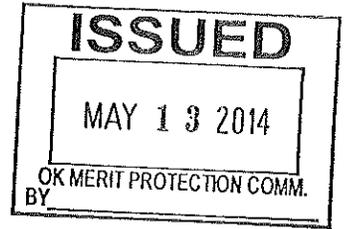


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA



CLINT PAINTER,)
)
 Appellant,)
)
 v.)
)
 OKLAHOMA DEPARTMENT OF)
 PUBLIC SAFETY,)
)
 Appellee.)

Case No. MPC-13-080

FINAL ORDER

This matter came on for hearing on the merits before the undersigned duly appointed Administrative Law Judge on the 28th day of April, 2014 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Clint Painter (“Trooper Painter” or “Appellant”), was present in person and by counsel, Gary James. Appellee, Department of Public Safety (“DPS” or “Appellee”) appeared by and through General Counsel, Stephen Krise, and Assistant General Counsel, Christina Cornish, and table representative, Lt. Chris Bridges.

Appellant, a permanent classified employee working for Appellee, was suspended without pay for thirty-one work days beginning on November 2, 2012, pursuant to Merit Rules 455:10-11-14 and 455:10-11-15. Appellant was additionally placed on probation for a period of twelve months, beginning October 24, 2012. Appellant appealed the disciplinary action.

Two preliminary matters were addressed. Appellee had filed a motion to compel certain discovery responses related to identification of Trooper names. Upon the representation of Appellant's counsel that Appellant would not offer related matters into evidence, the parties agreed that the motion to compel was moot, and the motion to compel was stricken. The Appellant's motion to dismiss and for partial summary judgment was denied, but the Administrative Law Judge took judicial notice that the undersigned does not have jurisdiction to declare a state statute unconstitutional.

The record was opened and the hearing began. Arguments of counsel were heard, and the sworn testimony of two witnesses for Appellee was presented. Exhibits were introduced as Joint Exhibits 1-6, Appellee Exhibits 1 and 4 (Appellee 4 is also identified as Protected Exhibit 1), and Appellant Exhibits 2, 3, 4, 5, 7, 8, and 11, all of which are incorporated herein and made a part hereof.

After careful consideration of the record, including all relevant evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following case background, summary of testimony, findings of fact, conclusions of law, and order.

CASE BACKGROUND

At the time of the disciplinary action subject to this appeal, Appellant, Clint Painter, had been a Trooper with the Oklahoma Highway Patrol for over five years. The record is clear that Appellant had consistently received positive evaluations, had received numerous commendations and awards, and had completed advanced training.

On or about February 1, 2012, an Oklahoma citizen, Nathan Wyatt ("Mr. Wyatt"), filed a formal complaint with the investigations unit of DPS, Troop Z, alleging that Appellant had

engaged in illegal adulterous acts with Mr. Wyatt's ex-wife ("Mrs. Wyatt"), while both Mrs. Wyatt and Trooper Painter were married. On February 8, 2012, Mr. Wyatt withdrew his complaint, stating concerns for his children. On February 10, 2012, Captain Paul Christian directed Troop Z to continue the internal inquiry into Trooper Painter's alleged conduct. Trooper Painter admitted engaging in sexual acts with Mrs. Wyatt while both Mrs. Wyatt and Trooper Painter were married.

DPS subsequently appointed a Department Review Board to investigate the allegations and recommend potential discipline. The Board unanimously found that Appellant had an unlawful sexual relationship with Mrs. Wyatt that brought DPS into disrepute and reflected negatively on the Highway Patrol and, potentially, all of its members, and that Appellant had violated the following DPS policies:

1. OHP Policy 1.2.3(B)(1), Conduct Unbecoming an Officer;
2. OHP Policy 1.2.3(B)(2), Immoral Conduct;
3. OHP Policy 1.2.2, Application of Code, Canons and Rules;
4. OHP Policy 2.1.2(C), Philosophy of the Patrol;
5. OHP Policy 1.2.3(A)(8), Public Example;
6. The Patrol Code of Ethics; and
7. Canons of Police Ethics, Article 6, Private Conduct.

The Review Board determined that Trooper Painter's conduct fell within Category C of the Department's disciplinary matrix, Chief's Directive No. 2010-03 (the "Discipline Matrix"), and recommended Trooper Painter be suspended without pay for thirty (30) days, and be transferred.

On October 3, 2012, DPS notified Trooper Painter that it was proposing a thirty-one working day suspension without pay. (Joint Exhibit 6). The basis of the proposed discipline, as stated in the notice, was violation of:

1. Oklahoma criminal statute 21 O.S. §§ 871, 872 (adultery);
2. OHP Policy 1.2.3(B)(1), Conduct Unbecoming;
3. OHP Policy 1.2.3(B)(3), Conformance to Laws;
4. OHP Policy 1.2.3(B)(2), Immoral Conduct;
5. OHP Policy 1.2.3(A)(8), Public Example;
6. OHP Policy 1.2.2, Application of Code, Canons, and Rules;
7. OHP Policy 2.1.2(C), Philosophy of the Patrol;
8. Patrol Code of Ethics, ¶¶ 3 & 4; and
9. Canons of Police Ethics, Article 6, Private Conduct.

On October 10, 2012, Trooper Painter responded to the notice of proposed discipline by memorandum to Commissioner Michael C. Thompson. (Joint Exhibit 3). Therein, Appellant asserted that the proposed thirty-one day suspension was: (1) inappropriate for the conduct outlined in the notice; (2) in possible violation of federal and state law; and (3) in possible violation of merit protection rules. Appellant urged that discipline for violation of 12 O.S. §§ 871 and 872 was inappropriate because he had not been criminally prosecuted for violating the statutes, because he believes the statutes to be in violation of the Due Process Clause, Establishment Clause, and First Amendment of the United States Constitution, and because he believes federal and state laws protect his rights to privacy and to engage in intimate human relationships. Trooper Painter further urged that the proposed discipline was inappropriate because he never engaged in sex with Mrs. Wyatt in his patrol car or while on duty, he did not

use his Department cell phone to communicate with Mrs. Wyatt, he kept his relationship with Mrs. Wyatt separate from his employment, Mrs. Wyatt was not a co-worker, there was no allegation he used his status as a Trooper to further the relationship, the relationship in no way interfered with his job performance or with the Department's ability to function, the private relationship was not publicly flaunted, and Mrs. Wyatt was separated from her husband at the time of the relationship.

On October 22, 2012, DPS issued its Notice of Suspension Without Pay and Probation (Joint Exhibit 1), in which it suspended Trooper Painter for thirty-one work days without pay, and placed him on probation for twelve months¹ (the "Disciplinary Action"). The Disciplinary Action was, according to the notice, based on Trooper Painter's violation of:

1. Oklahoma criminal statute 21 O.S. §§ 871, 872 (adultery);
2. OHP Policy 1.2.3(B)(1), Conduct Unbecoming an Officer;
3. OHP Policy 1.2.3(B)(2), Immoral Conduct;
4. OHP Policy 1.2.3(B)(3), Conformance to Laws;
5. OHP Policy 1.2.3(A)(8), Public Example;
6. OHP Policy 1.2.2, Application of Code, Canons, and Rules;
7. OHP Policy 2.1.2(C), Philosophy of the Patrol;
8. Patrol Code of Ethics; and
9. Canons of Police Ethics, Article 6, Private Conduct.

¹ The imposed probation had long expired by the time of the hearing. The parties agreed that issues related to probation were moot and that the only discipline subject to the appeal is the suspension without pay. Accordingly, "Disciplinary Action", for purposes of this appeal, is limited to the suspension without pay.

The issue presented by this appeal is whether there was sufficient cause to impose the Disciplinary Action and, if so, whether the discipline imposed was just and appropriate under the circumstances.²

SUMMARY OF TESTIMONY

The testimony of two witnesses, properly sworn and under oath, was taken and was made part of the record. Both witnesses were offered by Appellant.

Jason Holt

Captain Jason Holt (“Captain Holt”) is currently employed by the Oklahoma Highway Patrol as Commander of Troop B in Tulsa, Oklahoma. At the time of the Disciplinary Action, Captain Holt was a Lieutenant assigned to the investigations unit of Troop Z.³ Captain Holt participated in the DPS investigation into Trooper Painter’s conduct upon which the Disciplinary Action is based and signed the investigative report. (Appellee Exhibit 4, Protected Exhibit 1). Captain Holt testified that Mr. Wyatt’s complaint would have been automatically assigned to Troop Z, and that he was assigned to investigate the complaint by his supervising Captain.

Captain Holt recalls that Mr. Wyatt filed a complaint on February 1, 2012, alleging that Trooper Painter had a sexual affair with Mr. Wyatt’s wife during their marriage. When Captain Holt contacted Mr. Wyatt on February 3, 2012, Mr. Wyatt stated that he was having second thoughts about pursuing the complaint because his ex-wife told him the matter could hurt their

² The Prehearing Conference Order also states the following issue, which is not explicitly set forth in this Order: “Was the discipline in violation of any applicable law, rule, statute, or constitutional provision”. The issue is not specifically referenced here because it is, by definition, included in the issue, “whether the discipline imposed was just and appropriate under the circumstances”.

³ Although Troop Z currently handles only criminal investigations, at the time of the Disciplinary Action, Troop Z also investigated internal affairs.

children. Mr. Wyatt later asked Captain Holt to withdraw his complaint, and the complaint was withdrawn on February 8, 2012.

Captain Holt interprets OHP Policy 2.1.3(D), stating that withdrawal of a complaint “will normally terminate an investigation” (Appellant Ex. 11, page 6), to mean that withdrawal of a complaint *can* stop an investigation, particularly if the complaint did not allege a violation of law. On direct examination, Captain Holt testified, with regard to withdrawal of a complaint, that he had “encountered this one or two times”. On cross-examination, however, Captain Holt stated that he could not personally recall any other case in which an investigation had continued after the underlying complaint had been withdrawn, but believes withdrawal of complaints in some cases has led to dismissal of investigations and in other cases to continuation of investigations. He stated that the decision to continue or dismiss an investigation after withdrawal of a complaint is made by the office of the Chief of the Highway Patrol. In addition, Captain Holt testified that the Chief’s office identifies the allegation to investigate. In this case, Captain Holt recalls that the Chief’s office instructed Troop Z to continue the investigation after Mr. Wyatt withdrew his complaint, and identified the allegation to be investigated as “conduct unbecoming”. On cross-examination, Captain Holt stated that he did not know why the Chief’s office decided to continue the investigation after Mr. Wyatt withdrew his complaint.

Captain Holt testified on cross-examination that the investigation in this case proceeded as an administrative investigation rather than a criminal investigation because the Chief’s office categorized the investigation as administrative. Captain Holt does not believe the matter was ever referred to a district attorney for prosecution. Captain Holt testified that he could recall investigating adultery as a criminal matter only once – in the case of a former trooper who had

engaged in sexual acts with a minor. He recalled that the former trooper involved was ultimately terminated.

During his investigation, Captain Holt interviewed Mr. Wyatt and Trooper Painter, and attempted to interview Mrs. Wyatt. He testified that he had conducted administrative investigations before, and that this investigation was conducted in the same manner as all others. Captain Holt's investigative report is part of the record (Appellee Ex. 4, Protected Ex. 1) and will not be recounted here. Captain Holt determined, and Trooper Painter admitted, that Trooper Painter had a sexual affair with Mrs. Wyatt while both were still married. Captain Holt found no evidence that Trooper Painter engaged in sexual acts while he was on duty or in his patrol car, and could not determine that any text messages were exchanged between Mrs. Wyatt and Trooper Painter while he was on duty. Captain Holt testified that he determined Trooper Painter had violated state law and DPS policy, and was guilty of conduct unbecoming. Captain Holt's recommendation upon completion of the investigation was simply "that the appropriate level of command review the facts of this case to determine what type of action, if any, should be taken in the matter". (Appellee Ex. 4, Protected Ex. 1, page 8.)

Captain Holt testified that, following Troop Z's investigation, DPS appointed a board to review the matter. The board was organized in similar fashion to other review boards, and was comprised of five members representing various ranks.

Captain Holt testified that he has only used the DPS Discipline Matrix one time as a supervisor, partly because as a Troop Commander he is only authorized to impose informal discipline. He testified that he never used the matrix in Troop Z, because Troop Z's role was to investigate allegations rather than impose discipline. He testified that he found nothing about Trooper Painter's conduct to be a serious abuse of authority. With regard to the matrix, he stated

that he considered a trooper having illegal drugs or alcohol in a trooper unit to be equally or less egregious than having an extramarital affair, and that a trooper drinking in his unit would be equally egregious to an extramarital affair.

The undersigned found Captain Holt to be a credible witness.

Michael C. Thompson

Michael C. Thompson (“Commissioner Thompson”) joined the Oklahoma Highway Patrol in 1990 and currently serves as the Oklahoma Commissioner of Public Safety. In addition, Commissioner Thompson has served thirty years with the Oklahoma National Guard and currently holds the rank of Colonel.

Commissioner Thompson testified that the Oklahoma Highway Patrol has policies governing the conduct of its members that are similar to other law enforcement agencies around the country. He testified that he believes holding law enforcement officers, including troopers, to a higher level of conduct is important because a trooper has the power to arrest a person based solely on the trooper’s judgment and word. For that reason, he considers anything that diminishes a trooper’s credibility to be a serious matter. Commissioner Thompson testified that the OHP policies described in the Notice of Suspension Without Pay and Probation (Joint Ex. 1, Pages 2, 3) as violated by Trooper Painter are common in all law enforcement, and are reviewed in the Oklahoma Highway Patrol Academy. He described a trooper’s reputation as “everything”, especially when a trooper is located in a small community, as was Trooper Painter.

On cross-examination, Commissioner Thompson stated that “when kids see a patrol car and think, ‘that’s the guy that broke up my parents’ marriage’, that hurts” the department. He stated that he could see no difference between a trooper having an affair with another trooper’s wife and a married woman with no association with DPS. When asked on cross-examination

how far DPS should venture into the morals of troopers, Commissioner Thompson testified that he didn't know how to answer the question, but that in this case, it's not a private matter because Mr. Wyatt had filed a complaint with DPS. He testified that the complaint filed against Trooper Painter distinguishes this case from situations in which the Department only knows of rumors that a trooper is engaged in adultery. In this case, he believed DPS had credible evidence of Trooper Painter's adultery because Mr. Wyatt included it as part of the grounds for dissolution of his marriage, Trooper Painter had been previously disciplined for similar conduct, and because Mr. Wyatt gave DPS very credible evidence of adultery in his complaint. Commissioner Thompson was aware that Mr. Wyatt withdrew the complaint, and stated that withdrawal of a complaint would normally end the investigation. But Commissioner Thompson also believed evidence showed Trooper Painter may have influenced Mr. Wyatt's decision to withdraw the complaint. Commissioner Thompson was also influenced by the fact that, though Mr. Wyatt withdrew his complaint, "he never came back to say he made it up." Commissioner Thompson testified that when DPS is aware of a complaint, it is the department's duty to look into it and determine whether any misconduct has occurred.

Commissioner Thompson testified that adultery is a crime in Oklahoma, several other states, and the military. He considers adultery to be inconsistent with the values and ethics of the Oklahoma Highway Patrol, even if the adulterous acts do not result in any negative consequences. Commissioner Thompson considers adulterous acts to violate the OHP policies stated in the Notice of Suspension Without Pay and Probation (Joint Ex. 1, Pages 2, 3), and stated that arrest or conviction for such acts are not relevant to him – he cares about the act.

Commissioner Thompson testified that he is aware of two other troopers being disciplined for similar conduct. One trooper was discharged for having sex with a minor, was

criminally prosecuted, and is in prison. Another trooper was suspended for forty days and transferred for having sex with another trooper's wife. On cross-examination, however, Commissioner Thompson stated that he is not aware of any other trooper being disciplined for having adulterous relationships with adults unrelated to the Highway Patrol; no such discipline has occurred during his tenure as Commissioner, and he didn't pay attention to the issue before he became Commissioner. He also stated that he has heard a number of rumors of troopers involved in adulterous affairs, but is unaware of any situation in which a trooper has received a formal complaint for adultery that was not followed up on.

Commissioner Thompson testified that he was the appointing authority for purposes of issuing, and did issue, the Disciplinary Action in this matter. He testified that, though he was the final decision maker, he consulted with the Review Board, Troop Z, the Chief of the Highway Patrol, and the DPS legal division prior to imposing discipline in this case, and that he normally engages in such consultation before imposing final discipline. He stated that he normally receives recommendations from review boards (when appointed) and the Chief, and that sometimes he agrees with the discipline they recommend and sometimes he doesn't. He testified that another commissioner could disagree with what he did in this case, but that the discipline imposed on Trooper Painter is consistent with discipline DPS has imposed in the past. In this case, the Review Board recommended Trooper Painter's misconduct be categorized as a Category C on the Discipline Matrix, and that an unpaid suspension of thirty days be imposed. Commissioner Thompson disagreed with the recommendation.

In determining the appropriate discipline for Trooper Painter, Commissioner Thompson testified that he first determined whether an offense took place. He determined that the adultery complained of had occurred, and that Trooper Painter had multiple violations of OHP rules and

Oklahoma law as stated in the Notice of Suspension Without Pay and Probation (Joint Ex. 1, Pages 2, 3). Commissioner Thompson then reviewed the Discipline Matrix to determine into which category Trooper Painter's most serious infraction fits. Because adultery is not listed specifically on the matrix, Commissioner Thompson stated that he referred to the narrative of each matrix category to determine which narrative best fits the most serious infraction – in this case adultery. Commissioner Thompson stated that although the Review Board found Trooper Painter's violation should be placed in Category C, he determined that Category E best fit. On cross-examination with regard to Category E, Commissioner Thompson agreed that Trooper Painter's conduct was not a serious abuse or misuse of authority, but considered it to be unethical and to have an adverse impact on public safety or a member of the Department. Commissioner Thompson considers Trooper Painter's conduct to be similar to other behaviors tied to Category E. He believes adultery rises to the level of accepting a bribe or committing a drug related offense, and is more serious than an alcohol offense. He believes that the Category C offense recommended by the Review Board is more appropriate for immoral conduct, such as dishonesty.

To determine the appropriate discipline, Commissioner Thompson testified that he reviewed the Troop Z report, applicable OHP policies, Trooper Painter's personnel files, including PMPs (which were positive), and discipline previously imposed within the prior four years. He considered Trooper Painter's positive PMPs mitigating, but did not view good performance as "a get out of jail free card that allows you to violate rules". He considered other mitigating factors, as listed in the Notice of Suspension Without Pay and Probation (Joint Ex. 1, Page 5), but considered them to have less relevance because he was evaluating Trooper Painter's conduct rather than his performance. Commissioner Thompson testified that Trooper Painter's

“performance has been very good as a Trooper; it’s his conduct and judgment I have an issue with”. Commissioner Thompson also noted that many of Trooper Painter’s mitigating circumstances occurred before his first violation of OHP policy regarding adultery in 2009.

As aggravating circumstances, Commissioner Thompson considered the matters set forth in the Notice of Suspension Without Pay and Probation (Joint Ex. 1, Pages 5, 6). He gave significant weight to the fact that this is Trooper Painter’s second infraction of the same type. He testified that Trooper Painter graduated patrol school in 2007, by 2008 was in trouble for having sex with another trooper’s wife, and had received a sixty day suspension without pay and transfer for the infraction in 2009. Commissioner Thompson considered the first infraction to be “very serious”. Commissioner Thompson stated that “nobody wanted to work” with Trooper Painter after the first infraction, and that Trooper Painter had lied about the first infraction. Commissioner Thompson considered the fact that Trooper Painter was “doing the same conduct” only two years later to be a significant aggravating circumstance. Commissioner Thompson testified that he also considered the negative impact of Trooper Painter’s conduct on the Wyatt family, and the fact that Trooper Painter has still expressed no regret to both be aggravating circumstances.

Although the Review Board recommended a thirty day suspension, Commissioner Thompson determined that thirty-one days was appropriate. Commissioner Thompson testified that even harsher discipline would be warranted for two reasons. First, Trooper Painter’s previous penalty for his 2008 affair was a sixty day suspension. Progressive discipline would indicate that the next logical step would be termination. In addition, the discipline range for a Category E violation is a suspension of 31-60 days. Commissioner Thompson set the discipline

at a thirty day suspension because “That was my call. I’m not interested in punishing Painter. I just want him to do better. That’s why I went so low on the 31-60 day range.”

FINDINGS OF FACT

The parties stipulated that there has been no finding that any conduct for which Trooper Painter was disciplined in this case occurred while he was on duty or involved any state resource such as his patrol unit or cell phone. The parties also stipulated that Appellant was a permanent, classified employee of Appellee. The stipulations of the parties are incorporated herein as findings of fact.

Trooper Painter admits that he had an adulterous sexual relationship with Mrs. Wyatt. The affair was conducted on Trooper Painter’s personal time. It did not involve the use of DPS property such as Appellant’s trooper cell phone or patrol unit. Mrs. Wyatt had no connection to DPS. Until Mr. Wyatt lodged his complaint with DPS, Trooper Painter’s affair with Mrs. Wyatt had no known impact on Trooper Painter’s job performance or on DPS.

Mr. Wyatt filed a formal complaint with DPS accusing Trooper Painter of the adulterous affair with Mr. Wyatt’s then ex-wife. After Mr. Wyatt filed his formal complaint, Trooper Painter contacted Mrs. Wyatt about the complaint. Mr. Wyatt subsequently reported to Troop Z that Mrs. Wyatt had asked him to withdraw the complaint for the sake of their children, and withdrew the complaint. Whether Trooper Painter influenced Mr. Wyatt through Mrs. Wyatt to withdraw the complaint, as Commissioner Thompson testified he suspected, is unknown.

Despite DPS policy that withdrawal of a complaint will normally result in termination of a related investigation, Troop Z continued the investigation under order from the Chief’s office. The evidence presented indicates that continuation of an investigation after withdrawal of the underlying complaint is made on a case-by case basis and is not unusual. Under these

circumstances, continuation of the investigation after Mr. Wyatt withdrew his complaint was in keeping with DPS policy.

In the initial investigation, Troop Z found that Trooper Painter violated Oklahoma criminal statutes and DPS policy, was guilty of conduct unbecoming, and recommended that the appropriate level of command review the facts of the case to determine what type of action, if any, should be taken. The Troop Z investigation was conducted pursuant to DPS policy and in accordance with normal procedure.

DPS referred the matter to a Review Board. The Review Board was constructed and operated in accord with DPS policy and normal procedure. The Review Board unanimously determined that Trooper Painter had engaged in conduct unbecoming, classified the infraction as a Category C infraction under the Discipline Matrix, and recommended Trooper Painter be suspended for thirty days without pay.

Commissioner Thompson, as the appointing authority, reviewed the matter. He determined that Trooper Painter had engaged in an adulterous relationship with Mrs. Wyatt in violation of state criminal statutes, and that such act amounted to conduct unbecoming. Commissioner Thompson, after consultation with Troop Z, the Review Board, the Chief of the Highway Patrol, and the DPS legal division, determined that Trooper Painter's infraction best fit into Category E of the Discipline Matrix. After considering appropriate mitigating and aggravating circumstances, including Trooper Painter's positive record of performance and one past infraction of similar nature, Commissioner Thompson determined that a thirty-one day suspension without pay was reasonable and appropriate. The length of suspension is the lowest option for a Category E offense.

The Appellee notified Trooper Painter of its proposed discipline in accordance with applicable rules. Trooper Painter responded to the notice. DPS then notified Trooper Painter of the final discipline to be entered. Nothing in either notice violates any procedural rule or statute, and Trooper Painter received the notice to which he was entitled.

Trooper Painter presented no testimony at the hearing on this matter either personally or through any witness. His arguments that the Disciplinary Action is inappropriate must be gleaned from his filings in the appeal, the Exhibits introduced, and the arguments made by his counsel. His grounds for appeal are clearly set forth in his Petition for Appeal and his Amended Petition for Appeal.

Trooper Painter argues that DPS had no authority to discipline him in this matter because his private sexual relationships are protected by federal and state statutory and constitutional rights. Assuming, *arguendo*, that Trooper Painter's relationship with Mrs. Wyatt was protected by such rights, Trooper Painter provided no testimony or evidence that the Disciplinary Action or any act of DPS impinged on his rights. Moreover, the undersigned is not persuaded that Trooper Painter's affair with Mrs. Wyatt was a private matter. The affair remained private until Mr. Wyatt filed a formal complaint with DPS. At the time Trooper Painter engaged in his affair with Mrs. Wyatt, Trooper Painter was aware that he had been in trouble at work for similar conduct before, and was on notice that DPS might discipline him for his conduct. He also must have been aware, as indicated by his text messages with Mrs. Wyatt (Appellee Ex. 4, Protected Ex. 1, Pages 19-30), of the risk that his "private" affair would become public.

Trooper Painter argues that his conduct did not amount to conduct unbecoming essentially because his conduct did not impact his work and was made in his private capacity. The undersigned finds the argument persuasive only to a point. Appellee makes a compelling

case that Trooper Painter's conduct had a direct impact on his ability to perform his duties and on the Department as a whole. Troop Z found that Trooper Painter engaged in conduct unbecoming. The Review Board unanimously found so. Commissioner Thompson clearly agreed, and articulated his reasons for making the determination clearly through the notices given to Trooper Painter and through his testimony at the hearing, as reflected above.

Trooper Painter argues that the discipline imposed is excessive and not in keeping with the DPS Discipline Matrix. Though Trooper Painter introduced no evidence to support a claim that the discipline he received was disparate or in violation of any rule, his counsel questioned both of Appellee's witnesses on the use of the DPS Discipline Matrix at some length. Trooper Painter argues that the Discipline Matrix is unclear and was misapplied in this case. He argues that an adulterous affair is a less egregious infraction than possession of drugs or misuse of alcohol. But the question is not whether the appointing authority could have classified Trooper Painter's infraction as less (or more) than any other theoretical infraction and, having done so, placed the infraction in a lower (or higher) matrix category. The issue is, rather, whether DPS had a reasonable basis to place Trooper Painter's conduct in Category E and, ultimately, whether the discipline imposed was just and reasonable under the circumstances. Commissioner Thompson clearly articulated a reasonable basis for placing Trooper Painter's infraction in Category E. Whether the undersigned wholly agrees with Commissioner Thompson's reasons is irrelevant. Whether the undersigned might have placed Trooper Painter in a different matrix category is equally irrelevant. The undersigned is not the appointing authority of DPS. The appointing authority's decision to place Trooper Painter's infraction in Category E was reasonable, and -- particularly given Trooper Painter's prior disciplinary history -- the discipline imposed was just, fair, and consistent with the principals of progressive discipline.

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 states that a permanent classified employee may be suspended without pay for a period not to exceed sixty(60) calendar days for misconduct, insubordination, conduct unbecoming a public employee, and any other just cause.

4. Merit Rule 455-10-9-2 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 action taken and that the discipline imposed was just.

5. The Personnel Act and Merit Rules provide that an employee must receive notice of the proposed action, which shall include the statute, rule, policy, etc., which was violated, the specific acts or omissions which are the cause of the suspension, an explanation of the evidence justifying the suspension, and the employee must be given an opportunity to respond to the proposed suspension either in writing or orally. 74 O.S. § 840-6.4; OAC 455:10-11-15.

6. 21 O.S. § 871 defines adultery as the unlawful sexual intercourse of a married person with one of the opposite sex and provides that the crime may be prosecuted only by the spouse of one party to the act or by any person when the parties are living together openly.

7. 21 O.S. § 872 defines the criminal penalty imposed upon conviction of adultery.

8. OHP Policy 1.2.3(B)(1) defines conduct unbecoming an officer to include “that which brings the Department into disrepute, or reflects discredit upon the officer as a gentleman

and a member of the Patrol”.

9. OHP Policy 1.2.3(B)(2) provides that a trooper shall refrain from activity that impairs his ability to perform as a law enforcement officer or brings disrepute upon himself or the Department.

10. OHP Policy 1.2.3(B)(3) provides that a trooper shall obey all laws of the United States and every jurisdiction in which the trooper is present.

11. OHP Policy 1.2.3(A)(8) requires a trooper to conduct his public and private life in a manner that the public will regard him as an example of fidelity, stability, and morality.

12. OHP Policy 1.2.2 subjects a trooper concurrently to the standards expressed in OHP Policies, the Patrol Code of Ethics, and the Canons of Police Ethics.

13. The Patrol Code of Ethics states, in part, that a trooper will “keep my private life unsullied as an example to all”, “develop self-restraint”, be “honest in thought and deed in both my personal and official life” and be “exemplary in obeying the laws of the land and the regulations of my department”.

14. The Canons of Police Ethics, Article 6, Private Conduct provides, in part, that “a law enforcement officer shall be mindful of his special identification by the public as an upholder of the law” and shall “so conduct his private life that the public will regard him as an example of stability, fidelity and morality”.

15. Appellee, Department of Public Safety, has met its burden to prove, by a preponderance of the evidence, that Appellant, Clint Painter, violated the following:

- a. 21 O.S. § 871 by committing the criminal act of adultery;
- b. OHP Policy 1.2.3(B)(1), conduct unbecoming an officer;
- c. OHP Policy 1.2.3(B)(2), immoral conduct;

- d. OHP Policy 1.2.3(B)(3), conformance to laws;
- e. OHP Policy 1.2.3(A)(8), public example;
- f. OHP Policy 1.2.2, application of code, canons and rules;
- g. OHP Policy 2.1.2(C), philosophy of the Patrol;
- h. Patrol Code of Ethics; and
- i. Canons of Police Ethics, Article 6, Private Conduct,

all as set forth in the Notice of Suspension Without Pay and Probation (Joint Ex. 1).

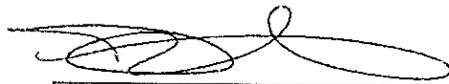
16. Appellee has further met its burden to prove, by a preponderance of the evidence, that it followed all procedural prerequisites to the Disciplinary Action.

17. Appellee has further met its burden to prove, by a preponderance of the evidence that just cause exists for the action taken and that the discipline imposed was just and appropriate 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** and the suspension without pay for thirty-one work days is sustained.

DATED this 8th day of May, 2014.



Matt Hopkins, OBA# 16666
Administrative Law Judge
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