

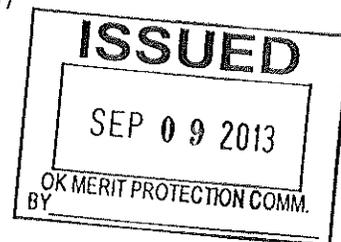
**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

CORD JAMES REGAN,)
Appellant,)

v.)

OKLAHOMA DEPARTMENT)
OF TRANSPORTATION,)
Appellee.)

Case No. MPC 12-207



FINAL ORDER

This matter comes on for hearing on July 8 and 9 and August 26, 27, and 28, 2013 before the duly appointed, undersigned Administrative Law Judge (hereinafter "ALJ") at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Cord James Regan (hereinafter "Regan"), appears personally and through counsel, Bill Searcy. The Appellee, Oklahoma Department of Transportation (hereinafter "ODOT"), appears by and through counsel, Tamar Graham Scott. Also present for Appellee was Table Representative, Mark Zishka.

Appellant Regan was a permanent, classified employee of ODOT, appealing an adverse disciplinary action of termination. During the administrative hearing, the sworn testimony of witnesses was presented, along with exhibits. Joint Exhibits 1, 4, 5, 6, 8, 9, 10, 11, 12, 14, 16, 23 and 39 were offered and were admitted into the record. Accordingly, the exhibits presented and admitted are incorporated herein and made a part of the record herein.

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

At the time of his termination, Regan was a Transportation Specialist in the Claremore Residency, Division VII of ODOT (hereinafter "Residency"). Regan had been employed in various capacities at the Residency since 2006. The parties stipulated that the Merit Protection

Commission (hereinafter "MPC") has jurisdiction of this matter, that Regan was a permanent, classified employee of ODOT, that Regan timely filed his appeal and that Regan was terminated effective March 27, 2012.

In 2010, Regan was assigned to the lab, conducting various testing of the samples and materials. He was trained and obtained various certifications. In July, 2010, he was removed from the lab and assigned as an inspector in the filed on road projects. In August, 2010 several concrete cylinders were discovered in the cylinder tanks at the lab in the Residency. When the techs recorded the results of the testing, they discovered that test results had previously been entered into the data system by Regan. They notified Regan's supervisor, Tim Bray. An investigation was initiated, and ultimately, in February, 2012, it was concluded that Regan falsified the test results. As a result of his supervisor's concerns, in June, 2011, ODOT placed a GPS device on the state vehicle assigned to Regan. Over the next eight months, ODOT monitored Regan's vehicle usage and determined that, although he was claiming a number of hours of overtime, Regan was often away from his assigned work area for extended periods of time. Regan had been previously counseled and disciplined for time and leave abuse.

On February 28, 2012, ODOT provided Regan with notice of the proposed disciplinary action of termination and placed him on suspension with pay pending final action (Joint Exhibit 4). The notice specified 30 different dates which Regan was allegedly away from his assigned work area according to the GPS readings. In addition, it accused Regan of falsifying his time sheets and falsifying concrete test results. Regan was provided with the GPS records and the documents supporting this decision shortly before the pretermination hearing. A pretermination hearing was held on March 13, 2012 and Regan was given an opportunity to respond. On March 27, 2012, ODOT provided Regan with written notice of termination (Joint Exhibit 12). In the notice, ODOT found that Regan repeatedly used an ODOT vehicle for personal use and gain. It also found that Regan reported personal time incorrectly on his leave reports, and received overtime pay as a result. The Notice stated that "these fraudulent actions **alone** are cause for your discharge" and for that reason, this decision will address only those causes. As a result of the specific language used by ODOT in the Notice of Discipline, the evidence regarding the alleged fraudulent cylinder test is disregarded and is not set forth herein.

ISSUES

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

The Testimony

The testimony of thirty-one (31) witnesses was given in this administrative hearing over a five day period, with each witness sworn and offered under oath.

Randal White is the Division VIII Engineer. He oversees 11 counties in northeast Oklahoma. White issued the Suspension with Pay (Joint Exhibit 4), the Specifics of Cause and the Notice of Proposed Disciplinary Action (Joint Exhibit 5), as well as the Final Notice (Joint Exhibit 12). White denied that he spoke with any of the employees about their testimony in this matter.

Terry Thompson is an Administrative Assistant in Division VII. She reports to White (Witness #1). She testified that she is responsible for personnel and human resources matters and helped to prepare the documents in this case. Thompson testified that all of the documents in Joint Exhibit 6 were given to Tim Bray and/or Mark Zishka to give to Regan as part of the Notice of Disciplinary Action.

Roy Counts is an Assistant Division Manager in Division IV of ODOT. He testified that he acted as hearing officer at the pretermination hearing. He testified that the hearing was continued to permit Regan an opportunity to review the records because some of the documents were not provided to him until shortly before the hearing. Counts stated that the misuse of the state vehicle and the time report issues were sufficient to justify the termination. He admitted that he did not make any findings related to the allegations of the concrete test falsification.

Mark Wilson is the Assistant Residency Manager and reports to Tim Bray. He testified that he delivered to Regan the Notice of Proposed Discipline, including a large, 2 inch thick, manila envelope full of supporting documents

Carl Powell is employed as a Mechanic in Division VIII. He testified that he installed the GPS device on Regan's vehicle as a result of an order from Marty Stewart. He stated that it was placed behind the glove box and attached to the battery and ignition. He had no knowledge or information about the device or how it worked.

Martin Stewart is the risk manager in Division VIII. He stated that Tim Bray approached him about his concerns that Regan was misusing his state vehicle. He selected Wireless Matrix for the device because of the availability of data information and the satellite views which were pictures instead of just maps. He stated that the GPS was very accurate. Stewart indicated that he personally tested the device by driving to the location of Regan's vehicle one morning and observed it at the Waffle House, exactly where it was indicated in the GPS reading. He indicated that the device is accurate to a couple of feet and monitors the location of the vehicle in "real-time" within 2-3 seconds.

Skip Nicholson is an Investigator in the General Counsel's Office at ODOT. He is a certified civil rights investigator. He stated that he was not involved in this matter but provided testimony on other investigations that he has been involved in. He stated that his experience with GPS devices is that they are very accurate. Nicholson testified that the devices are generally installed "secretly" so that the agency can monitor normal behavior. He also indicated that it is common for state employees who work in the field unsupervised to "fudge" and perform non-work activities. He discussed several other instances where GPS devices were used to monitor employees and the discipline imposed. Nicholson indicated that termination is warranted where the abuses are deliberate, repetitive or prolonged.

Danny Widener was the Lab Manager at Division VIII and retired in June, 2011. He provided testimony on the process to test concrete cylinders. He testified that he was aware of Regan's back pain. He also testified that Tim Bray asked him to sign a report about Regan's absences from the lab for personal business on state time (Joint Exhibit 6, Attachment 3).

Richard Moon was the ODOT Assistant Residency Manager and retired in May, 2011. He testified that there was often friction in the lab when Regan worked there with Widener. He also discussed the process for taking concrete samples. Eric Welch is a Transportation Specialist at Division VIII. He provided testimony on finding the cylinders in the lab in August, 2010. Gary Clabo is the Lab manager in Division VIII, who assumed that position when Widener retired. He provided the details of relating to the Regan's prior discipline, a letter of reprimand

in 2011 (Joint Exhibit 5, page 20). He stated that because Regan did not show up for work, an asphalt test had to be postponed. Tammy Remington is the Lab Supervisor in the Tulsa Residency. She discussed how to use the Site Manager data program. She stated that she was aware that Regan had “messed” with other employees that he had conflicts with by the manner in which he imputed data.

Joel Crabtree is an inspector in Division VIII. He oversees the construction of roads and indicated that he works on one project at a time. He testified that he worked with Regan on the Talala/169 project. Crabtree stated that there were field offices on site for doing paperwork and that there were always Port-a-potties on the job sites, although some were not very clean. He remarked that Regan would frequently leave the job site without informing anyone and that he was unreliable, often not reporting to work 1-2 times each week.

Mike Holloway is a Division VIII project manager. He testified that he worked with Regan on the Highway 10 project. He stated that Regan was absent or late multiple times and failed to show up at all for one portion of the project involving asphalt. Holloway testified that he and Regan often left the project at the same time, but Regan would not show up at the Residency Office until much later. Mike Hackelberg is also an inspector in Division VIII. He said that he worked with Regan for several days on the Highway 88 project. He said that Regan disappeared mid-morning and again for several hours at lunch time. He reported that the rest room facilities on the site were very clean but Regan would not use them.

Mark McFeeters is an inspector in Division VIII. He worked with Regan at the Catoosa project. He said that he requested Regan not come back to his project because he failed to take necessary samples as directed. Brian Kirtley is a Manager in the Human Resources Division at ODOT. He testified that he reviewed all of the documentation in this matter and it was all in compliance with the Merit Rules and agency policies.

Wendell Ragsdale is a contractor for Becco. He worked with Regan in 2010 and felt that Regan was reliable and efficient. He stated that Regan was on the job when needed and was always accessible by phone. He testified that he felt that Regan helped them complete the project on time. Marko Djukic is a contractor with APAC. Previously, he was an engineer in training at ODOT. He testified that he never knew Regan to hold up production due to absences or tardiness. He stated that Regan was there on the project when he was needed. Bonnie Grant worked as an Administrative Assistant at Claremore prior to her retirement. She testified that

she was aware that Widener had used his state vehicle for personal errands almost every day. She monitored that leave and time records and mileage reports. She also provided testimony about Regan's extended absences in 2006-2007 because of deaths in his family. Kathryn Webber is an Administrative Assistant responsible for payroll, claims and coordinates leave requests. She stated that Tim Bray asked to see Regan's time records in the Fall of 2011. She testified that every Friday, Bray went to breakfast with other employees on state time. She stated that they often traveled to Tulsa for lunch, a 20+ mile trip in state vehicles and that it was very common to be gone for 1-2 hour. She also testified that Mr. Welch had back surgery in 2010 and was transported to and from work in a state vehicle. She stated that once in 2010, she heard Bray yelling about Regan and called him a "SOB", very loudly so that it startled the witness. She stated that she was present when Regan was given the Notice of Proposed Discipline. She stated that Bray was yelling at him and using profanity.

John White was a Civil Rights Investigator until 2012. He testified that he completed a full investigation on Regan's claim of racial discrimination and found insufficient evidence of discrimination. He delivered his report to his supervisor and to Tim Bray. Norman Hill is the General Counsel for ODOT. He provided testimony on the use of GPS devices in state vehicles and that it is an accepted method where there is reason to suspect misuse of state property. He indicated that this involves a dual misconduct – misuse of property and misuse of time. He stated that the falsification of test results is very serious because it affects the payment of funds to contractors as well as the safety issue. He stated that other employees who falsified results have been terminated because it is so serious. He also stated that ODOT is very family-oriented and that if employees admit mistakes and attempt to improve, they are often given second chances. However, he said, if they lie or refuse responsibility, they violate the trust placed in them and it is a serious problem. He indicated that an eye-witness report is helpful but not necessary to support the GPS readings.

Tim Bray is the Resident Engineer at the Residency. He testified that Regan had a history of leave and time abuse and that his performance evaluations reflect these issues. He testified that he recommended Regan's termination because of repeated problems. Bray discussed the GPS reports and provided detailed testimony about the results on the dates listed in the Specifics of Cause. He stated that Regan was away from the job for a longer period than is reflected as "subjective time used" in that document according to the GPS data. He stated that

employees were permitted one hour for lunch and two 15 minute breaks per day if time permits. He stated that these times off were from the time an employee leaves the work site until he returns inclusive of travel time. He said that Regan was taking much more time each day, while often claiming overtime pay. He provided detailed testimony about the cylinder testing, but because that issue was excluded as cause for this action, it is irrelevant. Bray admitted that he did not seek an explanation about the GPS readings from Regan. He also admitted that he often went to other employees to inquire about Regan's whereabouts. He stated that Regan's misconduct is not a performance issue that could be corrected by counseling. He stated that he had counseled and disciplined Regan several times about his use of time and leave and it had not made a difference. Bray testified that Regan had never provided any medical documentation about a need for frequent stops nor made any requests for accommodation for any medical condition. He stated that Regan frequently complained about not being promoted and repeatedly asked for more pay. Bray identified Attachment 10 to Joint Exhibit 6 as his personal notes taken from time to time about his issues with Regan. He stated that different project managers often commented to him about Regan's absences and that it had become a problem. As a result, he requested that the GPS be put on Regan's vehicle.

Mark Zishka oversees three Residencies in Division VIII. He provided testimony about the GPS results and the listings in the Specifics of Cause. He stated that overall, the records showed that Regan spent very little time on the projects. He discussed that there was no reason for Regan to repeatedly drive through Pryor on his way to or from the office. He also mentioned that Regan lived in Pryor. Zishka remarked that the records showed that Regan took excessive time for traveling to and from locations and took frequent extended breaks and stops that were not work related. He testified that the device that had been placed on Regan's vehicle was subsequently placed on his vehicle. He stated that the GPS reports were very accurate and pinpointed his vehicle's travels and stops. Zishka provided extensive testimony on the cylinder testing, which does not need to be reported for reasons set forth previously. He stated that he does not trust Regan and it would be difficult if he was to return to his job. Zishka stated that there was no reason for Regan to drive 20-30 miles out of the way to eat or go to the rest room, but the reports showed that he did this routinely. He also stated that Regan appeared to make multiple trips per day. He stated that employees are not absolutely required to take the most direct route but they should use common sense to not waste resources of time and fuel. He

testified that the GPS data was never requested by Regan but was given to him prior to the pretermination hearing. Zishka stated that he had no history with Regan prior to this matter and did not believe that Regan was being targeted. He said that the civil rights complaint had no bearing on this discipline. Zishka stated that the repeated misuse of the vehicle alone would warrant termination. He stated that the misuse of the vehicle coupled with the overtime charges must be viewed in its entirety. He said Regan was aware of this situation because he had previously been disciplined and warned about using his vehicle for personal use (Joint Exhibit 9, page 128).

Michael Mahinga is a representative for Wireless Matrix. He testified via Skype and described the device used in Regan's vehicle. He stated that the device is accurate within 2-3 meters. He stated that the device transmits the data but doesn't store it internally. He discussed the various reports that are available to authorized users, including the speed, location, mileage and ignition on/off time. He mentioned that occasionally when there are insufficient satellites in the area, the device stores information temporarily but it will auto correct itself when the satellite coverage resumes. Mahinga testified regarding the manner of data transmission and accuracy of the device.

Cord James Regan began working at ODOT in 1999, after prior experience in lab testing and sampling. He recited his various training and certifications. He also discussed several deaths in his family which resulted in his early leave usage. Regan provide a substantial amount of testimony regarding the concrete cylinder testing and the investigation into the alleged fraudulent test report. He admitted that he was disappointed that he had not been promoted or given any raises. He was also apparently upset that he was not made Lab Manager and felt he was the most qualified but Bray "had it out for him". Regan testified about his civil rights complaint and felt that Bray was discriminating against him because he was Cherokee. He also stated that there was a double standard at ODOT and that others often used their state vehicles for personal use. Regan stated that the rest rooms at the project sites were generally filthy and full of waste, often with no running water. As a result, he would frequently travel to rest stops or convenience stores to use the rest room. He also stated that he often used the parking lots of various stores and shopping centers to make calls and to work on paperwork. Regan denies going to malls, casinos or grocery stores on state time. He said that he may have gone to a nearby McDonalds or other fast food places for lunches or breaks. He admitted that he didn't

always take the most direct route because of traffic. Regan denied ever using his state vehicle for personal trips to the health clinic, the vet or other locations. He admitted to driving to a Drug Warehouse on one occasion to purchase allergy medicine. He denied that he ever falsified his time records or over reported his work time.

Carlos Najera is an APAC employee, an asphalt producer. He testified that he knows Bray and had worked with him on several projects. He stated that the hours on the job varied by project and sometimes required working after or before normal hours. He stated that he felt Regan did his job. Patrick Potts is an ODOT employee in Division VIII. He was the lead inspector on the Catoosa project. He stated that the hours were irregular and that crews were often working 24 hours a day. He stated that he thought Regan did a good job for a new inspector. He said that Regan helped out when they ran out of concrete molds. He stated that he thought Regan did what was expected of him.

Josh Hill is a Technician at Division VIII. He stated that when he started, Regan answered a lot of his questions and seemed knowledgeable. Hill testified that Regan was occasionally not on the job but it was not a problem to him. He said that Bray had asked him about Regan's whereabouts on one occasion. He testified that he mentioned to Regan that he should talk to Bray about the tension between them and encouraged him to work things out. Rodney Cutsinger worked with Regan on the Owasso project for one day and Regan mentioned that he had to rush to get back to the lab so he wouldn't have to charge overtime.

DISCUSSION

Despite Appellant's repeated references to the motivation of Bray, there was no evidence presented, except Regan's personal opinion, to support his claim of racial discrimination or harassment. There was also no evidence that Regan had a medical condition that required frequent stops nor was there any evidence of a disability or need for reasonable accommodation.

There was a great deal of time spent on highly technical testimony about the concrete cylinders and the testing procedure, time wasted due to the clear wording in the Notice of Discipline. There was also much technical testimony and evidence about the GPS device and the data logs for Regan's vehicle. Regan offered no evidence to refute the validity or accuracy of the device and its data. The preponderance of the evidence supported that this was a reliable,

accurate recitation of the location of the vehicle during the times in question. The preponderance of the evidence also showed that on the 30 days listed in the Specifics of Cause, Regan was away from his assigned duties for extended periods of time, while reporting that he was working, often overtime. Regan failed to provide any reasonable explanation for these periods or for his whereabouts during many of the dates in questions.

Even a cursory review of the GPS reports showed excessive periods of time spent driving around away from the assigned projects, often several times per day. Regan's time records repeatedly show 10 to 20 hours of overtime per week. The cumulative effect of this misconduct must be considered. The preponderance of the evidence supports that Regan repeatedly used his state vehicle for personal use and gain and that he reported personal time taken as time worked and claimed and received compensated for this personal time.

The cumulative effect of the misconduct and the serious nature of the misconduct justifies the level of discipline imposed. Furthermore, Regan's refusal to acknowledge the misconduct or to take responsibility is particularly troublesome and further supports this level of discipline. This is particularly true given his prior disciplinary history for similar misconduct.

CONCLUSIONS OF LAW

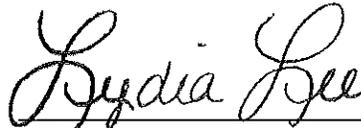
1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. Merit Rule 455:10-9-2 states that the Appellee 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. OAC 455:10-11-14 provides that an employee in the classified service may be discharged for misconduct and/or conduct unbecoming a public employee.
5. Appellee ODOT has met its burden to prove, by a preponderance of the evidence that just cause exists to discipline Regan for misconduct as discussed herein.
6. Appellee ODOT has 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.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition for appeal of Appellant Cord James Regan, MPC 12-207 be DENIED.

This Order entered this 6th day of September, 2013.

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