

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

WALTER MARK KURKLIN,)
Appellant,)
)
v.)
)
OKLAHOMA DEPARTMENT OF)
ENVIORNMENTAL QUALITY,)
Appellee.)
)

Case No. MPC 12-112



FINAL ORDER

This matter comes on for hearing on April 30, 2012 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Walter Mark Kurklin, appears personally, and by counsel, Daniel Gamino. The Appellee, Oklahoma Department of Environmental Quality, appears by and through counsel, Christi Andrews and Martha Penisten. Also present for Appellee was Table Representative, Tim Ward.

Appellant Walter Mark Kurklin is a permanent, classified state employee appealing an adverse disciplinary action of suspension without pay for five (5) days. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the parties stipulated to the admission of Joint Exhibits No. 1 through 28. In addition, the Appellant offered Exhibits 1 through 4, which were objected to by the Appellee. This Administrative Law Judge overruled the objections and admitted Appellant's Exhibits for the limited purpose of defining the issues, not to re-litigate the prior grievances. Accordingly all exhibits presented and admitted are incorporated herein and made a part hereof. The parties were permitted additional time to submit written summations which are part of the record on May 10, 2012. The record was held open an additional 30 days in order to properly consider the pleadings and evidence and the record was closed on June 10, 2012.

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

Background of Case

Appellant Walter Mark Kurklin (hereinafter “Kurklin”) is a classified employee of the Appellee Department of Environmental Quality (hereinafter “DEQ”). Kurklin is an Environmental Program Specialist III. The parties stipulated that the Merit Protection Commission (hereinafter “MPC”) has jurisdiction of this matter, that Kurklin was a permanent, classified employee of DEQ, and that Kurklin was suspended without pay for five days in October, 2011.

There was a substantial change in management at DEQ in 2010 and Kurklin was assigned to a new supervisor. DEQ admits that the new management has focused on improving deficiencies in employee performance and that a number of disciplinary actions have been undertaken to achieve this goal. Regarding this matter, Kurklin is a long-tenured employee of DEQ (1975 to present). He has received one previous disciplinary action of a letter of reprimand in May, 2011. This Reprimand was primarily based upon Kurklin’s untimely processing of training courses and attendance records. He responded to that action, objecting to the standards and accountabilities as unreasonable or inappropriate.

On September 8, 2011, DEQ provided Kurklin with notice of the proposed disciplinary action (Joint Exhibit 16). This disciplinary action charged Kurklin with Insubordination, Inefficiency, Inability to Perform Duties and Conduct Unbecoming a Public Employee. The Notice alleged that Kurklin was “Insubordinate” by failing to complete tasks, prioritize work, and write scripts for the database as required by his supervisor, as well as being argumentative and making derogatory remarks to his supervisor. It alleges that he was “Inefficient” by his lack of problem solving and time management skills and failing to prioritize his work. The Notice also charges “Inability to Perform Duties” by failing to enter training records in to the data base in a timely manner, failing to write scripts, and failing to review and print training requests. Finally, the Notice alleges that Kurklin is guilty of “Conduct Unbecoming a Public Employee” for failing to act in a professional manner by engaging in the aforementioned offenses. Kurklin was given an opportunity to respond at a pre-disciplinary hearing, held on September 21, 2011 (Joint Exhibit 17). At that hearing, Kurklin argued, among other things, that mitigation should be considered, including retaliation and hostile workplace.

On October 5, 2011, DEQ provided Kurklin with notice of discipline, imposing a five (5) day suspension without pay (Joint Exhibit 18). In the notice, DEQ found that the allegations listed in the Specifics of Cause were founded. The notice also contained a reference to one prior disciplinary action of a letter of reprimand.

The Testimony

The testimony of six (6) witnesses was provided in this hearing – 5 for the Appellee DEQ in support of its disciplinary action and one for the Appellant.

Shelly Chard-McClary is the Division Director of DEQ's Water Quality Division. She testified that over the last few years, DEQ had made a number of changes, in some part due to loss of funding and in an effort to reduce costs and improve efficiency. She discussed the need to "toughen-up" on the Performance Management Process ("PMP") and to improve consistency. Chard-McClary testified that a Level III Specialist, such as Kurklin, should have significant experience, possess good judgment and be able to work with a high degree of independence. She said that a review of Kurklin's duties in 2005 showed that his duties accounted for 1794 hours per year. (Joint Exhibit 20). In 2011, that same review showed 1175 hours per year, due to tasks being reassigned or eliminated. (Joint Exhibit 22). She admitted that these two exhibits were given to her by Glen Jones, who is now retired, and that she did not know how they were prepared or if Kurklin had any input into the formulation of those calculations.

Chris Wisniewski is an Environmental Manager II, who supervises 5 employees including Kurklin. As part of his job, Wisniewski sets the accountabilities and standards for his employees, as well as providing coaching, and oral and written reprimands. Wisniewski testified that Kurklin complained that he was being set up to fail. He said that Kurklin "chooses" to sort and file the paperwork, which puts him behind, but that is not on his PMP or part of his job duties. He admitted that he had never taken the time to sit with Kurklin to see how long his tasks and duties should take. He said that he never gave Kurklin any direction regarding what to do with the forms after they were scanned. He also admitted that Kurklin spent an entire day looking for a particular form, that he never directed Kurklin to stop looking for the form, but then he criticized him for wasting the day.

Patty Thompson was a co-worker of Kurklin's until she was promoted to Engineering Manager. She stated that she was the reviewer for Kurklin's PMPs beginning in 2009. She

mentioned a Corrective Action Plan which was implemented, but it was not part of the record of this hearing, nor was it noted in any of the disciplinary filings.

Steven A. Thompson is the DEQ Executive Director. He stated that he is involved in any disciplinary actions which result in a loss of income. He stated he reviews all of the information and hearing transcripts in making his decision. He implements progressive discipline in an effort to improve behaviors. Thompson admitted that he had no personal knowledge of whether Kurklin's duties can actually be performed in the allotted time. He also admitted that he made no specific investigation into the retaliation claims because he expects DEQ employees to act appropriately. Finally, Thompson admitted that Kurklin's job is unique and that no one else in the agency does the same thing.

Tim Ward, the Assistant Division Director testified to his role in the disciplinary process.

The Claimant, Mark Kurklin, testified that he has been employed at DEQ since its inception. He testified that his main function is to review and approve the training classes needed to maintain or obtain licenses. He also answers phone calls, makes reports and does programming, including writing scripts. Kurklin testified that the allocation of 20 minutes per class for class review and approval is totally inaccurate. He stated that some classes are that simple but that many require individual review and evaluation. He said that there are 5 steps involved in approving a class, beginning with checking the request form, organizing the forms, giving them to the Tech to log in, receiving the form back from the Tech, assigning a class number and editing the basic information, duplicating the data in another spreadsheet, followed by approval, notification to the requestor and return a final information packet. After these steps are complete, he organizes the forms by date and puts into a 3-ring binder for recordkeeping. He also stated that attendance forms must be mailed to the requestor. He said, based upon all of these steps, 20 minutes is completely unreasonable. He testified that he has tried to explain this to his supervisors many times, but they refuse to discuss or to try to understand. Regarding the Attendance records, he separates them by class and organizes them into batches. He has to review each form to make necessary corrections and then loads them by batch into the scanner. After they are scanned, he again reviews the files, justifies them, catches errors and checks for blank spaces. He also verifies the credit as proper. He discussed the programs that he wrote for this purpose. He then files the paper records as a back-up because DEQ has never made a decision to go completely digital, so organization of the paper files is still critical. He testified

that this process takes at least 12 minutes per form, not 3 minutes as indicated on Joint Exhibits 20 and 22. Kurklin testified that his job duties have increased over the last ten years. He stated that the number of class approvals has increased from about 500 per year to over 1000. He indicated that Joint Exhibits 20 and 22 failed to include out-of-state requests. He said that attendance records have also doubled from 5000 per year to over 10,000. He said that he has explained this to Wisniewski in great detail, but he refuses to listen. Kurklin testified that after he filed his grievance, he was clearly treated differently and the atmosphere got very hostile. He said that no one has ever addressed or refuted the things he included in his response to the letter of reprimand. Kurklin admitted that the procedure for processing the class requests and attendance records was developed by him and that he has never been told to do anything any differently. He said that the absolute number and time frames in his PMP doesn't allow him any flexibility to deal with unusual situations and is not an accurate average.

ISSUES

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

DISCUSSION

There was a great deal of testimony about duties, time frames and other information which was not included in the Notice of Disciplinary Action. DEQ charged that, over a one year period, Kurklin was untimely in processing 274 of the 761 class approval requests. As reflected in the log, the number of requests for approval varied widely throughout the year. Some months received over 150 class requests while others only had 10 or so. (Joint Exhibit 16, pg. 78-95). DEQ's application of a flat standard with no recognition of this fluctuation is troubling. While it is within an agency's purview to establish absolute standards, an element of reasonableness must apply as mitigation. Also, the standard as set forth in the PMP is "10 working days". The work days reflected in the log apparently count both the day it is received and the day it is turned in to calculate Kurklin's meeting the standard. It is clear from the evidence that Kurklin sometimes has difficulty in meeting this standard, with the approval taking 18 to 21 days in some cases. There was, however, sufficient mitigating evidence presented that the standard may not be

reasonable and that certain times of the year are admittedly more labor intensive than other. It is evident that Kurklin's supervisor never took the time to sit down with him to review his procedures or to give him any meaningful coaching on ways to improve his performance. DEQ's attitude is that an employee of Kurklin's level should be able to work independently and active coaching is not necessary. Kurklin's attitude is that he is doing what he has always done and no one has instructed him otherwise. This is a classic break-down in communication.

Regarding the allegation about the approval of the training class on July 11, 2011, Wisniewski admitted that he never even bothered to discuss this incident with Kurklin and never informed him that he had already approved the class. This lack of communication resulted in Kurklin duplicating the effort and wasting time. The class also does not appear on the "log sheet". There was evidence that Kurklin failed to write necessary scripts, however, Kurklin's failure to do this was related to his conflicting priorities and mitigated by problems with the program.

There is a dispute as to the July 20, 2011 discussion meeting. Kurklin stated that it was an incorrect portrayal of the meeting and that he only told Wisniewski that he was using false information and challenged that accusation. He denied name-calling. Ms. Thompson's testimony regarding this meeting was significantly different from her contemporaneous memo. (Joint Exhibit 10). The testimony also reflects that Wisniewski walked out of the meeting. It must be noted that Wisniewski's animosity towards Kurklin was palatable during the hearing. It is improper for employees and employers to permit their interchanges to become heated and/or unprofessional, however, total blame for this cannot lie only at Kurklin's feet. The evidence supports that Kurklin had a high degree of frustration with his supervisor's indifference to his concerns.

Regarding the training requests which were given to the Tech on August 1, 2011, Kurklin's PMPs do not reflect a time limit for printing and submitting the training requests to the Tech. The only standard in the PMP is for approval within 10 working days from the date he received it from the Tech. There was no evidence as to when those requests were given to Kurklin by the Tech. DEQ must establish a reasonable standard for this duty prior to seeking to impose discipline for its violation.

The final allegation of misconduct relates to Kurklin's failure to pick up faxes of training requests. The allegation charges that Kurklin is to process all training requests within 10

working days pursuant to his PMP. Again, the PMP indicates that the 10 working days begins to run from the date Kurklin receives them from the Administrative Tech, not the date they come into the office. This is another area where a reasonable standard should be established.

Performance evaluations are designed to be an interactive process. It is an opportunity for all involved to discuss accountabilities and standards. It is also an opportunity to address areas for improvement and for employers to assist their employees in improving performance. While it is critical that DEQ be able to document and quantify its employees' performance, it is also incumbent that the standards be reasonable. Based on the evidence presented in this hearing, it does not appear that any kind of meaningful interactive process has been undertaken. Arbitrary standards have been set in place which may or may not accurately reflect the actual time it takes to perform the duties given all of the circumstances. The evidence was clear that Wisniewski performed some but not all of Kurklin's tasks in a trial run, but he never requested Kurklin to show him how he was doing these tasks in order to provide positive coaching aimed towards improving Kurklin's performance. (Joint Exhibits 2 and 3). There has been a severe breakdown of communication and both parties are at fault for the current situation.

DEQ's Progressive Discipline policy states that formal discipline is to be used for "exceptionally serious violations or after informal discipline fails to produce acceptable results". (Joint Exhibit 16, pg. 114). It goes on to state that "all discipline documentation must include citations of informal or formal discipline used in the decision to administer formal discipline". DEQ cites no informal disciplinary steps that were utilized and includes only the May 4, 2011 Letter of Reprimand. There is a lack of disciplinary history for what appears to be strictly a performance-based problem, with little to no evidence of a bona-fide dialogue designed to truly improve performance.

Based upon the record, the undersigned finds that DEQ has met its burden of proof that just cause existed for the discipline imposed based upon Kurklin's inability to perform his job duties within the time frame standards set by DEQ. There is insufficient evidence to support the allegations of insubordination, inefficiency or conduct unbecoming a public employee. Given the mitigating evidence presented by Kurklin as set out herein, including Kurklin's long tenure with the DEQ and only one prior discipline in the form of a letter of reprimand, the discipline of five (5) day suspension without pay imposed herein is unduly harsh and was unjust given all of the circumstances.

CONCLUSIONS OF LAW

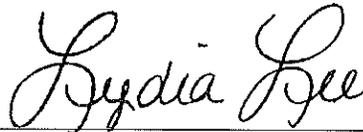
1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. Merit Rule 455:10-9-2 states that the Appellee DEQ 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. Merit Rule 455:10-11-15 states that a permanent classified employee may be suspended without pay for any of the reasons set forth in 455:10-11-14, which are misconduct, insubordination, inefficiency, habitual drunkenness, inability to perform the duties of the position in which employed, willful violation of the Oklahoma Personnel Act or the Merit Rules, conduct unbecoming a public employee, conviction of a crime involving moral turpitude or any other just cause.
5. The evidence shows that Kurklin failed to meet the standards set forth in his PMP in reviewing class requests for approval within 10 days from the date he received them from the Administrative Technician.
6. Appellee, DEQ, has met its burden to prove, by a preponderance of the evidence that just cause exists to discipline Kurklin for "Inability to Perform his Duties" as set forth in the Notice of Disciplinary Action. Appellee, DEQ, has not met its burden to prove, by a preponderance of the evidence that just cause exists to discipline Kurklin for "Insubordination", "Inefficiency" or "Conduct Unbecoming a Public Employee" as set forth in the Notice of Disciplinary Action.
7. Appellee, DEQ, has not met its burden to prove, by a preponderance of the evidence, that the discipline imposed was just under the circumstances considering the seriousness of the conduct as it relates to the employee's duties and responsibilities; the consistency of action taken with respect to similar conduct by other employees of the agency, the previous employment and disciplinary records of the employee and other mitigating circumstances. Specifically, DEQ failed to consider mitigating evidence and failed to engage in a meaningful process with the employee in order to genuinely improve his performance.

8. Based upon the reasoning set forth herein, the discipline imposed in the form of a five (5) day suspension without pay is excessive and unduly harsh given all of the circumstances. Discipline is reduced to a Letter of Reprimand, to include a corrective action plan designed to improve communication and performance.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition for appeal of Appellant WALTER MARK KURKLIN, MPC 07-074 be SUSTAINED IN PART as set forth in this Order. The discipline imposed upon Appellant is reduced to a formal Letter of Reprimand consistent with this Order. Appellant is to be restored with all pay and benefits withheld as a result of this disciplinary action. Appellant's personnel records are to be expunged of all records except those consistent with this Order.

This Order entered this 18th day of June, 2012.

A handwritten signature in cursive script that reads "Lydia Lee". The signature is written in black ink and is positioned above a horizontal line.

Lydia Lee
Administrative Law Judge