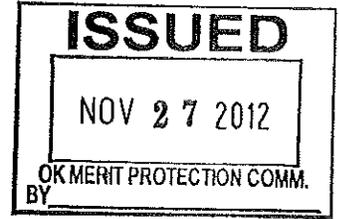


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

RICKY SANDERS,)
Appellant,)
)
v.)
)
OKLAHOMA DEPARTMENT OF)
MENTAL HEALTH AND)
SUBSTANCE ABUSE SERVICES,)
Appellee.)
)

Case No. MPC 12-228
12-224



FINAL ORDER

This matter comes on for hearing on November 8 and 9, 2012 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Ricky Sanders, appears personally, and by counsel, Melvin Hall. The Appellee, Oklahoma Department of Mental Health and Substance Abuse Services, appears by and through counsel, C. Allen Shaffer and Robin Wilson.

Appellant Ricky Sanders was a permanent, classified state employee appealing an adverse disciplinary action of termination. Whereupon the record was opened and the hearing began. The Appellant had filed a Motion for Summary Judgment, however, due to a technical error, Appellee's Response was not uploaded into the filing system. As a result, the undersigned ALJ was unable to properly consider the arguments of the Appellee opposing the Motion at that time. The matter was taken under advisement and the hearing began.

The sworn testimony of two witnesses was presented and is part of the record. At the close of the testimony of the second witness on November 8, the Appellant reasserted his Motion for Summary Judgment and requested a ruling prior to presentation of further testimony. The hearing was recessed until the following morning. On November 9, following consideration of the Motion, the Response and the arguments of the parties, the Motion was orally granted due to procedural irregularities and the hearing was concluded.

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 Ricky Sanders (hereinafter "Sanders") was a classified employee of the Appellee Oklahoma Department of Mental Health and Substance Abuse Services (hereinafter "Dept."). Sanders was a Patient Care Assistant at the Children's Recovery Center (hereinafter "CRC"). On February 29, 2012, a female employee at the CRC was walking by a large fan when her dress blew up, accidentally exposing the employee. Sanders allegedly made several offensive comments and/or gestures about the incident over the course of that day. A complaint was filed and on March 6, 2012, Sanders was notified that an investigation of this incident was being made and he was placed on suspension with pay during the interim. The investigation was completed on March 21, 2012. On March 26, Sanders was given a Notice of Recommendation to Discharge. The Notice gave a very brief recitation of the violation and indicated that no mitigating circumstances were being considered. The Notice also contained a summary of the evidence relied upon as "the knowledge and statements" of two employees but no further information or details as to what the knowledge or statements were. A pre-termination hearing was set for April 10, 2012 and was held on that date. Sanders, through his attorney, objected to this notice as being vague and asserted that the Notice did not meet the minimum requirements of the Merit System. Sanders was told in writing and orally that he would be notified of the final decision within ten (10) working days of the hearing. On the tenth day, Sanders did not receive a notice of final decision.

On April 23, 2012, Sanders was instead sent an Amended Notice of Recommendation to Discharge. No mention was made of the first notice or the pre-termination hearing that had already been held. The Amended Notice was substantially different from the first, contained a listing of mitigating evidence considered, a much longer recitation of the basis for the action and the summary of evidence was almost a full page long, including the knowledge and information of a third employee not previously listed. The Notice set another pre-termination hearing for May 1, 2012. The reason for this Amended Notice was not indicated or noted. At the second pre-termination hearing, Sanders vehemently objected to the procedural errors, as violations of merit rules and due process right deprivation.

On May 8, 2012, Sanders was given written notice of the Final Decision. This Final Notice neglects to mention the initial Notice or pre-termination hearing and fails to address any

of Sanders' concerns regarding the procedural irregularities. The notice contained a reference to one prior formal discipline of a letter of reprimand in January, 2010 and no informal discipline. The Dept. discharged Sanders effective on May 9, 2012, based upon "(1) Misconduct for creating an intimidating or offensive working atmosphere and violation of employee ethics; (2) Inefficiency for violating department policy; (3) Conduct unbecoming a state employee." Sanders timely appealed that action.

The Testimony

The testimony of two (2) witnesses, properly sworn and under oath, was taken and made part of the record in this matter.

Travis Kirkpatrick is an investigator at the Dept. and is a certified discrimination investigator, as well as CLEET certified. He was assigned to investigate the complaint in this matter and interviewed Sanders and the witnesses. He stated that Sanders consistently denied making inappropriate comments or gestures. He concluded, however, that the evidence supported the allegations that Sanders had violated Dept. policy. His report was completed on March 21, 2012. He testified that his report was approved by the Inspector General and by the Director. Kirkpatrick stated that he made no recommendations regarding discipline. He also stated that once he submitted his report on March 21, no further investigation was done, that no errors were made as far as he knows and that no additional evidence was obtained.

Jeff Smith is the Executive Director of the CRC. He testified that the CRC provided residential treatment for youths with both mental health and chemical dependency issues. He stated that many of the clients were there as a result of trauma and that many of the young men have violence in their background, including gang activity and sexual exploitation. As a result, it is critical for the staff of the CRC to instill an atmosphere of safety and act as healthy role-models. Smith testified that if the allegations were found to be true after the investigation, he had already made up his mind to terminate Sanders. He stated that he did not consider any other form of discipline because of the atmosphere of the CRC and Sanders' "pattern of behavior". Smith testified that he conducted both of the pre-termination hearings and that he had made up his mind to terminate Sanders at the time of the first pre-termination hearing. He testified that HR and/or legal made the decision to reissue the Notice and conduct a second pre-termination hearing but that no additional investigation or facts were considered. Smith issued the letter of Final Decision.

DISCUSSION

The decision in this matter results from the Motion for Summary Judgment filed by the Appellant. Granting Summary Judgment is appropriate where there is no dispute as to either material facts or inferences to be drawn from the disputed facts, or if there is only a question of law involved. See OAC 455:10-9-2(h). The facts set forth above are generally not in dispute. Although Sanders disputes that he engaged in any inappropriate behavior, that determination would occur only after a decision on the effect of the procedural errors.

The Dept. argues that they believed the initial Notice was legally sufficient and that the Amended Notice and second pre-termination hearing were only provided to Sanders to afford him procedural due process to ensure that he had every opportunity to be heard on the full spectrum of facts known to the Dept. but not previously disclosed to Sanders. However, the record clearly indicates that the Dept. failed to provide sufficient information in the March 26, 2012 initial Notice in compliance with the Merit Rules. More specifically, the Dept. failed to include sufficient notice of all grounds for termination or a sufficient summary of the evidence to support each of the stated grounds for termination. See 74 O.S. §840-6.4 and OAC 455:10-11-17. The initial Notice was woefully deficient in this regard – there was not even an indication of the date, location or details of the alleged incident(s). Furthermore, it specifically stated that no mitigating circumstances were considered.

In the initial Notice and at the first pre-termination hearing on April 10, 2012, Sanders was advised that he would be notified, in writing, of the final decision in this matter within ten (10) working days of the pre-termination hearing. See OAC 455:10-11-17. This did not happen. Instead, the Dept. simply chose to start over and issued an Amended Notice. It is clear from the facts of this case, that this Amended Notice was a sham, orchestrated to comply with the Merit Rule requirements only after deficiencies were pointed out, rather than an opportunity to provide true due process safeguards to Sanders. This is supported by Jeff Smith's testimony that he had already made up his mind to terminate Sanders at the time of the first pre-termination hearing. An appointing authority cannot get around the jurisdictional time restrictions contained in statute and rule by implementing a "do-over". This is especially true where no mention of the previous notice and hearing is made and no explanation is even attempted to indicate the basis for the Amended Notice and second pre-termination hearing.

This decision must be distinguishable from the situation where new information and/or evidence comes to light upon further investigation. There was no new information or evidence and no further investigation. Agencies are not precluded from amending the disciplinary action upon evidence of additional employee violations or misconduct. That is not the case here. The Dept. simply failed to meet its' statutory notice requirements and cannot arbitrarily extend jurisdictional time constraints by re-starting a process that was already predetermined at that point. To put it in golf terms - there is no "Mulligan" under the Merit Rules.

Because this decision is based entirely upon the Dept.'s violation of jurisdictional requirements, there are no findings regarding the behavior of the Appellant, whether discipline was warranted or whether the discipline so imposed was appropriate.

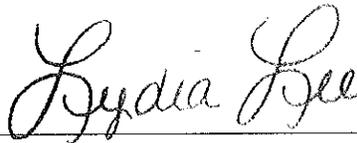
CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of this Request was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. There is no dispute as to either material facts or inference to be drawn from undisputed facts, and only questions of law are involved making this matter appropriate for a grant of summary judgment pursuant to OAC 455:10-9-2.
4. The record of this matter, including the testimony of witnesses and consideration of the Motion and Response and attached Exhibits, supports the finding that the Dept. was without implied or express authority to unilaterally extend the time requirements for making a final decision in a disciplinary action pursuant to OAC 455:10-11-17.
5. Having found that the Dept. was without authority to extend the time requirements, the Dept. failed to provide timely written notice of its decision to discharge Sanders. As a result, the final disciplinary action on May 8, 2012 to discharge Sanders is reversed.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the Motion for Summary Judgment of Appellant Ricky Sanders, MPC 12-228 is **GRANTED**, as provided in this Order. The discipline imposed upon Appellant is 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. If the Appellee timely files a petition to rehear, reopen or reconsider this matter pursuant to OAC 455:10-3-20, this decision shall be **STAYED** until the Commission has ruled on said petition.

This Order entered this 19th day of November, 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