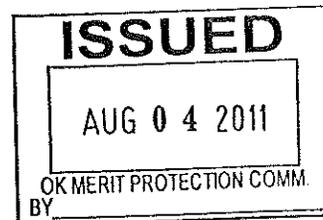


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA

DEBBIE MARTINEZ,)
Appellant)
vs.)
DEPARTMENT OF CORRECTIONS,)
Appellee)



CASE NO. MPC 11-173

FINAL ORDER

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on July 19, 2011 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant Debbie Martinez appeared in person and was represented by James Patrick Hunt, Esq. Appellee, Department of Corrections (hereinafter referred to as "DOC"), appeared by and through its Counsel Michelle Miniotta, Assistant General Counsel, and agency representative Karen White, District Supervisor.

Appellant, a Level III Probation and Parole Officer, was terminated from her employment with Appellee after a complaint was filed alleging that Appellant performed a home visit and inspection and conducted a search of property of an ex-parolee and her husband after her sentence had expired and she was no longer under Appellee's supervision. Appellant was discharged for violation of DOC OP-110215, I.A.1, 2, 3, 4 and 8; OP-110802, 1.A. and B.; and OP-040110 III. A.1.and F. 1, 2, 5, and 6. Appellant appealed her termination.

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 is a Probation and Parole Officer (PPO) III in the Central District Community Corrections of DOC. In August 2010, Appellant's team supervisor, Robert Truitt, Probation and Parole Officer IV, conducted a routine file review of Appellant's cases by downloading from the DOC website the Offender Roster for Case Supervisor Debbie Martinez that lists the clients assigned to Appellant's supervision. As a result of his review of Appellant's roster, Mr. Truitt sent Appellant a memo stating:

I have reviewed your roster and have found at least 40 offenders in which no contact has been made from a period of 5 months to 2 years. This is unacceptable. ...

I have determined that a plan of action is necessary in an effort to assist you so that you may come into compliance with Section 16 OP-160201. ... Below are the following steps:

1. Make all locator attempts including home visits by 8-26-10. I advise you to take an officer with you when conducting field locator attempts.

...

4. A follow up meeting will be held on 9-10-10 at 1100 hours to evaluate your progress.

Appellant Ex. 7

Mr. Truitt testified that the average case load among the seven PPO's under his supervision is 50 to 80 clients. However, Appellant maintains a "generic caseload" of 120 clients on her roster.

On August 22, 2010 Appellant, accompanied by PPO III Shannon Hazen, conducted a home visit of Crystal Murray, a client on Appellant's roster, who was identified by Mr. Truitt as requiring attention. The Offender Roster may include, among other information, date of the last home visit, date of the last office visit, supervision end date, sentence end date, home telephone number and address for each client. However, in Ms. Murray's case, information on the supervision end date and sentence end date was not on the roster. (Appellant Ex. 7) When Appellant and Ms. Hazen arrived at the residence, which Ms. Murray shared with her husband Terry Barlor, they were unable to gain entry through the front door and there were several pit bulls in the yard, barking viciously. Ms. Murray came outside and led them inside the house through a side door. She and Mr. Barlor gave them permission to conduct a walk-through home visit. While inside, they noticed surveillance equipment and cameras set up throughout the home. Ms. Martinez testified that she had a "gut feeling" that something was wrong at the residence; that perhaps something bad or illegal was going on. She based this feeling on her observations that Ms. Murray appeared agitated and acted erratically; the front door was inaccessible and sealed off; the only entrance to the home was through a back door protected by pit bulls; surveillance equipment and cameras were set up throughout the house; the dogs were brought inside and not properly contained, preventing the officers from conducting a thorough home visit.

Appellant and Ms. Hazen decided to leave the residence and call the Oklahoma City police for assistance.

Three OKC police officers arrived to give assistance. One of the police officers held the bathroom door closed to prevent the dogs from getting out; another stayed in the living room with Ms. Murray; the third officer arrived as the home visit was ending. (Appellant Ex. 6, page 6) Appellant conducted a walk-through of the home and observed a Crown Royal bag. She asked what was in the bag and was told nothing. At Mr. Barlor's invitation, Appellant states that she looked inside the bag. She then states that she observed Mr. Barlor on his computer and asked what he was doing. He indicated that he was instant messaging with a friend and Appellant asked him to show her. He complied.

The following day, August 23, 2010, Mr. Truitt received a call from Crystal Murray complaining that Appellant had come to her house the previous day harassing her husband and her, even though she has been discharged from parole. Mr. Barlor added his comments, reporting that Appellant had been rude and mean to both of them, treated him like a criminal, and made him show her what he was doing on his computer. (Appellee Ex. 12) Ms. Murray and Mr. Truitt advised that they had spoken with an attorney and believe that their civil rights had been violated.

A review of Ms. Murray's records confirmed that her sentence expired and she was discharged from parole on July 24, 2010, nearly 30 days prior to Appellant's home visit. (Appellee Ex. 9, 10, and 11)¹ Discussions with Appellant confirmed that (1) she did not check Ms. Murray's records prior to the home visit, and (2) during the course of

¹ However, there is no credible evidence that either Ms. Murray or Mr. Barlor advised Appellant of this fact when she and PPO Hazen appeared to conduct the home visit.

the home visit she looked inside a Crown Royal bag and asked Mr. Barlor to show her what he was doing on the computer. However, Appellant stated that her observations in both instances were with the permission of Ms. Murray and/or Mr. Barlor, and both inquiries by Appellant were based on her reasonable suspicions. Appellant stated that she did not believe that either of her actions constituted a search, but nonetheless, Mr. Truitt directed her to complete a Search and Seizure Report of the incident on September 2, 2010. (Appellee Ex. 8)

The matter was reported through the chain of command to DOC Deputy Director Reginald Hines, who ordered an investigation by the Office of Internal Affairs. (Appellant Ex. 11) The investigation concluded that Appellant violated agency policies by (1) failing to take appropriate actions to notice that Ms. Murray had discharged her parole on July 24, 2010; (2) conducting a home visit of Ms. Murray after she discharged her parole; and (3) failing to follow proper procedures when she turned the home visit into a search by looking into the Crown Royal bag. (Appellant Ex. 6) Appellee DOC terminated Appellant's employment effective March 7, 2011, for violation of agency policies with regard to the August 22, 2010 home visit of Crystal Murray. (Appellee Ex. 2) Appellant filed this appeal with the Oklahoma Merit Protection Commission.

DISCUSSION

The facts in this case are not in dispute:

- Appellant conducted a home visit of Crystal Murray, a client on her case roster, on August 22, 2010.
- Ms. Murray had discharged her parole on July 24, 2010.

- Appellant failed to check Ms. Murray's records to notice that she had discharged parole prior to making the home visit.
- While at the Murray residence Appellant looked inside a Crown Royal bag² and requested Ms. Murray's husband, Terry Barlor, show her what he was doing on his computer.
- Appellant never contacted her supervisor nor did she obtain a signed Consent to Search form from Mr. Barlor and/or Ms. Murray prior to looking inside the bag or viewing the computer.
- Appellant did not prepare a report of the August 22, 2010 incident until directed to do so by her supervisor on September 2, 2010.

Appellant argues, however, that (1) it was not her fault that she did not know Ms. Murray had discharged parole prior to her visit; (2) Appellant's actions while at the home visit did not constitute a search; (3) Appellant's discharge was motivated by racism and/or favoritism; (4) discharge was too harsh based on other similarly situated cases in the past.

Appellant argues that the roster print-out she received from Mr. Truitt did not indicate Ms. Murray's discharge date, and Mr. Truitt should have verified this

² Appellant made alternate arguments as to why she was suspicious of the bag, citing first her experience that bags of that type are often used to hide drugs or drug money, and alternatively that one condition of Ms. Murray's parole was not to consume intoxicating beverages. However, Appellant stated that she never read Ms. Murray's file and, therefore, she would have had no knowledge of her parole conditions.

Nonetheless, Appellant cannot be faulted for her "gut feeling" that something "wrong or illegal" might be going on at the residence in light of the pit bulls guarding the only entrance, the surveillance cameras, the lack of cooperation of Ms. Murray and Mr. Barlor that caused Appellant to call the OKCPD for assistance. PPO III Hazen shared Appellant's concern. In fact, Appellant should be commended for taking action to investigate what she and PPO Hazen both saw as a possible suspicious situation that may have involved danger to a third party. In situations such as this, the instincts of the officer in the field, if objectively reasonable, should be given weight. Here, Appellant's mistake was not in acting on her suspicions, but in failing to follow procedures when acting on her suspicions.

information before he highlighted Ms. Murray as a client needing follow-up by Appellant. This administrative law judge rejects Appellant's argument. The information on the roster was not misleading or inaccurate, it was simply incomplete. As PPO responsible for supervising Ms. Murray's parole, Appellant is responsible for obtaining the necessary information to ensure proper action on her part. That information is readily available on Ms. Murray's Order of Release on Parole (Appellee Ex. 10) and in her Case Notes (Appellee Ex. 11). It is patently unreasonable to expect team supervisor Truitt to review the files of some 300 to 400 offenders under the supervision of his seven PPO's. That is, of course, the responsibility of the PPO's assigned to supervise those offenders. The purpose of the roster review is to let team supervisor Truitt know if his PPO's are doing their job, and to advise the supervising PPO – in this case Appellant – of cases that need attention. It is then up to the supervising PPO to take the appropriate action, *after* gathering the relevant information. This Appellant failed to do.

Appellant argues that she did not believe her actions at the Murray residence constituted a search. This ALJ does not find this assertion credible. The definition of "search" in the DOC procedures is clear and unambiguous, and leaves little room for doubt, in this instance, that her actions fell within that definition. Further, Appellant testified that she has a degree in criminal justice and was CLEET certified in 2005, so she would be expected to have a better than average understanding that her actions constituted a search.³

³ Appellant also called two long-time PPO's to agree with her assertion that her actions did not constitute a search. This ALJ gives little credence to the stated opinions of witnesses concerning what does or does not constitute a "search," as that term is clearly defined in DOC procedures and does not require further clarification from witnesses' own interpretations. Additionally, on cross-examination, PPO Mark Pursley admitted that opening a closed Crown Royal bag does constitute a search.

Appellant further alleges that her discharge was the result of favoritism and/or racism by District Supervisor Karen White. She cites an altercation on December 1, 2010 between herself and an African American co-worker whom Appellant alleges threatened her, saying "Bitch, I'll kick your ass!" Appellant filed a claim of workplace violence against the co-worker, but she, herself, received discipline. It was after this incident that Appellant received her Notice of Pre-termination Hearing. (Appellee Ex. 1) District Supervisor Karen White testified that she had the December 1, 2010 incident investigated and found no witnesses to substantiate Appellant's allegations of workplace violence. (Appellant Ex. 16) Both Appellant and the co-worker received identical letters of concern. (Appellant Ex. 12 and 13) Appellant also cites three recent incidents involving improper searches and seizures in which the PPO's involved were given letters of reprimand and none were discharged. However, none of the PPO's involved in those incidents were African American. (Appellant Ex. 9, page 3) Appellant also offered testimony from PPO Mark Pursley that he was involved in an interview process with District Supervisor White to fill a vacancy and Ms. White vetoed his and the other interviewer's selection for an African American candidate, stating that she wants a person of color on every team. This, in and of itself, does not indicate racism or favoritism or any wrongful action by District Supervisor White, as there is no evidence that she selected an unqualified or less qualified candidate over another more qualified. Certainly, as district supervisor, Ms. White can determine which candidate, between two equally qualified candidates, would best serve the entire district. In making that determination she would have information and would take into account factors about

which a PPO would have no knowledge. Appellant has failed to show that the decision to terminate her employment was based on racism or favoritism.

Finally, Appellant presented evidence of three recent incidents of improper searches and seizures by PPO's that did not result in discharge. In May 2010, a PPO I in the Northeast District Community Corrections was given a Letter of Reprimand for two separate incidents with two different clients in which personal property was wrongfully searched and seized in violation of DOC policies and procedures, and in direct violation of supervisor directives. (Appellant Ex. 3) In January 2009, a PPO I in the Jay Probation and Parole Office was issued a written reprimand after entering an unoccupied residence with gun drawn, conducting a search, and intentionally failing to notify a supervisor of the incident, all in violation of DOC policies and procedures. (Appellant Ex. 4) In June 2009, District Supervisor White issued a Letter of Reprimand to a PPO III in the Central District for illegally seizing a personal surveillance camera -- belonging to a private resident of another apartment -- that was mounted in the walkway of an apartment complex, without first contacting a supervisor, and failing to properly document the incident. (Appellant Ex. 5)

District Supervisor White distinguished the first two cases from the instant one by the fact that the PPO's involved were both PPO I novices, unlike Appellant who, as a PPO III, is considered an expert in her job and held to a higher standard. Although the June 2009 incident involved another PPO III, Ms. White distinguished that incident from this one because the PPO III in the 2009 incident believed her safety was at issue. Yet the Letter of Reprimand states "no unusual circumstances were identified that would have prevented you from" contacting a supervisor prior to the seizure. (Appellant Ex. 5,

page 3) District Supervisor White testified that her decision to terminate Appellant's employment was due to the fact that Appellant is at the top of the line as a Parole and Probation Officer and should have known better; Appellant doesn't acknowledge that she conducted a search; Appellant thinks team supervisor Truitt should have checked the status of the case; and Appellant doesn't appear to take responsibility for her actions.⁴

After reviewing all of the evidence presented in this case, the undersigned Administrative Law Judge finds that Appellee has proven, by a preponderance of the evidence, that Appellant's actions on August 22, 2010 violate DOC policies and procedures and just cause exists to discipline Appellant. However, the discipline imposed is too harsh when compared with prior discipline imposed in similar situations, and Appellee has failed to show by a preponderance of the evidence, that the discipline imposed – termination of Appellant's employment – is just under the circumstances.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled matter.
2. Any findings of fact that are properly conclusions of law are so incorporated herein as conclusions of law.

⁴ This ALJ acknowledges that Appellant's "position" is one that does not accept responsibility for her actions, and her acceptance of responsibility is a legitimate consideration for an appointing authority to consider in determining whether behavior can be corrected if the employee is allowed to remain in her position. I also note, however, that throughout these proceedings Appellant has had legal representation, and her stated "position" may be more one of "legal posturing" than her true belief or lack of understanding.

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

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

5. DOC Policy OP-110215, Section I A(2) and (3) *Rules Concerning the Individual Conduct of Employees*, requires employees to engage in conduct which upholds the public trust, affords respect, courtesy, and preserves the dignity of others, and requires employees to refrain from illegal conduct.

6. DOC Policy OP-110215, Section I A(8). *Rules Concerning the Individual Conduct of Employees*, states that employees must promptly and truthfully report improper actions which violate DOC policies and procedures.

7. DOC Policy OP-040110, *Search and Seizure Standards*, Section III. A.1. Searches of Offenders Arrested/Apprehended in the Community, provides that a PPO will not unreasonably invade the privacy of a third party not under DOC supervision. Where the offender is a cohabitant, the search will entail only those areas under joint control of the cohabitant and single control of the offender.

8. DOC Policy OP-040110, *Search and Seizure Standards*, Section III. F.1. Field Visits/Home Visits, authorizes a PPO to enter an offender's place of residence where authorized by the parole certificate as a condition of parole or which incorporates by reference the DOC rules for supervising a parolee.

9. DOC Policy OP-040110, *Search and Seizure Standards*, Section III. F.2. Field Visits/Home Visits, authorizes a PPO to conduct a warrantless search without prior notification of the district supervisor or designee only when emergency circumstances demand to protect the officer against loss of life or serious bodily injury. The district supervisor will be notified at the first available opportunity after the search begins.

10. DOC Policy OP-040110, *Search and Seizure Standards*, Section III. F.5. Field Visits/Home Visits, authorizes a PPO to conduct a warrantless search without prior notification to the district supervisor if an offender verbally agrees to the search and signs a DOC Consent to Search form prior to the search.

11. DOC Policy OP-040110, *Search and Seizure Standards*, Section III. F.6. Field Visits/Home Visits, requires a PPO participating in a search to prepare a written report setting forth the circumstances of the search and submit it through the chain of command to the district supervisor.

12. DOC Policy OP-040110, *Search and Seizure Standards*, Attachment A, Search Definitions, defines HOME VISIT as a routine entry into the residence of an offender to check compliance with the rules of the court, DOC, or the parole board.

13. DOC Policy OP-040110, *Search and Seizure Standards*, Attachment A, Search Definitions, defines SEARCH as looking for or seeking out that which is otherwise concealed from view with a view to discovering contraband or some evidence of guilt or wrong doing. Merely looking at that which is open to view is not a search.

14. Appellee, Department of Corrections, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Appellant Debbie

Martinez for violating DOC policies and procedures during the August 22, 2010 home visit of ex-offender Crystal Murray.

15. Appellee, Department of Corrections, has failed to meet its burden to prove, by a preponderance of the evidence, that the discipline imposed – termination of Appellant’s employment with DOC -- was just under the circumstances.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant is hereby **GRANTED IN PART**. Appellant’s discipline is reduced from discharge to ten (10) work days suspension without pay. Appellant is reinstated with backpay and benefits from March 22, 2011 until her reinstatement, with such backpay and benefits reduced by the amount of any earnings, unemployment benefits, or other income received or earned by Appellant from March 7, 2011 until her reinstatement.

DATED: this 2nd day of August, 2011.



Annita M. Bridges, OBA # 1119
Administrative Law Judge
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