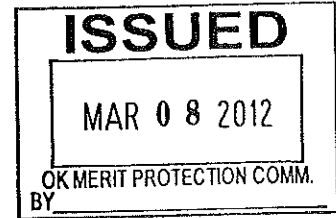


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA



SCOTT ESK, )  
Appellant )  
vs. )  
DEPARTMENT OF PUBLIC SAFETY, )  
Appellee. )

CASE NO. MPC 11-161

FINAL ORDER

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on February 28 and 29, 2012, at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Scott Esk, appeared in person and was represented by Valerie Williford, Esq. Appellee, Department of Public Safety (hereinafter referred to as "DPS" or "Appellee"), appeared by and through its Counsel, Stephen Krise, General Counsel and Christina Cornish, Assistant General Counsel, and table representative, Lt. Jerry Treadwell.

Appellant, a permanent classified employee working for Appellee, was discharged February 16, 2011 in accordance with Merit Rule 455:10-11-14 after he was arrested on his job for two counts of threatening violence against his former pastor and an elder of 84<sup>th</sup> Street Church of Christ, and after an internal agency investigation confirmed that Appellant had threatened and harassed these individuals continually since his wife divorced him in 2007.

Whereupon, the sworn testimony of witnesses for both Appellee and Appellant was presented, along with Exhibits, 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, Scott Esk, had been employed with the DPS for 12 years in the Oklahoma City office, and was working as a data management analyst when, on December 10, 2010 he was arrested at his job on two counts of *Threatening to Perform an Act of Violence*, 21-1378.B. Joint Exhibit #7. As a result of Appellant's arrest, Appellee DPS undertook an internal investigation to uncover the facts of Appellant's arrest and determine whether Appellant was in violation of any agency rules or Merit Rules. Based on its investigation, Appellee determined that Appellant had engaged in conduct which was unbecoming a public employee and violated state criminal statutes. Joint Exhibit #1. Appellant was discharged effective February 16, 2011. Joint Exhibit #1.

The facts reveal that Appellant and his family were members of the 84<sup>th</sup> Street Church of Christ in 2007 when Appellant's wife, Pam, took their three sons and left Appellant because of his physical and emotional abuse towards her and the boys. She sought assistance from Pastor Harry Osborne and the three church elders, who engaged a professional counselor to work with the couple and attempt reconciliation. While Appellant acknowledged certain actions he took towards his wife and sons, he

would not admit that they were abusive actions. Unable to achieve reconciliation, Pam filed for divorce.

The Church of Christ does not recognize divorce except in the case of adultery. In addition to the abuse, Pam brought to the attention of the church elders numerous phone calls made by Appellant from his cell phone to a house of prostitution, which she believed constituted evidence of Appellant's adultery. Pastor Osborne and the elders found this evidence sufficient to substantiate her allegations of adultery, and supported Pam in her divorce. Throughout the legal proceedings, Pastor Osborne was very supportive, accompanying Pam to her court appearances, assisting her in obtaining a Victim's Protective Order against Appellant, and at her request, supervising the sons' visitation with Appellant.

Appellant denied that he committed adultery and steadfastly refused to acknowledge the "unscriptural" divorce. He blamed Pastor Osborne and the elders for encouraging the divorce, and set out on a mission to get them to "repent" of their part in this "sin" of divorce, to expose them to the church membership as unrepentant sinners, and to have them removed as church leaders. In spite of their instructions to him not to call their homes, Appellant continually telephoned Pastor Osborne and Elder Gerald Gudgel, left angry messages and sent e-mails accusing them of interfering with his marriage, and calling for them to repent and leave the church. Appellant began a crusade of weekly e-mails replete with accusations against Pastor Osborne. He sent these e-mails to Churches of Christ throughout the country and the Philippines, where Pastor Osborne often conducts business. According to Appellant, these e-mails "kept people informed quite well" about the various "sins" of Pastor Osborne and Gerald

Gudgel. Appellant would often ride his bicycle by the home of Gerald Gudgel in the evenings and shout in passing, "Repent!"

Raymond Looney testified that in 2007 while he was a member of 84<sup>th</sup> Street Church of Christ, he was asked to be a supervisor, along with Pastor Osborne, during the children's weekend visitation with Appellant. He testified that Appellant was extremely angry and agitated about Pastor Osborne being in his home, and grew more angry as the weekend wore on. During that weekend, Appellant told Mr. Looney that he would "like to show Harry Osborne how good I am with a firearm," that he would "show him [Harry Osborne] what violence really is," and that he "would like to put Harry Osborne in a body bag." Mr. Looney testified that since that weekend in 2007, Appellant has repeated these threats against Pastor Osborne in at least two subsequent telephone conversations with him. Mr. Looney was so shaken by that weekend experience that he declined any further supervision requests from either Pam or from Appellant, fearing that Appellant might redirect his anger toward him and his family if he said something Appellant did not like.

Appellant began his crusade against Pastor Osborne and the elders in 2007 and has relentlessly continued even to this day.<sup>1</sup> In 2007, because of Appellant's harassing and threatening conduct, the church withdrew fellowship from Appellant and banned him from the church. Pastor Osborne and Gerald Gudgel testified that sometime in 2010 Appellant's behavior began to escalate. Pastor Osborne testified that when he was out of town on business once, Appellant threatened to take over the church for a

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<sup>1</sup> Pastor Osborne testified that the church e-mails continue even to the date of this hearing, as Appellant sent out a mass e-mail against the pastor to churches across the country on the evening of February 27, 2012. Appellant acknowledged that he did so.

meeting; Appellant left voice messages on his phone stating that he and God rebuke the Pastor and that soon he would have to pay. Appellant made no secrets about owning a gun, and stated to church members that he would make Pastor Osborne dance, a reference to using his gun for such purpose. On three occasions the church hired armed security for fear of violence by Appellant.

On the morning of Sunday, November 28, 2010 members of the 84<sup>th</sup> Street Church of Christ arrived at the church for Sunday services to find copies of a letter posted on all the windows and doors and on posts in the parking lot. Addressed as "Dear Brethren," the letter asserts its purpose to provide "an update on the latest sin approved of by your elders and your preacher:..." and tells of Pam's refusal to allow him visitation with his sons, "undermining [his] parental authority" in violation of her "obligation to be in subjection to her husband...". Joint Exhibit #4. The flyer continued:

"You need to ask yourself this question: 'How long will I let all this sin go on in my midst before I finally take action against it?' ...It's about time this unrighteous game comes to an end. I will pray for repentance on the part of Pam, the elders, Harry Osborne, the McCoys, the Looneys, and you."

Joint Exhibit #4

Fearing for the safety of the church congregation, the following day Pastor Osborne filed a Crime Report with the Oklahoma City Police Department stating his concern that Appellant will become violent, after the harassment and threats made against him over the years and the threats contained in the posted letter to the church. Joint Exhibit #6. A few days later, on December 2, 2010, Gerald Gudgel filed a Crime Report against Appellant, also. Joint Exhibit #6. Following an investigation by Oklahoma City Police Officer Chuck Wheeler, Appellant was arrested on December 10,

2010, pursuant to an Arrest Warrant for Threatening to Perform an Act of Violence. Joint Exhibit #7.

Upon learning of Appellant's arrest at his worksite, Appellee undertook its own internal investigation. Lt. Brent Jones from Troop Z, Investigations, was assigned to investigate Appellant and the circumstances leading to his arrest. In the course of his investigation, Lt. Jones interviewed Pastor Osborne, Gerald Gudgel, Pam Esk, Raymond Looney, and Oklahoma City Police Officer Wheeler, and concluded that Appellant's harassing and threatening statements concerning Pastor Osborne violated Oklahoma criminal laws and constituted conduct unbecoming a state employee. Following a pre-termination hearing, and after reviewing Appellant's written submission at that hearing, the investigation report by Lt. Jones and supporting documentation, Appellant's prior discipline, Appellant's personnel file, including his most recent PMP, the recommendation for termination by Appellant's supervisor, and discipline administered in previous similar circumstances, DPS Commissioner Michael Thompson determined that just cause exists to terminate Appellant's employment with DPS effective February 16, 2011. This administrative law judge concurs.

Appellant does not deny making the statements alleged, but denies that they were threatening. He claims that he was merely joking when he stated he would "make Harry Osborne dance," and further claims that there were no threats made directly to Harry Osborne, and further claims that his speech is protected by the First Amendment to the Constitution. This judge rejects Appellant's argument. The First Amendment does not grant an absolute right to any and all speech. Speech which threatens the life of another individual is not protected. It is also not a joke. Nor does it need to be made

directly to the victim. The test is whether a reasonable person in the victim's shoes would be threatened by such speech. I find that a reasonable person -- hounded continuously for over three years by an individual, allegedly abusive to his wife and children, who makes threats of violence toward him to others, as well as against others, and who possesses the means to carry out such threats -- could reasonably feel threatened by such behavior. Indeed, Pastor Osborne and Gerald Gudgel were so threatened by Appellant that they felt compelled to file a crime report against him. Pastor Osborne took the extra precaution of obtaining a Victim's Protective Order. Joint Exhibit #10 & #11.

Appellant argues that he should not have been discharged since he did not actually harm anyone, the criminal charges were dropped, and his behavior had no effect on his work. This administrative law judge disagrees. While Appellant was not discharged for causing harm to anyone, his behavior certainly did cause harm to the pastor, the elders, and the congregation of 84<sup>th</sup> Street Church of Christ in disruptions, emotional distress, monetary costs for hiring armed security, and possible damage to the reputation of Pastor Osborne. Additionally, Appellant's behavior reflects badly on his employer, Department of Public Safety, an agency whose mission is to protect the public and uphold the law. To have an employee who so willfully ignores the law and threatens the safety of the public is, at best, an embarrassment to the Department of Public Safety and is unacceptable. Even after his arrest and the filing of charges against him, Appellant has continued his harassing behavior by sending e-mails against Pastor Osborne to churches throughout the United States. Appellant was not discharged for conviction of a crime, and although the charges against him were

dismissed, they were dismissed without prejudice to re-filing, pending further investigation by the district attorney. Joint Exhibit #9.

### **CONCLUSIONS OF LAW**

1. Any findings of fact that are properly conclusions of law are incorporated herein as conclusions of law.

2. Merit Rule 455:10-11-14 states that a permanent classified employee may be discharged for conduct unbecoming a public employee or any other just cause.

3. Merit Rule 455:10-9-2 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 the action taken.

4. Title 21 Oklahoma Statutes Section 1378 B., *Punishment for Planning or Threatening Violent Act*, provides that any person who shall threaten to perform an act of violence involving or intended to involve serious bodily harm or death of another person shall be guilty of a misdemeanor, punishable upon conviction thereof by imprisonment in the county jail for a period of not more than six (6) months.

5. Appellee, Oklahoma Department of Public Safety, has met its burden to prove, by a preponderance of the evidence, that Appellant, Scott Esk has engaged in conduct unbecoming a public employee and that just cause exists for his discharge.



**ORDER**

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

DATED this 8<sup>th</sup> day of March 2012.



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Annita M. Bridges, OBA # 1119  
Administrative Law Judge  
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