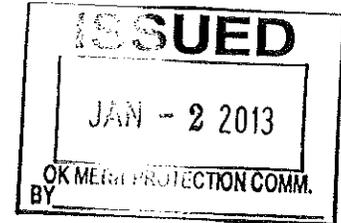


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

JOHN WHITE,)
Appellant,)
)
v.)
)
OKLAHOMA DEPARTMENT OF)
TRANSPORTATION,)
Appellee.)

Case No. MPC 12-145



FINAL ORDER

This matter comes on for hearing on December 10 and 12, 2012 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, John White, appears personally, and by counsel, Daniel Gamino. The Appellee, Oklahoma Department of Transportation, appears by and through counsel, Assistant Attorney General Bryan Neal and through table representative, Gregory Pringle.

Appellant John White is a permanent, classified state employee appealing an adverse disciplinary action of a five day suspension without pay. The hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the parties stipulated to the admission of Appellee's Exhibits No. 1 through 12. In addition, the Appellant offered Appellant's Exhibits No. 1, 4, 15, 16, 19-21, 23 and 25 which were admitted with no objection. Appellant's Exhibits No. 8, pgs. 1-5 only, 17 and 24 were offered with objection by the Appellee, with the objections overruled and all offered Exhibits were admitted. Appellant's Exhibits No. 1 and 20 were admitted pursuant to the Protective Order and are not to be made a part of the public record. Accordingly all exhibits presented and admitted are incorporated herein and made a part hereof. At the close of the testimony of the witnesses, the hearing was concluded and the record closed.

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 John White (hereinafter "White") was a classified employee of the Appellee Oklahoma Department of Transportation (hereinafter "ODOT."). White is a Senior Civil Rights Investigator with ODOT. On December 21, 2011, White was given notice that he was being considered for discipline of a Suspension without Pay for 5 days for Insubordination and Just Cause (Appellee's Exhibit 5, unnumbered page 3). Attached to the Notice was a supplement entitled Specifics of Cause (Appellee's Exhibit 5, unnumbered page 4). The Specifics of Cause generally allege that on December 14 and December 20, 2011, White refused a directive from his supervisor, Greg Pringle, to complete a certain civil rights investigation (hereinafter "Tulsa investigation"). A pre-disciplinary hearing was held on January 9, 2012. White, through his attorney, disputed the allegations and presented evidence in his defense. The hearing officer found that sufficient grounds existed to support the discipline and concurred in the imposition of the 5 day suspension without pay (Appellee's Exhibit 5, unnumbered pages 5-7).

On January 10, 2012, White was given written Notice of Suspension without Pay (Appellee's Exhibit 5, unnumbered page 10). The Specifics of Cause attached to the Notice contained a reference to only one prior discipline, an informal verbal reprimand on December 8, 2011, also related to the Tulsa investigation. The Suspension without Pay was served January 17 – 24, 2012. White timely appealed that action.

The Testimony

The testimony of three (3) witnesses, properly sworn and under oath, was taken and made part of the record in this matter.

Brian Kirtley is the HR Director at ODOT. Kirtley testified that the Civil Rights Division was separate from other departments at ODOT and is not part of the HR Division. He testified regarding his experience and knowledge of the Merit Rules and statutes dealing with the imposition of discipline for classified employees. He discussed the performance management process (hereinafter "PMP"). Kirtley stated that the rules and statutes do not specifically state that the PMP is required to be used or considered in imposing suspensions, but only used in decisions regarding promotions, appointments, demotions, performance pay increases and discharges. (See 530:10-17-31). He testified as to his opinion that Pringle's failure to properly complete White's PMP has no bearing on this action. Kirtley described "insubordination" as a

refusal to do as directed and stated that it embodied an element of “defiance”. He said that discipline is designed to change behavior, to improve performance and also to punish improper behavior. He said that serious misconduct justified increasing the level of discipline under the ODOT progressive disciplinary procedure. Kirtley testified that no PMP had been conducted for White for several years, but that did not eliminate the discipline or prevent the agency from increasing the progressive discipline to this level.

Kirtley testified that he knew no specifics about the facts relating to the Tulsa investigation. He was aware that the report was completed by White in July, 2011. He attended a meeting with White in October, 2011 regarding this report. He stated that he found no reason to re-open the investigation and stated this opinion to White at that time. He indicated that he did not review any of the evidence relating to this action prior to the imposition of the formal discipline, but he relied upon the statements of Pringle.

Gregory Pringle is the Manager of the Civil Rights Division at ODOT. He stated that he had been the Director of that Department for approximately 3 years and is White’s immediate supervisor. He testified that he has had many meetings with White to counsel him about work results. He stated that some of these meetings lasted more than an hour and, occasionally, almost two hours. The Tulsa investigation was the result of a supervisor in Tulsa reporting several comments made by one of his employees regarding perceived racial discrimination. It did not result from a formal complaint by the employee. He testified that White completed the investigation and submitted his report. One of the comments from an interviewee raised a possible age discrimination issue in Pringle’s opinion, and he discussed it with White. The report was revised and resubmitted by White in July, 2011. The comment was removed and no discussion of age discrimination was included.

Pringle testified that in January, 2012, he decided that he no longer wanted White to look into the age discrimination issue because the “higher-ups” in Tulsa were upset about the whole investigation. He admitted that White warned him early on that this could happen and that an age investigation could really “stir things up”. Pringle testified that he took over the Civil Rights Division in October of 2009. He stated that he has not issued any written policies or rules about how to conduct an investigation or how to handle the Affirmative Action Plan, among other things. He also admitted that he had made no written directives stating time lines, procedures or processes for re-opening investigations.

Pringle testified that the first PMP he completed on White did not occur until the end of November, 2011, although he had been his supervisor since 2009. He admitted that he did not “open” the PMP process with White, did not conduct a mid-year review and also admitted that he never bothered to type up the PMP until a few days prior to meeting with White to close it out (Appellee’s Exhibit 11). Pringle testified that White did not always seem to understand what his job duties were or what was expected of him, but admitted that he never used the PMP process to set the expectations or communicate with White. Pringle also admitted that the next PMP was never opened properly, no mid-year meeting was held and that he closed the PMP 5 months early with a “Needs Improvement” Rating and an Overall Performance Rating of “Does not meet standards” (Appellant’s Exhibit 24). He offered no explanation for this highly irregular PMP.

Pringle admitted that White re-wrote the report when requested (Appellee’s Exhibit 1). He also admitted that White gave him and/or showed him all of the supporting documentation that he used in the Tulsa investigation (Appellant’s Exhibit 4), although he stated in the Specifics of Cause that White refused to provide them. Pringle testified that when White initially turned in the report in July, Pringle was so angry with the quality of the report that he left the office and drove around for several hours to “cool off”. Pringle also admitted that he took the confidential report home and let his wife read it in order to confirm his impressions of the report. He admitted that his wife was not authorized to see this type of confidential report. Pringle stated that the report missed so many points that a senior investigator should have addressed and that was the source of his anger.

Pringle testified that he held several 1-2 hour meetings with White to discuss the report. During the meetings, Pringle admits that he raised his voice, banged his fist on the desk and pointed his finger at White. He said that White asked him repeatedly not to do that and threatened to leave. Pringle admitted that White never displayed any anger, animosity or hostility towards Pringle. Pringle also testified that White told him that he didn’t find any evidence of an ADEA violation on many occasions. Pringle also testified that he never drafted or implemented a Performance Improvement Plan although he was to do so as part of the verbal reprimand (Appellee’s Exhibit 5, page 2) and also indicated that one was in place in his e-mails to White (Appellee’s Exhibit 2).

John White, the Appellant, testified that he has worked at ODOT since May, 1990. He became a Civil Rights Investigator in 2000, after obtaining the appropriate training and

certifications. He later obtained his certification as a Senior Investigator in 2004 (Appellant's Exhibit 21). White testified that he knew Pringle prior to his current position with ODOT and was pleased when he was selected to head the Civil Rights Division. He held no animosity towards his supervisor. White testified that his experience has demonstrated that civil rights investigations can be terribly disturbing to the work unit and can stir up all sorts of bad feelings. White was very concerned about potential liability in the Tulsa investigation and expressed his concerns to Pringle. He was particularly concerned that the employee never raised the age discrimination issue and it was not proper, according to his training, to expand the investigation without a prima facie case. White stated that investigators are in highly trusted positions. To investigate claims which are not prima facie discrimination is unethical and jeopardizes their position. In October, 2011, White stated he met with Kirtley and the supervisors from Tulsa to discuss the investigation. The supervisors from Tulsa did not understand why the investigation had not been concluded, particularly when the employee's only concern was the racial discrimination. White stated that he had concluded his investigation and all were in agreement to not pursue an alleged age discrimination issue as there was no justification to do so. Pringle declined to attend this meeting. Approximately a month after this meeting, Pringle began to make additional demands regarding this investigation. White stated that he gave him all of the information and advised him that there was no evidence of age discrimination. Despite this, Pringle continued to demand that White investigate the age issue. The meetings with Pringle became more abusive, in White's opinion. White said that Pringle would pound his fist, shake his finger and made many gestures to intimidate him during these meetings.

White testified that he filed several grievances against Pringle because of his harassing behavior. He also filed a grievance as a result of the PMP irregularities. White said that Pringle's anger got much worse after that. White testified that he was genuinely trying to do his job and never had the intent to refuse his supervisor's directives or to be defiant. He said that despite providing all of the information, Pringle still demanded more. White testified that Pringle was inconsistent in his directions, and would get angry when the inconsistencies were pointed out. White testified about several exhibits which highlight Pringle's deficiencies as a supervisor, including missing meetings to go out shopping. White also included an unsolicited letter endorsing the quality of his work.

White testified about several other ODOT disciplinary actions which resulted in suspensions without pay. He discussed an employee who was impersonating a police officer in an ODOT vehicle and one who solicited sex from a male prostitute while on duty. These employees were suspended for 7 days and 1 day respectively. White claims that discipline is not imposed fairly nor is it uniformly administered.

White testified that he never refused Pringle's directives. He said that he did look into the age issue and found no evidence to support it. White stated that he thought the matter was closed. White also testified about impairing the integrity of the report if the investigator can be forced to change the report beyond what the evidence supports. He said he was very conflicted because Pringle asked him to follow-up on his report to see if his recommendations had been followed. This indicated to him that the report was accepted and the matter was closed. At all times, White was an extremely credible witness.

DISCUSSION

The allegations in this matter are very serious. White is accused of insubordination for refusing the directives of Pringle, his immediate supervisor. Appellee argues that this is willful misconduct and is not a matter of poor performance which could have been helped or addressed in the PMP process. This argument is without merit in this case. It is clear from the totality of the evidence that this situation occurred as a result of poor communication, lack of written directives and, potentially, a hostile work environment.

First, there was no evidence presented as to the status of the investigation from the time White turned in his revised report in July, 2011 until October, 2011 when the meeting was held to discuss this report. Indeed, Pringle did not even attend the meeting, even though he states that he had held the report for three months because of his concerns about the quality of the report. At the meeting, all in attendance agreed that the report was complete. As a Senior Investigator, White reasonably relied upon this understanding. On December 8, Pringle met with White to again discuss the Tulsa investigation. Pringle's memo states that, on that date they met to discuss his Performance Improvement Plan (hereinafter "PIP") and his job duties. When White objected to the PMP evaluation, he was given a verbal reprimand. Pringle also indicated that he would draft the PIP, although his testimony indicated that he never did so. Pringle's

memo demonstrates that there was a fundamental misunderstanding of expectations between himself and White. This misunderstanding could have been alleviated if the PIP was initiated or if the PMP process had been properly utilized. Further, Pringle testified that White did not always seem to understand what his job duties were or what was expected of him. Utilization of the PMP process could have helped both parties with this matter. Pringle did not have a viable excuse for his failures to properly complete the PMPs or draft the PIP. Rather, he blames these failures entirely on White, attempting to shift the burden to White to perform these tasks. As a supervisor, who clearly wants his directives to be satisfied, Pringle neglected valuable tools to assist his employee in achieving that goal. Indeed, Pringle's behavior as a supervisor is seriously found wanting.

The Specifics of Cause allege that on December 14, 2011, White failed to provide the information on the Tulsa investigation and that he refused to provide additional information. White offered numerous e-mail messages and attachments sent to Pringle on that date which showed that he did, in fact, provide all of the necessary information and documentation to Pringle, and he admitted that he received these e-mails. As a result of the testimony and Exhibits, there is not sufficient evidence to support this allegation of insubordination.

The Specifics of Cause also allege that on December 20, 2011, Pringle directed White to "wrap up an issue" by the end of the year or by January 6, 2012. Although not specified, this "issue" was apparently the age discrimination concern in the Tulsa investigation. This vague allegation failed to provide proper notice of the charges against White. In any event, the very next day, on December 21, 2011, White was charged with insubordination. Therefore, he was not even given the chance to "wrap up an issue" by the end of the year. This is also despite the substantial evidence that White had completed the report and had found no evidence to support any additional issues. White advised Pringle of this on many instances. The directives are very broad, and there is not sufficient evidence to support this second allegation of insubordination.

Because ODOT failed to meet its burden of proof regarding the allegations of misconduct, it is not necessary to address the progressive discipline issues raised in this appeal. There are no other outstanding issues to be decided in this appeal, although there are several grievance appeals pending which may deal with the same series of events. This decision is limited to the adverse action appeal relating to the 5 day Suspension without Pay.

CONCLUSIONS OF LAW

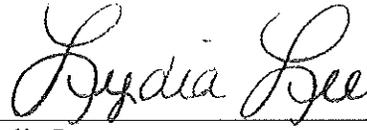
1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of this appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. Merit Rule 455:10-9-2 states that the Appellee ODOT 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. Appellee, ODOT, has failed to meet its burden to prove, by a preponderance of the evidence that just cause exists to discipline White for "Insubordination", as set forth in the Notice of Suspension without Pay and the attached Specifics of Cause.
6. Because Appellee, ODOT, has not met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline White for "Insubordination", there is no need to determine if the discipline imposed was just under the circumstances of this matter.
7. Based upon the reasoning set forth herein, the appeal of White is sustained and the final disciplinary action taken by ODOT on January 10, 2012, in the form of a five (5) day suspension without pay is vacated.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition for appeal of the Appellant John White, MPC 12-145 is **SUSTAINED**, as provided in this Order. The discipline imposed upon Appellant is vacated and rescinded and Appellant is to be restored to his position with all pay and benefits withheld as

a result of this disciplinary action. Appellant's personnel records are to be expunged consistent with this Order.

This Order entered this 26th day of December, 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