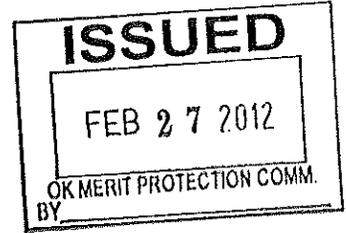


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA



GARRY BARNES, )  
Appellant )  
vs. )  
DEPARTMENT OF CORRECTIONS, )  
Appellee. )

CASE NO. MPC 12-047

FINAL ORDER

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on February 16, 2012 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Garry Barnes, appeared in person and was assisted by his wife, Shannon Barnes. Appellee, Department of Corrections (hereinafter referred to as "DOC"), appeared by and through its Counsel Michele Miniotta, Assistant General Counsel, and agency representative Mike Mullin, Warden of the Jess Dunn Correctional Center in Taft, Oklahoma.

Appellant, a correctional officer at Jess Dunn Correctional Center, filed this appeal when he was terminated from his job with the Department of Corrections after he was charged with indecent exposure and pled guilty to the misdemeanor of outraging public decency, for which he received a one year suspended sentence.

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, Garry Barnes was a Correctional Security Officer (CSO) III at the Jess Dunn Correctional Center (JDCC) in Taft, Oklahoma. JDCC is a minimum security facility that houses 982 male felons, the majority of whom are sex offenders. The facility is recognized for its expansive sex offender treatment program. On August 11, 2010, Appellant was charged with the felony of indecent exposure after his next-door neighbor, with whom he and his wife had had a long-standing feud, accused him of exposing his penis to her. (Appellee's Ex. 8) Appellant pled not guilty to the charges. The case dragged on until June 28, 2011, when the Muskogee County District Attorney offered Appellant a plea bargain to the lesser, misdemeanor offense of outraging public decency.

Amy McFarland, Esq., the attorney who represented Appellant in the criminal matter, testified that Appellant did not want to accept the plea bargain initially, as he had done nothing wrong and was concerned about the effect such a plea would have on his employment. Before he agreed to the plea, Appellant and Ms. McFarland contacted Appellant's supervisor, Chief of Security Mike Murray, to find out whether the plea would cause him to lose his job. Chief Murray advised that he was not the decision maker, but in his opinion he didn't see why Appellant would lose his job if he pled guilty to the misdemeanor. Feeling less anxious about his job, Appellant accepted the plea bargain,

pled guilty to outraging public decency, and was sentenced to 12 months' probation. (Appellee's Ex. 11, 12, and 13)

After learning of Appellant's guilty plea, Warden Mike Mullin initiated proceedings to terminate Appellant's employment and held a pre-termination hearing. (Joint Ex. 1) After considering Appellant's employment record, including his performance evaluations and two prior disciplinary actions; after investigating the agency's past treatment of employees similarly situated; and after reviewing the terms of Appellant's probation, Warden Mullin determined to terminate Appellant's employment for violation of OP-110215 I. and VI. (Joint Ex. 2, 3, 4, and 5 and Appellee Ex. 13) Appellant filed this appeal.

Appellant argued that Appellee failed to follow the Progressive Discipline procedure and that there are other employees at JDCC who have pled guilty to, or been convicted of, misdemeanors and were not terminated. Appellee acknowledged that there were employees at JDCC with misdemeanor convictions, but stated that each case is considered individually, and depends upon the nature of the offense. For instance, alcohol related misdemeanors may not result in termination for the first such offense.<sup>1</sup> However, Warden Mullin testified, there are five inmates at JDCC who are there because of convictions of outraging public decency, and having a security officer at the facility with the same conviction would undermine the authority and credibility of Appellant, as well as the institution.<sup>2</sup> Further, the terms of Appellant's probation prohibit

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<sup>1</sup> Sgt. Allen Fennell testified that he was hired in spite of a public intoxication misdemeanor conviction. And Warden Mullin testified that there were others at Jess Dunn who had misdemeanor convictions.

<sup>2</sup> Warden Mullin's further argument that outraging public decency implied an act of moral turpitude, against society's morals, is not persuasive to this ALJ, as Appellee cited no Merit Rules or Operating Procedures dealing with immoral conduct as grounds for Appellant's termination.

him from carrying, having in his possession, or having under his control a firearm. (Appellee Ex. 13) Although CSO's do not carry firearms on duty, they must be ready and able to use one when a situation arises where a firearm is needed, and they are tested annually on their firearm readiness. Warden Mullin searched other similarly situated individuals and found only one other DOC employee who had an outraging public decency conviction. He, too, had been terminated.

Based on the evidence presented, this administrative law judge finds that Appellee has met its burden to show, by a preponderance of the evidence, that just cause exists for Appellant's termination for violation of OP-110215 I.A. 2, 3, and 4, *Establishment of Rules and Code of Conduct* and OP-110215 VI., *Illegal Activity* and that Appellee did not violate the Progressive Discipline rules and procedures when it terminated Appellant.

### **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.
3. Merit Rule 455:10-11-14 and DOC Policy OP-110415, Section II.C. state 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 455:10-11-4 and DOC Policy OP-110415 state that progressive and consistent discipline does not preclude the use of more severe disciplinary responses to serious infractions, nor does it require it to be applied without regard for individual differences such as performance record and other mitigating circumstances.

5. 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 the disciplinary action and that the discipline imposed was just.

6. DOC Policy OP-110215, Section I.A.2. *Rules Concerning the Individual Conduct of Employees*, requires employees to conduct themselves in a manner befitting their position and to engage in conduct which affords respect, courtesy, and preserves the dignity of others.

7. DOC Policy OP-110215, Section I.A.3. *Rules Concerning the Individual Conduct of Employees*, states that employees will refrain from conduct which is illegal, and serves to denigrate, demean, or disregard the welfare of others.

8. DOC Policy OP-110215, Section I.A.4. *Rules Concerning the Individual Conduct of Employees*, states that employees will promote and model exemplary, law abiding behavior.

9. DOC Policy OP-110215, Section VI. *Illegal Activity*, prohibits an employee from engaging in any illegal activity prohibited by federal, state, or municipal criminal laws, except minor traffic violations, as well as laws governing the conduct of state employees.

10. Appellee DOC has proven by a preponderance of the evidence that just cause exists for discipline of Appellant after he entered a guilty plea to the misdemeanor

of outraging public decency, and that the discipline of discharge 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 **DENIED**.

DATED: this 24<sup>th</sup> day of February, 2012.

A handwritten signature in black ink, appearing to read "Annita M. Bridges", is written over a horizontal line.

Annita M. Bridges, OBA # 1119  
Administrative Law Judge  
OKLAHOMA MERIT  
PROTECTION COMMISSION  
201 N. E. 38<sup>th</sup> Terrace, Suite 5  
Oklahoma City, Oklahoma 73105  
(405) 525-9144