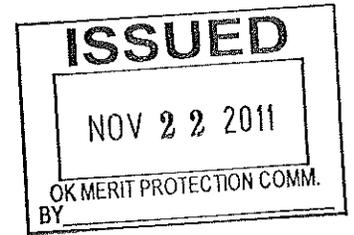


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

**ALPHANO OBIERO (ALSO KNOWN)
AS AL OBIE),)
)
Appellant,)
)
v.)
)
**OKLAHOMA TAX COMMISSION,)
)
Appellee.)****

Case No. MPC 11-218



FINAL ORDER

This matter comes on for hearing on November 2, 2011 before the undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Alphano Obiero, who is also referred to in the record as Al Obie (hereinafter “Obiero”), appears by and through counsel, Melvin Hall. The Appellee, Oklahoma Tax Commission (hereinafter “OTC”), appears by and through counsel, Abby Dillsaver and Table Representative, Kanda Woods.

Appellant Obiero is a permanent, classified employee of OTC, appealing an adverse disciplinary action of a six-day suspension without pay. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. It is noted that Obiero failed to comply with the Protective Order and failed to submit redacted documents in compliance with that Order. Accordingly, the Appellant’s Prehearing Conference Statement and attached Exhibits are stricken from the record. Appellee OTC’s Exhibits 1 through 10 were offered with no objections, and were admitted into the record. Accordingly, these 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.

ISSUES

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

FINDINGS OF FACT

Background of Case

Appellant, Alphano Obiero, is employed as an Auditor II, a classified position at the Appellee, Oklahoma Tax Commission. He appeals an adverse action of a six-day suspension without pay. Obiero has prior incidents of discipline, as reflected on the certificate of progressive discipline (Exhibit #7, pg. 41) as amended by letter of April 21, 2011 (Exhibit #9, pg. 57).

This disciplinary action was instituted as a result of Obiero's failure to perform his job duties. OTC alleges that Obiero failed to process tax returns for Taxpayer "M" for well over two years, which created a \$1.8 Million interest liability, the largest ever owed by OTC. As a result, OTC initially proposed discipline of termination for the alleged misconduct (Exhibit #7). A pre-termination hearing was scheduled and held.

Following the pre-termination hearing, on April 27, 2011, OTC elected to reduce the proposed level of discipline and imposed a six-day suspension without pay (Exhibit #10). Obiero timely appealed the disciplinary action and this proceeding was held.

Discussion of Evidence

OTC offered the testimony of 5 witnesses and Obiero offered his own testimony. All witnesses were properly sworn and provided testimony under oath.

The first witness is Obiero's supervisor, Gary Williams. At the time of this action, Williams was the Auditor Supervisor in the Compliance Division. He retired from OTC in September, 2011 after 26 years. He discussed the procedure for processing "suspended" corporate tax returns. He said that the auditors in his division review the return to determine errors. These "backlogs" are to be processed with the highest refund amounts first, then the oldest returns next. "Processable" returns must be out within a specified time frame or the state will be liable for interest. Williams admitted that some returns take longer than others to review

and process, resulting in an occasional interest payment. He testified that he discussed the priority of processing with Obiero several times. He also stated that returns over \$50,000 must be approved by Williams' supervisor, Charlie Robinson. Williams stated that his lead auditor, John Varghese often assisted with the reviews. Those returns are initialed to show the review and then returned to the auditor. Williams testified that it takes an average of 1-2 weeks to review the returns.

Williams said that most of the time, Obiero did a good job. He has a history of problems with attendance and the volume of his backlog, which were noted in his performance reviews (hereinafter "PMPs"). Williams discussed Obiero's PMPs, noting that his backlog focus "needs improvement" back in 2007 (Exhibit #2), and that his 2008 PMP noted similar concerns (Exhibit #3). He noted that in 2009, Obiero was assigned to work on a special Teradata project called "CAMS". From April to September, 2009, Obiero was to devote 100% of his time to this CAMS project. In September, 2009, Obiero received a verbal reprimand. Due partly to his inability to close leads and his on-going attendance problems, Obiero's work on the project was reduced to 50% of his time and he was reassigned his regular duties. His low rate of processing returns was noted and a plan of action was implemented. His hours were also adjusted to help improve his attendance. (Exhibit #6). Obiero responded that he had given a number of the returns to Williams to review, however, Williams testified that Taxpayer "M"'s returns were never located.

Williams indicated that Obiero's performance did improve following that reprimand and reassignment. Mid-year 2010, Obiero stopped working on the CAMS project entirely and returned to reviewing returns full-time. Williams testified that Obiero had the 2007 return for Taxpayer "M" for since 2008. He was assigned the 2006 return for "M" in June, 2009, however did not claim it until sometime later. These tax returns were on Obiero's backlog reports for several years (Exhibits 6A-6G). In 2011, "M" called and made inquiries on the status of these returns. Williams had Varghese locate and review the returns. He testified that there was no evidence that Obiero had ever worked on the returns. The lengthy delay in processing the returns resulting in a \$1.8 Million interest liability for the OTC. Obiero's failure to timely and properly process the returns resulted in this disciplinary action. Williams also received a written reprimand for his actions in this matter.

Williams admitted that the backlog is mentioned on all of the auditor's PMPs. He also admitted that 3 or 4 of the files noted by Obiero were found in his office for review, but denied that the rest were ever given to him, including the returns for "M". Williams also admitted that although he held meetings with Obiero to discuss his backlog, he never specifically brought up any particular taxpayer return, including "M". Williams also testified that neither he nor Varghese could find any work on the "M" returns after searching on-line and in the office.

John Varghese is an Auditor IV. He testified that he routinely maintains a backlog of less than 50 returns. He testified that it was universally understood that suspended returns with higher refund amounts have a higher priority to help reduce liability for interest. He said that each auditor receives a monthly report to assist them in determining which returns to work first. (Exhibits 6A-6G). Varghese received the telephone inquiry from Taxpayer "M" because he had been assigned the 2008 return. He testified that he had been unable to finish 2008 because of the refund carry-over and Obiero had not completed the previous 2 years. Varghese stated that he had asked Obiero about the returns a number of times and Obiero would respond that he was working on them. Once he stated that Obiero told him that he had given them to Williams, but they could not be located. After the call from "M", Varghese took all of the returns, reviewed them and processed them. He stated that there were no issues on the returns to require them to have been held up for so long. When he received the returns, it did not appear the Obiero had done anything on them and that there were no notes, no correspondence or worksheets. Varghese stated that the refunds for "M" were over \$5 Million, with over \$1.5 Million in interest payable.

Varghese stated that he had worked at OTC for about 25 years and had worked with Obiero for almost 15 years. He testified that every return would at least have the auditor's worksheet to indicate what had been done on the return. He said that the worksheet would be sent with the return to explain any issues or action. No such worksheet from Obiero was ever found or produced for "M's" returns. Varghese completed worksheets once the returns were removed from Obiero and assigned to him.

James Fourcade is the Director of the Compliance Division. In 2010, he was the Director of the Income Tax Division where he supervised Williams and his area. He reiterated the procedure for reviewing the highest refund returns first to reduce the potential for interest payments. He also testified regarding the "Aging Reports" which listed the top 15 returns for

each auditor (Exhibits 6A-6G). Fourcade explained that he reviewed Obiero's PMPs and that his backlog had been a concern for several years. He testified that he was present when Williams discussed the oral reprimand with Obiero (Exhibit 6). He stated that Obiero was very defensive during the meeting and claimed that he had given most of the top 15 to Williams previously. Fourcade testified that he and Williams looked in Williams' office but could not find any of the noted returns. He stated that because of the seriousness of the offense, because Obiero had been counseled repeatedly to reduce the backlog and because this was the largest interest liability ever incurred by OTC, he prepared a memo recommending Obiero's termination (Exhibit #7, pg. 42). Fourcade testified that OTC is the steward of taxpayer money and this type of negligence could not be tolerated. Fourcade indicated that Williams was reprimanded because of his failure to properly monitor Obiero's work. Fourcade stated that he relied upon Williams to properly supervise his employees. He said that Obiero received a Suspension without Pay rather than a termination because there was insufficient progressive discipline to jump steps directly to termination. Williams received a written reprimand because he had no previous discipline and had generally met his standards and goals. He felt that this was an isolated instance for Williams, while Obiero's was an on-going issue for which he had been previously reprimanded and counseled. Also, Fourcade stated that Williams was preparing to retire within a year.

Kanda Woods is the Director of Human Resources at OTC. She initially received the memo recommended Obiero's termination (Exhibit #7, pg. 42). She prepared the Notice of Proposed Discipline and set the pretermination hearing (Exhibit #7). She testified that the hearing was continued once at Obiero's request (Exhibit #8). She also stated that she corrected some of the information contained in the Notice (Exhibit #9). Woods testified that after the hearing, the decision was made to impose a lesser discipline in the form of a suspension without pay (Exhibit #10).

Tony Mastin has been employed at the OTC Administrator since March, 2007. He has been employed at OTC since 1984. He is considered the appointing authority for OTC and is involved in all disciplinary actions of suspensions without pay or higher. He approved the suspension without pay as a result of the pretermination hearing recommendation. He felt that the allegations were serious enough to warrant the discipline and all allegations were properly substantiated.

Obiero testified that he had been employed at OTC since February, 1996 and had been an Auditor II in the corporate compliance area since 1997. He noted that all of his PMPs resulted in a rating of "Meets Standards". Obiero testified that he gave the returns for "M" to Gary. He said that it was a simple return with no issues. He testified that he quickly gave them to Williams but never got them back. Obiero admitted that he never asked Williams where they were, although they continued to appear on his Aging Reports. He claimed that he received the Aging Reports, checked the returns off and gave the reports back to Williams with his notes. He also claimed that in 2008, he began to make copies of every return given to Williams, but admitted that he did not produce those copies when confronted by Williams and/or Fourcade. He also admitted that he has never produced either the reports or the copies of the returns.

Obiero's claims that he had completed the work in a timely fashion are simply not credible, given the testimony of the other witnesses in this matter. It was noted repeatedly in his PMPs that he was to focus on keeping his backlog under control and to claim his returns in a more timely manner. He has made no attempt to produce any evidence to support his claims. There is also no evidence of the worksheets that Varghese state should exist. While clearly Williams was at fault for his failure to properly supervise Obiero, this does not excuse Obiero for his severe performance deficiencies. OTC produced sufficient evidence to support the allegations against Obiero. Given OTC's repeated attempts to improve Obiero's performance through the PMP process and the oral reprimand, and considering the seriousness of the allegations including the largest interest liability ever incurred by the OTC, the discipline imposed here is fair and just under all of the circumstances.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. Title 74 O.S. §840-6.5 and OAC 455:10-9-2 states that the Appellee OTC 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 performance problems and policy violations.

5. Appellee OTC, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Obiero for his performance deficiencies and his appeal on that ground is denied.

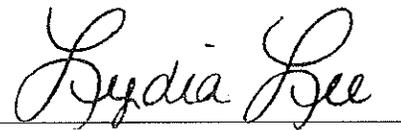
6. Appellee OTC, has met its burden to prove, by a preponderance of the evidence, that the discipline imposed was just, considering all of the circumstances.

7. The record herein supports the imposition of formal discipline as imposed of a six-day Suspension without Pay as just and appropriate considering all of the facts and circumstances of this matter.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Alphano Obiero, MPC 11-218 be DENIED and the appeal is hereby dismissed.

This Order entered this 15th day of November, 2011.



Lydia Lee
Administrative Law Judge