovered.

7. Landers also does not dispute the allegations that he improperly used his patrol vehicle. On June 25, 2010, Landers was on duty at the State Capitol. When he completed his shift and he was off-duty, Landers drove his patrol car to DPS, approximately 2 miles away, to conduct personal business as alleged.

8. On December 20, 2010, DPS gave Landers notice of the final disciplinary action, imposing a one-day Suspension Without Pay which was served on January 3, 2011. He also received discipline in the form of a Transfer from Troop S effective January 1, 2011. (See Exhibit #3). Landers timely appealed the disciplinary action and this proceeding was held. Landers also file a grievance and appeal over the transfer, which was dismissed as already pending in this appeal.

9. The level of discipline imposed was based upon a "Disciplinary Matrix", approved as a Chief's Directive, effective April 15, 2010. (Joint Exhibit #2). The Appellant is challenging the

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<sup>1</sup> There is some discrepancy as to whether there are three or four separate policy violations. For purposes of this hearing, I find that there are only three violations alleged in the Notice.

validity of the Matrix, as it was not submitted to the Merit Protection Commission until after it was applied in this matter. Appellant is also challenging the manner in which the Matrix was used herein, as no mitigating circumstances were considered in the decision process.

### ISSUES

1. Is the Disciplinary Matrix enforceable and proper?
2. Did the DPS have just cause to impose discipline in this matter?
3. If so, was the discipline imposed just and appropriate under the circumstances and consistent with progressive discipline policy, Merit rules and laws?

### THE TESTIMONY

The testimony of six (6) witnesses was given, with each witness sworn and offered under oath. Trooper Bryan Landers testified that he graduated from the Highway Patrol Academy in June, 1998. He began his career in Troop F. He completed several specialized training programs in size and weight enforcement. As a result, in 2002, he was encouraged to accept a position in Troop S. Landers stated that the average time served before consideration for Troop S is 10-15 years as a Trooper. He was recruited after 4 years and has spent approximately 9 years in Troop S. Landers stated that he had received additional specialized training in the area of sizes and weights in order to perform his job. Since his transfer to Troop A, he has to drive approximately 45 miles each way to report to work. He disputes that the transfer resulted in more oversight of his shift, in that he rarely interacts with his supervisor now. He complains that the other Troopers assigned to Troop A Metro live in the vicinity and can attend children's school activities or go home for dinner with their families. Landers argues that this assignment is particularly punitive for him as it is impossible to travel to his home in McClain County during his shift. He works the 3 pm to 1 am shift and misses out on most evening family activities. His performance has not diminished in Troop A.

Landers testified that he has operated his private driving school since 2006. He said he never conducts classes or other private business while he is on duty. He said that the June 10 and 22 occasions were an exception. Landers noted that it is widely accepted that Troopers are

authorized to conduct personal errands while on duty. For example, he stated that Troopers frequently go to the DPS offices to conduct personal business at the credit union located there. He also said Troopers are allowed to attend school events, in uniform and on duty, as a public image builder. He said Troopers were able to stop at the dry cleaners or the store while on duty or on their way home, in uniform or in a patrol car. He was never informed that there was a distinction between conducting personal errands and tasks associated with a for-profit business enterprise. He said that since he was off-duty on the June 25 event, he didn't believe it was a violation to drive 2 miles out of the way to stop at the DPS offices. He said this was consistent with the actions of other Troopers.

Regarding his website, Landers had the site created by a vendor and he never caught the information citing the Oklahoma Highway Patrol (hereinafter "OHP") or identifying him as a Trooper. He stated that when it was pointed out to him, he had it removed immediately. He said that he left the reference to the Troopers Association because membership is open to non-troopers and does not inappropriately identify him.

Landers testified that he was unaware of the Disciplinary Matrix before it was used in this disciplinary action. He testified that he never received any training about the Matrix, and that he has tried to read it and found it to be confusing. Landers argues that his troop assignment has nothing to do with his violations, as it would be easier to go to DPS for his business now that he is in the metro area. He testified that, although he was not aware that his actions were a violation of policy at the time, he will not do it again. This disciplinary process has been successful in correcting the behavior, and the troop reassignment is inappropriately punitive.

Landers noted that his operation of the driving school had been approved as a secondary job. He made the appropriate application and disclosure. Landers offered testimony about the secondary employment that some Troopers have as private security guards. He testified that they frequently wear their OHP badges and often wear shirts, hats, or jackets that display the OHP logo.

The second witness was Marilyn Greenroyd. She is an administrative officer in the division where driving schools are licensed. She has worked at DPS for 34 years. She testified that on June 10, 2010, Landers used his badge to enter her restricted access office. She testified that Landers came to file paperwork for his driving school. She subsequently rejected the

application because it was incomplete. On June 22, 2010, Landers again came to her office to question her about the rejection. Both times, Landers was in uniform. On June 23, 2010, Landers called her and complained that she was holding up his business and threatened to go to her supervisor and also to the Commissioner. Greenroyd admitted that she was asking for some documents that that were no longer required due to a statutory/regulatory change. She stated that she was following an out-of-date checklist. She also admitted that Landers had the right to complain to her supervisor. She subsequently notified Karen Gentry about the incidents.

Karen Gentry, Greenroyd's supervisor, testified that she became aware of the situation with Landers on June 23, 2010. She is the Director over the division that licenses the driving schools. She said that Greenroyd complained that Landers was "threatening" and in uniform, conducting his business while he was on duty. Gentry reported these incidents to Lander's Troop Commander. She said that she spoke with Landers on the phone later that day and he indicated that he was very unhappy with the way his application was being delayed. She said she requested that Landers come and meet with her on June 25 to discuss the situation. She said he was again in uniform, but he explained that he had just gotten off duty. Afterwards, she was asked to file a formal, written complaint, which was personally picked up by Lt. Gandy, the investigator for Troop S. Gentry stated that she testified at the Review Board but was not involved in imposition of discipline. Gentry admitted that she frequently sees Troopers in uniform in the DPS building and in the credit union. She stated that her concern was that it was a private business and it appeared that Landers was asking for special treatment. She also admitted that the checklist they were following was out-of-date and that was the basis for Lander's frustration.

Kevin Ward was the Commissioner of Public Safety at the time of this disciplinary action. He was the appointing authority and made the final decision about the level of discipline to impose for Landers. Ward testified that he was somewhat aware of the initial allegations and the Board's findings. He said that the Chief recommended the level of discipline. He said that transfers at DPS can be made as needed for "the good of the agency", or can be made as a disciplinary action. Ward discussed that Chief Guillotte gathered information and obtained input from a variety of sources in establishing the Disciplinary Matrix and that Ward ultimately approved it. He stated that using the Matrix was mandatory, not discretionary, in determining the appropriate level of discipline. He said it was established to ensure uniform discipline

throughout all of the various troops around the state. Ward testified that the Matrix required one to always look at both the mitigating and aggravating circumstances in each instance to determine the level of discipline. He indicated that it would involve a balancing test. Ward stated that he was not aware of any reason to deviate from the recommendation of the Chief and therefore, imposed the recommended discipline. He admitted that some DPS employees have complained that the Matrix is difficult to understand.

Ward stated that he understood that the transfer was appropriate because of the allegations that Landers was running his private school classes in Norman while he was on-duty. He also admitted that he did not personally review the evidence or documents, but relied entirely upon the Chief's recommendation. He was not given or shown any evidence of either mitigating or aggravating circumstances. Ward also testified that his understanding of the Matrix was that mitigating evidence was always considered, even if there were multiple violations. Ward admitted that Troopers are permitted to use their patrol vehicles to make personal errands and are allowed to go to school events and attend to other family and personal matters while on duty. He stated that the difference here is that Landers was engaging in a for-profit business. Ward admitted that this distinction is not in a written policy.

Major Rusty Rhoades was the Chairman of Lander's Review Board. Rhoades testified that he had served on several such Boards, but this was his first as Chair. He stated that Lander's Board was a fact-finding effort and they did not consider or recommend discipline in this matter. Rhoades stated that it was understood, however, that the report would be used in imposing discipline. He stated that honesty is the required standard when appearing before the Board. He testified that all allegations regarding Landers' untruthfulness were unanimously considered to be unfounded. Rhoades testified that the Board had some concerns over Lt. Gandy's investigation due to his inexperience in this type of investigation. He testified that the Board considered both mitigating and aggravating circumstances that were not specifically listed but could be "gleaned" from the report.

Van Michael Guillotte was the Chief of the Highway Patrol under Commissioner Ward, from 2007 to 2011. He stated that he received the complaint from Gentry and assigned it to Troop S to conduct an investigation. He stated that the quality of the investigation concerned him, so he convened a Review Board to act as fact-finder. Following the Board's report, he recommended discipline based upon only three violations, namely Landers going to DPS on state

time on June 10 and 22, Landers using his patrol vehicle after he was off-duty on June 25 to go to DPS, and the driving school website identification of Landers' as a Trooper. Guillotte stated that he has a strong feeling against "making money" in a private business venture and that Landers' action were very different from just making a few stops on personal business.

Guillotte stated that the Disciplinary Matrix was initiated in order to help provide more consistency in imposing discipline across the board. He said that he made the recommendation to impose the one day suspension without pay and the transfer to Troop A Metro. He testified that this was determined after applying the Matrix. Of particular importance, he admitted that the decision to make the transfer was made in part because of some of the unfounded allegations regarding time-keeping and Landers not performing to the best of his ability. Guillotte testified that he felt there would be more oversight in the metro area in case these were occurring.

Guillotte testified that use of the Matrix was mandatory to provide consistent treatment. He testified that he interpreted the Matrix to "mandate" imposing an aggravating penalty in all cases where there are multiple violations. He stated that he did not consider any mitigating circumstances because of this "mandatory" requirement. He also admitted that there are no criteria for determining when transfers where appropriate discipline. Although Guillotte testified that he did not feel there were any mitigating circumstances to consider, he admitted that he would have disregarded any mitigation because of his interpretation of the Matrix.

### DISCUSSION

First, it must be noted that ordinarily, work assignments and locations are typically within the sole purview of the appointing authority and are not appealable to MPC. However, DPS has taken the unusual position that transfers may occur "for corrective purposes or as a result of disciplinary action" (Joint Exhibit #1, pg. 25). DPS admits that this transfer was part of the imposed discipline and was not made simply for the good of the agency. As such the transfer is appealable and subject to review in the decision-making herein.

DPS argues that out of ten (10) allegations of misconduct, five (5) were considered to be founded by the Review Board. However, this ignores the fact that DPS only cited three violations in the formal notice of discipline. The other allegations, whether founded or unfounded, cannot be considered as the basis for imposing discipline. 74 O.S. Section 840-6.5

(C.) requires that the notice of a suspension must contain the specific cause for the discipline. Therefore, the only policy violations that will be considered are those contained in the Notice (Joint Exhibit #3).

Based upon Landers's own admissions that he conducted business while on state time on June 10 and June 22, that he used his patrol vehicle to drive for a personal purpose, and that his personal business website identified him as a Trooper, it is clear that the evidence supports that violations of DPS policy have occurred. Although discussed, there was no evidence submitted to support that a violation of state law, namely 47 O.S. Section 156.1 occurred. Therefore, the remaining issues to be determined are the validity of the Discipline Matrix and the appropriateness of the level of discipline imposed in this matter.

DPS argues that the Disciplinary Matrix is a properly established, enforceable progressive disciplinary tool. The evidence supports that, at the time of this disciplinary action, the Matrix had not been filed with the Merit Protection Commission as required by Merit Rule 455:10-11-5. DPS argues that this is harmless error and Landers argues that it could not be enforced until it was filed. There is no requirement that the policy be "approved" by the Commission, just filed. The rule itself also acknowledges that the specific needs of an agency should be addressed in the progressive discipline policy. Neither party offered any authority on the effect of the failure to file the Matrix. After consideration of the arguments, there is no compelling reason to reject the entire Matrix because it was not filed properly. This appears to be a ministerial function and is not sufficient to invalidate the entire Matrix.

Having made that determination, however, the interpretation and implementation of the Matrix as evidenced by the testimony is clearly improper. DPS applied the Matrix with no consideration of mitigating circumstances, in direct violation of state law, as well as ignoring the express wording of the Matrix itself. 74 O.S. Section 840-6.3 provides that progressive discipline must include the flexibility to vary penalties if justified by aggravating or mitigating circumstances. It also requires that supervisors **shall** consider aggravating or mitigating circumstances when determining the proper action. Therefore, the Matrix must be interpreted to ensure that it complies with the progressive discipline statutes.

Guillotte testified that the Matrix provides that the highest class violation is the primary violation and additional founded violations "will be considered aggravating circumstances" to enhance discipline. He said this mandates that mitigating circumstances cannot be considered in

imposing discipline, nor can the presumptive penalty be imposed. According to the use of the Matrix in this case, as a result of more than one violation of policy, discretion and flexibility are eliminated. This flies in the face of the clear wording of the policy itself. Under "Purpose", the policy specifically states that *at their discretion*, the Commissioner or the Chief have the final authority to impose discipline (Joint Exhibit #2, pg. 1). The use of the word discretion anticipates that flexibility can be used. This is also evident in the provision for requesting one or more levels higher or lower where mitigating or aggravating circumstances warrant it (Joint Exhibit #2, pg. 6). The Matrix specifically provides that the presumptive penalty may be increased or decreased based upon mitigating or aggravating circumstances, but that the presence of either *do not automatically* require the imposition of a penalty outside the presumptive penalty (Joint Exhibit #2, pg. 7).

In this case, the primary violation is a Disciplinary Level 3. The presumptive penalty for such violation is a Written Reprimand, with a mitigated penalty of informal discipline and an aggravated penalty of a 1-9 day suspension without pay, a transfer and/or demotion. (Joint Exhibit #2, pg. 6). Here, there are three violations listed in the Notice, so the two additional violations will be considered aggravating, but should not be considered to mandatorily increase the penalty. By doing so, DPS violated its own policy. The Matrix also provides that both mitigating and aggravating circumstances must be documented. There is no such documentation in the record. The Review Board was not charged with determining discipline, therefore its report cannot be considered as documenting facts necessary for determining the appropriate penalty.

DPS' failure to document mitigation and aggravation, its failure to even consider mitigating evidence and its improper interpretation of the mandatory consideration of the multiple violations result in a failure to comply with the agency's progressive disciplinary policy. According to the Matrix, any reviewer should contemplate if there are factors not already taken into consideration in the conduct category or the definition of the specific violation that might justify decreasing or increasing the sanction. This clearly indicates that the intent is to consider both mitigation and aggravation each and every time and make a determination as to the appropriate weight to be given. DPS mandatory interpretation is inconsistent with the policy.

It must also be noted that, in order for the Disciplinary Matrix to be an appropriate progressive discipline tool, it must provide for discipline that is "progressive in nature". 74 O.S.

Section 840-6.3 (C.). The Matrix requires that the employee's prior discipline for similar infractions within the previous four years be considered (Joint Exhibit #2, pg. 2). It further provides that minimal or lack of prior discipline history is a mitigating circumstances (Joint Exhibit #2, pg. 7). Landers' Notice does not contain any mention of consideration of his disciplinary history (Joint Exhibit #3). This, coupled with Guillotte's testimony that he did not consider any mitigating circumstances, demonstrates another instance of DPS failure to follow the Matrix regarding consideration of prior discipline. It should also be noted that there was insufficient evidence of similar disciplinary transfers to consider "consistency, impartiality and predictability" of discipline as required by law.

DPS is to be commended for conducting a full and complete review and investigation of this matter. However, DPS stumbled when Chief Guillotte admitted that he considered matters as the basis for his recommendation which were not founded in the Review Board report or listed in the Notice of Disciplinary Action. This is the very essence of a violation of progressive discipline. Further, DPS' argument that MPC has no business "second-guessing" the discipline and that troopers are better suited to make decisions about discipline for troopers than MPC is particularly troublesome and shows a clear disdain for the appeal rights of its employees. These arguments were voiced by DPS on more than one occasion during this hearing.

Landers arguments regarding disparate treatment for similar violations was not refuted by DPS. The evidence presented clearly indicates that DPS does not impose discipline for every instance of personal use of patrol vehicles, nor do they impose discipline for every personal errand done while on duty. This could easily result in inconsistent application and also could be perceived by employees as not being an absolute prohibition. DPS position on "for-profit business transactions" vs. "personal business" is not contained or clarified in the Operations Manual (Joint Exhibit #1). Clearly, if there is properly such a distinction, the policy could easily so indicate.

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. DPS's own progressive discipline policy states that the goal is to redirect employees towards improved job performance and conduct which complies with policy. (Joint Exhibit #1, pg. 71). It states that progressive discipline is intended to be consistent, impartial and predictable, while preserving flexibility to respond with varying penalties if justified. There was no evidence that the

violation impacted the agency adversely<sup>2</sup>. There was no evidence that the imposition of the presumptive discipline of a written reprimand would not correct or remedy the behavior. There is no evidence that the behavior or violation has reoccurred or continued.

The undersigned has considered all of the facts and circumstances of this case and the testimony of the witnesses. It is undisputed that Landers violated DPS policy. DPS' failure to file the Disciplinary Matrix does not operate to invalidate the Matrix itself. In determining the appropriate level of discipline to be imposed, and following the Matrix, one must consider both the mitigating and aggravating circumstances. In considering the list of mitigating circumstances in the Matrix, Landers has taken responsibility for his misconduct, other Troopers make personal stops and do errands while on duty and in their patrol cars, Landers had no previous disciplinary record, had received an Overall Performance Rating of "Meets Standard" on his 2 most recent PMP evaluations, had received some awards and/or commendations and his violations were considered Category C, which is mid-range in the Matrix. The two additional violations are aggravating circumstances. These appear, however, to be the only aggravating circumstances in the record. Applying a balancing test, as Commissioner Ward testified was appropriate, the mitigating circumstances outweigh the aggravating circumstances. As a result, there is insufficient evidence to apply any level of discipline other than the presumptive penalty under the Matrix, which is a written reprimand.

Given the totality of the circumstances, a reduction of the discipline is appropriate. Considering that this violation is serious, however, that Landers has never been subject to any form of discipline before and that other violations of these policies are overlooked, the imposition of a lesser level of formal discipline seems appropriate. There is no reason to believe that the presumptive penalty of a Written Reprimand would not have the desired result of correcting the behavior and preventing it from reoccurring as required by the progressive discipline policy.

#### **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.

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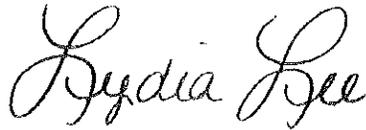
<sup>2</sup> This statement is specific to this hearing and deals only with the lack of testimony and evidence herein.

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 DPS 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. The Disciplinary Matrix adopted by DPS for use in determining the appropriate level of progressive discipline lists a Written Reprimand as the presumptive penalty for policy violations of this type.
5. The preponderance of the evidence shows that Landers's conduct in using his patrol vehicle for personal business, for failing to devote full time and attention to his duties and for identifying himself as a Trooper on his driving school website violated DPS policies.
6. Appellee DPS, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Landers for his violations of policy and his appeal on that ground is denied.
7. Appellee DPS, has failed to meet its burden to prove, by a preponderance of the evidence, that the discipline imposed was just, considering the mitigating circumstances and in compliance with its Disciplinary Matrix. As a result of DPS' failure to consider mitigating evidence, the discipline imposed is unduly harsh and unfair given the totality of the evidence and constitutes disparate treatment considering other similar violations and discipline.
8. 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 Landers's duties and responsibilities; the consistency of action taken by DPS with respect to similar conduct by other employees; the previous employment and disciplinary records of Landers; and other mitigating circumstances as discussed herein.
9. The record herein supports imposition of formal discipline in the form of a Written 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 Bryan Landers, MPC 11-139 be SUSTAINED IN PART. The discipline imposed upon Appellant is reduced to a Letter of Reprimand consistent with this Order. The transfer to Troop A Metro is revoked as a disciplinary action. Appellant is to receive back pay and benefits consistent with this Order and Appellant's personnel records are to be expunged except for a Letter of Reprimand consistent with this Order.

This Order entered this 8th day of November, 2011.

A handwritten signature in cursive script that reads "Lydia Lee".

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Lydia Lee, OBA #10374  
Administrative Law Judge